

Intermediary Liability and Website-Blocking in the EU

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Moving Parts

Rights: 2001 Infosoc Directive

Art. 3.2: Making available right

Art 8.3: right to injunctive relief “against intermediaries whose services are used by a third party to infringe a copyright or related right”

Limitations on Injunctive Relief

2004 Enforcement Directive, art. 3:

Remedial measures should be fair, proportionate and not excessively costly

2000 eCommerce Directive, art 15:

No duty to monitor, “nor a general obligation actively to seek facts or circumstances indicating illegal activity”

EU Charter of Fundamental Rights

Art. 17(2): right to protection of intellectual property

Art. 16: Freedom to conduct a business

Art. 11: Freedom to receive information

Art. 52: Principle of proportionality

SABAM cases (filtering)

Case C-70/10 (Scarlet Extended v. SABAM) ECJ 2011 (access provider; users participated in P2P); Case C-360/10 (SABAM v. Netlog) 2012 (social networking platform)

Injunctive relief can be directed to prevention of commission of future infringements; not limited to preventing continuation of past infringements (Case C-324/09, L'Oréal v eBay (2011), para. 131)

BUT no “active monitoring of all the data . . .”

Scope of Filtering at Issue

- all electronic communications passing via its services, in particular those involving the use of peer-to-peer software (Scarlet)/information which is stored on its servers by its service users (Netlog);
- which applies indiscriminately to all its customers;
- as a preventive measure;
- exclusively at its expense; and
- for an unlimited period

Rationale: IP protection not absolute; remedy disproportionate

Inconsistent with eCommerce Directive art. 15
because requires active monitoring of
customers' data

Violates customers' rights in personal data and
to information; might block lawful
communications

Violates isp's rights; excessively costly and
complicated

Injunction may require Site-blocking

Case C-314/12, UPC Telekabel Wein,
27 March 2014

Who is an “intermediary” under
InfoSoc Directive art 8.3?

Is a site-blocking remedy
proportionate?

Intermediary

Off-Shore Infringer: kino.to makes audiovisual works available, Austrian users access via local isp, but Telekabel doesn't host or have any contractual relationship with kino.to (in SABAM cases, host service and end-user infringers were isp's customers)

CJEU doesn't address question whether end-users are infringers; if no contractual relationship with infringer, is isp an intermediary "whose services are used by a third party to infringe a copyright or related right"

Infringing site “uses services” of its end-users’ isps

Remedial measures are aimed at *preventing* infringement (para 37)

Infringement to prevent is the making available of unauthorized content to the public; no need to show that customers actually accessed it (paras. 38-39); [see also *Svensson*]

isp’s services are “used by a third party” (the infringing website) “to infringe a copyright ” because isp allows its customers to access the site

Purposive interpretation

Infosoc Directive, Recital 59; 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. . . . 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.

Telekabel, para 33: "To exclude internet service providers from the scope of Article 8(3) of Directive 2001/29 would substantially diminish the protection of rightholders sought by that directive"

Proportionality

Means of site-blocking left to isp; no conflict with right to conduct business

But injunction may conflict with right to receive information: “Accordingly, in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.” (para.57)

Going forward

Procedure: How will end-user intervention work in practice?

Substance: When will site-blocking be ordered?

Host site outside/inside EU? Intra-EU site blocking if takedown-stay down not a remedy?

Exclusively/predominantly/>50% infringing?

How assess: proportion of contents v. proportion of hits?