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―EU の動向と日本法への示唆―

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第一部基調講演

Injunctions Against Intermediaries in the European Union

Accountable, But Not Liable?

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Martin Husovec: Hello everyone. Good afternoon. *Konnichiwa*. It is my great pleasure to be here today. I would like to thank, first of all, for the kind invitation coming from Professor Takakura, from Professor Ueno, and the team of Professor Takakura and Professor Kinoshita and all the others that warmly welcomed me here yesterday with productive discussions and for further discussions today that we'll have perhaps after this talk and after the panel discussion.

I always love to come back to Tokyo. It's my second time being in Tokyo, and the last time I was here I spent two months here, and it was a Great research stay. I used to go running to the Imperial Palace. I used to know the know the rules, but as I learned just yesterday when I went running again, it takes you just three years to forget that you should run anti-clockwise. So I should be coming more often I guess.

In today's talk I would like to talk about website blocking, but the reason why the panel here is broader than that is because I'd like to explain it from the European situation which looks at these measures only as a subtype of possible measures that you can receive against intermediaries.

In the EU the situation is as following: website blocking is a type of remedy that you can receive within a broader set of remedies we have against the intermediaries which are not

conditioned upon the intermediaries' wrongful actions.

Essentially these remedies of injunctions against intermediaries, as we call it, allows you to target those service providers who did nothing wrong but are in a position to assist the right holders in the enforcement of their rights. So the basis of this legal duty that courts impose on providers is not a breach of the law, but it's the fact that they are in a position to help the right holders in that particular situation.

So for the lawyers among you, this means that it appears as a sort of third category, right next to primary liability and secondary liability. As you very well know, primary liability deals with those infringers who themselves infringe the rights, while the secondary liability deals with people who infringe by helping other people to infringe.

But because here no one is necessarily infringing the right I have coined the term "accountable, not liable" which essentially refers to the fact that these players are held accountable for help in particular situations but not held liable for the actions of users that are a cause of this particular action.

This perspective is important because also in Europe it wasn't always clear that this is what we were talking about, and just in recent years, I would say the last two years, this understanding is gaining more momentum, and we see that more and more people are subscribing to this understanding that indeed these measures are not about wrongfulness of the actions of the intermediary but involve help in an enforcement.

So to better understand the place of website blocking we should first look at the map of providers that we have online. And when we look at the landscape, what we see is that there are some providers that provide applications, like YouTube or The Pirate Bay, and there are some other providers who provide more of an infrastructure, like your access provider and your payment provider.

It is very important to understand all services on the internet are not necessarily equal, and that they contribute to the infringing actions of users in different ways. They might be more or less related to the infringing actions, and they might be more or less important for the overall functioning of the internet. And these are considerations that we should have in the back of our minds when we think about how to approach regulation of these different services.

In my work I try to distinguish two most fundamental types of services which I call proximate on one hand and remote on the other.

Proximate providers are providers that you might know because you engage with them very often, and those are at the application level of the internet, so all kinds of services that you use to consume, where you upload your user-generated content.

The remote providers are further away, and very often invisible from the perspective of the user. Those can be all kinds of providers that provide you access to the internet, whether it's your own home provider of internet access, or it's someone who provides internet access to this university when you access their WiFi, or it's a payment provider, for instance.

So while the proximate providers are providers that in Europe we would normally expose to some form of liability in case they do not react to notifications about the infringing behavior of users, the remote providers would stay outside of the remedy of this liability and would be not exposed to such liability.

When we talk about website blocking we're looking at mostly the remote providers, because the proximate providers would not be necessarily blocking a website but they would be reacting upon notification and wouldn't have to await any decision of a court or of an authority.

When we look at these providers we actually see that there are many different measures that can be applied to them, and website blocking is just one of the measures. And this slide is by no means exhaustive of all kinds of possibilities that exist.

When thinking of alternatives, obviously one of the alternatives is always also approaching the application level providers directly and not going to remote providers to address the problem that is happening on the application level.

In Europe, the legal basis for website blocking is very short and very vague. In 2001 when the copyright reform was happening in Europe to adjust the European laws to digital environment, we passed among others also this provision that allows or actually prescribes the member states to provide for certain types of injunctions. This obligation was extended later from copyright law also to all other IP rights, and these days we also find it in the upcoming unitary patent system.

The obligation that the European legislator postulated was very short, and it was essentially that member states of the EU should make sure in their own legal systems that right holders in their territory are able to apply for an injunction that would be addressed to an intermediary whose services are used by some third party to infringe an intellectual property right.

At the time of drafting and the passing of the legislation, it wasn't really clear what these conditions really mean, and many member states took it to mean that essentially when an intermediary will infringe, then of course they will provide for an injunction as against any other type of infringer.

But already back then there were voices in academia saying that this provision could be a dynamite. It could be a provision whose reach is hardly foreseeable for the application in the future.

If you want to understand why there wasn't such heavy lobbying, or even discussion about this provision, it was because at the time it was misunderstood, and it was understood at being very harmless, and hence, not many people thought it was somehow important to push against or even think about.

This situation persisted for several years after the implementation until right holders started pushing in some member states for exactly what we discussed today: website blocking, and website blocking essentially became what is called in IT jargon a "killer app" for these types of provisions.

But soon it became clear that this was intended as a completely new policy intervention that somehow stayed under the radar and introduced what I already told you at the very beginning, a measure that allows you to target non-infringers and ask them for some type of help and even compel them to such help in the court.

These days we already have case law clarifying this, essentially clarifying two important points that were contentious earlier: first, that these measures not require any wrongdoing, and second, that these measures, at their core, are aimed at preventing infringing actions from taking place.

For Europeans, obviously, this means that a lot of other measures are possible next to website blocking, such as internet disconnections, password protection of WiFi in order to prevent copyright infringement, or filtering.

Obviously, just because they are theoretically possible and you can propose them as a plaintiff and you can bring them to the court, it does not necessarily mean that the judges will actually grant them, because we have strict limitations that we impose on these measures.

There are a few limitations that are stemming from the statutory law, and those are very broad, essentially they copy and paste in article 3 of the Enforcement Directive, provisions of article 41 of the TRIPS agreement. Those requirements are requirements of the measures of being proportionate, not creating obstacles to legitimate trade, being sufficient dissuasive, being efficient, etcetera.

Next to these very general requirements we also have one very specific requirement which is essentially that whatever the courts or legislator do, they should never impose what we call a general monitoring of users on an intermediary. So we should never impose an obligation on an intermediary that would force him or her to generally monitor his users.

But because these limits are very general, the court in the case law ends up applying, to a great extent, as the main moderator of this remedy, the fundamental rights of different stakeholders involved in the situation.

Those are a right to privacy and data protection of users, a right of freedom of expression of users, and at the same time, the rights to conduct the business of the provider who is subject to these measures.

Another right that is less addressed, but should be there to, is a right of due process of those who are not a part of the proceedings, as I will show you.

I will delve into website blocking, but before that I'd like to tell you that although this sounds very novel and very unusual, actually the national law in some major jurisdictions already had some precedent for similar types of measures. This applies to both Germany and the UK.

Let's have a look at website blocking, because this is why we are here. As I said, this is for us only one of the enforcement measures that we can potentially request.

So how does it work? You have a right holder. In my case, this is Disney, that wants to shut down The Pirate Bay. What it realizes is that there are access providers like AT&T that provide

access to the internet, and that The Pirate Bay as users are at the same time also customers of AT&T. So Disney comes to the court and tries to compel AT&T, in this example, to block for the customers of AT&T, for its own customers, the access to The Pirate Bay.

Now, in the legal proceedings, which is civil, only right holder and AT&T are party to the proceedings. This means neither the affected website nor the affected users are a part of the proceedings. But in the discussion before the court, the interests of all these parties are taken into account.

What courts essentially do is they weigh, on one hand, the rights to property of the right holder against freedom of expression and privacy of users, the right to conduct business of the intermediary, and what they should be also doing is looking at the due process and the rights to conduct business of the affected website.

Because these two players are not party to the proceedings, sometimes courts, especially UK courts, try to come up with all kinds of clauses that should make it possible that these players come to the court after the block is issued to be able to challenge the block.

Unfortunately, there is no single way that these kinds of cases are handled on the national level. There is a lot of variation, and if you are interested there is a paper that I link here which discusses all kinds of variations that occur on the national level.

But to give you a sense, for instance, courts, when granting this measure word the injunctions in different ways. Some courts would say you have to block this particular website using these particular measures, while other courts, like Austria for instance, would say this website should be blocked, and it's up to you what kind of measures you will use.

Another difference is that while some countries would say these players can come back to the court and force the court to set the judgement aside. Other courts would say that their decision about website blocking is final, is not limited in time, and if someone wants to challenge they have to bring their own independent actions using their own independent cause of action.

So for instance, an Austrian court would say that in case the user wants to challenge the website block, which is a requirement under the European case law, it has to go and use its contract as a basis for enforcing access to something that is legal but is nevertheless blocked.

In the meantime one of the novel ways how users, but potentially also the targeted websites, could challenge [unclear] blocking is not only relying on freedom of expression but also relying on our net neutrality laws that prohibit any type of blocking unless it is based on the court decision. But this last measure is only applicable to those who end up being accidentally blocked, when a block against, let's say, Pirate Bay, ends up blocking your blog just because, for instance, you share the same IP address.

Another important point of divergence is that different countries would say that websites, for example The Pirate Bay, are infringing at different points of time, because the laws that regulate accessory liability are largely not harmonized on the European level.

The Court of Justice of the European Union, our top EU court, is somehow trying to harmonize indirectly through case law when websites like The Pirate Bay would be infringing exactly because that unifies the label of websites that could be not only sued directly but also that could be subject to actions like website blocking where infringing behavior by websites is a precondition of such blocking.

But by far the most important divergence concerns the costs and their allocation. The regular allocation of costs would be that the right holders pay their own costs of legal representation. They pay the court fees. But when it comes to implementation costs which are the most significant costs in this equation, those would be borne by the intermediary.

So this in practice means that the right holder goes to the court any time the expected benefit of the block is higher than the cost of representation and the fees they have to pay for the court. And because the Court of Justice of the European Union says that these measures do not necessarily have to be particularly effective, this means that these kinds of measures then are also granted by national courts.

Just to give you a sense of numbers, the cost of legal representation and fees could be around 10,000 euros, while the cost of implementation could be in 5-6 zero sums for the provider.

This creates a problem that I call waste of resources, because the process doesn't assure that the only website blocking that is granted creates more benefits than costs to all these players in the chain.

And it's also hard to resolve through judicial intervention, because courts will always have

imperfect information about expected benefits of blocking a particular websites, because those benefits are best known to the right holders who see them on the balance sheet and on their sales.

But if right holders have no incentive to take into account the full cost of the measures, and the courts are not able to moderate the measures so that they would only grant those measures that create more benefit than they cost, then we need to find another solution of how to approach this.

The easiest solution is to expose the right holders when they go to the court, not only to their own cost of representation of the court fees, but also to the implementation costs. Because then if they go to the court they think about these three costs already, and they go only to the court if the expected benefit of blocking is higher than these direct costs that they have to bear.

This makes also the life of judges easier, because they don't have to any more consider costs when they try to weigh different interests, and they only focus on their central role which is to moderate measures through fundamental rights at stake.

This is important because these website blocks, if they don't have time limitation, there will be an obligation that sticks to ISP forever, potentially. So you want to make sure that the measures are granted only if they are human rights compliant with all those rights that we have discussed and they actually bring higher benefit to the right holders than they cost all these direct players.

And paying the cost also makes measures flexible, because the right holders can any time analyze whether the impact of the measure is higher than the cost, and if it isn't then they can simply stop paying, and these measures will dissolve.

So when you think about this, it addresses one of the big concerns, but obviously doesn't solve even a bigger concern, which is how to shape these measures so that their exact implementation matches with our expectations stemming from the fundamental right.

Let's zoom out now from the fact that we have website blocking. And let's think about the alternative to the world with website blocking.

The alternative to this world is what would say in terms of Coase theorum is allocate the entitlement with the intermediaries, which means that the right holders have no claim to compel

intermediaries for website blocking but they have to negotiate it in voluntary negotiations.

But now think again about the human rights. Which of the two alternative worlds is better? A world where you have voluntary deals between right holders and intermediaries that you need to moderate through fundamental rights? Or a world where you have website blocking that the courts moderate through fundamental rights?

Obviously, I understand that in Japan voluntary website blocking is not necessarily possible, because of the secrecy of information that exists under the existing laws. This means that from these two worlds you actually don't necessarily have the world with the voluntary negotiation, because that is preempted by the law. But for instance in the United States, where website blocking could be voluntarily agreed, the question is, which of these two worlds is better for you to safeguard the fundamental rights, as well as which one is better for the right holders to enforce their rights?

To illustrate a point that I made earlier about the cost, let me tell you two different examples of measures that were legislated in Europe and were voluntarily agreed upon in the United States.

In France, as some of you may know, some time ago the legislation was passed,
which was also targeting access providers, and the idea was that you send notifications to users when they are found to infringe using internet access.

The same solution was also created in the United States through voluntary agreements, and that voluntary agreement is called copyright alert system.

So the French system, after a while became unsustainable, because it was so costly that the government couldn't anymore justify spending all this money, because at the same time they saw that the benefits that they could see was very low from this huge system. So the system was essentially killed, but it had to be killed by public officers who didn't want to pay anymore for this type of scheme.

In the US the same thing happened. The scheme, after several years, discontinued. And the reason for that of course we don't know, because these are private deals, but the very likely reason for that was that it wasn't bang for the buck, it wasn't good for the money that the right holders were paying under this scheme. The benefit was comparably very low. So you can see here why having flexibility to pull the plug is important. In the system voluntary deals,

obviously right holders were reevaluating benefits and costs.

In the system where government is running the system they are subject to transparency, hence they will be subject to public pressure, and you also would like to see higher benefits than costs and when it becomes clear that the two are a mismatch you will also discontinue such a scheme.

But if you run the same scheme through the court system, as you can in Europe, there is no reason for you to discontinue. You can just carry on, and because the cost is not appearing on your balance sheet it's someone else's cost. So that's why allocation of cost is actually about much more than just who pays the bill. It's about what kinds of measures we will see in practice. What kind of website blocking, and which websites will be blocked in practice? Because some websites might be insignificantly contributing to the decline of sales, though they might be still technically infringing. Others might be significantly contributing to the decline of sales, and hence they will become suddenly the target if the decline is much higher than what they have to pay for the costs of the blocking.

But the costs also determine which exact access providers will be actually sued and requested to block, because adding additional providers to our lawsuit or petition does not change how much you pay. You will naturally include everything. But if you have to consider that you will have to finance the block with every single provider separately, you think twice, will it make sense, given the user base of that provider, to actually go after also that particular provider?

And this is important also, because the costs of implementation are not the same for all the providers. Small providers have to shoulder a higher bill in relative terms than bigger providers, because they don't necessarily have necessary technology. So cost allocation is really one of the ways that you can influence the shape, the entire way how these measures are practiced in the legal practice.

In the European system, the measures that we have pose many more problems than just the problem of cost, as I have explained just a second ago. But these problems do not necessarily arise unless you would be interested in implementing the way the Europeans do it which has its drawbacks.

One of the issues the European system creates is that by basing measures on a very brief provision of the law, right holders can be very creative in what they request from the court.

These orders then essentially allow the right holders to formally request and present to them to the court which they would have to otherwise bring to the legislature and convince the legislature in a democratic process to impose as a law.

To give you two examples, shown on the abstract. The proposal for what is now being considered in the European parliament, a proposal for filtering that could be implemented by platforms like social networks or other hosting providers, is a proposal that earlier made it to the court in a form of an injunction that was proposed to be imposed on different players, including a social network.

The second example is current litigation in Ireland where basically through courts right holders try to create a three strikes scheme that essentially would do what HADOPI law was doing in France, but here there is no legislative process. It only goes through the courts and is agreed upon by the parties.

Additional problems that the European system poses, that I will not address but I am happy to talk about in the discussion, are impact of measures on innovation and the way that these measures can compete and undermine the way that the tort law assigns liability in the system.

When we look at the European system and global, what we can see is that a court is an effective moderator of these measures through fundamental rights. Although, we could still say that there are some orphaned rights that could be addressed in much greater detail, those being the right to due process and privacy when it comes to certain types of measures. But many of the problematic cases that come to the court very often come to the court because the cost allocation is not done in a sufficiently smart way, so to say.

The only country at this point that is smart about costs is the United Kingdom where the costs are indeed imposed on the right holders as the result of a certain precedent, which as you can see has a lot of economic considerations behind this.

If Japan wants to consider website blocking at any point, I think it's obviously important to consider all the fundamental rights. But even before that, I think that thinking about the incentives you will set by allocating the cost in a particular way will influence the framework perhaps even more than many other considerations.

When it comes to the way the fundamental rights shape the framework, I think there are many

different interesting cases from which there is a possibility to learn, though I don't think there is a single model which could speak to you, since your tradition of some of the rights is probably different than the European.

I have intentionally left out the details on how specifically you can shape these measures in all kinds of small details, because I expected this will be discussed in the upcoming panel. I thought that rather than that, I will address a much bigger macro question that I think you need to ask before you think about all those small details.

For more details of the European situation you can find additional slides that you can look at. And with this I'd like to thank you very much for your attention, and I hope this was somewhat understandable and interesting for you. Thank you very much. (Applause)

Martin Husovec: Thank you very much for this very insightful debate. I greatly enjoyed all the insights, many of which would be shared in Europe too. I have three remarks, and then perhaps a few open questions.

First, I completely agree that the question of whether you want to have website blocking or not is a policy question that should require a lot of evidence, and you should be cautious.

However, when you think about whatever blocking will be implemented, always consider also this second option, namely, what is already possible or not when it comes to voluntary blocking.

Because in terms of political economy, what can happen is that you will see a push for this notion of imminent danger that would justify some form of intervention being broadened to allow some form of blocking that would not be transparent and would not go through the courts, and you would have blocking without actually legislating it. So you want to keep watching both sides as they develop and as the doctrine moves on, what is permissible and what is not.

Second, I'd like to echo Professor Ueno's comment that these measures do not necessarily have to come by way of injunction. In fact, if you look at what The Court of Justice of the European Union is making out of the measure, we call it an injunction because it is in a provision about injunctions, but the court makes it very clear that this is a very different type of injunction from a regular injunction against an infringer.

For instance, the court would not allow that such injunction actually ask for prohibition of a conduct, which is a regular thing that injunction would do, but would always require that the injunction is what would be called mandatory injunction, so would actually oblige to positive actions and not to prohibition of conduct.

Actually not to be confusing it, but it could easily be called something as rights to assistance by means of website blocking or just named by the procedure, but certainly the name of injunction doesn't capture well what it really does.

And third, I'd like to echo Professor Yamamoto's comments about procedure. I think they clearly show that you cannot implement this without actually having special procedural considerations through the system. It's very hard to put this in an adversarial system and let the court figure out how to square all the interests involved, because very often the procedural rules are not set up for these kinds of multi-party interests that are very technical.

So the first question I would like to ask is to what extent Japanese judges could also oversee the injunction after it has been granted. Is there a precedent in some other area where a judge would actively look at a situation as it evolves, not only grant but actually also in the future by looking at conditions that change and perhaps adjust the situation?

Participant: [Japanese]

Participants: [Japanese]

Martin Husovec: The second question I have is a little bit more general. It was mentioned earlier that in the Japanese constitution censorship is prohibited, and this would be the case in many European countries too. But to my understanding, this applies to governmental censorship, censorship by government or its bodies. And as I understand from our conversation yesterday, private censorship is actually protected as a form of freedom of expression.

If you conceptualize blocking too harshly as a form of governmental censorship, don't you actually shoot yourself in the foot by channeling everything into voluntary blocking, since that is not against censorship because it's done by the target parties?

Participant: Thank you. [Japanese]

Martin Husovec: But that is interesting, because a judge imposed that blocking is acceptable for the constitution, and administrative is not acceptable? And voluntary is accepted for the constitution, but not necessarily for the statute?

Participant: [Japanese]

Chair: Do we have room for one more question?

Martin Husovec: At the moment the blocking is being discussed for copyright law, and to me it seems from the discussion that it would make sense to actually discuss it more broadly as what type of harm should be addressed by blocking in general. Because it seems to me that the harm, for instance for the statute that would allow you to do it voluntarily, is so you accept it for child pornography, but why? And why not for something else?

And if you create legislation for copyright specifically, even if it qualifies, then a lot of people start asking why is copyright more important than, say, terrorist content? Why shouldn't we have it for this?

This is what we see in Europe where copyright holders are very strong, so they get all kinds of solutions that even law enforcements authorities are not able to get from the legislator. The question is, is this then convincing? I wonder, what do panel members think about this?

Participants: [Japanese]

Martin Husovec: It's not, and that's the problem.

Kinoshita: Thank you very much.