

# Kluwer Copyright Blog

## Swedish Patent and Market Court goes back to basics on blocking injunctions

Hans Eriksson (Westerberg & Partners Advokatbyrå AB) · Monday, February 25th, 2019

While avid readers of IP blogs have recently learned about UK courts issuing flexible and powerful live blocking orders against illegal streaming websites ([here](#)), Italian courts imposing dynamic blocking orders elegantly skirting the outer limits of the general monitoring prohibition ([here](#)), and German courts handing down blocking injunctions based on something as German-sounding as *Störerhaftung*, there have also been sage words shared about the rise of blocking injunction litigation in Sweden ([here](#) and [here](#)). Though it may seem from this reading list that learned copyright practitioners in other jurisdictions have moved the blocking injunction discussion into the twenty-first century (or perhaps the twenty-second), recently the Swedish Patent and Market Court of Appeal took a more back-to-basics approach in the ongoing litigation between movie rightsholders and the major Swedish DSP Telia, reversing a lower court's interim blocking injunction due to lack of proportionality ([here](#), in Swedish).



*A different kind of blocking*

The rightsholders in this case sought to prohibit the DSP from giving its customers access to certain illegal (or were they...read on) file sharing services, one of which was the blocking injunction repeat offender [The Pirate Bay](#). The novelty in this case was that for the first time in Sweden the rightsholders also sought an interim injunction.

Under the Swedish Copyright Act, in order to issue an interim injunction, rightsholders must

establish probable cause that the DSP has at least contributed to (its customers') copyright infringement, and that it can be reasonably feared that the DSP's continued contributory infringement will further harm the value of the rights. Interim injunctions must also be proportional. Swedish courts have a history of allowing only clearly defined injunctions that fastidiously mirror the infringing act (arguably a different take from that championed in [UPC Telekabel](#)). Moreover, the argument that rightsholders should foot even part of the bill for implementing blocking injunctions (as developed in case law in the UK and Italy) has not yet come to Sweden, meaning that DSPs are not taking these developments lightly.

The first instance Patent and Market Court found that the rightsholders had proved their exclusive rights to the movies, that those movies had been shared on the illegal file sharing services, and that the DSP's granting of internet access to its customers constituted probable cause for contributory copyright infringement. The court issued a preliminary injunction requiring the DSP to block access to a long list of websites, proxies and mirror websites, through the use of technical blocking means.

Upon appeal, the DSP invoked a host of objections against the lower court's interim decision. It was argued that the DSP had not contributed to any copyright infringement, and even if it had, that the DSP's contributory infringement had not harmed the rights at issue. The leading Swedish case law on the issue was attacked as materially wrongfully decided in light of applicable EU law, and additionally a wild separation of powers argument was made regarding the judge in that case, to the effect that the judge was biased due to having previously worked in a leading legislative role in the government. Blocking injunctions should not be issued at the interim stage at all, on account of legal certainty concerns, since interim decisions by nature are preliminary and limited in scope. An interesting point raised was that the rightsholders had *de facto* known about the alleged infringement for a long time without acting, and that an interim injunction was thus not warranted by the facts of the case. But the strongest objections presented concerned the proportionality of the interim decision.

In order to warrant an interim injunction under Section 53b of the Copyright Act, the party seeking an injunction has to prove infringement of its rights. The Patent and Market Court of Appeal agreed with the first instance court that, at this early stage of proceedings, there was probably cause for holding the DSP liable for contributory copyright infringement. Interestingly, no concrete evidence showing the DSP's customers' actual use of their internet access to use the illegal file sharing services was discussed in the judgment and critical voices have accused Swedish courts of taking this step in the chain of evidence for granted, but it may simply be a drafting point for the court to clarify in future judgments.

As to the proportionality assessment, that is the balancing of the rightsholders' interest in having a blocking injunction issued against the DSP's interest in not being subject to one, the court found that this assessment must be carried out differently in an interim decision, as compared to in a final judgment. The DSP's freedom to conduct business, the harm the DSP may suffer from a wrongly issued interim injunction, the risk that the DSP's customers' fundamental freedoms are trampled upon and that the rights of the holders of the domains targeted by the injunction are violated, must all be assessed together, i.e. mix all the ingredients in the proportionality assessment fermentation tanks and see what the results are.



*Proportionality assessment fermentation tanks (patent pending, Westerberg & Partners)*

With reference to UPC Telekabel, the court reiterated that injunctions must be precisely targeted in order to fulfil its stated goal of stopping the DSP's customers' copyright infringement, without needlessly impacting the DSP's customers' legal use of the internet. It is up to national courts to assess whether an injunction risks significantly impacting the DSP's customers' legal use of the internet. UPC Telekabel does not, however, say anything about interim blocking injunctions, and the Patent and Market Court of Appeal notes that there is no practical venue for the DSP's customers, or the holders of the targeted domains, to make their voices heard at the interim stage through legal intervention in the case. This may not be considered a big problem in cases where it is established that the targeted websites are obviously and unequivocally illegal pirate services, since those are services that are highly unlikely to contain content internet users wish to legally access using the DSP's services. But when there is ambiguity as to what is actually blocked by the injunction, the Patent and Market Court showed through this decision that it wishes to tread lightly (and carry a big gavel).



*The Pirate King of Penzance, post sentencing*



In what has arguably become something of a trend in Swedish copyright cases, the Patent and Market Court of Appeal proceeded to take a strict view of the burden of proof and applicable evidentiary standards when assessing the evidence invoked to substantiate the proportionality of the interim injunction. Even though interim decisions are by nature preliminary, based on limited evidence, and must be handled expeditiously, the court clearly wished to send a strong signal it wants claimants to make sure to dot their i's and cross their t's.

Based on a strict reading of the evidence invoked, which showed that, at least at this time, some blocked websites linked to different websites, and in one case to an apparently wholly legal website for movie reviews, and since the DSP's objections against a wide array of the websites listed in the interim blocking injunction had not been effectively countered by the rightsholders, the court did not find it proportional for the DSP to block these websites. The Patent and Market Court of Appeal thus reversed the interim decision and sent the rightsholders back to the first instance Patent and Market Court, with only a black eye and liability for the DSP's litigation costs.

The future impact of this case should not be overstated. The case does not show Swedish courts finding blocking injunctions, or even interim blocking injunctions, to be disproportional *per se*. Instead this case instructs plaintiffs to be exceedingly meticulous when invoking evidence to establish which websites should be blocked. It is not enough to trust the court to scour voluminous lists of blocked websites to find pirates at work. This is obviously something the rightsholders in this and other cases can do, which means this is unlikely to be the last word on interim blocking injunctions in Sweden. It is also interesting, and for the rightsholders likely frustrating, to note that the rightsholders had originally sought a dynamic blocking injunction, which was summarily rejected by the lower court. Such an injunction, if accepted for the first time in Sweden, would in the best of worlds have meant that the ambiguities the court found and used to reverse the decision could have been handled in real time by the parties, without the court's intervention. Clearly showing that until full EU-wide copyright and enforcement harmonization is achieved (likely in the year 2525), there is more work to be done for copyright litigators in Sweden and around the EU.

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