

HIGH COURT

BETWEEN:

Record No. 2019/5278P

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED

Plaintiff

- and -

EIRCOM LIMITED TRADING AS EIR

SKY IRELAND LIMITED

SKY SUBSCRIBERS SERVICES LIMITED

VIRGIN MEDIA IRELAND LIMITED

VODAFONE IRELAND LIMITED

Defendants

Judgment of Mr. Justice Robert Haughton delivered on 15 July 2019

1. This is the first time that this court is asked to make an order of this nature. The difficulty that gives rise to the present proceedings is the unauthorised live streaming of Premier League games which is causing considerable damage to the Plaintiff. Instead of watching Premier League games through legitimate and licensed services, some people are seeking to do so free of charge.

2. It is constructive to note what happened when a similar matter appeared before Mr Justice Arnold in the UK in *The Football Association Premier League Ltd v. British Telecommunications Plc & Ors* [2017] EWHC 480 (Ch) who, at paragraph 16, stated:

"...there is increasing evidence of football fans turning to streaming devices which access infringing streams as a substitute for paid subscriptions to services such as those offered by Sky and BT. This undermines the value of FAPL's rights and, if unchecked, is likely to reduce the revenue returned by FAPL to football clubs, sports facilities and the wider sporting community. An added concern is the availability of live streams of Premier League match footage during the Closed Period (as to which, see FAPL v Sky at [9]), which deters attendance at those matches."

3. Whilst the last condition may not have the same impact in this jurisdiction i.e. attendance at matches, the other factors are relevant. At paragraph 18, Arnold J stated:

"The streaming server is the crucial link in the chain by which an unauthorised copy of footage of a Premier League match is transmitted to the consumer. A single server may be accessed using a number of different user interfaces. For example, the same stream on the same server may be accessed via multiple apps, websites and add-ons for set-top boxes. If access to that server is blocked, all of those access mechanisms will be disrupted."

4. It would seem that the use of set top boxes is prevalent and the principal reason why the Plaintiff wants to block streaming servers. The reasons why blocking orders are now sought are set out at paragraph 24 of the judgment of Arnold J:

i) "The video monitoring technologies used by FAPL now permit the identification of infringing streams with a very high level of accuracy in close to real-time during Premier League matches. The servers from which such streams emanate can be notified to the Defendants nearly instantaneously."

ii) Advances in certain of the Defendants' blocking systems will allow them to block and unblock IP addresses during the course of Premier League matches, in some cases automatically."

In relation to (i) above, Mr. Newman S.C. stated to the court that identification can occur within minutes.

5. There are other advantages to such blocking orders:

(a) The list of target servers may be re-set.

(b) The order is for a limited period of time. The first order by Arnold J lasted for 2 months (this was all that was left of the Premier League season).

(c) Safeguards: there is notice to each hosting provider as well as obligations to ensure that there was correct blocking.

6. The evidence before the UK in relation to academic literature in the judgment of Arnold J (at paragraph 50) dealing with the effectiveness of such orders is also notable. This academic literature indicates that such orders reduced access to those sites by 90%, resulted in a decrease in overall piracy rates by 22% for users affected by the blocks and an increase in the consumption of legal content by between 6% (Netflix) and 10% (BBC and Channel 5).

7. It is clear from the affidavit evidence that it is anticipated that such an Order would have similar effectiveness in Ireland. Blocking streams is more effective and persuasive. Monitoring techniques have also improved considerably.

8. This court has the benefit of the blocking orders in the United Kingdom and their success. There is no reason to suggest that it would not be same in Ireland. This court has flexibility regarding the measures it may take to prevent copyright infringement. This is evident from the Court of Appeal judgment in *Sony Music Entertainment (Ireland) Ltd & Ors v. UPC Communications Ireland Ltd* [2016] IECA 231 where Hogan J helpfully identifies the appropriate remedies.

9. The main provisions are Article 8(3) of Directive 2001/29/EC which states:

"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."

10. The Defendants are in the position of intermediaries in this case.

11. Article 11 of Directive 2004/48/EC ("IP Enforcement Directive") states:

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

12. The last limb of Article 11 is precisely the point in the present case. Article 11 is supported by Recital 23 of the 2004 Directive which states:

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

13. At paragraph 47 of the Court of Appeal's judgment, Hogan J referred to *UPC Telekabel Wien GmbH* (Case C-314/12). This case concerned two film production companies who sought an order from the Austrian courts to block access to a particular website. There was a preliminary reference to the Court of Justice. One of the questions referred by the Austrian courts was whether an order of this kind was compatible with Article 8(3) of the 2001 Directive. This question was answered in the affirmative by the Court of Justice who held at paragraph 48 of its judgment:

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

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

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

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

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

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

14. Accordingly, in this case, whilst the remedy may not be 100% successful, this is not relevant as long as the remedy is persuasive.

15. At paragraph 65 of his judgment, Hogan J set out the relevant test for blocking injunctions. Whilst this test was set out in a somewhat different context concerning music rights, it is relevant. Hogan J stated for an injunction to be established, it must be:

(i) necessary;

(ii) that the costs involved were not excessive or disproportionate and that the order itself should not be unduly complicated;

(iii) that the cost sharing proposals were fair and reasonable;

(iv) that the order respected the fundamental rights of the parties affected, including internet users and

(v) that the duration of the proposed injunction and the provisions for review were reasonable.

16. I am quite satisfied that:

(i) based on the evidence, it is necessary to make the blocking order.

(ii) absent of any blocking order, there will be continued abuse via illegal live streaming of Premier League games and the

blocking order is most effective and cost-effective;

(iii) whilst the Order is relatively complicated, it is logical with checks and balances.

(iv) No issue arises in relation to cost sharing.

(v) Fundamental rights: this is the case but I am satisfied regarding the notification requirements to third parties and they are given the opportunity to apply to court.

(vi) Duration: I am asked to approve an Order which states, in relation to "Expiry", *"This Order shall cease to have effect upon expiry of the final Match Period of the 2019/2020 Football Association Premier League competition season or further order of the Court."* That would mean that the Order would cover the commencement of the league in August 2019 to perhaps to May 2020. Proceedings would not continue and fresh proceedings would have to be issue for the next season. It is open to the Court to keep proceedings in being. Generally, proceedings should have finality but draw a distinction between normal proceedings and this case where there is a likelihood of an ongoing problem. In *Sony*, there was a review after 5 years. This case is different. However, as this is the first application of its kind, this Court should review any further Order to determine whether this Order is effective at the time of the next application.

17. I will therefore stay the proceedings, grant the Order sought to 30th June 2020, with liberty to the Plaintiff to apply on or before this date to renew the Order.