

Blocking injunctions against ISPs in Sweden - the Swedish court doesn't wait for the CJEU

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Readers familiar with EU copyright law will recall that national courts of the EU Member States are able to issue injunctions against ISPs (providers of internet access) ordering them to prevent their customers from accessing websites infringing copyright by blocking access to the websites (UPC Telekabel Wien v Constantin Film C-314/12) by reference to Article 8(3) InfoSoc Directive (Directive 2001/29).

While the frequency of issuing injunctions following the CJEU's ruling has varied in the Member States, the practice has now reached Sweden. And the velocity of the development is staggering. The Swedish Patent and Market Court of Appeals (Patent- och marknadsöverdomstolen; PMÖD) has issued an injunction ordering one of the largest internet providers in Sweden (B2 Bredband) to block their customers from accessing The Pirate Bay (TPB) and Swefilmer websites. A total of 0,02% of the company's customers visited the websites in question. The injunction encapsulates **5** web addresses in relation to Swefilmer, and **323** addresses in relation to TPB. It has been issued for a period of three years. The decision cannot be appealed to the Swedish Supreme Court.

While an injunction addressed to an ISP, but effectively targeting a website, should not come as a surprise after UPC Telekabel, a number of legal issues in relation to the assessment, and relevance, of the infringements make one raise at least one eyebrow.

Legal basis for issuing injunctions in Sweden

In Swedish copyright law injunctions can be issued on the basis of s. 53b of the Copyright Act (see here for an unofficial English language version). Under s. 53b a court may prohibit a party, under the penalty of a fine, from committing or contributing to copyright infringement. Although the national provision has different wording from Art. 8(3) InfoSoc Directive, in particular because it expressly requires primary or secondary infringement to be conducted by the addressee of the injunction, it is seen as implementing Art. 8(3) InfoSoc Directive, an interpretation which PMÖD also confirmed in the present case after having assessed the compatibility of the Swedish provision.

The decision of the Patent and Market Court of Appeals (PMÖD)

PMÖD delivered its judgment on **13 February 2017** and reversed the District Court's decision, despite an ongoing case before the CJEU with essentially identical circumstances (Stichting Brein, v

Ziggo and XS4ALL Internet C-610/15), Having found that the ISP is liable for secondary infringement in relation to the communication of works and sound recordings to the public, PMÖD issued the injunction against the ISP, essentially ordering the ISP, under penalty of 500 000 SEK (52 000 EUR), to prevent its customers from accessing the TPB and Swefilmer websites. Interestingly the court also noted that “as far as The Pirate Bay is concerned”, the ISP has *also* contributed to the reproduction of works and sound recordings. TPB is therefore *associated* with both the communication of works to the public and the reproduction of works.

It is clear from the wording of Art. 8(3) InfoSoc Directive, and indirectly from the Swedish provision given the circumstances of the case and applicability of *UPC Telekabel*, that the third party using the services of the addressee of the injunction must do so in order to infringe copyright or a related right. With regards to Swefilmer this is straightforward, much like in *UPC Telekabel*, as the website was held to communicate content to the public. Yet, with regards to TPB it is anything but clear because of the fairly general reasoning when determining what infringements take place and by whom they are committed.

Essentially, the court stated that it was “indisputable that the works and the sound recordings, in any case at the time to which the rightholders’ evidence refers, have been unlawfully made available and reproduced via The Pirate Bay and Swefilmer services. The starting point for the assessment by the Patent and Market Court of Appeals is therefore that infringement of the relevant rights has occurred via The Pirate Bay and Swefilmer services” (authors’ translation of the Swedish judgment). The court noted further that “within the framework of The Pirate Bay and Swefilmer it is a matter of very extensive activity in which the rightholders’ protected content has been made available without their consent”. Finally, for the purpose of establishing the contributory infringement of the addressee of the injunction required under the Swedish provision, the court notes, perhaps surprisingly in relation to the identity of the infringer, that the ISP makes unlawful communications and reproductions of the content possible by offering an internet connection to its customers.

As the injunction is effectively targeting TPB, one would expect the court to establish a link between the ISP’s contributory infringement and the infringing activity of its customers on the one hand, and the relevance of TPB’s potential role in the infringement process on the other hand. However this is not unequivocally established in the judgment as the court seems to focus instead on the infringements committed by the users and the ISP’s role in contributing to those infringements.

That the ISP’s customers infringe copyright by reproducing or making the content available to others and necessarily use their ISP’s service to accomplish this is nothing new (and individuals have indeed been convicted for it when making use of TPB; Svea Court of Appeal, case B 3672-11, 19 July 2011), but to order an ISP to block access to a website is not a measure that will prevent these customers from continuing to infringe (nor even perhaps deter infringements, although the court did imply the opposite). It is moreover hard to see how these customers could be regarded as the “third party” within the meaning of Art. 8(3) InfoSoc Directive, i.e. a third party which uses the services of an intermediary to infringe copyright.

If the court’s reasoning should instead be read as meaning that the rights are infringed by other users of the internet, i.e. not customers of the ISP in question, who are downloading and sharing protected content and that these users should instead be deemed to use the ISP’s services within the meaning of Art. 8(3) InfoSoc Directive, which would be a very broad application of Art. 8(3), then it is equally hard to see the role of the website in relation to the existence of a copyright-relevant act. In a peer-to-peer network, which TPB has not created as such nor is administering but with which it is often associated, the transfer of content, including files containing copyright-protected works, occurs directly from one internet user to another internet user and the only intermediaries relevant for the transfer and availability of content are, ordinarily, the ISP of each user and the software that is used

by each user to download and share files.

Surprisingly the court does not discuss the relevance of TPB's secondary infringement (contribution to communication of works to the public) for which the operators of the website had been convicted in Sweden in 2010 (Svea Court of Appeal, case B 4041-09, 26 November 2010). One therefore wonders why the injunction, while being addressed to the ISP, effectively targets TPB at all. The circumstance that files are not de facto stored on TPB website makes this case vastly different from the circumstances in *UPC Telekabel* and should have been taken into account accordingly when applying that case and indeed Art. 8(3) InfoSoc Directive. In fact, it may even justify a reference for a preliminary ruling from the CJEU. Yet the court seems to presume that as long as some infringement has been, or may be, taking place then that is sufficient to issue an injunction against an ISP (whose role is indispensable for the infringement to occur) *but* which effectively targets a party that is not infringing the rights or indeed that is not using the ISP's services *to infringe* the rights. In other words, the Swedish court seems to have interpreted Art. 8(3) InfoSoc Directive in such a way that, whereas it is necessary to establish that a third party is using the services of the intermediary (the addressee of the injunction), the injunction, while being addressed to the intermediary, can target the actions (or omissions) of another party, whether or not that party is de facto infringing copyright. TPB's role is certainly not unimportant for the effectiveness of the infringement, but it is not indispensable, nor even "merely" needed, for the infringement to occur. By way of comparison, that is not how the Dutch Supreme Court seems to understand that provision in *Stichting Brein*, as it essentially asks, by its second (conditional) question, whether Art. 8(3) InfoSoc Directive can be applied even though a website such as TPB does not infringe copyright.

Perhaps one is to understand that PMÖD is implying that TPB is indeed to be deemed as the third party that uses the ISP's services to infringe copyright, however it is not decisively stated in the judgment. This would, however, correspond to the five day older Opinion of Advocate General Maciej Szpunar in *Stichting Brein*. Yet, if one is to presume that Art. 8(3) InfoSoc Directive must be interpreted in such a way that the third party using the services of the intermediary to infringe copyright ought *simultaneously* to be the party effectively targeted by the injunction, as was the case in *UPC Telekabel*, then considering that operators of TPB have been convicted for secondary copyright infringement in Sweden, and that the Swedish provision requires at least secondary copyright infringement by the addressee of an injunction, PMÖD would need to answer the question of whether it can issue an injunction against a party that is *contributing to contributory infringement of copyright*. This could be another circumstance justifying a reference for a preliminary ruling from the CJEU. Such a situation does not however even seem to be encapsulated by s. 53b of the Swedish Copyright Act as the addressee of an injunction must contribute to primary infringement and not secondary infringement.

A final thought

Art. 8(3) InfoSoc Directive gives rise to several different interpretations as to its scope, despite its seemingly straightforward wording. In any event, the specific rules governing the issuing of injunctions and secondary liability are matters not regulated by EU law and national courts of the Member States certainly have more freedom, although Art. 8(1) InfoSoc Directive does prescribe that any sanctions must be *effective, proportionate and dissuasive*. Determining the suitability of a sanction certainly therefore requires a degree of diligence. After all, the inherent nature of cases involving blocking injunctions addressed to ISPs is that there is no party in such proceedings to challenge the validity and scope of the primary or, as the case might become, secondary infringement.

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OPINION OF ADVOCATE GENERAL
SZPUNAR
Delivered on 8 February 2017 (1)

Case C-610/15

Stichting Brein
v
Ziggo BV,
XS4ALL Internet BV

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As to why the Swedish court did not decide to stay the proceedings until the CJEU delivers its judgment in *Stichting Brein*, despite the identical circumstances, it is certainly a matter which the national court ought to have addressed. At least the CJEU will have the benefit of both the Opinion of the Advocate General and the judgment of the Swedish court when it comes to rule on the case - unless of course this judgment is in fact meant to be the Swedish language version of the Opinion...

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