

Observatory at EUIPO

Véronique DELFORGE | Alicante | 12 July 2022



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Meeting with Observatory

Exchange of best practices on Ideaspower@school and IP teaching.

Targeting the management of stakeholder network, the methodology and content of specific studies, and enforcement tools.

- **Reports presentation**

Expert: *Gyta Berasnevičiūtė-Singh*

- **Case law cases presentation**

Experts: Véronique Delforge, Erling Vestergaard

Case-Law

1. Blocking orders and liability of intermediaries: Premier League (UK, IE), New judicial procedure in France (Arcom)
2. Case examples showing damages calculation in trademarks cases
3. Landmark decisions in criminal law: SKF case, Popcorn Time

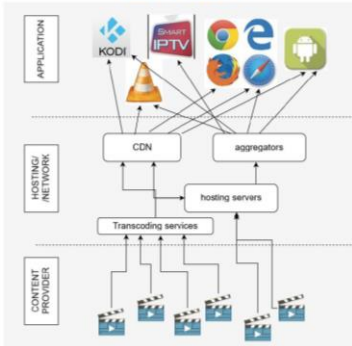


Blocking orders and liability of intermediaries

New forms of online piracy: live streaming piracy

- **Streaming** is the most used access method to pirate content (about 80 % of all access)
- **IPTV** (internet protocol television): subscription based or open IPTV streams
 - **Television market:** *from traditional modes of broadcasting by air, satellite and cable toward internet-based streaming / IPTV offers (continuous broadcasting) – live & on demand*
- **Live Streaming** – open web streams (**intermittent** broadcasting)

Figure 6. OVERVIEW OF THE KEY COMPONENTS OF TECHNICAL INFRASTRUCTURE FOR DELIVERY OF ILLEGAL IPTV



How you stop rapidly innovating online infringement occurring? The answer might be to adopt an equally innovative approach to the law in the area, that can match and claim victory over a wily and underhand opposition (without going into extra time)– [Borges Salmon](#) LLP

Legal framework



Action v. Parties often **best placed** to bring such infringing activities to an end (Art. 8(3), Rec. 59 Infosoc)

E-Commerce Directive

Instructs MS to ensure the availability of court actions against information society services' activities to terminate any alleged infringement and prevent further impairment of involved interests

Article 18(1)
Article 14(3)

InfoSoc Directive

Regardless liability

Member States shall ensure that rightsholders 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

Article 8(3)
Rec. 59

IPRED

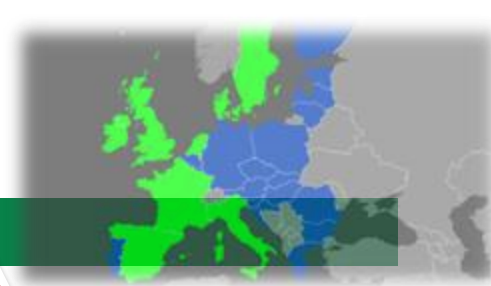
Member States shall also ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right (...)

Articles 11

Digital Service Act

PIS shall, inform the authority issuing the order of the effect given to the orders, without undue delay;
"standardized orders": statement of reasons, Uniform resources locators" & Copy to be sent to other DSC

Article 8



Definitions

Remedies under Infosoc Directive and IPRED but **divergent implementation & application**

Allow the repeated blocking of a site, every time a live broadcast is in process

Live blocking order

“Injunctions which can be issued, for example, in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL, and which are drafted in a way that makes it possible to also cover the new IP address or URL, without the need for a new judicial procedure to obtain a new injunction” (IPRED Guidance)

Dynamic blocking injunction

“an order requiring an internet intermediary to implement technical measures directed at preventing or disabling access to a specific internet location”

Blocking injunction

Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

UK - Football Association Premier League (FALP) v BT, High Court, 8 March 2017

NORMS

- Section 97A of the Copyright, Designs and Patents Act 1988;
- Article 8(3) Directive 2001/29/EC

FACTS

- FALP vs 6 UK ISPs (among which **licensees** of Premier League content)
- Order to immediately block streaming servers identified by FALP's technology as infringing



Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

I. Background – Why injunction against Streaming servers?

GROWING PROBLEM of live Premier League footage being streamed without consent of FALP on internet

5 factors – evidences that football fans turn to streaming devices as a substitute for paid subscriptions

SOURCE!



*The streaming server is the **crucial link in the chain** by which an unauthorised copy of footage of a Premier League match is transmitted to the consumer. A single server may be accessed using a number of different user interfaces. For example, the same stream on the same server may be accessed via multiple apps, websites and add-ons for set-top boxes. If access to that server is blocked, all of those access mechanisms will be disrupted (para 17)*

Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

II. The order : « Live »

Two-stage exercise to compile Target Servers to block:

- **Fingerprinting technology + other subset** identified by FALP (predominant purpose to provide access to infringing streams, not used for other substantial purpose)

'Order' different from previous blocking websites orders

Live' blocking order: effect only at the times when live FALP footage is broadcast

Dynamic list of Target Servicers (re-set each match during FALP season)

Only for a **short period** (18/03/2017- 22/05/2017: 2016/2017 premier League season)- effectiveness assessment, adaptation for next season

Additional safeguards: notice to each hosting providers weekly basis, when IP adress is subject to blocking – and redress mechanisms

Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

III. Four Jurisdictional requirements

1. Are defendants service providers?	YES – E-Com Directive 'Mere conduit'
2. Do the users/operators of the Target services infringe FAPL copyrights?	YES Reproduction/ copy by users in the course of streaming the works Operator perform an act of communication to the public (deliberately, full knowledge) targeted at the public in the UK
3. Use of the defendants' services to commit the infringements?	YES (essential role – user's access to the Target Servers)
4. Actual knowledge	YES (pre-application correspondence, notices, evidence)

Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

IV. Should an order be made? PROPORTIONALITY

Balancing of rights	IP protection / Freedom to carry out business/info
Effectiveness and dissuasiveness	More effective than blocking websites, new (automated) monitoring techniques, education
Substitutability	Dynamic order
Alternative measures	Failed takedown notices, criminal prosecutions
Not unnecessarily complicated or costly	(5 of the Defendants support the Order)
Avoidance of barriers to legitimate trade	Targeted nature of the Order, short lifespan and bandwidth requirements
Safeguards	Short duration, etc.
Proportionality	Yes

Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

Next:

- Extension of the first decision to 2018-2019 season, 2019/2020 season
- Sign of effectiveness and balanced order (no overblocking)

Model in EU?

IE, NL, ES, SE, FR, EL, BE...



Case-Law: 'Live' blocking injunction – Sport (UK) - Multiple steps approach J.Arnold

Ireland: legal test for the granting blocking injunctions

1. **Necessary** Intermediaries' services are being used to infringe copyright;
2. **Costs** not excessive, disproportionate - Order will not impose '**unbearable sacrifices**' on ISPs;
3. **Cost sharing proposals** fair and reasonable
4. **Respect fundamental rights** of the parties affected
5. **Duration and provision for review** must be reasonable

27/03/2014, [C-314/12](#), **UPC Telekabel** Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH, EU:C:2014:192)

October 2021: [Act no 2021-1382 of 25 October 2021](#) on the regulation and protection of access to cultural works in the digital age.

Case-law: Live' blocking injunction – Sport France « New accelerated procedure »

Dedicated judicial proceeding for RHs of sport content

Enabling also 'live blocking' measures

Judge can order season-long dynamic blocking injunction

Rely on ARCOM (regulator) trusted third party/ One-stop-shop to facilitate identification of pirate sites



Rely on ARCOM to characterize illicit websites upstream and downstream of judicial decisions

Case-law: Live' blocking injunction – Sport France ('Roland Garros')

Tribunal Judiciaire de Paris, Fédération Française de Tennis v SFR-FIBRE, ORANGE, ORANGE CARAIBE, SOCIETE FRANCAISE DU RADIOTELEPHONE-SFR, SOCIETE REUNIONNAISE DU RADIOTELEPHONE SRR, FREE, BOUYGUES TELECOM, COLT TECHNOLOGY SERVICES, OUTREMER TELECOM and CANAL + TELECOM, N° RG 22/53742, [25 May 2022] – ROLAND GARROS



Case-law: Live' blocking injunction – Sport France ('Roland Garros')

Norm:

- Article [L.333-10](#) of the Sports Code

Facts: **May 2022**

- French Tennis Federation (exclusive licensee broadcasting rights over Roland Garros tennis matches) *versus* FR ISPs
- Request to block infringing domains to prevent access to infringing IPTV services + block future mirror websites of the domains listed in the claim.

Case-law: Live' blocking injunction – Sport France ('Roland Garros')

Two step analysis

1° infringement to the audiovisual exploitation rights (L333-1)

'serious and repeat infringements'

Communication to the public

2° Measure solicited

Proportionate and strictly necessary

- List of Domain names
- Freedom about method of implementing
- Limited duration
- Urgency of the matter (2 days)

stream2watch.com
lalastreams.me
jokerlivestream.art
jokersecretpage.xyz
batmanstream.org
cdn.laola1.live
freestreams-live1.com
4stream.gg
streambee.to
livetv.sx
cdn.livetv541.me
mamahd.best
live.jokerswidget.org
live.harleyquinnwidget.live
mygoalv.org
tennistream.com
cnnlivestreams.com
cdn.livetv543.me

+ **Safeguards** (overblocking)
+ **Arcom** supporting update
Costs?



Latest developments and trends- Static, Dynamic, live blocking injunctions in EU

Last reports

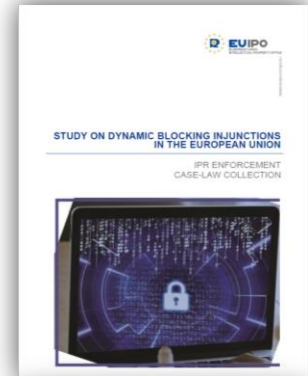
- Euiipo: [Study on Dynamic blocking injunctions in the European Union](#) - **March 2021**
- EAO: [Mapping report on national remedies against online piracy of sports content](#)- **Dec. 2021**
- EP(JURI) [Study on cross border enforcement of IP rights in the EU](#) - **Dec. 2021**

Recent case-law in EU:

- EUIPO: [Recent case-law on IPR enforcement](#) (last version **May-June 2022**)

Main trends:

- **New targets?** DNS blocking ([Cloudflare Germany](#) & [Italy, Quad9](#))
- **Increasing role of administrative bodies in the EU:** Dynamic – live blocking injunctions
- **Voluntary initiatives**



Latest developments and trends- Static, Dynamic, live blocking injunctions in EU

Administrative bodies in the EU

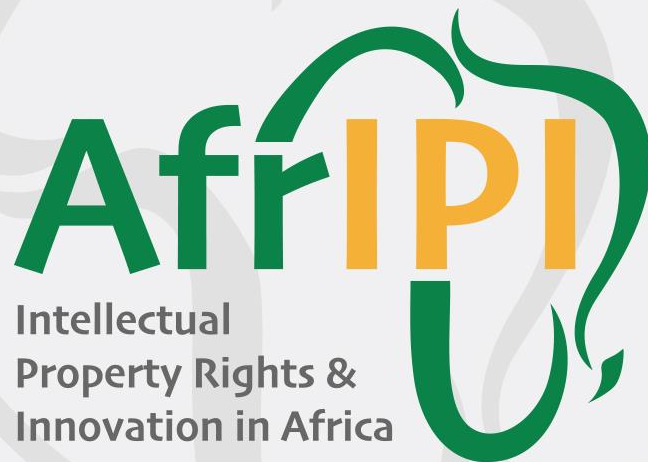
GREECE	Committee for the Notification of Copyright and Related Rights Infringement on the Internet (EDPPI)	Dynamic, live
ITALY	Autorità per le Garanzie nelle Comunicazioni (AGCOM)	Dynamic, live
LITHUANIA	Radio and Television Commission of Lithuania (RTK)	Dynamic
SPAIN	Comisión de Propiedad Intelectual, Sección Segunda	Dynamic
FRANCE	Audiovisual and Digital Communication Regulatory Authority « ARCOM » (law 26 octobre 2021)	Dynamic, live
PORTUGAL	General Inspectorate of Cultural Activities (IGAC) – MoJ	Dynamic, live
BELGIUM	Draft law - Service de lutte contre les atteintes au droit d'auteur et aux droits voisins commises en ligne	Dynamic

Latest developments and trends- Static, Dynamic, live blocking injunctions in EU

Voluntary initiatives in the EU

DENMARK	Code of Conduct for handling decisions on blocking access to services, infringing intellectual property rights’ - Telecommunications Industry and the Rights Alliance
BELGIUM	Code of Conduct Belgian Internet Service Providers (ISPA)
UK	Code of Conduct with search engines (demotion of copyright infringing websites)
PORTUGAL	General Inspectorate of Cultural activities (IGAC)
SPAIN	Anti-piracy agreement between telecommunications and cultural industries on dynamic blocking injunction (2021)
GERMANY	Code of Conduct - Clearing Body for Copyright on the Internet (CUII) – voluntary ISP blocking after oversight from review committee and DE Government Federal Network Agency (BNetzA) (2021)
NETHERLAND	Agreement BREIN with Dutch ISPs: when BREIN obtains a blocking order against one ISPs, other ISPs will voluntarily apply it as well (2021) – First Ruling Rotterdam Court (24 March 2022)
SWEDEN	Agreement between RHs and SE ISPs – towards a simplified and more efficient (judicial) process to handle blocking orders (2022) – info here and here . (2022)
ITALY, FRANCE	Regulatory framework for developing Code of Conduct (FR: New Law 2021-1382)

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THANK YOU



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