

Dynamic blocking injunction against ISPs

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Introduction

In a groundbreaking case for copyright holders and internet service providers (ISPs) in Sweden, the Patent and Market Court of Appeal (PMCA) recently declared, for the first time, that dynamic blocking injunctions are in line with Swedish legislation. **(1)** Unlike regular static blocking injunctions that cover only a specific infringement by a specific infringer, dynamic blocking injunctions also cover other infringements and possibly those by other infringers.

In this case, the PMCA declared that, in order to prevent ISPs from being accomplices to online copyright infringement committed on illegal file-sharing sites by providing internet access to such sites to their customers, ISPs can be ordered to block not only the domain names and web addresses that lead to the illegal file-sharing sites, but also future undefined domain names and web addresses whose main purpose is to provide access to these illegal file-sharing sites.

Facts

A Swedish ISP was sued for complicity with copyright infringement by several rights holders for providing internet access to webpages such as The Pirate Bay. In the first instance, the rights holders successfully claimed that the court should order the ISP to block numerous listed webpages and future webpages whose main purpose is to provide access to such services. The injunction was combined with a fine. The ISP denied being an accomplice to online copyright infringement and appealed the regular and dynamic blocking injunction claiming that they were disproportionate and that a dynamic blocking injunction could not lawfully be determined as it was neither clearly defined nor specified. The rights holders opposed any revision of the judgment.

Decision

The PMCA's judgment primarily concerned three questions:

- whether the ISP was an accomplice to the copyright infringement;
- whether an injunction should be imposed; and
- if so, how the injunction should be formulated and defined.

Section 53b of the Copyright Act states that an injunction can be imposed against an accomplice to copyright infringement. The provision implemented Article 8.3 of the EU Information Society Directive (2001/29/EC). The Court of Justice of the European Union (CJEU) has declared that:

- Article 8.3 requires no contractual relationship between an intermediary (eg, an ISP) and an infringing party; and
- it does not have to be proved that internet users have accessed the infringing material.

The ISP claimed that Section 53b of the Copyright Act must be interpreted as a penal provision as declared in the Swedish preparatory works. The PMCA stated that it had to interpret national law in conformity with the EU Information Society Directive and EU law. However, the court is limited by general principles of law, especially in terms of legal certainty and non-retroactivity. The PMCA found that an interpretation in accordance with the EU Information Society Directive was not *contra legem* or retroactive, as in 2014 the CJEU had declared that ISPs are intermediaries under the EU Information Society Directive. **(2)** The CJEU has also declared that an interpretation that conforms with EU law has priority over declarations in preparatory works and therefore the Swedish preparatory works were not applicable.

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In summary, the PMCA decided that the ISP was an accomplice to the copyright infringement and an injunction could be imposed. The injunction must be appropriate, effective and proportionate. The proportionality assessment included balancing between the concerned parties. The PMCA found that a blocking injunction was a targeted and appropriate measure, as it prevented the ISP's customers from accessing the websites concerned. The PMCA agreed with the ISP's objection that it was easy to circumvent the blocking injunction, but the court found that it would at least make it more difficult and that a measure does not have to stop the infringement completely to constitute an appropriate remedy.

As to the balancing of interests, the PMCA stated that the injunction had a limited effect on the freedom to conduct business for the ISP, especially if the injunction was time limited. Freedom of information does not mean the right to access materials that have been made public without the consent of the rights holders, but it was clear that the injunction would block much more than just these copyright protected works. Most of the material on the webpages was copyright protected and made public without consent; therefore, the freedom to access information was interfered with only to a minimal extent. The PMCA concluded that the protection of intellectual property weighed more than the freedom to conduct business and access information in this case and that the injunction was proportionate.

With regard to how the injunction was to be formulated, the PMCA declared that an injunction concerning only the relevant domain names and web addresses was easily circumvented and for the sake of efficiency, the injunction should also include future domain names and web addresses. To clearly define the services that would be subject to the injunction, their characteristics, construction and function were decisive. The domain names or web addresses predominant purpose had to be to enable access to said services. The PMCA stated that it would be inappropriate and disproportionate if the ISP was responsible for monitoring new sites and decided that the rights holders had to inform the ISP of any new sites. In the first instance, this addition was not included in the judgment (but was included in the reasoning), which left the ISP wondering whether they were responsible for monitoring new websites or whether the rights holders were responsible for informing it thereof. The injunction was declared to be clear and specified enough and as the court balanced the interests of the concerned parties at the time of the judgment, the rights holders had not interfered with the injunction and no disproportionate measures had been introduced, as the ISP claimed. The PMCA decided that the dynamic blocking injunction would be in force for three years. The judgment could not be appealed.

Comment

The role of intermediaries in the ongoing battle against extensive online copyright infringements committed through websites such as The Pirate Bay has been a hot topic for years. In particular, there has been debate regarding dynamic injunctions, as they prohibit future infringements (and possibly future infringers) without a court being involved when the new infringements occur (possibly by new infringers). In this precedent judgment, the PMCA has clarified that, since rights holders have a right to gain effective protection against infringements of their copyright, they must be able to use dynamic injunctions as a tool to achieve this. Allowing dynamic injunctions in Sweden is in line with the approach taken by both the CJEU and other EU members states in recent years.

This judgment opens up new possibilities for rights holders in Sweden. As a result, it is likely that discussions will take place between rights holders and ISPs about entering into agreements regarding voluntary blocking measures, as is said to have been done in other countries. Regardless of the result of any such discussions, there will also likely be an increase in the number of court cases regarding dynamic blocking injunctions. If so, such cases are likely to provide more detail about the exact features and boundaries of dynamic blocking injunctions.

Importantly, the PMCA, as opposed to a lower court, clarified that for this type of dynamic blocking injunction, rights holders must be responsible for informing ISPs of new domain names and web addresses that are covered by the judgment and which should therefore be blocked. In other words, ISPs have no obligation to independently monitor the Internet for new infringements.

For further information on this topic please contact [Josefine Linden](mailto:josefine.linden@westerberg.com) or [Stefan Widmark](mailto:stefan.widmark@westerberg.com) at Westerberg & Partners Advokatbyrå Ab by telephone (+46 8 5784 03 00) or email (josefine.linden@westerberg.com or stefan.widmark@westerberg.com). The Westerberg & Partners Advokatbyrå Ab website can be accessed at www.westerberg.com.

Endnotes

(1) Patent and Market Court of Appeal (13399-19).

(2) *UPC Telekabel* (C-314/12).

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