

# Blocking Measures and Proportionality; Freedom to Conduct a Business, Freedom of Information and Balancing of Interests\*

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## 1. Introduction

The Pirate Bay, TPB, originally a Swedish entity (or grouping), is by now a notorious and world “famed” service, working on the internet to provide access for the public mainly to attractive movie house films, video and pop hit music, phenomena surely protected by copyright and related rights; however, TPB does so without seeking out any permission from right holders for the dissemination that it in fact accomplishes from TPB platforms.<sup>1</sup> TPB is basically worked out as a homepage, which provides an interface for users, as well as search and database functions accessible by any of its domain-, web- or IP-addresses or proxy services. In the case analyzed below, TPB also provided on its homepage torrent files, the possibility to download those torrent files accessible from the TPB addresses, and, further, a tracker function, consisting of bit torrent racks accessible from TPB addresses.

A number of major rightholders in music and film in Sweden, among them Universal Music AB, Sony Music Entertainment Sweden AB, Warner Music Sweden AB, Nordic Film A/S and Svensk Filmindustri AB (here the “Rightholders”) raised a claim in 2015 before the Stockholm Court of first instance on an *injunction* directed towards a Swedish internet service provider (ISP), called B2B Bredband AB (here B2B). The Rightholders’ claim meant that B2B must be compelled to block the making available to the public or abstain from it in any way, as regards the Rightholders’ films, musical works,

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<sup>1</sup> TPB is by now active world-wide and has so far been found guilty of IP law infringement in more than 28 court judgements around the world.

or recordings, by use of the services emanating from its clients TPB and *Swefilmer*; the latter was active in the same way as TPB. The injunction was thus to be formed, as it was claimed, as an obligation for B2B to use technical measures by DNS (Domain Name System) blocking (against domain and web addresses) and IP blocking (against IP addresses) of TPB and Swefilmer.

The Stockholm Court dismissed the claim. However, the Svea Appeal Court, also being the new special “supreme” court for intellectual property cases in Sweden (the PMÖD),<sup>2</sup> ordered the injunction in a way that addresses central phenomena of European IP law – proportionality, basic freedoms, sanctions, and the balancing of intellectual property law interests against other fundamental interests.<sup>3</sup>

We will explore those phenomena below, seen from an EU law perspective, following with a critical eye the schemes developed by the PMÖD. The core issue may, in short, be phrased as follows: Under what conditions would it be possible for a right holder to obtain an injunction against an ISP who offers its customers services that carry merely a *third party’s infringement* of a protected work or other subject-matter in a network made available to the public via certain domain names, web or IP addresses?

It should be observed, in particular, that the potential infringing acts were accomplished by B2B’s *subscribers* to its services, who shared files with protected works and other subject matter via TPB (and Swefilmer). The latter, it was claimed, contributed to those criminal acts, thus repeatedly committing accessory crimes. If B2B were not even contributing according to penal law, the question would be whether the injunction could still be obtained, as Swedish Law offers the possibility of an injunction of the said kind only if the injunction is targeting an ISP who is at least *objectively* liable, directly or indirectly, if not *subjectively*, for an infringement of copyright or related rights.<sup>4</sup>

The main sources for this exercise (and for the PMÖD) were Article 8(3) of the Information Society Directive 2001/29 (Infosoc)<sup>5</sup> and Article 12(1) –

<sup>2</sup> Patent- och marknadsöverdomstolen, PMÖD.

<sup>3</sup> See the judgement of the Svea Hovrätt, Patent- och marknadsöverdomstolen, PMÖD, 2017.02.13, case PMT 11706-15 – “Universal Music et al. v. B2B”.

<sup>4</sup> Article 53 b (1) of the Swedish Copyright Act expressly states this prerequisite for an injunction on an intermediary: “At the request of the author or his successor in title or of a person who, on the basis of a license, has the right to exploit the work, the Court may issue an injunction prohibiting, under penalty of a fine, a person who commits or contributes to an act implying an infringement ...”

<sup>5</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001

(3) of the E-Commerce Directive 2001/31,<sup>6</sup> and, not least, a number of quite recent CJEU decisions, primarily in cases C-314/12 – “UPC Telekabel”, C-494/15 – “Tommy Hilfiger”, C484/14 – “McFadden”, and C-610/15 – “Stichting Brein”.<sup>7</sup>

## 2. An ISP as an ‘intermediary’ according to the Information Society Directive?

The prominent norms for this case are found in Article 8 of the Infosoc Directive. It is clear from that Article that right holders must be provided appropriate, effective, proportionate and dissuasive sanctions and, further (according to Article 8(3)), to be in a position in Member States to apply for injunctions against, what is called, *intermediaries*.

### **Article 8**

#### **Sanctions and remedies**

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.
2. Each Member State shall take the measures necessary to ensure that right-holders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).
3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>6</sup> Directive 2000/31/EC of the European parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

<sup>7</sup> CJEU, C-314/12 – “UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH” ECLI:EU:C:2014:192; CJEU, C-494/15 – “Tommy Hilfiger Licensing LLC et. al. vs. DELTA CENTER” ECLI:EU:C:2016:528; CJEU, C-484/14 – “Tobias McFadden vs. Sony Music Entertainment Germany GmbH” ECLI:EU:C:2016:689; CJEU, C-610/15 – “Stichting Brein vs. Ziggo BV and XS4 All Internet BV” ECLI:EU:C:2017:456.

To start with, it can be stated, as indeed the PMÖD does, that an ISP is such an intermediary mentioned in Article 8(3) of the Infosoc Directive. In any case, this directly follows from the plain language of the CJEU in the *UPC Telekabel* case.<sup>8</sup> It may also be noted, according to the same decision of the CJEU, that an injunction against such an ISP does not demand the existence of a particular relationship, such as a contract, between the intermediary and the person actually violating IP rights; neither does it need to be shown that the ISP actually took part in or observed the protected material made available to the public without the right holder's permission.

Further, as follows from recital 58 of the Infosoc Directive, the injunction must be available "even where the acts carried out by the intermediary are exempted under Article 5".<sup>9</sup> Even if no violation of copyright proper is accomplished by the service provider itself because one of the exemption norms of Article 5 of the Infosoc Directive applies, it is nonetheless one of the obvious goals of the Infosoc Directive to bring also such an actor, an ISP, into play. This is simply because of the central position of an ISP when effective actions against copyright infringement are envisaged.

This falls in line with the CJEU ruling in the *Tommy Hilfiger* decision, according to which an ISP merely offering internet access to its customers, without offering any other service or some kind of supervision, is still an intermediary in the meaning of Article 8 (3) Infosoc Directive.<sup>10</sup> As was defined also in the *UPC Telekabel* decision, there is no need to demonstrate a certain *link* between an ISP and a perpetrator.<sup>11</sup>

<sup>8</sup> CJEU, C-314/12 – "UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH" ECLI:EU:C:2014:192 para32.

<sup>9</sup> Infosoc Directive, recital (58): "In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States."

<sup>10</sup> CJEU, C-494/15 – "Tommy Hilfiger Licensing LLC et. al. vs. DELTA CENTER" ECLI:EU:C:2016:528, para 22, 25.

<sup>11</sup> CJEU, C-314/12 – "UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH" ECLI:EU:C:2014:192 para 34: "... for Article 8(3) of Directive 2001/29 to be applicable, there has to be a contractual link between the internet service provider and the person who infringed a copyright or related right.", para 35: "Neither the wording of Article 8(3) nor any other provision of Directive 2001/29 indicates that a specific relationship between

Also, as said in the *Tommy Hilfiger* decision, an intermediary may be ordered to take measures aimed at bringing infringements of a third party to an end, regardless of any liability by the intermediary of its own.<sup>12</sup> Furthermore, in order to obtain an injunction against an ISP, a right holder does not need to show that some customers of that provider actually have accessed on the website at issue.<sup>13</sup>

The picture becomes even clearer when looking at the relationship between the just mentioned norms and the limitations to liability for ISPs set forth in Article 12(1) of the *E-Commerce Directive*. However, as stated in the 2016 CJEU decision in the *McFadden* case, it follows from Article 12(3) of that Directive that those limitations to liability do not affect a court's authority to require a service provider to terminate or prevent infringement of copyright according to the norms of the Member State.<sup>14</sup> An injunction against an ISP, based on Article 8(3) of the *Infosoc Directive*, is thus not

the person infringing copyright or a related right and the intermediary is required." para 36: "Nor is the conclusion reached by the Court ... that, in order to obtain the issue of an injunction against an internet service provider, the holders of a copyright or of a related right must show that some of the customers of that provider actually access, on the website at issue, the protected subject-matter made available to the public without the agreement of the rightholders."

<sup>12</sup> CJEU, C-494/15 – “Tommy Hilfiger Licensing LLC et. al. vs. DELTA CENTER” ECLI:EU:C:2016:528 para 22 for an explicit statement in this sense (with further references): “It is settled case-law that the third sentence of Article 11 of Directive 2004/48, like Article 8(3) of Directive 2001/29 to which it refers, obliges Member States to ensure that an intermediary whose services are used by a third party in order to infringe an intellectual property right may, regardless of any liability of its own in relation to the facts at issue, be ordered to take measures aimed at bringing those infringements to an end and measures seeking to prevent further infringements (see to that effect, in particular, judgments of 12 July 2011 in *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraphs 127 to 134, and 24 November 2011 in *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraphs 30 and 31).”

<sup>13</sup> Cf. CJEU, C-314/12 – “UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH” ECLI:EU:C:2014:192 para 36: “Nor is the conclusion reached by the Court ... that ... the holders of a copyright or of a related right must show that some of the customers of that provider actually access, on the website at issue, the protected subject-matter made available to the public without the agreement of the rightholders.”

<sup>14</sup> CJEU, C-484/14 – “Tobias McFadden vs. Sony Music Entertainment Germany GmbH” ECLI:EU:C:2016:689 para 76: “... Article 12(3) of Directive 2000/31 states that that article is not to affect the possibility, for a national court or administrative authority, of requiring a service provider to terminate or prevent an infringement of copyright.”, para 79: “... Article 12(1) of Directive 2000/31 ... must be interpreted as meaning that it does not preclude a person from claiming injunctive relief against the continuation of an infringement ...”

hindered by limitations to liability pursuant to Article 12(1) of the E-Commerce Directive.

In conclusion, and according to the findings of the CJEU, to have an injunction in place (i) an ISP does not need to have a contractual or other confirmed relation, or *link*, to the perpetrator, (ii) neither does it matter whether the ISP possibly answers to a claim on responsibility, as an accessory crime or a distinct criminal act, or (iii) whether the ISP had an actual possibility to observe the infringing materials while offering the service as an ISP.

From a strictly Swedish legal perspective, this norm of the CJEU seemed almost to demonstrate a total ‘openness’ for an injunction against an ISP – the mere provision of a service may be enough – whereas Swedish Law at that point of time demanded at least *objectively* an *accessory crime* of the ISP in order for a court to offer the right holder an injunction against the ISP. The above mentioned decisions of the CJEU, built on its interpretations mainly of the Infosoc Directive, simply outdated that Swedish norm and paved the way for an enlarged involvement of the ISPs in the battle against internet pirates.

Accordingly, in the Swedish case mentioned above, the ISP B2B was, without any doubt and clearly as a matter of principle, such an intermediary against which a right holder may successfully claim an injunction. However, this would not have come about earlier on in Sweden, had it not been for the recent legal positions of the CJEU on the basis of the norms of the Infosoc Directive.

Yet, quite another issue emerges from the requirement for an injunction to be proportionate, effective, balanced etc.

### 3. Proportionate measures

By measuring proportionality, a court should assess the fundamental rights based on EU rules, such as the right owners’ interest in protection of their IP rights, or B2B’s interest in conducting its business or, at least, it should ensure that that interest is not minimalized. Further, as was also recognized by the PMÖD, an injunction of the kind claimed in the case would hinder B2B subscribers to access the right owners’ material, what would be a factual limitation of freedom of information, directed towards a third party’s right to access information on the internet. Finally, a court must design applied

injunction measures so as to be effective and appropriate.<sup>15</sup> We will look into how those criteria were dealt with by the PMÖD.

The PMÖD starts off by stating that the injunction claimed for would, to some extent, limit B2B's means to *conduct its business*. The entity would have to take administrative as well as technical measures, causing certain costs for B2B. However, taking into account the CJEU findings in *UPC Telekabel*, the injunction asked for would not infringe the very substance of the freedom of an ISP to conduct its business.<sup>16</sup> The PMÖD noted that the parent company of B2B was already blocking users' access to certain domain names and web addresses in other countries, upon decisions by local courts, and that the costs of those measures, just as in the present case, could easily be handled within the budgetary frames of B2B. The injunction was therefore found proportionate, also in regard of the restrictions to the freedom to conduct a business that it indeed would cause.

A specific matter in this context was whether it would be proportionate to let the injunction cover also a service *no longer in action*, a service that since long had not offered users any protected material any more. As mentioned above B2B had a client, called Swefilmer, which, just as TPB, offered access to illicit material, mostly films, but it had gone out of business about one and a half year earlier. However, the PMÖD found no reason to spare Swefilmer the injunction. In particular, it stressed that a very comprehensive body of films, protected by copyright, had been very broadly made available to the public by Swefilmer, and that its services had not been stopped until this case was due in the court of first instance. Further, the PMÖD considered it probable that the individuals behind Swefilmer, "in new or old constellations", would eventually commit new infringing acts relative to the Rightholders in the case at hand. A risk of continued infringements later on was considered apparent, even though for the time being the service was closed.<sup>17</sup>

The PMÖD then went on to state that the injunction surely could be questioned as limiting the *freedom of information* of the subscribers to B2B. But in this case it was a fact that the Rightholders' specific rights concerned

<sup>15</sup> Cf CJEU, C-314/12 – "UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH" ECLI:EU:C:2014:192 para 46, 47, 56, 62 and 63.

<sup>16</sup> Cf CJEU, C-314/12 – "UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH" ECLI:EU:C:2014:192 para 51.

<sup>17</sup> Cf the Swedish Supreme Court decision in NJA 2007 p 431, and the judgement of the CJEU in C-316/05 – "Nokia v. Joacim Wärdell" EU:C:2006:789 para 36.

materials protected by copyright and had been used without due permission of the Rightholders. This immediately led to the conclusion that the injunction was not disproportionate. However, such an injunction without doubt concerned also a much wider grouping of different materials than merely such items protected by copyright and related rights of which the Rightholders were in control. Their claim for blocking measures would thereby be broader than their rights would permit. In fact, the Rightholders' in this case represented only a fraction of all those protected IP rights made available via TPB and Swefilmer.

However, the granted injunction finally covered “all” of the traffic to/from/via the defined web- and IP-addresses. The decisive reasons for this, firstly, followed from the fact that the services of TPB and Swefilmer disseminated materials that “as a matter of principle” were “entirely” protected by copyright made available to the public without the permission of any Rightholder. It was also found to be the purpose of TPB and Swefilmer to make protected materials available to the public in this way. Secondly, the claimant, as well as eventually the defendants, agreed that any means less demanding than those blocking measures asked for were simply not at hand. Also the PMÖD found this reasonable, noting that there was no alternative technical solution at hand that would not demand some element of supervision and filtering of the mass of information that B2B disseminated via its services. Also in this respect the injunction was found proportionate.<sup>18</sup>

Finally, while discussing whether the injunction was *effective* and *appropriate*, there were some interesting findings of the PMÖD. The parties showed that different web addresses used by TPB and Swefilmer were constantly changing. However, the PMÖD stated that it was not a prerequisite for an injunction that it would lead to a complete cessation of the infringement. It would be enough for the injunction, to be considered effective and appropriate, if it at least made it *more difficult* to access to the protected material.<sup>19</sup>

In short, even if it was comparatively simple for TPB and Swefilmer, or the actors behind those services, to create new web addresses etc. to offer the public access to “their repertoire”, the injunction adds to making access to those services more difficult.

<sup>18</sup> Cf eg CJEU, C-70/10 – “Scarlet Extended SA” EU:C:2011:771 para 35–54.

<sup>19</sup> Cf CJEU, C-314/12 – “UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH” ECLI:EU:C:2014:192 para 62 and 63.



#### 4. Adjusting the injunction – what blocking measures would be appropriate, effective, proportionate, and dissuasive?

The content and format of an injunction is, as a matter of principle, totally under the court's command, as is the case in all disputes of a mandatory nature. A court is therefore not bound by how a party's claim has been construed. The claimants had asked for an injunction hindering access of B2B's subscribers to the services of TPB and Swefilmer through blocking measures concerning domain names, web- and IP-addresses. Thus, a specific issue in this case was how the court would then specify what positive acts B2B was to accomplish in order to fulfil the injunction. It had to be considered, eg, what impact B2B's status of an ISP, which was not itself neither directly or indirectly a perpetrator, would have on the shape and content of the injunction.

Still, Article 8 of the Infosoc Directive clearly states that rightholders shall be provided appropriate, effective, proportionate, and dissuasive sanctions. This is plain language, far more than a speech for the feast and calls for precise and adequately framed sanctions.

However, an expansive element of this decision was, as indicated above, the PMÖD finding it reasonable to let the injunction cover also materials *not represented* by the claimants in the case, though this must be said to fall in line with how courts in other Member States have reasoned in comparable cases.<sup>20</sup> The core element of this particular question was simply that virtually all of the materials made available via TPB and Swefilmer were infringing copyright owners' rights meaning there were virtually no alternative technical ways to define the content of the injunction.

The PMÖD noted that there were indeed differences as to how blocking measures would function in relation to domain names, web-addresses and IP-addresses. When it comes to IP addresses, it was assumed that there was a risk of blocking *other* services than those actually targeted, as several services may be active via one and the same IP-address. Blocking of IP addresses is therefore not as reliable and adequate as blocking of domain names and web-addresses. As the claimants had failed to prove that the IP-addresses mentioned in the claims were not used by other services than those con-

<sup>20</sup> Judgement of the Supreme Court of Denmark 2010.05.27, case 153/2009; Oslo district court (Norway) in case 15-067093TVI-OTIR/05; Tribunal de Grande Instance de Paris 2014.12.04, case 14/03236.

trolled by TPB and Swefilmer, the PMÖD found reason to simply cut out all IP-addresses from the injunction.

This considerable limitation to the blocking measures, which was actually decided, may be seen as a gesture to pay reverence to *freedom of access to information*, not merely as an ambition to design the injunction in precise and appropriate ways.

As regards the blocking of domain names and web addresses, the PMÖD was far more generous to the claimants. It found it proven that there were not any uncertainties or technical difficulties connected to the demanded measures to hinder access (as described in the claims). B2B could by itself choose technical ways to accomplish the demanded blocking measures, whereas there was no need to actually define those in the phrasing of the injunction.

We may also note that services from the website “Kickass Torrents” were covered by the injunction as being “connected” to TPB services, though B2B claimed they were not. The Kickass Torrent website, indeed not run by TPB, was available also via TPB, namely via its function “Pirate Search” and related instructions on how to download torrent files. As for Swefilmer, it offered hyperlinks to, e.g., Google and C More and therefore should, according to B2B, be exempted from the injunction. But they were not! The effect of the injunction, namely that B2B subscribers would not be able to access certain (licit) domains and websites, was not considered to be of relevance, as subscribers could access such services otherwise and would thus not at all be totally hindered from such access by the injunction.

Finally, we may note the timing of the injunction. In Sweden, injunctions in the field of IP rights are normally not limited in time, though there is no legal restriction on the possibility of limiting the scope of an injunction in time. However, in this case, as the injunction was directed towards a person other than the perpetrator or anyone else factually contributing to the infringement according to penal law, it apparently was extra delicate to handle, in a proportionate way, the freedoms of information and to conduct a business at hand. With express respect for those values and probably as a gesture to continental law, the PMÖD set the injunction to last for a period of three years.

## 5. Concluding remarks

Clearly, this case and the ruling of the PMÖD place intermediaries as a main target when it comes to find remedies and sanctions against copyright

infringements in the internet environment, also when an ISP is neither directly or indirectly a perpetrator. Just as was foreseen in the Infosoc Directive, or at least being the very core of the norms on sanctions and remedies of Article 8 of that directive, intermediaries, whose services are used by a third party to infringe a copyright or related right, should be much involved in the potential stoppage of further infringements. Although the principles of proportionality, just as the fundamental freedoms of the EU charter must be respected also in the overly technique-driven environment of potential blocking measures, as quite carefully observed by the PMÖD, we may note that the PMÖD has sought to fulfil those ambitions of the Infosoc Directive to offer effective sanctions against IP infringements on the internet and, to reach that result, even has done away with some elements of statutory Swedish law.

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