[NL] Internet Service Provider Ordered to Reveal Personal Data of Website Holder

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On November 25 2005, the Dutch Supreme Court delivered its judgment in the dispute between the Internet Service Provider (ISP) Lycos and Pessers.

Pessers sells stamps using the website www.ebay.com. On a website carrying the title "Stop the fraud", which is hosted by Lycos, Pessers is called a swindler. Pessers' attempt to contact the holder of the insulting website through an address mentioned on its webpage failed, but he also contacted Lycos requesting the website be removed and the name and address of its holder revealed. Lycos refused to provide those details.

Pessers argued that Lycos should reveal the identity of the holder of the website and that Lycos' refusal to do so could be considered unlawful.

The Court of Appeal considered with regard to the E-commerce Directive that the removal by an ISP of information that cannot be considered to bemanifestly unlawful , cannot be justified. However, the request to reveal the identity of the holder of the website should be judged independently of the ISP's liability based on the E-commerce Directive. Refusal to reveal the identity of the holder of a website might, in certain circumstances, constitute an unlawful act. The Court of Appeal judged that an ISP, such as Lycos, should provide the name and address of the holder of the website, taking into consideration the following circumstances:

1. The possibility that the information, in itself, may be unlawful and harmful towards the third party, can to a reasonable extent be assumed;

2. The third party has a concrete interest in obtaining the name and address of the website holder;

3. In the circumstances of the case, no other less far-reaching option can be considered in order to retrieve the name and address of the website holder;

4. The assessment of the interests of the third party, the ISP and the holder of the website leads to the decision that those of the third party should prevail.

The Supreme Court ruled, firstly, that the civil and criminal liability imposed on ISPs as laid down in the E-Commerce Directive does not preclude a national judge

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from determining which criteria ISPs should respect in order to comply with standards of due care. These standards of due care encompass the obligation to prevent and to trace unlawful activities.

The Supreme Court finds that the argument put forward by Lycos - that the name and address of a website holder can only be obtained by a third party when it is obvious to the ISP that a certain act is manifestly unlawful or, when it concerns a case that criminal authorities are willing to prosecute - would lead to a situation in which the group of persons able to obtain the name and address of a holder of a website would be fairly small. The Supreme Court also ruled that the circumstances, as laid down by the Court of Appeal, do not automatically lead to the conclusion that an ISP must reveal the identity of the holder of a website. According to the Supreme Court, the Court of Appeal weighed all the circumstances carefully and thus the conclusion that Lycos should provide the name and address of the holder of the website could be justified. The balancing of interests might lead to a different result in other circumstances.

LJN: AU4019, Hoge Raad, C04/234HR

http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AU4019

Ruling by the Dutch Supreme Court, Lycos Netherlands B.V/Pessers of 25 November 2005, C04/234HR

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