

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC2A 1NL

Date: 13 March 2017

Before :

MR JUSTICE ARNOLD

Between :

**THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED**

Claimant

- and -

(1) BRITISH TELECOMMUNICATIONS PLC

Defendants

(2) EE LIMITED

(3) PLUSNET PLC

(4) SKY UK LIMITED

(5) TALKTALK TELECOM LIMITED

(6) VIRGIN MEDIA LIMITED

Ian Mill QC (instructed by **DLA Piper UK LLP**) for the **Claimant**

Jaani Riordan (instructed by in-house solicitors) for the **First, Second, Fourth and Sixth
Defendants**

The **Third and Fifth Defendants** did not appear and were not represented

Hearing date: 8 March 2017

Judgment Approved

MR JUSTICE ARNOLD :

Introduction

1. The Claimant (“FAPL”) is the governing body of the football competition known as the Premier League (“the Premier League”). FAPL owns the copyright in films comprising television footage of all Premier League matches, and in artistic works which appear within that footage. The Defendants are the six main retail internet service providers (“ISPs”) in the United Kingdom. By this claim FAPL seeks an injunction against the Defendants pursuant to section 97A of the Copyright, Designs and Patents Act 1988 (“the 1988 Act”), which implements Article 8(3) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”), requiring the Defendants to take measures to block, or at least impede, access by their customers to streaming servers which deliver infringing live streams of Premier League footage to UK consumers.

2. In some respects the application is similar to one by FAPL which led to a blocking order being made in respect of a website known as FirstRow Sports for the reasons I gave in *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch), [2013] ECDR 14 (“*FAPL v Sky*”). The application differs in a number of respects, however, and in particular in that it is directed at streaming servers rather than a website. This is the first time that such an order has been sought in respect of streaming servers.
3. Although FAPL is formally the only applicant, the application is supported by the following other rightholders:
 - i) British Broadcasting Corporation and BBC Worldwide Ltd;
 - ii) DFL Deutsche Fußball Liga GmbH;
 - iii) Liga Nacional de Fútbol Profesional;
 - iv) The Football Association Ltd;
 - v) The Scottish Premier League Ltd;
 - vi) The Football League Ltd;
 - vii) England and Wales Cricket Board Ltd;
 - viii) PGA European Tour;
 - ix) The Professional Darts Corporation Ltd; and
 - x) Rugby Football Union.
4. On 8 March 2017 I made an order substantially in the terms which had been agreed between the parties (“the Order”). This judgment contains my reasons for doing so.

The law

5. The law with respect to the making of website blocking orders under section 97A of the 1988 Act is now fairly well established. It has recently been reviewed by the Court of Appeal in the closely related context of the making of blocking orders under section 37(1) of the Senior Courts Act 1981 and Article 11 third sentence of European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (“the Enforcement Directive”) in *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658, [2017] Bus LR 1. Further background is contained in my judgment at first instance in that case ([2014] EWHC 3354 (Ch), [2015] Bus LR 298), and in the case law referred to therein. I shall take that material as read.

FAPL and its rights

6. I described FAPL and its rights in *FAPL v Sky* at [8]-[13]. Since then, there have been certain changes. In particular, the Clean Live Feed for each match is now recorded prior to onward transmission and so the FAPL now claims copyright in those films. In

addition, FAPL now claims copyright in new logos and graphics referred to as the Logos and Dixonbaxi Graphics. I am satisfied by the evidence filed by FAPL that copyright subsists in the various copyright works relied upon by FAPL (“the Works”) and that FAPL owns those copyrights. The other point to note is that the value of FAPL’s rights has increased yet further, being licensed for £1.7 billion annually in the UK alone.

The Defendants

7. The Defendants are not merely ISPs. Some of them have an interest in the subject-matter of FAPL’s rights. More specifically:
 - i) The First Defendant (“BT”) is one of two exclusive licensees of broadcasting and internet transmission rights for Premier League footage in the UK.
 - ii) The Second Defendant (“EE”) is a wholly owned subsidiary of BT.
 - iii) The Third Defendant (“Plusnet”) is also a wholly owned subsidiary of BT. It has not previously been the subject of an order under section 97A, but has similar blocking technology to BT and EE.
 - iv) The Fourth Defendant (“Sky”) is the other exclusive licensee of Premier League footage in the UK.
 - v) The Fifth Defendant (“TalkTalk”) retransmits licensed channels containing Premier League footage to its subscribers.
 - vi) The Sixth Defendant (“Virgin”) likewise retransmits such channels to its subscribers.
8. FAPL’s application is supported by BT, EE, Sky and Virgin, who have appeared by counsel for that purpose. BT, Sky and Virgin have also filed evidence in support of the application. In addition, Plusnet has confirmed in writing that it supports the application. TalkTalk does not support the application, but it has confirmed in writing that it does not oppose the application. All of the Defendants have been involved in negotiations over the terms of the Order, with the result that the wording of the Order was agreed. Since the Order affects third parties who are not before the Court, however, counsel for FAPL rightly accepted that the fact that the making of the Order was either supported or not opposed by the Defendants did not absolve the Court from the responsibility of considering whether the Order was justified.

Confidentiality

9. Both FAPL on the one hand and BT, Sky and Virgin on the other hand have sought confidentiality in respect of both parts of their evidence and parts of the Order. In the case of the evidence, confidentiality is claimed on two main grounds. The first is that some of the evidence reveals commercially sensitive information concerning such matters as the impact of live streaming on FAPL and the resources deployed by some of the Defendants to implement blocking measures. The second is that disclosure of some of the evidence would facilitate infringement of FAPL’s rights and/or circumvention of the Order. In the case of the Order, confidentiality is claimed on the

second ground. Originally FAPL's claim to confidentiality was cast too broadly, but at the hearing FAPL narrowed that claim. I am satisfied that, as recast and subject to one point addressed below, the claim to confidentiality is well founded. Accordingly, the Order contains certain confidentiality provisions, and in particular an order under CPR rule 31.22, in respect of the confidential parts of the evidence.

Background to the present application

10. This application seeks to combat the growing problem of live Premier League footage being streamed without the consent of FAPL (or its licensees) on the internet. Since *FAPL v Sky*, this problem has been exacerbated in five main ways.
11. First, consumers are increasingly turning to set-top boxes, media players (such as the popular Amazon Fire TV Stick) and mobile device apps to access infringing streams, rather than web browsers running on computers. This means that traditional blocking orders (targeting websites) 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 consumers to access infringing material. Instead, such devices can connect directly to streaming servers via their IP addresses.
12. Secondly, the skill and effort required to find and use such devices and apps to access infringing content has fallen dramatically. Devices such as set-top boxes and media players are easy to connect to domestic televisions. Software to access suitable streams (in particular, software known as Kodi together with third-party add-ons) has become much easier to find and install. Indeed, it is increasingly easy to purchase set-top boxes and other devices which are already loaded with such software. Moreover, sources of infringing content often update automatically.
13. Thirdly, it is now possible to access a large number of high-quality infringing streams of footage of each Premier League match.
14. Fourthly, there is evidence that, regrettably, a significantly higher proportion of UK consumers believes that it is lawful to access unauthorised streams using such devices and software than believes that it is lawful to access unauthorised content via file-sharing websites.
15. Fifthly, the streaming servers used to make available infringing streams to the public have increasingly been moved to offshore hosting providers who do not cooperate with rightholders' requests to take down infringing content either at all or in a timely manner. A timely response is important in the case of Premier League matches because, to be effective, any intervention must occur during the course of a match. The operators of streaming servers regularly change the IP addresses from which the servers operate.
16. As a result of these factors, 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.

17. Four main elements are required to stream live content to consumers: (i) a source feed of infringing footage (typically sourced from a cable or satellite decoder box which is being used to receive a licensed service, whether transmitted by Sky or BT in the UK or by another FAPL licensee outside the UK); (ii) a platform to manage distribution of the footage; (iii) a streaming server hosted by a hosting provider which actually transmits copies of the footage; and (iv) a user interface which a consumer can use to access one of those copies.
18. 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.
19. It is for the reasons explained above that FAPL seeks to block access to streaming servers used to deliver infringing streams of Premier League footage to UK consumers.

The Order

20. Confidential Schedule 2 to the Order sets out a list of IP addresses of the servers (“the Target Servers”) access to which the Defendants are required by paragraph 1 of the Order to block or attempt to block in the first instance. The list of Target Servers has been compiled in two stages. First, a contractor engaged by FAPL has monitored infringing streams during a number of weeks of the current Premier League season using proprietary video fingerprinting technology. In this way a large number of IP addresses at which infringing streaming servers were located have been identified. As noted above, it was found that many of the IP addresses change periodically, although the rate at which this occurs varies.
21. Secondly, FAPL has identified a subset of infringing streaming servers which should be blocked. The three criteria for selection are set out in Confidential Schedule 3 to the Order. These criteria are intended to focus the Order upon the more egregious infringers. FAPL, supported by BT, EE, Sky and Virgin, requested that these criteria all be kept confidential, because if they were made public it would make it easier for the Order to be circumvented. I agree that one of the criteria should not be made public for that reason. (For the same reason, the list of Target Servers is confidential, because someone in possession of the list could work out the confidential criterion.) I do not accept that the same applies to the other two criteria, which it is the public interest for me to describe. First, FAPL and its contractor must reasonably believe that the server has the sole or predominant purpose of enabling or facilitating access to infringing streams of Premier League match footage. Secondly, FAPL and its contractor must not know or have reason to believe that the server is being used for any other substantial purpose.
22. The two-stage exercise described above was repeated shortly before the hearing on 8 March 2017, so as to produce an up-to-date initial list of Target Servers.

23. The Order differs from those previously granted in respect of websites in four other important respects as well.
24. First, the Order is a “live” blocking order which only has effect at the times when live Premier League match footage is being broadcast. This is possible because of two technological advances:
 - 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. If this process is automated, or if manual supervision can be provided at the relevant times, that would mean that blocking can be responsive to changes in the IP addresses being utilised by the operators of streaming services at the times when blocking is most needed to protect the rights in question. It would also mean that blocking need not occur outside of match times.
25. Secondly, although it is standard practice for orders under section 97A to enable the IP address or URL of the target website to be updated as and when necessary, the Order provides for the list of Target Servers to be “re-set” each match week during the Premier League season. This allows for new servers to be identified by FAPL and notified to the Defendants for blocking each week, and ensures that old servers are not blocked after the end of a week unless they continue to be observed as sources of infringing footage.
26. Thirdly, the Order is only for a short period. It comes into force on 18 March 2017. This is to give the Defendants time to get ready to comply with it (although two of the Defendants are permitted a little longer under the terms of the Order). It will only endure until 22 May 2017, which is the end of the 2016/2017 Premier League season. The short duration of the order is intended to enable an assessment of its effectiveness, and of any issues encountered, with a view to FAPL applying for a similar order to cover the 2017/2018 season, with any changes that may seem appropriate in the light of this season’s experience.
27. Fourthly, in addition to the safeguards which have become standard in section 97A orders, the Order requires a notice to be sent to each hosting provider each week when one of its IP addresses is subject to blocking. Furthermore, the hosting providers and the operator of any website or streaming service claiming to be affected by the Order are given permission to apply to set aside or vary the Order as well as the operators of the Target Servers and any customer of the Defendants who claims to be adversely affected by the Order.

Jurisdictional requirements

28. Section 97A of the 1988 Act empowers the High Court “to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright”. In order for this Court to have

jurisdiction to make the Order, four matters must be established. First, that the Defendants are service providers. Secondly, that users and/or the operators of the Target Servers infringe FAPL's copyrights. Thirdly, that users and/or the operators of the Target Servers use the Defendants' services to do that. Fourthly, that the Defendants have actual knowledge of this.

Are the Defendants service providers?

29. It is well established that the Defendants are service providers within the meaning of regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

Do the operators and users of the Target Servers infringe FAPL copyrights?

30. FAPL contends that the operators and users of the Target Servers infringe its copyrights in a number of ways. I accept this, for the following reasons.
31. *Copying by users.* In the course of streaming the Works, users who access a stream cause their computer, mobile device or set-top box to create copies of the Works in the memory of those devices. In some cases, a substantial part of a Work may be copied in a single frame (for example, a Logo). In the case of films of matches, copying of a substantial part is very likely to occur if users stream footage of any appreciable segment of the match. Such copying obviously takes place in the UK insofar as users are located in the UK.
32. *Communication to the public by operators.* Operators of Target Servers which stream the Works communicate the Works to the public for the following reasons.
33. First, streaming involves an act of communication of the Works by electronic transmission to each user who accesses a streaming server during a relevant match period: see Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [EU:C:2013:147], [2013] FSR 36 at [26] and [35] and Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76], [2015] EMLR 5 at [17]-[20].
34. Secondly, the operators of the Target Servers commit that act of communication because they intervene deliberately, and in full knowledge of the consequences of their actions, to give access to the Works in circumstances where the users would not in principle be able to enjoy the Works without that intervention: see Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [EU:C:2016:221], [2016] Bus LR 1231 at [35]. The process of setting up a streaming server and configuring it to (i) interface with a streaming platform, and (ii) connect to, and copy, a source feed with Premier League footage are conscious steps that must be taken by the operators.
35. Thirdly, the Works are communicated to the public since the evidence shows 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: see *GS Media* at [36].
36. Fourthly, 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 rightholder: see *ITV* at [24]-[26] and

[39]. Needless to say, FAPL has not authorised any of the operators of the Target Servers. Nor have Sky or BT.

37. Fifthly, even where the source is an internet transmission, the class of persons to whom the Works are communicated is a “new public” which was not already taken into account by FAPL (or Sky or BT) when they authorised the initial communication to the public of their work in the form of broadcasts and specific transmissions to authorised users of paid streaming services: see *Svensson* at [24]-[31]. Plainly, in delivering services such as BT Sport, Sky Sports or NOW TV to paying subscribers, Sky and BT have not taken into account that the works so broadcast or transmitted would be made freely available to all internet users by means of the Target Servers. Doing so would naturally be prohibited by their terms of use, and would require circumvention of the measures used to protect content delivered via these means (for example, conditional access, encryption, and usernames and passwords), which together restrict access to paying customers: cf. *GS Media* at [50]. Generally speaking, the operators of the Target Servers are not merely linking to freely available sources of Premier League footage. Even if in some cases they do, the evidence indicates that they do so for profit, frequently in the form of advertising revenue, and thus are presumed to have the requisite knowledge for the communication to be to a new public: see *GS Media* at [51].
38. Sixthly, these acts of communication to the public are targeted at the public in the UK and, as such, are to be regarded as taking place here. This conclusion is supported by a number of factors:
- i) A very substantial volume of traffic from BT, Sky and Virgin, who are the three largest UK ISPs, has been recorded from these servers during Premier League match times. The extent of these spikes in traffic, the closeness of their correlation with each scheduled match, and the absolute volume in terms of raw bandwidth consumed, are only consistent with large numbers of consumers obtaining Premier League content from these servers.
 - ii) The traffic spikes are sustained throughout the period of each Premier League match. By and large, the bandwidth (and therefore interest) lasts for precisely the same period as the match, with an immediate drop-off thereafter. Deliberate consumer activity of this kind is strongly indicative of the fact that a substantial proportion of the relevant UK public regards the Premier League content on these servers as directed to and meant for them.
 - iii) The only other spikes in UK traffic that have been observed have occurred during the broadcast of other sporting events on subscription TV (such as World Championship Darts and the English Football Championship), all of which would also be of interest to viewers in the UK.
 - iv) While it is not possible to know what the overall traffic is to the Target Servers worldwide, it is reasonable to assume that traffic of this magnitude accounts for a substantial proportion of all communications with the Target Servers.
 - v) In many cases, the channels being offered on the Target Servers reproduce licensed UK subscription channels that carry Premier League content, which are themselves deliberately targeted at UK consumers.

- vi) Where the streams are embedded into websites, they commonly have advertising targeted at UK consumers.
39. *Accessory liability of the operators.* The operators of the Target Servers authorise copying by their UK users for similar reasons to those given in respect of the operators of the target websites in cases such as *FAPL v Sky*. In the alternative, they are liable as joint tortfeasors, again for similar reasons.
40. *Future infringements.* As with all orders under section 97A, the Order aims to restrain future infringements of FAPL's rights. This is in accordance with Article 8(3) of the Information Society Directive and Article 11 of the Enforcement Directive: see Case C-324/09 *L'Oreal SA v eBay International AG* [2011] ECR I-6011 at [144].

Use of the Defendants' services

41. It is clear that the Defendants' internet access services are used to commit the infringements referred to above, since they play an essential role in enabling users to access the Target Servers and thereby obtain copies of the Works: see Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [EU:C:2014:192], [2014] Bus LR at [30]-[32]. Further, there is specific evidence of large volumes of access to the Target Servers by which Premier League material is transmitted by customers of at least three of the Defendants (BT, Sky and Virgin). It may be inferred that the customers of the other three Defendants also access the Target Servers in the same way.

Actual knowledge

42. The Defendants have actual knowledge of the infringing use of their services as a result of detailed pre-application correspondence, monitoring some of the Defendants have themselves carried out, notices sent by the Premier League, and more recently service of the application and accompanying evidence.

Should an order be made?

43. The correct approach to the question of whether, assuming that jurisdiction is established, the Court should exercise its discretion to make an order was considered by the Court of Appeal in *Cartier* at [103]-[129]. Although there are a number of factors to be considered, the overriding question is whether the Order is proportionate having regard to the competing rights of those affected by it.

The comparative importance of the rights engaged and the justifications for interfering with those rights

44. This requires the Court to consider the comparative importance of, and the justifications for interfering with, FAPL's copyrights on the one hand and the Defendants' freedom to carry on business and internet users' freedom to impart or receive information on the other hand.
45. So far as FAPL's copyrights are concerned, for the reasons given above, it is clear that users and operators of the Target Servers are infringing those copyrights. FAPL has a legitimate interest in curtailing such activity. So do FAPL's licensees such as

BT and Sky. Moreover, as FAPL contends, given FAPL's role in supporting sport in the UK and given the substantial contributions made by FAPL and its licensees to the UK economy, there is a public interest in combatting infringements of its rights.

46. As to the Defendants' freedom to carry on business, the orders sought by FAPL would not impair the substance of this right. The orders would not interfere with the provision by the Defendants of their services to their customers. The orders would not require the Defendants to acquire new technology: they have (or are in process of acquiring) the requisite technology already. The main effect of the Orders would be to impose additional operating costs on the Defendants. There is a small risk of the Defendants being attacked either by hackers or by operators of the Target Servers, but in my judgment this risk is not a significant one. It is also true that there is a risk of reputational damage to the Defendants, particularly in the event of overblocking, but again I do not consider this risk a significant one. Overall, as counsel for FAPL submitted, the fact that five of the Defendants positively support the making of the Order is strong evidence that it will not impair their freedom to carry on business.
47. As for the freedom of internet users to impart or receive information, this plainly does not extend to a right to engage in copyright infringement. Since the Target Servers appear to be exclusively, or almost exclusively, engaged in infringing activity, at least during the periods in which the Order will take effect, the operators have no right which requires protection. Thus the only question is whether any lawful activity may be adversely affected. Given the targeted nature of the Order, and the safeguards built into it, that should not be the case. I shall return to this point below.

Effectiveness and dissuasiveness

48. FAPL contends that the Order will be effective and dissuasive in that it will substantially reduce infringements of FAPL's copyrights in the Works by UK consumers accessing the Target Servers. This contention is supported by a number of factors.
49. First, past experience suggests that blocking causes a material reduction in the number of UK users who access blocked websites: see for example the evidence reviewed in my judgment in *Cartier* at [220]-[236]. The same may be expected to be true of blocked streaming servers.
50. Secondly, recent academic literature supports this conclusion. For example, research by Brett Danaher, Michael Smith and Rahul Telang of the School of Information Systems, Heinz College, Carnegie Mellon University published in April 2016 (available via SSRN) concluded that blocking of 53 BitTorrent and online streaming websites as a result of orders of this Court in November 2014 reduced access to those sites by 90% from the UK, resulted in a decrease in overall piracy rates by 22% for users affected by the blocks, and increased consumption of legal content by between 6% (Netflix) and 10% (BBC and Channel 5).
51. Thirdly, as discussed above, blocking access to streaming servers is likely to be more effective than blocking websites which embed or link to streams from such servers both because streaming servers are the crucial link and because multiple websites typically embed or link to each server stream.

52. Fourthly, monitoring and blocking techniques employed by FAPL and the Defendants respectively have improved considerably since earlier blocking orders were made, in some instances because of improved automation and in other instances because of the investment of manual resources to carry out blocking at the relevant times. This makes it feasible to identify and block Target Servers much more rapidly than before, leading to the prevention of an even greater proportion of potential infringements.
53. Fifthly, there is reason to hope that blocking access to the Target Servers will help to educate UK consumers that accessing infringing streams is not a lawful or reliable way to access Premier League content.
54. While there is always the prospect that some users and/or operators will circumvent blocking, there is no evidence to suggest that the likelihood of this occurring will be any greater in the present case than in other cases.

Substitutability

55. In relation to the substitutability of other streaming servers for the Target Servers, counsel for FAPL pointed out that Advocate General Szpunar has recently concluded in Case C-610/15 *Stichting BREIN v Ziggo BV* [EU:C:2017:99] at [81] that the fact that websites other than the blocked website (in that case The Pirate Bay) could be used to infringe did not detract from the effectiveness of the blocking measure. While the judgment of the Court of Justice of the European Union is still awaited, this supports the approach to this question adopted by this Court and by the Court of Appeal in *Cartier*.
56. FAPL also relies upon the fact that the Order makes provision for the future detection and blocking of streaming servers which are used to stream Premier League content as well those comprising the initial list of Target Servers. This makes the prospect of consumers switching to other streaming servers less of a concern.

Alternative measures

57. FAPL contends that the available alternative measures are either ineffective or incomplete in addressing this problem. This contention is supported by the following points.
58. So far as takedown notices to streaming server operators and hosting providers are concerned, FAPL and its licensees have made extensive efforts to contact server operators and (where this fails) their hosts. While some of these notices are complied with promptly, many are not, either during a game or at all.
59. Almost all hosting providers used by streaming server operators are located offshore, and accounts are often registered anonymously, which makes it impossible or impracticable to pursue the primary wrongdoer. A substantial number of hosting providers refuse to take action based on notices sent on behalf of FAPL, and as discussed above it is to these providers that streaming server operators increasingly turn. Even if takedown notices are not completely ignored by a hosting provider, in many cases they will not be acted on quickly enough to be meaningful.
60. Takedown notices have also been sent to marketplace operators (such as eBay and Amazon) requesting removal of listings which advertise set-top boxes which are configured to access infringing material. However, sellers are becoming more sophisticated in how they market these products, making them harder to detect, and marketplaces often fail to remove listings when asked.
61. Licensees can sometimes identify the customer from which an infringing stream originates. If it is possible to identify that customer, their account may be terminated and legal action pursued. However, this takes time and will not usually be effective to interrupt a stream mid-way through a match.
62. Criminal prosecutions have been pursued against sellers of set-top boxes which are configured to access infringing material. However, it is often difficult to identify the individual who is responsible for an infringement, and the police are unwilling or unable to pursue every possible prosecution.
63. Having regard to the foregoing, I conclude that FAPL does not have available to it alternative measures to combat the infringements of its copyrights of which it complains which are as effective as the Order but less onerous.

Not unnecessarily complicated or costly

64. There is no suggestion by the Defendants that the Order is unnecessarily complicated or costly. As noted above, five of the Defendants positively support the Order while TalkTalk does not oppose it, and the terms of the Order were agreed. There is no order as to costs.

Avoidance of barriers to legitimate trade

65. FAPL contends, and I accept, that the targeted nature of the Order means that it avoids creating barriers to legitimate trade. The vast majority, if not all, of the content being streamed by the Target Servers during the relevant time periods infringes the

copyrights of FAPL or a third party. Even where streamed content is not Premier League content, the monitoring that has been carried out indicates it consists almost exclusively of commercial broadcast content such as other sports, films, and television programmes. In some cases the channel logo is blacked out — it is to be inferred by the streaming server operator — which is consistent with a conscious attempt to obscure the unauthorised status of the material. All of this material is, by its nature, of a kind in which copyright subsists. Its retransmission by streaming server operators is inherently likely to infringe the rights of third parties who own or license such material for broadcast, for the same reasons as those set out above. As stated above, a number of third party right-holders whose sports content is also carried on certain of the Target Servers have expressed their support for the application.

66. Further, because of the short lifespan and high bandwidth requirements of streaming servers, they are almost exclusively dedicated to the activity of streaming. In the experience of FAPL's expert witness, they are not used for other purposes such as hosting legitimate websites. He has not seen any examples during his monitoring of streaming servers also being used for other purposes such as operating websites. As he explains, there are both technical and practical reasons for this.
67. While it is theoretically possible that a certain proportion of streamed content may be non-infringing, the inference to be drawn is that such content is *de minimis* or at least very small. In any case, any interference with legitimate content would only be temporary due to the very short duration of each instance of blocking. As counsel for FAPL submitted, the opinion of Advocate General Szpunar in *BREIN* at [74]-[76] supports the conclusion that any such interference is justified by the protection of FAPL's rights.

Safeguards

68. As discussed above, the Order contains certain additional safeguards over and above those previously adopted in the context of website blocking. I would particularly highlight the short duration of the Order.

Proportionality

69. FAPL contends that, taking into account the considerations outlined above, the Order is proportionate. It does not impair the rights of the Defendants to carry on business. To the limited extent that it interferes with the rights of internet users to impart or receive information, the interference is justified by a legitimate aim, namely preventing infringement of FAPL's copyrights on a large scale, and it is proportionate to that aim: it will be effective and dissuasive, no equally effective but less onerous measures are available to FAPL, it avoids creating barriers to legitimate trade, it is not unduly complicated or costly and it contains safeguards against misuse. I accept this contention.

Conclusion

70. For the reasons given above, I concluded that the Court had jurisdiction to make the Order and that I should exercise my discretion to do so.