[NL] Court orders ISPs to temporarily block access to The Pirate Bay

IRIS 2017-10:1/29

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On 22 September 2017, The Hague District Court ordered a preliminary injunction against internet services providers (ISPs) Ziggo and XS4AALL to temporarily block access to The Pirate Bay until the Dutch Supreme Court had issued a judgment in the main proceedings.

This case has to be seen in light of the main proceedings before the Dutch Supreme Court, between the applicant BREIN, a foundation protecting the rights and interests of Dutch copyright holders, and Ziggo and XS4ALL as defendants, both of them ISPs who give their end-users access to The Pirate Bay. The main proceedings were suspended on 13 November 2015 for a preliminary ruling reference by the Court of Justice of the European Union (CJEU), which was issued on 14 June 2017 (see IRIS 2016-1/22, IRIS 2017-3/5, and IRIS 2017-7/4). On 6 July 2017, interim proceedings were initiated by BREIN. It primarily asked the District Court to order the two ISPs to block their customers' access to the domain names and IP addresses through which The Pirate Bay operates. This claim was based on Art 26d of the Dutch Copyright Act and Art 8 sub-paragraph 3 of the EU Copyright Directive, under which intermediaries can be ordered to cease their services used by others for copyright infringements.

The District Court first looked at whether there is an urgent interest at stake for BREIN to obtain an injunction. It concluded that new factual circumstances had occurred and that BREIN had initiated the interim injunction proceedings in an expeditious manner.

The District Court then established that it should align its judgment with the 2012 judgment of the Court of first instance, in which Ziggo and XS4ALL were ordered to block access to The Pirate Bay, and which was later overturned by The Hague Court of Appeal in 2014 (see IRIS 2012-2/31 and IRIS 2014-3/37). The District Court based its reasoning on the interlocutory judgment given by the Dutch Supreme Court in which it was made clear that the appeal judgment was wrong on several points. According to the Supreme Court, the Court of Appeal could not have required that the blocking of access to The Pirate Bay would put an end to the illegal downloading of works by end-users. Furthermore, the Supreme Court found the Court of Appeal's explanation as to why "art works" were not supposed to be the subject of the blocking measure unclear. Finally, in light of the CJEU's

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preliminary ruling and as opposed to what was said in the appeal judgment, the District Court inferred that the administrators of The Pirate Bay made an “act of communication to the public”. Having regard to this, the District Court concluded that the Court of Appeal judgment was not in line with a correct interpretation of copyright law and, consequently, that it did not take the interests of BREIN sufficiently into account when assessing the proportionality of the measure.

The District Court therefore aligns its proportionality test with the one carried out by the judge of first instance in 2012, in which both the interests of BREIN, the ISPs’ subscribers and the ISPs themselves were represented and in which the blocking measure was said to be proportionate. The District Court found that the proportionality of the measure was strengthened by the CJEU ruling in which it was said that the exchanged works were “communicated to the public” and that copyright infringements had thus occurred on the site itself. In light of this, the aim of countering visits to The Pirate Bay should also have been taken into account by the Court of Appeal when assessing the proportionality of the measure. The District Court concluded that the blocking measure was proportionate and ordered the ISPs to block access to The Pirate Bay until the Dutch Supreme Court had issued its judgment in the main proceedings.

Rechtbank Den Haag, 22 september 2017, ECLI:NL:RBDHA:2017:10789, Ziggo & XS4ALL/BREIN

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:10789

District Court The Hague, 22 September 2017, ECLI:NL:RBDHA:2017:10789, Ziggo & XS4ALL/BREIN

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