

HIGH COURT

COMMERCIAL

BETWEEN:

Record No. 2020/6450P

UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL

Plaintiff

- and -

**EIRCOM LIMITED TRADING AS EIR
SKY IRELAND LIMITED
SKY SUBSCRIBERS SERVICES LIMITED
VIRGIN MEDIA IRELAND LIMITED
VODAFONE IRELAND LIMITED**

Defendants

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 14th Day of July, 2021:

Introduction

1. This is an application by the plaintiff, UEFA, pursuant to paragraph 9 of an Order that I made on 29th September 2020, for a further order extending the “live blocking” injunction previously granted and further staying the proceedings until the 31st of July 2023, or the day after the last match period of the 2022/2023 UEFA competition season, whichever is the later.

2. I made the previous Order on 29th September, 2020 (the “2020 Order”) and set out my reasons for doing so in a judgment which I delivered on the same date: *Union des Associations Européennes de Football v Eircom Ltd & Ors* [2020] IEHC 488 (“*UEFA1*”). In that judgment I set out in some detail the background to the application made at that stage by

UEFA. I set out the relief sought, the relevant legal principles, the statutory principles involved and the test which the court had to apply on an application for a “live blocking” injunction. As I noted in *UEFAI*, considerable assistance was to be derived from the judgment of Hogan J. in the Court of Appeal in *Sony Music Entertainment (Ireland) v UPC Communications Ireland Ltd* [2016] IECA 231 (“*Sony*”) and from the judgment of Haughton J. in the High Court in *The Football Association Premier League Ltd v Eircom Ltd & Ors* [2019] IEHC 615 (“*FAPLI*”). I then considered the evidence that was adduced for the purposes of UEFA’s application, and explained how I believed that the evidence was sufficient to satisfy the test for the grant of a “live blocking” injunction in this jurisdiction under Irish and EU law.

3. The 2020 Order was expressed to last until the 31st of July 2021 and made express provision for a review of the Order and its effectiveness. What is now sought by UEFA is an extension of the 2020 Order and, as part of that application, I am asked to consider the effectiveness of the Order.

Position of the Defendants

4. The position of the named Defendants, who are all internet service providers (“ISPs”) and are *mere conduits* for the purposes of both Irish and EU law, is set out below. It is not alleged that any of the named Defendants have been guilty of any copyright infringement whatsoever.

5. The position of the Defendants is that three of the Defendants - namely, Eircom, Virgin Media and Vodafone Ireland - have remained neutral in respect of the application to extend the 2020 Order on the terms sought by UEFA. The position of the two Sky Defendants is that they support the making of the Order and do not oppose the terms of the Order put in draft form before the Court by UEFA. As I have had cause to mention in some

of the earlier judgments I have given in similar applications, that is a reasonable, responsible and appropriate position for the Defendants to take in respect of the application.

Changes to the 2020 Order

6. The Order which UEFA seeks is worded in very similar terms to the 2020 Order. There is really only one substantive change which is sought to be made, and that is that the term of the extension being sought is effectively two years, rather than one year i.e. UEFA wishes to extend it to the 31st of July 2023, at the latest. As we will see when we come to the evidence, the reasons for the extension sought are set out very clearly in the grounding affidavit sworn by Mr. Simon Lloyd Parry on behalf of the Plaintiff.
7. There are a couple of other minor amendments to the Order sought, and to the draft Order, which has been provided to the Court and they were mentioned in the course of submissions by Mr. Newman S.C. The first amendment is on page 2 of the draft Order i.e. the reference to "*subscription television channel*" is to be changed in that the reference to "*subscription*" is to be taken out from paragraph 2(a)(ii). The second minor change is that there is to be provision made, in the event of any update to Schedule 1 of the draft Order providing for the match periods and game periods covered by the Order, that after the updated copy of that Schedule is provided to the Defendants, then a copy should be filed with the Registrar and placed on the Court file.
8. The significant change sought is that the term of the Order is longer than the term of the existing Order. It is said that the 2020 Order was in dynamic form (which means it was in a form which was capable of being adapted and updated to address any developments taking place during the course of the term of the Order) and that it has operated effectively for a year without any known instance of over-blocking. Over-blocking is where access to legitimate services are interfered with by the terms of the Order. The issue of over-blocking is addressed in the evidence put before the court for the purposes of this extension application.

9. Mr. Parry has also explained that two year “live blocking” orders have been made by the courts of England and Wales, including on applications made by UEFA, and, therefore, it is suggested that the Court should not have any concern with the two years extension sought as part of this application. It is averred also that a two-year term would reduce costs and associated court time and would not lead to any risk of prejudice to the Defendants or to any other interested party and I take that also to include legitimate internet users. It is also averred that the extended duration of two years is appropriate in circumstances where the Order in *UEFAI* is now bedded down and has applied in this jurisdiction without incident or complaint.

10. It is noted that the 2020 Order also made provision for liberty to or permission to apply, and for an application to be made for an “emergency brake” on the operation of the Order, and that none of that has had to be operated in the one year term in which the existing 2020 Order has been in existence.

Relevant Legal Principles: “Live Blocking” Injunctions

11. The relevant legal principles and the test which the Court has to apply on an application for a live blocking order are now well established in this jurisdiction. I summarised them in the judgment I delivered in *UEFAI*, and I did so by referring to the earlier judgment of Hogan J. in the Court of Appeal in *Sony* and the judgment of Haughton J. in the High Court in *FAPLI*.

12. Essentially the test requires the applicant for a “live blocking” injunction to establish that:

- (i) the order sought is necessary;
- (ii) the costs involved are not excessive or disproportionate and the orders made are not unduly complicated;
- (iii) the cost sharing proposals (if any) are fair and reasonable;

- (iv) the orders respect the fundamental rights of the parties affected, including internet users, and I also include in that regard the rights of the Defendants themselves as internet service providers; and
- (v) the duration of the proposed injunctions and the provisions for review are reasonable.

13. I note that while some concerns were expressed by Hogan J. in *Sony* as to the provision for review of “live blocking” injunctions, I do not believe that those concerns have any real application in this case. The order made by the High Court (Cregan J.) in *Sony* provided for a review after five years. In the appeal, Hogan J. was, I think, concerned that the position might not be seen to be sufficiently certain for the parties if it was open to review in five years’ time. He felt that provision for liberty to apply in the event of any significant changes ought to be sufficient. However, I think, that in the context of this case there is already express acknowledgment in the case law that a review is something which can be appropriate in orders such as this. That was acknowledged by Hogan J in *Sony* itself, by Haughton J. in *FAPL1* and indeed by me in my judgment in *The Football Association Premier League Ltd v Eircom Ltd & Ors* [2020] IEHC 332 (“*FAPL2*”) and in my judgment in *UEFAI* where it was said that reviews can be very useful.

14. I think, therefore, that the provision for review, certainly in the case of a review after one year, and particularly where that review involves the Court considering the effectiveness of the operation of the Order and its capacity to address illegal streaming activities taking place, and the need, perhaps, to adjust or adapt the measures to be put in place to deal with such illegal streaming activities, is entirely appropriate in an Order such as this.

15. I will come in a moment to whether a review after two years might also be appropriate, but I can perhaps assure the parties at this point that my conclusion is that such a review in two years’ time is something which I believe to be reasonable and appropriate in the

particular circumstances of this case, having regard to the evidence that has been put before the Court and taking into account the appropriate concerns raised by Hogan J. in *Sony*.

16. The relevant authorities and statutory provisions, as I have mentioned, have all been addressed in *UEFAI* and I do not propose to repeat them here. There have been no relevant changes, as far as I am aware and as far as the parties to these proceedings are aware, to either the statutory provisions, whether in Irish law or in EU law, or to the applicable legal principles in the period since my judgment in *UEFAI*.

Relevant Evidence

17. I will refer briefly now to the evidence that the Plaintiff has put before the Court in support of the application and I do so noting that there are no substantive changes to the terms of the Order, save for the fact that it is sought for a two year period rather than a one year period.

18. As noted by Mr. Parry in his affidavit of the 15th of June 2021, sworn for the purpose of grounding the present application, the Plaintiff relies on the affidavits which were before the Court in respect of the application which led to the 2020 Order. They include an affidavit of Mr. Seong Sin Han (sworn on 8th September 2020), an affidavit of Mr. Victor Kovner (sworn on 8th September 2020), an affidavit of Ms. Rebecca Stavrinou (sworn on 8th September 2020) and an affidavit of Mr. Jiajun Chen (sworn on 9th September 2020).

19. In addition to those affidavits, on which the Plaintiff relies in support of this application, the Plaintiff also relies on Mr. Parry's affidavit, to which I have just referred, on another affidavit sworn by Ms. Stavrinou, who is an Anti-Piracy Compliance Manager at OPSEC Online Limited and an affidavit of Mr. George Demetriades who is a lead data analyst at Friend MTS Limited.

20. It is unnecessary for me in terms of the evidence to go through the background to the application - that is all something that I addressed and considered in *UEFAI* - but what I do

think is important is that I refer to why it is said by the Plaintiff that the Order has been effective, why it is necessary for it to be extended and why it is necessary for that extension to be for a period of two years.

21. At paragraph 14 of his affidavit, Mr. Parry notes that following the making of the 2020 Order, the Plaintiff and its agents have been able to identify and successfully block access to a large volume of unauthorised streams during UEFA match periods throughout the 2020/2021 competition season. In support of that averment, Mr. Parry refers to Ms. Stavrinou's second affidavit, which was sworn for the purposes of this application. At paragraph 14, Ms. Stavrinou states:

"During the period between 29 September 2020 and 17 May 2021, Opsec Online has detected 90,948 infringements during Match Periods across 2,415 unique IP addresses. This means that on average 204 infringing streams were detected per UEFA-organised Match. On average each IP address was notified to the ISPs. On average each IP address was notified to the ISPs for blocking for 2.6 consecutive Game Periods."

22. As I have noted, the Defendants are ISPs. Clearly, there is a vast amount of infringing streaming going on and the extent of such infringing streaming being detected on foot of the 2020 Order and otherwise is very significant.

23. Having referred to and relied on Ms. Stavrinou's second evidence, Mr. Parry also refers to paragraph 15 of Ms. Stavrinou's affidavit where Ms. Stavrinou states that: *"These figures represent a substantial volume of infringement which was successfully blocked during the term of the 2020 Order and this indicates that the 2020 Order has been effective."* I fully agree with and accept that evidence and there is no contradictory evidence before the Court.

24. At paragraphs 15 to 17 of his affidavit, Mr. Parry addresses the question of over-blocking. Over-blocking is something that the Court will always be concerned about in an

application such as this. The Court will be concerned to ensure that the order is appropriately framed so as to minimise the risk of such over-blocking and, where it occurs, to ensure that there are mechanisms in place to address it. Mr. Parry deals with this at paragraphs 15 to 17 of his affidavit. His evidence is also supported by the other affidavit evidence before the Court and, in particular, by the affidavit of Mr. Demetriades (in particular, at paragraph 35 of that affidavit).

25. At paragraph 15, Mr. Parry notes that representatives of UEFA's legal team and its legal representatives, including Mr. Parry, contacted the representatives of the Defendants who are responsible for implementing the 2020 Order, with a view to ascertaining whether there have been any difficulties in relation to the operation of the Order and in relation to the operation of the blocking process more generally.

26. It would appear from the contacts made that the processes for notifying, implementing and de-notifying IP addresses for blocking under the 2020 Order have and continue to operate smoothly. Mr. Parry continues by stating that representatives of the Plaintiff, including Mr. Parry himself, have spoken with representatives of the Defendants to enquire whether there have been any complaints received from customers which might be attributable to the implementation of the 2020 Order or whether they or their customers have any concerns about the issue of over-blocking.

27. Again, it would appear from those enquiries, and having regard to the contacts with the Defendants' representatives, that neither the Plaintiff nor any of the Defendants have received any complaints from the Defendants' subscribers, or from any third party, to the effect that the operation of the 2020 Order has resulted in over-blocking or, in particular, has resulted in the blocking of lawful content.

28. Mr. Parry has also considered the position with the relevant appointed agents of the Plaintiff. They were formerly Opsec Online Limited, of which Ms. Stavrinou is a

representative, and are now Friend MTS Limited, a company of which Mr. Demetriades is the representative. They have all confirmed to the Plaintiff that they too are unaware of any instance of over-blocking during the course of the 2020/2021 competition season and have not received any complaint in response to any notification sent on foot of the 2020 Order. Similarly, Mr. Parry says that neither he nor any of his colleagues in UEFA have been contacted with any complaint about over-blocking.

29. Therefore, the evidence put by the Plaintiff before the Court is that there have been no issues in relation to over-blocking; that if there have been any concerns, they have not been expressed by the Defendants or by the Defendants' subscribers and that the experts engaged by the Plaintiff as part of the process have not come across any evidence of over-blocking. I should add that Mr. Demetriades avers at paragraph 35 of his affidavit that, having reviewed the evidence provided by the previous agent, Opsec Online Limited, and having conducted a further audit of infringing streams from which the Target Servers list is gathered, it is his opinion that the target servers are being used for the sole or dominant purpose of streaming UEFA content or other commercial broadcast content which appears to infringe the rights of third parties and are not being used for any lawful purpose.

30. Mr Demetriades also states that the processes of, and safeguards adopted by, the previous agent ensured that the risk of over-blocking is reduced as much as practicably possible, such that there is no evidence that he has seen to date of over-blocking as a result of the implementation of the 2020 Order and, in his view, the risk of lawful material being blocked remains very low.

31. He further avers that based on his review of the evidence, in particular the affidavit and the material put forward by Ms. Stavrinou, it appears to him that the 2020 Order has been effective to date in blocking infringing streams of UEFA match footage.

32. What is particularly significant here to my mind is the fact that the evidence all points one way, not only in terms of the effectiveness of the Order, but also in terms of the absence of any issue in relation to over-blocking and the steps taken to minimise significantly the risk of lawful material being blocked. I accept that on the evidence such risk is, and remains, very low.

Application of the Relevant Principles

33. The issue I have to consider now, based on the fact that the case law remains the same and the legal principles remain the same, is whether or not it is appropriate, on the evidence just summarised, for me to continue the Order. I have set out above the test which the Court has to apply.

34. I am satisfied that the Order sought is necessary. I am also satisfied that the period of the Order ought to be the two-year period requested, and I will deal with that issue specifically in a moment. The question of costs and cost sharing proposals do not arise in this application. Nobody has suggested that the costs are disproportionate or excessive, or that there are cost sharing proposals which are not fair and reasonable.

Extension of Order for Two Years

35. I am also satisfied that an order in the particular terms sought, namely, an extension for two years, respects the fundamental rights of the parties affected, including internet users, and the legitimate rights of the Defendants as ISPs. I am satisfied that the duration of the proposed Order, in its extended form, is reasonable, and that the provisions for review are reasonable also. I note, in that regard, that the Order contains a number of provisions for liberty or permission to apply, which are to be found at paragraphs 16 and 22, and provides extensive provisions for an “emergency brake” to be applied in specified circumstances, and that is to be found at paragraph 17 of the draft Order.

36. As regards the appropriateness of granting the Order for the two-year period sought, I am satisfied that the evidence establishes that such an extension is appropriate. This issue is specifically dealt with by Mr. Parry at paragraphs 20 to 23 of his affidavit. He notes at paragraph 20 of his affidavit that while the original Order was granted for a one-year period to cover one UEFA competition season, the Plaintiff is seeking a two-year term for the extended Order until the end of July 2023 to cover two UEFA competition seasons.

37. Mr. Parry gives four reasons for this. He says first: *“the process of identifying and notifying Target Servers for blocking is now well established.”* He refers back to paragraphs 15 and 16 of his affidavit, where he said that as far as he has been aware, and as far as anyone can establish, there have been no incidents of blocking of legitimate content; nor have there any complaints in relation to the blocking process. He asserts that: *“It is a robust process which involves ongoing communication between the Defendants and the Plaintiff (and its agents) in order to address any issues or concerns as soon as possible.”*

38. Second, Mr. Parry states that *“...despite the 2020 Order, there remains a clear need for continuing relief of the kind sought and that need is likely to continue for at least the next two years.”*

39. Third, he states, in his belief: *“...that having a two-year term would reduce costs and associated court time, without any risk of prejudice to the Defendants or any other interested party.”*

40. Fourth, he states *“It is not anticipated that there will be any material change in circumstances over the period of the next two UEFA competition seasons which would require any alterations to the proposed Order”.*

41. Mr. Parry draws attention to the fact that the existing 2020 Order includes provision for permission to apply, so that any problems that may arise during the term of the extended Order sought can be quickly brought to the Court's attention.

42. I entirely accept that those four reasons put forward by Mr. Parry justify the making of an Order in the terms sought and, in particular, justify making an Order for the two-year period sought by the Plaintiff. I am also comforted by the fact that that is a view that has also been adopted by the courts of England and Wales, where blocking orders have been granted for two-year periods, including on an application made by UEFA.

43. I am quite satisfied that it is appropriate, proportionate and cost effective to have a blocking Order made in respect of the two-year period sought. It seems to me that it does satisfy the requirement of the test that the duration of the Order and the provisions for review be reasonable, and as I have indicated earlier, it seems to me that the review period is appropriate in the particular circumstances of this case. I accept the reasons that Mr. Parry put forward to the effect that the two-year period is appropriate and that the provision for applications being made within that period deals with any legitimate concerns that any interested party may have. I do not believe that the existence of such a period of review on the particular facts of this case give rise to any concerns as to the certainty of the legal position of the parties. In those circumstances, it seems to me that the concerns expressed by Hogan J in *Sony* do not apply on the particular facts of this case. Any concerns that the parties have in relation to the operation of the Order can be addressed in accordance with the terms of the Order, and, as I have mentioned, the relevant paragraphs are 16, 22 and 17 of the Order.

44. I am, therefore, satisfied that the term of the extended Order sought is appropriate.

Relevant Changes to UEFA Competitions

45. I should also say and just for the sake of completeness, that there have been some changes to the UEFA competitions in the period since I made the Order and in particular, a new competition is sought to be included within the scope of the Order. That is the prestigious UEFA Europa Conference League competition and the match schedule which will

be attached to the Order will now include references to the matches in the UEFA Europa Conference League. Necessary adjustments also have to be made to the copyright works protected by the Order as a result of the inclusion of this new competition.

Conclusions

46. For the reasons I have set out in this judgment, I am satisfied that it is appropriate to make the Order sought by the Plaintiff. I will, therefore, extend the Order that I made on 29th September 2020 in the terms of the draft Order provided to the court, with the minor adjustments which I have indicated in the course of this judgment. I will also stay the proceedings further until the 31st of July 2023, or the day after the last match period of the 2022/2023 UEFA competition season, whichever is the later.