

Kluwer Copyright Blog

Dynamic blocking injunction confirmed by Swedish Patent and Market Court of Appeal

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Blocking injunctions against internet service providers (ISPs) remain one of the most interesting and litigated issues of contemporary copyright law. Though the concept of blocking injunctions *per se* is firmly established on the basis of CJEU case law (C-324/09 [L'Oréal](#), C-70/10 [Scarlet Extended](#), C-360/10 [Sabam](#) and the seminal C-314/12 [UPC Telekabel](#)), blocking



injunction jurisprudence in the EU continues to develop apace. Perhaps the most interesting recent development concerns so-called dynamic blocking injunctions.

As noted by the EU Commission in its 2017 Guidance on certain aspects of Directive 2004/48/EC, dynamic blocking injunctions are:

“injunctions which can be issued for instance in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL and which is drafted in a way that allows to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction.”

In the context of the modern internet, regular (i.e. static and fixed) blocking injunctions targeting a specific domain or website with infringing content can easily be circumvented by posting the infringing content on another domain or website.

The development and refinement of dynamic blocking injunctions presents a delicate balancing act between different interests, such as the fundamental rights to information, to conduct a business, and to the protection of intellectual property, contained in the Charter of Fundamental Rights of the European Union as well as the general monitoring obligation in Article 15 of

Directive 2000/31/EC.

Over the last few years, dynamic blocking injunctions in various forms have been issued by national courts in the UK, Italy, Netherlands and Denmark (and arguably Austria). Questions such as the scope and timing of the injunction, as well as the larger and nebulous issue of how the rightsholders and the ISPs should actually work together to enforce the injunction, including the practically important but in the literature rarely discussed issue of cost allocation, have been handled differently in different jurisdictions. These recent developments are the subject of a current comparative study by Berdien B. E. van der Donk from the University of Copenhagen (see [here](#)) where interesting parallels are drawn to C-18/18 Glawischnig-Piesczek, where the CJEU allowed an injunction to include not only identical infringements, but also similar infringements, under Article 15 of Directive 2000/31/EC.

In the absence of coordinated international work in this field, blocking injunction jurisprudence in the EU continues to develop before national courts. And as of June 29 this year, Sweden can be added to the list of member states that have firmly established dynamic blocking injunctions in their copyright systems.

The Patent and Market Court of Appeal's decision

In this case (discussed previously [here](#), [here](#) and [here](#)), several major rightsholders in the film industry claimed that the ISP's provision of internet services to a number of repeat offender file-sharing services such as the Pirate Bay constituted contributory copyright infringement.

This is the latest in a line of Swedish cases on ISP liability and blocking injunctions, where questions of proportionality, the risk of over-blocking and Swedish law's compliance with applicable EU rules have all been litigated at length (for a critique of the Swedish legal system's sometimes perfunctory application of contributory infringement to ISPs in this scenario, see a two-part article found [here](#) and [here](#)).

First instance dynamic blocking injunction

The Patent and Market Court issued the first ever Swedish dynamic injunction in this case in December 2019 (case PMT 7262-18).

With the rationale that Swedish courts have wide latitude in formulating delineated and clearly defined injunctions, which do not go further than motivated *in casu*, the blocking injunction ordered the ISP to "take reasonable steps" to block its customers' access to the illegal file-sharing services, not only on the listed domain names and web addresses (subject to a separate traditional blocking injunction with immediate effect) but, for a period of three years, on domain names and websites "whose sole purpose is to provide access to said illegal file-sharing services". The file-sharing services targeted by the dynamic injunction were described at some length in the decision.

The language of the injunction lacked some detail. The order did not specify the mechanism through which the ISP would be made aware of additional domain names and web addresses to block, or the level of knowledge that would trigger additional blocking actions from the ISP. These points were discussed briefly in the decision and it was evident that the Patent and Market Court envisioned a pragmatic system in which the claimants would inform the ISP of new instances where the infringing services were made available and the ISP would act expeditiously to block them (which the court described as within two to three weeks).

Second instance dynamic blocking injunction

In its decision of June 29 ([here](#) in Swedish), the precedent-setting Patent and Market Court of Appeal confirmed and finally established the use of dynamic blocking injunctions in Swedish copyright litigation.

The court confirmed that dynamic injunctions are appropriate and proportionate tools against large-scale copyright infringers of this type. Even if a blocking injunction, be it static or dynamic, can be circumvented, the ISP's blocking actions will at least stop a significant amount of infringement. While the ISP had argued that injunctions of this kind are not effective in preventing copyright infringement, the court found that it does not follow from CJEU jurisprudence that blocking injunctions are only appropriate if the action can stop all infringement (UPC Telekabel, paras 62-63). The court also noted that this effectiveness argument actually speaks in favour of the application of a dynamic injunction rather than a regular injunction, since a dynamic injunction will likely increase the effectiveness of the injunction, likely to the frustration of the ISP.

Even if the file-sharing services targeted by the injunction in this case contained some legal content, the court found that, on the basis of evidence, the preponderance of content was illegal and that the application of an injunction against these sites did not violate the ISP's customer's fundamental right to information. Interestingly, the court stopped short of giving any indication of how large a proportion of content on the file-sharing service would have to be illegal for an injunction to be proportionate in this regard.

The court also tweaked some of the language of the dynamic injunction order. It found that it is not necessary for the order to specify that the ISP should only "take reasonable steps" to block a particular domain or website. The issue of whether the ISP has taken reasonable steps in a particular case is instead something that would have to be litigated if the rightsholders sued the ISP for not having followed the injunction order (which is issued on penalty of a fine). This is likely to be frustrating to ISPs, as it incentivizes them to follow rightsholders' instructions, which may in turn arguably contribute to a risk for over-blocking and additional litigation.

The most interesting change in the second instance court's wording of the dynamic injunction concerns the target of the injunction, i.e. the identification of the illegal file-sharing services. It is in the nature of a dynamic injunction that the target file-sharing services may change owner or graphic presentation on a domain or website. In order for the dynamic injunction to function effectively, the target file-sharing service must thus be clearly defined. The court found that the important factors to take into consideration in this regard are the services' "characteristics, structure and function".

While those services were described on five pages in the first instance decision, the second instance decision instead defines them in a brief third of a page (Appendix B). In this commentator's view, this is a curious choice, since the brief definition gives the ISP precious little information about the "characteristics, structure and function" of the target file-sharing services. This may make it difficult for the ISP to ascertain whether a new iteration of the Pirate Bay, with a different name, different graphical presentation etc. falls under the injunction, which in turn may arguably contribute to a risk of over-blocking and more litigation.

The future

The Patent and Market Court of Appeal's decision marks a significant victory for rightsholders

against ISPs. Though dynamic injunctions are now firmly established as an effective tool to combat large-scale copyright infringement in Sweden, some of the details may need to be ironed out in future litigation, or – as is reportedly the case in other jurisdictions – through voluntary agreements between the large ISPs and rightsholder organisations about how these frenemies should work together to enforce dynamic blocking injunctions. Likely, the last word on dynamic injunctions in Sweden has not been said – but rightsholders can certainly take comfort from this decision.

It should be noted that the Swedish dynamic injunction system established by this decision requires ISPs to foot the entire bill for the cost of not only enforcing these blocking measures, but also paying rightsholders' litigation costs. This is reportedly not the case in other jurisdictions, which has likely facilitated the ISPs' acceptance of this system abroad.

Lastly, one wonders how long it will take for creative litigants to start looking to apply the new, freer and open-ended injunctions signaled by this decision to fields other than copyright – trademark law being an obvious example.

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