

LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS
INTELLECTUAL PROPERTY
TECHNOLOGY AND INNOVATION

Winning Whack-A-Mole – Getting an ISP Blocking Injunction in Ireland

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Recent decisions of the Irish courts show that Ireland, as a jurisdiction, is capable of responding efficiently to the changing landscape of internet copyright infringement and providing just and effective remedies to copyright holders.

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The enforcement by copyright holders of their rights against unauthorised streaming sites has been compared to the fairground game of Whack-A-Mole. Each time a copyright holder might get an injunction against an infringing server or streaming site, another will simply pop up somewhere else. The solution is a blocking injunction.

The blocking injunction has been invoked a number of times in Ireland, and its use as a remedy against stream hosting servers was recently revisited by Barniville J in the Commercial Court in [UEFA v Fircom Limited & Ors](#).

DEVELOPMENT OF ONLINE STREAMING

Online streaming has developed in recent years in line with how we consume media, moving beyond just websites to phone apps and specific devices through which users can watch illegal streams on their TVs. These devices can connect directly to streaming servers via their IP addresses, without accessing a specific site or sites. As a result, the economic harm being caused by illegal streams and its impact on rights-holders continues to grow. This is especially true for live sports events, as their value is concentrated in the live broadcast. The traditional blocking order for a website can no longer prevent mass infringement, making blocking injunctions against servers an increasingly critical tool for a copyright holder in the digital age.

It is now widely accepted that unauthorised streams of content are acts of communication to the public under the Copyright and Related Rights Act 2000, even where the source of the unauthorised stream is a separate, authorised stream that has been hijacked by the infringer and made available for free.

A PRINCIPLED BUT FLEXIBLE APPROACH

In the *UEFA* decision, Barniville J granted an injunction requiring eir, Sky, Virgin Media and Vodafone to block access to the IP addresses of a list of servers which were being used, or it was apprehended would be used, to make an unauthorised free stream of UEFA football matches available to the public. The application was not opposed by any of the ISP defendants. The injunction will remain in place for the duration of the entire 2020/2021 football season, specifically covering the UEFA EURO 2020 (taking place in 2021 due to the Covid-19 pandemic), in addition to other matches taking place during the season.

The judge noted that blocking injunctions against servers have been granted by the courts in the UK, and he entirely accepted the evidence that they did not result in so called "over blocking", and were a proportionate limitation to the freedoms of internet users.

In granting the injunction, Barniville J set

out the reasons why a blocking injunction should be available to copyright holders, and the test that ought to be applied to determine if one should be granted:

- the granting of the injunction must be necessary;
- the costs involved must not be excessive or disproportionate and the order itself should not be unduly complicated;
- the cost sharing proposals should be fair and reasonable;
- the order must respect the fundamental rights of the parties affected, including internet users; and
- the duration of the proposed injunction and the provisions for review must be reasonable.

THE PRACTICALITIES

1. The process for applying for a blocking injunction is now well established with a clear test in place for potential applicants to gauge their likelihood of success before initiating the application.
2. ISPs rarely oppose blocking injunctions, and as was the case in *UEFA*, may in some instances support the application where their interest as a television provider aligns with that of the copyright holder.
3. An application for a blocking injunction may be entered into the Commercial Court and heard very quickly, as was the case in *UEFA*, where Barniville J accepted the application to the Commercial Court, heard the full application and gave his judgment all in the same day. Further, the application was heard on affidavit meaning there was no requirement for the applicant to give evidence in person.
4. The High Court in the *UEFA* case, and also in another recent case, *Football Association Premier League Limited v Eircom & Others*, gave an order that was flexible enough to ensure that the list of target servers could be amended, and thus the injunction could be applied to future servers who infringed UEFA's copyright in the same way as those in existence at the time of the application. This means that each time a new infringing server pops up, the copyright holder does not have to apply for separate relief, saving time and costs – essentially ensuring that the copyright holder can actually win the Whack-A-Mole game of online streaming, at least for the duration of the injunction.

We would like to thank Isabel Cooke, trainee, for her contribution to this article.

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