Advocate General: Website Block Obligation for Access Providers Approved

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In his opinion of 26 November 2013, the Advocate General of the Court of Justice of the European Union (CJEU), in Case C-314/12, considered that a court injunction requiring an Internet access provider to block certain websites that infringed copyright did not breach EU law.

In the dispute between Austrian access provider *UPC Telekabel* and the companies *Constantin Film Verleih GmbH* and *Wega Filmproduktionsgesellschaft GmbH*, the Austrian Supreme Court had referred the matter to the CJEU for a preliminary ruling. The essential question concerned the interpretation of Article 8(3) of Directive 2001/29/EC ("Copyright Directive"), under which injunctions may be issued against intermediaries whose services are used by a third party to infringe a copyright or related right. In the case at hand, the website kino.to was the service being used to infringe copyright. However, the injunction was issued against *UPC Telekabel*, which merely provides access to the Internet and, thereby, to kino.to. In the Austrian court proceedings, a temporary injunction had been issued against the access provider, requiring it to block the website, even though *UPC Telekabel* had no legal connection with kino.to and did not provide it with Internet access or storage space. In previous CJEU case law, injunctions issued under Article 8(3) of the Copyright Directive had always been issued against the access provider of the infringing party, not that of the user of an illegal service.

In the Advocate General's opinion, the wording, context, meaning and purpose of Article 8(3) of the Copyright Directive suggested that it applied to the access providers of website users. The legislator required strict, effective regulation for the protection of copyright. If an operator of illegal services could not be prosecuted, for example if it was based outside Europe, the need for effective protection could require the access provider to take responsibility, even if it had no legal or actual connection with the illegal service.

A court blocking order was limited by the fundamental rights of the parties concerned. Generally speaking, and unless specific measures were ordered (so-called "*Erfolgsverbot*"), blocking orders could not be imposed. However, the Advocate General thought a blocking order was not necessarily disproportionate even if the blocking measures required considerable investment on the part of the access provider and yet were easy for users to circumvent. Incidentally, national courts should consider all the specific circumstances of each individual case and

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weigh up the fundamental rights of each party. As part of this weighing process, account should be taken of the possibility that more access providers would be required to act in the future. If such action would cost so much that it would jeopardise the business model of the access providers concerned, consideration should be given to requiring rightsholders to share these costs. Priority should continue to be given, however, to the enforcement of copyright against the operators of the illegal website or its access provider.

Opinion of Advocate General Pedro Cruz Villalón of 26 November 2013 (case C-314/12)

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