Kluwer Copyright Blog

First blocking order in Germany to prevent access to copyright infringing website

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A recent decision of the Munich Regional Court marks the first-ever blocking order in Germany against a copyright infringing website (judgment of 1 February 2018 – BeckRS 2018, 2857; English translation available here). If confirmed by higher courts (the judgment is subject to ongoing appeal proceedings), the decision will indeed have paved the way for a much-needed legal means against pirate websites in Germany.

In essence, the court held: (1) Despite the 2017 amendments to the German Telemedia Act (TMA), it is still possible to bring website blocking claims against access providers on the basis of a breach of duty of care (*Störerhaftung* – see below); (2) implementation costs of EUR 150,000 may be deemed acceptable to a provider; and (3) in preliminary injunction proceedings, there shall be no overly strict criteria placed on subsidiarity.

Facts of the Case

The applicant is the distributor of a successful German cinema film. This film was available via the illegal streaming service kinox.to even while it was still in the cinema exploitation phase. With its application for an injunction, the applicant took action against a German access provider and requested that it be prohibited from providing its customers access to the film on kinox.to.

The Court's View

The application for an injunction was successful.

The Regional Court granted the applicant's claim for injunctive relief under copyright law on the basis of the so-called *Störerhaftung*, i.e. legal liability of persons who are neither the perpetrator nor directly participating in a right infringement but nevertheless shall be held liable for a wilful and causal breach of duty (as specified for access providers, in particular, by the German Federal Court of Justice, BGH, in its decision "Störerhaftung des Access-Providers", GRUR 2016, 268).

According to the Regional Court, the *Störerhaftung* had not been excluded pursuant to the new version of Sec. 8 I 2 TMA which had been reworded in the course of the 2017 TMA Amendment. While the Regional Court found that the wording of this provision did indeed suggest a limitation to liability, it followed that, from a historical and systematic interpretation, Sec. 8 I 2 TMA only applied to providers of WLAN networks. Such an understanding, in the eyes of the court, derived from the legislative documents pertaining to the TMA Amendment. Furthermore, the court stated that an exclusion of all claims for injunctive relief against access providers would in fact contradict European law, namely Art. 8 III of Directive 2001/29/EC. The Regional Court therefore concluded that the *Störerhaftung* was applicable.

In this respect, subsidiarity was required, meaning that the rightholder must first have attempted, using all reasonable means, to effect legal action against the operator of the service and its service providers (e.g. hosting providers). The Regional Court found that the applicant had done this to a sufficient extent. In the court's opinion, it would not have been reasonable to expect the applicant to pursue even more time-consuming measures against rights infringers that are often based in a foreign country and are difficult to reach out to.

The Regional Court did not see any preclusion of the applicant's claim in the fact that the blocking measures could possibly be circumvented.

According to the court, the respondent was also unable to cite unreasonable costs for the website block and the necessary adjustments to the system. This was the case even if one took the EUR 150,000 costs asserted by the respondent (and disputed by the applicant who instead had stated a four-figure sum) as a basis. In this context, the Regional Court noted that the information provided by the respondent in relation to their costs did not only relate to the blocks themselves but also covered the installation of the blocking system. These costs could not be asserted in full, however, since otherwise the first legal action against an access provider would always fail on the grounds of the comparatively high installation costs. Moreover, the Regional Court stated that the financial outlay must be seen in the context of the access provider's total revenues as well as the number of customers it has. Thus, even costs in the amount of EUR 150,000 were not seen as disproportionate.

A Content Protection Perspective

The Regional Court of Munich's judgment allowed – for the first time in Germany – legal action to block a copyright infringing website.

The court's argument, according to which claims against access providers (on the basis of the *Störerhaftung*) remain possible even after the most recent TMA amendment, is compelling.

Moreover, a future in which the blocking of rogue websites will finally be possible in Germany over a broad scope should be welcomed. Blocking claims are already recognised in numerous other

EU states. Experience in those places has shown that “website blocking” can be performed effectively, at reasonable financial cost and without any illegitimate impairment of users (keyword “overblocking”). In this respect, it comes as no surprise that since the implementation of the blocking of kinox.to the respondent’s customers have not yet demanded any right to access this copyright infringing site.

Finally, the court’s approach is logically consistent in concluding that the assessment of the costs for the initial setup must also take into account any additional, later blocking that has been made possible through said setup. With that, the court avoids a situation whereby, on the one hand, the initial expense for implementing the system is considered unreasonable and, on the other hand, individual blocks – which in themselves would be reasonable – are technically not possible due to the (not adjusted) setup.

The court applies the requirements of subsidiarity in a practice-oriented manner. The operators of pirate websites often act conspiratorially and through a number of international service providers that are very hard to even make contact with. In line with the court’s approach to the subsidiarity requirement, blocking claims against access providers can be enforced in expedited protection proceedings with comparably low cost.

That said, the judgment – while being a welcome step forward – is only a first-instance decision. It now remains to see what the Munich Court of Appeal will say on the matter.

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