

Neutral Citation Number: [2021] EWHC 869 (Ch)

Case No: IP-2019-00150

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (Ch D)

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 13 April 2021

Before :

DEPUTY MASTER FRANCIS

Between :

PERFORMING RIGHT SOCIETY LIMITED

Claimant

- and -

QATAR AIRWAYS GROUP Q.C.S.C.

Defendant

Edmund Cullen QC (instructed by Wiggin LLP) for the Claimant
Nicholas Saunders QC and Chris Aikens (instructed by CMS Cameron McKenna Nabarro
Olswang LLP) for the Defendant

Hearing date: 23 March 2021

JUDGMENT

Deputy Master Francis:-

Introduction

1. The question for my determination in this judgment is whether an order for extended disclosure should be made, and if so the extent of such an order, as part of the directions for the trial of preliminary issues in these proceedings.
2. The parties have sensibly agreed the matters which should be tried as preliminary issues, in order that the proceedings can be expediently managed, but are starkly at odds as to the need for or scope of any extended disclosure in connection with such trial.

The claim and the matters which the parties have agreed should be tried by way of preliminary issue

3. The claim is one brought by Performing Right Society Limited (“PRS”) against Qatar Airways Group Q.C.S.C. (“Qatar Airways”) for global copyright infringement. It is based upon the inflight entertainment system known as Oryx One which Qatar Airways operates on its flights worldwide, together with two complementary apps known as the Oryx One Play App and the Oryx One App, through which Qatar Airways provides its passengers with entertainment services and access to a wide range of entertainment content, including music, films, television shows and games (collectively described as “the Services”). PRS claims that the content which Qatar Airways makes available through the Services includes many thousands of musical works to which it is the assignee of the worldwide performing rights (referred to as “Repertoire Works”) and that in making such content available to its passengers without licence from PRS, Qatar Airways has infringed those rights. It seeks injunctive relief to restrain such infringement and damages.
4. As one for global copyright infringement resulting from the operation of its inflight entertainment system on Qatar Airways flights worldwide – at the time proceedings were issued, I am told, to over 160 destinations across the world - the claim engages not only UK and Qatari copyright law, but also the laws of many other territories from where its flights take off and land, and perhaps also of those territories over which its flights pass in transit.
5. The parties have already engaged in a preliminary jurisdictional skirmish in which Qatar Airways unsuccessfully argued that the claim should be stayed on grounds of *forum non conveniens* or otherwise on case management grounds by reason of the claim having the most real, or at any rate a stronger connection to Qatar than to the UK. I refer to the judgment of Birss J dated 17 July 2020, reported under neutral citation number [2020] EWHC 1872 (Ch), for a useful overview of the claim.
6. Following that judgment, the parties have agreed that the claim should proceed in the first instance by way of trial of various issues of principle arising under UK and Qatari copyright law. Those agreed issues are as follows:-

- (1) *Whether, on every occasion that one of the Repertoire Works (including any of the Sample Infringing Works) has been played to any of the Defendant's passengers via the Services at a time when the relevant aircraft was present in:*
 - (i) *the United Kingdom (whether on the ground or in the territorial airspace of the United Kingdom), the Defendant performed such work in public within the meaning of section 19 of the CDPA?*
 - (ii) *Qatar (whether on the ground or in the territorial airspace of Qatar), the Defendant performed such work in public within the meaning of Article 7(6) of the Qatari Law No. 7 of 2002 on the Protection of Copyright and Neighbouring Rights?*
- (2) *Whether, at any time when one of the Repertoire Works (including any of the Sample Infringing Works) has been made available to any of the Defendant's passengers via the Services at a time when the relevant aircraft was present in:*
 - (i) *the United Kingdom (whether on the ground or in the territorial airspace of the United Kingdom), the Defendant communicated such work to the public within the meaning of section 20 of the CDPA?*
 - (ii) *Qatar (whether on the ground or in the territorial airspace of Qatar), the Defendant communicated such work to the public within the meaning of Article 7(7) of the Qatari Law No. 7 of 2002?*
- (3) *Whether, for the purpose of issue (2) above, the Defendant only communicated such work to the public when the Repertoire Work was actually played by one of the Defendant's passengers?*
- (4) *Whether, for the purposes of issues (1) and (2) above, sections 19 and 20 of the CDPA are inapplicable when the relevant aircraft was only in the territorial airspace of the United Kingdom in transit to some other territory?*
- (5) *Whether, for the purposes of issues (1) and (2) above, Articles 7(6) and 7(7) of the Qatari Law No. 7 of 2002 apply whenever the relevant aircraft was in the territorial airspace of a country other than Qatar in transit to Qatar or to some other territory?*

The performing rights in issue

7. The two performing rights which are in issue under UK law are the public performance right under section 19 of the Copyright Designs and Patents Act 1988 ("the CDPA"), and the communication to the public right under section 20 of the CDPA. I understand that Qatari law provides similar protections to that afforded under those two sections, although the precise scope and extent of those protections under Qatari law may be in issue between the parties. For the purposes of this judgment I shall refer only to the relevant provisions of the CDPA, assuming for these purposes that there are no major differences of principle with the equivalent provisions of Qatari law.
8. Section 19 of the CDPA provides so far as material as follows:-

(1) The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.

(2) In this Part “performance” in relation to a work—

(a) includes delivery in the case of lectures, addresses, speeches and sermons, and

(b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work.

(3) The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film, or broadcast.

9. Section 20 of the CDPA provides as follows:-

(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,

(b) a sound recording or film, or

(c) a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—

(a) the broadcasting of the work;

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

10. At a high level, I understand that the question in issue between the parties under section 19 of the CDPA is whether on each occasion that it has played one of the Repertoire Works to a passenger via the Services, Qatar Airways has performed the work *in public*. In other words, there is no dispute that there is a performance, but there is one as to whether it is in public.

11. As regards section 20 of the CDPA, at a similarly high level I understand that the dispute between the parties is whether, in making one of the Repertoire Works available to its passengers via the Services, there was an act of communication of the work and whether that communication was one made to the public. In other words, the dispute under section 20 is not just as to the public nature of the communication, but whether there was an act of communication at all.

12. There is a fairly extensive body of both domestic case law, and decisions of the CJEU, which considers the communication to the public right, emanating in its present form as it does from the Information Society Directive (Directive 2001/29). I was referred at the hearing in particular to the decision of Arnold J in *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3749 (Ch); [2014] ECDR 7 in which he summarised (at paragraph 12) the various principles to be derived from previous CJEU decisions, and the first instance decision of Birss J in *Warner Music UK Ltd v TuneIn Inc* [2019] EWHC 2923 (Ch); [2020] ECDR 8 where he set out at paragraph 109 various further principles on the communication to the public right which had

emerged from subsequent decisions. I was also referred to the judgment of the CJEU in *Stichtung Brein v Ziggo BV* C-610/15, EU:C:2017:456; [2017] Bus LR 1899, in particular paragraphs 23 – 26 and 29.

13. Since the hearing, the Court of Appeal has delivered judgment on 26 March 2021 on TuneIn’s appeal against Birss J’s decision, reported under neutral citation number [2021] EWCA Civ 441. I invited the parties to draw to my attention anything in that judgment to which I should have regard, and received in response brief observations from both parties. Of particular relevance, and assistance to me, Arnold LJ set out in paragraph 70 an updated summary of the principles which he had previously aggregated in *Paramount*, which incorporates further principles enunciated in *Stichtung* and other decisions since *Paramount*. I extract from that summary the following points which strike me as significant in the present case:-

“(1) “Communication to the public” must be interpreted broadly...

“(4) “Communication to the public” involves two cumulative criteria: first, an “act of communication” of a work, and secondly, the communication of that work to a “public” ... Nevertheless, it is necessary to carry out an individualised assessment in the light of several factors which are complementary, interdependent and may be present in widely-varying degrees both individually and in their interaction with each other ...

“(8) A user makes an act of “communication” when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the work, or would be able to do so only with difficulty ...

“(9) It is sufficient for there to be “communication” that the work is made available to the public in such a way that the persons forming that public may access it, whether or not those persons actually access the work ...

“(11) “The public” refers to an indeterminate number of potential recipients and implies a fairly large number of persons ... “Indeterminate” means not restricted to specific individuals belonging to a private group; and “a fairly large number of people” indicates that the concept of “public” encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant ...

“(12) For that purpose, the cumulative effect of making the works available to potential recipients should be taken into account, and it is particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively ...

“(14) In considering whether there is a communication to “the public”, it is not irrelevant that the communication is of a profit-making nature ... A profit-making nature is not necessarily an essential condition for a communication to the public, however ...”

14. The facts of *TuneIn* are very different from those of the present case, concerning as they do an on-line platform, available via a website and via apps, providing a service which enabled UK users to access the streams of many thousands of radio stations broadcast by third parties from many different geographical locations across the world. However Mr Cullen QC drew my attention to various features of the services offered by the platform set out in paragraphs 123 of Birss J’s judgment, including the aggregation of radio station streams, the categorization of music stations, the curation of station lists, the personalization of consent, and search functionality, which the judge identified as being of relevance in demonstrating the platform’s degree of intervention in providing access to foreign internet radio streams, a point of importance to the question whether the services offered by the platform constituted a communication to the public. In paragraph 137 of his judgment in the Court of Appeal, Arnold LJ endorsed Birss J’s conclusions on this question.

The dispute about extended disclosure

15. In section 1A of the Disclosure Review Document (“the DRD”), PRS has identified various issues for disclosure in relation to the preliminary issues trial, together with the Models for Extended Disclosure which it contends to be appropriate. These have narrowed a little following agreed amendments made by Qatar Airways to its defence. The surviving issues for disclosure and appropriate models, on its contention, are as follows:-

1. Is the Claimant the assignee from its members of (i) the right to perform in public the musical works created by them and (ii) the right to communicate those works to the public within the meaning of provisions corresponding to sections 19 and 20 of the CDPA in countries throughout the world?

PRS states that this issue requires Model B disclosure on its part alone.

3. To what extent is and / or was the Oryx One Play app available for use by the Defendant’s passengers?

PRS states that this issue requires Model B disclosure on its part and request-led search-based Model C disclosure on the part of Qatar Airways. It sets out in section 1B the classes of document for which Qatar Airways should be required to undertake a search as comprising:-

“Technical guides, manuals, instructions to and from software and other suppliers, purchase orders and invoices to and from software and other suppliers, internal inventories and documents, and stock lists recording or evidencing the technical specifications relating to the Oryx One Play app and the Oryx One on board screen system and, in particular, the aircraft on which the Oryx One Play app is, and was, made available to the Defendant’s passengers.”

4. To what types of devices can and / or could the Oryx One Play app be downloaded by the Defendant’s passengers?

PRS states that this issue requires Model B disclosure on its part and Model C disclosure on the part of Qatar Airways. It sets out in section 1B the classes of document for which Qatar Airways should be required to undertake a search as comprising:-

“Technical guides, manuals, internal documents, information for passengers and download store operators, promotional materials and download data recording or evidencing the types of devices to which the Oryx One Play app could be downloaded by the Defendant’s passengers.”

5. What content is and / or was available through (i) the Services and (ii) the Oryx One Play app?

PRS states that this issue requires Model B disclosure on its part and Model C disclosure on the part of Qatar Airways. It sets out in section 1B the classes of document for which Qatar Airways should be required to undertake a search as comprising:-

“Documents for or from within each of the Services and the Oryx One Play app, databases relating to each system, instructions to and from content suppliers, content lists provided by those suppliers, playlists, content menus, usage reports and app data, manuals and entertainment guides, promotional materials and information provided to passengers which record or evidence the range of content made available to the Defendant’s passengers via each of the Services and the Oryx One Play app.”

6. What content can and / or could be streamed using the Oryx One app?

PRS states that this issue requires Model B disclosure on its part and Model C disclosure on the part of Qatar Airways. It sets out in section 1B the classes of document for which Qatar Airways should be required to undertake a search as comprising:-

“Documents from or from within the Oryx One app, databases relating to the Oryx One app, instructions to and from content suppliers, content lists provided by those suppliers, playlists, content menus, usage reports and app data, manuals and entertainment guides, promotional materials and information provided to passengers recording or evidencing the extent to which audio and audio-visual content can and could be streamed by passengers using the Oryx One app.”

7. How, and to what extent, does the Defendant optimize and promote content that it has made available through the Services?

PRS states that this issue requires Model B disclosure on its part and narrow search-based Model D disclosure on the part of Qatar Airways.

9. Does the Defendant provide the Services for profit and / or are the Services intended to enhance the experience of the Defendant’s passengers such that they form

part of the package of benefits and services for which the Defendant's passengers pay?

PRS states that this issue requires Model B disclosure on its part and Model C disclosure on the part of Qatar Airways. It sets out in section 1B the classes of document for which Qatar Airways should be required to undertake a search.

“Internal documents (including strategy and planning documents), advertising materials and other promotional materials relating to the IFE System and the Services recording or evidencing the way in which the Services are marketed to the Defendant's passengers.”

16. It is necessary to look back to the pleadings to identify the factual disputes which are said to give rise to these issues for disclosure, and the request-led Model C disclosure, or, in the case of issue 7, Model D disclosure, sought.
17. Issue 1 arises as a result of a non-admission by Qatar Airways that the performing rights assigned by members to PRS extend beyond the UK performing rights. This is a simple matter for PRS to prove by production of relevant sample assignments entered into by its members, but it is not in fact a question which the court is being asked to determine as a preliminary issue. It is not therefore an issue for disclosure at all in the preliminary issue and I say nothing more about it in the discussion which follows.
18. Issues 3 and 4 concern the Oryx One Play app. It is common ground that the inflight entertainment system operated by Qatar Airways enables content to be made available to passengers when on the aircraft by means of individual on-board touch screens located in front of the passenger and headphones connected by a socket in the passenger's seat. In addition, however, PRS contends that Qatar Airways makes all such content available to its passengers by an on demand streaming service accessible through its Oryx One Play app which it states can be downloaded by passengers onto and used on both personal electronic devices (phones and tablets) and laptops in advance of their flight (see paragraphs 8.2 and 10 of the particulars of claim).
19. For its part, Qatar Airways states that the Oryx One Play app was only made available to passengers on 10 of its aircraft which were not equipped with the Oryx One on board system, none of which are presently in service. It accepts that the Oryx One Play app could be downloaded by passengers before their flight but only onto personal electronic devices and not also laptops, and it asserts that the content made available through the app could only then be accessed by passengers when on board the aircraft using the on board WiFi (see paragraph 8 (d) of the defence).
20. Issue 5 concerns the range of content made available via the Services generally, and via the Oryx One Play app in particular. PRS asserts (pending disclosure) that such content includes more than 5800 Repertoire Works (paragraph 15 of the particulars of claim and appendices 1 to 4 thereof), and that all such content is made available to passengers both by the on-board screens and on their personal devices via the Oryx One Play App (paragraphs 9, 10, 15 of the particulars of claim). Qatar Airways admits that a substantial number of the listed Repertoire Works are made available via the onboard screens (paragraph 12 of the defence), but states that the range of content available via the Oryx One Play app was much more limited; it included no audio tracks other than Holy Quran

recitation audio, and the majority of TV and film titles available consisted of Arabic and other non-Western titles (paragraph 8 (e) of the defence).

21. Issue 6 concerns the range of content made available through the Oryx One app. PRS asserts that passengers can use this app before boarding their flight to create customized playlists of content that they wish to watch or listen to during the flight (paragraph 11 of the particulars of claim), and for those purposes are able to browse content and view trailers using the app (paragraph 12.1 of the particulars of claim). Qatar Airways admits that the Oryx One app is available to all passengers for use as a “playlist and scheduling service”. However it states that no audio or audio-visual content can be streamed using the app, save for a small library of trailers which is updated each month and can be streamed at any time (paragraph 8 (f) of the defence).
22. Issue 7 is concerned with the question how Qatar Airways optimizes and promotes the content which it makes available to passengers. In paragraph 12 of the particulars of claim, PRS makes a general averral that Qatar Airways not only gives access to content but also optimises and promotes content, and then in paragraphs 12.1 and 12.2 sets out two particular ways in which that is done, namely by allowing the browsing of content and viewing of trailers pre-flight via the Oryx One app and by recommending content to passengers via that app, and by indexing and categorizing on the app the content which it makes available to passengers. In paragraph 9 of the defence, Qatar Airways admits the particular ways in which it is said to optimize and promote content (subject to the limitations on the content made available through the app which it set out in paragraph 8 (f)), but makes no admission beyond that as to the general averral.
23. Issue 9 is concerned with the question whether Qatar Airways profits directly or indirectly from the provision of content including the Repertoire Works via the Services. In paragraph 13 of the particulars of claim, PRS asserts that Qatar Airways provides the Services for profit and that they are intended to enhance the experience of its passengers and form part of the package of benefits and services for which its passengers pay. In paragraph 10 of its defence, Qatar Airways admits the second proposition, but denies that it profits directly from the provision of the Services which are provided free of charge to its passengers.

The principles to apply in considering whether to make an order for Extended Disclosure

24. Practice Direction 51U sets out the following principles which the court should apply in considering whether and what order to make for Extended Disclosure:-

Paragraph 2.4

The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.3).

Paragraph 6.3

Save where otherwise provided, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure that is search-based (i.e. Models C, D and/or E) where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

Paragraph 6.4

In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors:-

- (1) the nature and complexity of the issues in the proceedings;
- (2) the importance of the case, including any non-monetary relief sought;
- (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
- (4) the number of documents involved;
- (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
- (6) the financial position of each party; and
- (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

Paragraph 6.5

A request for search-based Extended Disclosure (i.e. Models C, D and/or E) must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4). Where Disclosure Model D or E is proposed parties should be ready to explain to the court why Disclosure Model C is not sufficient.

Paragraph 6.6

The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity.

25. The Issues for Disclosure which the parties are required to identify in section 1A of the DRD, in respect of which either party seeks an order for Extended Disclosure under Models C, D or E, are defined in paragraph 7.3 of the Practice Direction as follows:-

“Issues for Disclosure” means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.

26. In his judgment in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch); [2002] Bus LR 699, Sir Geoffrey Vos stated at paragraphs 46 - 47:-

“46. It can be seen, therefore, that issues for disclosure are very different from issues for trial. Issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim. That is why paragraph 7.3 of PD51U provides that issues for disclosure are “*only those key issues in dispute*, which the parties consider will need to be determined by the court *with some reference to contemporaneous documents* in order for there to be a fair resolution of the proceedings” (emphasis added). Paragraph 7.3 goes on to explain, as I just have, that issues for disclosure do “not extend to every issue which is disputed in the statements of case by denial or non-admission.”

“47. This explanation demonstrates that, in many cases, the issues for disclosure need not be numerous. They will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure.”

He then stated in conclusion at paragraphs 55 - 56:-

“55. The Disclosure Pilot is intended to operate proportionately for all kinds of case in the Business and Property Courts from the smallest to the largest. Compliance with it need not be costly or time-consuming.

“56. The important point for parties to understand is that the identification of issues for disclosure is a quite different exercise from the creation of a list of issues for determination at trial. The issues for disclosure are those which require extended disclosure of documents (i.e. further disclosure beyond what has been provided on initial disclosure) to enable them to be fairly and proportionately tried. The parties need to start by considering what categories of documents likely to be in the parties’ possession are relevant to the contested issues before the court.”

The parties’ respective positions

27. Mr Cullen QC, on behalf of PRS, submitted to me that Extended Disclosure was required by his proposed Models in relation to each of the items within his List of Issues for Disclosure to enable the matters of principle ordered to be tried as preliminary issues to be fairly determined. He stressed in particular the fact-sensitive individualized assessment of the Services as a whole which was required in considering whether there has been an infringement of the communication to the public right, for which purpose the court needed to have sufficient information about the nature and operation of those Services which was solely within Qatar Airways’ knowledge. That included information about the means of access to the content, the quantity and type of content, the way in which content is presented – for instance, whether curated or promoted by the search facilities offered – and whether the content was provided via the Services at a profit.
28. On the question whether an order for Extended Disclosure in the terms which he sought was reasonable and proportionate under paragraph 6.4 of the Practice Direction, Mr Cullen QC suggested that Qatar Airways was exaggerating the extent of the searches

which it would be required to undertake in compliance with the proposed order, and that it was for Qatar Airways to comply with the order in a reasonable and proportionate way.

29. On behalf of Qatar Airways, Mr Saunders QC, who appeared with Mr Aikens of Counsel, submitted that none of the items listed within the List of Issues for Disclosure were genuinely key matters in dispute which needed to be determined by reference to contemporaneous documents in order for there to be a fair resolution of proceedings. He contended that the issues of principle arising for determination on the trial of the preliminary issues were all matters which were primarily questions as to the application of the law to the admitted facts as set out in the parties' statements of case and could fairly be tried based on those admitted facts. Although he accepted that there were some factual disputes between the parties relating to passengers' mode and means of access to the Oryx One Play app and the range of content made available by it, together with a dispute relating to the range of content available to be streamed via the Oryx One app, he stressed that PRS was not asserting any positive case by way of reply to the details set out by Qatar Airways in its defence, and the mere joinder of issues on such matters was not itself sufficient to trigger a requirement for Qatar Airways to give Extended Disclosure.
30. Mr Saunders QC emphasized the requirement that an order for Extended Disclosure should be reasonable and proportionate having regard to the matters set out in paragraph 6.4 of the Practice Direction. He contended that the order sought by PRS would involve Qatar Airways in a very extensive exercise in searching for documents and in managing the volume of documents likely to be caught and that the costs of that exercise, for which the parties in their cost budgets have agreed estimated costs, on Qatar Airways' part of £158,340, and on PRS's part of £90,080, were disproportionate and could not be justified.
31. Mr Saunders QC did not submit to me ways in which a request-led order for disclosure under Model C could in relation to any of the relevant Issues for Disclosure be more limited in scope than that proposed by PRS. However, he suggested that if any of the items within PRS's List of Issues for Disclosure was properly a matter for disclosure at all, it could be adequately and proportionately dealt with by an order for Model B disclosure on the part of Qatar Airways.

Discussion

32. It will be necessary for me to consider each of the items within the List of Issues for Disclosure separately or in separate groups. However before doing so, I should at the outset address two more general points.
33. Mr Saunders QC was at pains in his submissions to emphasise the limited degree of any factual disputes between the parties, at least on the questions upon which the preliminary issues trial will be determined. On this, I do not accept that the absence of a reply on the part of PRS is any real indicator of the extent of the factual disputes in issue. I note, moreover, that the parties have agreed directions for service both of an initial round of witness statements, and thereafter further statements in reply, and they have agreed estimated costs within their costs budgets for the witness statements phase in sums of £75,000 on the part of PRS, and £75,950 on the part of Qatar Airways. I take this as an indication that there are on both sides anticipated to be significant disputes of fact to be determined at the trial of the preliminary issues, encompassing the items contained in the Lists of Issue for Disclosure.

34. On questions as to the proportionality of the order for Extended Disclosure as it is sought by PRS, I have been concerned about the extent of the disclosure exercise which Qatar Airways would be required to undertake under PRS's proposed order, having regard to what Qatar Airways itself envisages that this would entail, as set out in section 2 of the DRD. The estimated costs of Extended Disclosure, a combined sum just shy of £250,000, are substantial. However I remind myself that this is a dispute between two very large commercial entities relating to alleged copyright infringement across Qatar Airways' entire passenger fleet which PRS seeks to restrain by injunction and to recover substantial damages. The issues in dispute are complex, and of very great importance to both parties. In that context, I am satisfied that if it is otherwise appropriate to make orders for Extended Disclosure in the terms sought, I should not be deterred by the extent of that exercise or the costs which will be involved.
35. I must however turn to each of the specific items with the List of Issues for Disclosure to consider whether:-
- a) it is a key issue in dispute which will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the preliminary issues, the formulation set out in paragraph 7.3 of the Practice Direction;
 - b) the Model of Disclosure proposed is appropriate in order to fairly dispose of the preliminary issues, as set out in paragraph 6.3 of the Practice Direction;
 - c) the proposed order for Extended Disclosure is reasonable and proportionate having regard to the matters in paragraph 6.4 of the Practice Direction.

Issues 3 and 4

36. Having regard to the summary of relevant considerations identified in the case law on the communication to the public right set out by Arnold LJ in paragraph 73 of *TuneIn*, it does appear to me to be relevant to the individualized assessment which the court is required to undertake for the court to determine the manner and mode in which the content was made available to passengers via the Oryx One Play app, and whether it was limited as Qatar Airways alleges to specific aircraft which were not equipped with Oryx One or limited in the types of device to which the app could be downloaded.
37. Mr Saunders QC stated that it would be unnecessary for the court trying the preliminary issues to consider the Oryx One Play app separately from Oryx One. He suggested that it would be sufficient if PRS established that the provision of content through Oryx One was an act of communication to the public, and it was not the case that there would be no act of communication simply because the range of services was narrow. However it is not evident from the defence that Qatar Airways is making any concessions in relation to the question what constitutes a sufficient act of communication which would enable me to conclude that PRS's allegations relating to the Oryx One Play app added nothing to the claim and would not be relevant to the court's determination.
38. The answers to those questions referred to in paragraph 36 above should, I apprehend, be readily ascertainable from technical manuals relating to the Oryx One Play app and the

Oryx One on board system, coupled with documents showing the aircraft in respect of which the app is made available. I am sceptical that the search for such documents is as extensive a task as Qatar Airways makes out in section 2 of the DRD.

39. I am satisfied that it is appropriate to make a request-based order for Extended Disclosure under Model C on these two issues to facilitate the fair resolution of the question whether in making Repertoire Works available to its passengers through the Services Qatar Airways made acts of communication to the public, thereby infringing the communication to the public right.

Issues 5 and 6

40. It also appears to me relevant to the individualized assessment which the court is required to make for the court to determine the extent of the content which is made available via the Oryx One Play app and the Oryx One app, and whether in both cases it is more limited than that available on Oryx One in the ways alleged by Qatar Airways. To enable the court fairly to determine that question, disclosure is reasonably required of documents which show the range of content made available on those apps.
41. However, I do accept Mr Saunders QC's submission that disclosure on this question should not be allowed to extend into a more roving enquiry as to the extent to which such content has in fact been accessed by passengers via those apps, which is a question which goes to the quantum of the claim for damages. I note in this regard the distinction drawn by Arnold LJ in principle (9) in paragraph 70 of *TuneIn* between works being made available to the public so they can access them (which is sufficient to establish a relevant act of communication) and the works actually being accessed (which it is unnecessary to show for that purpose, although of course key at the subsequent stage when damages fall to be assessed).
42. I consider that it is appropriate to make an order for Extended Disclosure on these two issues under Model C, but in order to keep such disclosure issues within legitimate bounds the Model C requests should be more limited than presently proposed. In particular, usage reports and app data seem to go only to the question whether content has actually been accessed rather than it being made available via the apps so that it can be accessed and so should not be included within the Model C requests under issue 5 or 6.

Issue 7

43. On this issue, it is in my judgment significant that Qatar Airways has admitted the particular ways in which PRS alleges that it optimizes and promotes content that it has made available through the Services. Given that admission, the question arises what dispute is there between the parties that requires for its fair determination an order for Extended Disclosure on Qatar Airways' part under Model D.
44. Mr Cullen QC submits that that PRS is entitled to disclosure of documents which might reveal other ways in which Qatar Airways optimizes and promotes content over and above the particular ways it has itself identified in paragraphs 12.1 and 12.2 of the Particulars of Claim. He points out that these are matters within the exclusive knowledge of Qatar Airways.

45. I do not agree. It is apparent that PRS has carried out its own investigations into Qatar Airways' in-flight entertainment system, and into the content which is made available through each of the Services and the manner in which such content is promoted. It has been able to plead the detailed particulars set out in paragraphs 12.1 and 12.2 based upon those investigations. If there are other, materially different ways in which Qatar Airways is alleged to optimize and promote content, it is, in the first instance, for PRS to plead the same in its particulars of claim. Mr Saunders QC characterized the request for Extended Disclosure on this issue as a fishing expedition. The expression may be somewhat pejorative; however I do consider that there is no key outstanding factual issue in dispute on the parties' cases as they are presently pleaded which would justify an order for Extended Disclosure under Model D on this issue.

Issue 9

46. The factual dispute on this issue also appears to be limited. Qatar Airways accepts that the Services, though (on its case) provided free of charge, are part of the package of services and benefits for which a passenger pays through his or her fare; to that extent at least it may be said to profit indirectly from making content available to its passengers via the Services.

47. On behalf of PRS Mr Cullen QC submits that the question at issue and relevant to the court's determination whether there has been an act of communication is more nuanced; it is whether Qatar Airways has used or exploited its ability to make content available to its passengers as a means of selling tickets.

48. I can see that such a question may very well be of relevance and importance to that determination, although it is not one which is obviously put in issue as such or in that way in paragraph 13 of the particulars of claim.

49. Looking at the scope of the Model C requests which PRS seeks to make through an order for Extended Disclosure, it seems to me that PRS might be justified in seeking disclosure of outward-facing advertising and other promotional materials used by Qatar Airways to sell its flights to see the extent to which the in-flight entertainment system is promoted as a selling point. However, I cannot see that there would be any reasonable justification for the disclosure of internal or planning documents. Moreover, whilst it may be reasonable and proportionate for there to be an order for search-based disclosure of documents within the former class, I do not consider it would be reasonable or proportionate for that to be extended to documents of the latter class.

50. In my judgment, it is appropriate for there to be Extended Disclosure on this issue, but such order should be limited under Model C to outward-facing advertising and other promotional materials.

Disposal

51. For the reasons which I have endeavoured to set out fairly succinctly above, I shall make an order for Extended Disclosure:-

a) in relation to items 3 and 4 under the Model C requests as they are set out in section 1A of PRS's DRD;

b)in relation to items 5 and 6 under the Model C requests as they are set out in section 1A of PRS's DRD, but excluding the requests for usage reports and app data;

c)in relation to item 9 under the Model C request as it is set out in section 1A of PRS's DRD, but excluding the requests for internal documents.

52. I shall dismiss the application for an order for Extended Disclosure under Model D in relation to item 7.

53. I shall leave it to the parties to agree a revised form of wording for those requests to give effect to this judgment, and to agree revised budgets for the disclosure phase in the light of the somewhat more limited scope of the disclosure which is to be ordered in comparison to that which PRS has sought. If the parties are unable to agree any of these matters, any outstanding disputes may be referred to me for determination on paper, if the parties consider it appropriate, or otherwise at a further hearing to be arranged.

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