

To block or not to block? The Dutch blocking injunction saga continues...

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Karljin van den Heuvel (Institute for Information Law)

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On November 13th the Dutch Supreme Court provided another chapter in the case of ISPs and blocking of the Pirate Bay (hereafter: TPB). It **decided** that the Court of Appeal had used an incorrect, namely too broad, criterion to judge the effectiveness of a blocking measure. Furthermore, preliminary questions were referred to the ECJ concerning whether TPB infringes copyright and related rights by facilitating infringements on its site and, if not, whether it would still be possible to order its blocking through an injunction against an ISP. The saga thus continues.

Back in 2010 BREIN, the association for the protection of the entertainment industry, first tried to get a blocking injunction after **previous decisions** against TPB did not have any effect. They failed in summary proceedings, but succeeded in **substantive proceedings** in 2012. As a result, TPB was blocked by several ISPs in The Netherlands for over two years. The Court of Appeal quashed the District Court's decision early in 2014 because the measure was deemed wholly ineffective. Studies showed that the blocking measure was structurally bypassed, and as a result overall illegal downloading actually increased in this period. Therefore the measure did not result in a fair balance of the rights involved as required by article 52 of the EU Charter.

The Supreme Court judgment can be broken down into the two major arguments raised by BREIN: first that the Court of Appeal used an incorrect criterion in judging the effectiveness of the blocking measure, and secondly that the Court of Appeal wrongly held that TPB itself did not infringe copyright and related rights by facilitating infringement. Both complaints will be discussed below.

Effectiveness of the blocking measure

With regard to the first complaint, the Supreme Court referred to the ECJ judgment in the case of *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* which was issued two months after the Court of Appeal's judgment. This case concerned an injunction ordering an Austrian ISP to block access to a website that streamed illegal content. Amongst other things, the ECJ provided a criterion to assess effectiveness of a blocking measure.

The ECJ stated that it might not be possible to put a complete end to infringement of intellectual property by such a measure, as technological solutions can always be circumvented (*para 58*). A 100% success rate cannot therefore be demanded from website blocking. Rather, the measures taken must be effective in the sense that they either prevent unauthorised access to the illegal material, or at least make this difficult to achieve and seriously discourage users from doing this (*para 62*). *Christina Angelopoulos* has astutely commented that this can hardly be considered a firm stand by the ECJ.

The Supreme Court referred to the *Telekabel* judgment and (unsurprisingly) concluded that the Court of Appeal had wrongly assessed the effectiveness of the blocking measure by looking at the overall effect on illegal downloading. Despite the fact that the blocking measure can be, and is, bypassed, this does not automatically mean that it does not strike a fair balance between the rights of the actors involved. It remains to be seen whether the ISPs' blocking measure will meet the minimum requirement of effectiveness, but this seems likely given the low threshold. Despite its vagueness, it seems logical that the blocking measure will at least make it more difficult for users to access the illegal content. Given the minimal effort required from the ISPs this "effectiveness" of the measure must be deemed sufficient to strike a balance.

Does TPB infringe copyright and related rights by facilitating infringement on its site?

The Court of Appeal decided that TPB itself, by making available meta-information which allows users to download illegal content from other users through the P2P protocol, did not infringe the right of communication to the public (Art. 3 Infosoc Directive). The access to illegal content offered by TPB was considered "too indirect" to constitute an intervention. This is consistent with earlier Dutch case law concerning TPB that considers that the making available of torrents does not constitute infringement, though it is unlawful if it thereby facilitates the public to download illegal material. By contrast, in the UK these facilitating acts do constitute infringement as decided in the *Dramatico Entertainment v BskyB* case. This shows, as *Angelopoulos* notes in her most recent article, that indirect infringement is not harmonised throughout the EU.

The Supreme Court considered that on the one hand TPB only facilitates the means to infringe, which does not in itself amount to a communication to the public according to recital 27 of the Infosoc Directive. On the other hand, TPB is an essential actor in the making available of these protected works. Without their website, users would not be able to (so easily) infringe copyright and related rights. The Supreme Court concluded that the issue is not clear, and therefore referred the following two questions to the ECJ:

1. *Is there a communication to the public within the meaning of art. 3(1) of the Infosoc Directive by the operator of a website, if on this website there are no protected works available, but a system exists whereby meta-information about protected works on the computers of users is indexed and categorised so that users can track the protected works and up- and download them?*
2. *If the answer to question 1 is negative: do art. 8(3) of the Infosoc Directive and art. 11 of the Enforcement Directive allow an injunction against an intermediary if this intermediary facilitates infringing activities as meant in question 1?*

The first question seems to go beyond the scope of this case. In this vein the ISPs argued that BREIN did not have sufficient interest in this question because it had already been decided that the ISPs' subscribers infringed intellectual property by using the services of TPB to up- and download protected works, and that the operators of TPB infringed copyright by making available "art work" of the materials such as CD and DVD covers.

In my opinion this is a legitimate argument: irrespective of the answer to the first question, the fact that the ISP carries these infringements over its network is enough to grant a blocking injunction against the website, provided it strikes a fair balance between the rights involved. According to the Supreme Court however, whether TPB itself infringes copyright is an important consideration in this balancing exercise (*Para 5.3.2*). This seems to suggest that the "seriousness" of the infringement must be taken into account.

However, any infringement is infringement which the right holder has a right to prevent. Accordingly, any infringement made using the ISP's channel will justify a measure against this ISP. It is hereafter, with regard to the nature of the specific measure taken, that a fair balance must be struck between the right to intellectual property that has been breached and the ISP's right of freedom to conduct a business and the user's right to freedom of expression and information (see a recent article on this balancing exercise [here](#)). One can ask whether the affirmation or denial of the first question, however interesting, can change the outcome of this balance.