[NL] ISPs ordered to block The Pirate Bay

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On 2 June 2020, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) delivered an important judgment in the case between Internet service providers (ISPs) Ziggo and XS4ALL against Stichting Brein, following years of litigation. Stichting Brein is a foundation formed by rightsholders to act against copyright piracy. Stichting Brein requested a dynamic blocking injunction against the two ISPs at the Court of The Hague in 2014 for not blocking access to The Pirate Bay (see IRIS 2014-3/37). The case made its way to the Netherlands Supreme Court (*Hoge Raad der Nederlanden*), who asked the Court of Justice of the European Union (CJEU) some preliminary questions (see IRIS 2016-1/22). The CJEU held, in short, that the activities of The Pirate Bay amounted to copyright infringement. The Pirate Bay does not offer unlawful content directly on its website, but provides an indexed and continuously updated catalogue of links to sources (see IRIS 2017-7/4). The CJEU found that The Pirate Bay played an essential role in making works available to the public, while being aware of the infringing nature of its activities. After the CJEU ruling, the Supreme Court held that The Pirate Bay itself indeed infringed copyright and that the case needed to be decided along the lines of the CJEU's UPC/Telekabel Wien judgment (see IRIS 2014-5/2). The case was referred back to the Amsterdam Court of Appeal for a final ruling on the merits (see IRIS 2017-7/4, IRIS 2018-3/26, IRIS 2018-5/24).

The Amsterdam Court of Appeal applied the CJEU's UPC/Telekabel Wien judgment, balancing the users' right to freedom of information, the intellectual property rights of the rightsholders and the freedom of ISPs to conduct business. The court distilled four requirements from Telekabel Wien. First, that the addressee of the injunction can ascertain that the measures chosen are the measures required to prevent the imposition of a penalty. Secondly, that Internet users can assert theirs rights before the courts to ensure that the chosen measures affecting their right to information are justifiable, considering their ability to lawfully access information, and amount to ending the copyright infringement, after the ISP has chosen the measures.

The Amsterdam Court of Appeal pointed out that in the Telekabel Wien case, the requested injunction did not specify which measures had to be taken to achieve the required result. Stichting Brein, however, did provide a clear list of 154 (sub)domain names it wanted blocked in order to end the infringement. The court therefore concluded that the first requirement had been met, as the parties'

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interests were considered in the procedure at hand. Furthermore, if circumstances were to change, Dutch law enables parties to protect their rights accordingly. The third requirement is that Internet users not be unnecessarily deprived of the possibility to lawfully access available information. The court held that the amount of illegal content on the website justified the injunction, given the severity of the copyright infringements and the evasion of other means of enforcement. The injunction affects a small portion of lawful content but does not limit access to a specific category of information that otherwise would not be accessible anymore. Fourthly, that the measures have the effect of preventing unauthorised access to protected subject matter or, at least, make it difficult to access protected subject matter. The court explained that some Internet users would stop visiting the website altogether, whilst others might try to circumvent the blocking measures. In both cases, this would satisfy the requirement. Given the dynamic nature of the injunction and Stichting Brein's continuous efforts to request blocking injunctions for other websites, it is to be expected that it will become more and more difficult over time for Internet users to access the unlawful subject matter. The court held that the measures either prevent or hamper access to the unlawful content and discourage Internet users from attempting to access the website.

Finally, the Amsterdam Court of Appeal ruled that the domain names and IP addresses of The Pirate Bay websites would have to be blocked by the ISPs, including new domain names that provide access to the same infringing website. A breach of this obligation is subject to penalty payments.

Gerechtshof Amsterdam, 2 juni 2020, ECLI:NL:GHAMS:2020:1421.

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2020:1421

Amsterdam Court of Appeal, 2 June 2020, ECLI:NL:GHAMS:2020:1421.

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