

# Kluwer Copyright Blog

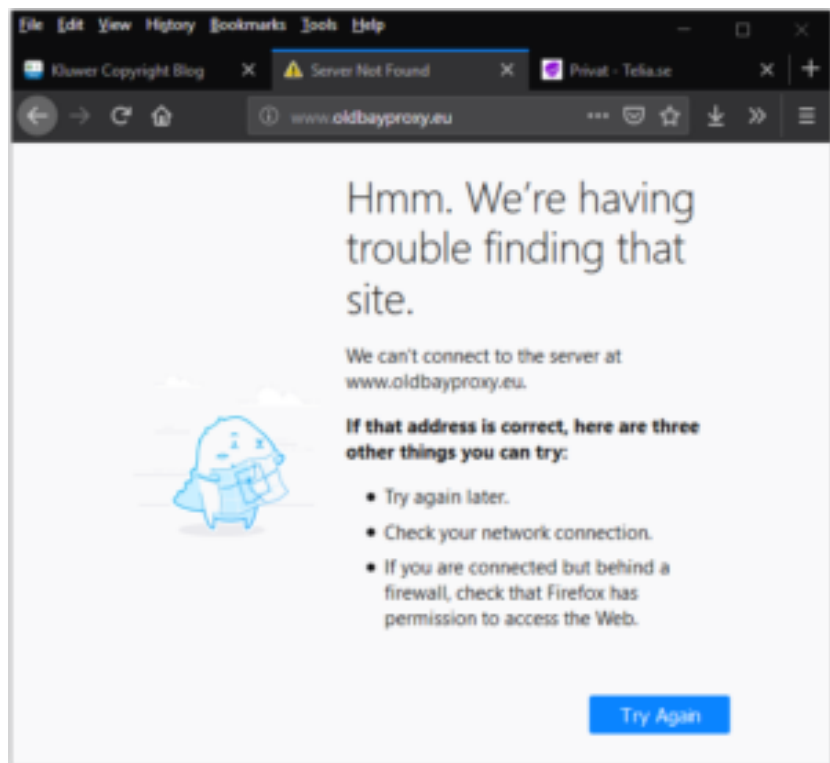
## Blocking injunctions against ISPs in Sweden 2.0 beta – the rise of the interim injunction? (Part 1)

Kacper Szkalej (Lund University) · Thursday, November 22nd, 2018

Josef K. was minding his own business when one morning, even though he knew he had done nothing wrong, he was arrested. This was the beginning of his trial. In his masterpiece entitled *The Trial*, Franz Kafka tells, among many things, the story of a man trying to interact with a preposterous system of justice. Almost 100 years after the publication of *The Trial*, in a world where copyright is being infringed in a plethora of ways, ISPs are minding their own business when they are suddenly summoned to become the addressee of a website blocking injunction.

The practice of applying for such injunctions is an established tactic in online enforcement of European copyright law, made possible by Article 8(3) InfoSoc Directive in combination with *UPC Telekabel Wien v Constantin Film C-314/12*. Essentially an ISP may be ordered to block its customers' access to a webpage *because* the operator of that webpage is considered to use the services of the ISP to infringe copyright.

In Sweden this practice is developing very slowly. The first blocking injunction was only issued in February 2017 against B2 Bredband in case PMT 11706-15 (described [here](#)). It was not until May 2018, however, that a second application for a blocking injunction was made, this time against the ISP Telia. The novelty in this latter case (PMT 7262-18) is that the rightholders simultaneously applied for an interim injunction. The specialised first instance Patent and Market Court (PMD) issued the interim injunction, ordering Telia to block



*oldbayproxy.eu – one of the affected domains that does not lead anywhere*

approximately 65 domain names through which The Pirate Bay (TPB) and a number of streaming websites (Dreamfilm, Nyafilmer, and Fmovies) were allegedly available.

### **Legal basis for issuing interim injunctions in Sweden**

In Swedish copyright law interim injunctions can be issued pending the final outcome of a case on the basis of s. 53b para 2 Copyright Act (see [here](#) for an unofficial English language version). For the injunction to be issued, the applicant must show ‘*probable cause*’ for infringement or contribution thereto *and* that it can be ‘*reasonably feared*’ that the respondent, by continuing with the infringement or the contribution to the infringement, will *reduce the value* of the relevant exclusive rights (immediate threat requirement).

Injunctions must be proportional, dissuasive and effective, and, contrary to the flexible outcome in *UPC Telekabel*, must be clearly delimited and unequivocally formulated.

### **The interim decision of the Patent and Market Court (PMD) in the Telia case**

PMD delivered its judgment on **15 October 2018**. Having satisfied itself that the ISP is liable for contributory infringement in relation to the communication of works to the public by TPB and the streaming websites, PMD issued the interim injunction ordering the ISP, under penalty of 500 000 SEK (48 500 EUR), to prevent its customers from accessing TPB and the streaming websites by blocking the domain names specified by the rightholders. The Court seemed unimpressed by the fact that not all of the domain names did in fact lead to the specified services, or that one of those services, Dreamfilm, no longer exists and the operators of that service have been involved in [criminal court proceedings for copyright infringement](#) (liability affirmed on appeal in Case B 1565-17, 22 February 2018). The Court refused, however, to recognise the rightholders’ request for an open-ended injunction, which was based on the argument that the services may register new domain names after an injunction has been granted and that therefore the ISP should be required to block such domains as are communicated from time to time.

On the face of it, the outcome of the interim decision may seem uncontroversial. While difficult to accept as a matter of principle because the ISP was held liable for contributory infringement (as a matter of formality – preliminarily), it is not necessarily surprising – in the previous case the higher instance court, PMÖD, held B2 Bredband liable for contribution to ([supposedly](#)) the infringements carried out by TPB as well as a streaming service (another one in that case). For this reason the Court in the present case, although methodically referring to the legal requirements for the interim injunction, held in relation to the ISP’s contributory liability that it did not, given the preliminary assessment it was conducting, “find reason to make a different assessment than the Patent and Market Court of Appeals did in the B2 Bredband case”, for which reason there exists “probable cause that Telia is contributing to an act that constitutes an infringement”. Having relied on PMÖD’s assessment, which was made in relation to a final injunction, and was therefore, at least in theory, subject to more scrutiny, it seems unlikely that a different conclusion will be reached in the main proceedings, unless something changes, especially that PMÖD used its discretion to act as a final instance court in that case.

As for the immediate threat requirement, the Court observed firstly that an “unlawful dissemination” (sv. olovlig spridning) may normally be considered as reducing the value of the exclusive rights because it “leads to revenue loss for the rightholders since consumers which otherwise would pay to access the work instead acquire it gratuitously”, for which reason “it can reasonably be feared that the value of the exclusive rights is reduced if the unlawful dissemination continues, which it can be expected to do if an injunction is not issued”; and that therefore, since the Court considers the ISP to contribute to the infringement, “even a passive provision of infrastructure in this case may affect the value of the exclusive rights”.

A proportionality assessment often raises questions relating to the proportion of lawful and unlawful content since if the injunction is issued it will prevent access to a service which allows others to receive and to impart information. The Court observed that it found it probable that a “large amount” of protected works had been disseminated “from the services in question” and that on the evidence submitted it was probable that the core of the services’ business idea was to disseminate protected content without the rightholders’ permission, for which reason the “freedom of information” would not be affected. Regrettably, the Court did not indicate whose freedom was at stake – the services’, the ISP’s customers’, or certain other third parties’. The question is all the more interesting since with regards to the streaming services the rightholders essentially claimed that those services were linking to other unlawful services, which they however did not identify, or otherwise seemed to show that the works had been made available without consent elsewhere, making it therefore inconclusive whether the content was in fact originating from unlawful or lawful sources (e.g. through a *BestWater* type of link). This did not make an impression on the Court, which instead seems to have preferred to give effect to hypothetical commercial awareness: “The rightholders can hardly be considered as having given their consent to disseminate works to the public that accesses the works gratuitously through the services, only because for example consent had earlier been given for a contract-compliant limited electronic dissemination”. Moreover, while [simple] domain name blocking was considered to be an effective measure because it was sufficient that the injunction at least made it more difficult to access protected content (*UPC Telekabel* paras 62-63), a number of domain names specified by the rightholders referred to websites of domain name registrars (companies registering domains), making it unclear what type of protected content such a measure could possibly make difficult to access, and that would additionally justify a potential limitation on the registrar’s freedom to conduct a business.

The interim decision was appealed and is currently pending before PMÖD, which complicates the entire Trial. Although the interim injunction was to be effective from **30 October 2018**, PMÖD has delayed its execution (sv. inhibition) until it has ruled in the matter (PMÖD, PMÖ 9945-18, 30 October 2018). In the meantime, PMD is continuing with the main proceedings for a (final) blocking injunction.

### **Step by step, ISP by ISP**

It is certainly a prerogative of aggrieved parties to decide against whom to institute proceedings, when, and for what, but once again the rightholders (two of which were also claimants in *B2 Bredband*) decide to summon only one ISP. To successfully be able to claim that contributory infringement of one passive ISP is reasonably anticipated to reduce the value of exclusive rights, while leaving the remaining ISPs outside such a claim, is as Kafkaesque as it possibly can be. It is a factor that ought to have played a decisive role in the assessment; but perhaps it should not have been carried out in the first place because it had taken the aggrieved parties four years (since *UPC Telekabel Wien*; notwithstanding national copyright law) to ask for an interim injunction forcing

this ISP to block access to no one other than the world-renowned and infamous Swedish TPB, three years to block Dreamfilm, which stopped operation long before the institution of proceedings, two years to block Fmovies, and over a year to block Nyafilmer.

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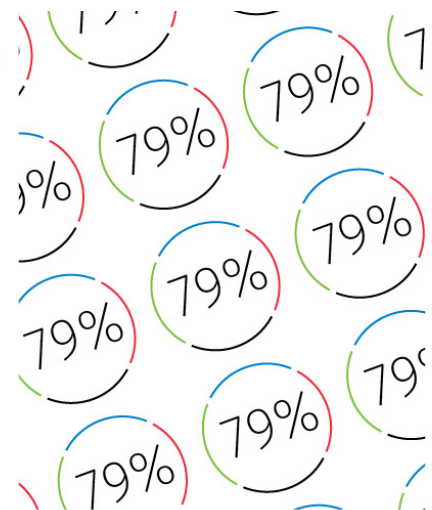
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