Court of Justice of the European Union: Internet Service Providers may be ordered to block access to websites that contain IP infringing material

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Alexander de Leeuw
Institute for Information Law (IViR), University of Amsterdam

On 27 March 2014, the Court of Justice of the European Union (CJEU) gave its ruling in Case C-314/12, a case between UPC Telekabel Wien, on the one hand, and Constantin Film Verleih and Wega Filmproduktionsgesellschaft, on the other. The CJEU considered whether it is permissible to order an internet service provider (ISP) to block its subscribers' access to a website on which copyright protected films are made available to the public, without the rightsholders' consent.

Constantin Film and Wega are film production companies. They claimed that some of the films in which they hold the copyright and related rights were made available on a website for streaming or downloading without their consent. The Vienna Commercial Court granted an order according to which UPC is prohibited from providing its customers with access to the website at issue. This order "was to be carried out in particular by blocking that site's domain name and current IP ('Internet Protocol') address and any other IP address of that site of which UPC Telekabel might be aware."

UPC contested the order, stating that "its services were not used" to infringe a copyright or related right pursuant to Article 8(3) Copyright Directive, which is a requirement for injunctions to be granted against an ISP. The underlying argument was that UPC did not have any business relationship with the operators of the website, and it was not established that its own customers acted unlawfully. Moreover, UPC argued that the blocking measures can be technically circumvented and are excessively costly.

In short, the Austrian Supreme Court presented four preliminary questions to the CJEU, of which two are particularly important. It first asked the question: when is a person deemed to be 'using the services of an intermediary' for the purposes of Article 8(3) Copyright Directive. Secondly, the Austrian Supreme Court asked whether it is compatible with Union law to grant an order to block access to a website in general terms, in light of the balance between parties' fundamental rights that must be made.

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First, the CJEU noted that intermediaries are often in the best position to bring an end to infringing activities. The Court further stated that ISP's are inevitably actors in any transmission of infringing material over the internet; without granting access to the network, the transmission of such material is not possible. The Copyright Directive contains no indication that there must be a specific business relationship between the infringing party and the intermediary. Such a requirement would even be contrary to the purpose of that Directive, as it would reduce legal protection. According to the Court, there is also no need to show that the customers of the ISP actually accessed the infringing material. Thus, when infringing content is made available on a website, the person making it available is using the services of the internet service provider.

In considering the second question, the Court reiterated that, in any case, a fair balance must be struck between the applicable fundamental rights and principles of EU law. The fundamental rights involved in this case are the intellectual property rights, the freedom to conduct a business and the freedom of information of internet users. An important EU principle involved is the principle of proportionality. Although an order for an ISP to block access to a website restricts its freedom to conduct a business, the Court stated that it "does not seem to infringe the very substance" of that freedom.

A general order to prohibit access to a website leaves the ISP with the freedom to decide which specific measures should be taken. It gives the ISP the opportunity to choose measures that it believes are in line with its way of doing business. Therefore, intellectual property rights seem to outbalance the freedom to conduct a business under these circumstances. However, when giving shape to the measures, the ISP must ensure compliance with the fundamental right to information of its subscribers. The measures taken must be "strictly targeted". In short, this means that the measures must not limit the possibility of lawfully accessing the information available.

Furthermore, the Court acknowledged that blocking measures might not completely prevent the infringing activities. However, it considers it to be sufficient if the measures "have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult [...]." In this regard, it is interesting to consider the Dutch XS4ALL case (see IRIS 2014-3/37). In that case, a Dutch Court of Appeal stated that the ISPs concerned did not have to block access to The Pirate Bay, based on a contrary balancing of the fundamental rights involved. The blocking measures were deemed ineffective and disproportionate.

Thus, the fundamental rights of EU law do not preclude a court order that prohibits an ISP from providing its customers with access to a website on which infringing material is made available, when the measures to be taken by the ISP are not specified. Also, it is not required that the measures have the effect of a

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complete end to infringing activities.

UPC Telekabel v. Constantin Film Verleih, Court of Justice of the European Union, Case C-314/12

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