



Blocking of The Pirate Bay: what constitutes an effective measure?

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Millions are spent in an attempt to keep the copyright compensation system for the music and film industry the way it is, but the copyright holders do not seem to be able to find a definite answer to online piracy. One of the prominent attempts to reduce piracy is to order ISPs to block torrent sites. In a series of recent Dutch cases blocking of the most famous (or notorious) torrent site was disputed: The Pirate Bay. Despite the fanaticism of organisations such as the Dutch BREIN (as they say: “A unique bundling of forces of the entire entertainment industry in the fight against Intellectual Property theft”), these orders invoke (almost) no positive effects against piracy. And on top of that: neither attorneys nor judges seem to be capable of clearly expressing what effectiveness exactly entails.

In November 2015, in *BREIN vs. Ziggo/XS4ALL*, the Dutch Supreme Court has asked prejudicial questions to the Court of Justice of the European Union (ECJ). The challenge the ECJ stands for is to rule on the leeway the Enforcement Directive and the Copyright Directive offer for a blocking injunction of a torrent site by an ISP. The underlying central notion is ‘effectiveness’. An ISP can only be summoned to block certain sites if the order is effective, as follows from the European Charter and the mentioned Directives. But how to measure and determine effectiveness?

The answer to this effectiveness question is far from clear. Also, one can doubt whether the threshold of effectivity provides the right key to solve the problem of online piracy. While discussing effectiveness we also take into account how the entertainment industry is currently operating, and discuss alternatives which might surpass whatever effects current measures have. Different scholars have come up with, e.g. so called Alternative Compensation Systems, that could offer an effective way to combat online piracy.

At its core, this paper examines how the ECJ could rule in *BREIN vs. Ziggo/XS4ALL*, and especially we provide guidelines on how to establish what makes an order to an ISP effective, if at all. We will compare the approaches in Europe and the United States. Is effectivity an explicit criterion in combating piracy through the blocking of ISPs in these legal systems and how is effectiveness defined? We analyze how European national case law as well as case law from the ECJ (e.g., *UPC Telekabel Wien*) addresses effectiveness.

We will analyze how the concept of the effectivity of blocking torrent sites by ISPs is handled in Europe and the United States, and do suggestions as how the ECJ should answer the prejudicial questions in *BREIN vs. Ziggo/XS4ALL*. In doing so, we contribute to the discussion on the legitimacy of blocking orders to ISPs, and in particular in getting better grip on how to evaluate effectiveness.