

HIGH COURT

COMMERCIAL

[2014 No. 806 P]

[2014 No. 13 COM]

BETWEEN

SONY MUSIC ENTERTAINMENT (IRELAND) LIMITED

UNIVERSAL MUSIC IRELAND LIMITED

WARNER MUSIC IRELAND LIMITED

PLAINTIFFS

AND

UPC COMMUNICATIONS IRELAND LIMITED (No. 1)

DEFENDANTS

JUDGMENT of Mr. Justice CREGAN delivered the 27th day of March, 2015

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INTRODUCTION

1. The plaintiffs are record companies who produce and sell records. They are also the owners of copyright in a large number of sound recordings and have, by reason of an exclusive licence, the exclusive right in the State to sell copies of large numbers of sound recording. The copyright in these recordings is owned by diverse companies within the Sony Music, Universal Music or Warner Music group of companies.

2. The defendant is a company incorporated in the State and it provides a service to subscribers whereby subscribers may access the internet by broadband. The defendant is an internet service provider ("an ISP").

THE ISSUE

3. The issue which is raised in this case is the significant problem of internet piracy of music. There are many people unlawfully downloading music for free on the internet using the defendant's internet services.

4. The problem is enormous. For example, during a 30 day period in November 2012, an agent of the plaintiffs' identified that persons using the defendant's internet services had unlawfully uploaded approximately 7,500 copies of a sample of nearly 250 songs in a one month period.

5. The plaintiffs' position is that they do not consent to this unlawful activity and they regard it as a breach of their copyright. Indeed one of the agreed facts in this case is that there is wholesale theft of the plaintiffs' copyright being conducted on the internet at present by subscribers to various internet service providers.

NATURE OF THE RELIEF SOUGHT- A GRADUATED RESPONSE STRATEGY

6. By letter dated 19th December, 2013 the plaintiffs, through their solicitors, informed the defendant that they had information that their copyright was being infringed by persons using the defendant's service. In particular the plaintiffs informed the defendant of:

- (a) The internet protocol (IP) address of the UPC subscriber account
- (b) The date and time of use
- (c) The sound recording of the plaintiffs' made available from the internet protocol address in question and
- (d) The peer to peer protocol used.

The plaintiffs called upon the defendant to communicate with its subscribers and to terminate these infringements and to prevent further infringements.

7. The defendant however has indicated that it would not act on the plaintiff's complaint and it would not communicate with its subscribers unless ordered to do so by the Court.

8. The plaintiffs in their Statement of Claim are seeking what has been called a "graduated response" to the problem of internet piracy.

9. Thus, the injunction which the plaintiffs are seeking, is an injunction pursuant to s.40 (5A) of the Copyright and Related Rights Act, 2000 (as amended) requiring that the defendant take reasonable steps to prevent its subscribers from using the defendant's internet service for the purpose of breaching the plaintiffs' copyright in the plaintiffs' sound recordings.

10. In particular the plaintiffs are seeking an injunction in the following terms:

That, where the defendant is notified by the plaintiffs of the IP address (with date and time stamp) of a subscriber to the defendant's internet service, who is making available the plaintiffs' copyright sound recordings to the public, through the internet, without the plaintiffs' consent:

(1.) That the defendant - in respect of the first such notification - would send the subscriber an educational communication informing the subscriber of the details of the infringement of copyright notified, the damage caused to artists, musicians and the music industry generally by such infringements, the manner in which the subscriber's internet connection can be secured, asking the subscriber to desist from any further infringement and warning the subscriber of the consequences of further infringements.

(2.) That the defendant would send to its subscribers - in respect of a second such notification from the plaintiffs -

a communication informing the subscriber of the details of the infringement of the copyright notified, requesting that the subscriber cease and desist from any further infringement and warning the subscriber of the consequences of further infringement.

(3.) That, in the event of a third such notification, the defendant would send its subscriber a communication setting out the same matters as set forth in (2) and also suspend its internet service to that subscriber for one week.

(4.) That, in the event of a fourth such notification, the defendant (having assured itself of the probity and reliability of the processes involved in the steps above) would take steps to terminate its contract with the subscriber for the provision of internet service.

11. This type of solution is what is known in the industry as a "Graduated Response Strategy" (GRS). The essential elements are that the owners of the copyright send to the ISP a list of infringements with reference to specific internet protocol addresses; (The copyright owners can only identify the specific IP address. They cannot identify the name and address of the subscriber). However when this information is sent to the defendant, the defendant as the ISP can, using the IP addresses, identify the name and address of its subscribers. It then writes to its subscribers informing them that these matters have come to its attention. The second letter is a second reminder or threat of further action. The third step would be the suspension of the account for a week. The fourth step would be the termination of the account.

12. This issue of a Graduated Response Strategy has been the subject of immense discussion, debate and controversy throughout Europe, and indeed throughout the world. I will outline later in the judgment where other countries have put forward legislative responses to the issue.

13. Mr. McDowell S.C. for the plaintiffs indicated to the court in his opening submissions that the plaintiff was not wedded to any particular formulation of the graduated response but would be open to any form of court injunction which might achieve the desired end.

14. The defendant's position is that it is resisting any application for an injunction. It does so on a number of grounds including:

(a) That this entire area of how best to respond to internet piracy is not an appropriate matter for a court to consider but rather instead requires an industry - wide response or indeed a legislative response;

(b) That any such injunction must be granted in conformity with the restrictions on the limits and scope of such an injunction - as set out in the directives and case law in this area;

(c) That the court should be slow to order an injunction which would be unfair, disproportionate, and not suited to the needs of the case.

THE EVIDENCE

Statement of agreed facts

15. The parties to these proceedings have produced a statement of agreed facts. I have incorporated this into my judgment as it provides an important backdrop to the consideration of the issues in this case: -

"The Infringing Activity

15.1 As found by the High Court in *EMI v. UPC*¹ at paragraph 3 of the judgment,

"...a substantial portion of [UPC's] 150,000 customers, or the children in their teenage and twenties years of these customers, are using the internet service provided by UPC to steal copyright material which is the property of the recording companies. UPC, as the internet service provider, transmits, in digital form, this copyright protected music through its system and into, and out of, the home personal computers that are used for copyright piracy".

The Defendant's Internet Service is Being Used by Subscribers to Infringe Copyright

15.2 As found by the High Court in *EMI v. UPC* at paragraph 99 of the judgment, "[i]n the context of the detailed description of peer-to-peer copyright piracy in this judgment, I ask myself the question, whether internet facilities such as those sold by UPC are being used to infringe the copyright in works owned by the recording company. In the present, though intermittent, sense they are. Each time someone downloads a work from other peer-to-peer users, the facilities of UPC are then being used to infringe the copyright owned by the recording company." As subsequently found by the High Court in the judgment of McGovern J in *EMI v UPC* [2013] IEHC 274 such infringements were held to be taking place on the networks of at least 6 ISPs in the State. A similar finding was made by Kelly J in respect of the Plaintiffs' application to block the KAT website (December 2013).

The Scale of the Infringing Activity

15.3 As found by the High Court in *EMI v. UPC* at paragraph 21 of the judgment, "[t]he evidence establishes that this problem is a massive one. This is an instance where the multiplication on a huge scale of small problems has changed the nature of the issue into a huge pilfering of the resources of creative artists. For each individual person, the number of downloads cannot be regarded as being on a commercial scale. It is the multiplication of the problem through millions of individuals feeling free to use the internet to pirate the copyright of creative artists and recording companies that has created the undermining of that right on a foundational scale".

15.4 As found by the High Court in *EMI v. UPC* at paragraph 16 of the judgment, "[t]he relevant evidence and surveys presented to the Court by Mr. Kavanagh and Mr. Doyle indicates that with the growth of broadband internet rollout, the easy and unimpeded piracy of music will grow. The Court sees no reason why a person, who is not habituated to purchasing recorded music, would not take it for free over the internet."

15.5 In the month of November 2013, an agent of the Plaintiffs participating in peer to peer networks, using the Bittorrent and Ares Protocols alone, identified, in respect of a sample of 250 of the Plaintiffs' sound recordings, 7,757 instances of the making available to members of the public of those 250 sound recordings utilising the Defendant's customer accounts.

15.6 There is no reason to believe that the scale of the infringing activity at the present time is not of a like order to that identified by the High Court in its judgment in EMI v. UPC. Infringing activity may be continuing but the scale of infringing activity identified by the High Court in EMI v UPC has since been addressed in part at least through the applications by the Plaintiffs to block The Pirate Bay (June 2013) and KAT (December 2013) websites.

Most Peer to Peer Traffic is Currently Unlawful Transmission of Copyright Matter

15.7 As found by the High Court in EMI v. UPC at paragraph 30, *"the large majority of the current use of peer-to-peer technology is for the purpose of illegally downloading copyright material."* a conclusion supported by evidence including the expert evidence of Prof Nixon tendered on behalf of the Defendant at the hearing.

15.8 There is no reason to believe that the position as stated in the judgment in this regard does not remain the case. It is not clear that this is still the case as legitimate uses of P2P technology were recognised by the High Court. The relevance of this fact to the current proceedings is unclear but the Defendant accepts that P2P technology is still used for the purposes of illegally downloading copyright material.

Infringing Downloading/Uploading of Copyright Recordings Using Peer to Peer Technology is Easy and Widespread

15.9 As found by the High Court in EMI v. UPC at paragraph 13, *"[i]llegal downloading is done with considerable ease",* the court accepting the evidence of Mr Kavanagh *"[i]n less than three minutes he had joined the relevant website, downloaded the necessary software, accessed the relevant swarms of computers offering the track illegally, and downloaded the targeted song."*

15.10 The technical means of peer to peer file-sharing are as found by the High Court in EMI v. UPC at paragraph 28 of the judgment: *"The nature of peer-to-peer traffic has been described in evidence in technical terms. I wish to give a brief description here. Professor Paddy Nixon, of University College Dublin, told me that the relevant studies showed an analysis of internet traffic that was 70% peer-to-peer in Eastern Europe and 56% in Western Europe. As to encrypted peer-to-peer traffic, while some reports put that level as well over 25%, the studies referred to in evidence showed it at 20% or just under. Peer-to-peer networks are established using appropriate technologies, such as BitTorrent, whereby each participant becomes both a downloader of material and an uploader. The principles applied in legal peer-to-peer file sharing and illegal peer-to-peer file sharing are the same. A lengthy musical, or other, work would be split up into thousands of digital parcels, each one of which carries an identifying code which indicates that it is a particular track. This can be checked by anyone over the internet through DtecNet whereby identification can be made to the particular IP address that is engaged in the process of uploading/downloading copyright material without permission.... A participant, having downloaded the relevant software for free over the internet, such as eDonkey, or Gnutella, will find out on a site where a particular track is available and then join his computer, through the internet service provider, to a swarm of computers worldwide that has the material available for illegal downloading. Each user will open a file on their computer for this sharing purpose. What they already have is shared, potentially, with every other computer in a swarm, while what every other computer in the swarm has on their corresponding file, is potentially shared with the illegal downloader. What makes peer-to-peer communication useful, in terms of legal applications, is that it markedly increases the swiftness of a download and that the party from whom the download is taking place, does not require the same level of power as if the traffic were all coming from one source. Because the traffic is taken from hundreds or thousands of computers, there are that number of platforms, and their combined power, for hosting the information and for transmitting it through the network to the person who wants the download. Each piece, marked with the relevant # file, is also identified digitally as to the place in which it should sit in the overall work. The computer identifies these pieces and places them in an appropriate order. Thus, instead of the scale of A major arriving as A, C#, E, D, B etc, it will arrive A, B, C#, D, E by reference to the identifying codes. A may arrive from a computer in Kerry, and E may arrive from a computer in Germany, but they will all be assembled on the users computer in the right order so that perfect digital reproduction of the original is attained. This is usually, whether it is illegal or legal, then downloaded onto an iPod, or other portable device. Whereas the computer in Kerry, and the computer in Germany, are outside the UPC network, and may be transmitted from and through several different internet service providers, for the copy to arrive at a UPC broadband subscriber's computer, it must pass through the UPC network that is the subject matter of this case. For seconds, or for minutes, in digital form, it is on that network before it arrives, unless blocked or diverted, at a UPC subscriber's computer. During the course of transmission there may be momentary stopping and starting, but the pieces will be sent out in the right order."*

15.11 It is not only easy to use P2P it is also easy to move between different types of P2P protocols and different P2P indexing sites. It is also easy to move from monitored P2P protocols to unmonitored channels such as direct downloading sites and newsgroups.

Scale of the Damage to Copyright Holders

15.12 As found by the High Court in EMI v. UPC at paragraph 8 of the judgment, *"the business of the recording companies is being devastated by internet piracy. This not only undermines their business but ruins the ability of a generation of creative people in Ireland, and elsewhere, to establish a viable living. It is destructive of an important native industry. While the evidence focussed on the recording industry, the retail sector must also be affected by this wholesale theft. Furthermore, the evidence presented convinces me that a substantial portion of the generation now in their teenage years and twenties are actively dissuaded by illegal alternatives from legitimately purchasing music"*.

15.13 As found by the High Court in EMI v. UPC at paragraphs 11 and 17 of the judgment, the estimate that *"at least €20m in lost sales are being caused to the Irish market by illegal downloads on an annual basis"* was reliable and that *"[s]imilar losses in revenue must also undermine revenue to record shops"*.

15.14 As found by the High Court in EMI v. UPC at paragraph 15 of the judgment, *"the implications of this are that those involved in creative work will get a substantially, and unfairly, reduced return for the expenditure of their talent in creative work. From the point of view of the recording companies, if there are no profits, and no royalties to artists, the legal sale of recorded music, through the preparation of albums, will cease."*

15.15 There is no reason to believe that the scale of the damage being occasioned to copyright holders by the infringing activity at present is not of a like order to that identified by the High Court in its judgment in EMI v. UPC. Infringing activity may be continuing but the scale of damage identified by the High Court in EMI v UPC has since been addressed in part at least through the applications by the Plaintiffs to block The Pirate Bay (June 2013) and KAT (December 2013) websites.

The Defendant is a Mere Conduit within Article 12 of Directive 2000/31

15.16 As found by the High Court in EMI v. UPC, at paragraph 108 of the judgment, *"UPC is a mere conduit. It did not initiate any peer-to-peer transmission, whereby copyright material is stolen; the peer-to-peer swarms select who is to receive the transmission; and, in the course of transmission, the information is not selected or modified [by UPC]."*

Complaints of Infringement Made by the Plaintiffs and Information Supplied to Defendant

15.17 By letter of 19 December 2013 the Plaintiffs, through their Solicitors, informed the Defendant of the following information in respect of the infringement of the copyright in the Plaintiffs' recordings by persons using the Defendant's service in the manner described above, namely

- (a) the internet protocol address of the UPC Subscriber Account used;
- (b) the date and time of the use;
- (c) the sound recording of the Plaintiffs' made available from the internet protocol address in question; and
- (d) the peer to peer protocol used,

and called upon the Defendant to communicate with its subscribers in the manner set forth in the first relief sought in the proceedings in order to terminate and prevent the infringement by those subscribers of the copyright in the Plaintiffs' recordings using the Defendant's service. The Defendant has declined to act upon the Plaintiffs' complaints by communicating with its subscribers.

Other Methods Utilised by the Music Industry to Tackle the Infringement were Futile

15.18 As found by the High Court in EMI v. UPC at paragraph 62 of its judgment, whilst *"Norwich Pharmacal orders are therefore clearly established as an alternative to this injunctive relief. The evidence establishes, however that this process is burdensome and, ultimately, futile as a potential solution to the problem of internet piracy"*.

15.19 As found by the High Court in EMI v. UPC at paragraph 62 of its judgment, *"[t]he other alternative open is that of information campaigns to educate the public. This did not work. There were international and local press releases at the time of these [Norwich Pharmacal] cases. For a month or two an impact was observed on the incidences of infringements. They quickly returned to their previous level as if nothing had happened"*.

The Defendant's Contracts with Subscribers Prohibit the Infringing Activity & Make Provision for Termination on This Ground and on Other Grounds

15.20 The Acceptable Usage Policy makes provision for the termination or suspension of the Defendants' broadband service as provided to a subscriber for violation of intellectual property rights, with or without warning on the part of the Defendant, and the General Terms and Conditions make provision for termination of the service by the Defendant for breach of contract, including disconnection by reason of non-payment and breach of the Acceptable Usage Policy.

The Defendant does not Terminate Subscriber Contracts for Engaging in the Infringing Activity

15.21 As found by the High Court in EMI v. UPC, at paragraph 4 of the judgment, *"The customer use policy of UPC makes it very clear that the internet service of UPC cannot be used to steal copyright material. This is a matter of contract, and for a breach of this obligation by the customer, UPC can terminate the contract. It never does."*

15.22 As further found by the High Court in EMI v. UPC, at paragraph 52 of its judgment, *"[s]pecific provisions exist whereby UPC may terminate a customer's service for the infringement of copyright. They have never done this, nor do they have any interest in doing it. Specifically the UPC customer contract provides:-*

"Any images, photographs, articles, pages, designs, drawings, software, music, information and other materials published on the internet and the services are protected by copyright. Published material on the internet and on the services does not mean that it is available for anyone to copy. Unless the owner of that copyright specifically states that you may copy their work, you should assume that you cannot. It is an infringement of copyright to reproduce, adapt, translate, broadcast or perform copyright protected material without permission, to make infringing copies available to the public or otherwise to knowingly deal in infringing copies. The services must not be used, directly or indirectly to transmit, publish, link to or otherwise make available any confidential information or trade secrets of any person or company. You shall not post, publish, transmit, link to, otherwise make available re-transmit or store material on or through any UPC systems, services or products and/or undertake any activity, which infringes or breaches any third party intellectual property rights (which shall include but not be limited to copyrights, trademarks, design rights, trade secret patents, rights of privacy and publicity, moral rights and performance rights). For the avoidance of doubt, the installation or distribution of "pirated software" or other software products that are not appropriately licensed to the customer will constitute a violation of intellectual property rights. In the event of any disagreement as to whether materials posted, transmitted, re-transmitted or stored by a customer or in contravention of this section, the decision of UPC shall be final."

The Circumstances in which the Defendant Terminates Subscriber Contracts

15.23 The Defendant regularly terminates contracts with subscribers for breach of the Defendant's General Terms and Conditions on the ground of non-payment of bills.

15.24 These terminations for non-payment of bills are carried out by the Defendant without prior application by the Defendant to court or prior authorisation from any other distinct person or body.

15.25 The Defendant at present does not have any formal procedure for the hearing of representations by subscribers as to reasons why termination should not occur.

The Evidence-Gathering Process Undertaken on behalf of the Plaintiffs for the Purpose of Making Complaint to Internet Service Providers is Reliable

15.26 As found by the High Court in EMI v. UPC at paragraph 34 of the judgment, *"DtecNet does what any user of a peer to peer network does in order to obtain a download" and "[t]he IP address of those engaging in the peer-to-peer uploading/downloading of copyright material can be discovered easily and accurately."*

15.27 As also found by the High Court in EMI v. UPC at paragraph 34 of the judgment, *"[t]he process of DtecNet is automatic, in the sense that the handshake between the computers, in peer-to-peer terminology, is fully automated. The search for particular files, for example the 1,000 most popular songs relevant to the recording companies, at that time, is inputted for the purpose of search. I am satisfied from the evidence that the process is highly accurate. The activity log further transcribes the activity whereby the*

evidence is secured in a reliable format. There was nothing in the evidence to suggest to me that this process was subject to any degree of substantial error. Furthermore, the evidence establishes that there is a substantial problem on the UPC network with copyright piracy."

A Subscriber who has His or Her Contract Terminated by the Defendant is Free to Enter a New Contract with another ISP

15.28 As found by the High Court in EMI v. UPC at paragraph 72 of the judgment, "[t]here is no general register for those who are cut off from internet service for not paying their bills. I am satisfied from the evidence of Anna Coyle, that there is some degree of informal communication, but that if it happens, it is rare. There is no plea in this case that a general register should be created of those who have been cut-off from internet access due to failure to pay a bill or due to repeated violations of a prohibition against internet piracy. To set up such a register may well have data protection implications. I do not need to comment on any issues that might so arise. As the solution is now proposed, there is no disproportionality."

The Right to Privacy is not Engaged by the Public Offering of Recordings to Other Peer-to-Peer Users

15. 29 As found by the High Court in EMI v. UPC at paragraph 68 of its judgment, "[i]n the case of internet file sharing to infringe copyright, I am of the view that there are no privacy or data protection implications to detecting unauthorised downloads of copyright material using peer-to-peer technology; (see, EMI Records (Ireland) Limited v. Eircom Limited [2010] IEHC 108, (Unreported, High Court, Charleton J., 16th April, 2010). In this regard, I am taking into account the fact that the process of detection through DtecNet is essentially anonymous. As previously emphasised, a communication between the recording companies and an internet service provider, having used the facilities offered by the DtecNet, that in a particular month a certain one hundred subscribers downloaded an average of twenty copyright protected tracks each, illegally, giving a date and time and the IP address, discloses no information publicly. The recording companies do not thereby harvest the names and addresses of infringers of copyright for data purposes, or for future communication or for evidence in a potential criminal case. They get nothing apart from a set of numbers. As between UPC and their customers, any solution to this illegal activity is conducted privately as between them. They already know each other, as they are joined by a contract. That communication is within the range of matters over which an internet service provider is entitled to deal with its customer. The abuse of an internet service for copyright theft is a serious matter from the point of view of the general enforcement of copyright protection. An internet service provider is entitled to have a policy against it. In this instance, it is apparent that UPC pretends to have such a policy. The existence of a genuine anti-piracy policy would enhance the public standing of any corporation and is a matter in respect of which they have an interest. Enforcing a private contract, in this context, does not have privacy implications. Any form of blocking on that customer and internet service provider basis does not carry a privacy implication. If the response is a graduated one, as opposed to a blocking of communications merely on a basis of identifying its nature and the relevant IP number, no privacy implication arises. As Professor Nixon (giving evidence on behalf of the Defendants UPC) put it:-

"If to achieve the goal of identifying that you have to do other things, like store the IP addresses of where it came from and where it went to, and various other things, and you are spotting those for infringing and non infringing uses, then I would start to worry about that information being stored, and how it is being used, for what purposes... In a graduated response, they are not, the DtecNet guys are looking at every communication that goes through the UPC network. What they are doing they are joining a particular stream of communications that is in this peer-to-peer network, which has by default at this moment in time, lets say 60%, 70%, 90% of the people who are on it are sharing infringing material, and you pick those people and you store the information. Now I don't think so - I think that is reasonable... nobody is exposing anything in these networks, apart from the fact that they have an IP address, some made up user name, and the files that they are infringing, or the files they are not infringing. So, that information is made publicly available [over the network anyway] so, that is fine."

15.30 As set forth in the evidence of Mr Sehested which was relied upon at paragraph 38 of the judgment of the court in EMI v. UPC, "all of the information that we [DtecNet] capture is publicly transmitted information that anyone with an internet communication and a peer-to-peer programme, that is freely downloadable, would be able to capture. Again all the files that we capture here are files that are actively made available by the users... [i]n this case specifically we are solely looking for sound recording. So we only look for content that is part of that file that we have been given to monitor for."

15.31 As found by the High Court in EMI v. UPC at paragraph 70 of its judgment, "the right of privacy is not engaged by the scrutiny of files publicly made available for copyright theft on the internet...". "

THE PLAINTIFFS' EVIDENCE IN THIS CASE

Evidence of Willie Kavanagh

16. Mr. Willie Kavanagh gave evidence on behalf of the plaintiffs. Mr. Kavanagh was formerly chairman and managing director of EMI Records. He is also chairman of IRMA, the association for the recorded music industry in Ireland, of which the plaintiffs are members. It is an industry representative body. Mr. Kavanagh's evidence was that the three plaintiffs combined would have approximately 80 - 85% of modern music markets in Ireland. His evidence was that the turnover of recorded music in 2003 on the part of IRMA members was approximately €160 million per annum. However by 2013 that market turnover had declined to €56 million. In his view, the biggest contributor towards that collapse in revenues was internet piracy and the illegal downloading of music. Mr. Kavanagh accepted that some of the reduction in turnover was because of the recession and also because the price per unit had reduced. However he attributed approximately half of these losses to internet piracy which, in his view, would amount to approximately €500 million over the last decade. He also gave evidence that record companies invested in fewer bands because the return on investment was more difficult to achieve - because the record companies could not sell enough records to justify the investment.

17. Mr. Kavanagh gave evidence that IRMA first took legal proceedings against Eircom to deal with this issue. Those proceedings were settled after eight days and, as part of the settlement process, the parties agreed a graduated response protocol with Eircom. It was also part of that settlement that the plaintiffs would seek to arrive at similar protocols with all the other ISPs in Ireland.

18. Mr. Kavanagh also gave evidence that the cost to IRMA members of the graduated response protocol consisted of set up costs (approx. €75,000) and ongoing costs. In addition Dtecnet receive approximately €60,000 to €96,000 per annum. These costs are paid for by the plaintiffs.

19. Mr. Kavanagh also gave evidence that the protocol between the plaintiffs and Eircom was arrived at by agreement. However it was suspended from time to time - for example when the Data Protection Commissioner took issue with the protocol and litigation ensued. In addition Eircom decided that it wanted to upgrade its system from a partially manual system into an automated system. Again the plaintiffs cooperated with Eircom during that process because the plaintiffs could see that this was evolving into a much more effective solution to the problem.

20. The Eircom GRS protocol commenced in December 2010. It ran until September 2011. It was then put on hold because of the Data Protection Commissioner's intervention from October 2011 to July 2012. The system was put back online again in July 2012 until June 2013. The system was down again between June 2013 and March 2014 because Eircom were upgrading that system. It has resumed since March 2014 to January 2015.

21. Mr. Kavanagh gave evidence that, in his view, the graduated response agreement with Eircom had been very effective despite the interruptions. Mr. Kavanagh's evidence was that if you looked at the first eleven months data (which were uninterrupted) the number of people who received letters threatening disconnection was only 1% of the numbers of the initial warning letters sent out.

22. Mr. Kavanagh also gave evidence that anywhere graduated responses happened there have been remarkably few disconnections because very few people get to that level.

23. Evidence was also given by Mr Kavanagh of the agreement/protocol between the plaintiffs and Eircom. In broad terms, this protocol consisted of the following steps

1. Step 1 – evidence of infringement was to be provided by the copyright holders to Eircom.

2. Step 2 – Eircom sent a first warning letter to the customer confirming Eircom had received a notification from the copyright holders in respect of unlawful copyright infringements. The primary purpose of this first warning letter is educational. Eircom also provided customers with details of whom they could contact if they wish to query or make representations to Eircom regarding their infringement status.

3. Step 3 – if there was a second infringement Eircom sent a second warning letter to the customer. This letter is regarded as a severe warning. The customer would be informed of the second infringement by means of the letter; this warning letter would provide details of the infringement detected to date and would also repeat the educational message of the first letter. The primary purpose of the second warning letter would be to alert the customer that their account would be suspended for a period of seven days if they are found to be infringing copyright on a third occasion. Again the second warning letter would provide customers with details of whom they could contact should they wish to query or make representations to Eircom in respect of their infringement status.

4. Step 4 – Third warning letter. If a third, valid and actionable notification was received from the copyright holders to Eircom evidencing an internet copyright breach then Eircom sent a third warning letter to the customer notifying them that their service would be suspended in seven calendar days for a period of seven days. Again this suspension notice would provide customers with details of whom they could contact should they wish to query or make representations to Eircom regarding the infringement status. Subject to these representations the customer's broadband account would be suspended when the notice period expired for a period of seven days.

5. Step 5 – if there is a fourth actionable infringement against the customer then Eircom would write a fourth letter to the customer by registered post confirming that Eircom have received a fourth valid notification from the copyright holders and notifying the customer that their broadband would be discontinued in fourteen days. Again this termination notice would provide customers with details of whom they could contact should they wish to query or make representations to Eircom in respect of their status.

24. The evidence was given that this process with Eircom worked reasonably well and that only 1% of Eircom customers moved to the disconnection stage.

25. However the Graduated Response System agreed between the plaintiffs and Eircom is subject to a number of exceptions. It does not apply to business users, it does not apply to mobile broadband. However it is common case between the parties that these would also be excluded in the current proceedings.

The evidence of Dr. Brett Danaher

26. Dr. Brett Danaher, professor of economics, gave expert evidence on behalf of the plaintiffs. In his expert report he referred to the fact that evidence accepted in the earlier proceedings indicated that approximately 700,000 people download approximately 164 million songs per year in Ireland from illegal sources leading to annual losses of approximately €19.6 million in Ireland.

27. Professor Danaher stated that "Graduated Response" refers to an anti piracy enforcement mechanism whereby some party (such as rights holders or internet service providers or a government agency) monitor the internet traffic of consumers checking for downloads that infringe copyrights. Under Graduated Response, initial instances of infringement are met with a warning while repeat instances by the same household are met with sterner warnings (or successively more serious penalties) to the infringers. He noted that in France, New Zealand and South Korea, the national governments have enacted and enforced Graduated Response policies while in the United States major internet service providers have voluntarily agreed upon, and initiated, Graduated Response anti - piracy strategies.

28. According to Professor Danaher the most famous graduated response anti - piracy law to date is HADOPI in France. Under this law, a separate HADOPI government agency was formed which could send warnings to French copyright infringers for their first and second instances of infringement and potentially send cases to court for the third instance of repeat infringement within the household. In a criminal court, a range of penalties could be applied, including fines and/or suspension of internet access for up to one month. Because of this pattern of Graduated Responses, HADOPI became colloquially referred to as the "three strikes law". The stated purpose of the law was "to promote the distribution and protection of creative works on the internet". It was accepted that if artists could not recover their costs of creating a song or a movie, then they would reduce their output leading to less innovation and culture.

29. HADOPI appears to have come into effect in or about 2010. The first tranche of first strike notices went out in September 2010; the first tranche of second strike notices were sent out in spring 2011. It appears that as at 2013 only 134 cases required a third strike and/or consideration for prosecution.

30. However it appears that following a change in the political climate in France in 2013, HADOPI was changed to remove suspension of internet as a potential penalty.

31. The second example is the Copyright Amendment Act (CAA) of 2011 in New Zealand. According to Professor Danaher this CAA had a lot in common with HADOPI in that it provided for a Graduated Response. However, unlike HADOPI, copyright holders would not

report instances of infringement to a government body but instead directly to the ISPs. Under the New Zealand system, subscribers would receive a first warning and a second warning against infringement. On the third instance the copyright holder could take its case against the user to the copyright tribunal which could then order a fine of 15,000 New Zealand dollars. Originally the Copyright Amendment Act contained a provision for potential suspension of service but this was removed because of opposition.

32. Professor Danaher has, to his knowledge, written the only peer - reviewed/published study that empirically analyses the impact of HADOPI on legal markets. In his report he set out his methodology and his caveats. He also set out his empirical findings and conclusions on Graduated Response. His expert conclusion is as follows:

"Together, given that these experiments happened in different countries [France and New Zealand] and at different times but produced similar results, I believe the evidence to be compelling that Graduated Response enforcement has an impact. Further the evidence suggests that while the threat of a penalty may be important, the impact seems to occur when people become aware of the threat and that it can persist even when only a small number of cases of application of the penalty occur. The impact of graduated response in France was quantitatively similar to the impact in New Zealand, on a percentage basis – French sales experiences a causal increase of about 23% and New Zealand sales increased by about 21-30%. This may imply that the percentage of pirates who can be influenced by such policies is similar across countries although it would require additional studies to make this claim confidently. I believe that a graduated response system in Ireland would also increase the size of the Irish digital music market, provided that there was sufficient public awareness of the implementation of the policy....My expert opinion is that graduated response anti - piracy enforcement, when accompanied by significant public awareness that enforcement will begin, is one of the most effective enforcement tools available to convert illegal file sharers to legal consumption methods."

Evidence of Mr. Sehested

33. Mr. Sehested was senior vice president of a company called MarkMonitor Inc. Mark Monitor previously traded as DtecNet Software Apps ("DtecNet"). His evidence set out how Dtecnet gathered evidence in respect of infringement of copyright by P2P users. He also gave evidence about judicial endorsements of such evidence - gathering procedures and how it was relied upon in other courts in Australia, Denmark and the UK. He also gave evidence that during a 30 day period in the month of November 2013 DtecNet collected evidence in Ireland under his supervision by participating in peer to peer networks using the "BitTorrent" and "ARES" protocols alone. His company used a sample of 250 of the plaintiff's sound recordings and discovered 7,257 instances of the making available to the members of the public of those 250 sound recordings utilising UPC customer accounts.

Evidence of Michael Walsh

34. Michael Walsh gave evidence on behalf of the plaintiffs. He is the founder and director of Kerna Communications Limited ("Kerna") a specialist computer consultancy which provides consultancy services to the plaintiffs and the IRMA. He is an expert witness on behalf of the plaintiff and provided an expert report for the court. His expert report dealt with the organisation and functioning of the internet, "peer to peer" (P2P) technology, non - infringing uses of P2P and also the issues of graduated response. In addition Mr. Walsh dealt with the graduated response agreement and protocol which the plaintiffs have put in place with Eircom. His evidence was, that to implement this agreement, both the plaintiffs and Eircom have built IT systems to manage the flow of infringement notices to Eircom and to maintain the database of infringement notices. The development of these systems was conducted by Eircom but in close cooperation with the plaintiffs (and Mr. Walsh) in a way that minimised development overheads and also respected the confidentiality of all parties and in particular Eircom's customers.

35. His evidence was that a graduated response is a targeted process that discriminates between infringing and non-infringing use of P2P. Evidence of infringement is collected by automated systems that search for copyrighted content that has been shared by customers of the ISP. The search process is driven by the lists of copyrighted materials provided by the copyright owner and only this material is searched for. Once evidence of copyright infringement is collected and forwarded in the form of notices of infringements to the ISP, the ISP must operate data processing systems to receive and manage these notices, associate them with customer accounts and thereby enable the ISP to track the infringing customers' progress through the graduated response stages.

36. Mr. Walsh's report (and appendices) set out in great detail the technical and management processes put in place to implement the agreement between the plaintiffs and Eircom on its graduated response protocols. He dealt with the technical set - up of graduated response with Eircom and the Eircom upgrades.

37. He also commented on UPC's evidence in relation to the UPC costs of graduated response.

38. Mr. Walsh's evidence was that the proposed costs put forward by UPC for development costs of development work were inflated. In Mr Walsh's evidence he states that UPC is proposing a total of 1,050 man days for the project which he says is between 4.5 and 5 years total effort. The total cost is given at €940,000. Mr. Walsh comments "The overall impression is of inflated effort and costs without an adequate rationale offered for the high figures. The effort figures cannot be accepted without much more detail as to how they have been derived. These numbers are also large when compared with the scale of the project implemented by Eircom".

39. Mr. Walsh was also critical of the defendant's estimate of operating costs. This he said was based on the number of invoices received, the number of letters sent to customers, the number of customer calls to the support desk and the estimate of the call handling costs arising from these. He said "the estimate of annual operating costs is therefore an arithmetical calculation based on these principally unsupported assumptions that there will be three customer calls for each graduated response letter sent".

40. Mr. Walsh also gave evidence that - even taking the defendant's claim at its height the initial capital expenditure was €940,000 - on a proportional basis this was not excessive as UPC had approximately 350,000 broadband customers. If one divided €940,000 among 350,000 broadband customers this would equate to €2.70 per customer per year. If the capital expenditure was amortised over a period of 4 years this would equate to approximately a cost of 60c per customer which Mr. Walsh noted equated to a postage stamp per customer. He also gave evidence that ISPs calculated revenue on average revenue per user per month and in that context 60c per annum was a very small number and not a disproportionate cost.

41. Mr. Walsh also gave evidence of the amount of terminations of internet services which Eircom had done. In fact it appeared that no disconnections whatsoever had taken place by Eircom pursuant to the protocols agreed between the parties. There were twelve or so disconnections that were pending but these did not, in fact, take place. These disconnections were put "on ice" because of the data protection issues raised by the Data Protection Commissioner and have not been reactivated.

42. Mr. Walsh's evidence was that, allowing for various pilot schemes and start - up problems, the Eircom scheme properly started in January 2011 and ran until September 2011. During this period of approximately eight months, approximately 5,000 notifications were

sent by the plaintiff to Eircom each month. (The actual figure is somewhat less than this.) This means that approximately 30,000 to 40,000 notices of infringements have been sent by the plaintiffs to Eircom pursuant to its agreed protocol. This in turn would refer to approximately 8,000 to 9,000 customer accounts. However there has been 0% termination of service so far. However Mr. Walsh also gave evidence that the number of suspensions is also below 1%.

43. Mr. Walsh's evidence also was that, at the start of the commencement of the Graduate Response Strategy (GRS) protocol, Eircom had a stand alone computer system but later it moved to an integrated system which interfaced with its customer accounts systems.

44. In cross examination Mr. Walsh agreed that a considerable lead - in time was required to conduct test systems, pilot schemes and deal with technical problems. Such a system required a number of steps - planning, design, building, testing and deployment. He also accepted that the Eircom system was down for protracted periods of time due to various technical and legal problems. However the Eircom protocol had been re - worked since March 2014.

45. However Mr. Walsh accepted in cross examination that he was not in a position to refute what the defendant said in relation to its computer systems, that he hadn't inspected the defendant's computer systems, that he had never designed a computer system for ISPs for GRS and that he had no expertise in software. Despite these concessions, in my view, his evidence was relevant and helpful to the court. He also accepted that the defendant had engaged in a bona fide attempt to consider its appropriate computer requirements. He also accepted that a rate of €1,000 per day was reasonable. He also accepted that there was no actual evidence of Eircom's costs before the court.

THE DEFENDANT'S EVIDENCE

Mr. Bryan Brown

46. Mr. Michael Bryan - Brown gave evidence on behalf of the defendant. Mr. Bryan - Brown is managing director of regulation and competition policy at Liberty Global PLC, the parent company of the defendant. His evidence was that regulatory and public affairs policy issues of UPC and other subsidiaries of Liberty Global PLC throughout Europe are centralised at headquarter level. He stated that Liberty Global's policy with respect to internet piracy (and related issues such as graduated response) is not something which is set at country level but is set at parent company level. He also gave evidence that the issue of graduated response has been discussed in many different countries throughout Europe and in many different forums. His evidence was that Liberty Global take the view that the best way for any graduated response to be implemented is via legislation or a joint industry response as had happened in the UK and France.

47. It is in this context that, he said, the defendant's position on graduated response has to be considered. The defendants had adopted a position that "in common with nearly every ISP in Europe we declined to take any voluntary action". The defendant's position was that "While we do not condone piracy internet censorship (for example blocking websites/IP address) we take the view this is a matter for governments and law makers not for ISPs". That policy stance is instrumental in driving the response of the defendant to these proceedings. In its view the issues of graduated response are so complex and raise so many public policy and regulatory issues that it is not possible or feasible for a national court to make an order in terms of the injunctions sought by the plaintiffs. He also gave evidence that a voluntary agreement between the plaintiffs and Eircom of a voluntary GRS was unique in Europe and that there were no reported cases, as far as he was aware of a previous court - mandated GRS in Europe.

48. Mr. Bryan Brown also gave evidence of a voluntary system which had been agreed by the defendant's parent company in the UK and which the defendant had proposed to the plaintiff in Ireland. This consisted of the following elements:

- (a) That the plaintiffs would provide the instances of infringements to the defendant
- (b) That the defendant would write a series of three letters to its subscribers holding these IP addresses. However importantly these letters would not contain any threats of a sanction (eg suspension or termination).
- (c) That the defendant would consent to mass Norwich Pharmacal orders.
- (d) That this would then permit the plaintiffs to write the first and second letters which it sought in its GRS to the offending subscribers.
- (e) That the plaintiffs could then in infringement proceedings against the named subscribers seek a court order for the suspension or termination of their accounts with the defendant and that the defendant would neither consent nor object to such applications.

49. His evidence was that, in the UK, there was agreement within the industry to the cost sharing of this scheme under which the rights holders paid 75% of the cost of the first step (i.e. of writing the three letters to the subscribers) and the ISP paid 25% of such costs. By contrast, in this case, Mr. Bryan Brown said the plaintiffs wished the defendant to implement a policy where the defendant would bear all the costs.

50. In cross examination, Mr. Bryan Brown accepted that, given that there was no threat of a sanction contained in the first three letters sent by the defendant to its subscribers, that they were "educational letters". He also accepted in cross examination the contention that there had been no reported case where a Norwich Pharmacal order had been granted permitting the disclosure of names and addresses of subscribers where only educational letters had been sent.

51. Mr. Bryan - Brown also gave evidence that the development of a computer system could take up to eighteen months to develop i.e. to plan, design and build and test the software. A further six months would be required to carry out a pilot system.

52. Mr. Bryan Brown also gave evidence that the turnover of the defendant in Ireland was approximately €350 million per annum.

53. He also made the point that the plaintiff is seeking to increase its profits from increased sales and therefore it was inequitable to ask the defendant to contribute to the cost of enforcement. Moreover the defendant did not do anything wrong therefore he asked why should the defendant pay 100%.

54. Mr. Bryan Brown also stated that the defendants have taken a position which is no different to any other ISP in Europe. The defendant sells internet services to people. If people use the internet for illegal purposes that is not within the defendant's control. The defendants do not have particular packages aimed at pirates, it does not market its services to pirates; it markets its services based on speed, functionality, price and the attractiveness of a bundled package. Therefore the defendant does not accept that it is

in any way behaving unlawfully or unethically or inappropriately.

55. The defendant moreover does not sell stand alone broadband product but bundles its products e.g. telephone, television and broadband.

56. Mr. Bryan Brown also gave evidence that there had been Digital Rights legislation in the UK which was enacted in 2010 but had not as yet commenced. There had been, according to Mr. Bryan Brown, a policy choice by the UK government that a voluntary solution was preferable and the government was encouraging the industry to move towards an agreed solution. However these negotiations are still continuing some three or four years later. Thus at present there is no graduated response in the UK.

57. Mr. McDowell S.C. for the plaintiffs put the Eircom report dated 20th May, 2014 entitled "Graduated Response - Music Industry Update" to Mr. Bryan Brown. It appeared from this report that 4,508 first letters had been sent out as at 20th May, 2014; 1,138 second letters had been sent out; 257 third letters had been sent out; 140 customers had been suspended; 49 had been reconnected and that so far no final letters of termination had been sent.

58. Mr. Bryan Brown accepted that the contract which UPC had with its customers permitted UPC to terminate or suspend the customer account for violations of user policy. However he also stated that UPC did not intend to enforce this part of the contract. Moreover he gave evidence that the defendant would not send out warnings to customers who were breaching copyright or thereby breaching the Acceptable User Policy. UPC's position is that it would not suspend a customer voluntarily on the grounds that they had repeatedly breached the Acceptable User Policy. Again and again Mr. Bryan Brown reiterated that UPC would not take action voluntarily or unilaterally but only on foot of a court order or if compelled to do so by legislation.

59. Mr. McDowell S.C. for the plaintiffs put to Mr. Bryan Brown that the defendant was "simply neutral in the face of a very grave wrong being done to rights holders and that you're passive neutral bystanders in this process". Mr. Bryan Brown responded by saying that the defendant is "a mere conduit" within the context of the EU directives and the defendant was not prepared to take enforcement steps on a voluntary basis.

60. However Mr. Bryan Brown also gave evidence that, as far as the defendant was concerned, three letters making the situation clear to subscribers followed by a disconnection - without the intermediate stage of suspension - was a perfectly fair process/ design for a graduated response system. Indeed he stated that there were many ways in which one could design a three strike system that would be reasonable to subscribers.

61. However it was put to him that the Eircom data established that suspension might usually be the end of the matter and that in the majority of cases it would not have to go as far as the point of permanent disconnection or termination of service. However, Mr. Bryan Brown maintained that in his view suspension did not seem necessary.

62. In relation to the capital expenditure, the defendant's evidence was that it would cost approximately €940,000 to build the relevant computer system.

63. Significantly, Mr. Bryan Brown accepted the possibility of cost sharing i.e. sharing the capital and operating expenditures of such a system. Thus the defendant accepted that some form of cost sharing would be fair and equitable. The question then is where is that balance to be struck? He accepted that there was a level of costs which was proportionate for the defendant to bear, a level of costs which was disproportionate for the defendant to bear, and that cost sharing is the solution to the problem. Again the defendant accepted that it was envisaged within the relevant European legislation that there was a level of cost which was proportionate for the defendant to bear and a level at which it was not proportionate for an ISP to bear. In his view, this was a factual matter for the court to consider. In my view, this is an important consideration to bear in mind.

64. It was put to Mr. Bryan Brown that the capital expenditure of €940,000 spread across an Irish subscriber base of 350,000 subscribers was only approximately €2.70 per head and that in annual terms, if amortized over a number of years, it was less than the price of a postage stamp per subscriber. However Mr. Bryan Brown stated that just because the defendant was a large company that did not mean that it could ignore such an amount of money. He confirmed that the defendant's turnover was €350 million in Ireland.

65. Mr. Bryan Brown also stated that in his view, the top figures (i.e. €940,000) are more helpful when assessing this matter rather than the cost per consumer amortised over years (i.e. the postage stamp argument.) He said that in the scale of a business like the defendant's, such an amount was hugely material because the defendant had millions of customers and there are often debates within the defendant company about changes to hardware that might only cost a few cents per subscriber.

Evidence of Mr. Minogue

66. Mr. Minogue is vice president and chief information officer at UPC Communications. He has responsibility for information technology, residential and consumer billing functions and all programme management functions within the organisation. He reports to the managing director of UPC in Ireland and also reports to the managing director for IT technology for Liberty Global worldwide.

67. Mr. Minogue confirmed that the graduated response strategy as proposed by the plaintiffs could definitely be technically achieved. He said there was no question but that it was technically possible. That, in my view, is also an important consideration on the facts of this case and also on the feasibility or desirability of a court injunction.

68. He also gave evidence that in order to implement a graduated response strategy, in response to notifications from copyright holders, an automated process would have to be developed and integrated with UPC's existing computer systems. Such a system would require the development of bespoke software and other relevant technical upgrade steps. His evidence was that the existing computer architecture of UPC was very complicated. He also gave evidence that the IP addresses actually reside within the defendant's system at the *"lowest level of our architecture and the best way I could describe it is it's in the deepest depths of the ocean when it comes to our systems and our platforms. The skill set that is required in terms of managing that element is very much an engineering skill set. It is not user based information, is not agent based information and this is the depth at which all IP addresses are required. So they are not readily available at any given point in time"*.

69. He also gave evidence that it would not be feasible or practicable to build some stand - alone system which would achieve the same objectives. The defendant runs its business by simplifying its business processes, by automating them as much as possible and by having a single source of throughput for all the information which is the defendant's core system. Mr. Minogue gave evidence that it simply was not possible to build a stand - alone computer system because it would, of necessity, have to be linked back into the defendant's current computer architecture to get core information for the stand - alone system. Indeed Mr. Minogue noted that Eircom initially attempted to operate its agreed protocol with the plaintiff by using a semi - automated approach but this had

numerous difficulties and as a result Eircom went back to the drawing board and developed a fully automated system which was tied into their main computer system.

70. Moreover Mr. Minogue's evidence was that to implement a GRS the system would need to be consistent, it would need to be accurate, it would need to be repeatable and there would have to be effective controls in place to stand over the integrity of any of the actions which the defendant might take against its customers. In his view the only way in which this could be done is to fully automate this as part of an integrated system. To implement a manual process would be paper - based and error prone. Moreover it was essential from the defendant's point of view that its communications with its customer were accurate and reliable because if inaccurate letters were sent to customers it would clearly adversely affect the defendant's relationship with its customers.

71. Mr. Minogue on behalf of the defendant gave evidence about the new computer software which would have to be developed by the defendant and which would have to be added on to its existing computer architecture. In the course of his evidence he made the following points:

(1.) A "low tech" solution (whereby UPC simply write two letters to its customers without an automated process) is not one which would be favoured by the defendant for a number of reasons. Firstly because it would interfere with their customer care service requirements which require that each customer care operative is able to see immediately, on computer, all interactions with the customer. If a "low tech" solution were adopted, then this information would not be available to the customer care employee because it would be retained on a different computer database.

(2.) Secondly, when the plaintiffs give the defendant a monthly list of IP addresses, the defendant must then establish the names and addresses of its subscribers to whom these IP addresses are assigned. As stated above, Mr. Minogue gave evidence that this information resides at a very deep level within the computer architecture of the defendant. It is not easily retrievable. His evidence was that it could only be retrieved by skilled computer engineers employed by the defendant. It could not be retrieved easily by normal customer care employees. Thus the retrieval of customers' names and addresses is a costly and time consuming process.

(3.) Thirdly he said that the "low tech" solution would, over time, in fact be a more expensive and costly process for the defendant. Given the amount of notifications which would take place on a monthly basis there was, he believed, an imperative to make the entire process automated. He noted that Eircom had also made its process automated.

(4.) In order to make the process automated it would be necessary for the company to develop a new computer software to deal with this graduated response strategy and, in an automated way to, retrieve the customers' names and addresses from the IP addresses given to the defendant by the plaintiff, to generate letters to customers, and to keep a record of letters to customers and their responses.

(5.) The development of such a computer process would be time consuming. Mr. Minogue's estimate was, that all going well, it would take twelve months but allowing for the usual complexities and setbacks in such a programme it could take twelve to eighteen months. The company had engaged with its computer partner Accenture to develop a memorandum on this issue and its best estimate of projected costs of developing such a computer system were approximately €940,000. This was a once off capital expenditure. In addition he estimated that the annual operational costs of responding to 5,000 monthly requests by the plaintiff was approximately €250,000- €300,000 per annum.

(6.) He also gave evidence that the defendant had no current plans to replace its existing computer architecture.

72. In the light of all of this evidence it would appear that a "low tech" solution for the defendant would be difficult to implement. Having said that, it is clearly a matter for the defendant to respond in whatever manner it wishes.

73. In cross examination Mr. Minogue accepted that the total revenue for the defendant in Ireland in 2013 was €340 million. The capital expenditure for the same year was approximately €53 million. He also accepted that depreciation on IT equipment was from three to eight years. He also accepted that UPC had approximately 350,000 broadband customers. Thus a capital expenditure figure of €940,000 would amount to a sum of €2.70 per user which would be amortised over three to eight years. If amortised over eight years that would amount to less than 50c per customer per annum. Mr. Minogue also gave evidence that the cost of implementing a graduated response system would not affect the viability of UPC at all because its gross profit in 2013 was €238 million. Moreover it would not call into question the defendant's ability to conduct its business.

74. Mr. Minogue's evidence was that the capital cost estimate of €940,000 was unlikely to go up and indeed was a fair and accurate reflection of what the cost would be.

75. Mr. Minogue also gave evidence that building this new computer system was analogous to building a motorway. i.e. whether a hundred cars or a thousand cars use that road each day it still had to be built to a certain standard. Thus, whether the plaintiffs issue 5,000 notifications a month or less, the building of the new system would still cost €940,000.

76. Moreover if there were 5,000 notifications per month from the plaintiff to the defendant that would amount to 60,000 notifications per annum. The defendant's estimate is that this would require approximately 17,000 letters per annum to be sent out to customers (as some customers would be responsible for a number of the illegal uploads). Mr. Minogue's evidence was that it would cost approximately €16 per letter (in terms of man - hours) etc and this would result in a figure of approximately €250,000 per annum.

77. Mr. Minogue's evidence was that the lower the number of notifications per month the lower the monthly cost to the defendant and therefore it would reduce the annual operational expenditure of the defendant.

Evidence of Mr. Goddard

78. Mr. Goddard also gave evidence on behalf of the defendants. He is with Deloitte Technology Practice in Ireland and has over twenty years experience of leading the implementation of large scale systems integration projects in the financial service and technology sector. He confirmed that the estimates of UPC in relation to capital expenditure and annual operating costs were fair and reasonable. He indicated that it would be fair and reasonable to assume a project duration of about nine to twelve months for the development of this project.

79. He also gave evidence that there was a contingency in the planning process of approximately 10%. Thus it is possible that the UPC cost of developing the project might be less than €940,000.

80. It appears from the evidence that if there were two letters instead of three that that would bring about a 5% reduction in capital expenditure and if there were less notifications that would reduce the operational expenditure.

AGREEMENT BETWEEN UPC AND ITS CUSTOMERS

81. UPC enters into a contract between it and its subscribers. The agreement contains the following definitions:

1. "Agreement" means the contract between you and us comprising the Order Form and these terms and conditions.
2. "Broadband Internet Service" means Broadband permanent (always on) connection to the Internet provided to you by us via a cable modem or other means.
3. "The internet" means the global data network comprising interconnected networks using TCP/IP ("Transmission Control Protocol/Internet Protocol").
4. "Internet Services" means the service provided to you by us using digital or analogue technology to enable you to gain access to the Internet and certain services, whether by means of a television, personal computer or otherwise.
5. "Services" means the Telephone Services, the Internet Services, the Television Services and any and all other services provided to you under this Agreement whether directly from the Network or indirectly by means of an Operator's Network linked to the Network.
6. "User Policy" means any user policy we issue from time to time in relation to the Services that you can view on your television or computer screen.

Section 2.1 provides

"We shall provide and you shall use the Services and Equipment subject to the terms of this Agreement. We will provide the Services to you from the date we activate them and will continue to do so unless this Agreement is terminated as per this Agreement."

Clause 2.3 provides

"We have the right to change or suspend the Services where we reasonably determine that any technical modification to the Network or change in our trading, operating or business practices or policy is necessary to maintain or improve the Services which we provide to you, including but not limited to:

(iv) Where there is any change or amendment to any law or regulation which applies to our trading, operating or business practices or policy or the Commission for Communications Regulation or any other Competent Authority makes any direction or order recommending or requiring any technical modifications or changes in our trading, operating or business practices or policy; or

(v) In our reasonable opinion it is otherwise necessary or desirable to do so.

Where practicable, we will give written notice to you prior to the changes being introduced. We will also publish details of any changes (including the operative date) on our website as soon as possible prior to the changes being introduced."

4.1 "You must use the Services according to any reasonable instructions which we give you in writing from time to time. Any other use is prohibited.

4.2 "You agree to take responsibility for, and agree to indemnify us completely in respect of, all liabilities, claims and losses incurred by you or us which are in any way connected with your use or misuse of the Services or failure to prevent misuse of the Services by others, or any other breach by you of your obligations under this Agreement. Any misuse by you of the Services or other breach of your obligations under this Agreement will entitle us to suspend the provision of the Services or terminate this Agreement at our discretion".

4.8 "You may not use the Services (1) to send a message or communication which is offensive, abusive, indecent, obscene, a nuisance or a hoax or (2) to cause annoyance, inconvenience or needless anxiety or (3) fraudulently or (4) in connection with a criminal offence. As well as any other rights we may have, if in our reasonable opinion we believe the services have been used in breach of this Condition, we may immediately suspend the Services and/or terminate this Agreement and/or retain the whole or any part of any deposit or Charges paid".

Clause 8.6 provides

"You acknowledge that we may cooperate with any court, tribunal, regulatory body, police authority or other Competent Authority in any investigations or proceedings concerning you or your use of the Services. This may include disclosing communications transmitted via the Services or other details regarding your use of the Services to such authorities."

18.4 "Title, ownership rights and intellectual property rights in and to the content accessed using the Services is the property of the applicable content owner and may be protected by applicable copyright or other law. This Agreement gives you no rights to such content". (Emphasis added).

18.8 "We aim to resolve any dispute, including any query which may relate to a refund quickly and satisfactorily. You can contact us by calling 1908. Details of our complaint and dispute resolution procedures are set out in our Customer Charter a copy of which can be found at www.upc.ie."

At section 23.1 the agreement provides as follows

"We reserve the right to monitor and control data volume and/or types of traffic transmitted via the Internet Services

as well as monitoring the Services for abuse or breach under the Agreement or User Policy. We reserve the right to restrict access to the Services and to impose data traffic restrictions at our discretion, in order to implement new facilities, allow data retrieval and maintain Service levels."

Section 23.2 provides

"You agree at all times to comply with our User Policy which can be accessed at www.upc.ie. You must not use the Services or knowingly or otherwise allow any other person to use the Services that in any way violates this Agreement or the User Policy. If we believe that the Services are being used in violation of the User Policy we are entitled to suspend or terminate any or all of the Services as per this Agreement or the User Policy". (Emphasis added).

Section 23.7 provides:

"No authority or representation is given by us that you have the right to use proprietary material belonging to any third party, or that we have any control over the use by others, whether subscribers to the Services or not, of any of your proprietary material."

82. Thus UPC has - as a matter of agreement with their own subscribers - the power to suspend or terminate any of their services.

THE DEFENDANT'S ACCEPTABLE USER POLICY

83. The defendant has an acceptable user policy. This is incorporated into its contract with its subscribers. Section one states

"This user policy sets out how 'the services' (defined as 'any broadband internet or related services that you have ordered currently use and/or any new or additional services which you may use in the future') provided by NTL may be used and any restrictions on your use of the services.

This user policy has been created to promote the integrity, security, reliability and privacy of the NTL systems and networks and forms part of the legally binding terms and conditions which govern your use of the NTL systems, services and equipment. This user policy also identifies the actions that NTL considers to be intrinsically abusive and thus constitute prohibited uses of the NTL systems, services and equipment.

If we have reasonable grounds to suspect that you are in breach of this user policy or any other terms on which we provide services to you, or you do anything which would put us in breach of our statutory or other obligations, we reserve the right to suspend or terminate your access to the services without liability to you. We will give you notice of suspension or termination as soon as it is practical to do so." (Emphasis added).

Section 4 - prohibited conduct

"As a general principle you must not use the services in any way that is unlawful or illegal or in any way that affects the enjoyment of other users of the services or the internet. You may only use NTL systems, services and equipment in a manner that in the sole judgment of NTL is consistent with the purposes of such systems, services and products."

"By way of illustration and not limitation, the following uses of NTL systems, services and equipment are prohibited:

1. You shall not post, publish, transmit, link to, otherwise make available, retransmit or store material on or through any NTL systems, services or products and/or undertake any activity which is

(1) In violation of any law or regulation which is enforceable in the Republic of Ireland.

Section 5 - Intellectual property rights

"Any images, photographs, articles, pages, designs, drawing, software, music, information and other materials published on the internet and the services are protected by copyright."

"Published material on the internet and on the services does not mean it is available for anyone to copy. Unless the owner of that copyright specifically states that you may copy the work, you should assume that you cannot. It is an infringement of copyright to copy, reproduce, adapt, translate, broadcast or perform copyright protected material without permission, to make infringing copies available to the public or otherwise to knowingly deal in infringing copies. The services must not be used directly or indirectly to transmit, publish, link to or otherwise make available any confidential information or trade secrets of any person or entity."

"You shall not post, publish, transmit, link to, otherwise make available, retransmit or store material on or through any NTL systems, services or products and/or undertake any activity which infringes or breaches any third party intellectual property rights (which shall include but not be limited to copyrights, trademarks, design rights, trade secrets, patents, rights of privacy and publicity, moral rights and performance rights). For the avoidance of doubt, the installation or distribution of 'pirated' software or other software products that are not appropriately licensed to the customer will constitute a violation of intellectual property rights. In the event of any disagreement as to whether materials posted, transmitted, retransmitted or stored by a customer are in contravention of this section the decision of NTL shall be final". (Emphasis added).

Section 16 - Violations of user policy

"NTL may in its sole discretion suspend or terminate a customer's service for any material violation of the user policy at any time and without warning. As a general matter however NTL attempts to work with users to cure violations and to ensure that there is no reoccurrence of the violation prior to terminating service but it shall not be obliged to do so."

"In applying the user policy it is intended that common sense and responsible attitudes should be the guiding principles. If you breach the user policy you may receive a formal warning from NTL specifying the unacceptable conduct and notifying you that repeated breaches may result in the services being temporarily or permanently withdrawn, upgraded, downgraded or fees imposed.

If, after you receive a formal warning from NTL your conduct continues to breach the user policy, NTL may take any

and/or all actions described in this user policy including determination, suspension or upgrading or downgrading of the services to you. If your access to the services has been suspended downgraded or upgraded NTL may continue to do so until such time as NTL is satisfied that you have implemented appropriate steps to ensure that your use of NTL systems services or equipment will comply with the user policy. Further breaches will be grounds for termination of your contract with NTL.

Notwithstanding the above NTL may terminate your contract with NTL without following the above procedures if you commit a breach of the user policy which in the reasonable opinion of NTL is serious enough to merit immediate termination."

84. Mr. Bryan Brown in his evidence stated that "it is not and never was Liberty Global's or UPC Ireland's position to enforce such AUP provisions in the manner requested by the plaintiffs". This, therefore, is a decision which the defendant has made that - although it retains the contractual right to move against its subscribers for such infringement - it has chosen not to do so.

85. Of course one can understand the commercial logic for this. The persons whose interests are seriously affected by copyright infringements are the copyright holders. The defendant is not a holder of copyright. The defendant's financial interests are not infringed by these breaches by its subscribers. Indeed the defendant's financial and commercial interests would be affected by a suspension or termination of some of its subscribers. Therefore, one can quite understand why the defendant does not wish to move against its customers and why it does not wish to enforce these provisions in its contracts with subscribers.

THE LEGAL CONTEXT

INTRODUCTION - THE EUROPEAN DIRECTIVES

86. There are four major directives which govern this area. These are:

1. The E- commerce Directive – Directive 2000/31
2. The Copyright Directive – Directive 2001/29
3. The Intellectual Property Rights Enforcement Directive – Directive 2004/48
4. The Framework Directive – Directive 2002/21 (as amended by Directive 2009/140 and by regulation 544/2009)

THE E- COMMERCE DIRECTIVE [2000/31/EC]

87. Directive 2000/31 is entitled "*On certain legal aspects of information society services in particular electronic commerce in the Internal Market*".

88. Recital 45 to this directive provides as follows:

"The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it." (Emphasis added).

89. Recital 48 provides:

"This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities."

90. Article 12 sets out what has been called the "Mere Conduit" defence. Article 12 is in section 4 which is headed "Liability of intermediary service providers".

91. Article 12 provides as follows:

Mere Conduit

"1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;*
- (b) does not select the receiver of the transmission; and*
- (c) does not select or modify the information contained in the transmission.*

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement." (Emphasis added).

92. Article 15 (1) and (2) provide as follows:

"No general obligation to monitor"

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

93. Thus, it is clear from the E- commerce Directive that

(a) Although intermediary service providers have a limitation of liability under the directive, that does not mean that injunctions cannot be granted against them (see Recital 45 and Article 12(3) and s.40 (5)(a) of the Copyright and Related Rights Act 2000 as inserted by SI 59/2012.)

(b) However measures or injunctions taken by a Member State or a Court shall not include a general obligation to monitor nor a general obligation actively to seek facts or circumstances indicating illegal activity (Article 15 (1)).

(c) This will usually mean therefore that bodies such as the plaintiffs have to provide internet service providers with specific information about illegal activity.

(d) The "mere conduit defence" provides that the internet service provider is not liable for the information transmitted but that does not mean that they are not amenable to a court injunction. Indeed it is accepted by the defendant that it is, in principle, amenable to a court injunction.

THE COPYRIGHT DIRECTIVE (Directive 2001/29/EC)

94. Directive 2001/29 is entitled *"On harmonisation of certain aspects of copyright and related rights in the information society."*

95. Recitals 11 & 12 provide:

"(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action."

96. Recital 58 and 59 provides as follows:

58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(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 added.)

97. Article 1 (1) of the directive sets out the scope of the directive and provides:

"1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society."

98. Article 8 of this directive is of fundamental importance in this case. Article 8 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 added).

99. It is clear therefore that article 8 (3) provides that Member States shall ensure that rights holders (such as the plaintiffs) are in a position to apply for an injunction against intermediaries (such as the defendants) whose services are used by a third party to infringe a copyright or related right. Thus it is clear that the directive envisages injunctions being obtained against intermediaries by rights -

holders to ensure third party subscribers do not infringe copyright. Thus European law permits the granting of an injunction against a person (such as the defendant) even where they have committed no legal wrong.

THE IPR ENFORCEMENT DIRECTIVE (Directive 2004/48/EC)

100. Directive 2004/48 is entitled "*On the enforcement of intellectual property rights.*"

101. Recital 17 provides as follows:

"(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement."

102. Recital 23 provides:

"(23) 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 right. The conditions and procedures relating to such injunctions should be left to the national 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."

103. Article 1 provides as follows:

"This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term 'intellectual property rights' includes industrial property rights."

104. Article 2 (1) provides as follows:

"Without prejudice to the means which are or may be provided for in Community or National legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned."

105. Article 3 is also of fundamental importance in this application. It is contained in chapter 2 headed "Measures Procedures and Remedies." Article 3 (1) and (2) provide as follows:

"General Obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. 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 for safeguards against their abuse."

106. Article 11 is entitled "Injunctions" and provides as follows:

"Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring 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 Directive 2001/29/EC." (Emphasis added).

107. It is clear from Article 3 (1) and 3 (2) that measures such as injunctions must be fair and equitable, not unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays. In addition, such injunctions should also be effective, proportionate and dissuasive and applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

108. It is also clear that the first part of Article 11 on injunctions permits the judicial authorities of a Member State to issue injunctions against the "infringer" prohibiting the continuation of the infringement. However, the internet service provider (such as the defendant) is not the "infringer". The infringer is the user who is unlawfully downloading or uploading the copyrighted material.

109. The last sentence in Article 11 also provides an obligation on Member States to 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. Thus persons, such as the plaintiffs, must be in a position where they are enabled to apply for an injunction against intermediaries such as the defendant. This means that the legislative provisions set out in the directive and in the Irish legislation and the Irish statutory instruments must be read in such a way as to give effect to this provision.

THE FRAMEWORK DIRECTIVE (DIRECTIVE 2002/21/EC)

110. Directive 2002/21 is entitled "*On a common regulatory framework for electronic communications networks and services (Framework Directive)*".

111. Article 1 provides as follows:

"1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment to facilitate access for disabled users. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community."

2. This Directive as well as the Specific Directives are without prejudice to obligations imposed by national law in accordance with Community law or by Community law in respect of services provided using electronic communications networks and services.

3. This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.

3a. 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.

Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. 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."(Emphasis added).

112. The defendant places great reliance on Article 3a of the framework directive. In its submission, any injunction sought by the plaintiffs - and in particular any injunction of the nature of a graduated response - must comply with the provisions of Article 3a of the framework directive. In particular it lays great emphasis on the fact that a prior, fair and impartial procedure shall be guaranteed (including the right to be heard of the person concerned) before any suspension or termination of a subscriber from the network can take place. Because the procedure must be "impartial" it follows, it says, that it involves persons outside the defendant and therefore points to the need for a full, impartial procedure and appeal procedure.

THE PROVISIONS IN THE DIRECTIVES WHICH GOVERN THE SCOPE OF INJUNCTIONS WHICH CAN BE GRANTED BY THE COURTS

113. Given the complexity of the provisions of the directives and the complex interplay between them, I have sought to gather in the various provisions of the four directives which set out the nature, scope and restrictions on the type of injunctions which can be ordered by the courts. These are as follows:

1. The E- commerce directive

Article 12 (3) clearly permits national courts to require internet service providers to terminate or prevent infringements. Again the jurisdiction of the court to grant such injunctions is circumscribed: the injunction must simply require the service provider "to terminate or prevent an infringement".

2. The copyright directive

Article 8 (1) provides that sanctions provided for shall be effective, proportionate and dissuasive.

Article 8 (3) of this directive provides that Member States shall ensure that right - holders 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.

3. The IPR enforcement directive

The key legal measures which circumscribe the granting of injunctions are in Article 3 (1) and 3 (2) of the IPR enforcement directive. This provides that measures, procedures and remedies - which would include injunctions - must fulfil the criteria set out in Article 3 (1) & (2).

4. The framework directive

In addition, any of these measures regarding end - users' access to or use of services may only be imposed if they fulfil the requirements of Article 3 (a) of the framework directive.

5. Summary

I would therefore, for the purposes of this application, summarise the various requirements of the directives in relation to the scope of injunctions as follows:

The IPR criteria

1. Any injunction shall be fair and equitable
2. Any injunction shall not be unnecessarily complicated or costly
3. Any injunction should not entail unreasonable time limits or unwarranted delays
4. Any injunction shall be effective, proportionate and dissuasive
5. Any injunction shall be applied in a manner such as to avoid the creation of barriers to legitimate trade
6. Any injunction should provide for safeguards against its abuse

The Framework Directive criteria:

7. Any injunction granted shall respect the fundamental rights of a subscriber (including such rights as are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law)

8. Any injunction granted shall ensure that there is a prior, fair and impartial procedure which includes the right to be

heard of the person concerned

9. Any injunction granted shall ensure that there is a right to effective and timely judicial review of such an injunction.

114. I would also note that there was no real dispute between the parties about criteria 5,6,7 and 9 above. Thus the issues which I have to consider in this application are:

(1) Is the injunction sought fair and equitable?

(2) Is it unnecessarily complicated or costly?

(3) Does it entail unreasonable time limits or unwarranted delays?

(4) Is it effective, proportionate and dissuasive?

(5) Does it ensure a prior, fair and impartial procedure (which includes the right to be heard) before any measures are taken to suspend or terminate users access to, or use of the defendant's internet services.

IRISH LEGISLATION

Copyright and Related Rights Act 2000

115. Section 37 deals with the rights of a copyright owner and provides:

"(1) Subject to the exceptions specified in Chapter 6 and to any provisions relating to licensing in this Part, the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of the following acts, namely:

(a) to copy the work;

(b) to make available to the public the work;

(c) to make an adaptation of the work or to undertake either of the acts referred to in paragraph (a) or (b) in relation to an adaptation, and those acts shall be known and in this Act referred to as "acts restricted by copyright".

(2) The copyright in a work is infringed by a person who without the licence of the copyright owner undertakes, or authorises another to undertake, any of the acts restricted by copyright.

(3) References to the undertaking of an act restricted by the copyright in a work shall relate to the work as a whole or to any substantial part of the work and to whether the act is undertaken directly or indirectly."

S.I. 68/2003

116. Statutory instrument 68/2003 – the European Communities (Directive 2000/31/EC) Regulations 2003 - was promulgated with a view to giving effect to certain provisions of the E-commerce directive (Directive 2000/31).

117. Regulation 16 implements the exemption from liability of intermediary service providers set out in article 12 of the E-commerce directive (Directive 2000/31). It provides that intermediary service providers (ISPs) shall not be liable for information transmitted by them on their communications network, provided certain conditions are fulfilled.

118. Regulation 16 (3) provides that

"This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe or to cease to infringe any legal rights."

S.I. 59/2012

119. The explanatory memorandum to this statutory instrument provides as follows:

"These regulations clarify that an injunction may be sought against an intermediary to whom article 8 (3) of directive 2001/29, ...on the harmonisation of certain aspects of copyright and related rights in the information society, applies. Article 8 (3) requires that right - holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related right".

120. Regulation 2 of S.I. 59 amends the Copyright and Related Rights Act 2000 by inserting a new subsection 40 (5A).

121. Regulation 2 provides as follows –

"The Copyright and Related Rights Act 2000 (No. 28 of 2000) is amended—

(a) in section 40, by inserting the following subsection after subsection (5):

"(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.” (Emphasis added).

CONSTITUTIONAL RIGHTS OF PLAINTIFFS

122. It has also been held that the copyright rights of persons are rights protected by the Constitution. In *Phonographic Performance (Ireland) Limited v. Cody* [1998] 4 IR 504, Keane CJ. in the Supreme Court stated as follows

“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 be 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. The statements in some English authorities that copyright other than by statutory provision ceased to exist with the abolition of common law copyright are not necessarily applicable in Ireland.” (Emphasis added).

123. It is therefore the case that copyright rights are also constitutional rights - just as the rights of subscribers to fair procedures, are constitutional rights.

REVIEW OF CASE LAW

124. I have also been referred to a considerable body of related case law in this matter.

125. In *EMI Records (Ireland) Ltd v. Eircom* [2009] IEHC 411, Charleton J. considered an application by the plaintiffs to require Eircom to block access to a site called Pirate Bay which was a website stealing the copyright owned by the plaintiff in musical works. That case however concerned a “web blocking injunction” – which is a more focused type of injunction than the injunction sought by the plaintiffs in this case.

126. I have also considered the decision of Charleton J. in *EMI Records (Ireland) Ltd and Others v. Eircom Ltd* [2010] IEHC 108. In that case the plaintiffs – who are the same plaintiffs in this action – were companies who had copyright in creative works. The defendant, Eircom was an internet service provider, just like the defendant in these proceedings. Some of Eircom’s customers engaged in alleged unauthorised sharing of copyrighted material over the internet mainly through peer to peer sharing groups. The plaintiff sued the defendants in respect of this unauthorised infringement of its copyright material. A settlement was entered into between the parties whereby a protocol was agreed between the parties. As a result of this Eircom agreed to cut off the service of repeat copyright infringers.

127. However the Data Protection Commissioner, having been informed of the settlement, raised a number of issues as to the lawfulness of its terms. The first issue was whether data comprising IP addresses in the hands of the plaintiffs constituted “personal data” for the purposes of the Data Protection Act. The court held that data comprising IP addresses did not constitute personal data for the purposes of the Data Protection Act. Indeed the court held that none of the three issues raised by the Data Protection Commissioner prevented the parties from implementing their settlement.

128. In para. 9 of his judgment Charleton J. summarised the original settlement which had been arrived at between the plaintiffs and Eircom in those proceedings which had been challenged by the Data Protection Commissioner. As he states:

“Under the terms of the settlement, these companies tell the plaintiffs that a particular computer has been involved in illegal file sharing of its copyright material. This information is passed by one of the plaintiffs to the defendant, Eircom, as the internet service provider. It then informs its subscribers that they have been detected infringing copyright. If there is a second occasion of illegal downloading, the defendant is obliged, when so informed, under the settlement to write to the subscriber warning them that unless that sort of infringement ceases, they will be disconnected from general internet service. This disconnection does not apply to any telephone or television service that a subscriber gets over their internet facility. On a third infringement, that discontinuance is implemented by Eircom; the subscriber is taken off service except for phone or television internet access. This is a serious sanction. Some would argue that it is an imposition on human freedom. There is no freedom, however, to break the law. Further, while it is convenient to have internet access at home, most people in Ireland have only to walk down to their local town centre to gain access for around €1.50 an hour. The parties also agreed, under the settlement, to negotiate a protocol setting out the details of the precise procedure for implementing this settlement.

10. Since it was likely to be deeply unfair that only the defendant with about 40% of the market share... should bear the burden of this settlement, thus activating the winds of market forces to drive customers towards [the defendant’s] competitors, the plaintiffs agreed to initiate similar proceedings against other internet service providers in the State. This, I understand, has been done. That case is in the Commercial Court list for hearing on 10th June, 2010.”

129. At para.42 of his judgment Charleton J. held that a graduated response and the settlement made between the plaintiffs and Eircom was lawful - in that it did not trespass upon any of the concerns raised by the Data Protection Commissioner.

130. However the Eircom case differs from the present case in that the parties entered into that graduated response protocol by agreement not by way of court order/injunction. By contrast in the present case the defendant is not consenting to entering into such a settlement with the plaintiff and it is therefore a matter for the court to consider whether, and if so under what circumstances, an injunction should issue.

131. I have also considered *EMI Records (Ireland) Ltd and Others v. The Data Protection Commissioner and Eircom Plc* [2012] IEHC 264. This was a judicial review brought by the applicant against the Data Protection Commissioner. However the issues which arose in that case are only of tangential relevance to this application.

132. In *EMI Records (Ireland) Ltd and Others v. UPC Communications Ireland Ltd* [2010] IEHC 377 the plaintiffs brought an application for injunctive relief against the defendant in terms similar to the application which the plaintiffs had brought against Eircom

(which had settled) and similar to the application which the plaintiffs have brought against UPC today. However Charleton J. in his judgment declined to grant injunctive relief to the plaintiffs, on the grounds that there was a lacuna in s.40 (4) of the Copyright and Related Rights Act 2000, which prevented him from granting such an injunction. (That legislative lacuna has since been remedied by S.I. 59/ 2012.)

133. I have also had regard to this provision when considering the injunction in this matter. In my view the statutory requirement under S.I. 59/2012 that 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" is similar to the language of Article 3a of the Framework Directive.

134. I have also considered the Supreme Court decision in *EMI Records (Ireland) Ltd v. The Data Protection Commissioner and Eircom Ltd* [2013] IESC 34. However the issues in the Supreme Court appeal were whether the record companies were entitled to maintain judicial review proceedings despite having a statutory appeal process available to them and also whether the enforcement notice of the Data Protection Commissioner was invalid because of the absence of reasons.

135. I have also considered the decision of McGovern J. in *EMI Records (Ireland) Ltd and Others v. UPC Communications Ireland Ltd and Another* [2013] IEHC 274. This also was an application for an injunction requiring the defendants to block access by their subscribers to the website known as Pirate Bay. In that case McGovern J. referred to the earlier decision of Charleton J. in *EMI Records (Ireland) Ltd and Others v. UPC Communications Ireland Ltd* [2010] IEHC 377. As McGovern J. noted, having considered the matter in great detail, Charleton J. concluded that the legislative basis which would enable him to grant a blocking injunction did not exist in Irish law as it exists in many European jurisdictions. McGovern J. however noted that the lacuna referred to in that judgment had now been filled by S.I. 59 of 2012 (The European Union (Copyright and Related Rights) Regulations, 2012, which had inserted s.40 (5A) into the Copyright and Related Rights Act, 2000.)

136. In that decision McGovern J. also held that the defendants should bear the costs of implementing the necessary blocking mechanisms. As he stated at para. 13 of his judgment:

"I am also satisfied that there is nothing in the legislation which would prevent the court directing that the defendants bear their own costs involved in implementing the necessary blocking mechanisms pursuant to the court order. Indeed, the defendants have all conceded that this should be so. I therefore direct that the costs associated with implementing the order should be borne by each of the defendants".

137. I have also considered the decision of Arnold J. in *Twentieth Century Fox Film Corp. v. British Telecommunications Plc* [2011] RPC 28 and *Twentieth Century Fox Film Corporation & Ors. v. British Telecommunications Plc* (No. 2) [2011] EWHC 2714 (Ch).

138. In *Twentieth Century Fox* (No.2) Arnold J. at para. 32 of his judgment states as follows:

"Costs of implementing the order

Each side contends that the other should pay the costs of implementing the order. In my judgment the costs of implementing the order should be borne by BT. The Studios are enforcing their legal and proprietary rights as copyright owners and exclusive licensees, and more specifically their right to relief under Article 8(3). BT is a commercial enterprise which makes a profit from the provision of the services which the operators and users of Newzbin2 use to infringe the Studios' copyright. As such, the costs of implementing the order can be regarded as a cost of carrying on that business. It seems to me to be implicit in recital (59) of the Information Society Directive that the European legislature has chosen to impose that cost on the intermediary. Furthermore, that interpretation appears to be supported by the Court of Justice's statement in L'Oréal v eBay at [139] that such measures "must not be excessively costly". The cost of implementing the order is a factor that can be taken into account when assessing the proportionality of the injunction, and in the present case I have done so: see the main judgment ([2012] 1 All ER 806) at 200. Indeed, my conclusion there that the cost to BT "would be modest and proportionate" is supported by the evidence subsequently filed by BT, which estimates the initial cost of implementation at about £5,000 and £100 for each subsequent notification."

139. Clearly the costs in the present case are of a different order of magnitude but in my view the principle still holds good. The costs of complying with an injunction should generally be borne by the defendants.

140. In *L'Oréal SA v. eBay International AG*, Case C – 324/09 [2011] ECR I - 6011, (on a reference for a preliminary ruling from the High Court of Justice in England and Wales) the CJEU stated at para. 131 of its decision

"131. Next, it must be stated that, in view of the objective pursued by Directive 2004/48, which is that the Member States should ensure, especially in the information society, effective protection of intellectual property (see, to that effect, Case C - 275/06 Promusicae [2008] ECR I - 271, paragraph 43), the jurisdiction conferred, in accordance with the third sentence of Article 11 of the directive, on national courts must allow them to order an online service provider, such as a provider making an online marketplace available to internet users, to take measures that contribute not only to bringing to an end infringements committed through that marketplace, but also to preventing further infringements."

"133. An interpretation of the third sentence of Article 11 of Directive 2004/48 whereby the obligation that it imposes on the Member States would entail no more than granting intellectual-property rightholders the right to obtain, against providers of online services, injunctions aimed at bringing to an end infringements of their rights, would narrow the scope of the obligation set out in Article 18 of Directive 2000/31, which would be contrary to the rule laid down in Article 2(3) of Directive 2004/48, according to which Directive 2004/48 is not to affect Directive 2000/31."

134. Finally, a restrictive interpretation of the third sentence of Article 11 of Directive 2004/48 cannot be reconciled with recital 24 in the preamble to the directive, which states that, depending on the particular case, and if justified by the circumstances, measures aimed at preventing further infringements of intellectual property rights must be provided for."

141. Likewise the court stated at para. 141 of its judgment:

"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. In *Scarlett Extended SA v. SABAM*, C – 70/10 [2011] the court considered a number of aspects of these various directives. In that case the CJEU 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

- (a) All electronic communications passing by its services in particular those involved in the use of peer to peer software
- (b) Which applies indiscriminately to all its customers
- (c) As a preventative measure
- (d) Exclusively at its expense and
- (e) For an unlimited period... with a view to blocking the transfer of files the sharing of which infringes copyright.

143. The court 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 prohibited by Article 15 (1) of Directive 2000/31. The court held that it 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 Directive 2004/48 (which requires measures to ensure intellectual property rights should not be unnecessarily complicated or costly). Therefore it held 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.

144. However, in the present case, the injunction is not directed at filtering all electronic communication passing via the defendant's services at all; moreover the injunction would not apply indiscriminately to all its customers but only those in respect of whom it receives a notification from the plaintiffs; thirdly the injunction is not being granted as a preventative measure primarily but instead to restrain an ongoing infringement; moreover the injunction is not exclusively at its own expense because plaintiffs also have to pay for a considerable portion of the relevant cost and expenses.

145. At para. 46 of its judgment the court held

"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".

146. I am satisfied however that the injunction which I propose to grant in this case does not infringe any of the principles set out by the CJEU in the SABAM case. I am satisfied that the injunction which I propose to grant in this case does indeed strike a fair balance between the protection of intellectual property rights enjoyed by copyright holders and the freedom to conduct a business enjoyed by operators such as ISPs. I am also satisfied that the injunction which I propose to grant does not apply indiscriminately to all customers of the defendant and it does not require the defendant to introduce a system for filtering all electronic communications passing on its internet services. Moreover it is not a purely preventative measure but rather a measure which is primarily designed to identify actual infringements which have taken place and to notify such infringers to cease and desist their activities. Moreover the process of a graduated response must be seen in the round. The plaintiff is paying for the costs of the first step and the final step; the defendants are being directed to pay the costs of communicating with their own subscribers. Thus the defendant is not being asked to bear all the expense exclusively.

147. In *UPC Telekabel Wien GmbH v. Constantine Film*, C – 314/12 [2014] the court stated at para. 50

"50. An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions.

51. However, such an injunction does not seem to infringe the very substance of the freedom of an internet service provider such as that at issue in the main proceedings to conduct a business.

52 First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.

53 Secondly, such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction."

148. The court also observed at para. 47 that it was necessary to strike a balance between the copyright rights protected under Article 17 (2) of the charter, the freedom to conduct a business under Article 16 of the charter and the freedom of information of internet users under Article 11 of the charter. I am satisfied that the injunction sought in this case also complies with these principles.

ASSESSMENT

Introduction

149. In this case, both the plaintiffs and the defendant agree that there is wholesale theft of the plaintiffs' copyright in music on the defendant's network. This wholesale theft occurs as a result of illegal music downloading/ uploading and the fact that people are able to obtain copies of music on the internet without paying for it. This clearly is an infringement of artists' copyright and indeed the

plaintiffs' copyright. It also means that artists who have spent considerable time, money and effort in creating, composing and producing music are unable to obtain financial rewards for their work.

150. The European Union has sought to address the problem through a variety of directives. In the E-commerce directive, it has recognised and provided for what has been called the "mere conduit" defence (i.e. that internet service providers such as the defendant are not liable as a matter of law for the activities which their subscribers undertake as illegal activities using their ISP lines.)

151. However, even though ISPs are not regarded as liable in law for the actions of their subscribers, the EU directives – and the implementing national regulations in Ireland – specifically permit Member States to take appropriate measures to deal with this issue.

152. Moreover the directives permit the courts of Member States to impose injunctions on internet service providers such as the defendant having regard to the restraints and safeguards by which the directives have set out to circumscribe the limits of such an injunction.

153. The plaintiffs in this case have sought an injunction to permit a graduated response solution to the flagrant breach of their constitutional rights. The defendant has sought to resist this injunction in full. However, as the trial has progressed, the defendant has taken a constructive approach to the issue and has sought to engage both with the Court and with the plaintiffs in respect of what it might regard as a reasonable approach. That is not to say that the defendant is consenting to an injunction but rather that it has sought to narrow the differences between the parties where possible. Having said that, there are still substantial issues of principle, of practicality and of cost between the parties.

154. I think it is also only fair to note that although UPC was the subject of some criticism in the judgment of Charleton J. in *EMI and Others v. UPC* [2010] IEHC 377, I do not believe that any similar criticism would be justified for their stance in this case. The legal position which they have adopted is understandable, the witnesses which they have proffered to the court have been at an appropriate level of seniority to explain the policy position adopted by UPC and its engagement with the legal issues in this application has been positive and constructive.

The elements of the graduated response injunction sought by the plaintiffs

155. It is important to understand the nature of the injunction sought by the plaintiffs because it is unusual. There have been a number of variants of the injunction discussed during the course of the court hearing but essentially the outcome which the plaintiffs are seeking is a structure or methodology to deal with internet piracy which will consist of the following steps:

(1) Step 1 – the plaintiffs through their own efforts and own software will forward to the defendant the IP address (with date and time stamp) of subscribers to the defendant's internet services who have infringed the plaintiffs' copyright in respect of specific songs on specific dates. This step would be at the cost of the plaintiffs.

(2) Step 2 – the defendant having received the IP address of its subscriber will then ascertain the name and address of that subscriber. It will then write a warning letter to the subscriber informing them that they have committed an infringement of copyright and requesting that they cease and desist from any future copyright infringements. (The plaintiffs submit that the cost of this communication should be borne by the defendant.)

(3) Step 3 – where the plaintiffs establish that there are further copyright infringements by the same person and forward these IP addresses (with date and time stamp) to the defendant, the defendant would write a second letter to the infringer informing them that a second infringement of copyright has been noticed and again asking the subscriber to cease and desist from future copyright infringements. (The plaintiffs submit that the cost of this should be borne by the defendant.)

(4) Step 4 – that, where the plaintiffs forward a third copyright infringement from the same IP address to the defendant, the defendant writes a third letter to its subscriber to notify them that – given the continued breach of copyright infringement – the defendant intends to suspend the customer's internet access for a period of seven days. (The cost of this according to the plaintiffs should be borne by the defendant.)

(5) Step 5 – that again where the plaintiff provides further evidence of copyright infringement and provides details of the IP address of the subscriber (with date and time stamp) that the defendant would write a fourth letter to its subscriber informing them of the continued copyright infringements and notifying them that they are terminating their access to the internet through the defendant. (The costs of this, according to the plaintiffs should be borne by the defendant.)

156. There was much discussion, evidence and submissions during the course of the hearing about each of these five steps. The parties initially adopted very different approaches but as the hearing progressed, the issues between the parties narrowed.

157. I now propose to consider each of these proposed steps one by one.

Step One

158. Step one is not problematic. Both the plaintiff and the defendant agree that the process must commence with the plaintiff identifying infringements of its copyright to the defendant. The plaintiffs do this by retaining a specialist computing company which uses specialised software called Dtecnet. This software permits the plaintiffs to identify on any given day at any given time whether particular songs (in which the plaintiffs own a copyright) are being illegally uploaded by the defendant's subscribers. The plaintiffs agree that they will pay for the cost of ascertaining these infringements. Clearly no issue arises under the directive in relation to this matter at least until and unless the infringer seeks to challenge the credibility or reliability of such information. The defendant however has indicated that it will accept the evidence and information of infringement as presented to it by the plaintiffs. In order to make the process manageable but also effective, the plaintiffs are suggesting that they would send a list of approximately 5,000 infringements each month to the defendants. The plaintiffs are in a position to identify the IP addresses of the subscribers but clearly they do not have access to the names and addresses of those subscribers. That is confidential information held by the defendant, as the internet service provider.

Step Two

159. The next step is that the defendant must then match the IP address given to it by the plaintiff with an exact subscriber name and address. I would have thought that this was quite an easy task for the defendant to undertake but in evidence and in submissions the defendant maintains that this is not so. The defendant's position is that this information about which IP addresses its subscribers use is, in fact, buried deep in the company's computer architecture. 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.

Step Three

160. Step three in effect replicates step two. Thus the plaintiffs detect illegal downloading and copyright infringements and forward this information with the relevant IP addresses to the defendant. The defendant then matches the IP addresses with its subscribers name and addresses. Again this will be an expensive and time - consuming exercise involving a considerable amount of computer engineers and manpower. Again in circumstances where the plaintiffs provide the defendants with approximately 5,000 notifications per month, some of these notifications will relate to customers who have now been detected committing a second copyright infringement. Again the defendant could write a second warning letter to its customers warning them that they have been detected again and asking them to cease and desist if directed to do so.

Steps four and five

161. Steps four and five raised the sharpest issues of dispute between the parties (apart from the issue of costs). The plaintiffs' application in respect of step four and five follows closely on steps two and three i.e. the plaintiffs continue to furnish monthly lists of infringements to the defendant and when the defendant and/or plaintiff become aware that specific subscribers of the defendants are now infringing for a third time, the defendant would write a third letter to that subscriber informing them that, by virtue of their repeated copyright infringement, their internet access will be suspended for a period of seven days (under step four) and/or in respect of a fourth offence will be terminated (under step five).

Evolution of Proposals

162. There has been a significant evolution of thinking by all parties to this dispute during the course of the hearing. I set out below the progress of proposal and counter - proposal as it illustrates the issues which now require to be resolved in this case.

(I) The Defendant's First Proposal

163. The defendant's first proposal to the plaintiffs - set out in its letter of 11th August, 2014 - was an attempt to establish in Ireland a similar scheme to that set up in the UK. This proposal consisted of the following elements

1. Step 1. - Rights holders such as the plaintiffs send their complaints of copyright infringement to the ISP.
2. Step 2. - The ISP then identifies the relevant customer and sends such customers a letter. However this letter would not be a cease and desist letter but rather an education letter about the difficulties of internet piracy.
3. Step 3. - The defendant when it received evidence of a second infringement would send a second education letter.
4. Step 4. - The defendant when it received a third instance of copyright infringement would send the customer a third education letter. However none of these letters would contain any threat of suspension or termination.
5. The cost sharing for this scheme would be that the ISPs would pay 25% and the rights - holders would pay 75%.

164. This offer by the defendant was rejected by the plaintiffs as being utterly ineffective, unworkable and placing all the burden on them. The plaintiffs point out that the defendant's contract with its subscribers provides for a termination of the contract for copyright infringement (or other breaches of the subscriber contract) and that what the plaintiffs sought was that UPC would act on foot of complaints and, if necessary, after repeated infringements and warnings suspend the subscriber contract in accordance with the terms of the contract.

165. In any event, I am of the view that the plaintiffs' criticisms of the proposal are well - founded. It is impractical, ineffective and not dissuasive. It is also not fair and equitable.

(II) The Defendant's Second Proposal - 13th January 2015

166. The defendants wrote to the plaintiffs during the course of these proceedings on 13 January 2015 outlining a second proposal. This proposal consisted of the following elements.

1. Step 1- The plaintiffs write to the defendant with evidence of copyright infringement.
2. Step 2 - The plaintiff then applies to court for Norwich Pharmacal orders against the defendant in respect of the defendant's subscribers names and addresses. The defendant agreed that it would neither consent nor object to any such application. This would mean that the plaintiff would obtain the names and addresses of all of the defendant's subscribers who are engaged in this process. The defendants believe that such mass Norwich Pharmacal orders could happen in a very cost effective and simple manner.
3. Step 3 - The plaintiffs (not the defendants) then take whatever graduated action it deems appropriate - for example the plaintiffs write first, second or third warning letter to such customers requesting them to cease and desist and/or threatening a suspension and/or termination.

The defendant's view on this is that there is no great difference between the plaintiffs doing it and the defendants doing it but that it would be easier for the plaintiffs to do it because they could build a computer system from scratch and therefore would not have to impose on the defendant the necessity of building a new computer system which integrates with the defendant's computer system. Thus the burden would be on the plaintiffs to proceed in the most appropriate manner which they believe to be consistent with their legal obligations. Thus insofar as the plaintiffs wish to enforce their copyright then they would be free to do so. The defendants saw this as being an effective and cost - effective way of proceeding.

4. Step 4 - The fourth step in the process would be, that in the case of repeat infringers, where the plaintiffs have identified and

corresponded with such infringers, the defendant would not oppose (i.e. it would neither consent nor object) to any application to court by the plaintiffs under s.40 (5A) of the Copyright and Related Rights Act 2000 on a periodic basis to seek to have subscribers internet connections suspended or terminated if the court considered it appropriate.

167. The problems with such a proposal from the plaintiffs' point of view are that each letter (sent to a customer of the defendant) would have to be preceded by discovering that that customer had made copyright infringements. That would therefore necessitate three rounds of Norwich Pharmacal orders which the plaintiffs would have to obtain against the defendants. This is clearly not only impracticable but it also would be an enormous burden on court resources. Thus if the plaintiffs sent, for example, 5,000 notifications of copyright infringements to the defendants, that would necessitate the plaintiff having to make Norwich Pharmacal applications in respect of 5,000 IP addresses. Moreover in the second month, the plaintiff would have to make a second court application for a further series of Norwich Pharmacal orders for 5,000 IP addresses etc. Thus on a monthly basis the plaintiff would be coming to court seeking to obtain Norwich Pharmacal orders in respect of 5,000 IP addresses. Such a proposal, according to the plaintiffs, is unworkable. I agree with that view. It would flood the court system on a monthly basis with 5,000 Norwich Pharmacal applications in respect of the defendant's ISP service alone. Clearly such a system is not appropriate. It is not proportionate to the problem to be resolved.

168. Moreover the plaintiffs gave evidence about the enormous costs and expense of pursuing Norwich Pharmacal orders against defendants. But even apart from the cost to the plaintiff, it would impose an enormous administrative burden on the court system.

169. Moreover under the directives, any injunction should be "dissuasive". It is clear that any educational letters sent to customers would not be dissuasive. Moreover it appears that Norwich Pharmacal orders are not appropriate where educational letters are being sent. Indeed the whole purpose of Norwich Pharmacal orders is to enable a claim to be prosecuted against the alleged wrongdoer.

170. Mr. McDowell for the plaintiffs submitted that the UPC proposal effectively made UPC into a spectator in relation to the infringement of the plaintiffs' copyright and that this completely ignores the language of the directives which state in many cases that the ISP is in a better position to prevent the infringement of copyright than anyone else.

171. In my view, the plaintiffs' criticisms of this proposal are well- founded. It is an unworkable solution.

(III) The third proposal – the plaintiffs' proposal 19th January 2015

172. During the course of the trial, the plaintiffs, in a continuing attempt by both sides to narrow the issues between the parties, wrote an open letter to the defendant about their proposals for a graduated response system. In broad terms the elements in the plaintiffs' proposal were as follows:

1. Step 1. - The plaintiff notifies the defendant of the various copyright infringements.
2. Step 2. - The defendant, where it receives a first copyright infringement notification would send its subscriber a letter informing the subscriber of damage caused by internet piracy and asking the subscriber to desist from any further infringement and warning the subscriber of the consequences of further infringements.
3. Step 3. - In respect of a second notification the defendant would send its subscriber a second letter requesting the subscriber to cease and desist from any further infringement and warning the subscriber of the consequences of further infringement.
4. Step 4. - Where there was a third copyright infringement notification UPC would send its subscriber a further communication informing the subscriber of the details of the infringement, requesting the subscriber to cease and desist and giving the subscriber the option of

- a. Having its UPC internet connection suspended for one week or
- b. Going to the next stage set forth below.

If no choice is made by the subscriber option (a.) would apply and the subscriber would be suspended by UPC for seven days.

5. Step 5. - Where there was a fourth copyright infringement notification to a subscriber or where option (b.) was selected by a subscriber at the preceding stage, a retired judge (or similar person of demonstrable independence agreed upon by the plaintiffs and the defendant) acting as adjudicator would carry out a review of the evidence underlying each notification and receive any representations of the subscriber for the purposes of determining

(1) whether the subscriber should be suspended (in the event that the review is carried out on foot of a third notification) or

(2) whether the subscribers internet service should be terminated (in the event that the review is on foot of a fourth notification) or

(3) whether in respect of a fourth notification it would be more appropriate that an application should be made to court for an order in respect of this subscriber.

6. Step 6. - In the event of a recommendation of a reference to court the plaintiffs and the defendant and the relevant subscriber would be informed by the defendant of the making of such determination by the adjudicator. The defendant would then furnish the plaintiffs the IP address etc and the plaintiffs could then make a Norwich Pharmacal type application to ascertain the subscribers' identity and contact details. The defendants would then consent to such Norwich Pharmacal orders.

7. Step 7. - The plaintiffs could then seek an order under s.40 (5A) of the 2000 Act for the subscriber's internet contract

with the defendant to be terminated. Such applications would not be opposed by UPC and no costs would be sought by UPC. Such applications could of course be opposed by the subscribers.

173. Under the plaintiffs' proposal the plaintiffs would be responsible for all of the costs of its side for the costs of identifying copyright infringement etc. and

(1.) The number of notifications to be sent by the plaintiff would not exceed 5,000 per month.

(2.) The remuneration and other costs of the adjudicator would be shared between the parties.

(3.) The defendant would be responsible for all the costs associated with communicating with its own subscribers including any capital expenditure costs or annual running costs.

174. The defendant's position is that it viewed this proposal as a positive development and that it appeared to address in substance the issues which arise under Article 1 (3) (a) of the Framework Directive i.e. the requirement for a prior and impartial process.

175. However the real problem according to the defendant was the costs issue because the plaintiffs' proposal imposes the entire burden upon the defendant and this would require the defendant to build a separate computer system which would be a costly exercise.

The fourth proposal – the defendant's letter of 21st January, 2015

176. The defendant responded to the plaintiffs' letter of 19th January, 2015. In this letter, it states that it is concerned that the plaintiffs' proposal did not adequately address significant concerns raised by the defendant and in particular the significant concerns as to the complexity and workability of such a graduated response solution and whether it is something that could safely be the subject of a valid and effective court injunction. In particular, the defendant was concerned that issues could arise in the course of managing the GRS process which might not have been properly anticipated by a court order. It noted that the experience in other jurisdictions appears to support the view that these matters are best addressed by detailed regulations which can build in the need for appropriate checks and balances including periodic reviews.

177. However, having said that, the defendant set out a counter - proposal as follows

Step 1 – The rights - holders send evidence of infringement to the defendant

Step 2 – The defendant would send its subscriber a first letter informing the subscriber of the details of the infringement notified, the damage caused by such infringement and asking the subscriber to cease and desist from any further infringement.

Step 3 – In respect of a second copyright infringement within a period of twelve months of the first letter, UPC would send that subscriber a second letter informing them of the infringement and requesting that the subscriber cease and desist from further infringement.

Step 4 – Where there is a third copyright infringement notified by the plaintiff to the defendant, the defendant would send its subscriber a further letter informing the subscriber of the infringement, requesting the subscriber to cease and desist from any further infringement and warning that the subscriber can expect legal action if the infringement does not come to an end.

Step 5 – Where there is a fourth copyright infringement in respect of a certain subscriber within twelve months, the defendant would send to the plaintiffs a notification that the subscriber has reached four infringements within a twelve month period. The subscriber would not be identified other than through the fourth IP address.

Step 6 – The plaintiff could then make a Norwich Pharmacal type application to ascertain the subscriber's identity and contact details, and the plaintiff could then seek an order under s.40 (5A) of the 2000 Act for the internet service of that person to be terminated. Such applications would not be opposed or consented to by the defendant and no costs would be sought.

178. In respect of the costs of implementing the above steps, the defendant's position was that seeking to impose the entire or the majority of the implementation and operating costs of the graduated response scheme on the defendant was neither proportionate nor fair nor equitable. It proposed that the operating costs be split as to 75% for the rights holders and 25% for the defendant. Thus it proposed the following

(1) The plaintiff to be responsible for the costs of identifying copyright infringement.

(2) The plaintiffs to discharge 75% of the capital and operating expenditure reasonably required by the defendant to operate the scheme and the defendant to discharge 25% of such expenditure. Capital expenditure cost was to be capped at €940,000 and the operating cost was to be capped at €300,000 per annum. The plaintiffs would also have a right to a full audit of UPC's costs to implement and operate the scheme on an annual basis.

The plaintiff's response – letter dated 22nd January, 2015

179. The plaintiffs' solicitors replied to the defendant's solicitors on 22nd January, 2015. In their letter they accepted that the defendant had shown a significant level of engagement and a *bona fide* attempt to move matters forward. They indicated that the major issues between the parties now appeared to be in relation to costs and timing.

180. In relation to costs, the plaintiffs indicated that they could not possibly agree to the cost structure proposed by the defendant because the music industry in Ireland would not be able to afford it and therefore it simply would not happen. This of course would make the entire process nugatory and the court must be vigilant to ensure that this does not happen.

181. Moreover the defendant sought at all times to make the process of the defendant carrying out these procedures conditional upon the plaintiff also seeking similar orders against all other ISPs in the Irish market. This the plaintiffs are prepared to do.

182. The plaintiffs' letter stated that under the UPC proposals – which required the plaintiff to bear 75% of the cost and the defendant only to bear 25% of the cost – that this would mean that the plaintiffs would pay €705,000 by way of capital expenditure and €225,000 by way of operating expenditure annually to UPC.

183. However in addition the plaintiffs have to bear their own capital cost of setting up their own technical structures. The capital cost of setting up the plaintiffs' own technical structure to deal with the Eircom protocol was €76,500 and in their letter the plaintiffs' solicitors indicated that Mr. Michael Walsh (for the plaintiffs) estimated that to scale up the operation to deal with all five ISPs would entail a further minimum capital outlay of €160,000. This would mean that the plaintiffs would be engaged in capital expenditure of approximately €236,000.

184. In addition the plaintiffs have to pay their own operational costs. According to the plaintiffs' letter the plaintiffs' operational costs in respect of the Eircom protocol were approximately €83,000 per annum. Mr. Michael Walsh on behalf of the plaintiffs' estimated that to scale up the operation to deal with all five ISPs would entail an operating expenditure for the plaintiff of approximately €376,000 annually.

185. In addition the legal costs of dealing with Norwich Pharmacal orders was difficult to estimate but were expected to be at a minimum of €100,000 per annum.

186. Thus, in relation to capital costs, if IRMA were to pay its own capital costs and 75% of UPC's costs this would result in a figure of €160,000 plus €705,000 which is €865,000. In addition the plaintiffs would have to pay 75% of the capital costs for four other ISPs. However no figures are available for these other ISPs.

187. In addition, in relation to operational costs, the plaintiffs would have to pay its own operational costs and 75% of UPC's operational costs. This would involve costs of €376,000 plus €225,000 which would come to €601,000. In addition under the defendant's proposal the plaintiffs would have to pay 75% of the operating costs of all other ISPs.

188. The plaintiffs in their letter stated that the plaintiffs and all other Irish record companies only had a turnover of approximately €29.6 million in 2013. If profits were assumed to be in the region of 10% of turnover then that would give a profit of €2.9 million per annum. On this basis they said that capital expenditure figures and operational expenditure figures of the sort which were set out above are quite simply not feasible and would render the entire process nugatory.

189. The plaintiffs also stated that the UPC entire capital expenditure could be amortised over a period of years and should be regarded as the cost of doing business in a regulated market.

190. The plaintiffs also took issue with the projected period of eighteen months to build and test the project and a six month pilot scheme and sought to have this matter reduced to a much shorter period term.

Defendant's response – letter dated 28th January, 2015

191. In this letter the defendant again stated its reservations about whether a graduated response solution (GRS) could safely be the subject of a valid and effective court injunction. It pointed to the fact that previous injunctions involved for example website blocking orders and similar matters but that these injunctions could be complied with in a one - off and timely fashion and at a relatively minor cost. It also stated that the issue of who should bear the cost was an issue of policy matter which should not be decided by the High Court.

192. In the defendant's letter it was of the view that the second and third communications to their customers were identical and therefore they wished to remove the third communication in order to simplify the process and make it less costly.

193. Moreover the defendant was of the view that suspension of subscribers by the defendant is fraught with legal difficulty – particularly under Article 1 (3) a of the Framework Directive.

194. In respect of costs the defendant maintained its position of a 75% / 25% split.

The plaintiff's letter dated 29th January, 2015

195. The plaintiffs replied to this letter on 29th January, 2015. In this letter the plaintiffs state that they were frustrated that UPC continued to maintain that the injunction claimed could not be granted by the court whilst also stating that UPC would do nothing whatsoever to assist in the absence of an injunction being granted. They also state that "it is completely disingenuous to suggest that the Irish music industry with the hoped for increase in revenue could ever be able to afford the pay the cost that UPC insist on".

196. They also state as follows

"Once again UPC reminds the plaintiffs of its innocence. There is significant difference between being legally innocent and morally innocent. Whilst UPC has said repeatedly that as a mere conduit the law finds them to be legally innocent, they have watched the creative industries being decimated whilst benefiting – through the inevitable enhancement of the attractiveness of broadband access – from the availability of free music, film and TV programmes on their network and done nothing. It appears to the plaintiffs that Mr. Justice Charleton's express view that 'UPC have demonstrated a public and a private face' continues to resonate, with UPC determined to make the grant of relief dependant upon an impossible condition."

197. The plaintiffs in their letter of 29th January, 2015 agreed to the removal of the third communication in order to reduce the defendant's expense and it also suggested the number of notifications could be reduced from 5,000 per month to 3,500 per month. This would also bring about a reduction in the operational cost for the defendants.

Summary of current state of proposals

198. Having regard to this intensive exchange of correspondence between the parties, and the intensive engagement by both parties on the issues, it is clear that the following steps could in fact be the subject – matter of an injunction.

1. Step 1 – That the plaintiffs would furnish all relevant infringement information to the defendant and that the plaintiffs would bear the cost of this process.
2. Step 2 – That the defendant, when it receives a first copyright infringement notification from the plaintiffs, would send its subscribers a letter setting out the infringement and requesting him/her to cease and desist.

3. Step 3 – That the defendant where it receives a second copyright infringement notification would send a second letter to its subscriber requesting him/her to cease and desist.

4. Step 4 - That the defendant, where it receives a third copyright infringement in respect of a subscriber from the plaintiffs, would send to the plaintiffs a notification that a subscriber account has been the subject matter of three such notifications.

5. Step 5 – The plaintiffs, having been informed of a third copyright infringement notification and having been informed of the relevant IP addresses etc, could make a Norwich Pharmacal type application to ascertain the subscriber's identity and address and the plaintiffs could then seek an order under s.40 (5A) for the suspension and/or termination of the subscriber's service. Such applications would not be opposed or consented to by the defendant and the defendant would not seek its costs.

199. Whilst I note that the defendant is still maintaining its objections in principle that an injunction should not be granted, nevertheless it is clear that these steps could all be taken by the defendant if it were directed by way of court injunction to do so.

200. It appears therefore that the major issue which is left to be considered is the issue of who should bear the costs of the defendant's capital and operating expenditure.

Approach to the Legal Issues Involved

201. As I set out earlier in this judgment, the criteria which a court must consider before granting an injunction of the type sought in this application are as follows:-

(i) any injunction granted must be fair and equitable;

(ii) any injunction granted must not be unnecessarily complicated or costly;

(iii) any injunction granted must not entail unreasonable time limits or unwarranted delays;

(iv) any injunction granted must be effective, proportionate and dissuasive;

(vi) any injunction granted must ensure there is a prior fair and impartial procedure which includes the right to be heard of the person concerned before a subscriber's access to the internet is curtailed.

202. I turn now to consider the issues which arise in this case in the light of the above criteria.

The remedies..... "shall not be unnecessarily complicated or costly"

203. The first issue which arises in this matter is whether the steps being imposed upon the defendant are "unnecessarily complicated or costly".

204. The first step is to be taken entirely by the plaintiffs and at their own expense. Therefore that raises no issues for the defendant. The next steps involve the defendant being directed to write two letters to its customers. The question arises as to whether such a court order would be "unnecessarily complicated or costly."

205. On first principles one would have thought that asking an internet service provider to write two or three successive letters to its customers could not possibly be a costly or complicated task. However on the facts of this case it appears that this may be so, for a number of reasons. Firstly, the defendant submits that once it receives the IP address of the infringer from the plaintiff, it has to search its computer database to ascertain which of its subscribers was using that IP address on that date and at that time. This apparently is not a simple task. I was surprised to hear that, but evidence was given that this is so. It requires a skilled computer engineer to access computers deep in the architecture of the defendant's computing system to access this information. This takes time and therefore money. Moreover, given the sheer volume of requests – which the plaintiffs estimate at approximately 5,000 complaints per month – this clearly involves a significant manpower and logistical challenge for the defendant. Thus the defendant could be put to the task of ascertaining 5,000 IP addresses per month.

206. The court made numerous enquiries of a number of the defendant's witnesses as to whether a "low tech" solution was either feasible or desirable. By a "low tech" solution I mean a solution in which the defendant would simply write two letters to its infringing customers, and would afford the subscribers an opportunity of reply and would then write the third letter. I enquired whether there was any necessity to have a complex and costly computer programme developed for such a situation. I would have thought that a small number of employees could carry out this task of writing to their subscribers, of noting any replies, of writing a second letter, of noting any replies and then of writing a third letter and noting any replies.

207. However, for all sorts of reasons I was informed that this was not possible. The first was because the staff carrying out this "low tech" solution would be general administrative staff. Such general administrative staff would not have the skills to access those parts of the computer database to retrieve the IP addresses and reconcile them with the subscriber's names and addresses. This can only be done by trained computer engineers. Secondly, given the considerable amounts of man hours which would be required on a month – to – month basis to process 5,000 requests per month it was submitted that in fact the "low tech" solution would end up being more expensive in the long run than a high – tech or automated solution.

208. An automated solution would involve designing a new software programme specifically for this process. This would interact with the existing computer architecture, it would receive the monthly IP information from the plaintiffs, it would automatically search the defendant's computer architecture to locate the relevant subscriber name and address and it would produce that information.

209. Having heard the defendant's technical experts I accept their evidence that a "low tech" solution is not really feasible either in the short the medium or the long term. It consumes too many man hours on a monthly and annual basis. Thus the only real solution appears to be to automate this process.

210. Having heard the evidence from the defendant's technical experts I am of the view that the automated computer system which they say is now required is indeed required. Moreover the costs of developing such a system will cost the defendant company a once – off capital cost of between €800,000 to €960,000.

211. 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.

212. 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 is fulfilled.

Does the development of the defendant's computer system "entail unreasonable time limits or unwarranted delays"

213. The defendant's technical experts gave evidence that the development of an automated computer system was a complex and time consuming process. It went through a number of stages from development, to testing, to integration to a pilot scheme. The defendant's position was that it was likely that this entire process could take between twelve and eighteen months. The plaintiffs protest that this is far too long. The defendant's position however is that this is what it will take given the current architecture of the defendant's computer system.

214. Having heard the defendant's technical experts I am of the view that it could take at least twelve months and perhaps slightly longer to develop this computer software system. However, the test in the directive is that an injunction directed by the court should not "entail unreasonable time limits or unwarranted delays". In the circumstances, I am of the view that the proposed timetable of 12- 15 months does not entail an "unreasonable time limit" or an "unwarranted delay."

215. Moreover I do not believe it is appropriate for the court to impose a tighter or more restrictive timetable on the defendant. To do so might be to impose an "unreasonable time limit" on the defendant. Having said that, the defendant must use all reasonable efforts to expedite the process and to put it in motion. Therefore I am of the view that this criterion for an injunction is also fulfilled.

Would the remedies be effective, proportionate and dissuasive?

216. The next issue I have to consider is whether the injunction would be "effective, proportionate and dissuasive" in helping to remedy the problem of internet piracy. In my view, the five step process set out above, would indeed be effective, proportionate and dissuasive. The first step is in the plaintiffs' own control and therefore need not be considered further. The second and third steps require the defendant to write warning letters to their subscribers. In my view, these warning letters will be effective and dissuasive. I say this because the evidence from the Eircom protocol would suggest that each time an infringing customer receives a letter, many of them modify their behaviour. Thus, it would appear from the plaintiffs' experience with Eircom, that if 100 people receive a first warning letter, that perhaps only 50% of those require to receive a second warning letter and a far smaller percentage require a third letter or indeed a fourth letter. Indeed the evidence from the plaintiffs' experience with the Eircom protocol is that very few customers were suspended and indeed no customer appears to have had his contract terminated.

217. Moreover it is clear that requiring UPC to write two letters to its subscribers is the absolute minimum which is required to deal with the problem. The defendant has not identified any other step or process to deal with the problem in an effective manner.

218. I would conclude therefore that an injunction directing the defendant to write to their customers on two separate occasions would be effective, proportionate and dissuasive.

Prior, impartial procedure

219. The main submission made by the defendant in respect of this matter is that any attempt by them to suspend or to terminate their subscriber's access to the internet would be a breach of Article 3 and 3 a of the Framework Directive. In particular the defendants argued that where any steps are to be taken which affect end users access to, or use of, services on the internet, then Article 3a of the Framework Directive is engaged.

220. Article 3 a provides

"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".

221. The second paragraph of Article 3 (a) provides that any of the measures regarding end users access to or use of services and applications may only be imposed if they are appropriate proportionate and necessary.

222. Most importantly the defendants laid considerable emphasis on the fact that Article 3 (a) provides

"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."

223. Thus the question is this: if the defendant moves to suspend or to terminate its subscribers access to the internet for alleged copyright infringement, is Article 3 (a) applicable?

224. 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 3 (a) 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 3 (a) of the Framework Directive.

225. 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.

226. 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 3 (a) of the directive. Given that Article 3 (a) 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".

227. 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.

228. 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.

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

230. 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 3(a) 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.

231. In cases where the arbitrator decides that the matter should proceed to a court hearing, then the plaintiffs may, of necessity, have to apply for a Norwich Pharmacal order and subsequently court orders to suspend and/or terminate subscriber's access to the internet. I note that the defendant has agreed not to object or consent to such applications and to bear its own costs. These elements too will form part of a court order.

Another possible solution – Norwich pharmacal orders

232. Another possible solution to the above problem of a prior, fair and impartial procedure, would be to use "*Norwich Pharmacal*" orders. A "*Norwich Pharmacal*" order is an order of the court that the defendant disclose to the plaintiffs the names and addresses of certain parties (in this case the defendant's subscribers) in respect of whom there is a prima facie demonstration of a wrongful activity (in this case the infringement of the plaintiffs' copyright). It arises in circumstances where parties (such as the plaintiffs) are aware that other parties (such as the defendant's subscribers) are engaged in wrongful activity (for example the wrongful infringement of copyright) and where such parties are using the defendant's network to engage in such wrongful conduct. In these circumstances the plaintiffs can apply to the High Court to obtain a *Norwich Pharmacal* order compelling the defendant to provide the plaintiffs with the names and addresses of those persons who are suspected of being engaged in unlawful copyright infringement.

233. The principle was decided in the House of Lords decision in *Norwich Pharmacal v. Customs and Excise* [1974] AC 133 which established a principle articulated in the speech of Lord Reid (at page 175) as follows:

"If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers".

234. As Kelly J. stated in *EMI Records (Ireland) Ltd v. Eircom Ltd* [2005] 4 IR 148 at pages 149 – 150:

"That principle has been accepted as forming part of the law in a number of common law jurisdictions including this State. It has been relied on to obtain eponymous orders of the type sought in this case. They are simply called Norwich Pharmacal orders. They require disclosure of identity and other information held by a third party concerning an alleged wrongdoer to the wronged person."

235. Such orders have been approved in Ireland by the Supreme Court in *Megaleasing UK Ltd v. Barrett* (No. 2) [1993] ILRM 497. As Kelly J. noted at page 150 "orders of this type have been particularly useful in the field of infringement of intellectual property rights".

236. There has been much discussion during the hearing of this case about the suitability of *Norwich Pharmacal* orders. The plaintiffs submitted that in previous years they had sought and obtained *Norwich Pharmacal* orders against copyright infringers and indeed had brought a number of High Court actions against such infringers. The plaintiffs' position however was that the legal costs involved in bringing such applications were enormous and utterly disproportionate to the financial returns from such applications. As a result the plaintiffs ceased bringing such applications because they were, quite simply, not worth the effort. That may well be so. However in this case the defendant has indicated that, if the plaintiffs wish to bring such *Norwich Pharmacal* applications, that it would consent to such applications and would provide the information under direction of a court order.

237. Moreover the evidence presented in this case, based on the plaintiffs' protocol with Eircom, shows that, although there is a considerable amount of copyright infringement taking place on the Eircom network, once specific subscribers receive the first letter indicating that they have been detected, this brings about a significant reduction in the numbers of such persons breaching copyright laws on the internet. Likewise the evidence from the Eircom protocol is that the numbers decrease even further once the second letter is received and indeed the numbers decrease even more once Eircom had reached the stage of suspension and termination. Indeed the evidence was that only a few customers of Eircom ever reached the termination stage.

238. I think it is reasonable to have regard to the experience of the plaintiffs with the Eircom protocol and to note that the sending out of the first and second letter brings about a significant reduction in copyright infringement.

239. I also think it is reasonable to surmise that once a subscriber receives a first, then a second, warning letter, and once the plaintiffs are then able to write directly to such subscribers pursuant to a Norwich Pharmacal order – that this will have the desired effect of reducing the amount of copyright infringements without the necessity for the plaintiffs to have to take expensive legal actions in respect of all infringers.

240. I would conclude therefore that the defendant's willingness to consent to Norwich Pharmacal orders is also an important element of the solution to the problem.

241. However I will hear further submissions from the parties on the exact interplay between the issue of an independent arbitrator and the issue of Norwich Pharmacal orders.

The injunction shall be fair and equitable

242. Any injunction which is to be granted by the courts must be "fair and equitable" under the terms of the directive. What is "fair and equitable" depends, of course, on all the circumstances of the case. In my view, in assessing whether it is fair and equitable to grant an injunction I must consider

- (a) whether it is fair and equitable in principle to grant such an injunction and
- (b) whether the allocation of costs of compliance with the injunction as between the parties is fair and equitable

Whether it is fair and equitable in principle to grant an injunction in this case

243. I am of the view that it is fair and equitable as a matter of principle to grant an injunction in this case in terms sought by the plaintiffs for a number of reasons as follows:

1. Both parties accept that there is wholesale theft of the plaintiffs' intellectual property rights taking place on the defendant's network. 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.
2. These intellectual property rights are constitutionally protected rights and therefore the breach of these rights is a breach of the plaintiffs' – and the artists' – constitutional rights. The creators have a constitutional right to be paid for the musical works which they have created by virtue of their own inspiration, sacrifice, and hard work.
3. The courts should not permit a party's constitutional rights to be destroyed in this way without taking steps to ensure that such rights are protected and vindicated.
4. Moreover, under EU law as implemented into Irish law, the various EU directives expressly permit the courts to impose injunctions on internet service providers such as the defendants even though the defendants are mere conduits.
5. Whilst it is true that the defendant is not carrying out the intellectual property piracy, nevertheless it is taking place on its network and to that extent the defendant is facilitating it. In addition although the defendant is not profiting from such illegal activity directly, it is nevertheless deriving revenues from subscriber usage on its network which includes illegal downloads.
6. In addition the defendant has a contract with each subscriber and the contract contains express prohibitions on customers engaging in IP infringements. Moreover the contract explicitly states that the defendant reserves the right to suspend or terminate a customer's contract for such infringements. The customer has agreed to these provisions and has therefore taken the defendant's services on condition that they do not engage in such intellectual property infringements. Nevertheless the defendant has stated in evidence in these proceedings that it does not intend to take any action against its subscribers unless compelled to do so by court injunction or by legislation.
7. In the welter of all the technological evidence, it is important not to lose sight of the fact that the essence of the injunction which I propose to grant is that the defendant has to write two letters to offending subscribers who are in clear breach of their contract with the defendant. How the defendant chooses to implement that injunction is a matter for it. I have heard evidence that a "low tech" solution is not possible. If it were, the defendant could adopt it. I have also heard evidence that an automated solution is required. Again that is the defendant's choice. However if the defendant wished to adopt a stand alone system or an integrated system that is their choice.
8. It is unfortunate – and it is one of the factual complexities of this case – that the defendant's complex computer architecture means that it is an expensive process to build a new integrated computer programme to deal with this issue. However it is difficult to see – as a matter of principle – why this should prevent the plaintiffs from obtaining an injunction or prevent the court from granting an injunction. Indeed if that were so, it might create a perverse incentive for ISPs to build computer systems which were impervious to regulatory requirements. That cannot be correct as a matter of principle or as a matter of law.
9. If there were only minimal costs to the defendant in complying with such an injunction, I would have no hesitation in ordering such an injunction, because of all of the above facts. So the question of principle then becomes: if a Court would have no hesitation in granting an injunction if the costs were minimal, should a Court refuse an injunction because the costs of compliance with such an injunction in this case are of the order of €800,000 to €960,000.
10. In my view, it should not. To refuse an injunction for this reason would mean in effect that, although the plaintiff's constitutional rights are being infringed, they cannot protect these rights because of the configuration of the defendant's computer systems and the costs of developing a software programme to deal with this problem. That cannot be correct as matter of principle. Moreover, to some extent, the fact that the cost of compliance is so high is because matters have been allowed to get this far and the wholesale theft of the plaintiffs' intellectual property rights has gone unchallenged by

the defendant in its relationship with its subscribers. In circumstances where it has in the past resisted all applications for injunctive relief brought by the plaintiffs, it cannot now argue that the cost of compliance imposes an unfair burden on them.

11. Moreover the defendant has accepted in evidence that developing an appropriate computer programme is absolutely achievable.

12. Therefore I would conclude that, in the circumstances of this case, and as between these plaintiffs and this defendant, it is fair and equitable, as a matter of principle, to grant an injunction sought against the defendant directing it to take the requisite steps to write to their subscribers informing them of the intellectual property infringements and asking them to cease and desist.

244. I have also considered the argument of the defendant that this is a matter for the legislature not for the courts. However I do not agree with that submission. Whilst a generalised response covering the entire industry might be a matter for the legislature, I have been asked to consider a specific dispute between particular parties to litigation and to consider a specific injunction in circumstances where the EU directives and implementing legislation permit the granting of injunctions in circumstances such as these.

245. It has been suggested by the defendants that this order will de facto (if not de jure) govern the entire ISP sector. I do not accept that this is so. I have only dealt here with the issues and costs as they arise between the parties to this litigation. Other parties might present different issues and different costs.

246. Moreover any submissions by the defendant in respect of the implementation or workability of such an injunction are manifestly unfounded in the light of their own witness who indicated that such a computer programme can definitely be designed and implemented.

Whether the allocation of costs of compliance with such an injunction are fair and equitable

247. In considering the question of whether the costs of compliance with such an injunction are fair and equitable, it is, in my view, reasonable to have regard to the provisions of the EU directive which expressly states that such injunctions are not to be "unnecessarily costly". As stated above, that carries within it, in my view, the necessary implication that some injunctions of their nature may be necessarily costly. However the directive, as a matter of statutory construction, permits injunctions which are necessarily costly. The only prohibition in the directive is that such injunctions should not be "unnecessarily costly".

248. As a general principle, the cost of compliance with a specific injunction granted by the courts under common law, or to restrain a breach of constitutional rights, nearly always, as a matter of course, has to be borne by the defendant. In the present case, given that such injunctions are permitted under European law there is nothing in the directives or indeed in the recitals to the directives to suggest that that normal rule should change in cases such as this. Indeed in my view, the directive means as a matter of statutory interpretation, that if a court orders an injunction, and such an injunction is necessarily costly, then the cost of compliance with that injunction must be borne by the person against whom the injunction is granted.

249. Mr McDowell S.C. submitted – and I believe, there is considerable strength in this argument – that internet service providers have been granted an immunity from liability under the mere conduit defence but in return the directive provides that they are amenable to court injunctions to take certain steps to protect the intellectual property rights of rights holders. Again this means as a matter of statutory interpretation that the defendant should bear the costs of such injunctions.

250. In addition the EU directives provide that the court shall only grant an injunction where it is fair and equitable to do so. This permits the court to consider, on the fact of each particular case, whether the costs of compliance with an injunction are fair and equitable and also to consider a fair and equitable sharing of the costs of compliance with such an injunction.

251. Moreover 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.

252. 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 Mr Bryan Brown's evidence – 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.

253. 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%.

254. 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.

255. 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.

256. 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.

257. This argument – that the defendant benefits through the inevitable enhancement of the attractiveness of broadband access from the availability of free music, film and TV 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.

258. 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.

259. 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. However I will hear further submissions on whether this should be paid over eight years at €20,000 per annum or over a shorter period.

260. 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.

261. 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.

262. 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.

263. 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 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.

264. If the plaintiffs move to 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.

265. Moreover, if an independent arbitrator is put in place the plaintiffs and defendant will have to share the cost of an independent arbitrator equally. That, in my view, is also fair and equitable.

REFERENCE TO CJEU

266. The defendant has submitted that I should refer an issue to the CJEU for a preliminary reference and I have considered that. However it is only appropriate to refer a question if it is necessary for the determination of an issue before the court. It is not clear to me what precise question, if any, I should refer. The directives and implementing legislation grant the courts the authority to issue injunctions against internet service providers; the directives and legislation also set out the criteria which the courts should consider in granting such injunctions; moreover the issue of costs is specifically dealt with in the directives where it is provided that injunctions should not be awarded where they are "unnecessarily costly". That means as a matter of statutory interpretation that if an injunction is "necessarily costly" it can still be imposed. The criteria for the granting of such injunctions also provide for a "just and equitable" criterion to do justice between the parties. The defendant has accepted in evidence that the computer programme is absolutely achievable. The evidence is that it is costly but necessarily so. The only question that remains is who should bear this cost. The defendants submit that it would be unfair and inequitable if it had to bear the whole cost. The defendant then submits that if that be so then it is a question of cost sharing and that it is then a question of deciding the relative percentage of costs each party should bear. The defendant suggests a 75% / 25% split in its favour. The plaintiff believes it should pay as little as possible. The question therefore of the relative percentage and what is just and equitable on the facts of this case seems to me to be a matter which a national court can decide without the necessity for a reference. I also note that in the directives they say that the modalities of such court injunctions are a matter for national courts. On balance therefore I do not believe that it is appropriate to refer a question to the CJEU on this point.

CONCLUSION

267. I would therefore propose to grant an injunction as sought by the plaintiff and I will hear the parties on the form of the order and the exclusions or safeguards on that order.

¹. References to "EMI v. UPC" in this Statement are references to *EMI Records [Ireland] Ltd & Ors –v- UPC Communications Ireland Ltd* [2010] IEHC 377.

