

Site-blocking Orders in the EU: Justifications and Feasibility

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Abstract

The recent CJEU Site-blocking order (Case C-314/12, 27 March 2014) affirms that it is the responsibility of the intermediary to choose and implement appropriate technical measures to protect rightholders. Such responsibility can be justified as it is feasible for the intermediary to know and best adopt recourses and abilities available to him. Nevertheless, this is not an easy and straightforward task for the intermediary as the deployment of technical measures for the blocking of infringing sites has to achieve the effect of striking a balance for the protection between copyrights and related rights; the freedom to conduct a business; and the freedom of information of internet users. This paper analyses and justifies the responsibility and feasibility of site-blocking from intermediaries; and provides insights into the promotion of harmonised implementation of technical measures in the EU.

Keywords: Site Blocking, IP Blocking, DNS Blocking, URL Blocking, DPI and Proportionality

Introduction

Site blocking, also known as 'website blocking', is used to prevent Internet users' access to Internet sites hosting illegal materials so as to reduce online copyright infringement or other rights infringement. There are three common technical measures which can be deployed for site blocking: Domain Name System (DNS) blocking (i.e. berkeley.com); Internet Protocol (IP) address blocking (i.e. 10.16.250.206) and Uniform Resource Locator (URL) blocking (i.e. http://www.berkeley.com).¹ In addition, packet inspection, which includes shallow packet inspection and deep packet inspection, can be considered as another independent technical

¹ See *Twentieth Century Fox and others v British Telecommunications plc*, [2011] EWHC 1981 (Ch), paras. 71-72; Feiler, L. Website Blocking Injunctions under EU and U.S. Copyright Law - Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?, *Transatlantic Technology Law Forum (TTLF) Working Paper No.13*, 1 May 2012, Stanford Law School; Kleinschmidt, B., An International Comparison of ISP's Liabilities for Unlawful Third Party Content, *International Journal of Law and Information Technology* (2010) Vol. 18, No. 4, p. 332-355; and Hambidge, T. R., Containing Online Copyright Infringement: Use of the Digital Millennium Copyright Act's Foreign Site Provision to Block U.S. Access to Infringing Foreign Websites, *Vanderbilt Law Review* (2007), Vol.60, No. 3, p. 905-937.

measure to examine network in more detail,² though deep packet inspection may also be used to exercise URL blocking known as a hybrid method such as ‘DPI-based URL blocking’.³

It is worth noting that the deployment of these technical measures may incur different costs, effects and risks. The assessment of the appropriateness of applied technical measures usually depends on seven key factors: ‘speed of implementation, cost, blocking effectiveness, difficulty of circumvention, compatibility with judicial process, integrity of network performance and impact on legitimate services’.⁴

It is widely accepted that the cost of DNS blocking and IP blocking is similar, while URL blocking can be rather costly.⁵ In general, it is possible for Internet users, website operators or Internet access providers to circumvent those measures completely or to some degree, and thus it affects the outcome and effectiveness of the site blocking order. It is commonly recognised that DNS blocking is not very efficient as it is easy for website operators and Internet users to circumvent it.⁶ In contrast, IP blocking and URL blocking are relatively efficient. However, IP blocking bears higher risk of over blocking, whilst URL blocking might cause the inefficient performance of network due to the change of its infrastructure.⁷

In order to optimize technical measures for site blocking, it is suggested that hybrid options such as DNS blocking in combination with DPI or URL blocking may potentially be used to reduce the impact on the performance of network and improve the effectiveness of blocking by making circumvention difficult.⁸ For example, the British Telecom developed a hybrid method called ‘Cleanfeed’ which deploys a two-stage mechanism - ‘IP address blocking and DPI-based URL blocking’ - to filter specific internet traffic.⁹

Due to current lack of standard practice on the employment of site blocking measures in countries and within Member States in Europe, it generates a wide debate on whether a site blocking injunction from the Court should specify specific technical measures. The recent CJEU Site-blocking order case (*UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, 27 March 2014) affirms that it is the responsibility of the intermediary to choose and implement appropriate technical measures to protect rightholders. Such responsibility can be justified as it is feasible for the intermediary to know and best adopt recourses and abilities available to him. Nevertheless,

² “Site Blocking” to reduce online copyright infringement: a Review of Sections 17 and 18 of the Digital Economy Act, Ofcom, United Kingdom, 27 May 2010, available at <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> (last accessed 30 July 2014), p.3.

³ *Twentieth Century Fox and others v British Telecommunications plc*, [2011] EWHC 1981 (Ch), para. 71, ‘DPI-based URL blocking using ACLs on network management systems’.

⁴ “Site Blocking” to reduce online copyright infringement: a Review of Sections 17 and 18 of the Digital Economy Act, Ofcom, United Kingdom, 27 May 2010, p.3-4.

⁵ See note 1.

⁶ *Ibid.* Website operator can circumvent DNS blocking by using another domain name; and Internet users can circumvent it by configuring their computers to use alternative DNS servers.

⁷ *Ibid.*

⁸ “Site Blocking” to reduce online copyright infringement: a Review of Sections 17 and 18 of the Digital Economy Act, Ofcom, United Kingdom, 27 May 2010, p.4.

⁹ *Twentieth Century Fox and others v British Telecommunications plc*, [2011] EWHC 1981 (Ch), para. 73.

this is not an easy and straightforward task for the intermediary as the deployment of technical measures for the blocking of infringing sites has to achieve the effect of striking a balance for the protection between copyrights and related rights; the freedom to conduct a business; and the freedom of information of internet users.

This paper analyses and justifies the responsibility and feasibility of site-blocking from intermediaries; and provides insights into the promotion of harmonised implementation of technical measures in the EU.

Ruling on Site-blocking Order: CJEU Case C-314/12¹⁰

The CJEU Case C-314/12 concerns unauthorised Internet access to copyrighted films between UPC Telekabel Wien GmbH, based in Vienna, Austria, providing Internet, TV and telephony services; and the two German film companies, Constantin Film Verleih and Wega Filmproduktionsgesellschaft.¹¹

Constantin and Wega noticed that UPC enabled a website (kino.to) to provide unauthorised public access to UPC customers, via streaming and downloading, to some of their copyrighted films.¹² When Constantin and Wega requested UCP to block the kino.to site, UPC refused.¹³ Constantin and Wega sought an injunction prohibiting UPC from providing its customers with access to the site. UPC Telekabel denied a claim of copyright infringement as it did not have any business relationship with the operators of the website at issue.¹⁴

The Higher Regional Court (Vienna, Austria) reserved the order of the court of the first instance and held that 'by giving its customers access to content illegally placed online, UPC Telekabel had to be regarded as an intermediary whose services were used to infringe a right related to copyright, with the result that Constantin Film and Wega were entitled to request that an injunction be issued against UPC Telekabel.'¹⁵ However, as regards technical measures for the protection of copyright, it reversed the order of the court of the first instance and held that 'UPC Telekabel could only be required, in the form of an obligation to

¹⁰ This section draws upon the author's recent publication: Wang, F., CJEU Site-blocking Orders: Case Note for *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (Case C-314/12, 27 March 2014), (June 2014) *Journal of Intellectual Property Forum* Issue 97, p.89-94.

¹¹ Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Judgment of the Court (Fourth Chamber) of 27 March 2014.

¹² Case C-314/12, para. 2.

¹³ It is commonly understood that the rightholder would ask the website to take down infringed content at first instance, though it may not always be a feasible option as the rightholder may not have correspondent detail of the website owner. Under such circumstances, the rightholder may then contact the Internet intermediary who carries a third party's infringement of a protected work in a network and enables its customer access to such website.

In addition, 'Austria has not implemented any notice and takedown procedure' (See Market/2006/09/E Service Contract ETD / 2006 / IM / E2 /69, Study on the Liability of Internet Intermediaries, Country Report – Austria, 12 November 2007 (prepared by Gerald Spindler), p.3, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/austria_12nov2007_en.pdf (last accessed 30 July 2014)).

¹⁴ Case C-314/12, para. 16.

¹⁵ Case C-314/12, paras. 14.

achieve a particular result, to forbid its customers access to the website at issue, but that it had to remain free to decide the means to be used.¹⁶ UPC Telekabel appealed on a point of law to Austrian Supreme Court. The Supreme Court requested the European Court of Justice (CJEU) to answer whether UPC Telekabel should 'be ordered to block the access of its customers to a website making available to the public some of the films of Constantin Film and of Wega without their consent'.¹⁷

Upon the request of the Austrian Supreme Court, CJEU is required to interpret Article 5(1) and (2)(b) and Article 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society,¹⁸ by answering the questions referred:

'1. Is Article 8(3) of Directive 2001/29 ... to be interpreted as meaning that a person who makes protected subject-matter available on the internet without the rightholder's consent [for the purpose of Article 3(2) of Directive 2001/29] is using the services of the [internet] access providers of persons seeking access to that protected subject-matter?

If the answer to the first question is in the negative:

2. Are reproduction for private use [within the meaning of Article 5(2)(b) of Directive 2001/29] and transient and incidental reproduction [within the meaning of Article 5(1) of Directive 2001/29] permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?

If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's [internet] access provider in accordance with Article 8(3) of [Directive 2001/29]:

3. Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to prohibit in general terms an [internet] access provider from allowing its customers access to a certain website (thus without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring coercive

¹⁶ *Ibid.* See also para.12. The Court of First Instance (Commercial Court, Vienna, Austria) imposed specific measures to prohibit UPC Telekabel from providing its customers with access to the website at issue by blocking that site's domain name and current IP ('Internet Protocol') address and any other IP address of that site of which UPC Telekabel might be aware'. This is contrary to the ruling of the appeal court (the Higher Regional Court, Vienna, Austria).

¹⁷ Case C-314/12, para 15; paras. 1 and 2.

¹⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019. See Article 5 concerns exceptions and limitations to the reproduction rights; and Article 8 concerns sanctions and remedies. Article 8(3) provides that '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.'

penalties for breach of the prohibition by showing that it had nevertheless taken all reasonable measures?

If the answer to the third question is in the negative:

4. Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an [internet] access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?¹⁹

The CJEU firstly points out that it is solely for the national court to determine both the need for and the relevance of the questions that it submits to the Court of Justice.²⁰ This reflects on the power of a national court for the determination of the liability of Internet intermediaries, which is also indicated in the EC Directive on Electronic Commerce (Articles 12-14).²¹ It is confirmed that Articles 12 – 14 of the EC Directive on Electronic Commerce 'do not affect the possibility for a national court or administrative authority to require a given service provider to determine or prevent an infringement on a case-by-case basis (i.e. to issue injunctions aiming at removal of illegal information or the disabling of access to it) which is – in principle – subject to the national law'.²² It is worth noting that in the present case, the CJEU did not mention about the relevant provisions (i.e. Articles 12 – 14) of the EC Directive on Electronic Commerce in its judgment concerning limitations on the liability of service providers who offer mere conduit, caching and hosting service. If Articles 5 and 8 of the Directive 2001/29 and Articles 12-14 of the EC Directive on Electronic Commerce were read together and construed, it would help to explain with more clarity concerning exceptions and limitations to the reproduction rights for the protection of copyright.²³

The CJEU, then, goes on answering Question 1 in combination of Question 2. It defines the term 'intermediary' that, according to Recital 59 in the preamble to Directive 2001/29, 'the term "intermediary" used in Article 8(3) of that directive covers any person who carries a third party's infringement of a protected work or other subject-matter in a network'.²⁴ It asserts that 'Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person

¹⁹ Case C-314/12, para. 17.

²⁰ Case C-314/12, paras. 19 and 20.

²¹ 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'), *Official Journal* L 178, 17/07/2000 P. 0001 – 0016.

²² See Market/2006/09/E Service Contract ETD / 2006 / IM / E2 / 69, Study on the Liability of Internet Intermediaries, Final Report, 12 November 2007, p.4, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf (last accessed 30 July 2014).

²³ See Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Judgment of the Court (Third Chamber) of 24 November 2011. Recitals 16 and 59 and Article 8 of Directive 2001/29 was read together with Recitals 45 and 47 as well as Articles 1, 12 and 15 of Directive 2000/31 (EC Directive on Electronic Commerce) alongside other directives – EC Directive on the Enforcement of Intellectual Property Rights 2004; EC Directive on Data Protection 1995; and EC Directive on e-Privacy 2002.

²⁴ Case C-314/12, para. 30.

who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29'. It concludes that UPC is regarded as an intermediary whose services are used to access Constantin and Wega's films on a website (Kino.to).

Referring to Question 3 together with Question 4, the CJEU points out again that Member States must apply rules for the injunctions according to national law. It states, 'as is apparent from Recital 59 in the preamble to Directive 2001/29, the rules for the injunctions which the Member States must lay down pursuant to Article 8(3) of the directive, such as those relating to the conditions to be met and the procedure to be followed, are a matter for national law'.²⁵ This is in line with Recital 45 of the EC Directive on Electronic commerce which provides that 'the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it'.²⁶

The CJEU further emphasises that in addition to the interpretation of national law in a manner consistent with the directive, the authorities and courts of the Member States must ensure that they 'do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality'.²⁷ Subsequently, it suggests that an injunction should be sought to strike a balance between copyrights and related rights; the freedom to conduct a business; and the freedom of information of internet users.²⁸

However, the determination of appropriate technical measures becomes most challenging as technical availability and suitability impacts on the feasibility of site-blocking. Even if there are suitable technical measures available, it is possible that the implementation of such measures could be unreasonably costly. It leads to the debate on the justification and feasibility of ISP's site-blocking. As UPC Telekabel claimed, the various blocking measures which may be introduced can all be technically circumvented and that some of them are excessively costly.²⁹

The CJEU supports the Appeal Court for the issue of the injunction that contains non-specific technical measures as 'it does not seem to infringe very substance of the freedom of

²⁵ Case C-314/12, para. 43.

²⁶ EC Directive on Electronic Commerce 2000, Recital 45.

²⁷ Case C-314/12, para. 46. *See also* Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 68.

²⁸ Case C-314/12, para. 47. *See also* para. 49, which explains that 'the freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it'.

²⁹ Case C-314/12, para. 16.

an internet service provider³⁰ in accordance with the principle of legal certainty³¹ for two reasons as follows:

‘First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.

Secondly, such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.³²

That is, in compliance with the fundamental right of internet users to freedom of information, the intermediary should adopt resources and abilities available to him for technical measures to prevent or put up barriers to unauthorised access to the protected subject-matter without making unbearable sacrifices. Thus, the CJEU allows a court injunction that ‘does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish’.³³

The Court (Fourth Chamber), therefore, supports blocking orders for infringing sites and allows the intermediary to choose suitable technical measures that are available to him. It finally held that:

‘1. Article 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons

³⁰ Case C-314/12, para. 51.

³¹ Case C-314/12, para. 54.

³² Case C-314/12, paras. 52 and 53.

³³ Case C-314/12, para.64.

accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

2. The fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish'.³⁴

Site Blocking Order with Non-specific Technical Measures: Justifications and Feasibility

In light of the ruling of the *UPC case* above, it is understandable that the CJEU, in principle, should leave the Member States with the necessary discretion to define transposition measures which may be adapted to the various situations possible, because the provisions in directives are relatively general.³⁵ However, without a general guidance from the Commission, service providers may not be in a position to foresee a constructive framework which meets the underlying legal requirements and achieve the effect of striking a balance for the protection between copyrights and related rights; the freedom to conduct a business; and the freedom of information of internet users.

In absence of a harmonised standard from the Commission at the Community level, national courts may also implement Directive 2001/29 differently according to their national law. This results in that courts in some Member States issue a technological specific site blocking order, whilst courts in other Member States issue an injunction with non-specific technical measures or even do not deem it to be appropriate to order Internet access service providers to block infringing sites. It is notable that courts in member states such as Germany, Netherlands and Ireland rejected to issue site blocking injunctions.³⁶

In contrast, Member States such as Belgium, UK and Denmark have been issuing site blocking injunctions with specific technical measures. For example, in Belgium the Belgium

³⁴ Case C-314/12, para. 66.

³⁵ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 29 January 2008, para. 67. See also Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 84.

³⁶ See *EMI Records (Ireland) Ltd & Ors -v- UPC Communications Ireland Ltd* [2010] IEHC 377 (11 October 2010).

Court ordered a court-appointed outside expert to conduct a technical and commercial evaluation of filtering applications for a case concerning copyright protection in the case of *SABAM v Scarlet*,³⁷ though later an injunction for the installation of a filtering system was prohibited by the CJEU as such system filters ‘all electronic communications passing via its services which applies indiscriminately to all its customers, as a preventive measure, exclusively at its expense, and for an unlimited period’.³⁸ In another Belgium case of *VZW Belgian AntiPiracy Federation v NV Telenet*, the Antwerp Court of Appeal issued a site blocking order with a specific technical measure - DNS blocking.³⁹

In the UK, the UK Courts also specify technical measures in site blocking orders. For example, in the case of *the Football Association Premier League Ltd (FAPL) v British Sky Broadcasting Ltd etc.*, the Court ordered a hybrid method of site blocking which included the combination of IP blocking and URL blocking.⁴⁰ That is, ‘the orders require IP address blocking of the IP address for FirstRow’s domain name firstrow1.eu. FAPL’s evidence is that this will not result in over-blocking since that IP address is not shared. The orders also require IP address re-routing and URL blocking at any shared IP addresses.’⁴¹ Likewise, in the case of *Twentieth Century Fox and others v British Telecommunications plc*,⁴² the High Court issued a site blocking injunction ordering BT to deploy specified technology – the ‘Cleanfeed’ system, to block access to the Newzbin2 website. It explained that ‘Cleanfeed is a hybrid system of IP address blocking and DPI-based URL blocking which operates as a two-stage mechanism to filter specific internet traffic.’⁴³ The issue of an injunction to BT was justified, based on BT’s general knowledge of general infringements rather than knowledge by specific individual infringements.⁴⁴

In Denmark, in the case of *IFPI Danmark v Tele 2 A/S*, the City Court of Copenhagen ordered DNS blocking by granting the Danish branch of IFPI requiring ISP to block access to www.allofmymp3.com.⁴⁵ Similarly, in the case of *IFPI Danmark v DMT2 A/S*, Frederiksberg Court upheld *sub nom Sonofon A/S v IFPI* (High Court of Eastern Denmark, 26 November 2008) and *sub nom Telenor v IFPI* (Danish Supreme Court, 27 May 2010) and granted the

³⁷ *SABAM v Scarlet*, Brussels Court of First Instance, No. 04/8975/A. Decision of 29 June 2007. See also Belgium ISP ordered by the court to filter illicit content, available at <http://history.edri.org/edri/gram/number5.14/belgium-isp> (last accessed 30 July 2014). It states ‘In a report published on 3 January 2007, the expert presented 11 solutions that could be applied in order to block or filter the file-sharing, and seven of them could be applied by Scarlet.’

³⁸ Case C-70/10 *Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (Sabam)*, Press Release No. 126/11, Judgment of the Court (Third Chamber) of 24 November 2011, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-11/cp110126en.pdf> (last accessed 30 July 2014).

³⁹ *VZW Belgian AntiPiracy Federation v NV Telenet*, 26 September 2011, docket no. 2011/8314.

⁴⁰ *The Football Association Premier League Ltd v British Sky Broadcasting Ltd, British Telecommunications Plc, Everything Everywhere Ltd, Talktalk Telecom Ltd, Telefónica UK Ltd, Virgin Media Ltd, Chancery Division*, 16 July 2013, [2013] EWHC 2058 (Ch).

⁴¹ [2013] EWHC 2058 (Ch), para. 56.

⁴² *Twentieth Century Fox and others v British Telecommunications plc*, [2011] EWHC 1981 (Ch).

⁴³ [2011] EWHC 1981 (Ch), para. 73.

⁴⁴ [2011] EWHC 1981 (Ch), para. 131.

⁴⁵ *IFPI Danmark v Tele 2 A/S*, Copenhagen City Court, 25 October 2006, docket no. F1-15124/2006.

Danish branch of IFPI requiring ISP to block access to www.thepiratebay.org ('the Pirate Bay') by DNS blocking.⁴⁶

As shown above, Courts in those Member States have ordered DNS blocking, IP blocking, URL blocking or a hybrid method of blocking according to different circumstances such as whether there is a shared IP address for different websites. Such technological specific site blocking orders are to ensure the best possible outcome based on feasible technologies that are commonly recognised. Currently there is no uniform framework of assessment on suitable technical measures for courts in Member States to issue site blocking injunctions. In the recent UK case of *EMI Records Ltd and others v British Sky Broadcasting Ltd and others*, it refers to the *UPC* case in the Austrian Court that 'the Oberster Gerichtshof expresses concern at para 4(1) that courts in different member states have reached different conclusions on the proportionality of blocking orders. It suggests at para 4(2) that the question "should be judged in a uniform manner throughout Europe" in accordance with "guidelines for assessing the proportionality of specific blocking measures" laid down by the Court of Justice.⁴⁷ This calls for harmonisation of the adoption of appropriate blocking measures by Internet service providers to bring about the consistent application of standard.

Thus, it would be helpful if the Commission could establish such framework to improve the feasibility of effective blocking and ensure a harmonised standard to protect different interests of right holders by transplanting some successful experience from countries such as the US. Under US Copyright Act, there is a formal scheme for injunctive relief considerations based on four relevant criteria:

- 1) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider, would significantly burden either the provider or the operation of the provider's system or network;⁴⁸
- 2) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;⁴⁹
- 3) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations;⁵⁰ and
- 4) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.⁵¹

⁴⁶ *IFPI Danmark v DMT2 A/S*, Frederiksberg Court, 29 October 2008; *sub nom Sonofon A/S v IFPI*, High Court of Eastern Denmark, 26 November 2008; and *sub nom Telenor v IFPI*, Danish Supreme Court, 27 May 2010.

⁴⁷ *EMI Records Ltd and others v British Sky Broadcasting Ltd and others*, Chancery Division, 28 February 2013 [2013] EWHC 379 (Ch), para.99.

⁴⁸ 17 U.S.C. §512(j)(2)(A).

⁴⁹ 17 U.S.C. §512(j)(2)(B).

⁵⁰ 17 U.S.C. §512(j)(2)(C).

⁵¹ 17 U.S.C. §512(j)(2)(D).

In addition to a site blocking scheme to be conducted by Internet access service providers, a notice and takedown scheme to be operated by Internet hosting service providers (the site operators) can be coupled to 'provide a valuable complement to a technical blocking measure' and lower the risk of over blocking.⁵² In 2012 the European Commission opened the Public Consultation on Procedures for Notifying and Acting on Illegal Content hosted by Online Intermediaries (hereafter 'the consultation').⁵³ This consultation aims to collect opinions on how to develop a clean and open Internet by reviewing the provisions under Article 14 of the EC E-Commerce Directive; and is deemed to be another attempt in regulating the liability of online intermediaries after the publication of recent comments and reports on the enforcement of intellectual property (IP) rights (the application of the EC Directive on Intellectual Property Rights Enforcement),⁵⁴ and the public consultation on the future of e-commerce and the implementation of the E-commerce Directive.⁵⁵ The focal point of the consultation lies in questions on whether hosting service providers should have a procedure for notifying illegal content and what actions hosting service providers should take against illegal content. If such scheme is considered in combination of a scheme for site blocking measurements, it will help establishing a coherent and systematic framework of reducing online copyright infringements.

The Enhancement of the Principle of Proportionality

Despite the permission of issuing an injunction with non-specific technical measures for the blocking of infringing sites, the present CJEU *UPC* case reinstates the harmonised implementation of the principle of proportionality where several fundamental rights are at issue⁵⁶ by referring to national authorities and courts to establish whether all reasonable measures are taken.⁵⁷ According to the principle of proportionality, measures taken should not only prevent unauthorised access but also not unnecessarily deprive internet users of the possibility of lawfully accessing the information available.⁵⁸ In addition, it also takes into consideration the feasibility of technology available for measures, by permitting either

⁵² "Site Blocking" to reduce online copyright infringement: a Review of Sections 17 and 18 of the Digital Economy Act, Ofcom, United Kingdom, 27 May 2010, p.14. In addition, this report also suggests other complementary measures such as 'de-listing from search index, squeeze revenues, and domain seizures'.

⁵³ A Clean and Open Internet: Public Consultation on Procedures for Notifying and Acting on Illegal Content hosted by Online Intermediaries, European Commission, 4 June 2012 to 5 September 2012 (extended to 11 September 2012).

⁵⁴ Synthesis of the Comments on the Commission Report on the public consultation on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, European Commission, July 2011, available at http://ec.europa.eu/internal_market/consultations/docs/2011/intellectual_property_rights/summary_report_replies_consultation_en.pdf (last accessed 30 July 2014).

⁵⁵ Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC), European Commission, 2010, available at http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm (last accessed 30 July 2014).

⁵⁶ Case C-314/12, para. 46.

⁵⁷ Case C-314/12, paras. 64 and 66.

⁵⁸ *Ibid.*

preventing, or making it difficult to access protected subject-matter.⁵⁹ Such principle has been applied consistently in some Member States. For example, in the UK, in the case of *EMI Records Ltd and others v British Sky Broadcasting Ltd and others*, the Court considers the proportionality of the proposed orders from the perspective of individuals affected by them who are not before the court.⁶⁰ In *Twentieth Century Fox Film Corp v British Telecommunications Plc*, it applies the principle of proportionality in that ‘the order would potentially prevent BT subscribers from making use of Newzbin2 for non-infringing uses. On the evidence, however, the incidence of such uses is de minimis’.⁶¹ In *the Football Association Premier League Ltd (FAPL)* case, it also employs the principle of proportionality in orders, which explains that ‘the interests of FAPL and the supporting rightholders in enforcing their copyrights clearly outweigh the art.11 EU Charter rights of the users of the Websites, who can obtain the copyright works from lawful sources. They even more clearly outweigh the art.11 rights of the operators of the Websites, who are profiting from infringement on a large scale. They also outweigh the Defendants’ art.11 rights to the extent that they are engaged’.⁶² As shown above, the proportionality test, known as ‘ultimate balancing test’,⁶³ is horizontally applied to consider the proportionality of different rightholders protection, remedies and orders for infringement of protected subject-matters.

Conclusion and Recommendation

After all, site-blocking (sometimes alongside Internet filtering) is a common method used to prevent unauthorised access to protected materials online. However, it is also a highly technical issue concerning the determination and deployment of appropriate measures. While it is fully understandable that courts give intermediaries freedom to decide the means to be used taking into account their technical knowledge, availability and resources, it may also cause inconsistent implementation by intermediaries in Member States or result in ineffective outcomes without harmonised standard. It may be helpful to have a framework established to ‘meet the requirements of the copyright owners for a timely implementation of blocks and a flexible approach from service providers to tackling circumvention’ as well as to fulfil the need to ‘respect the legitimate interests of site operators, service providers and end users’.⁶⁴ That is, a framework of technical measures for site blocking has to achieve the

⁵⁹ *Ibid.*

⁶⁰ *EMI Records Ltd and others v British Sky Broadcasting Ltd and others*, Chancery Division, 28 February 2013 [2013] EWHC 379 (Ch), para.8.

⁶¹ *Twentieth Century Fox Film Corp v British Telecommunications Plc*, Chancery Division, 28 July 2011 [2011] EWHC 1981 (Ch), para. 186.

⁶² *The Football Association Premier League Ltd v British Sky Broadcasting Ltd, British Telecommunications Plc, Everything Everywhere Ltd, Talktalk Telecom Ltd, Telefónica UK Ltd, Virgin Media Ltd*, Chancery Division, 16 July 2013, [2013] EWHC 2058 (Ch), paras. 56-59.

⁶³ *Golden Eye (International) Ltd & Ors v Telefónica UK Ltd & Anor* [2012] EWCA Civ 1740 (21 December 2012), para.18, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1740.html> (last accessed 30 July 2014).

⁶⁴ “Site Blocking” to reduce online copyright infringement: a Review of Sections 17 and 18 of the Digital Economy Act, Ofcom, United Kingdom, 27 May 2010, available at <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> (last accessed 30 July 2014), p.50.

effect of striking a balance for the protection between copyrights and related rights; the freedom to conduct a business; and the freedom of information of internet users. Moreover, it is also recommended that complementary measures such as search engine de-listing and notice and takedown process may help to make site blocking more effective and reduce the potential harm from over blocking.⁶⁵

A general framework of harmonised standards on site blocking is, therefore, of necessity to be established by the Commission in the EU. The power of the Commission for the protection of IP rights, e-business and internet users can be replicated from that in other sectors such as data privacy protection so as to achieve a harmonised standard for the protection of different rightholders. For example, the power of the Commission can be found under the recent Proposal of General Data Protection Regulation 2012, which explicitly specifies that implementing powers should be conferred on the Commission for various measures such as technical standards and mechanisms for certification; and the Commission should consider specific measures for micro, small and medium-sized enterprises.⁶⁶ The power of the Commission can also be reflected by Articles 23, 30 and 39 of the Proposal of General Data Protection Regulation that the Commission shall be empowered to adopt delegated acts for the purpose of specifying any further criteria and requirements for appropriate measures and mechanisms and lay down technical standards for the requirements for data protection.⁶⁷ Correspondingly, relevant criteria for the determination of appropriate technical measures in site blocking injunctions should be established in a general guideline on the proportionality of site blocking from the Commission; and where necessary, an injunction shall contain a court-appointed expert's recommendation of specific technical measures on a case-by-case basis. This is to ensure the effectiveness of the court order, and the balance protection to the interests of different rightholders.

⁶⁵ *Ibid*, p.51. 'For instance, a notice and take down process may reduce the potential harm from over blocking by providing an opportunity for site operators to remove infringing content and so ensure the continued availability of legitimate content which may otherwise have been inadvertently blocked. Search engine de-listing would make it harder for operators of blocked sites to re-establish their service, such that users could easily locate it.'

⁶⁶ Proposal of the General Data Protection Regulation, Brussels, 25.1.2012 COM (2012) 11 final, Recital 130.

⁶⁷ *Ibid*.