[IE] Court of Appeal dismisses appeal by ISP against court-ordered graduated response system for copyright infringement

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The Irish Court of Appeal has dismissed an appeal by the Internet service provider (ISP) UPC Communications Ireland Ltd (UPC) concerning the jurisdiction of the High Court to grant graduated response system (GRS) injunctions to support the enforcement by music companies of copyright infringements against ISPs subscribers. The term "GRS" refers to "types of steps which an ISP may be required to take against copyright infringers, ranging from warning letters at one [end] of the spectrum to orders blocking access to particular websites at the other".

The case originated in 2014 when music companies, Sony Music, Universal Music and Warner Music issued injunctive proceedings against UPC (now Virgin Media Ireland Ltd), seeking an order that UPC implement a graduated response system (GRS) in response to alleged copyright infringement as a result of illegal file sharing on the UPC network.

In March 2015, Justice Cregan in the High Court made an order compelling UPC, "a non-infringing intermediary ISP", to implement a form of graduated response system (GRS) within its network for the benefit of the relevant copyright holders Sony, Universal and Warner. The High Court GRS order is "a very detailed one but, in essence, the order requires UPC to send each relevant subscriber a 'cease and desist' letter upon receipt of notification of the first and second copyright infringement notifications which it receives from the rightholders." On receipt of the third copyright infringement notice, UPC is then obliged "to send the relevant rightholders a notification that the particular subscriber has been the subject of three such notifications." The rightholders are then "entitled to apply to court for an order terminating the subscriber's Internet broadband service." The GRS order further provides that "the rightholders are required to pay 20 per cent of any capital expenditure incurred by UPC with a cap of EUR 940,000 on each such expenditure." This was the first time that a court ordered or "common law" GRS had been imposed anywhere in European Union.

UPC appealed the decision, contending that the High Court had "no jurisdiction to make an order of this kind", and further submitted that "the order actually made is more appropriate to that of a specialist regulator vested with appropriate

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expertise and which is best placed to make policy decisions of this kind and that the order is not one which a court required to make judgments based only on legal rights (including equitable rights) and wrongs could appropriately make."

According to Justice Hogan in the Court of Appeal, the appeal presented "issues of enormous importance as far as the effective protection of copyright is concerned" and also raised "important questions concerning the jurisdiction of the High Court to grant injunctions and the inter-action national and EU procedural law".

Sony Music however argued that the effect of both Article 8 (3) of the Information Society Directive 2001/29/EC (as transposed into national law by S.I. No. 59/2012 - European Union (Copyright and Related Rights) Regulations 2012, and the enactment of the new section 40 (5A) of the Copyright and Related Acts 2000, is to grant such jurisdiction (see IRIS 2012-4/31).

The Court of Appeal agreed with Sony Music, stating that the effect of Article 8 (3) of the 2001 Directive, as transposed by s.40 (5A) of the 2000 Act), "certainly changed the substantive law in relation to injunctions" so far as Ireland is concerned. Justice Hogan stated that "[W]hile it is true that Article 8 (3) did not quite do so in express terms, a series of judgments of the CJEU ... has clearly confirmed that Article 8 (3) has had this effect by requiring national courts in appropriate cases to grant injunctions against non-infringing ISPs" (see for example, IRIS 2012-1/2).

The Court of Appeal pointed out that from a legal perspective UPC "has committed no legal wrong", stating that Section 40 (3) of the Copyright and Related Acts 2000 which corresponds to the parallel provisions of Article 12 of the 2000 Directive provides that "Member States shall ensure that ISPs are not liable for copyright infringement where they are the "mere conduit" of the internet service". Justice Hogan stated "[A]s a matter of general law the courts have no jurisdiction to grant an injunction against a defendant who has committed no cognisable legal wrong or where such a wrong is not threatened." Article 8 (3) of the 2001 Directive however states that "Member States shall ensure that rights-holders 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".

The Court of Appeal ultimately upheld the decision of the High Court. However, Justice Hogan did amend two aspects of the High Court order: the requirement for a five year review was removed from the order and the provision that UPC would not seek its costs with regard to any future Norwich Pharmacal applications (i.e. disclosure order) made on the foot of the information disclosed to rights holders under the GRS. The Court of Appeal's decision clarifies which steps the courts may require ISPs to adopt in order to assist rights holders in challenging online copyright infringement.

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Sony Music Entertainment (Ireland) Ltd., Universal Music Ireland Ltd and Warner Music Ireland Ltd v UPC Communications Ireland Ltd [2016] IECA 231

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