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

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On 12 January 2018, Midden-Nederland District Court, in the Dutch city of Lelystad, ordered five Internet Service Providers (ISPs), through an interim injunction, to temporarily block access to the Pirate Bay (TPB) until both the The Hague District Court and the Dutch Supreme Court had given their judgments in the main proceedings.

The dispute concerns BREIN, a foundation which protects the rights and interests of Dutch copyright holders, and five ISPs, namely T-Mobile, Tele2, CAIW, Zeelandnet and KPN, which give their end-users access to TPB. Based on Art 26d of the Dutch Copyright Act and Art 15e of the Dutch Related Rights Act, BREIN, the claimant in the dispute, requested the court to order all ISPs to block access to the domain names and IP addresses through which TPB operates.

Having regard to similarities in terms of cases, the court based its reasoning on an earlier judgment, decided by the The Hague District Court on 22 September 2017, in which BREIN also required ISPs, namely ZIGGO and XS4ALL, to cease their activities with regards to the giving of access to TPB (see IRIS 2017-10/23). By referring to that court's reasoning, in which the CJEU's preliminary judgment of 14 June 2017 (see IRIS 2016-1/22, IRIS 20173/5, and IRIS 2017-7/4) was taken into account, Midden-Nederland District Court concluded that the blocking measures were justified, proportionate and effective. The fact that such measures can be circumvented by use of technical means is irrelevant. In the view of the court, what counts is that these measures make it more difficult for end-users to access TPB, amounting to a decrease in users' visits to that website and thus in illegal downloading. As concerns the "urgent interest" of the claimant in obtaining a preliminary injunction, the court took into account that BREIN had only recently — in December 2017 — brought proceedings in the main action and, therefore, that a final judgment could not be expected in the short term. Moreover, taking into account the CJEU judgment in which it was found that TPB itself infringed copyright law by making an act of "communication to the public", which led to blocking measures in the case of Ziggo and XS4ALL, the Court inferred that the "urgent nature" of the claim was present.

Besides having to block access to TPB within ten days, all ISPs were also required to pay a penalty sum for non-compliance amounting to EUR 10 000 and an

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additional EUR 2 000 for each day of further infringement; however, such a fine cannot exceed EUR 1 million. Moreover, all ISPs, except KPN, were required to jointly pay the procedural costs amounting to EUR 15 859. The reason why KPN was exempted from the latter costs is because its subsidiary SX4ALL already complied with the earlier blocking measures issued by The Hague District Court, and consequently, unlike the other ISPs, KPN did not file a defence against BREIN. Finally, Zeelandnet was ordered to pay an additional EUR 2 500 because it had argued that the judge lacked competence for ruling on the dispute.

Concerning KPN, the blocking measures will have to stay in place until the Dutch Supreme Court has given a ruling in the main proceedings between BREIN and Ziggo/XS4ALL, which were suspended on 13 November 2015. With regard to the other ISPs, their blocking measures will have to last until the court of first instance has decided on the main proceedings initiated by BREIN on 13 December 2017.

Rechtbank Midden-Nederland, 12 januari 2018, C/16/448423/KG ZA 17-382, KPN & T-Mobile & TELE2 & Zeelandnet &CAIW/BREIN

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2018:114

District Court Midden-Nederland, 12 January 2018, C/16/448423/KG ZA 17-382, KPN & T-Mobile & TELE2 & Zeelandnet &CAIW/BREIN

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