

# **THE HIGH COURT**

## **COMMERCIAL**

[2020 No. 6450 P]

**UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL**

**PLAINTIFF**

**AND**

**EIRCOM LIMITED T/A EIR, SKY IRELAND LIMITED, SKY SUBSCRIBERS**

**SERVICES LIMITED, VIRGIN MEDIA IRELAND LIMITED AND**

**VODAFONE IRELAND LIMITED**

**DEFENDANTS**

**EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 29<sup>th</sup>  
day of September, 2020**

### **Introduction**

1. The Plaintiff in these proceedings, UEFA, is one of six continental confederations for association football and is the governing body for association football in Europe. Its members consist of 55 of the national football associations of countries in Europe and Central Asia. It organises a large number of well-known European-wide club competitions, including the UEFA Champions League, the UEFA Europa League, the UEFA Super Cup, as well as well-known national team competitions, such as the European Qualifiers for the EUROs and the FIFA World

Cup and the EUROs themselves, as well as several other competitions, including the UEFA Nations League and friendlies.

2. In these proceedings UEFA seeks an injunction under section 40(5A) of the Copyright and Related Rights Act 2000 (the “2000 Act”), as inserted by the European Union (Copyright and Related Rights) Regulations 2012, requiring the Defendant internet service providers (ISPs) to block access to the IP addresses of servers which are being used, or which it is apprehended will be used, by non-parties for the purpose of making available to the public, the copyright works of UEFA without its consent.

3. The Defendant ISPs are what are described as “*mere conduits*” and it is not alleged that they have been guilty of any copyright infringement whatsoever.

4. The position adopted by the Defendants in the proceedings can be briefly summarised as follows. The 1st, 4th and 5th defendants, that is Eir, Virgin Media and Vodafone Ireland, are neither supporting nor opposing the application and are adopting a neutral position.

5. The 2nd and 3rd Defendants, namely Sky Ireland and Sky Subscribers Services, are supporting the orders sought by UEFA.

6. I have already dealt today with an application by the Plaintiff to enter the proceedings in the Commercial List. All of the Defendants consented to that application and, therefore, I made an order entering the proceedings in the List.

7. I also acceded to an application by the Plaintiff, to which all of the Defendants also consented, that the proceedings should be heard on affidavit and that I should dispense with the delivery of further pleadings. I made those orders and directions and have proceeded to hear the Plaintiff's application immediately

following the entry application.

8. I had the benefit of the papers being provided to me in advance and I have read the papers carefully before dealing with this application. I have been helpfully provided with detailed legal submissions which have made the delivery of this *ex-tempore* judgment a much easier exercise than might otherwise be the case.

#### **Relief Sought by UEFA**

9. As I have indicated earlier, the proceedings seek orders under section 40(5A) of the 2000 Act. Essentially the proceedings seek a “live blocking” injunction against the Defendant ISPs. It is the first time that UEFA has sought such an injunction in Ireland, but follows the making of similar orders by the High Court in Ireland on the application of the Football Association Premier League in *The Football Association Premier League Limited v Eircom & Others* [2019] IEHC 615 (“*FAPL1*”) in 2019, which order was extended by me in a judgment that I delivered on the 15th of June 2020, in respect of the balance of the games for the 2019/2020 FA Premier League season and for the 2020/2021 season: *The Football Association Premier League Limited v Eircom & Others* [2020] IEHC 332 (“*FAPL2*”).

10. Similar orders have been made in the Courts of England and Wales in favour of this Plaintiff (UEFA) and others in *Union Des Associations Européennes de Football v British Telecommunications Plc & Ors* [2017] EWHC 3414 (Ch) (Arnold J.). Like orders have also been made for boxing matches: *Matchroom Boxing Ltd & Anor v British Telecommunications Plc & Ors* [2018] EWHC 2443 (Ch) and *Queensberry Promotions Ltd v British Telecommunications Plc & Ors* (Order made by Arnold J. on 28 November 2018).

## Legal Principles

**11.** The law regarding web blocking or live blocking orders or injunctions in this jurisdiction is well established. There are several cases in which such orders have been made, in particular, *EMI v. Eircom* [2009] IEHC 411, *EMI v. UPC* [2010] IEHC 377, *EMI v. UPC* [2013] IEHC 204, *EMI v UPC* [2013] IEHC 274 *Sony v. UPC*, 2 December 2013, unreported, High Court, *ex tempore* judgment (Kelly J., in respect of the Kickass Torrent (KAT) website), *Twentieth Century Fox Film Corp & Ors v Eircom Ltd*, unreported, High Court, *ex tempore* judgment (Cregan J., in respect of the Movie4k, Primewire and Watchseries websites), *Twentieth Century Fox Film Corp & Ors v Eircom Ltd* [2018] IEHC 54 and *The Football Association Premier League Ltd v Eircom Ltd & Ors* [2019] IEHC 615 at paragraph 15.

**12.** The application of the relevant statutory provision, namely section 40 (5A) of the 2000 Act was comprehensively considered by the High Court and by the Court of Appeal in *Sony v. UPC* [2015] IEHC 317 and [2016] IECA 23, albeit in a slightly different context.

**13.** The comments by Hogan J. in the Court of Appeal in *Sony* were discussed and applied by Haughton J. in the *FAPL1* in 2019 (at paragraph 15 of that judgment) and that judgment was in turn approved by me in *FAPL2* in 2020 (at paragraph 8 of my judgment).

**14.** In summary, in order for the Court to grant a website blocking order, the Court must be satisfied of the following:

1. The Defendant ISPs' services are being used to infringe copyright;

2. The proposed order will have the effect of preventing or terminating that infringement. in that it at least makes it more difficult or discourages it;

3. The proposed order will not impose “*unbearable sacrifices*” on ISPs (to use the terminology used by the Court of Justice of the European Union in *UPC Telekabel Wien GmbH* (Case C-314/12) (Judgment delivered 27<sup>th</sup> March, 2014)); and

4. The proposed order will not unnecessarily deprive internet users of the possibility of lawfully accessing content online.

**15.** The issue of the cost of implementing and the cost of applying such an order is also addressed in the case law. However, those issues do not arise on the facts of this case.

**16.** The Plaintiff has helpfully provided a draft Order which Counsel has taken me through in the course of the application. The draft Order is worded in a similar manner to the Order which the Court granted in *FAPL1* and which was extended by me in my judgment in *FAPL2*.

**17.** I do note, however, that one of the confidential attachments, which is exhibited at confidential exhibit VK 4, renders the Order sought in this case more dynamic in line with the criteria set out earlier and the necessity for injunctions such as this to be effective in accordance with Article 3.2 of the IP Enforcement Directive 2004/48/EC, given that infringing servers that meet the criteria for blocking may be identified during the period of the relevant order.

18. My attention has been drawn to the judgment of Arnold J. in the High Court of England and Wales in the *Football Association Premier League Limited v. British Telecommunications Plc & Others* [2017] EWHC 480 (Ch) (“*FAPL(UK)*”). At paragraphs 10 *et seq.*, Arnold J. explained that the reason why orders are sought against streaming servers is because they constitute 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, web sites and add-ons for set top boxes. If access to that server is blocked, all of those access mechanisms will be disrupted".*

19. I completely agree. Those observations apply equally to the facts of this case.

20. As noted earlier, none of the Defendants are opposing the application. Two of them, namely the Sky Defendants, are supporting the application and the other Defendants remain neutral. However, nonetheless, the Court must still be satisfied that the order sought is lawful and that it is appropriate for the Court to grant the injunction sought.

### **Relevant Evidence**

21. Before considering the relevant statutory provisions and the circumstances in which the court will consider making an order of the type sought, it is appropriate to summarise briefly the evidence before the court which was

undisputed and which I entirely accept. That evidence is contained in the various affidavits before the court, including the affidavit of Seong Sin Han sworn on 8th September, 2020 on behalf of UEFA and the affidavits of Rebecca Elizabeth Stavrinou sworn on 8<sup>th</sup> September, 2020, Victor Kovner sworn on the same date, and Jiajun Chen sworn on 9th September, 2020.

22. The relevant evidence, which I accept, can be summarised as follows, as set out in those affidavits:

(a) As outlined in the affidavit of Mr. Seong Sin Han, UEFA's members consist of 55 national football associations of countries in Europe and Central Asia. The various UEFA club competitions are explained at paragraphs 8 *et seq* of Mr. Han's affidavit, including the UEFA Champions League, the UEFA Europa League and the UEFA Super Cup. The national team competitions are also explained in Mr. Han's affidavit which includes the UEFA European Football Championship ("EURO"); this is a tournament that ordinarily takes place every four years and is "*...one of the most viewed sporting events in the world*".<sup>1</sup>

(b) As outlined at paragraphs 30-32 of Mr. Han's affidavit, for club competitions, the rights cycle covers three football seasons,<sup>2</sup> with rights to broadcast live matches in Ireland awarded to RTÉ, Virgin Media Ireland Limited and British Telecommunications Plc ("BT"). At national team level, the rights cycle to broadcast live matches for the European qualifiers, the UNL and Friendlies covers a four-year term<sup>3</sup> and such rights are licensed to RTÉ, Virgin

---

<sup>1</sup> Para 24 of Mr. Han's affidavit.

<sup>2</sup> 2018/2019, 2019/2020, 2020/2021.

<sup>3</sup> 2019/2019, 2019/2020, 2020/2021 and 2021/2022.

Media Television Limited and SKY UK limited. The EURO is a final tournament, played over a 4-5 week period and the rights to broadcast live matches for the EURO in Ireland are licensed to RTÉ.

(c) The various copyright works owned by the Plaintiff are further set out in the affidavit of Mr. Han at paragraphs 33 *et seq*, including the copyright in the transmission to viewers of the Live Match Broadcast and the films comprising the title sequences, break bumpers, screen wipes, as well as certain recorded elements (for example, slow motion footage) in the Multilateral Feed and Unilateral Feed. Furthermore, each of the UEFA Competitions use Logos, Graphics and other uniform visual elements that are protected by copyright as original artistic works.<sup>4</sup> The Plaintiff is also the owner of the copyright in music recordings specially arranged and recorded for a number of UEFA competitions, including the famous (amongst football supporters) UEFA Champions League anthem.<sup>5</sup>

(d) UEFA competitions are hugely successful globally and in Ireland. For example, as set out at paragraphs 75-76 of Mr. Han's affidavit, it is estimated the 2019 UCL Final was watched by a global average TV audience of 74.7 million, with 161.3 million and 160.9 million TV viewers worldwide watching the 2017 and 2018 UCL Finals respectively. These figures do not take into account the number of individuals watching the UCL Finals by way of live streaming. Furthermore, in Ireland, it is estimated that 633,000 people in Ireland

---

<sup>4</sup> As set out in Exhibit SSH-3.

<sup>5</sup> See para 60 *et seq* of Mr. Han's affidavit.

watched the 2019 UCL final live. At national team level, the EURO competition is likewise very popular in Ireland as noted by Mr. Han at paragraph 80 of his affidavit. During EUROS in 2016, the group match between Ireland and Italy attracted 1.45 million viewers in Ireland, which made the match the most viewed programme on Irish television at that point.

(e) The harm caused by illegal online streaming is explained in Mr. Han's affidavit at paragraphs 82 *et seq.* As noted by Mr. Han, at paragraph 83, "*...the real time nature of live sport means that the primary value of UEFA Live Match Broadcasts is at the point in time when it is being broadcast.*"<sup>6</sup> The manner in which online illegal streaming operates is set out by Mr. Han, who notes the agility by which illegal streamers act and that, from the consumer's perspective, the quality and availability of unauthorized streams have "*markedly improved*" in recent years.<sup>7</sup> The methodology of how illegal streaming operates is further explained in the affidavit of Victor Kovner, with a helpful chart shown at paragraph 15 of the said affidavit.

(f) As averred at paragraph 125 of Mr. Han's affidavit, it is believed that each of the Defendants' services are being used by unauthorised streaming servers to make available the works to subscribers to the Defendants' services and thus infringe the Plaintiff's copyright works. The affidavit of Jiajun Chen exhibits at JC2, a confidential traffic analysis, which demonstrates such illegal activity in this jurisdiction.

---

<sup>6</sup> Emphasis added.

<sup>7</sup> Para 86.

(g) The duration of the proposed injunction would cover the UEFA EURO 2020 (taking place in 2021 due to the COVID-19 pandemic) and other Matches taking place during the entire 2020/2021 football season, including the UCL, UEL, UEFA Super Cup, the UNL and EQ for the FIFA World Cup.<sup>8</sup>

(h) Similar Orders have been obtained by the Plaintiff in the United Kingdom, with the most recent obtained in July 2019 for two footballing seasons. According to the affidavit of Mr. Han, the Orders have proven to be effective with no known instance of “*over-blocking*”.<sup>9</sup> The “*very low*” risk of over-blocking is further averred to in the affidavit of Ms. Stavrinou at paragraph 28. Ms. Stavrinou in her affidavit further sets out the difficulties with unresponsive service providers who are streaming illegal UEFA matches and the confidential process by which target servers are determined to be appropriate for blocking (at confidential exhibit RES 4).

23. That appears to me to be the principal evidence relevant to this application and, as I have indicated, I entirely accept that evidence.

#### **Relevant Legislative Provisions and Case law**

24. Section 17(1) of the Act provides that copyright is a property right and section 17(2) provides that copyright subsists in “*films*”, “*artistic works*” and a “*broadcast*”. A “*film*” is defined very broadly in the 2000 Act as “*a fixation on any*

---

<sup>8</sup> Para 129(d).

<sup>9</sup> Paras 131-136.

*medium from which a moving image may, by any means, be produced, perceived or communicated through a device*". "Artistic works" are defined broadly as *inter alia* drawings or similar works "*irrespective of their artistic quality*". Furthermore, a "broadcast" means, under section 2, "*an electronic transmission of sounds, images or data, or any combination or representation thereof, for direct public reception or for presentation to members of the public*".

**25.** Section 37(1)(b) of the 2000 Act provides that the owner of the copyright has the exclusive right to make available the work to the public, or to authorise others to do so.

**26.** Section 40 of the 2000 Act includes s. 40(1)(a), which is very clear that making copyright material available through the internet may only be undertaken with consent. It provides that the making available to the public of a work includes:-

*".... making available to the public of copies of the work, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of works through the Internet)."*

**27.** Section 40(1)(b), refers to "*performing, showing or playing a copy of the work in public*".

**28.** Section 40(5A) of the Act provides that:-

(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... applies.*"

(b) *“In considering an application for an injunction under this subsection, the court shall have due regards 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.”*

29. Article 8(3) of Directive 2001/29 provides that:-

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

30. Recital 59 of the Directive explains that:-

*“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, ..., 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 referring to such injunctions should be left to the national law of the member states.”*

### **Application of Legislative Provisions and Case law to the Facts**

31. I entirely accept that each of the Defendants is a “*mere conduit*” and as such they are not liable for any copyright infringement arising out of activities of their subscribers under Irish law implementing Directive 2000/31. An ISP, and the Defendants are ISPs, are subject only to the grant of the *sui generis* type of injunction sought by UEFA on this application.

32. The act of infringement in question is the illegal streaming of UEFA competition matches in this jurisdiction by third parties who are not authorised to do so.

33. In the *FAPL(UK)* judgment, Arnold J. in the High Court of England and Wales held that there was a communication to the public by target users which streamed unauthorised FA Premier League content for a number of reasons. In reaching that conclusion he made reference to various judgments of the Court of Justice of the European Union, including the judgment in *GS Media v. Sanoma Media Netherlands BV & Others* (Case C-160/15) (judgment delivered 8<sup>th</sup> September, 2016). The reasons for the conclusion reached by Arnold J. included the following:

- (i) Streaming involves an act of communication of copyright by electronic transmission to each user who accesses a streaming sever during a relevant match period;
- (ii) The operators of the target servers commit that act of communication because they intervene directly, and in full knowledge of the consequences

of their actions, to give access to the copyright works in circumstances where the users would not in principle be able to enjoy the works without that intervention;

(iii) The works are communicated to the public since the evidence showed that the streams are capable of being viewed by an indeterminate number of potential viewers and are in fact viewed by a large number of people;

(iv) Insofar as the streams are taken from a source which was originally delivered by cable or satellite broadcast, streaming is a different technical means which requires separate authorisation from the right holder;

(v) Even where the source is an internet transmission, the class of persons to whom the works are communicated constitute a “*new public*”, as they were not already taken into account when the plaintiff had authorised the initial streaming service.

**34.** I agree and accept that those reasons are relevant for the purposes of the present application.

**35.** As noted earlier, Hogan J. in the Court of Appeal in *Sony* set out the relevant test for blocking injunctions. That test was referred to and applied by Haughton J. in *FAPL1* and was followed and approved by me in my judgment in *FAPL2*.

**36.** The test was described by Haughton J. in *FAPL1* (at page 2 of the judgment) as follows:

*“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.”*

**37.** That is the test which I must apply on this application.

**38.** I am satisfied that the Order is necessary for the purpose of protecting the Plaintiff's copyright against infringement. I note from the evidence, and accept, that there has been a significant shift away from the use of websites in more recent years in favour of devices and apps, in particular, set top boxes that can be watched on televisions in people's living rooms. As noted by Mr. Han in his affidavit, UEFA matches are extremely popular in Ireland. The affidavit of Jiajun Chen provides a confidential traffic analysis which evidences the use of the Sky network by Irish viewers to watch online illegal UEFA content. It does not appear to be suggested, and it does not appear to be the case, that the position is any different for the other Defendants' networks.

**39.** Given the popularity and ease of use of the illegal streaming devices “ISDs”, the ability to watch illegal and unauthorised UEFA content in real time is understandably of significant concern to the Plaintiff. It is on this basis that the orders on this application are sought, as they are seen to be an effective method of

targeting that type of infringement and I entirely accept that that is the case.

**40.** The consequence of such illegal activity was explained by Arnold J. in the *FA Premier League* judgment, to which I have already referred, as follows. He stated:

*"This means that traditional blocking orders targeting web sites will not be able to prevent the growing majority of infringements because these devices do not rely upon access to a specific website in order to enable consumer to access infringing material. Instead such devices can connect directly to streaming servers via their IP addresses.*

**41.** Mr. Han notes at paragraph 83 of his affidavit that:

*"...if unauthorised streams are not removed immediately, or rapidly during the course of the Match, then the harm will already have been suffered by an unauthorised source of the content being available to consumers. By the end of the Match, the streams will have served their purpose, so removal post-match would carry no or, at best, very limited benefit."*

**42.** I accept that evidence. I next turn to consider the position of the rights of internet users. The draft Order, provided to the court, seeks to protect against "over-blocking" and the risk of "over-blocking" is described by Ms. Stavrinou in her affidavit as being "very low". That evidence was not disputed and I accept it.

**43.** Furthermore, paragraph 11 of the draft Order provides for a notification

requirement on the Defendants to their customers, with that notification being required to include a statement that affected users have the right to apply to the court to discharge or vary the order. Permission to apply to the court is also afforded under paragraph 18(d) of the draft Order and that permission is given to the Defendants' customers.

**44.** I am satisfied that, on the evidence, the rights of internet users are respected and that the Order proposed by the Plaintiff respects the fundamental rights of the parties affected, including internet users.

**45.** It is next necessary to consider the duration of the proposed Order and that is something that is again dealt with in the terms of the draft Order itself and in the evidence. The draft Order which the Plaintiff asks the Court to make, provides that if the Order is made the proceedings will be stayed until the 31st of July 2021, or the day after the last match period of the 2020/2021 UEFA competition season, whichever is the later. It seems to me that the duration of the proposed Order, which is consistent with the orders made in *FAPL1* and *FAPL2*, is sufficient and reasonable in all the circumstances.

**46.** I should also say, as I noted myself in my judgment in *FAPL2*, that an Order such as is sought by the Plaintiff in this case is consistent with the case law of the Court of Justice of the European Union and, in particular, with the judgment of that court in *Spiegel Online v. Beck* (C-516/17) (judgment delivered 29<sup>th</sup> July, 2019), in that the Order seeks to strike a fair balance between the respective rights and interests of the Plaintiff and of the internet users. I am satisfied, on the basis of the evidence, that the Order sought in this case does strike such a fair balance.

**47.** As regards the other two elements of the test set out by Hogan J. in *Sony*

and referred to by Haughton J. *FAPL1* and by me in *FAPL2*, namely, that the costs involved in complying with the order must not be excessive or disproportionate and that any cost sharing proposals provided for be fair and reasonable, those issues do not arise for consideration on the facts of this case.

### **Conclusion**

**48.** Having carefully considered all of the evidence and the extremely helpful submissions made by counsel for the Plaintiff and the reasonable and entirely appropriate stance adopted by the Defendants, it seems to me that the Order which the Plaintiff seeks in this case is clearly appropriate. I am satisfied that it will not impose any undue burden on the rights of internet users and will only impose a burden on the Defendants which is appropriate and proportionate.

**49.** In those circumstances, having considered the terms of the draft Order which I propose attaching as Appendix 1 to this judgment, I am satisfied that it is appropriate to make the Order sought in the terms proposed.