Court of Justice of the European Union: Advocate General Cruz Villalón Delivers Opinion on Scarlet v Sabam

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On 14 April 2011, ECJ Advocate General Cruz Villalón delivered his opinion on case C-70/10, involving a reference for a preliminary ruling from the Cour d' appel de Bruxelles in Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM). The referred question concerns whether or not EU law permits member states to authorise national courts to issue injunctions against Internet Service Providers (ISPs) obliging them to introduce, for all their customers, in abstracto and as a preventive measure, at the cost of the ISP and for an unlimited period of time, a filtering system with the objective of identifying copyright-protected works exchanged on its networks and blocking their transfer.

The case involves an appeal by ISP Scarlet against a judgment of the *Tribunal de Première Instance de Bruxelles* ordering the implementation of such measures impeding the sharing of files containing musical works in the repertoire of Sabam, a Belgian collective rights management society (see IRIS plus 2009-4).

The AG noted that such a system would, by definition, filter all data communications passing through Scarlet's network, while blocking all data exchanges involving prohibited copyrighted content either at the point at which they are requested or at the point at which they are sent. As a result, the court order constitutes a general monitoring obligation, prohibited by Article 15 of the E-Commerce Directive, while it is capable of affecting the communications of an unspecified number of natural or legal persons, whether or not they are clients of Scarlet and irrespective of their place of residence. Moreover, given the in abstracto and preventive character of the injunction, blocking will not rest on a court ruling confirming the infringing nature of the material or the imminent possibility of infringement.

In view of these considerations, AG Villalón concluded that the deployment of such a filtering system would constitute a restriction of the right to respect for the privacy of communications, and the right to protect personal data and freedom of information, as protected by the Charter of Fundamental Rights. Such restrictions may be permissible on the condition that they be "in accordance with the law" and must, in accordance with the case law of the European Court of Human Rights, meet the requirements concerning the "quality of the law". Consequently, such a restriction would only be permissible if it were adopted on a national legal

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basis, which was accessible, clear and predictable. This, according to the AG, is not the case for the Belgian injunction at issue, which is both special and new. Neither the filtering system, which is intended to be applied on a systematic, universal, permanent and perpetual basis, nor the blocking mechanism, which can be activated without any provision being made for the persons affected to challenge it or object to it, are, according to the AG, coupled with adequate safeguards and should therefore be considered impermissible.

Avocat général Pedro Cruz Villalón, 14 avril 2011, affaire C-70/10, Scarlet Extended SA c. Société belge des auteurs compositeurs et éditeurs (Sabam)

http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=fr&num=79889585C19100070&doc=T&ouvert=T&seance=CONCL

AG M. Pedro Cruz Villalón, 14 April 2011, Case C-70/10, Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (Sabam)

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