



OUTER HOUSE, COURT OF SESSION

2021 CSOH 36

A325/20

OPINION OF LADY WOLFFE

In the cause

SKY UK LIMITED

Pursuer

against

ALEX CHERRIE

Defender

Pursuer: Tariq; Burness Paull LLP
Defender: No appearance

6 April 2021

Background

Introduction

[1] This matter called before the Court on the pursuer's motion for *interim* interdict against the defender from breaching the pursuer's copyright and which is protected by the Copyright, Designs and Patents Act 1988 (the "1988 Act"). The full terms of the *interim* interdict are noted below (at para [17]) but, essentially, the pursuer seeks to prevent the defender from copying the pursuer's programmes (which are behind a paywall) and from providing links to these via the defender's own online forum in the form of several "subreddits". So far as Counsel's researches disclosed, this was the first occasion this Court

has had to consider a potential breach of an intellectual property right via the Reddit platform and to consider the question of what constituted “communication to the public” in respect of material that had, to some extent, been content available to the public for free (an issue addressed by the Court of Justice of the European Union (“the CJEU”) in *Svensson v Retriever Sverige AB* [2014] Bus LR 259, (Case C-466/12) (“*Svensson*”) and in *GS Media BV v Sanoma Media Netherlands BV and Others* (“*GS Media BV*”), [2016] Bus LR 1231, Case C-160/15).

The pursuer’s activities and intellectual property rights

[2] The pursuer describes its activities (in article 2 of condescendence) and its associated intellectual property rights (in article 3 of condescendence), in the following terms:

- “2. The Pursuer is a leading provider of pay television services in the United Kingdom. The Pursuer provides its services by means of satellite and internet broadcast. The Pursuer’s television service has numerous channels, including flagship channel brands such as Sky One, Sky Arts, Sky Atlantic, Sky News, Sky Cinema and Sky Sports. A full list of the Pursuer’s channels is provided in the Annex hereto (the ‘Sky Channels’). Each of the programmes on the Sky Channels is transmitted by the Pursuer by way of electronic transmission from the UK for simultaneous reception by authorised subscribers in the UK (the ‘Broadcasts’). All transmissions of the Sky Channels are encrypted by a conditional access system. Save for programmes broadcast on the Sky Arts channel, which became a free to air channel on Freeview and Freesat on 17 September 2020, these transmissions can only be received by the Pursuer’s authorised account holders who subscribe to the Pursuer’s television service. A subscriber requires to have a decoder and a viewing or decoder card to receive the Pursuer’s satellite Broadcasts. Decoders and viewing cards are made available to subscribers by the Pursuer. Save for programmes broadcast on the Sky Arts channel, a subscriber requires to have a Sky account to receive the Pursuer’s internet Broadcasts. Sky accounts are made available to subscribers by the Pursuer. The Pursuer’s revenues derive from retailing pay television subscriptions. These subscriptions allow the Pursuer to invest billions of pounds annually in acquiring content for the Sky Channels.
3. Copyright subsists in the Broadcasts in terms of sections 1(1) (b) and 6 of the Copyright, Designs and Patents Act 1988 (the ‘1988 Act’). The author of a work is

the first owner of the copyright. In terms of section 9(2) (b) of the 1988 Act, the author of a broadcast work is the person making the broadcast. The Pursuer is the author of the Broadcasts. The Pursuer is the owner of the copyright in the Broadcasts. In terms of section 16(1) of the 1988 Act, the Pursuer, as the owner of the copyright in the Broadcasts, has the exclusive right to: (i) copy the Broadcasts (section 17 of the 1988 Act); and (ii) communicate the Broadcasts to the public (section 20 of the 1988 Act).”

[3] In his submissions, Mr Tariq, who appeared on behalf of the pursuer, drew a distinction between the programmes broadcast via the pursuer’s Arts channel (“the Arts Channel” or the “Arts Channel programmes” as the context requires), which became free to air in September 2020, and the pursuer’s programmes broadcast on its other channels which were all behind a paywall. This was relevant to the issue addressed by the CJEU in *Svensson* and *GS Media BV*.

The platforms by means of which the defender is alleged to have infringed the pursuer’s copyright

[4] The pursuer’s position is that the defender has breached its copyright by his use of two media platforms: Reddit and YouTube. It is helpful briefly to describe these online platforms before setting out what the pursuer contends is the defender’s infringing conduct on these platforms.

Reddit

[5] Reddit is a social news platform based around communities. A community is known as a “subreddit”. A subreddit is controlled by a moderator. The moderator of a subreddit controls the content it contains. A moderator can post content, including hyperlinks to other content, as well as remove content posted by others. Readers can access a specific subreddit

containing content of particular interest to them. Readers can then join that subreddit, post on the community page and review other users' posts to it. Subreddits are free to view on the internet and one does not require to subscribe to the subreddit in order to view its content.

YouTube

[6] YouTube is a well-known online platform to which persons may upload or post video content, and which is thereafter publically accessible on the internet without payment. Persons may also set up particular YouTube channels, which may attract a following or subscribers.

The defender's alleged activities on Reddit and YouTube

Reddit

[7] The pursuer avers that the defender has a Reddit profile with the username "Cherzo1"; that he has been active under this profile for over a year; and that the defender is the sole moderator of three subreddits: (i) r/UKTVLAND; (ii) r/notapanelshow; and (iii) r/UKPanelShowsOnly which I shall refer to respectively as "the first subreddit", "the second subreddit" and "the third subreddit", and collectively as the "Subreddits"). The first subreddit had 19,262 readers as at 14 July 2020 and 21,100 readers as at 3 November 2020. The second subreddit had 14,782 readers and 16,400 readers on those respective dates. The number of readers on those dates for the third subreddit was 7,979 and 9,400. The second subreddit has existed for about 3 years. The previous sole moderator was an account with the name "Cherzo". Cherzo1 became the sole moderator about 1 year ago.

[8] The means by which the defender is averred to have breached the pursuer's copyright is by Cherzo1 encouraging readers of the Subreddits to post requests for links to UK television programmes and thereafter by the provision of hyperlinks to a Google Drive containing a copy of the requested content. Those hyperlinks, which are provided by Cherzo1, are visible and clickable by all readers, and clearly labelled to allow the user to identify the content that is being hyperlinked. The particular instances of the defender providing unauthorised access to the Broadcasts via his Reddit profiles were said to be as follows:

- 1) On the first subreddit, it is averred that the defender has posted a hyperlink to, *inter alia*, episodes of "*Gangs of London*" (a series broadcast on Sky Atlantic); "*Cop Squad*" (a series broadcast on Sky One); "*Thronecast*" (a series broadcast on Sky Atlantic); "*The Russell Howard Hour*" (a series broadcast on Sky One); "*Portrait Artist of the Year*" (a series broadcast on Sky Arts); and "*A League of Their Own*" (a series broadcast on Sky One);
- 2) On the second subreddit, it is averred that the defender has posted a hyperlink to, *inter alia*, an episode of "*The Russell Howard Hour*" (a series broadcast on Sky One) and "*Portrait Artist of the Year*" (a series broadcast on Sky Arts); and
- 3) On the third subreddit, it is averred that the defender has posted a hyperlink to, *inter alia*, episodes of "*There's Something About Movies*" (a series broadcast on Sky One), "*A League of Their Own: European Road Trip 2*" (a series broadcast on Sky One); and "*A League of Their Own - Christmas Special 2019*" (broadcast on Sky One).

YouTube

[9] The pursuer avers that the defender also operated a YouTube channel called “Cherzo” at a specified URL (“the YouTube Account”). Prior to the closure of that account by YouTube on 12 November 2020, at the pursuer’s request, the YouTube Account had acquired 95,300 subscribers as at 3 November 2020, an increase from 76,600 subscribers as at 14 July 2020. In the period between 19 April 2016 and its closure, the YouTube Account attracted over 16 million views.

[10] The pursuer avers that its copyright was infringed on the YouTube Account in the following respects:

“The Defender was providing unauthorised access to the Broadcasts to the public via the YouTube Account. The YouTube Account included copies of content taken from the Broadcasts. Multiple episodes of ‘*Portrait Artist of the Week*’ (a series broadcast on Sky Arts) had been copied onto the YouTube Account, both prior to and following the channel becoming free to air on 17 September 2020. The most recent activity was the posting of a full episode of ‘*Portrait Artist of the Year*’ on 22 October 2020. This video was posted by ‘Cherzo’. This video had over 95,000 views as of 3 November 2020. At 44 minutes and 25 seconds into the episode, a statement that the copyright in the Broadcast is owned by the Pursuer can be clearly seen. The YouTube Account included references to the Subreddits.”

[11] In the course of submissions, reference was made to an investigation report prepared by the pursuer’s investigation team (“the Report”) and contained in the pursuer’s first inventory of productions, whose terms supported the pursuer’s averments.

Payments to the defender

[12] The Summons also sets out the means by which it is averred that the defender solicited and received online payments to his Patreon and PayPal accounts, which are both digital payment platforms. (The URLs for these were provided in the Summons.) In particular, the Subreddits and, prior to its closure, the YouTube Account, contained details

of how users could make payment to the defender and they contained links to the defender's Patreon and PayPal accounts. In respect of the defender's Patreon account, it is averred that:

“[t]he Defender has over 111 ‘patrons’ being users who contribute money to him. The account offers five payment tiers ranging from £1 plus VAT per month to £17 plus VAT per month. The ‘About’ section on the Patreon account states as follows: ‘I have a YouTube channel and Reddit account that i use to post UK Panel Shows mostly, i need to have patreons to get computer equipment and online space to continue this, i would also like to get sources for recording shows to post, such as subscription to TV packages or IPTV Servers [sic].’ The Defender recognises his need to pay for a subscription to access certain content, such as the Sky Channels, and seeks a contribution from ‘patrons’ towards those costs.”

In respect of the defender's PayPal account, which is in the name of the defender and not an online alias, it is averred that this permitted users to make one-off payments to the defender.

The defender's alleged infringements of the 1988 Act

Section 16, 17 and 20: the prohibition of inter alia copying and communicating works protected by copyright without the consent or license of the copyright owner

[13] Reference was made to sections 16, 17 and 20 of the 1988 Act. Read short, in terms of section 16(2) of the 1988 Act, the pursuer's copyright in the Broadcasts is infringed by a person who without the licence of the pursuer does, or authorises another to do, any of “the acts restricted by copyright”. These acts were said to include:

- 1) “copying” the Broadcasts (in terms of section 17 of the 1988 Act); and
- 2) “communicating” copies of the Broadcasts to the public (in terms of section 20 of the 1988 Act).

In terms of section 17(4) of the 1988 Act, “copying” in relation to a broadcast includes making a photograph of the whole or a substantial part of any image forming part of the

broadcast. In terms of section 20 of the 1988 Act, a “communication” must be by electronic means and includes making a work available to the public in such a way that members of the public may access the work from a place and at a time chosen by them.

The defender’s alleged infringements via the YouTube Account

[14] The pursuer avers that the defender has uploaded copies of content from the Broadcasts to the YouTube Account, including entire episodes of programmes from the Sky Channels. The copying of the Broadcasts was an infringement of the Pursuer’s copyright in the Broadcasts in terms of section 17 of the 1988 Act.

The defender’s alleged infringements via the Subreddits

[15] Separately, the pursuer contends that the defender is operating the Subreddits for the purposes of posting links to its television programmes, and allowing users to post links to and to access its television programmes. It avers that the TV programmes

“...include those broadcast on the Sky Channels. The Defender has posted hyperlinks to a Google Drive containing content from Broadcasts. The Defender has provided the means for others to post links to such content...”

The provision of hyperlinks as constituting the infringing communication

[16] The pursuer’s position is that the provision of a hyperlink is a “communication by electronic means” for the purposes of section 20 of the 1988 Act. It avers:

“The Defender’s Subreddits, and previously the YouTube Account, have thousands of followers. Anyone can access the accounts and view the content. Videos on the YouTube Account had over 16 million views. The communication is therefore to a public. The work must also be communicated without the authorisation of the copyright owner. If the Defender communicates the work to a public not taken into account by the Pursuer when authorising the initial communication, then the Defender’s communication is unauthorised. Save for those broadcast on the Sky Arts channel after 17 September 2020, the Broadcasts are only available to users with Sky

accounts. Those users pay subscription fees to the Pursuer. By posting hyperlinks to content from the Broadcasts or allowing others to do so, the Defender has circumvented the requirement for a Sky subscription. Users of the Subreddits, and previously the YouTube Account, are able to access the content from the Broadcasts without a Sky subscription. The communication of the Broadcasts to a public without the authorisation of the Pursuer is an infringement of the Pursuer's copyright in the Broadcasts in terms of section 20 of the 1988 Act."

The terms of the interim interdict sought

[17] The pursuer sought interdict *ad interim* in the following terms:

"1. For interdict against the Defender, acting on his own or through his servants, agents, employees or anyone on his behalf from infringing the Pursuer's copyright in the broadcast of television programmes on any of the Sky Channels (as identified in the Annex hereto) (the '**Broadcasts**') by (a) copying any Broadcasts; and/or (b) communicating any Broadcasts to the public and, in particular, and without prejudice to the generality of the foregoing, by:

- (i) uploading any Broadcasts to or making any Broadcasts available on any YouTube accounts;
- (ii) posting any new hyperlinks or continuing to hyperlink to any Broadcasts on Reddit including on:
 - (a) the subreddit r/UKTVLAND;
 - (b) the subreddit r/notapanelshow;
 - (c) the subreddit r/UKPanelShowsOnly; and/or
 - (d) any other Reddit account or subreddit;
- (iii) uploading, posting or hyperlinking to any Broadcasts online in any way whatsoever; and / or
- (iv) causing, directing, procuring, authorising, assisting or enabling others to do any of the aforesaid acts;

and for interdict *ad interim*."

The pursuer's submissions

The prima facie case

[18] Mr Tariq took the Court through the averments set out above and through the Report in some detail. He noted that, apart from the Arts Channel, which became free to air in September 2020, all of the Sky content comprised in the Broadcasts was a subscription service behind a paywall. By his conduct the defender had copied and communicated the Broadcasts to the public by electronic means, in breach of sections 17 and 20 of the 1988 Act.

[19] In relation to Reddit, Mr Tariq noted that this has been described as “the front page of the internet”. It was a prominent, not obscure, online platform which members of the public could readily and freely access, and could post comments or content and read other users’ posts. It was completely free. One could join Reddit simply by signing up with an email address. However, content posted on Reddit and subreddits could be accessed by members of the public without joining. The defender operated the Subreddits by encouraging readers and members of his community to post requests for links to UK TV programmes. The requests were not all for Sky content but many Sky programmes were requested and posted. A TV programme was provided via a hyperlink to an analogue drive on which the TV programme had been saved. The hyperlink is visible and accessible to any person who views the Subreddits, not just to the person who requested it. Across all three Subreddits the defender had around 54,000 subscribers, all of whom could request and view content via the hyperlinks. There was no need to subscribe to the Subreddits to view its content or to access TV programmes via the hyperlinks posted to them, but subscribers would get a notification when new content was posted.

[20] Proof of infringement of copyright did not require that the infringer derived financial gain, however in this case the defender did seek to benefit financially from his infringing conduct. The defender sought to make a profit from his copying and communicating of the Broadcasts by soliciting payments to his PayPal and Patreon accounts, details of which were contained on defender’s Subreddits and on the defender’s YouTube Account. The Subreddits alone comprised a total community of 54,000 members. In one week alone, there were 95,000 views. This was significant. The Report contained an image showing that the pursuer’s copyright notice was clearly visible on the content that the defender was posting.

[21] Mr Tariq submitted that the defender could not but be aware that his conduct in copying and communicating by hyperlink the pursuer's content was an infringement. First, the pursuer had used a "takedown" request of Reddit. This only resulted in removal of the specific content complained of but did not stop the defender's activities. Second, the defender had posted instructions on the Subreddits advising those requesting TV programmes not to refer to "Sky" in terms but to "read the rules [ie of the Subreddits] before requesting". At p 4 of the Report, an extract of the defender's "rules" was recorded. This read:

"For requesting, just type show and episode/series number, then click request flair, you don't need to type [REQUEST], don't request shows that are always capped or uploaded, it will probably just be deleted, it will be posted, Don't request shows before they have even aired. Don't make multiple requests for the same show(s), they will be deleted, one request is enough. Do not put Sky.com links in your requests, it will be deleted. Do not post links to ad and malware laden sites, they will be deleted and you may get banned. No Torrents." (Emphasis added.)

Third, while the defender's YouTube had ultimately been closed, and of which the defender could not but have been aware, he had continued the same infringing conduct on the Subreddits.

The balance of convenience

[22] The pursuer had wished to avoid litigation. It had tried to get Reddit and YouTube to remove content. YouTube ultimately closed the defender's account. Reddit removed individual programmes but the defender continued to post new links. A number of new links had been posted in the day or so preceding the application for *interim* interdict, including to *Russell Howard* shows and *A League of Their Own*. The takedown requests were not effective and the defender continued to post hyperlinks on the Subreddits to the pursuer's programmes. In relation to the YouTube Account, this had been taken down but

had had no deterrent effect, as the defender's activities in the Subreddits continued unabated.

Discussion and decision

The link between Cherzo, Cherzo1 and the defender

[23] The first matter to consider is whether the pursuer has provided sufficient material from which it may be inferred that the usernames Cherzo and Cherzo1 are the online *persona* of the defender.

[24] As noted above, all of the online activity noted is conducted by someone with the username of Cherzo or Cherzo1. In order to establish a link between the defender and these usernames, reference was made to the Report, which contains 27 pages of appendices of screenshots of online platforms. The Report also contained the results of the pursuer's investigations relied on to establish the *prima facie* case of infringement of the pursuer's copyright in the Broadcasts.

[25] The pursuer's investigators used open sources to establish a link between the defender and the activities of Cherzo1. These are set out in detail in the Report. In brief, these included:

- 1) *Reddit*: A search of Reddit for "Cherzo" on 24 November 2020 returned the profile for Cherzo1 on the Reddit site as a user and that the profile had been active under this username for more than a year. Cherzo1 was the moderator of the Subreddits. In relation to the link between "Cherzo" (the earlier username) and "Cherzo1" (which appeared to be used as the successor username), the researches disclosed that while Reddit does not give details of deleted or removed profiles, a Google search had produced a post on the second subreddit

indicating that “Cherzo” had quit as he was having a dispute with another Reddit user (or “redditor”). Cherzo1 responded to that post stating that he was “back” and from this the author of the Report inferred that Cherzo and Cherzo1 were usernames for the same individual.

- 2) *YouTube*: A search of YouTube on 3 November 2020 returned a channel called “Cherzo” and which contained links to the Subreddits and for donations. All of the video uploads on this channel were from the Arts Channel and the thumbnails contained Sky graphics.
- 3) *Photobucket*: A Photobucket account in the name of Cherzo contained images of Sky TV shows, including a still from *A League of their Own*.

The Subreddits and the YouTube Account all contained details of how to donate and included links to online payment platforms Patreon and PayPal.

- 4) *Patreon*: The Patreon account for Cherzo specified five payment tiers (of varying monthly amounts). The “About” section of this user stated:

“I have a YouTube channel and Reddit account that i use to post UK Panel Shows mostly, i need to have patreons to get computer equipment and online space to continue this, **i would also like to get sources for recording shows to post, such as subscription to TV packages** or IPTV Servers.” (Spelling is in the original.) (Emphasis added.)
- 5) *PayPal*: The PayPal account identified for donations (with the username Cherzo) was linked to the name Alex Cherrie.
- 6) *Steam*: Another open source search produced a gaming account on Steam with the username Cherzo and linked to a person called Alex Cherrie located in North Lanarkshire.

- 7) *Facebook*: A search of Facebook for “Alex Cherrie” disclosed that this user had studied in Glasgow and that one of his friends on Facebook was a “Mary Cherrie”.
- 8) *Trace IQ*: A search via Trace IQ disclosed the full name of Alexander Brian Cherrie, his date of birth and also the address of the defender, which was an address shared with a Mrs Mary Cherrie (born in 1947).
- 9) *The pursuer’s accounts*: Finally, a search of Sky’s own accounts disclosed that an Alex Cherrie had had a number of accounts with the pursuer, all now dormant, two of which had the address of the defender and his known email address. The last transaction had been in April 2020 for the purchase of an “entertainment pass”.

[26] In light of these materials I am persuaded that it may reasonably be inferred that the defender is the individual operating online using the names Cherzo and Cherzo1 on the platforms noted, including the Subreddits and YouTube.

The prima facie case

The Broadcast behind the pursuer’s paywall

[27] I have no hesitation in finding that the pursuer has presented a strong *prima facie* for breach of copyright in respect of the Broadcasts by the defender. (I consider the position in respect of the Arts Channel programmes in the next paragraph.) On the material presented, the defender was not just engaged in copying images, which suffices for section 17(4) of the 1988 Act, the defender appears to have copied and made available to the public whole episodes of the pursuer’s content which has the protection of copyright. I also accept that, on the pursuer’s narrative of the defender’s now-closed YouTube channel and on his still-

running Subreddits, the Broadcasts were made available to the public by electronic means and in such a way that members of the public could access this content in a manner and at a time of their choosing, such as to bring the defender's conduct within the scope of section 20 of the 1988 Act. As Mr Tariq noted, the defender has thousands of viewers who may view the Sky Broadcasts without restriction. None of this has been authorised by the pursuer. This conduct constitutes a clear *prima facie* breach of the pursuer's copyright in the Broadcasts.

Does posting links to the Arts Channel programmes constitute communication to a new public?

[28] As noted above (see para [3]), Mr Tariq drew a distinction between the Broadcasts behind the pursuer's paywall and the Arts Channel which had been free to air from September 2020. Mr Tariq quite properly noted that a distinct question arose as to whether the defender's copying and communication of programmes from the Arts Channel could nonetheless constitute an infringement. The specific question was whether this constituted a communication to a "new public".

[29] In *Svensson, cit supra*, the CJEU addressed the question of whether the provision of a clickable link (ie a hyperlink) on one website to protected works available on another website constituted "an act of communication to the public" for the purposes of article 3(1) of Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright ("the Directive"). (Article 3(1) is transposed into the provisions of the 1988 Act under consideration.) The CJEU noted that there were two criteria comprised in the concept of "communication to the public": see paragraph 16. In respect of the first of these criteria (discussed at paragraphs 17 to 20), being the "act of communication", it is sufficient to note the observation of the CJEU (at paragraph 18) that

“the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works”, and its conclusion (at paragraph 20) that such provision constituted an action of communication within the meaning of article 3(1) of the Directive.

[30] In relation to the second criterion, the CJEU observed:

“21. So far as concerns the second of the above-mentioned criteria, that is, that the protected work must in fact be communicated to a ‘public’, it follows from article 3(1) [of the Directive] that, by the term ‘public’, that provision refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons: the *SGAE* case, paras 37 and 38, and the *ITV Broadcasting* case, para 32.

22. An act of communication such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients.

23. In those circumstances, it must be held that the manager is making a communication to a public.

24. None the less, according to settled case law, in order to be covered by the concept of ‘communication to the public’, within the meaning of article 3(1) of [the Directive], a communication, such as that at issue in the main proceedings, concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at **a new public**, that is to say, at a public **that was not taken into account by the copyright holders when they authorised the initial communication** to the public: see, by analogy, the *SGAE* case, paras 40 and 42; the order in *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai* (Case C-136/09) [2010] ECR I-37 and the *ITV Broadcasting* case, para 39.” (Emphasis added.)

On the facts of that case, the links were to news articles freely available on their original website and the CJEU held that therefore there was not the requisite publication to a “new public”. By contrast in this case, apart from the Arts Channel programmes, the Broadcasts are behind a paywall.

[31] The CJEU approved *Svensson* 2 years later, in *GS Media BV* (at para 37) where it observed:

“Moreover, it is settled case-law of the Court that, to be categorised as a 'communication to the public', a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a **'new public'**, that is to say, to a **public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work** (judgment of 13 February 2014, *Svensson and Others*, C-466/12, ECLI:EU:C:2014:76, paragraph 24, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraph 14 and the case-law cited).” (Emphasis added.)

[32] Mr Tariq founded on these passages to support the extension of the *interim* interdict to the Sky Arts Channel programmes. While the Sky Arts Channel programmes have been free to air since September 2020, I accept as well-founded Mr Tariq’s submission that the pursuer did not thereby make those programmes free to the world at large. In order to view these programmes, albeit without payment, an individual nonetheless required to create an account with the pursuer and to download the “Sky Go” app on their devices. Importantly, an individual creating an account would have had to assent to the pursuer’s terms and conditions. These terms included restrictions on the account user and they expressly prohibited any copying, downloading or transmission that was not for personal use. The pursuer was making this content free only to that proportion of the public who would create accounts with it and who would agree to the pursuer’s terms and conditions. Accordingly, in my view, when the defender created a hyperlink to the Sky Arts Channel programmes, he was circumventing these protections and was making these programmes available to a “new public” which would not have been the same public the pursuer envisioned, and who would have had to accept its terms and conditions. There is a second way in which the defender’s activities constituted communication of the Sky Arts Channel programmes to a new public. On the pursuer’s platform, many of these programmes were time-limited, in

the sense that they could only be viewed during a specific time-frame, after which they were no longer accessible. However, the defender's provision of access to these via the hyperlinks on the Subreddits or formerly on the YouTube Account also circumvented these restrictions. The pursuer did not envisage making these programmes available to members of the public after the limited time for access had passed, but which the defender's links also enabled. In my view, those members of the public who viewed the Sky Arts Channel programmes after these ceased to be available free to air via the pursuer's platform were also a "new public".

Balance of convenience

[33] I also accept that the pursuer has established that the balance of convenience favours the grant of *interim* interdict. A number of factors support that conclusion. First, I find that the pursuer has established a strong *prima facie* case. It has also demonstrated that this is potentially a flagrant breach, given that the infringing posts on the Subreddits have continued notwithstanding the closure of the defender's YouTube Account and, indeed, the removal (at the pursuer's request) of infringing content from that channel as far back as July 2020. Furthermore the pursuer's use of alternative non-litigious means, in the form of requests to YouTube and Reddit, has had only limited success. The pursuer's concern is that, if the defender had advance notice of these proceedings and the *interim* interdict, he would seek to evade detection by setting up new online accounts under different aliases. The defender's activities demonstrate infringement on a large scale. The defender has in excess of 51,000 users across the Subreddits and had 95,000 users on the YouTube Account. The number of users of the Subreddits continues to grow: between July and November 2020 there had been a 17% growth in numbers. There could be no legitimate purpose in the defender's activities on the two online platforms other than to benefit financially from his

repeated copyright infringements. Infringement at this volume materially impairs the pursuer's business model. The infringements continue.

Decision

[34] I find that, collectively, these factors support the balance of convenience and the grant of the interdict *ad interim* in the terms sought.