



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 22

A152/23

OPINION OF LORD SANDISON

In the cause

(FIRST) SKY LIMITED and (SECOND) SKY UK LIMITED

Pursuers

against

CHRISTOPHER AIRLIE

Defender

Pursuers: Tariq; Burness Paull LLP

Defender: Party

1 March 2024

Background

[1] The first pursuer is the holding company of the Sky group, a household name throughout the United Kingdom and indeed beyond. It is part of the largest media conglomerate in Europe, and an ultimate subsidiary of the US Comcast Corporation. The second pursuer, another company in the group, is in business as a provider of pay television satellite broadcast services to its subscribers amongst the British public, the content of which includes but is by no means limited to matches between top-flight clubs in the English and Scottish football leagues. It has over ten million such subscribers to those services.

[2] The defender is the owner of the Troll Inn, Dundee, and its licence holder and designated premises manager in terms of the Licensing (Scotland) Act 2005. The Troll Inn is part of a small parade of three commercial premises set down in a housing estate some distance to the north of Dundee city centre and not far inside the Kingsway ring road. It is sandwiched between the Arklay Street Mini Mart and an establishment bearing, in an equally self-explanatory manner, the name of “Mr Chippy”. It is a small bar (perhaps accommodating about thirty people before starting to feel crowded) and its principal decorative theme – as the name implies – consists of the display of a large collection of troll memorabilia, including statues, statuettes and photographs. Its location, facilities and ambience are not such as to attract the Bright Young Things of the city, nor yet its well-heeled bourgeoisie. Rather, it caters for a highly local and dedicated and mature clientele which, for one reason or another, tends to prefer a quiet drink or two in the company of the trolls to whatever other options might be available to it in the City of Discovery. The average number of patrons in attendance on any particular occasion is likely to amount to something in rather low double figures.

[3] What brings this modern-day David and Goliath into conflict before the court? The first pursuer owns the copyright in certain graphics which, by arrangement between the pursuers, are shown throughout broadcasts of football matches made by the second pursuer in the course of its business. The graphics in question can be broken down into two groups. Those in the first group are horizontally set out, and begin with the word “sky” in blue followed by the word “sports” in white on a red box background. Those words are either followed by nothing, or by “HD”, “football”, “main event” or “mix”, in each case in a slightly lighter blue than that used for “sky”. The second group is in grayscale, with three vertically-stacked lines of text. The first line is “sky sports” with “sky” in grey on a black

background and “sports” in black within a grey box. The last line is “LIVE” in grey on a black background. The middle line is either “football”, “main event” or “Premier League”, in the latter case with a depiction of a globe between those words, in each case in grey and within grey vertical and one lower horizontal line, on the same black background. Their appearance is such:

The logo consists of the word "sky" in blue lowercase letters, followed by the word "sports" in white lowercase letters inside a red rectangular box.The logo consists of the word "sky" in blue lowercase letters, followed by the word "sports" in white lowercase letters inside a red rectangular box, and the letters "HD" in blue uppercase letters to the right.The logo consists of the word "sky" in blue lowercase letters, followed by the word "sports" in white lowercase letters inside a red rectangular box, and the word "football" in blue lowercase letters to the right.The logo consists of the word "sky" in blue lowercase letters, followed by the word "sports" in white lowercase letters inside a red rectangular box, and the words "main event" in blue lowercase letters to the right.The logo consists of the word "sky" in blue lowercase letters, followed by the word "sports" in white lowercase letters inside a red rectangular box, and the word "mix" in blue lowercase letters to the right.



[4] The graphics are artistic works which undoubtedly qualify for copyright protection in terms of the Copyright, Designs and Patents Act 1988. The pursuers make no copyright claim extending beyond those graphics; in particular, neither of them claims to enjoy the copyright in the video or audio of the football matches over which the graphics are displayed during the second pursuer's broadcasts. It is obvious that the attractive force to viewers of those broadcasts consists in the content of the matches themselves rather than the opportunity to view the graphics. However, by consistent association of the first pursuer's graphics with the second pursuer's broadcasts, the benefit of copyright protection is, to some degree at least, in practice achieved for the whole package. There is undoubtedly a degree of contrivance in that commercially symbiotic arrangement, and the artificiality inherent in it is apt, like all artificialities, to bump up from time to time against the limits which reality imposes.

[5] The pursuers allege that the defender has shown the second pursuer's broadcasts of football matches, featuring the copyright graphics, on television screens at the Troll Inn

during the opening hours of the premises, or at least has authorised others to do so. In particular, they claim that he showed or authorised the showing of the SPFL match between St Mirren and Celtic on a television screen on 5 March 2023, that he showed the EPL match between Leicester City and West Ham on one screen on 28 May 2023, and the match between Everton and Bournemouth on the same date on another screen, and that he showed the EPL match between Brentford and Everton on one screen on 23 September 2023. The defender did not have the commercial subscription to the second pursuer's broadcasts which would have licensed the showing of the match broadcasts and thus the graphics displayed as part thereof. The pursuers seek declarator of the claimed copyright infringement, interdict against its repetition, an award of damages in respect of it, and orders enabling them to publish any decision of the court in their favour at the defender's expense.

[6] The defender denies having breached the first pursuer's copyright. He maintains that some of his customers bring their own electronic devices, such as mobile phones, tablets, laptops or computer monitors, to the Troll Inn and watch the second pursuer's broadcasts there on those devices, using an app ("Sky Go") authorised by it which permits them to view those broadcasts on any device in the company of family or friends. He claims that the matches in question were watched in that way by customers on monitors brought in by them, rather than on television sets provided by the bar. The pursuers maintain that that amounted to copyright infringement in any event, but despite some judicial encouragement did not seek to challenge the legal relevancy of the defences or seek summary decree, preferring to reserve their position on that issue until after proof before answer. The matter came before the court for such a diet of proof of two days' duration. The defender was

represented by agents and counsel at the earlier stages of proceedings, but was unable to afford their continued support, and prepared for and conducted the proof himself.

Relevant statutory provisions

[7] The Copyright, Designs and Patents Act 1988 provides *inter alia* as follows:

“16.— The acts restricted by copyright in a work.

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—

...

(d) to communicate the work to the public (see section 20);

...

and those acts are referred to in this Part as the “acts restricted by the copyright”.

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

- (a) in relation to the work as a whole or any substantial part of it, and
- (b) either directly or indirectly; and it is immaterial whether any intervening acts themselves infringe copyright.

...

20.— Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in—

- (a) a literary, dramatic, musical or artistic work,

...

(2) References in this Part to communication to the public are to communication to the public by electronic transmission...

...

26.— Secondary infringement: provision of apparatus for infringing performance, &c.

(1) Where copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for—

...

(c) receiving visual images or sounds conveyed by electronic means,

the following persons are also liable for the infringement.

...

(3) An occupier of premises who gave permission for the apparatus to be brought onto the premises is liable for the infringement if when he gave permission he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright.”

The Intellectual Property (Enforcement, etc.) Regulations 2006/1028 provide *inter alia* as follows:

“5. Order in Scotland for publication of judgments

In Scotland, where the court finds that an intellectual property right has been infringed, the court may, at the request of the pursuer, order appropriate measures for the dissemination and publication of the judgment to be taken at the defender's expense.”

The evidence

Pursuers' case

[8] **Karen Anderson** (59), a commercial policing operations manager for the second pursuer, provided a witness statement stating that the first pursuer was the owner of the copyright subsisting in the graphics in issue in the present case, they having been created by designers employed or engaged by the second pursuer and subsequently assigned to the

first pursuer. Sky Subscribers Services Limited entered into agreements with subscribers on behalf of the second pursuer and supplied them with viewing cards enabling them to decode satellite broadcasts. There were residential subscriptions which enabled services for domestic premises only, and commercial subscriptions which cost the subscriber considerably more in order to reflect the fact that the broadcasts were being shown to larger audiences for financial gain. For licensed premises, the cost of a commercial subscription was calculated according to the rateable value of the premises.

[9] In further examination-in-chief, Ms Anderson stated that she managed the second pursuer's day-to-day business operations to protect its legitimate customers by visiting commercial premises to see if they were showing content unlawfully. General market research intelligence would first be gathered about premises that might be showing the second pursuer's output, and then targeted investigation might be instructed. She could not say specifically how or why the Troll Inn had come under investigation.

[10] Commercial premises could obtain annual licences to show the second pursuer's broadcasts, or buy monthly permits which could be cancelled on thirty days' notice. The fees in relation to licensed premises were based on their published rateable value, with discounts available in certain circumstances, for example in very rural locations. Mr Airlie had until the end of 2022 at various times held both annual and monthly licenses for the Troll Inn, with the former having cost him about £915 per month and the latter about £1,400 per month. She was unable to confirm that those prices had been correctly calculated and had not herself addressed the question of what the current charges would be. She was aware of the existence of the Sky Go app, which was available as a free service to residential customers of the second pursuer, and enabled them to view its broadcasts on mobile phones or tablets when not at home. Although the app was not intended for use on televisions

away from home, and the app would not cast to devices other than that on which it was installed, she could not say that a technically-aware customer would not be able to arrange for the app's output to be displayed on a television.

[11] The Sky channel identifying graphic would be shown in the top right-hand corner of the screen when a match was being broadcast. Authorised commercial feeds also had an icon on screen demonstrating their authorisation. That icon had been missing from the matches upon which the investigators who visited the Troll Inn had reported, which chimed with the lack of a license being in force for those premises. The observations made by the investigators suggested that the feed at the Troll Inn was coming from either the Sky Go app or a separate pay-as-you-go residential customer service called Now TV. Both sources would result in the showing of an icon in the shape of a monitor at the bottom right-hand corner of the screen, and were otherwise indistinguishable.

[12] Ms Anderson was unable to say that the Everton versus Bournemouth match on 28 May 2023 which had been incidentally remarked upon by one investigator had been shown by the second pursuer rather than by another broadcaster, being able only to say that it would not have been shown by the second pursuer and also by another broadcaster.

[13] An order enabling the court's decision to be publicised at the defender's expense was helpful in protecting the first pursuer's copyright and operated as a deterrent; copyright abuse declined in areas where such publicity had occurred.

[14] In cross-examination, Ms Anderson stated that license charges to commercial premises reflected the benefits which could flow from showing the football matches to customers. Her view was that the Sky Go app permitted residential customers to view matches with friends and family, even in a public house, so long as what occurred was purely for private and personal purposes. She had not mentioned Sky Go in her witness

statement despite being aware that its permissible use was an issue in the case. She knew nothing about what a Sky regional manager might have said to Mr Airlie on the subject.

[15] Ms Anderson accepted that it was very difficult to differentiate by sight between a television and a computer monitor and was unable to identify monitors as distinct from flat-screen televisions in various photographs shown to her. In re-examination she made it clear that she did not regard any difference between monitors and televisions as relevant to the pursuers' case.

[16] **Alison Isabel McLean** (53), an investigation agent, provided a witness statement in which she said that she had been a police officer with Strathclyde Police and the Police Service of Scotland for 28 years and had then been an investigation agent for 6 years, with a role attending premises to determine whether the content of television broadcasts being shown was an infringement of copyright belonging to the first pursuer. On 28 May 2023 she visited the Troll Inn in that connection and observed a flat screen TV on a shelf located above a window to the right of the main entrance (viewed from inside the premises). There were about 13 people in the bar and she took, from its location and the interaction amongst them which she observed, that the bar served a local clientele who knew each other. On the TV above the window the second pursuer's broadcast on the Sky Sports Premier League channel of the football game between Leicester City and West Ham United was being shown. There was a rectangular box on the bottom right-hand side of the screen indicating that the program was being shown via Sky Go or Now TV. There were interruptions to the video feed due to buffering. She observed the channel identifier and the Sky Sports copyrighted graphics being displayed.

[17] Ms McLean also noted that there was another television behind the bar at the premises, which she believed was showing (without sound) a football match between

Everton FC and Bournemouth FC. As she had not been asked to investigate any unauthorised showing of that match, she did not closely observe what could be seen on that screen, concentrating on the showing of the match between Leicester and West Ham which she had been asked to investigate, and completing the contemporaneous report upon which she based her witness statement on that match.

[18] In further examination-in-chief, Ms McLean confirmed that the icon which would have shown that the feed on the game on which she was reporting was for an authorised commercial subscriber had not been present. She had concentrated on the game she had been asked to report on, and had completed her report on it within an hour or so of leaving the bar. She had not given any thought as to whether the screen she saw that game on was a television or a monitor.

[19] In cross-examination, Ms McLean confirmed her impression that the customers in the Troll Inn appeared for the most part to know each other. She could not comment on whether a television set would show buffering during a broadcast. The customers present were scattered through the bar and turning to watch the match, although she could not say exactly who was watching for how long, or whether some might have been looking generally in the direction of the screen without actually watching the game.

[20] In re-examination, Ms McLean stated that she had attended the bar alone, pretending to be an ordinary member of the public.

[21] **David Mackie** (63) gave a witness statement noting that he had worked as a private investigator for 8 years, having previously been a police officer for 30 years. On 23 September 2023 he attended at the Troll Inn with another investigator, Barry Kydd, and was present there for around 20 minutes. A large television, with a screen size of about 50 to 60 inches, was mounted on the wall above a window to the right-hand side of the bar's

entrance (viewed from the interior). It was showing a football match between Brentford FC and Everton FC, broadcast on "Sky Sports Main Event". The screen did not show the motif which would have indicated that the feed was being provided by an entity with a commercial subscription. The copyrighted graphic "Sky Sports Main Event" was present. There were ten customers present in the premises, half of whom were watching the match. There was a cable running from the television to a speaker, on top of which was a silver-coloured television box which was not Sky branded.

[22] In further examination-in-chief, Mr Mackie stated that he had been in the Troll Inn in his investigatory capacity on at least four or five previous occasions. He had been looking for television boxes or other equipment that could enable broadcasts to be shown, but had been given no particular reason as to why he had been asked to visit in September 2023. He had been sitting close to the screen and had had an unobstructed view of it. He had completed his report within a couple of hours of leaving the premises. On being shown CCTV footage of his September 2023 visit, he was able to identify himself and Mr Kydd. Most of the customers were looking at the screen for most of the time. Two standing at the bar had been glancing at it constantly. He had spoken casually to one customer about the game being shown. There had been a computer monitor behind the bar, but it was switched off.

[23] In cross-examination, Mr Mackie insisted that his evidence was truthful and accurate. He and Mr Kydd had been in the bar for roughly 20 minutes. If the CCTV material appeared to show otherwise, it was wrong. He was trained to make accurate observations. He had not been watching all the other customers constantly. The match he saw was being shown on a television. The icon which would have shown that the source of the feed was Sky Go was not present on screen. He was asked to look at various

photographs of what were said to be televisions and monitors, and gave his opinion on which was which.

[24] Mr Mackie's re-examination added nothing to what he had already said.

[25] **Barry David Kydd** (43) gave a witness statement in which he said that he had been a part-time private investigator for just over a year, being principally employed as a mental health peer support worker and previously having been a Sky TV installer. He had attended at the Troll Inn with Mr Mackie on 23 September 2023. He had seen two televisions, the first being the one in the location above the front window already described and the second facing the bar service area, which was turned off. He could see wiring running from the first television to a silver, unbranded set-top box on the same shelf. The television was showing a live match between Brentford FC and Everton FC bearing the "Sky Sports Main Event" copyrighted graphic. The on-screen motif which would have shown that the feed was from an authorised commercial subscriber was absent. There were ten customers in the bar, of whom six or seven appeared to be actively watching the game.

[26] In further examination-in-chief, Mr Kydd stated that the silver box he had seen looked like a satellite set-top box of some kind, but he could not say whether or not it was connected to the screen showing the match in question. It had been showing a green light, but the cabling was out of sight. He had not noticed the bar's CCTV equipment. The screen he had seen above the window was a television, although you could probably play computer content on it. It appeared to be a permanent feature of the bar. He could see it clearly, having been seated nearby. The screen size looked to be in the region of 47 to 50 inches. He had completed his report within a few minutes of leaving the premises. He had not timed himself entering and leaving the bar; if the CCTV recording showed that he and Mr Mackie had been in the premises for 16 minutes, that would be correct. He had

spoken to one customer about the match being shown; the customer had commented on Everton's surprisingly good performance given their recent form. Customers seated at other tables had also been watching the game, with others keeping an eye on it.

[27] In cross-examination, Mr Kydd stated that he had not seen a DVD player connected to the television above the window, but had not been looking out for one. Six or seven people (including himself and Mr Mackie) were actively watching the game. The two customers at the bar, also included in that number, had been less intently looking at it. He probably visited 50 or 60 bars a year in his investigatory capacity. He could not comment on the terms of use for the Sky Go app. He was shown photographs of screens and monitors and gave his opinion about which appeared to him to be which. He recalled that the television he had seen above the window was silver in colour, but was not sure about that. In re-examination, he identified a television shown in one of the photographs as being the one he had seen.

Defender's case

[28] **Christopher Airlie** stated that he had owned the Troll Inn since April 2001. It was a community public house with mostly regular, local customers. The premises did not enjoy a commercial subscription to the second pursuer's broadcasts.

[29] As to the events of 28 May 2023, Ms McLean had not stated where the 13 customers supposed to have been present were situated, or how many of them were watching the screen on which the match was being shown.

[30] Turning to the events of 23 September 2023, the football match between Brentford FC and Everton FC was shown on a monitor rather than a television and was being shown by use of the Sky Go app to which one of the bar's customers was a subscriber, and which

allowed such subscribers to watch the second pursuer's broadcasts with friends and family on any device and at any time or place. The two investigators' reports were inconsistent about how many customers were watching the match and how they were able to observe that, and their claim to have been on the premises for 20 minutes was irreconcilable with the CCTV footage Mr Airlie had of the day, which showed that the visit had lasted just under 15 minutes.

[31] Mr Airlie added in his oral evidence that he had asked the pursuers' solicitors about the permissible limits for the use of the Sky Go app, but had not had an answer even after he had chased up the matter. He had asked about where a monitor showing a Sky Go feed could be placed, but had been ignored.

[32] In cross-examination, Mr Airlie stated that he accepted that the Leicester versus West Ham game on 28 May 2023, and the Brentford versus Everton game on 28 September 2023, had been shown on broadcasts by the second pursuer. He presumed that the St Mirren versus Celtic match on 5 March 2023 had been broadcast by it too. He did not know who had broadcast the Everton versus Bournemouth game on 28 May. Matches shown at the Troll Inn had been shown on computer monitors, not televisions. The match on 5 March had been shown on a monitor placed on the shelf above the front window, with his consent. He did not know exactly what had happened on 28 May, not having been present, but could not dispute Ms McLean's evidence. The showing on 23 September had occurred in the same circumstances as that of 5 March. He had made an arrangement with two of his customers, David McLellan and Craig Dolan, that they could bring in a device to the bar in order to watch the matches in question via Mr McLellan's Sky Go subscription. That arrangement had been going on for years, and had started off with the use of a small tablet, but escalated in about February or March 2023 to involve the use of computer monitors. It then happened

all the time. The monitors had been placed on the shelf above the window, in front of the bar television which was already set up there. The monitor used in September had been about 36 inches in size; he could not say whether the same one had been used in March. The customers had set the monitors up, plugged them into the bar's electricity supply, and connected them to a laptop situated on a seat in front of the shelf. The matches were shown to a group of customers who were friendly with each other; had a stranger appeared in the bar and positioned himself where he could see the monitors, they would have been re-orientated so that he could not see what they were displaying.

[33] Mr Airlie described the CCTV set-up at the bar and what was shown in the photographs on which the earlier witnesses had been asked to comment. He had spoken to a Sky sales representative who visited him about the permissible use of the Sky Go app and had been told that it would be fine for it to be used for two or three people to watch a match together in the bar; nothing had been said about what size of device could be used. He had asked the second pursuer's representative around May 2023 for a best and discounted price for a licence to show its broadcasts, as he wanted to draw people in, but had been quoted about £1,300 a month for a monthly subscription, which he considered grossly excessive.

Pursuers' submissions

[34] On behalf of the pursuers, counsel moved the court to grant the decrees of declarator and interdict sought, to find the defender liable in damages to the pursuers in the sum of £10,000, to make publicity orders under Regulation 5 of the Intellectual Property (Enforcement etc.) Regulations 2006, and to award the expenses of process to the pursuers.

[35] The defender had infringed the first pursuer's copyright in artistic works (being the graphics already described) by communicating some of them to the public at the Troll Inn,

or at least authorising others to do so. The copyrighted graphics were communicated to the public when the defender, or those authorised by him, showed broadcasts of football matches made by the second pursuer on a screen or screens at the bar while it was open and customers were present. Specifically, that had occurred on 5 March 2023 (St Mirren versus Celtic), on 28 May 2023 (Leicester City versus West Ham and Everton versus Bournemouth) and on 23 September 2023 (Brentford versus Everton).

[36] The defender's actions constituted an infringement in the copyright in the displayed graphics in terms of section 20 of the Copyright, Designs and Patents Act 1988. Even if there was truth in the defender's position, that the second pursuer's broadcasts were shown through its "Sky Go" application on computer monitors belonging to his customers and which had been brought onto the premises by them, the defender had nonetheless authorised others to communicate the copyrighted graphics to the public under section 16(2) of the 1988 Act. He had permitted the monitors to be brought onto his premises, placed on a prominent shelf, plugged in and connected to a data source so that the second pursuer's broadcasts, featuring the copyrighted works, could be shown to those present in the bar. Reference was made to *Football Association Premier League Ltd and Others v QC Leisure and Others* [2012] Bus LR 1321, [2012] ECDR 8 at [194] – [196]. Declarator that infringement had occurred was therefore appropriate. Given the persistence of the infringement, it was reasonable for permanent interdict to be sought and granted.

[37] As to damages, the pursuers sought an undifferentiated award in favour of them both of £10,000 plus interest at 8% a year from the date of citation until payment. After some inquiry by the court as to the basis on which that claim was being advanced, it emerged that appeal was being made to the principle in *General Tire and Rubber Co Ltd v Firestone Tyre and Rubber Co Ltd* [1975] 1 WLR 819, [1976] RPC 197 (although given that this is a Scottish case, it

might have been better to cite *Watson, Laidlaw & Co, Ltd v Pott, Cassels and Williamson, etc* (1914) SC (HL) 18, (1914) 1 SLT 130). Reference was made to Copinger and Skone James on Copyright (18th ed, 2023) at 21-297 to 21-305, and to *Reformation Publishing Co Ltd v Cruiseo Ltd* [2018] EWHC 2761 (Ch), [2019] Bus LR 78 at [45] – [46].

[38] The second pursuer further sought publicity orders under Regulation 5 of the 2006 Regulations entitling it to publish advertisements in “The Evening Telegraph”, “The Morning Advertiser” and “The Scottish Licensed Trade News”, as well as on its own website, stating the parties to the action, the basis of the claims made and the outcome of the action, and providing details as to where a copy of the judgment might be obtained, all at the defender’s expense to a maximum of £5,000. Upon the court questioning whether that request was nimious in character, it was conceded that one such advertisement would suffice.

Defender’s submissions

[39] A Note of Argument had been prepared and lodged for the defender when he was legally represented, although some of its content was superseded by the matters which emerged at proof. The defender indicated that he still wished to rely on it so far as it remained material. The Note indicated that it was accepted that, if the second pursuer’s broadcasts featuring the copyrighted graphics were indeed shown on televisions within the defender’s premises whilst it was open and whilst customers were present, he would be liable for copyright infringement in terms of section 20 of the 1988 Act. However, the defender’s position was that, where such broadcasts were shown, they were shown through the second pursuer’s Sky Go application on computer monitors belonging to his customers, which had been brought onto the premises by those customers. In such circumstances, the

court would need to determine whether the defender had authorised customers to communicate the copyrighted works to the public, and whether, as occupier of the premises, he gave permission for the computer monitors and any associated equipment to be brought onto the premises, knowing or having reason to believe that they would likely to be used as to infringe copyright. A good deal of written argument was presented as to whether the defender had indeed “authorised” his customers to do what they had supposedly done, it being submitted under reference to *Falcon v Famous Players Film Co Ltd* [1926] 2 KB 474 per Atkin LJ at 499 that that concept meant “a grant or a purported grant, which may be express or implied, of the right to do the act complained of”. However, in the course of the proof the defender was perfectly clear that he had been asked for permission for the monitors in question to be brought into the bar for the purpose of showing the second pursuer’s broadcasts and that, having the power to refuse to allow any such thing, he granted the permission asked, allowed the bar’s facilities (in the form of its television display shelf and power supply) to be used for the same purpose, and generally aided the enterprise of showing the second pursuer’s broadcasts in the bar for the purpose of providing his customers with the benefit of seeing the matches in the bar. In such circumstances the question of authorisation is not a live one in the action; the defender authorised the matters complained of on any view of the import of that word. Likewise (subject only to the question, later to be discussed, whether the communication of the copyrighted works was to the public), had the pursuers made any case of secondary infringement against the defender under section 26(3) of the 1988 Act, it would have been difficult on the facts established by the proof to see what the answer to such a case would have been. However, the pursuers confined their argument to a case of primary infringement by the defender and accordingly nothing more need be said about that aspect of the law.

[40] However, another strand of the defender's written argument remains live. That is the question of whether the copyrighted graphics were communicated to the public. It was submitted that whether an act took place in public or in private could usually be determined with reference to the nature of the audience: *Jennings v Stephens* [1936] Ch 469 per Romer LJ at 482, a domestic or quasi-domestic group not amounting to the public for these purposes, even if the location in question was normally used for public events. Neither was the size of the audience determinative; although a court might find it difficult to accept that a very large crowd constituted a domestic group, equally "the concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant": *Società Consortile Fonografici v Marco del Corso* [2012] Bus LR 1870, [2012] ECDR 16 at [86]. The concept of a new section of the public, over and beyond those to whom the copyright owner had consented to the copyrighted work being communicated, was also of significance: *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* [2007] Bus LR 521, [2007] ECDR 2 at [32] – [54]. The defender's position was that the viewings which had taken place were private as between the customers with the Sky Go application and a small group of their friends. The fact that they took place in a public house was not determinative; rather, it was the small size and quasi-domestic nature of the viewing group which rendered the communications in question other than to the "public" within the meaning of the 1988 Act.

[41] To those written observations the defender added orally that the evidence of the investigators adduced against him was in various respects vague, general and unsatisfactory, and should not in those respects be relied upon. They were unable to distinguish accurately between televisions and computer monitors, whether generally or with specific reference to what they had seen matches being shown on during their visits. It

had been left unclear by the pursuers what the boundaries of the legitimate use of the Sky Go app were. He had been given to understand by the Sky representative with whom he had spoken that what he proposed to allow was acceptable usage of the app. If the pursuers were unclear about the inter-relationship between the rules of the app and the terms of the 1988 Act (which he described, somewhat inaccurately, but echoing a sentiment that must have been felt by most intellectual property lawyers from time to time, as “about a million pages long”) then how could he and his customers be expected to keep to whatever the right side of the line might be?

Decision

Copyright infringement

[42] The defence to the case of copyright infringement advanced by the pursuers is in essence that what the defender allowed and indeed encouraged to take place at the Troll Inn was permissible according to the terms of the Sky Go app to which, it seems, those of his customers responsible for bringing and setting up the equipment used to show the second pursuer’s broadcasts subscribe. Most unfortunately in those circumstances, neither the pursuers nor the defender chose to lay those terms before the court, rendering it impossible for me to determine whether they do indeed have that effect, although at least in the abstract the proposition seems an unlikely one. Accordingly, the only live issue on the question of whether copyright infringement took place is whether what I find to have occurred amounted to a communication of the copyrighted graphics to the public within the meaning of sections 16 and 20 of the 1988 Act.

[43] As to the factual basis upon which that legal question falls to be answered, I accept the defender’s evidence that, after his commercial subscription to the second pursuer’s

broadcasts lapsed, an idea was put forward by certain of his customers who were subscribers to the Sky Go app (which is a free adjunct to a residential subscription to the second pursuer's broadcasts) that that subscription could be used to show those broadcasts in the Troll Inn, and that the defender willingly acceded to that suggestion, not least because the fact that the matches might be seen in the bar represented an attraction to other customers, both to visit in the first place and to remain when otherwise they might have left. I accept that devices were, by arrangement with the defender, brought into the bar by those customers and used to show the second pursuer's broadcasts, and that the situation escalated quite quickly to arrive at the point where a monitor indistinguishable on casual examination from a moderately-sized flat-screen television set was so brought in and placed on a prominent shelf above a front window of the bar, so that the matches being shown on it were visible to virtually anyone in the bar who wished to look at them. Although that may seem improbable at first blush, the defender gave detailed evidence about the identity of the customers involved and the location of the home of one of them, from which the monitor was said to have been carried to the bar, and I see no reason not to accept his evidence on those matters. It also must be appreciated that the use of the customers' own devices (as opposed to devices supplied by the bar) was seen as critical to the exploitation of the loophole which the defender believed he had identified in the terms of use of the Sky Go app.

[44] I further accept that the usual clientele of the bar when matches were shown would have been known to each other, at least to the extent flowing from the fact of their regular attendance there. However, there would on occasion have been strangers present (such as the investigators sent by the pursuers) and I do not accept the defender's evidence that, as and when such strangers appeared, the monitors would have been repositioned so that they

could not see what was being shown on them. That was not what happened when the investigators appeared, and there seems from the material before the court to be very little room for manoeuvre of that kind on the shelf where the monitors were ultimately placed.

[45] Although the defender stated that matches were shown in this manner “all the time”, there was no evidence that any formal arrangements were made to indicate to customers in advance when matches would be shown. It may be that the customers who brought the necessary equipment into the bar mentioned casually to others when they next intended to attend and what matches they intended to view and show when they did. From what the defender said about the frequency of the showing of matches, and how and in what context he said it, it seemed to me that matches were shown on monitors on perhaps four or five occasions a week from the start of March to the end of September 2023. It appears, both from the position he took when challenged about what was happening at his bar by the second pursuer’s representatives and their legal advisors, and from the tenor of his evidence at proof, that the defender did genuinely believe that the Sky Go app terms sanctioned what he was allowing, or at least that he considered that there was a reasonable argument to be had about that issue which the current action would resolve.

[46] It should be noted that most of these conclusions are enabled by the candid evidence of the defender himself, rather than from that adduced by the pursuers. They made no attempt at all at proof to establish their allegation that the second pursuer’s broadcast of the match between St Mirren and Celtic was shown at the Troll Inn on 5 March 2023. The investigator sent to the bar on 28 May 2023 for a different purpose observed only incidentally what she conceived to be a broadcast of the match between Everton and Bournemouth being shown behind the bar, and I would not have held her evidence on that to amount to sufficient proof that infringement of the first pursuer’s copyright took place in

that regard, not least because the evidence, such as it was, that that match was being broadcast by the second pursuer rather than a competing broadcaster was at best equivocal. I do, however, accept the evidence of that investigator in relation to the match which she was specifically sent to observe, namely Leicester City versus West Ham. As to the events of 23 September 2023, had only Mr Mackie's evidence been available to the court, I might have had some difficulty in accepting it in its entirety, since it was given in a most adamant manner, with what would have been quite reasonable concessions in relation to matters of impression entirely withheld, leading to the overall impression that an agenda was being advanced rather than evidence pure and simple being given. However, Mr Mackie's evidence was in its essentials supported by that of Mr Kydd, a very measured, reasonable and ultimately persuasive witness whose evidence I have no hesitation in accepting. It follows that I hold the specific allegation about copyright infringement on 23 September made out.

[47] I turn, then, to the significance in law of the factual scenario which I have held established, and in particular to the issue of whether what occurred amounted to communication to the public within the meaning of the 1988 Act. That issue has long played a significant role in questions of whether copyright infringement has taken place. Had the relevant sections of the 1988 Act been of an entirely domestic genesis, then the conclusion that the second pursuer's broadcasts were in the circumstances communicated to the public would have been inescapable, because any portion of the public which cared to turn up to the Troll Inn on the occasions in question would have been able to see them – see, eg, Brett MR in *Duck v Bates* (1884) 13 QBD 843 at 848, Bennett J in *Performing Right Society Limited v Hawthorne Hotel (Bournemouth) Ltd* [1933] Ch 855 at 857. Put in a slightly different way, the matches were shown to all who saw them in a setting entirely outwith their domestic lives

(see, e.g. Romer LJ in *Jennings v Stephens* [1936] Ch 469 at 482 – 483). The relatively small numbers of people making up the audiences on each occasion would not have been capable of altering that conclusion: Lord Wright MR in *Jennings* at 476.

[48] However, sections 16 and 20 of the 1988 Act are not wholly domestic legislation, in that they are a transposition into the law of the United Kingdom of Parliament and Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p 10), especially article 3(1) thereof, which provides: “Member states shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

[49] In these circumstances, the general approach to construction set out by the European Court of Justice in *Football Association Premier League Ltd v QC Leisure* (C-403/08) at [184] – [189], as follows, is applicable:

“[184] It should be noted at the outset that art.3(1) of the Copyright Directive does not define the concept of “communication to the public” (*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* (C-306/05) [2006] ECR I-11519; [2007] ECDR 2 at [33]).

[185] In those circumstances, and in accordance with settled case law, its meaning and its scope must be determined in light of the objectives pursued by the Copyright Directive and of the context in which the provision being interpreted is set (*SGAE* [2007] ECDR 2 at [34] and the case law cited).

[186] In this regard, it is to be noted first of all that the principal objective of the Copyright Directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that ‘communication to the public’ must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states (see *SGAE* [2007] ECDR 2 at [36]).

[187] Second, in accordance with recital 20 in its preamble, the Copyright Directive is based on principles and rules already laid down in the directives in force in the area

of intellectual property, such as Directive 92/100 which has been codified by the Related Rights Directive (see *Infopaq International* [2010] FSR 20 at [36]).

[188] In those circumstances, and given the requirements of unity of the EU legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the EU legislature has, in a specific legislative context, expressed a different intention.

[189] Finally, art.3(1) of the Copyright Directive must, so far as possible, be interpreted in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty. The Copyright Directive is intended to implement that treaty which, in art.1(4), obliges the Contracting Parties to comply with arts 1–21 of the Berne Convention. The same obligation is, moreover, laid down in art.9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (see, to this effect, *SGAE* [2007] ECDR 2 at [35], [40] and [41] and the case law cited)."

[50] The court went on (at [190] to [199]) to observe that the concept of communication deployed in art.8(3) of the Related Rights Directive, arts 2(g) and 15 of the Performance and Phonograms Treaty, and art.11bis(1)(iii) of the Berne Convention was a wide one which encompassed *inter alia* a means of communication such as display of the works on a screen, and the EU legislation expressed no different intention and fell to be regarded as including any transmission of the protected works, irrespective of the technical means or process used. It held that the proprietor of a public house who intentionally gave the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers effected a "communication", and that that communication was one "to the public" within the meaning of art 3(1) of the Copyright Directive where it effected the broadcast of a work to a "new public", that is to say, a public which was not taken into account by the authors of the protected works when they authorised their use by communication to an original public, which was the situation where broadcast works were transmitted by the proprietor of a public house to the customers present in that

establishment, because those customers constituted an additional public which was not considered by the authors when they authorised the broadcasting of their works.

[51] The court added finally at [204] that it was “not irrelevant” that a communication within the meaning of art 3(1) of the Copyright Directive was of a profit-making nature, in that it was indisputable that the proprietor of a public house transmitted broadcast works there in order to benefit therefrom by attracting customers to whom the transmitted works were of interest, and that that circumstance aided the conclusion that that situation constituted a communication to the public within the meaning of the Article.

[52] Applying that reasoning to the present case, the first pursuer authorised (directly or indirectly – the precise nature of the arrangements between the pursuers was not laid before the court) the communication of the copyrighted graphics to those members of the public who subscribed to the second pursuer’s broadcasts. In the case of commercial subscribers, it authorised them in turn to communicate the works to members of the public present in the commercial establishment in respect of which the subscription was held. As already noted, there was no material before the court which would have enabled a conclusion to be drawn as to the extent, if any, to which it authorised residential subscribers further to communicate the copyrighted graphics to members of the public by way of the Sky Go app, and no such authorisation is to be assumed. It follows that, construing sections 16 and 20 of the 1988 Act in a manner consistent with their antecedents in and reflected by the Copyright Directive, the showing of matches broadcast by the second pursuer in the Troll Inn in circumstances where any member of the public who chose to enter the bar could view them constituted, irrespective of the precise technical means or process used, a communication to the public within the meaning of those sections, and thus infringed the first pursuer’s copyright in the graphics displayed in the course of the broadcasts

[53] It is not without interest to note that the concept of a “new public”, beyond that contemplated by whomever the copyright holder had initially authorised to view the protected works, was precisely that which moved Greene LJ (as he then was) to his conclusions in *Jennings*, observing at 485 that:

“If the audience considered in relation to the owner of the copyright may properly be described as the owner's ‘public’ or part of his ‘public,’ then in performing the work before that audience he would in my opinion be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright.”

and adding at 487 that:

“Once it is appreciated that the wrong of infringement is defined by reference to the statutory right of the owner of the copyright, and that accordingly the question of what the words ‘in public’ means is to be examined primarily in the light of the relationship of the audience to the owner of the copyright and not in the light of the relationship of the audience to the performers, the difficulties in the present case appear to me to be removed.”

[54] In the light of these authorities and principles, and on the basis of the materials presently before the court, the defender’s infringement of the first pursuer’s copyright in the graphics displayed during broadcasts by the second defender, by way of authorising their communication to the public between March and September 2023 at the Troll Inn, is clearly established, and declarator to that extent will be pronounced. Since that infringement was persisted in after warning to desist had been given on behalf of the pursuers, and even after the court’s assistance was first sought by them, I will also grant perpetual interdict against the repetition of the infringing conduct which the evidence establishes.

Damages

[55] Until very shortly before the proof diet, the pursuers were seeking an account of profits from the defender in respect of his infringement of the first pursuer’s copyright. In

the circumstances of the infringement in question, the trouble and expense of composing such an account would in all probability have exceeded by many multiples the amount ultimately brought out by it. Whether moved by that consideration or others, the pursuers finally opted to claim damages in respect of the infringement instead. It is not obvious to me that all the implications of that choice were necessarily understood by them.

[56] The basic measure of damages for copyright infringement is the depreciation caused by the infringement to the value of the copyright. In *One Stop (Support) Ltd v Morris-Garner and Anr* [2018] UKSC 20, [2019] AC 649 Lord Reed JSC (with whom Baroness Hale of Richmond PSC, Lord Wilson and Lord Carnwath JJSC agreed) described a common approach to the assessment of such damages in the following terms:

“[27] The basis of the award of damages in cases of this kind was considered by Lord Shaw of Dunfermline in *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18; 31 RPC 104. The case concerned the sale of machines which infringed the pursuers’ patent. The issue in dispute was whether the pursuers were entitled to recover damages for sales which had been made by the defenders in a territory where the pursuers could not themselves have traded, and which, moreover, the defenders would have made even if the machines had not incorporated the infringing part. It was held that they were so entitled. Lord Shaw contrasted the principle underlying the assessment of ‘damages in general’, whether in contract or in tort, which he described as the principle of ‘restoration’ as he defined it, with a second principle of ‘price or hire’, applicable not only to patent cases but ‘wherever an abstraction or invasion of property has occurred’: 1914 SC (HL) 18, 29–31. As he explained, this distinction was relevant to the case before him, since the restoration principle could not support a claim by a patentee relating to a section of trade in which, it was argued, “he can have sustained no damage, because he would never have sold his patented articles within that section”: p 30.

[28] Lord Shaw described the second principle as follows, in a passage at p 31 subsequently quoted by Brightman J in the *Wrotham Park Estate* case [1974] 1 WLR 798, 813:

“It is at this stage of the case, however, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends – and I am inclined to think not infrequently extends – to patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such

abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.”

He illustrated this by the example of the liveryman’s horse, also at p 31:

“If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: ‘Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.’”

Lord Shaw also endorsed the view expressed by Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157, 165 that, even if it was not the claimant’s practice to grant licences, “it would be right for the court to consider what would have been the price at which – although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way.”

[29] The approach adopted in these cases was described by Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 as the “user principle”. He summarised it as follows, at p 1416:

“It is an established principle concerning the assessment of damages that a person who has wrongfully used another’s property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other’s property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner’s financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so. In *The Mediana* [1900] AC 113, 117, Earl of Halsbury LC made the famous observation that a defendant who had deprived the plaintiff of one of the chairs in his room for 12 months could not diminish the damages by showing that the plaintiff did not usually sit upon that chair or that there were plenty of other chairs in the room.”

[30] In these cases, the courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property

prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment.”

[57] Lord Sumption, the other Justice in *One Step*, reviewed the same and other authorities and stated as his view at [110] that the “user principle” was:

“exceptional because in general the law is concerned only with the specific enforcement of obligations or the money equivalent of their due performance. The exceptions in the case of trespass to or appropriation of property are justified by the nature of the right which the wrongdoer has infringed. Property rights confer an exclusive dominion over the asset in question. The law treats that exclusivity as having a pecuniary value independent of any pecuniary detriment that he might have suffered by the breach of duty. The user-rent is simply the measure of that value.”

[58] Reference might also usefully be made to what was said by Megarry V-C in *Tito v Waddell (No 2)* [1977] Ch 106 at 335.

[59] It is important to bear in mind that the user principle is simply a means to an end. That end is a reasonable assessment of the compensatory damages realistically due to the claimant in respect of the wrongful use of his property in circumstances where the right to control such use is in itself an asset of some value, aimed at determining the economic value of the right which has been breached: see *One Step* at [91] per Lord Reed JSC.

[60] The exercise of determining a hypothetical amount for which reasonable parties placed in the position of the parties to the litigation would have agreed to the use of the property in question is by no means an easy task, especially in cases where there is no readily-comparable actual market. As was noted by Nugee J in *Reformation Publishing* at [46], drawing from what had been gathered from the relevant authorities by HH Judge Hacon in *Henderson v All Around the World Recordings Ltd* [2014] EWHC 3087 (IPEC), the primary basis for the assessment is to consider what sum would have been arrived at in negotiations between the parties, had each been making reasonable use of their respective

bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place. The court must have regard to the circumstances in which the parties were placed at the time of the hypothetical negotiation and seek to establish the value of the wrongful use to the infringer, not a hypothetical person. The hypothetical negotiation is between the actual parties, assumed to bargain with their respective strengths and weaknesses. The fact that one or both parties would not in practice have agreed to make a deal is irrelevant. Of particular relevance for the circumstances of the present case is that the hypothetical licence being considered relates solely to the copyright which has been infringed, and endures only for the period of the infringement.

[61] Recognising pragmatically the difficulties which such an exercise involves, the law allows a substantial degree of leeway to pursuers, both in relation to what might otherwise fall to be regarded as a sufficiency of evidence, and in the assessment of such evidence as there is, in cases where it is clear that some substantive loss must have been suffered, and the problems lie only in how that loss is to be measured or even simply estimated – see *One Step* at [38] and [73] – [74]. Inherent difficulties in the measurement of such loss as may have been suffered do not justify the abandonment of the attempt, even if the result is what Lord Shaw in *Watson, Laidlaw & Co* at 29 – 30 described as the product of “the exercise of a sound imagination and the practice of the broad axe.”

[62] However, the nature of the exercise which is being undertaken must always be borne in mind. While the assessment of damages is liberal within the context of compensation as the guiding principle, the pursuers have the burden of proving that they have suffered a loss and giving the court some means by which the quantum of that loss may within the bounds of reason be assessed. As Lord Sumption JSC put it in *One Step* at [124]:

“ ... the award of a notional release fee is not a measure of damages but an evidential technique for estimating the claimant’s loss. Its use is appropriate only if there is material on which the notional release fee can be assessed and then only so far as the trial judge finds it helpful, in the light of such other evidence as may be before him.”

[63] I also bear in mind, in considering the quantum of the damages claimed by the pursuers, the observations of the European Court of Justice in *Football Association Premier League* at [108] – [109], as follows:

“[108] However, the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. Consistently with its specific subject-matter, they are ensured—as recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive envisage — only appropriate remuneration for each use of the protected subject-matter.

[109] In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service (see, by analogy, *Foreningen af Danske Videogramdistributører (FDV) v Laserdisken* (C-61/97) [1998] ECR I-5171; [1999] 1 CMLR 1297; [2000] ECDR 139 at [15], and *Kanal 5 Ltd v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* (C-52/07) [2008] ECR I-9275; [2009] 5 CMLR 18; [2009] ECDR 5 at [36]–[38]).”

[64] In the present case, the only evidence led by the pursuers and touching upon the issue of quantum of damages was the evidence of Ms Anderson that, at least from the documents she had read (which were not produced to the court) the commercial subscription rates paid from time to time to Sky Subscription Services Limited for behoof of the second pursuer by the defender in respect of the Troll Inn until the end of 2022 had been an annual subscription at a rate of about £915 per month (or about £10,980 for the year) and a monthly subscription of about £1,400 per month (or about £9,800 for repeated monthly subscriptions covering a 7 month period), and the evidence of the defender that, in May 2023, he had been told by a Sky representative that it would cost him around £1,300 for a monthly subscription. The suggestion was that either the annual rate or monthly subscriptions covering the period of infringement would amount to a sufficient surrogate

for the value of the infringed copyright on the basis of the user principle. The difficulties with that approach are immediately apparent. The subscription fees in question bear no relation to any sum that might have been sought and paid in order to secure the right to show the first pursuer's copyrighted graphics. Rather, they are what would have been sought and would have to have been paid in order to secure the rights to show the second pursuer's broadcasts of football matches during the relevant period. The graphics would automatically have come along with those broadcasts because of the pursuers' own choice inseparably to associate the two, but – as has been seen from the review of the law already set out – neither the fact that the first pursuer would not have been willing to make its graphics available separately from the second pursuer's broadcasts, nor the fact that in all probability no one (whether the defender or anyone else) would have been remotely interested in purchasing the right to communicate those graphics to the public without the broadcasts – operates to enable the quantification of damages to proceed on anything other than an assessment of the harm caused by the actual infringement which occurred, and nothing more nor less - see, for example, *Reformation Publishing* at [60] and [72]. In these circumstances the evidence concerning the subscription rates to the second pursuer's broadcasts is of no probative value whatsoever in assisting the court to fix a reasonable user-rent.

[65] No other evidence, whether from copyright licensing experts or otherwise, was led before the court to assist it in its task of determining what might be the hypothetical amount (if any) for which reasonable parties placed in the position of the parties to the litigation would have agreed to the use of the property in question. That is perhaps unsurprising, since any such evidence would have had to seek to describe, not only a non-existent market (a hurdle which in itself might not have proved insuperable), but a market whose features

would be essentially fantastical. It would be possible simply to conjure up a figure, for example £10 for every separate occasion on which the defender authorised the showing of the first pursuer's graphics over the period in question, but if the questions were then to be posed, why not £1, or why not £100, for each such occasion, no answer remotely arising out of the evidence in the case could sensibly be provided. In these circumstances I find myself in the same position as Lord Halsbury in *Watson, Laidlaw & Co* at 19; while there is no principle in debate, the court has simply not been provided in this case with the materials to assess damages. Put another way, even having selected the broadest of brushes to assist in the task of assessing any damages due, I find in the evidence before the court nothing at all with which to charge it. It might alternatively have been possible to assess damages in some way entirely different from the determination of a user-rent, for example by showing some diminution in the value of the graphics to the first pursuer in its intra-group arrangements with the second pursuer as a result of their unauthorised use, but no attempt was made to establish any such loss, and indeed there was no evidence at all before the court of what the arrangements between the pursuers in fact are.

[66] Further, it is not at all clear to me on what basis the second pursuer might claim to be entitled to damages for infringement of the first pursuer's copyright, even if the evidence in the case had furnished the means of assessing such damages. It might have been possible to lead evidence as to the intra-group arrangements and mount some sort of argument based on the notion of transferred loss, but no attempt was made on that front, which would in any event have been inconsistent with the existing conclusion for a single award of damages in favour of both pursuers. In these circumstances no award of damages could in any event have been made in favour of the second pursuer, and indeed – absent any demonstrated

proprietary or quasi-proprietary interest on its part in the copyrights in question – none of the court's orders in this case will be pronounced in its favour.

Publicity orders

[67] As already noted, it was conceded in the course of argument that the scope of the publicity orders in terms of the 2006 Regulations sought by the pursuers was disproportionate, and that an order permitting the dissemination of the court's judgment in one publication at the defender's expense would be more fitting to the circumstances of the case. I shall authorise the first pursuer to arrange for one such publication and consider that the commensurate expense for which the defender should be liable is properly to be limited at £1,000 only. Either pursuer is, of course, entitled to publish a true, fair and accurate account of these proceedings and their outcome (should it think it advantageous to do so) wheresoever and howsoever it pleases, but at its own expense.

Expenses

[68] Given (i) that the pursuers have failed in their damages claim (and indeed that the second pursuer has failed to obtain any remedy at all in its favour); (ii) that the publicity order granted has been greatly restricted in comparison to that sought; and (iii) that it was clear from an early stage in these proceedings that the defender's position depended entirely on a contention as to the proper construction of the terms of the Sky Go app which ought to have been capable of being resolved by provision of those terms and a debate on their true import, rather than by way of proof (the procedural hearing in the case having occurred at a point when only the pursuers were legally represented), I consider that substantial justice between the parties requires a considerable modification to the award of expenses to which

the pursuers might otherwise be entitled. I shall accordingly find the defender liable to the first pursuer only in the expenses of process, and modify that liability to one-half of the whole.

Conclusion

[69] I shall sustain the pursuers' second, third and eighth pleas-in-law to the limited extent already indicated, repel their fifth plea, sustain the defender's fifth plea-in-law, repel his first, second, third and fourth pleas, and grant decree as first, second and fourth concluded for to the extent indicated.