

CLIENT ALERT

EU Court of Justice Issues New Ruling on Website-Blocking Orders

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On March 27, 2014, the EU Court of Justice (CJEU) ruled in the UPC Telekabel Wien-case that national courts may impose website blocking orders to internet access providers (IAPs) requiring them to prevent their subscribers from accessing a website containing copyright infringing material, without specifying the concrete blocking measures to be taken. The Court also emphasized that the measures taken by the IAPs must strike a fair balance between all fundamental rights involved. The IAPs may find themselves in the unenviable position of having to determine the adequacy and proportionality of the blocking measures to be taken. This risks leading to additional litigation regarding the measures taken to implement website blocking orders.

Background

Article 8(3) of EU Directive 2001/29 (the Copyright Directive) provides for the possibility for rightholders to apply for an injunction against intermediaries – such as IAPs – whose services are used by a third party to infringe their rights.

Based on the national rules implementing this provision, Constantin Film and Wega, two film production companies, sought to obtain an injunction against UPC Telekabel, an Austrian IAP, ordering it to block the access of its subscribers to a website offering illegal film downloads and streaming. In its defense, UPC Telekabel submitted that its services could not be considered as being used to infringe copyrights within the meaning of Article 8(3) of the Copyright Directive because it did not have any business relationship with the operators of the website at issue. UPC Telekabel also asserted that all possible blocking measures can be circumvented and that some of them are excessively costly.

The Austrian Supreme Court referred the matter to the CJEU for a preliminary ruling.

The CJEU's ruling of March 27, 2014

A) The interpretation of Article 8(3) of the Copyright Directive

Article 8 of the Copyright Directive states in its paragraph 3: '*Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.*'

UPC Telekabel submitted that its services could not be considered as being used to infringe a copyright or related right within the meaning of Article 8(3) because it did not have any business relationship with the operators of the website at issue.

The CJEU, however, rejected the argument that, for Article 8(3) to be applicable, there has to be a contractual relationship between the IAP and the person who infringed a copyright or related right. Such a requirement does not follow from the wording of the Copyright Directive, nor can it be inferred from the objective pursued by that directive which is to guarantee a high level of protection to rightholders.

In addition, the Court notes that, in order to obtain an injunction against an IAP, holders of a copyright or of a related right must not show that the IAP's customers actually access the protected subject-matter made available to the public without their agreement. The Copyright Directive requires that the measures which the Member States must take in order to conform to that directive are aimed not only at bringing to an end infringements of copyright and of related rights, but also at preventing them.

The CJEU therefore concludes that Article 8(3) of the Copyright Directive must be interpreted as meaning that a person who unlawfully makes protected subject-matter available to the public on a website, is using the services of the IAP of the persons accessing that subject-matter. That IAP must therefore be regarded as an intermediary within the meaning of Article 8(3) of the Copyright Directive.

B) Imposing website-blocking orders without specifying the implementing measures

The referring court also asked the CJEU whether a national court can enjoin an IAP to block access to a certain website, in general terms, without identifying the specific measures to be taken. The IAP can avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable measures to achieve such blockage.

The CJEU referred to its previous findings in *Scarlet Extended* (case C-70/10) and *Promusicae* (case C-275/06). In order to assess whether an injunction, taken on the basis of Article 8(3) of the Copyright Directive, is consistent with EU law, it is necessary to take account of the requirements that stem from the protection of the applicable fundamental rights. Where several fundamental rights are at issue, the Member States must ensure that a fair balance is struck between them.

Injunctions taken on the basis of Article 8(3) result primarily in a conflict between (i) copyrights and related rights, (ii) the IAP's freedom to conduct a business, and (iii) the freedom of information of internet users.

The CJEU confirms that the IAP's freedom to conduct a business is restricted by the adoption of a blocking order that does not specify the measures to be taken. The Court, however, is of the opinion that such an injunction does not infringe the very substance of that freedom. The Court states that:

- Firstly, such an injunction leaves it to the addressee to determine the specific measures to be taken in order to achieve the result sought. Accordingly the addressee can select the measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.
- Secondly, such an injunction allows the addressee to avoid to incur any liability by proving that he has taken all reasonable measures. This should ensure that the addressee of the injunction will not be required to make unbearable sacrifices, which would be unjustified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.

The Court therefore finds that the requirement to strike a fair balance between the fundamental rights concerned does not preclude a website blocking order formulated in general wording provided the IAP can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable implementing measures. However, the Court specifies that the following two conditions must nevertheless be fulfilled:

- When the IAP chooses the measures to be adopted in order to comply with the injunction, he must ensure compliance with the fundamental right of internet users to freedom of information. The measures must serve to bring an end to a third party's infringement but without thereby affecting internet users who are using the provider's services in order to lawfully access information. The national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the IAP are known.
- Even though the enforcement of an injunction may not lead to a complete cessation of the infringements of the IP rights concerned (because of, inter alia, the risk of circumvention), the measures which are taken by the IAP must be sufficiently effective to ensure genuine protection of the fundamental right at issue. They must have the effect of preventing unauthorized access to the protected subject-matter or, at least, of making such access difficult to achieve and of seriously discouraging users from accessing the subject-matter made available to them in breach of that fundamental right.

Assessment

The CJEU finds that national courts should be allowed, under certain conditions, to impose a website blocking order without specifying the concrete measures to be taken by the IAP to achieve such blockage. The IAP must however be able to avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable implementing measures.

The CJEU thereby seems to be placing a heavy burden on IAPs who will have to determine which website blocking measures are reasonable and appropriate and at the same time (i) compliant with the injunction and (ii) not in breach of the fundamental rights of internet users. The question can be raised whether such delegation of a critical responsibility in an area that touches upon fundamental rights and freedoms is both workable and desirable. Moreover, it remains to be seen how the courts will deal with issues of potential liability should it turn out that the measures taken to implement the injunction are ineffective or in breach of third party rights.

This ruling can be expected to lead to increased litigation regarding the implementation of website blocking injunctions.

At the same time, it should be emphasized that the Court reiterated the need to strike a fair balance between conflicting fundamental rights such as the IAP's freedom to conduct a business and the internet user's right of information. The Court also insisted on the fact that the IAP is not the author of the IP infringement leading to the adoption of the injunction and is not required to make "unbearable sacrifices." Reasonable implementation measures will suffice.

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