

The Belgian Supreme Court confirms that ISPs may be ordered to block access to all domain names pointing to an infringing website

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On 22 October 2013, Belgium's Supreme Court, the Court of Cassation, confirmed that, as part of a criminal investigation for copyright infringement, Internet Service Providers (ISPs) may be ordered to block access to all domain names pointing to an infringing website.

According to the Court, such an injunction is not contrary to Article 52.2 of the Charter of Fundamental Rights of the European Union (concerning limitations and restrictions to freedom of expression) or to Article 15 of the Directive 2000/31/EC on electronic commerce (prohibiting Member States from imposing on ISP a general monitoring obligation).

Background

The decision is one of many that involves "The Pirate Bay" (TPB), the now (in)famous website providing torrent files and magnet links to facilitate peer-to-peer file sharing.

The Belgian chapter of this long lasting TPB saga started on 11 June 2010, when the Belgian Anti-Piracy Federation (BAF), an association representing film, music and game producers, started civil proceedings against two major Belgian ISP (Telenet and Belgacom) in order to have them block access to the TPB domain name (thepiratebay.org), as well as several alternative TPB domain names (such as thepiratebay.net, thepiratebay.se, etc.).

This injunction was first denied by a judgment of the Court of First Instance in Mechelen on 8 July 2010, but was later granted in an appeal by a judgment of the Antwerp Court of Appeal on 26 September 2011. The Court ordered the two ISPs to block access to eleven TPB domain names by using a technique called DNS Blocking, by which an ISP prevents its users from accessing a website via a specific domain name.

As one might expect, this technique proved to be of little help: shortly after the decision, the TPB website was made available via several alternative domain names which were not subject to the injunction.

Adapting its strategy, the BAF started criminal proceedings against unidentified persons for copyright infringement. In the framework of these criminal proceedings, the BAF asked the examining magistrate to issue an order against all Belgian ISPs to block access to the content hosted by the TPB server "*by any possible technical means*".

The examining magistrate granted this request in very broad terms, specifying that "*at least*", the ISPs should use DNS Blocking to block "*any domain that links to the TPB server*", such domain names to be identified by a technique called "*reverse IP domain check*" (which checks whether a domain name links to the IP address of a particular server) or by "*any other possible means*".

This injunction is much broader than the injunction previously obtained in the framework of the civil proceedings: it applies to all ISPs and to all TPB domain names, without any limitation of time or technical method to be used to comply with the injunction.

After an unsuccessful attempt before the Court of First Instance in Mechelen to have this injunction lifted (or limited) and an unsuccessful appeal before the Court of Appeal in Antwerp, three Belgian ISPs (Telenet, Tecteo and Brutele) turned to the Belgian Supreme Court.

The decision

Amongst other arguments, the ISPs claimed that the injunction was contrary to Article 52.2 of the Charter of Fundamental Rights of the European Union and Article 15 of the Directive 2000/31/EC on electronic commerce in so far as:

- (i) the injunction was not subject to any specific time limit;
- (ii) the injunction did not contain any list of the domain names that needed to be blocked nor did it mention the precise means to be applied by the ISPs in order to comply with the injunction;
- (iii) the injunction imposed on ISPs a general obligation to monitor the information which they transmit or a general obligation actively to seek facts or circumstances indicating illegal activity.

Regarding the first two arguments, the ISPs suggested that the Supreme Court refers questions to the CJEU for a preliminary ruling.

The Supreme Court refused to refer the questions, dismissed these arguments and confirmed the injunction.

In particular the Court held that:

- (i) the injunction was only valid pending a decision on the merits by the criminal court and there is no need for the injunction to specify any specific end-date;
- (ii) the injunction identifies one server that needs to be blocked and does not need to identify all the possible domain names linking to this server;
- (iii) an injunction to block a domain names linking to a particular server does not amount to imposing any general obligation to monitor the information transmitted by ISPs nor does it amount to a general obligation actively to seek facts or circumstances indicating illegal activity

Comments

This decision opens-up the path for broad injunctions against ISPs, thereby considerably strengthening the position of IP right holders. There is no doubt that

criminal proceedings, which up to now had not been commonly used by IP right holders in Belgium, will regain some attention.

However, one could certainly regret that the Supreme Court did not refer any questions to the CJEU and, more importantly, that the judgment does not refer at all to the teachings of the CJEU in the case *Scarlet* (C-70/10) of 24 November 2011 (which was referred to the CJEU by another Belgian Court, the Brussels Court of Appeal).

This is especially the case as the Supreme Court's decision came only one month before the opinion of the Advocate General Cruz Villalón in the case *UPC Telekabel* (C-314/12).

In *UPC Telekabel*, the CJEU was asked to bring further guidance on the type of injunctions that can be issued against ISPs (including DNS Blocking), and in particular on the necessary balance to be struck between all parties' fundamental rights (the right to (intellectual) property on the one hand and the fundamental rights of the persons affected by the injunction).

In its opinion of 26 November 2013, the Advocate General was of the view that it is incompatible with such necessary balance to enjoin an ISP, generally and without ordering specific measures, from allowing its customers to access a particular website that infringes copyright, even though the ISP can avoid incurring a penalty for breach of that prohibition by showing that it has taken all reasonable steps to comply with the prohibition.

Depending on the further guidance that will sooner than later be provided by the CJEU on this issue, the Belgian Supreme Court may have to revisit its position.