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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
[2023] EWHC 2252 (Ch)

No. IL-2023-000082

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 25 July 2023

Before:

MR JUSTICE MEADE

B E T W E E N :

SKY UK LTD

Applicant

- and -

BRITISH TELECOMMUNICATIONS PLC & ORS

Respondent

MR J RIORDAN appeared on behalf of the Applicant.

THE RESPONDENTS were not present and are not represented.

J U D G M E N T

MR JUSTICE MEADE:

- 1 This is an application in the context of a Part 8 claim seeking what is effectively an order under section 97A of the Copyright, Designs and Patents Act 1988. The applicant/claimant is Sky and the defendant/respondents are the usual ISP parties to this kind of order. As is normal, they have all been contacted and have not appeared to oppose the making of the order today.
- 2 The order sought has two elements, a dynamic block and a static block. Each of these, individually, is well preceded in decisions going back now over ten years in the case of the static blocking orders and, in many respects, the order sought today is a straightforward combination of those two types of orders. Because, in so many respects, what is sought today is on a well-trodden path I am not going to go through ticking boxes of all the elements of subsistence, infringement so on and so forth, but I record that I have read through the claimant's skeleton which covers those matters and have satisfied myself about them.
- 3 I do think it is appropriate to give some reasons in relation to the respects in which the orders sought today is different from what has come before. The significant difference, in my view, is that Sky seeks, in relation to the dynamic part of the order, to apply blocking measures at times and for periods of its choosing. The length of period and the amount of time that can be blocked per amount of calendar time is confidential (lest it facilitate evasion), and I will not state it in this judgment because I am sitting in open court.
- 4 This is quite a significant departure from previous orders which have been more specifically targeted at, particularly, valuable content in the nature of a particular sporting events and the like.
- 5 Under the proposed dynamic blocking approach, it would be Sky that chooses when to apply blocking measures, and for how long. The reason why this might be a potentially significant change is that it somewhat diminishes the amount of foresight that the court can use about the proportionality of the blocking. It might have, I was concerned, a slightly unpredictable effect or at least the capacity for an unpredictable effect. Without, as I say, going through the details of the periods permitted because they are confidential, I would be concerned about the effect that the new approach might have on the ISPs.
- 6 That concern in relation to the ISPs is, of course, very substantially ameliorated by the fact that they have not opposed this order and have been in dialogue with Sky and its experts about what is proposed. On the evidence I have seen, I am satisfied that they are not unduly concerned. Nonetheless, this is a new approach and there is always the risk of unforeseen consequences. I do think the proportionality analysis is different and merits comment because the blocking is not, in this instance, targeted at particularly valuable or notable content.
- 7 However, the fact that the blocking windows permitted are not around the clock and are to be targeted by Sky at its own election, and the fact that that will, in principle, allow Sky to deploy blocking windows against content which might, theoretically, at least be relatively banal, overlooks what I think is the totality of the picture which Mr Riordan, who appears for Sky, today explained to me.

- 8 In my view one has to have regard to the totality of Sky's investment and the very significant amounts that it has to pay for the right to broadcast the content that it does. Although the blocking is not necessarily to be directed to premium content, the goal of doing it is to protect that content and to protect the totality of Sky's investment in its broadcast business as a whole. If one sees it through that perspective the concern about proportionality is substantially addressed.
- 9 I also think it is an extremely important part of the picture that the research which has been done into the infringing content and the infringing operation of the targeted websites as a whole, has revealed that there is essentially no legitimate content on them at all, and they are almost entirely devoted to offering versions of Sky broadcasts. Indeed, insofar as there is any third-party content, the evidence I have seen satisfies me that that is almost certainly infringing third party rights, if not Sky's.
- 10 That remains, in my view, a critical part of the proportionality analysis. Additionally, I am satisfied on the evidence of Sky's expert and the submissions made to me on behalf of Sky today, that the risk of over blocking is negligibly small. Although the proportionality analysis is different, I think it is amply satisfied, and I am therefore prepared to make the order and change the approach of these orders to the extent I have indicated already.
- 11 The distinguishing feature of what is sought under this order is, as I have said already, that it would be entirely for Sky to decide where to direct the permitted blocking windows. It is to be hoped that all will run smoothly, and no problems will be caused either in terms of over blocking, although I have already concluded that is very unlikely, or causing a problem for the ISPs. Nonetheless, this is a new approach, and I think one must always proceed cautiously.
- 12 As I indicated in the course of argument, in my view, the way that caution should be expressed in the present application, is by granting the scope of relief Sky seeks, which is for the reasons I have already given justified, but for a significantly shorter period than the one year sought under the draft order that has been put before me. In a few months' time, it will be possible to review and more likely than not renew an order in this form with the benefit of some experience of how it works, and a report back, in particular, from Sky about the criteria that it has been applying to target the blocking windows to appropriate time windows.
- 13 Of course, the ISPs have the right under the order to apply anyway, but I think these kinds of orders must always be under court's supervision. Sometimes I make these orders for longer than their immediate predecessors, sometimes for the same amount of time. However, for reasons I have already given, I think a cautious approach in the current situation is to make the order for a relatively shorter time. In discussions with counsel who was able to take instructions during the hearing, that period will be four months from today.
- 14 My initial inclination had been to make it for three months, but it has been explained to me that there is some important premium content that tends to be broadcast at the end of the holiday, in other words, around about September/October. I accept the submission that it would be better to get past that and have the knowledge and understanding of how this order works, in such context before considering whether to renew the order in November.

CERTIFICATE

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This transcript has been approved by the Judge.