First Question: When is an Infringer Using the Services of an Intermediary?

According to Article 17 of the Performer's Protection directive, an infringer who uses an intermediary to infringe a copyright or related right will be held responsible, with the intermediary being jointly liable with the infringer. The CJEU in UPC Telekabel Wien sought to establish whether the intermediary must be regarded as having been sufficiently involved in the infringing activity. In 2011 the Oberlandesgericht Wien or the Austrian appeals court ordered UPC to block access for its customers to the websites Kino.to and Film4kino to. The company appealed to the Hoge Raad, the Dutch Supreme Court, which in turn referred questions to the CJEU (Case C-366/11). Following the CJEU’s answer, the Hoge Raad declared that UPC’s blocking measure was necessary and ordered the company to block access to the websites.

Second Question: What is an Intermediary’s Obligation in Respect of an Outcome Ban?

The CJEU first examined whether the purpose of the measures was to impose a censoring duty on the intermediary, which would require it to ‘inhibit access or block access to the infringing content’. The Court found that the blocking measures could be considered an outcome prohibition because the users could not access the content due to the intermediary’s actions. However, the blocking measures could not be imposed if they were disproportionate. The Court emphasized that the blocking measure could only be imposed if it was absolutely necessary and could not be avoided or circumvented. In such cases, the blocking measure would be necessary and proportionate. The Court also highlighted that the measures should not be imposed if they were not effective in blocking the infringing content.

Third Question: Are “Outcome Prohibitions” Compatible with Fundamental Rights?

The CJEU considered whether “outcome prohibitions” were compatible with fundamental rights, particularly the freedom of expression. The Court found that the blocking measures could not be imposed if they were disproportionate. The blocking measure could only be imposed if it was absolutely necessary and could not be avoided or circumvented. In such cases, the blocking measure would be necessary and proportionate. The Court also highlighted that the measures should not be imposed if they were not effective in blocking the infringing content.
of matters to be found "reasonable". The Court waffles considerably, going in the course of a single sentence from "genuine protection" to "effect of preventing unauthorised access" to "at least making it difficult" and finally landing on a minimum threshold of "seriously discouraging". It then repeats this meandering musing for better effect in bold in its final conclusion as if this will lend this exercise in equivocation more authority. It’ll be reasonable, the Court seems to say, as long as it’s not entirely ineffective, or at least tries to not be entirely ineffective, or at least suggests that users shouldn’t do this... Not what might be called a firm stand at all.

Of course, even this muted approach leaves intermediaries with the intractable problem of constant user damage for copyright, one might wonder which measures are truly even to be considered "seriously discouraged"? Given that existing data suggests blocking has no noticeable effect on actual numbers, indeed, in the recent English case, the court of appeal of The Hague overturned an injunction ordering access providers Ziggo and XS4All to block the well-known torrenting site The Pirate Bay, after studies confirmed no effect at all on the number of downloads from illegal sources. It is possible that the Court is simply insisting that a symbolic "do something" gesture must be made to establish that the intermediary is opposed to piracy, even if it cannot achieve real results.

Finally, it is also noteworthy that the Court did not follow the AG's advice regarding the subsidiarity of actions against the intermediary of the downloader. As he observed, "A claim against the ISP is, admittedly, not completely out of the question, but the originator must, as a matter of priority, so far as is possible, claim directly against the operators of the illegal website or their ISP". Of course, such a requirement is not explicitly embedded in the wording of Article 8(3), but I would argue does have a place in the consideration of the proportionality of an injunction, as suggested by the AG.

Conclusion

The real negative effects of the decision are likely to be limited to Austria - most Member States do not have procedural constructions comparable to the Erfolgsverbot. Indisputably, the issue was already considered last year by the UK's Justice Arnold in EMI Records v British Sky Broadcasting, who found that since UK courts must carefully consider fundamental rights and proportionality before any blocking order is made, the question was not applicable to them.

This indicates the more serious danger of the ruling, that of fragmentation. This was forewarned by the Austrian referring court, which suggested that guidelines assessing the proportionality of blocking measures be laid down by the CJEU. But would have been welcome instead that already at the highest level of the Court, the Court itself, and not the Court of Appeal, that filtering orders are illegal. We now know that blocking injunctions may be "but under what conditions?" DNS blocking and IP address blocking pass the test! What is the precise nature of the balancing test? It would be nice if the Court had delved into these questions.

The incongruence of allowing an "outcome prohibition" while simultaneously acknowledging that fully achieving said outcome is in all likelihood impossible cannot be ignored. What the Court has in effect suggested is not achieving a specific result, but doing the least useless thing the ISP can think of that is also respectful of the rights of others. As a result, the injunction is not really an "outcome injunction" at all anymore, but rather an "inaction injunction" of all anyways, but taken as an "inescapable attempt at an outcome injunction", to which clause we could attribute exactly what such a reasonable attempt ought to be. If it’s likely to have and adopt the measures ordered by the Austrian court of first instance, without actually having a CJEU ruling that says it must - and indeed with higher courts saying that the national courts are free to think differently.

It is worth noting that since was taken offline following an action of the German police forces against its operation. If it has since been replaced by kinogo.de.