Kluwer Copyright Blog

“In order to fight copyright infringements, ISPs may be asked to render specific websites inaccessible to their subscribers”

Philippe Laurent (Marx, Van Ranst, Vermeersch & Partners) · Thursday, October 6th, 2011

This sentence summarizes quite well the decision of the Antwerp Court of Appeal of 26 September 2011 which it is abstracted from.

The Belgian Anti-piracy Federation filed a cease and desist action against Telenet and Belgacom, two Belgian ISPs, in order to make them block The Pirate Bay’s websites in their respective networks.

In first instance, the President of the Commercial Court of Antwerp rejected the claims as he deemed that the requested measures were disproportionate.

The Court of Appeal overruled the decision and granted an injunction on basis of art. 87, §1, al.2 of the Belgian Copyright Act, which transposes art. 8, §3 of the InfoSoc Directive 2001/29/CE, and which provides that the Presidents of the Civil and Commercial Courts can grant injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right.

The main points of the Court’s reasoning are the following:

– It is clear and uncontested that copyright infringements take place on a massive scale thanks to “The Pirate Bay”.

– The fact that some material shared on “The Pirate Bay” is not copyright protected does not temper the previous finding.

– Even if some private copy exception could somehow cover the downloading of the works through “The Pirate Bay”, it does not apply to the making available of the works.

– The defendants do not commit infringements themselves, but they are nonetheless “intermediaries” in the sense of art. 87, §1, al.2.

– The action brought by the BAF is not a liability action, so the E-commerce Act of 11 March 2003 (transposing the E-commerce Directive 2000/31/CE) is of no help to the ISPs. More specifically, the legal rules providing for a liability limitation to the benefit of ISPs (the Court considers the “mere conduit” liability limitation as provided by art. 12, §3 of Directive 2000/31/CE) is no hindrance to the granting of an injunction order. Furthermore, the blocking measures that are

sought by the BAF are no monitoring tasks, as they are limited to the making unavailable of determined websites.

– That the measures sought will probably not put an end to any possible illegal activity on the Internet does not imply that these measures would be disproportionate.

– In order to fight copyright infringements, ISPs may be asked to render specific websites inaccessible to their subscribers. It belongs to the Judge to determine the blocking procedure.

– According to the Court, even though this measure could be more easily circumvented, DNS-blocking is the most acceptable solution, as IP-blocking would be more burdensome to the ISPs and could have more detrimental effects on third parties.

– There are no competition issues at stake, as the defendants are the two biggest Belgian ISPs.

– DNS-blocking is no limitation to the freedom of speech or to other fundamental rights.

– If third parties are affected by the blocking measures, they are free to institute third-party proceedings to contest the ruling.

The Court therefore enjoins Belgacom and Telenet *"to implement DNS-blocking, within 14 days upon the service of the decision, on the following limited list of domain names:*
www.thepiratebay.org, www.thepiratebay.net, www.thepiratebay.com, www.thepiratebay.nu, www.thepiratebay.se, www.piratebay.org, www.piratebay.net, www.piratebay.se, www.piratebay.no, www.piratebay.se, and www.ripthepiratebay.com,
under a daily penalty of 1.000 EUR for every day when defendants do not implement such "DNS-blocking" in their DNS-servers".

Of course, there is a lot to comment about the decision, and the different stakeholders will analyse, praise or criticise it in the light of arguments of their own. Copyright owners will acclaim the good interpretation and application of art. 8, §3 of Directive 2001/29/CE and the acknowledgment of their new enforcement prerogatives. ISPs will blame the incoherence of a system where their activity is supposed to be protected by "mere conduit" liability exemptions, but where injunctions under penalties could become a common practice that is likely to reposition them, little by little, as the "accountable managers" of the Net. Civil rights protectors will call out for "censorship" and will state that the measures pronounced are as disproportionate as ineffective.

Meanwhile, technicians and wily users will smile at the wording of the decision (which explicitly limit the scope of the injunction to "www" servers [1]) and will probably use proxies until The Pirate Bay registers other domain names…

[1] "www" is just a subdomain name that is commonly used to name a web server. It is not a standard though, and anybody can name his server the way he pleases, such as "www2" or "tpb" for instance. It is however very unlikely that Belgacom and Telenet will play the game of limiting the blocking at the server names level.

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