[NL] Internet Service Providers XS4ALL and Ziggo Do Not Have To Block Access to The Pirate Bay Website

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Denise van Schie
Institute for Information Law (IViR), University of Amsterdam

On 28 January 2014, the Court of Appeal in The Hague ruled that two internet service providers XS4ALL and Ziggo do not have to block their subscribers from accessing The Pirate Bay website.

BREIN, the Dutch association for the protection of the rights of the entertainment industry, requested the District Court to issue an injunction to block subscribers to XS4ALL and Ziggo from accessing The Pirate Bay website. The purpose of the injunction was to stop copyright infringements, based on Article 26d of the Copyright Act and Article 15e of the Neighbouring Rights Act. Under these Articles, the Court can issue an injunction to prevent copyright and other rights' infringements through the services of intermediaries, by ordering the intermediaries to cease the services used for the infringements. On 11 January 2012, the District Court of The Hague ruled that a large portion of the XS4ALL and Ziggo subscribers had committed copyright infringement by uploading protected works to The Pirate Bay website without the consent of the copyright owner. The District Court issued a court order to block the subscribers of XS4ALL and Ziggo from accessing The Pirate Bay website.

The judgment of the Court of Appeal overturned the judgment of the District Court. The Court considered that the number of illegal downloaders had increased, despite the blockage of The Pirate Bay website and that the blocking of access to the website was therefore unsuccessful in that it did not prevent newcomers to the website from downloading content from an illegal source. Also, it was noted that the decrease in visitors to the website had not led to a significant reduction of copyright infringements committed by subscribers of XS4ALL and Ziggo. According to the Court, therefore, the blocking of The Pirate Bay website had been ineffective in preventing illegal downloading.

The Court also held that the blocking of the website affects the freedom to conduct business of Ziggo and XS4ALL. The Court argued that the fact that the blocking is technically very easy to do and adds little or no extra cost, does not detract from the impact the blocking has on the freedom to conduct business. The blocking of the website constitutes an infringement of the freedom of businesses to act at their discretion and does not fulfil the intended purpose, i.e. the prevention of illegal downloading. The Court found therefore, that the

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infringement of the freedom to conduct a business was not justified under the principle of proportionality.

BREIN claimed that XS4ALL and Ziggo knowingly and structurally facilitated, and thus promoted, large-scale infringements of intellectual property by their subscribers when they did not block the access to The Pirate Bay website as ordered by the District Court. The Court of Appeal did not consider this claim to have any basis due to the fact that it held the ordered blocking as ineffective and disproportionate.

Gerechtshof Den Haag, 28 januari 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL/BREIN

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:88

Court of Appeal The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL v BREIN

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