# [NL] AG opinion on the blocking of The Pirate Bay

**IRIS 2018-5:1/24**

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On 16 March 2018, the Advocate General (AG) of the Dutch Supreme Court, van Peursem, delivered his opinion in the Pirate Bay case, in which he concluded that blocking access to The Pirate Bay (TPB) was legitimate. This opinion should guide the Dutch Supreme Court in its future ruling in the case between BREIN, a foundation which protects the rights and interests of Dutch copyright holders, and Ziggo and XS4ALL, ISPs which give their end-users access to TPB. The AG mostly based his opinion on both the Dutch Supreme Court's interlocutory judgment of 2015 and the EU Court of Justice's (CJEU) preliminary ruling of 14 June 2017 (see IRIS 2016-1/22, IRIS 2017-3-1, and IRIS 2017-7/4). In the former judgment, it was found that blocking measures are effective in cases where they render it more difficult for end-users to access illegal works. In the latter judgment, it was found that administrators of a platform such as TPB make an "act of communication to the public", within the meaning of Article 3 subsection 1 of the InfoSoc Directive (Directive 2001/29) and therefore breach the authors' exclusive rights.

Concerning the costs of the proceedings, the AG is of the opinion that The Hague Court of Appeal applied the wrong test for finding out whether XS4ALL's costs statement should have been disregarded because of late submission. According to the AG, instead of merely focusing on the procedural time limits, the Court should have primarily looked at whether such a late submission had affected BREIN in its defence rights, which does not seem to be the case. Moreover, the AG distinguished between the formal and material scope of application of Article 1019h Rv (Civil Procedures Code) and concluded that it was debatable whether or not the Article applied to the case at hand. According to the AG, the application of that Article, under which the losing party shall reimburse the proceedings costs to the winning party, could have a serious and undesirable chilling effect for ISPs.

With regard to the balancing exercise between the different human rights at stake which helps to ascertain whether or not a blocking measure is proportionate, the AG clarified that this is a task for a court of facts and not for the Dutch Supreme Court. Consequently, the latter can only provide the lower courts with further guidance on how to carry out such a balancing exercise. In order to balance the right to property (Article 17 of the EU Charter of Fundamental Rights) against the freedom to conduct a business (Article 16 of the Charter) and the right to freedom of information (Article 11 of the Charter), the AG makes reference to different CJEU case law, such as Promusicae or Telekabel Wien (see IRIS 2008-3/4 and IRIS

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2014-5/2), under which a blocking measure must meet three conditions. First, ISPs should be free to choose which technical means to use in order to comply with the blocking order. Secondly, the measures taken may not unnecessarily deny Internet users the possibility to obtain legitimate access to the available information. Finally, the purpose of the measure must be to end and prevent the infringement of copyright and must be reasonably effective in pursuing that objective. The last requirement implies that the measure does not per se need to put an end to the copyright infringements at issue. By referring to foreign judgments, the AG concluded that the result of the balancing exercise would mostly depend on the circumstances of the case at hand.

In light of the foregoing, the AG advised the Dutch Supreme Court to set aside the 2014 judgement of The Hague Court of Appeal (see IRIS 2014-3/37). If this turns out to be the case, the case will have to be reviewed from the start by a new court in order to reach a final decision concerning, inter alia, the procedural costs and the balancing exercise between the different rights at stake. In the meantime, following an interim injunction obtained by BREIN in September 2017, access to TPB is temporarily blocked by the two ISPs until a final decision has been reached (see IRIS 2017-10:1/29).

***Advocaat-generaal G.R.B. van Peursem, Conclusie inzake Stichting Brein tegen Ziggo B.V. en XS4ALL Internet B.V. 14/02399, 16 Maart 2018***

https://stichtingbrein.nl/files/20180316%20conclusie%20A-G.PDF

*Advocate General G.R.B. van Peursem, 14/02399, 16 March 2018*

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