



Press and Information

Court of Justice of the European Union

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Judgment in Case C-314/12

UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega  
Filmproduktionsgesellschaft mbH

## **An internet service provider may be ordered to block its customers' access to a copyright-infringing website**

*Such an injunction and its enforcement must, however, ensure a fair balance between the fundamental rights concerned*

Constantin Film Verleih, a German company which holds, inter alia, the rights to the films 'Vicky the Viking'<sup>1</sup> and 'Pandorum', and Wega Filmproduktionsgesellschaft, an Austrian company which holds the rights to the film 'The White Ribbon'<sup>2</sup>, became aware that their films could be viewed or even downloaded from the website 'kino.to'<sup>3</sup> without their consent. At the request of those two companies, the Austrian courts prohibited UPC Telekabel Wien, an internet service provider ('ISP') established in Austria, from providing its customers with access to that site. UPC Telekabel considers that such an injunction cannot be addressed to it, because, at the material time, it did not have any business relationship with the operators of kino.to and it was never established that its own customers acted unlawfully. UPC Telekabel also claims that the various blocking measures which may be introduced could, in any event, be technically circumvented. Finally, some of those measures are excessively costly.

Hearing the case at last instance, the Oberster Gerichtshof (Supreme Court, Austria) asked the Court of Justice to interpret the EU Copyright Directive<sup>4</sup> and the fundamental rights recognised by EU law. The directive provides for the possibility for rightholders to apply for an injunction against intermediaries whose services are used by a third party to infringe their rights<sup>5</sup>. UPC Telekabel submits that it cannot be considered to be an intermediary in that sense.

In today's judgment, the Court replies to the Oberster Gerichtshof that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder is using the services of the business which provides internet access to persons accessing that subject-matter. Thus, an ISP, such as UPC Telekabel, which allows its customers to access protected subject-matter made available to the public on the internet by a third party is an intermediary whose services are used to infringe a copyright.

The Court notes, in that regard, that the directive, which seeks to guarantee a high level of protection of rightholders, does not require a specific relationship between the person infringing copyright and the intermediary against whom an injunction may be issued. Nor is it necessary to prove that the customers of the ISP actually access the protected subject-matter made accessible

<sup>1</sup> 'Wickie und die starken Männer' in the original version.

<sup>2</sup> 'Das weiße Band' in the original version.

<sup>3</sup> In June 2011, that site ceased its activity in consequence of an action of the German police taken against the operators.

<sup>4</sup> 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 (OJ 2001 L 167, p. 10).

<sup>5</sup> As regards that possibility, the Court has already held that EU law precludes the imposition of an injunction by a national court which requires an internet service provider to install a filtering system with a view to preventing the illegal downloading of files which applies indiscriminately to all its customers, as a preventive measure, exclusively at its expense, and for an unlimited period (see Case [C-70/10 Scarlett Extended](#), and Press Release [No 126/11](#)). The Court has also held that the owner of an online social network cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work (see Case [C-360/10 SABAM](#), and Press Release [No 11/12](#)).

on the third party's website, because the directive requires that the measures which the Member States must take in order to conform to that directive are aimed not only at bringing infringements of copyright and of related rights to an end, but also at preventing them.

The Oberster Gerichtshof also seeks to know whether the fundamental rights recognised at EU level preclude a national court from prohibiting an ISP, by means of an injunction, from allowing its customers access to a website which places protected subject-matter online without the agreement of the rightholders, when that injunction does not specify the measures which the ISP must take and when that ISP can avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable measures.

In this connection, the Court notes that, within the framework of such an injunction, copyrights and related rights (which are intellectual property) primarily enter into conflict with the freedom to conduct a business, which economic agents (such as internet service providers) enjoy, and with the freedom of information of internet users. Where several fundamental rights are at issue, Member States must ensure that they rely on an interpretation of EU law and their national law which allows a fair balance to be struck between those fundamental rights.

With regard, more specifically, to the ISP's freedom to conduct a business, the Court considers that that injunction does not seem to infringe the very substance of that right, given that, first, it 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, and that, secondly, it allows him to avoid liability by proving that he has taken all reasonable measures.

The Court therefore holds that the fundamental rights concerned do not preclude such an injunction, on two conditions: (i) that the measures taken by the ISP do not unnecessarily deprive users of the possibility of lawfully accessing the information available<sup>6</sup> 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 users from accessing the subject-matter that has been made available to them in breach of the intellectual property right<sup>7</sup>. The Court states that internet users and also, indeed, the ISP must be able to assert their rights before the court. It is a matter for the national authorities and courts to check whether those conditions are satisfied.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>6</sup> In order to respect the freedom of information of internet users.

<sup>7</sup> In order to respect the intellectual property right of rightholders.