



THE COURT OF APPEAL

No. 2015, 338

Finlay Geoghegan J.
Hogan J.
Faherty J.

BETWEEN/

SONY MUSIC ENTERTAINMENT (IRELAND) LTD.,

UNIVERSAL MUSIC IRELAND LTD. AND WARNER MUSIC IRELAND LTD.

PLAINTIFFS/
RESPONDENTS

AND

UPC COMMUNICATIONS IRELAND LTD.

DEFENDANT/
APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 28th day of July 2016

1. What (if any) steps may the High Court require internet service providers to take to assist copyright holders to identify those of its customers who use the network provided by these providers to access the internet for the purpose of illegally downloading or uploading copyright material? This is in essence the fundamental issue which arises in this appeal brought by UPC Communications Ireland Ltd. ("UPC") from the judgment of Cregan J. in the High Court delivered on 27th March 2015 (*Sony Music Entertainment (Ireland) Ltd. v. UPC Communications (Ireland) Ltd. (No. 1)* [2015] IEHC 317). The appellant, UPC, is a non-infringing internet service provider ("ISP"). In the judgment under appeal Cregan J. made an order requiring UPC qua ISP to implement what is sometimes known as a form of graduated response system ("GRS") within its network for the benefit of Sony Music and the other respondents who are the relevant copyright holders. The term GRS is not a term of art, but it refers to types of steps which an ISP may be required to take against copyright infringers, ranging from warning letters at one end of the spectrum to orders blocking access to particular websites at the other.
2. The GRS order in question which was made by the High Court is a very detailed one but, in essence, the order requires UPC to send each relevant subscriber a "cease and desist" letter upon receipt of notification of the first and second copyright infringement notifications which it receives from the rightholders. On receipt of the third copyright infringement notice, UPC is then required to send the relevant rightholders a notification that the particular subscriber has been the subject of three such notifications. The rightholders are then entitled to apply to court for an order terminating the subscriber's internet broadband service. There is a monthly limit of some 2,500 notifications of this kind. For ease of reference, the curial part of the High Court order is appended to this judgment.
3. The order further provides that the rightholders are required to pay 20% of any capital expenditure incurred by UPC with a cap of €940,000 on each such expenditure, which sums are to be paid in five equal annual instalments. Business users are excluded from the scheme. The order provides that the matter is to be listed for review before the High Court in five years from the date of the perfection of the order, but the order is otherwise to last indefinitely. On the hearing of the appeal this Court was informed that this was the first GRS order of this kind made anywhere within the European Union.
4. This appeal accordingly concerns the jurisdiction of the High Court to grant GRS injunctions of this nature directed at non-infringing ISPs. It is common case – and so found by Cregan J. in the High Court – that the making of such an order this will entail significant capital and operating expenditure on the part of the ISPs. The copyright holders (whom for convenience I will term "Sony") maintain that the effect of both Article 8(3) of the Directive 2001/29/EC ("the 2001 Directive") and s. 40(5A) of the Copyright and Related Rights Act 2000 ("the 2000 Act") is to grant such jurisdiction. For its part UPC maintains that the court has no jurisdiction to make an order of this kind. It submits that the order actually made is more appropriate to that of a specialist regulator vested with appropriate expertise and which is best placed to make policy decisions of this kind and that the order is not one which a court required to make judgments based only on legal rights (including equitable rights) and wrongs could appropriately make.
5. It is obvious that this appeal presents issues of enormous importance so far as the effective protection of copyright is concerned. For good measure the appeal also raises important questions concerning the jurisdiction of the High Court to grant injunctions and the inter-action of national and EU procedural law in this regard.
6. Before considering these questions, it is necessary first to examine the background to this litigation. There is no question at all but that the development of the internet in the last twenty years or so has transformed the music industry, not always for the better so far as the copyright holders are concerned. In fact, the development of both web browsers and specialist software programmes has greatly facilitated what is known as peer-to-peer file sharing. All of this means that ordinary computer users can download or upload files to and from other users or groups of users. In practice this has the effect that the music loving population no longer has to purchase CDs from record shops or on-line as in the past: by paying for a broadband service they can effectively avoid the necessity to pay for the music which they enjoy.
7. These advances in digital technology and the increasing use of the internet have led to such widespread, anonymous infringement by computer users to the point where it is almost pointless for copyright holders to pursue such individuals who engage in on-line peer to peer file sharing. As counsel for Sony, Mr. McDowell S.C., explained, from time to time the copyright holders had pursued such

consumer infringers in the past in this jurisdiction by means of civil action in the High Court. This proved to be a futile exercise which consumed great amounts of time and effort and at considerable cost, because as often as not the infringer proved to be a teenager or young adult who had used a home computer for such file sharing and against whom an award of damages (which might in any event have been small or even negligible) would have been a wholly empty exercise.

8. The basic ineffectiveness of these remedies are not disputed by either party to this appeal and, in any event, graphic accounts of the futility of the traditional remedies for copyright infringement in this context were given in evidence before Charleton J. in *EMI Records (Ireland) Ltd. v. UPC Communications Ireland Ltd.* [2010] IEHC 377 and again before Cregan J. in the present case. This is doubtless why in recent times the copyright holders have focused on seeking remedies against ISPs such as UPC. They, after all, are the entities who are far better placed than anyone to identify the customers who have used their services for infringing activities. It is they alone who can match the internal protocol addresses of consumers with infringing activities or take steps to block access to websites who specialise in copyright infringement activities. As recital 59 of the 2001 Directive acknowledges:

"(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States." (emphasis supplied).

9. It is, however, necessary first to trace the recent history of this issue because it is only then that the difficult questions presented by this appeal can be brought into sharper focus. Although the rights and remedies available to rights holders are partly derived from both national and EU law, it can be convenient to consider both national and EU law separately before considering how they interact.

The position under national law

10. So far as national law is concerned, there are three basic juristic realities which must inform this analysis. First, it must be recalled that the ISPs are generally non-infringing entities. Indeed, it is agreed that UPC falls into this category, although there may, of course, be cases where an individual ISP is actually complicit in the infringement. Nevertheless, as a matter of traditional copyright law, the mere fact that the facilities provided by a manufacturer or a service provider are used by a consumer for infringement purposes or even facilitate such infringement does not in itself mean that such an entity is to be regarded as an infringer.

11. Thus, for example, in *C.B.S. Inc. v. Ames Records & Tapes Ltd.* [1982] Ch. 91, Whitford J. held that a record library which lent out records and simultaneously offered blank tapes for sale at a discount did not authorise the infringement of copyright in the records. He said ([1982] Ch. 91,106-107):-

"Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.... [Y]ou can home tape from bought records, borrowed records, borrowed from friends or public libraries, from the playing of records over the radio, and indeed, at no expense, from records which can be obtained for trial periods on introductory offers from many record clubs who advertise in the papers, who are prepared to let you have up to three or four records for a limited period of trial, free of any charge whatsoever."

12. This statement was expressly approved by Lord Templeman in the seminal decision of *CBS v. Amstrad Consumer Electronics Ltd.* [1988] UKHL 15, [1988] A.C. 1013. In *CBS* the issue was whether a manufacturer of high fidelity recording equipment was an infringer by reason of that fact alone when it knew – or must have known – that its equipment would be used by home consumers for illicit copying. This, of course, is just a variation from an earlier technological age of the problem which we must confront in the present case. In *CBS* Lord Templeman went on to say that the manufacturers in that case had not authorised the infringement ([1988] A.C. 1013, 1055):-

"These borrowed records together with all recording machines and blank tapes could be said to be "materials which by their nature are almost inevitably to be used for the purpose of an infringement." But lenders and sellers do not authorise infringing use."

13. Much the same can be said here: ISPs do not authorise the infringement of copyright by providing the use of internet broadband services any more than in the *CBS* case Amstrad had authorised such infringement by providing high fidelity recording equipment with enhanced recording equipment. It is true, of course, that in both instances such manufacturers and ISPs benefit indirectly from infringing activities. Just as enhanced copying facilities doubtless boosted the sales of Amstrad's products in the *CBS* case, the same is true here: the profits of the ISPs are doubtless boosted by the fact that its services can be used for copyright infringement activities. One of the reasons why some consumers may be prepared to pay for broadband services is that they know that they can access their music for free.

14. All of this is reflected in s. 40(3) of the 2000 Act, which provides that:-

"..provision of facilities for enabling the making available to the public of copies of a work shall not of itself constitute an act of making available to the public of copies of the work."

15. Section 40(3) of the 2000 Act corresponds to the parallel provisions of Article 12 of the 2000 Directive which provides that Member States shall ensure that ISPs are not liable for copyright infringement where they are the "mere conduit" of the internet service.

16. There is, of course, a strong moral case for saying that in such circumstances it would be only fair that ISPs should bear the cost and burden of assisting the rightsholders in detecting infringing activities. That, of course, is not the issue for this Court, for as both Lord Templeman observed in *CBS* and as Charleton J. stated in the High Court in *EMI Records*, in a society governed by the rule of law, any change in the law of this nature is fundamentally a matter for the legislative branch. The real question is whether, as we shall shortly see, the courts are *already* empowered to take make orders of this kind.

17. It follows, therefore, that from a *legal* perspective we are starting from a point whereby UPC has committed no *legal* wrong. Indeed, such is acknowledged in the agreed statement of facts whereby UPC is described as a non-infringing intermediary ISP. This is

a critical consideration, because, of course, as a matter of general law the courts have no jurisdiction to grant an injunction against a defendant who has committed no cognisable legal wrong or where such a wrong is not threatened. At the heart of the present appeal lies the question of whether Article 8(3) of the 2001 Directive (as transposed into national law by s. 40(5A) of the 2000 Act) has changed this principle in the case of non-infringing ISPs and, if so, in what manner and to what extent.

18. The second juristic reality is that, as Cregan J. himself recognised, copyright is a statutorily conferred species of property right. The classic statement to this effect is, of course, to be found in the judgment of Keane J. in *Phonographic Performance Ireland Limited v. Cody* [1998] 4 I.R. 504, 511 where he held that the right to be identified with a creative work and to enjoy protection whereby others are not allowed to copy it without permission was protected by the Constitution:-

"The right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of Article 40.3.2 and Article 43.1 of the Constitution of Ireland, 1937, as is the similar right of a person who has employed his or her technical skills and/or capital in the sound recording of a musical work. As such, they can hardly be abolished in their entirety, although it was doubtless within the competence of the Oireachtas to regulate their exercise in the interests of the common good. In addition and even in the absence of any statutory machinery, it is the duty of the organs of the State, including the courts, to ensure, as best they may, that these rights are protected from unjust attack and, in the case of injustice done, vindicated."

19. As Keane J. himself acknowledged, given the statutory nature of the right and the remedies thereby conferred, the capacity of the Oireachtas to regulate and modify that right may well be considerable. But, as Keane J. again recognised, what the Oireachtas cannot do is fail to protect the substance of this right.

20. Prior to the enactment of s. 40(5A) of the 2000 Act (as inserted by S.I. No. 59 of 2012), in *EMI Records Charleton J.* explored the question of the extent to which the courts could by injunction protect the rightsholders by granting an injunction against non-infringing ISPs:-

"An injunction is never available simply because the Court deprecates a situation or has no respect for the defence offered to participation in a grave economic wrong against copyright holders.....

The courts must defer, however, to the manner in which the Oireachtas circumscribes and regulates the enforcement of those rights. The Court is bound, in that regard, the matter having been considered by the Oireachtas, to apply the law within the four corners of the Copyright and Related Rights Act 2000. It might be possible to argue that in the absence of such protection, that the Court was mandated to use the amplitude of its powers in order to vindicate the injustice that is at the heart of this case. Further, it might be possible to argue that even in the absence of a primary actionable wrong that an injunction might be granted in relation to a morally indefensible action; see *Prince Albert v Strange* (1849) 2 De G & SM 293 where an injunction was granted for breach of confidence, not then a defined tort, and, more recently, *Douglas v Hello!* [2002] 2 A.C. 457. To act in this way, however, would be to ignore the power of the Oireachtas to regulate rights in accordance with a just scheme of legislation that balances the exercise of those rights with the responsibility of living within an ordered society. In some rare instances, the courts may also directly enforce *Bunreacht na hÉireann* through injunctive relief where no remedy is already set out in law. The courts are not entitled, on the other hand, to take an area which has been properly legislated for as to the extent and balance of rights by the Oireachtas and to take a different view. For the Court to pursue the course of granting an injunction on the basis not of law but of economic abuse or moral turpitude would lead the Court beyond the threshold of the judicial arm of government and into legislation. It would undermine respect for the rule of law: for no one would know quite what the rule of law might be if it depended on attitudes forged through legal argument in individual cases as to what was acceptable conduct. The danger that would arise would be that the Court could then be described by reasonable people as acting on the basis of preference, were the Court to use any wider and wrongly assumed right to injunct behaviour in the same way that the tort of conspiracy was historically used against trade union action by judges in England in the late 19th and early 20th centuries, up to the passing of the Trade Disputes Act 1906, and some would argue, beyond. Therefore, the only proper response to this problem is to consider the precise scope of the legislative framework as set out in the Act and whatever aspect of European legislation might legitimately be used as an aid in interpreting national law."

21. All of this is another way of saying that while Article 40.3.2 of the Constitution certainly imposes an obligation on the courts to fashion adequate and effective remedies (see, e.g., *The State (Quinn) v. Ryan* [1965] I.R. 70 and *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107, [2011] 3 I.R. 563), this principle applies in the context of existing *justiciable* controversies only. There is, of course, also absolutely no doubt but that a plaintiff whose constitutional rights have been infringed by a wrongdoer can, in principle, at least, sue directly for a breach of these rights, at least where the ordinary law of tort proves "basically ineffective" for this purpose: see, e.g., *Meskeil v. Córas Iompair Éireann* [1973] I.R. 121, per Walsh J., *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 626, 636, per Henchy J. and *Grant v. Roche Products Ltd.* [2008] IESC 35, [2008] 4 I.R. 679 per Hardiman J. Short of this, however, the courts have no jurisdiction to create entirely new torts: see, e.g., *Healy v. Stepstone Mortgage Funding Ltd.* [2014] IEHC 130.

22. Prior to the change effected by S.I. No. 59 of 2012 (and the enactment of the new s. 40(5A) of the 2000 Act), could, therefore, the rightsholders have sued the ISPs directly for a breach of their constitutional rights? It is clear from the judgment of Charleton J. in *UPC* that the answer would have to be in the negative, precisely because the ISPs had broken no law and nor had they themselves infringed the rightsholders' constitutional rights: they were not wrongdoers for this purpose. The basic ineffectiveness of the law had nothing, as such, to do with the ISPs or, indeed, with their conduct: it rather stemmed from the failure of the Oireachtas to enact legislation which had caught up with technological changes in the internet by providing for a new form of remedy to deal with the problem which had been identified in *EMI Records*.

23. The comments of Charleton J. in *EMI Records* regarding the functions of the courts in this sort of situation might be thought to have anticipated what Clarke J. was later to say in *R. v. An tArd Chláraitheoir* [2014] IESC 60 regarding the role of the courts where a legislative lacuna leaves important issues unresolved:-

"However, it is clear that the role of the courts in that process, while important, is limited. Short of the existing law being found to be in breach of the Constitution, the only proper role of the courts is to play their appropriate part in the evolution of the common law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fit for purpose it may well be that the only solution lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the courts."

24. The third basic juristic reality is that, at least prior to the insertion of the new s. 40(5A) of the 2000 Act by means of an amendment in 2012, the Oireachtas had failed to provide an effective remedy to ensure that the property rights of the copyright holders were indeed adequately protected in the manner required by Article 40.3.2. As Cregan J. found, all other measures which the rightsholders had tried – such as educational campaigns designed to alert the public as to the undesirable consequences of such widespread copyright infringement – had simply failed.

25. Whatever might have been the situation in 2000, by the date of the decision of Charleton J. in *EMI Records* in October 2010, the available evidence strongly suggested that copyright infringement on the internet had become so ubiquitous that it posed an existential threat to the very fundamentals of copyright protection itself. This state of affairs was well summarised by Cregan J. in his judgment in the High Court where, in an eloquent passage, he observed:-

“Indeed, this is not simply a case of an isolated infringement of copyright and an isolated breach of constitutional rights. This is a situation in which the constitutional rights of a whole class of persons are not just being infringed, they are being destroyed. The practice of downloading music for free is destroying the constitutional and intellectual property rights of all creative artists. The destruction of these constitutional rights of creative artists should be a matter of great concern in any civilised society. The current generation of writers, performers and interpreters of music cannot have their livelihoods destroyed by advances in technology which allow persons to breach their constitutional rights with impunity. The loss of future cultural creativity would be immense and incalculable.”

26. The effect of the decision in *EMI Records*, however, was that the Irish courts lacked any jurisdiction to order non-infringing ISPs to take action against customers who used their internet services for the purposes of copyright infringement. In this respect, Charleton J. found that the absence of any legal power for the “blocking, diverting or interrupting of internet communications intent on breaching copyright”, Ireland was not “yet fully in compliance with its obligations under European law.”

27. This lacuna was rectified by the enactment of s. 40(5A) of the 2000 Act (as inserted by S.I. No. 59 of 2012), which provision I propose to examine separately below.

The position under EU law

28. At a European level an attempt was made to address this problem in that Article 8(3) of the 2001 Directive provides that:-

“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

29. Article 11 of Directive 2004/48/EC (“the 2004 Directive”) complements this by providing:-

“Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue as against the infringer an injunction aimed at prohibiting the commission of an infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to recurring periodic penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of [the 2001] Directive.”

30. The thinking behind Article 11 is explained by recital 23 which provides:-

“Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder’s industrial property rights. The conditions and procedures relating to such injunctions should be left to the law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.”

31. While these legislative changes were well intentioned, it is nonetheless hard to avoid the conclusion that the drafting of both Article 8(3) of the 2001 Directive and the third sentence of Article 11 of the 2004 Directive left a good deal to be desired, even if all due allowance is made for the necessity to legislate given the complexities and vagaries of a variety of different systems of civil procedure throughout the Union. If the language of Article 8(3) (and, for that matter, the third sentence of Article 11 of the 2004 Directive) is taken at face value, then, at least so far as Ireland is concerned, Article 8(3) changed nothing since copyright holders were always in a position to apply for injunctions against ISPs.

32. In its own way, the decision of Charleton J. in *EMI Records* illustrates this, because it was perfectly open to the rightsholders to apply to the High Court for an injunction directed at the ISPs, which indeed they did. The difficulty which *EMI Records* illustrates was rather a different one, namely, that the High Court had no jurisdiction to grant relief directed at non-infringing ISPs where they had not committed any cognisable legal wrong and, moreover, it was not clear what sort of orders could be granted in respect of ISPs which were really directed at third parties and the legal basis by which such orders might be granted.

The jurisprudence in relation to Article 8(3) of the 2000 Directive and the third sentence of Article 11 of the 2004 Directive

33. These considerations notwithstanding, it is nonetheless clear from a series of decisions of the Court of Justice that Article 8(3) of the 2001 Directive (and the companion provisions of Article 11 of the 2004 Directive) have, in fact, changed the law, by mandating the creation of a new form of injunction directed against non-infringing parties which finds no real counterpart in our system of civil procedure. Again, the essential question in the present case is the extent to which Article 8(3) of the 2001 Directive has effected such a change.

34. There are, of course, some in-built limitations to the scope of any such injunction against ISPs. Article 15(1) of Directive 2000/31/EC (“the Electronic Commerce Directive”) provides that Member States “shall not impose a general obligation” on ISPs to monitor the information which they transmit or store, nor a general obligation “actively to seek facts or circumstances indicating illegal activity.” Article 3(1) of the 2004 Directive requires that Member States shall provide for “fair and equitable” measures to give effect to intellectual property rules and shall not be “unnecessarily complicated or costly” or “entail unreasonable time-limits or unwarranted delays.” Article 3(2) further provides that:-

“Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse.”

35. Article 8 of the 2001 Directive provides:

"Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. *The sanctions thus provided for shall be effective, proportionate and dissuasive.* 2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2). 3. Member States shall ensure that rightholders *are in a position to apply for an injunction against intermediaries* whose services are used by a third party to infringe a copyright or related right." (Emphasis supplied)."

36. It is also necessary to emphasise that Article 1(3a) of the Framework Directive 2002/12/EC (as amended) ("the Framework Directive") protects the procedural rights of consumers before their rights to internet access are suspended or terminated.

"Measures taken by Member States regarding end users access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of community law"

37. Article 1(3a) of the Framework Directive further provides that:

"A prior fair and impartial procedure shall be guaranteed including the right to be heard of the person or persons concerned subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."

38. This entire matter was explored by the Court of Justice in Case C-324/09 *L'Oréal SA* [2011] E.C.R. I-6011. In this case the principal defendant, eBay, had permitted certain individuals to offer for sale certain goods on its electronic marketplace. *L'Oréal* maintained that this conduct infringed its intellectual property rights. In order to attract customers to its website, eBay had bought certain keywords – including well-known trade marks – from paid internet referencing services (such as those provided for by Google). As Advocate General Jääskinen said in his opinion:

"The use of a selected keyword in the search engine triggers the display of an advertisement and a sponsored link, which leads directly to eBay's electronic marketplace."

39. Following a reference of certain questions from the High Court of England and Wales, the Court of Justice addressed the jurisdiction and powers of the courts to grant injunctions against ISP intermediaries, saying (at paras. 135 *et seq.*):-

"135. As is clear from recital 23 to Directive 2004/48, the rules for the operation of the injunctions for which the Member States must provide under the third sentence of Article 11 of the directive, such as those relating to the conditions to be met and to the procedure to be followed, are a matter for national law.

136. Those rules of national law must, however, be designed in such a way that the objective pursued by the directive may be achieved.... In that regard, it should be borne in mind that, under Article 3(2) of Directive 2004/48, the measures concerned must be effective and dissuasive.

137. Moreover, in view of the fact...the referring court will, when applying national law, be required to do so, as far as possible, in the light of the wording and the purpose the third sentence of Article 11 (see, by analogy, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 106).

138. The rules laid down by the Member States, and likewise their application by the national courts, must also observe the limitations arising from Directive 2004/48 and from the sources of law to which that directive refers.

139. First, it follows from Article 15(1) of Directive 2000/31, in conjunction with Article 2(3) of Directive 2004/48, that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website. Furthermore, a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.

140. Second, as is also clear from Article 3 of Directive 2004/48, the court issuing the injunction must ensure that the measures laid down do not create barriers to legitimate trade. That implies that, in a case such as that before the referring court, which concerns possible infringements of trade marks in the context of a service provided by the operator of an online marketplace, the injunction obtained against that operator cannot have as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing those trade marks

141. Despite the limitations described in the preceding paragraphs, injunctions which are both effective and proportionate may be issued against providers such as operators of online marketplaces. As the Advocate General stated at point 182 of his Opinion, *if the operator of the online marketplace does not decide, on its own initiative, to suspend the perpetrator of the infringement of intellectual property rights in order to prevent further infringements of that kind by the same seller in respect of the same trade marks, it may be ordered, by means of an injunction, to do so.*

142. Furthermore, in order to ensure that there is a right to an effective remedy against persons who have used an online service to infringe intellectual property rights, *the operator of an online marketplace may be ordered to take measures to make it easier to identify its customer-sellers.* In that regard, as *L'Oréal* has rightly submitted in its written observations and as follows from Article 6 of Directive 2000/31, although it is certainly necessary to respect the protection of personal data, the fact remains that when the infringer is operating in the course of trade and not in a private matter, that person must be clearly identifiable.

143. The measures that are described (non-exhaustively) in the preceding paragraphs, as well as any other measure which may be imposed in the form of an injunction under the third sentence of Article 11 of Directive 2004/48, must strike a fair balance between the various rights and interests mentioned above (see, by analogy, *Promusicae*, paragraphs 65 to 68).

144. In view of the foregoing, the answer to the tenth question is that the third sentence of Article 11 of Directive 2004/48 must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, dissuasive and must not create barriers to legitimate trade."

40. The decision in *L'Oréal* is clearly of importance because it illustrates how an ISP can be ordered to take steps against a commercial customer who is using its services for infringement purposes. There are, however, at least two important differences between the facts of *L'Oréal* and the present case. First, it seems implicit in that judgment that eBay were not simply a passive ISP (or, using the language of the 2000 Directive, a "mere conduit"), given that it had purchased certain key words corresponding to L'Oréal's trade marks from Google's internet referencing service for advertising purposes. This was clearly designed to prompt consumers to use eBay's electronic marketplace and thereby benefit in a tangible fashion from the conduct of the infringers who illegally marketed those self same goods on eBay. Second, *L'Oréal* concerned action to be taken against business users who engaged in or facilitated infringement activities. Different considerations apply in the case of non-business customers, not least because of privacy and data protection considerations. While these considerations do not detract from the importance of *L'Oréal*, they are sufficient to ensure that this decision could not, on its own, at least, be regarded as dispositive.

41. The matter was considered again by the Court of Justice in Case C-70/10 *Scarlet Extended S.A.* [2011] E.C.R. I-11959, but on this occasion the Court held that the various directives must be interpreted as precluding an injunction addressed to an internet service provider which ordered it to introduce a system for filtering all electronic communications passing by its services (in particular, those involved in the use of peer to peer software) as a preventative measure at its own expense and for an unlimited period.

42. The Court of Justice held that such an injunction, addressed to that internet service provider, would have obliged it actively to monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual property rights - thus requiring general monitoring expressly prohibited by Article 15(1) of the 2000 Directive. The Court took the view that this would therefore result in a serious infringement of the freedom of the internet service provider concerned to conduct its business, since it would require that provider to install a complicated costly permanent computer system at its own expense which would be contrary to the conditions laid down in Article 3(1) of the 2004 Directive (which requires measures to ensure intellectual property rights should not be unnecessarily complicated or costly). The Court reasoned that such an injunction would not meet the requirement that a fair balance be struck between the protection of the intellectual property rights enjoyed by copyright holders and the freedom to conduct business enjoyed by operators such as internet service providers.

43. As the Court put it (at para. 46 of the judgment):-

"Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter".

44. The matter was further considered by the Court of Justice in Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgivers CVBA* [2012] E.C.R. I- ("SABAM"). This was a reference from the Belgian courts in proceedings involving Netlog NV, a Belgian social networking site. SABAM contended that this site was being used by consumers as a means of uploading or storing copyrighted material of which its members were the rightholders. The Belgian courts had previously granted an order requiring Netlog to cease transmitting infringing material on its network. Netlog maintained that such an order would have the effect that it would be required:-

"...to introduce, for all its customers, *in abstracto* and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files."

45. It was also possible that introducing such a filtering system would mean that personal data would have to be processed which would have to satisfy the provisions of EU law relating to the protection of personal data and the confidentiality of communications.

46. The Court of Justice re-affirmed its own decision in *Scarlet Extended* and continued:-

"34. In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly (see *Scarlet Extended*, paragraph 36).

35. In those circumstances, it is necessary to examine whether the injunction at issue in the main proceedings, which would require the hosting service provider to introduce the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its service users in order to prevent any future infringement of intellectual-property rights.

36. In that regard, it is common ground that implementation of that filtering system would require:-

- ☐ first, that the hosting service provider identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual-property rights claim to hold rights;
- ☐ next, that it determine which of those files are being stored and made available to the public unlawfully; and
- ☐ lastly, that it prevent files that it considers to be unlawful from being made available.

37. Preventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider

and would involve almost all of the information thus stored and all of the service users of that provider (see, by analogy, *Scarlet Extended*, paragraph 39).

38. In the light of the foregoing, it must be held that the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31 (see, by analogy, *Scarlet Extended*, paragraph 40).

39. In order to assess whether that injunction is consistent with EU law, account must also be taken of the requirements that stem from the protection of the applicable fundamental rights, such as those mentioned by the referring court.

40. In that regard, it should be borne in mind that the injunction at issue in the main proceedings pursues the aim of ensuring the protection of copyright, which is an intellectual-property right, which may be infringed by the nature and content of certain information stored and made available to the public by means of the service offered by the hosting service provider.

41. The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected (*Scarlet Extended*, paragraph 43).

42. As paragraphs 62 to 68 of the judgment in Case C-275/06 *Promusicae* [2008] ECR I-271 make clear, the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.

43. More specifically, it follows from paragraph 68 of that judgment that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.

44. Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as hosting service providers pursuant to Article 16 of the Charter (see *Scarlet Extended*, paragraph 46).

45. In the main proceedings, the injunction requiring the installation of the contested filtering system involves monitoring all or most of the information stored by the hosting service provider concerned, in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also works that have not yet been created at the time when the system is introduced.

46. Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly (see, by analogy, *Scarlet Extended*, paragraph 48).

47. In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as hosting service providers (see, by analogy, *Scarlet Extended*, paragraph 49).

48. Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

49. Indeed, the injunction requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified (see, by analogy, *Scarlet Extended*, paragraph 51).

50. Moreover, that injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned (see, by analogy, *Scarlet Extended*, paragraph 52).

51. Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).

52. In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system."

47. The final decision of the Court of Justice relevant to this sequence is Case C-314/12 *UPC Telekabel Wien GmbH* EU:C: 2014; 192. In that case two film production companies established that a particular website was offering either the downloading or the "streaming" of films to which they held the copyright. They sought an order from the Austrian courts requiring UPC Wien qua ISP to block access to this particular site. One of the questions referred by the Austrian courts was whether an order of this kind was compatible with Article 8(3) of the 2001 Directive.

48. The Court of Justice answered this question in the affirmative, saying (at paras. 63 and 64) that such an injunction was not incompatible with EU law provided that it was necessary and proportionate and it respected the rights of the internet users:

"..... even though the measures taken when implementing an injunction such as that at issue in the main proceedings are not capable of leading, in some circumstances, to a complete cessation of the infringements of the intellectual property right, they cannot however be considered to be incompatible with the requirement that a fair balance be found, in accordance with Article 52(1), in fine, of the Charter, between all applicable fundamental rights, provided that:-

(i) they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and

(ii) that they have the effect of preventing unauthorised access to protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right.

In the light of the foregoing considerations, the answer to the third question is that the fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that:-

(i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and

(ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish."

49. The effect of this case-law is clear: Article 8(3) of the 2000 Directive does not simply seek to fill a jurisdictional lacuna in the systems of civil procedure of the Member States by allowing rightholders to apply for an injunction against non-infringing ISPs. This provision is not simply procedural, but it potentially changes the substantive law by requiring Member States to provide their judicial systems with the authority to grant injunctions of this kind, subject only to certain safeguards (such as the prohibition against general monitoring of users contained in Article 15(1) of the Electronic Commerce Directive). While I propose to consider shortly the implications of this change, it is next necessary to set out the provisions of s. 40(5A) of the 2000 Act.

Section 40(5A) of the 2000 Act

50. In the aftermath of the decision in *EMI Records*, it appears that the present plaintiffs commenced proceedings against the State claiming that Ireland had failed to give effect to the requirements of Article 8(3) of the 2000 Directive. It seems that before that litigation could be resolved, the European Union (Copyright and Related Rights) Regulations 2012 (S.I. No. 59 of 2012) were promulgated by the Minister for Enterprise pursuant to s. 3 of the European Communities Act 1972 (as amended). Article 2 of these Regulations amended by s. 40 of the 2000 Act by inserting a new s. 40(5A) in the following terms:

"(5A)(a) The owner of the copyright in a work may, in respect of that work, apply to the High Court for an injunction against an intermediary to whom paragraph 3 of Article 8 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society applies.

(b) In considering an application for an injunction under this subsection, the court shall have due regard to the rights of any person likely to be affected by virtue of the grant of any such injunction and the court shall give such directions (including, where appropriate, a direction requiring a person be notified of the application) as the court considers appropriate in all of the circumstances."

51. It will be seen that the new s. 40(5A)(a) closely follows the lay-out and structure of Article 8(3) of the 2001 Directive itself by allowing the High Court to grant an injunction against a non-infringing ISP. Section 40(5A)(b) seeks to ensure that the rights of internet users can also be protected by allowing such persons to assert their rights in such proceedings, thereby giving effect to the procedural protections required for subscribers by Article 1(3A) of the Framework Directive. The necessity for such procedural protections was, of course, a point subsequently emphasised by the Court of Justice in *UPC Tekekel Wien*.

The implications of Article 8(3) of the 2001 Directive

52. Article 8(3) (as transposed by s. 40(5A) of the 2000 Act) certainly changed the substantive law in relation to injunctions so far as this jurisdiction is concerned. While it is true that Article 8(3) did not quite do so in express terms, a series of judgments of the CJEU – ranging from *L'Oréal* onwards – has clearly confirmed that Article 8(3) has had this effect by requiring national courts in appropriate cases to grant injunctions against non-infringing ISPs. Certainly, by virtue of this Court's duty of loyal co-operation and the general principle of *interpretation conforme* reflected judgments such as Case C-106/89 *Marleasing S.A.*, it is necessary for this Court to construe s. 40(5A) of the 2000 Act as having had this effect. There is nothing in s. 40(5A) of the 2000 Act which precludes this construction. On the contrary, s. 40(5A)(b) confirms it by expressly directing the court to have regard to the rights of any person likely to be affected by the grant of an injunction.

53. This provision must accordingly be interpreted as meaning that not only that it empowered the High Court to grant an injunction in aid of rightholders against non-infringing ISPs, but more fundamentally it gave the High Court the power for the first time to grant injunctions against persons and entities who in themselves had committed no legal wrong and who had never threatened to do so. This represents a major change in the law, albeit in the relatively confined area of copyright infringement.

54. This change has further consequences in that many of the substantive rules governing the granting of injunctions are no longer necessarily applicable to the grant of s. 40(5A) injunctions. These traditional principles were developed over the decades, often in contexts where even in the case of final orders the courts were endeavouring to balance the competing rights and interests of the

parties. These traditional principles – such as requirements that the plaintiff come with clean hands or that the infringement of rights complained of be real and not trivial or technical – were fashioned with this balancing rights of competing rights and interests in mind.

55. While it is difficult to deny that the very novelty of the s. 40(5A) jurisdiction is likely to present its own difficulties, the general parameters of the jurisdiction have nonetheless been sketched out in the Directives and in the recent case-law of the CJEU. Many of the governing principles – such as requirements of necessity, proportionality and general cost effectiveness – are also reflected in the traditional principles found in our law governing the grant of injunctions, even if the terminology is different and even if the application of these principles will also call for a slightly different approach given that the order will be directed against an entity which, it must be recalled, has committed no legal wrong.

56. In many ways, this all reflects the fundamental objection voiced by UPC so far as the injunction granted by the High Court is concerned. Counsel for UPC, Mr. Ferriter S.C., maintained that the order granted by Cregan J. was not of a kind normally granted by a court and was more akin to the type of order made by a regulator vested with specialist expertise. How, for example, could a court determine questions of cost sharing as between rightholders and the non-infringing ISPs when there are no settled legal principles – such as would be the case, for example, in respect of an action in tort or for breach of contract – which would govern this question?

57. Indeed, it must be recalled that, as Mr. Ferriter S.C. submitted, the Supreme Court had previously set its face against the grant of injunctions of this kind in seminal cases such as *TD v. Minister for Education* [2001] IESC 101, [2001] 4 I.R. 259. In *TD* the High Court had granted a mandatory order directing the Minister for Education to build and construct a specialised accommodation centre in order to meet the educational needs of disadvantaged young children. This injunction was granted in order that the constitutional rights of these children to education under Article 42.4 of the Constitution might be upheld.

58. The Supreme Court held that an injunction in that form was contrary to the general system of separation of powers provided in the Constitution. Specifically, the Court ruled that it was contrary to Article 28.2 of the Constitution which provides that the executive power is vested in the Government. As Keane C.J. stated ([2001] 4 I.R. 259, 287):

“The difficulty created by the order of the High Court in this case is not simply that it offends in principle against the doctrine of the separation of powers, though I have no doubt that it does. It also involves the High Court in effectively determining the policy which the executive are to follow in dealing with a particular social problem. This difficulty is not met by the contention advanced on behalf of the applicants that the Ministers are being asked to do no more than carry into effect a programme prepared by them and which they assert it is their intention to implement. The evidence in this case establishes clearly that, in what is unarguably an extremely difficult area, approaches which at one time seemed appropriate may have to be reconsidered: in particular, officials are naturally concerned with how equivalent problems are being dealt with in other countries. There is no reason in principle why the executive should not adopt a flexible and open minded approach to the problems of children with special needs while at the same time ensuring that their constitutional right to have those needs met is respected. The making of the High Court order in this form, as the judgment of the trial judge emphasises, will make it necessary for the Minister to return to the High Court to obtain its sanction to any change in policy which necessitates a departure from the precise terms of the order. It cannot be right that the executive power of the Government can only be exercised in a particular manner, even though so to do would not contravene any person’s constitutional rights, without the sanction of the High Court.”

59. It should, of course, be observed that even in that case (unlike the present one) the order sought was against a party who – on one view of the facts and the law – had in fact infringed the constitutional rights of the applicant. The Supreme Court’s judgment may be said to proceed on that very premise, with the only issue whether a mandatory injunction of this kind should have been granted.

60. While in *TD* the question of the availability of resources to build the centre in question was not, in fact, an issue Keane C.J. also commented – albeit admittedly *obiter* – that it was not the function of the courts to make an assessment of the validity of the many competing claims on national resources, since ([2001] 4 I.R. 259, 288):

“in exercising that function the courts would not be administering justice in the normal sense but would be engaged in an entirely different exercise, *i.e.*, an adjudication on the fairness or otherwise of the manner in which other organs of the State had administered public resources.”

61. It is true that the GRS order made by the High Court might be thought to be open to the objection that inasmuch as the Court was being invited to make a highly prescriptive mandatory order and which did not involve the administration of justice in the traditional sense since the court was not granting an order against a non-infringing party by reference to established legal rights and wrongs and which involved the courts in making choices as to what steps ought to be taken. Indeed, in these respects, the GRS order has affinities with the type of regulatory order which a specialist expert body (had such been assigned this function) might well have proposed with a view to resolving the issues presented in this case.

62. The fact is, however, that the Union legislator has elected to vest a jurisdiction of this type (*i.e.*, a power to grant an injunction against non-infringing parties) in the national courts of the Member States by enacting Article 8(3) of the 2001 Directive. Although this type of injunction represents a novel innovation in our system of civil procedure it is nonetheless not for this Court to look behind that legislative policy choice.

63. Once, therefore, the legal Rubicon of vesting the High Court with a jurisdiction to grant an injunction against a non-infringing ISP has been crossed by the enactment of s. 40(5A) of the 2000 Act, then what follows is really all merely a matter of degree. It could be said that any order made in those circumstances begins to take on the character of a regulatory solution to the problem, precisely because the order is no longer directed to an infringing party and also because the court is no longer applying purely traditional legal principles such as might have been applicable to determine, for example, whether to grant an injunction or damages against a defendant who in appropriate civil proceedings had been found guilty of copyright infringement.

64. For all of these reasons I believe that the effect of Article 8(3) of the 2001 Directive is to permit the High Court in principle to grant an injunction of this kind.

Whether the injunction actually granted satisfies the requirements of Article 8(3) of the 2001 Directive.

65. In assessing whether an injunction of this kind ought to have been granted, the case-law of the CJEU to which I have already referred makes it clear that Sony was obliged to establish that such an injunction was:-

- (i) necessary;

- (ii) that the costs involved were not excessive or disproportionate and that the order itself should not be unduly complicated;
- (iii) that the cost sharing proposals were fair and reasonable;
- (iv) that the order respected the fundamental rights of the parties affected, including internet users and
- (v) that the duration of the proposed injunction and the provisions for review were reasonable.

66. These arguments can be considered in turn.

Is the order necessary?

67. As to the necessity of the injunction, there can be little doubt that such was necessary. Article 15 of the Electronic Commerce Directive prohibits the general monitoring of customers by ISPs, so that they are prevented from taking steps to seek out infringing activity on the part of their customers: see, e.g., *Scarlet Extended* at para. 51 and *SABAM* at paras. 44-45. In practical terms, therefore, the most obvious solution is one which involves the rightsholders informing the ISPs of the infringing activities of the latter's customers, with the ISP in question then writing to its own customers about this conduct.

68. At an earlier point in this judgment I noted that how the ubiquitous nature of the anonymous copyright infringement on the internet had rendered traditional remedies against infringers all but pointless. In his judgment Cregan J. drew attention (at para. 32 of the judgment) to the econometric analysis produced by the plaintiffs' expert witness, Professor Brett Danaher, who showed that warning letters of this kind issued pursuant to new copyright legislation providing for forms of graduated response in France and New Zealand respectively and which contained the threat of ultimate termination of contract had the effect of enforcing the legitimate market by around 25%.

69. It is clear from the judgment of the Court of Justice in *UPC Kabel Wien* that a dissuasive order of this kind which is likely to be effective in deterring future infringing activity satisfies the necessity test. The order proposed accordingly meets this test.

Would the order be unnecessarily costly and complicated?

70. So far as the costs are concerned, the evidence of UPC - which was accepted by Cregan J. - was that, as he put at para. 159 of his judgment:

"It is, I gather, not a simple task of simply imputing an IP address into a computer and obtaining the relevant customer name and address. Indeed the evidence was that the defendant can only match an IP address on a specific date and time with a specific subscriber by using the services of its skilled computer engineers. It is at present not a computerised process. It would therefore require an individual or team of skilled individuals a considerable amount of time to match a specific IP address with a specific subscriber name and address. This, I was informed, is a time consuming and therefore expensive task. Insofar as the defendant would be required to do so on approximately 5,000 occasions each month the costs would therefore be considerable. However leaving aside the issue of costs (and they are critical in this application) the defendant could, in principle, match the IP address given to it by the plaintiff with a subscriber name and address if directed to do so. The defendant could also write a letter to its subscriber informing them that illegal copyright infringements have been detected on their computer and asking them to cease and desist from future illegal activity if ordered to do so."

71. Cregan J. later found (at paras. 205-210) that an automated response was the only effective mechanism of putting such a proposal into effect. This solution would require UPC to design a new software programme which would, in the words of Cregan J., "interact with the existing computer architecture to receive the monthly internet protocol information from the plaintiffs" and thereby identify the name and address of the relevant subscriber. There is no doubt but that the development of this software will entail significant capital start-up costs, together with on-going operational costs. These costs were estimated by Cregan J. as a sum between €800,000 to €960,000. Was this solution "unnecessarily complicated or costly" in the language of Article 3 of the 2004 Directive? Cregan J. explained why, in his view, it was not (at paras. 211-212 of the judgment):

"In this regard I consider again the criteria for an injunction set out in the IPR Directive. This provides that the relevant remedies which might be considered by the courts "shall not be unnecessarily complicated or costly". However, on the defendant's own evidence, the defendant's position is that development of a new computer system is necessary, is complicated and is costly. Indeed the defendant itself accepts that their solution is not "unnecessarily complicated or costly". Instead they say it is complicated and costly and therefore should not be ordered by the court. However the criteria for the grant of such an injunction which a court must consider is not whether the injunction will be complicated or costly but whether it will be "unnecessarily" complicated or costly.

In my view, having heard the defendant's evidence, I would conclude that the development of an automated system appears to be the only real technical solution which can be adopted by the defendant. It is therefore necessary. Insofar as it involves the development of a new computer programme to interlink with its existing computer architecture it is, of necessity, complicated. Because it will involve considerable man hours in developing new software it is also, of necessity, costly. However having heard the evidence, I would conclude that the steps to be taken by the defendant to develop this computer software are not "unnecessarily complicated or costly" and therefore this criterion of what is required to grant an injunction under Article 3 [of the 2004 Directive] is fulfilled."

72. It would be difficult to improve upon this reasoning which, to my mind, aptly summarises why this order is necessary. Viewed in the abstract, of course, it could be said that the GRS order is complex and costly. But given that the multi-faceted nature of the problem will invariably require active engagement between the rightsholders and the ISPs, it cannot be said that the order is, in the words of Article 3(1) of the 2004 Directive, unnecessarily complex, given that, as Cregan J. found (and there has been no appeal against this finding) no other technical solution is realistically possible.

73. It is true that the sums in question are significant. But they need to be measured against the findings of Cregan J. that the gross turnover of UPC of approximately €340m. in 2013 and its gross profit of €238m.: see para. 73 of the judgment. There is equally no doubt but that the copyright holders have suffered an alarming drop in income over this period. Mr. Willie Kavanagh, the former Chairman of EMI Records in Ireland, gave evidence - which was implicitly accepted by Cregan J. - that at least 50% of that decline can be attributed to the spiralling problem of anonymous internet infringements. There was also evidence - again, at least implicitly accepted by Cregan J. - to the effect that these costs amounted to some 35 cent per customer per annum.

74. In these circumstances, I do not think that it can be said that the order proposed involves unnecessarily costly solutions.

Were the cost sharing proposals fair and reasonable?

75. In assessing whether the cost sharing proposals were fair and reasonable there is, admittedly, little to guide the court other than the very general rubrics of fairness and proportionality. One must, therefore, approach the matter from the standpoint of first principle. Cregan J. also approached the matter in this fashion, stating (at para. 252 of the judgment):

"....the plaintiffs argue that the defendant should pay the costs of compliance with an injunction because it is the defendant's internet services which are being used by the offending subscribers to engage in copyright theft. There is considerable force to this argument. It is an agreed fact that the copyright theft is taking place on the defendant's network by its subscribers. It is also a fact that the defendant earns revenues from all its customers including those customers who are engaged in illegal downloading. Therefore, as a matter of principle, in my view the defendant should bear the cost of compliance with such an injunction."

76. Since this is the very premise on which recitals 58 and 59 and Article 8(3) of the 2001 Directive all proceed, it is difficult to disagree with this statement as a starting point.

77. Cregan J. then went on (at paras. 252-261) to assess how the capital expenditure burden should be shared:-

"It is also noteworthy that the defendant accepts - in principle - that it should pay some percentage of the cost of compliance with such an injunction. In its view it would not be fair and equitable if it had to bear 100% of the costs of compliance. Likewise it seems to accept the proposition that it would not be fair and equitable if the plaintiff had to bear the full costs of compliance with the injunction. Thus there is a sliding scale of cost-sharing. The defendant's submissions - and, indeed, [the evidence of] Mr Bryan Brown [the director of regulation and competition policy at UPC's parent company] - was to the effect that some form of cost sharing between the parties would be fair and equitable. The question that then arises is, what is a fair and equitable allocation of the costs burden in this case.

I will deal with the issue of capital expenditure first. The figures are that it will cost the defendant between €800,000 to €940,000 to develop this new computer system. This is an extremely large figure. The defendant submits that a fair and equitable allocation of costs would be that the rights - holders pay 75% of this capital expenditure and the defendant pays 25%.

I can see no basis at all for this argument. The defendant sought to rely on the English industry precedent whereby the rights holders paid 75% and the ISPs paid 25% for the English proposal. However, in my view, that is not a good comparator for an application such as this. It is difficult to see on what basis the plaintiffs should have to contribute such a significant amount of money to what is essentially a computer problem of the defendant's own situation. Moreover the defendant's evidence is that in building this new computer system it is, to use the analogy of a motorway, building a motorway for future use by all persons apart from the plaintiffs who might wish to take such actions against it. Therefore it is difficult to see on what basis the plaintiffs should be primarily liable for these costs.

The next issue to consider is whether there should be a fifty - fifty split. The defendant sought to argue that the equities between the parties are equal. That would lead to a conclusion that the split should be 50/50. However I do not believe that the equities between the parties are equal. The plaintiffs' constitutional rights are being destroyed by the defendant's customers. The defendant's customers are breaching their contracts with the defendant. The defendant could intervene but chooses not to do so. The destruction of the plaintiffs' constitutional rights is taking place on the defendant's networks. The defendant is deriving substantial revenues from its subscribers including those subscribers who are engaged in illegal downloading and uploading. It is clear that the equities are not equal. The defendant, as an ISP and as a mere conduit, has immunity from liability for such acts as its subscribers carry on under the directive but that does not mean that it has immunity from the costs of injunctions. I am of the view therefore that it is fair and equitable that the defendant should bear the greater percentage and proportion of the capital expenditure costs.

Because the defendant is the company which profits - albeit indirectly - because it derives revenue from its subscribers who are engaged in this practice, it is the defendant who should, in my view, be primarily liable for the costs.

This argument - that the defendant benefits through the inevitable enhancement of the attractiveness of broadband access from the availability of free music, film and [television] programmes on their network, whilst destroying the plaintiffs' intellectual property rights and constitutional rights - is, in my view, an argument of immense power. The inescapable fact is that all these intellectual property infringements are taking place on the defendant's network. The defendant's network facilitates this wholesale breach of constitutional rights. The defendant has the contractual right to do something about this but it simply refuses to do so. It also benefits considerably from the subscriber traffic on its network and generates revenues from each subscriber. It therefore has, and must have, a role to play in the resolution of this problem.

There is, however, an argument that the actions of the defendant in complying with this injunction will bring about an increase in revenues to the plaintiffs. That may be so. There is also an argument that it would be unfair to impose the full costs of the capital expenditure on the defendant. I think there is some merit in this argument.

Therefore, in the circumstances of the case, I believe it is reasonable to take a figure of approximately €800,000 - €940,000 as representing the likely capital expenditure on this project. I note that the defendants can amortise this capital expenditure over a period of eight years. This will bring a figure of approximately €100,000 - €117,500 a year. In my view the plaintiffs should be required to contribute 20% of this amount.....

In devising this allocation, I have also had regard to the fact that I intend to reduce the operational costs on the defendant as set out below. This will lead to a reduction of operational costs of approximately €150,000 per annum for the defendant. This in turn will assist in reducing the overall effect of the capital expenditure burden on the defendant.

In addition, I have also had regard to the fact that the plaintiffs also incur capital expenditure in setting up their systems and they are bearing their capital costs themselves and are not seeking any contribution for this from the defendants. In my opinion therefore this is a fair and equitable solution in relation to the capital expenditure issue."

78. For my part, I consider that it would be difficult to improve on the reasoning contained in these compellingly eloquent passages. It

is plain that Cregan J. gave considerable thought to the arguments regarding costs sharing. He was right to observe that the equities are not equal, although in this particular this phrase should not be understood literally. Rather, what Cregan J. was acknowledging was that as UPC's subscribers use the latter's services for copyright infringement and as UPC itself indirectly benefits from this, it would be only fair that it should bear the heavier share of these costs, even if it has not itself engaged in any infringing activities. It would not at the same time be right that UPC should shoulder the entire capital expenditure burden, since the rightholders are likely to derive a significant revenue burden from the GRS system once it is operational.

79. So far as the operating expenditure is concerned, Cregan J. stated (at paras. 262-264 of the judgment):

"In relation to annual operational costs, the evidence from the defendant's witnesses was that the annual operating cost to the defendant of dealing with approximately 5,000 notifications per month from the plaintiffs would be between €250,000 to €300,000. Evidence was also given as to how these costs were calculated. It is clear that there is a direct correlation between the amount of notifications received and the direct operational costs to the defendant.

In the circumstances of this case, where the defendant has to incur capital expenditure I am of the view that it would be fair and equitable if the number of notifications from the plaintiff to the defendant was reduced from 5,000 per month to 2,500 per month. This will, in effect, reduce the defendant's annual operating cost from approximately €250,000 - €300,000 per annum to approximately €125,000 - €150,000 per annum. In my view, these operational costs will have to be borne entirely by the defendant. This is because the cost of compliance with the graduated response scheme must be seen in the round. The plaintiffs have to incur significant annual expenditures themselves in compiling the data of illegal infringements in relation to the defendant using the services of [a specialist company] DtecNet. It is fair and equitable that the plaintiffs should bear in full the costs of taking its own steps in relation to the graduated response and it is also fair and equitable that the defendant should bear in full the cost of compliance with the measures which it has to take under the injunction - namely the cost of communicating with its subscribers on a number of occasions.

If the plaintiffs move to [apply for] *Norwich Pharmacal* orders and/ or other court orders, they will also have to bear those costs themselves. Thus, the plaintiffs bear the costs of the first and last steps and the defendant bears the costs of communicating with its own subscribers. That, in my view, is fair and equitable both as a matter of principle and also on the facts and figures of this case."

80. Here again I can find no fault with this reasoning which seeks fairly to allocate costs-sharing on a reasonable and proportionate basis.

81. There are, perhaps, only two features of the order of the High Court with which I would respectfully disagree, namely, the issue of a review after five years and the costs of future applications. So far as future costs applications are concerned, in his order Cregan J. directed that in the event that the rightholders were subsequently to apply to the High Court for *Norwich Pharmacal* orders against individual subscribers following the entry into force of this GRS system that UPC should pay its own costs. One can understand why Cregan J. made this order, since it reflects an open offer made by UPC in the course of this litigation.

82. I do not think, however, that it would be appropriate for the High Court to make anticipatory orders of this kind in relation to what, by definition, would be future proceedings. An order of this kind would stretch the boundaries of the s. 40(5A) injunction jurisdiction beyond that which was necessary or required. Subject to that, however, there is no reason why the order of the High Court should not note that this was the position of UPC (*i.e.*, that it would not seek its costs in respect of any subsequent *Norwich Pharmacal* applications), even if beyond this the court should not go.

Would the GRS order made by the High Court breach the fundamental rights of UPC's subscribers?

83. It is not really disputed - at least for this purposes of this appeal - that any attempt by ISPs to suspend or to terminate their subscriber's access to the internet would be a breach of Article 1(3a) of the Framework Directive. While at one point of the proceedings the rightholders sought an order against UPC requiring it to suspend or to terminate its subscribers access to the internet for alleged copyright infringement, Cregan J. found (at paras. 224 *et seq.*) that the grant of such relief would be a breach of Article 1(3a):-

"Insofar as the defendant would be suspending or terminating any of its subscriber's connections or access to the internet pursuant to a court injunction (as opposed to any private law action taken by the defendant against its own subscriber for its own reasons) then, such an injunction would, in my view, be "a measure taken by a Member State regarding end - users access to, or use of, services and applications through electronic communications networks" within the meaning of Article 1(3a) of Directive 2002/21. The fact that such end - users could be suspended or that their access to or use of services could be suspended and/or terminated is captured by Article 1(3a) of the Framework Directive.

In those circumstances the Directive provides that "a prior, fair and impartial procedure shall be guaranteed including the right to be heard of the person concerned." The fact that the procedure must be "impartial" means - it is submitted by the defendant - that a third party apart from the defendant must be involved. Thus it submits that if any of its subscribers are to be suspended or terminated, then such a subscriber has an absolute right under the directive to a prior and impartial procedure. Thus it is not sufficient for a subscriber to write to the defendant and set out his or her reasons as to why his account should not be suspended or terminated. Such correspondence would - as matters currently stand - be assessed by a person within the defendant's company and a decision would be made as to whether the suspension or termination was warranted. However, the defendant submits that this is not what the directive mandates. It mandates an "impartial procedure". This means, in its view, that an independent third party must form part of any graduated response system before any court injunction could be granted by the court.

In my view these submissions are correct. It is clear that any move by the defendant to suspend or terminate any of its subscribers' access to the internet would, as a matter of interpretation of the directive, clearly engage Article 1(3a) of the [Framework] Directive. Given that Article 1(3a) of the Directive is engaged, it must mean as a matter of statutory interpretation that a "prior, fair and impartial procedure shall be guaranteed including the right to be heard of the person concerned".

Given that this is so, the defendant further submits that the court could not, as a matter of law, direct the defendant by means of an injunction to carry out steps four and step five (*i.e.*, suspension or termination) on its own. Again I agree with the defendant's submissions in this regard.

One of the suggestions put forward by the plaintiffs was that both parties could agree to appoint an impartial arbitrator (e.g. a retired judge or similar person) who could consider all applications and representations with respect to suspensions and terminations. This would, in my view, fulfil the requirement of a prior, fair and impartial procedure in relation to suspensions and terminations. The costs of such an arbitrator would be borne, according to the plaintiff's proposals, equally by both parties. Moreover the plaintiffs' proposal was nuanced in that it allowed the arbitrator to decide on the issue of suspension/termination himself or send it forward for hearing by the courts.

The defendant did not appear to put forward any convincing objection to this proposal.

I am of the view that this proposal is eminently fair and sensible. Firstly, it permits any injunction to fulfil the requirement of a prior, fair and impartial procedure mandated by Article 1(3a) of the Framework Directive; secondly it is not unnecessarily costly; thirdly it is fair and equitable because the costs are to be shared equally between the parties; fourthly it might obviate - and would certainly reduce - costly and time consuming applications to court both for the parties and subscribers."

84. Although this issue was not pressed before this Court, I agree with Cregan J. that the granting of an order directing UPC to terminate or suspend such subscriber *accounts in the manner originally sought in these proceedings* would be a breach of Article 1(3a) of the Framework Directive, given that such an order would not have respected the procedural rights of such subscribers.

85. Cregan J. went on to note that any subsequent application to the High Court for a *Norwich Pharmacal* order would of necessity meet the requirements of Article 1(3a) of the Framework Directive inasmuch as it provides for an independent and impartial procedure. One might add that s. 40(5A)(b) of the 2000 Act expressly requires the Court to have "due regard" to the rights of third parties likely to be affected by the grant of any injunction, so that the procedural rights of subscribers (and others) would be adequately protected in the event that there was ever an application for an order cancelling or suspending their internet service.

86. Nor is there any suggestion that the GRS order at issue involves the kind of general monitoring of this kind prohibited by Article 15 of the 2000 Directive as illustrated in cases such as *SABAM*.

87. In these circumstances, I consider that the GRS order made by the High Court respects the fundamental rights of subscribers.

The duration of the order

88. The order of the High Court provided for a review after five years. It is true that this was a most unusual feature of final order for an injunction, but again this is precisely because normally the court is finally determining the legal rights of the parties. Given that the type of injunction mandated by Article 8(3) of the 2001 Directive is heretofore virtually unique in the Irish legal order in that, to repeat again, it is not directed at an infringing party, it is, perhaps, not surprising that it would contain an unusual feature of this kind.

89. One can well understand that given the ever changing nature of technology and, indeed, the manner in which the internet continues to evolve, Cregan J. was accordingly anxious not to constrain the parties in perpetuity to a regime which might well be rendered obsolete, unnecessary or disproportionate by changing technology or other circumstances which it is all but impossible presently to foresee.

90. At the same time, there has to be some legal certainty for the parties, at least in the short to medium term. It follows that High Court orders should be certain. It is not clear what the future basis on which such a review might take place would be. I am of the view that the trial judge's understandable anxiety to cater for potential future technological development and other changes can be addressed by the provision for liberty to apply already contained in the order.

91. The liberty to apply is, accordingly, sufficient to address fundamental changes in circumstances or technology or other significant changes which may warrant an application to the High Court that the order be amended, varied or even discharged. That proviso is also sufficient to address the concerns of the CJEU expressed in *SABAM*. In this context, it is sufficient to say that any future applications to amend or vary or discharge the s. 40(5A) order should not be lightly made save where there is a material change of circumstances or other future changes which might be thought objectively to warrant such an application. Naturally, the evaluation of whether the circumstances justified any amendment, variation or discharge of the order would remain entirely a matter for a High Court judge hearing any such application.

Whether it would be appropriate to make an Article 267 reference to the CJEU

92. The Court was invited by UPC to make an Article 267 reference in respect of a number of proposed questions. In essence, the fundamental question proposed – although as drafted it took different forms – was whether the GRS order proposed was compatible with Article 8(3) of the 2001 Directive. For all of the reasons already set out in this judgment, I consider that for all the novelty of the actual order made by the High Court, it is clear from the jurisprudence of the Court of Justice – such as *L'Oréal SA, Scarlet Extended* and *UPC Kabel Wien* – that this particular legal Rubicon has already been crossed sometime ago.

93. In these circumstances, I believe that what is at issue here is really the *application* of principles already established by the Court of Justice. As this Court had already indicated in another context, where what at issue involves the application of principles already determined by the Court of Justice, then no question of interpretation of EU law arises for the purposes of Article 267, so that no reference is then required: see *People over Wind Environmental Alliance v. An Bord Pleanála* [2015] IECA 272.

Whether this Court is obliged to make an Article 267 reference

94. The slightly separate issue as to whether the Court was *obliged qua* court of last resort to make a reference pursuant to Article 267(3) TFEU was also addressed in argument before us. For the reasons just stated, I do not think that any questions of interpretation of EU law for the purposes of Article 267 TFEU properly arises.

95. In any event, it is clear from established authority that this Court is not a court of last resort with an obligation to refer pursuant to Article 267(3) TFEU. This is clear from the decision of the Court of Justice in Case C-99/00 *Lyckeskog* [2000] E.C.R. I-4839. Here the Court of Appeal for Western Sweden had asked the Court of Justice whether it was a court of last resort for the purposes of Article 267(3) TFEU, given that the Swedish Supreme Court could always grant leave on a discretionary basis to hear an appeal from that Court.

96. The Court of Justice held that the Court of Appeal was not such a court of last resort, precisely because of the possibility that the decisions of that Court could be the subject of an appeal to the Supreme Court:-

"Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the Supreme Court does not have the effect of depriving the parties of a judicial remedy.

That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol [Supreme Court] against the judgment of a hovrätt [Court of Appeal], which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk [code of judicial procedure], the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the Supreme Court.

If a question arises as to the interpretation or validity of a rule of Community law, the Supreme Court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage."

97. It is clear that our system of appellate review is not dissimilar. Thus, following the coming into force of the 33rd Amendment of the Constitution Act 2013 on 28th October 2014, the Supreme Court may give leave to appeal from a decision of this Court where the case meets the constitutional standard. Article 34.5.3 of the Constitution now provides that the Supreme Court may grant leave if it is satisfied that the "decision involves a matter of general public importance" or if the interests of justice so requires. That is the test which applies in all cases for leave to appeal from the Supreme Court is sought and it plainly satisfies the *Lyckeskog* requirements.

98. The extent of the Supreme Court's jurisdiction is, naturally, exclusively a matter for that Court. The Supreme Court can obviously make an Article 267 reference at the hearing of the substantive appeal. It would seem, however, that there is no reason in principle why that Court could not make an Article 267 reference to the CJEU even on an application for leave to appeal (or, in the words of the CJEU, at the stage "of the examination of admissibility") should this be required. It would appear, in any event, that the Supreme Court has already considered in at least one case whether it should make an Article 267 TFEU reference to the Court of Justice in the course of determining an application for leave to appeal to that Court from a decision of the Court of Appeal in accordance with Article 34.5.3 of the Constitution: see *Dowling v. Minister for Finance* [2016] IESCDT 40.

99. Judged, therefore, by the standards articulated by the Court of Justice in *Lyckeskog*, I am of the view that this Court is not a court of last resort for the purposes of Article 267(3).

Conclusions regarding Article 267 reference

100. For all of these reasons, I do not believe that a question of interpretation of EU law properly arises for the purposes of Article 267 TFEU. Nor is this Court a "court of last resort" for the purposes of Article 267(3) TFEU. In these circumstances, a reference to the Court of Justice is neither appropriate nor necessary.

Conclusions

101. In summary, therefore, I am of the view that, subject to the reservations regarding future review after five years and applications for costs in future cases, the GRS order which was actually made by the High Court was one which the High Court had jurisdiction to make. The order further satisfies the requirements of Article 8(3) of the 2001 Directive, as transposed by s. 40(5A) of the 2000 Act.

102. Subject to the minor variations by the deletion in the High Court order of 17th June 2015 of the provision for the review after 5 years and the prohibition on UPC seeking costs in future proceedings, I would otherwise dismiss the appeal brought by UPC.

APPENDIX

CURIAL PART OF HIGH COURT OF 17TH JUNE 2015

IT IS ORDERED, pursuant to s. 40(5A) of the Copyright and Related Rights Act 2000, (as amended), that the defendant shall take the following steps, in order to prevent the use of the defendant's fixed broadband internet service by subscribers (for the purpose of infringing the copyright in the plaintiffs' sound recordings by the making available by subscribers of those recordings to members of the public through the internet

1. On receipt of all relevant infringement information from the plaintiffs (in respect of fixed broadband internet subscribers), the defendant shall, on receipt of a first copyright infringement notification from the plaintiffs, send its subscriber a first "cease and desist" letter.
2. On receipt of a second copyright infringement notification from the plaintiffs, the defendant shall send to that subscriber a second "cease and desist" letter.
3. Where the defendant receives a third copyright infringement notification from the plaintiffs, in respect of a subscriber, the defendant shall send to the plaintiffs a notification that the subscriber has been the subject matter of three such notifications.
4. In respect of subscribers (in respect of which the defendant has received a third copyright infringement notification) the plaintiffs (having been informed of the relevant IP addresses, dates and time stamps) may make a "Norwich Pharmacal" type application to ascertain the subscriber's identity and address and the plaintiffs may then seek an order for the termination of the subscriber's internet broadband service and/or such relief as the plaintiffs may wish to seek against the subscriber directly. Such applications will not be opposed or consented to by the defendant and no costs will be sought by or against the defendant of the proceedings or of compliance.
5. The plaintiff shall pay 20% of any capital expenditure incurred by the defendant required by the defendant to operate the scheme the sum to be paid in five equal annual instalments. (The capital expenditure cost is to be capped at €940,000).

6. The amount of notifications shall not exceed 2,500 per month.
7. The above scheme shall exclude all business users and shall be in respect of fixed broadband internet subscribers only.
8. Liberty to apply.
9. The matter shall be listed for review on a date five years after the perfection of the order.
10. That the plaintiff should recover 60% of its costs up to the giving of judgment of 27 March 2015 from the defendant, said costs to be taxed in default of agreement.
11. That each party should bear their own costs which were incurred thereafter.