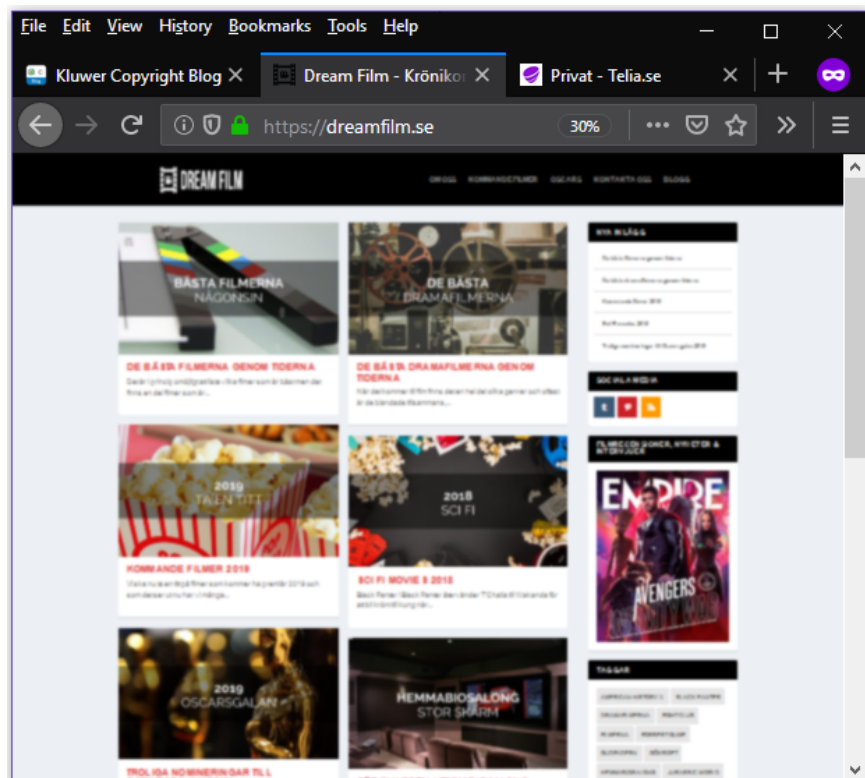


Kluwer Copyright Blog

Blocking injunctions against ISPs in Sweden 2.0 beta – the rise of the interim injunction? (Part 2)

Kacper Szkalej (Lund University) · Monday, November 26th, 2018

Website blocking injunction cases are complicated in Sweden because the Copyright Act requires contributory liability of the ISP, or in the case of interim injunctions – probable cause, for an injunction to be issued. While the reduced evidentiary burden for interim injunctions does not completely absolve a court from scrutinising the evidence, the legal context in which the Court was asked to make its assessment in the [Telia blocking injunction case](#) is different from the earlier [B2 Bredband case](#), not only because of developments in EU copyright case law but also, perhaps consequentially, with regards to the aggrieved parties' approach, as a result of which two interesting issues surface, beyond the Swedish copyright law context.



dreamfilm.se – one of the affected domains (allegedly pointing to a streaming service that stopped operation) that in fact leads to a movie review website/blog

1. The probability of the infringements and the ISP's contributions

In establishing the existence of primary infringement by the various services, to which the ISP is allegedly contributing by allowing its services to be used by the websites when providing internet access to its customers, the rightholders are relying on the CJEU's judgment in *Stichting Brein v Ziggo and XS4All Internet C-610/15* for the purpose of establishing liability of TPB on the one hand, but on *GS Media v Sanoma C-160/15* for the purpose of establishing liability of the streaming websites on the other hand. In the latter case the rightholders allege that the infringements take the form of linking to "other illegal streaming websites" (servers), which they do not however seem to identify, and claim that the *GS Media* presumption is applicable to the streaming websites because of the commercial nature of such linking; a circumstance which the rightholders evidence by mere reference to the presence of advertising on the relevant websites.

Consequently, before considering the final blocking injunction, which is the main issue of the proceedings, the first instance court, PMD, was asked to assess, at least in so far as the streaming services were concerned, whether an ISP's contributory infringement is probable in a situation where the existence of primary infringement (communication to the public by the websites) is contingent upon the (alleged) primary infringer's *knowledge*. Put differently, the Court was asked to assess whether the ISP is likely contributing to an infringement which *will exist*, if the alleged primary infringer is deemed to possess knowledge of the illegality of the protected content. If that is not the case, a primary infringement does not occur, and reasonably neither does the contribution. For an interim injunction, because of the lower evidentiary requirement, it would seem sufficient to evidence that that knowledge reasonably likely exists. But if the alleged infringer's acts (linking) are carried out for profit, that knowledge will be presumed to exist (*GS Media*, para 51). For this reason, unless it is rebutted, infringement becomes a legal fact, and is not merely probable; especially as the ISP, which is the respondent in such proceedings, cannot, nor has any interest whatsoever other than defending accusations of contributory liability, in showing a third party's lack of knowledge; much less arguing that the *GS Media* presumption should not apply to that third party. This may very well be a situation whereby the *GS Media* presumption is non-rebuttable. More importantly, owing to PMÖD's decision in *B2 Bredband* that PMD effortlessly applied in its judgment, the same should apply to the question of whether the ISP's contribution is probable – if the primary infringement is a legal fact, so is the ISP's contributory infringement if the mere provision of internet access is sufficient for such infringement to arise.

An ISP is minding its own business when it is doing nothing more than providing internet access to its customers. The question whether this constitutes contributory infringement is one the answer to which entirely depends in this case on whether the websites, and not the ISP, know whether the works they are *linking to* have been, according to the rightholders, unlawfully uploaded elsewhere, by an unidentified party. The *GS Media* presumption may very well have made the Court effectively decide the entire case, even though it was merely assessing whether to issue an interim injunction.

2. Paranoid fear of infringement and a third party's theoretical use of an ISP's services

For an interim injunction to be issued in Sweden, there must be a nexus between the contribution to the infringement on the one hand and the reasonably feared reduction in value of the exclusive rights on the other. In the Court's view, as mentioned in the [first post](#), that reduction could reasonably be feared to occur because "even [the ISP's] passive provision of infrastructure may affect the value of the exclusive rights", that value being anticipated to be reduced because of the revenue loss following the hypothetical outcome that "consumers which otherwise would pay to access the work instead acquire it gratuitously" as the primary infringement is continuing. In short,

therefore, an interim injunction could be issued because the ISP's contribution to the primary infringement makes it possible for "consumers" to acquire a work gratuitously rather than pay for it as the case is ongoing. Such an assessment, even if it were not carried out in the more flexible evidentiary framework of interim injunction proceedings, is not particularly controversial because European copyright law provides broad exclusive rights, and in particular a communication to the public may be deemed to occur even if no one actually accesses the work (e.g. *Svensson and Others v Retriever C-466/12*, para 19, *Stichting Brein v Filmspeler C?527/15*, para 36, *Ziggo*, para 31).

The Court's reference to *consumers* who may acquire the work gratuitously instead of paying for it as a basis for the reasonable fear of the reduction of the value of the rights is however perplexing since the rightholders did not evidence, nor even imply, that the ISP's customers, as opposed to the customers of *B2 Bredband* and *Ziggo's* customers (para 42 first sentence), used the infringing services in question. In *Ziggo* user activity was, arguably, also a requirement to find primary infringement by TPB (paras 36, 42). This peculiarity, while not precluding, as a matter of law, the existence of an infringement by the streaming services in question, makes it difficult to arrive at the conclusion that the value of exclusive rights is anticipated to be affected when it is not evidenced that even one customer of the ISP has ever used the infringing services. In fact, it cannot even be precluded that the *consumers*, whether or not customers of the ISP, may prefer to, and in fact do, pay for legal access to the work, even if they have gratuitous access through unlawful means. Reasonable fear of reduction of the value of the rights means the fear is not a paranoid one.

This raises a more fundamental question, however, that concerns the scope of Article 8(3) InfoSoc Directive, namely:

Must Article 8(3) be interpreted as meaning that a third party is using the services of a specific intermediary to infringe copyright, if

- (1) it cannot be ruled out, which is for the national court to determine, that none of the intermediary's customers have accessed the third party's service? Does the answer to this question depend on whether the third party stores the infringing content? (Cf. *UPC Telekabel Wien*, paras 40, 36-38 and 11)
- (2a) the infringement is conditional and occurs only because the third party is presumed to have knowledge of the illegality of the content? (*GS Media presumption*) Does the answer to this question depend on whether the presumption can reasonably be rebutted?
- (2b) the infringement is conditional and can only occur if the third party's service is used by individuals? (*Ziggo*) Does the answer to this question depend on whether the individuals are customers of the intermediary?

One final reflection

The present position is lamentable. Article 8(3) InfoSoc Directive is a very simple provision designed to do nothing more than to enable rightholders to turn to ISPs since they are sometimes best placed to put an end to an infringement (InfoSoc Directive, recital 59). Yet, instead of being invited to participate in proceedings to ensure that an injunction is *effective, proportionate* and *dissuasive*, and does not interfere with their freedom to conduct a business and at least their customers' rights and freedoms, in Sweden ISPs are brought to trial as the wrongdoer. Rightholders rely on ISPs to enable petabytes of legal content to reach consumers, but must at the same time turn against them and accuse them of contributing to copyright infringement; the ISPs,

who not infrequently offer legal content services as part of their internet subscription service, must defend such accusations in court to at least create the impression that they are not in contempt of the law; while courts must struggle with an increasingly difficult legal framework and in the end seem to be left with no choice other than to reflectionlessly hold that the provision of internet access infringes copyright law, in order to be able to issue an injunction. It may very well only be a matter of time before an ISP's, after all, *repetitive and continuous* contributory infringements following from the mere provision of internet access to its customers will be regarded as intentional and will open the possibility for criminal liability (which the Swedish E-Commerce Act does not absolve intermediaries from).

“Accountable, not liable”? In Sweden ISPs are currently accountable because they are liable, and for that reason they also pay the final costs. The law must either be amended as a matter of urgency, if Article 8(3) InfoSoc Directive is to serve its purpose in Sweden to the fullest extent and despite the discretion in recital 59, or effect must be given to the Swedish legislator's unequivocal intention to refuse to introduce a possibility to issue an injunction against an intermediary that merely provides its service, discussed during the transposition of the InfoSoc Directive (Prop. 2004/05:110, pp. 339-340, 342) and then again during the transposition of the Enforcement Directive (Prop. 2008/09:67 p. 195), or effect must at least be given to the fail-safe social benefit principle (*sv. social adekvans*) absolving from liability if the act does more good than harm.

There are plenty of possibilities to choose from, and **once again** there is an opportunity to consult the CJEU. For the moment we can let Kafka's *The Trial* remind us of its timelessness.

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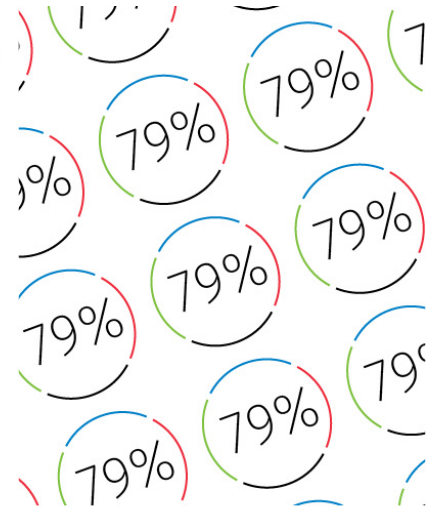
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