Court of Justice of the European Union: Ruling on the Obligations of Online Intermediaries

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On 24 November 2011 the European Court of Justice delivered its long-awaited judgment on the legality of injunctions obliging ISPs to install filtering systems on their networks for reasons of copyright enforcement. The case involved a dispute between Scarlet Extended SA, an internet access provider operating in Belgium, and the Belgian collective management organisation *Société d'Auteurs Belge - Belgische Auteurs Maatschappij* (Society of Authors, Composers and Publishers - SABAM). SABAM initiated the proceedings alleging that Scarlet (formerly Tiscali) has knowingly permitted the illegal downloading by third parties of its protected works through peer-to-peer file-sharing on its networks. The *Tribunal de Première Instance de Bruxelles* (Brussels Court of First Instance) granted SABAM's request for the imposition of an injunction obliging the ISP to install content management and identification fingerprint-based software so as to prevent the unauthorised exchange of protected material by its subscribers (see IRIS 2011-6/2 and IRIS plus 2009-04). Scarlet appealed the decision and the Cour d'appel submitted a request for a preliminary ruling to the Court of Justice, asking whether EU law permits member states to authorise national courts to order ISPs to install, on a general basis, as a preventive measure, at their own expense and for an unlimited period, a system for filtering all electronic communications in order to identify illegal file downloads.

The Court began by pointing out that, under the both the Copyright Directive and the Enforcement Directive, courts and administrative authorities may impose injunctions ordering service providers to terminate already committed or prevent future copyright infringement. Although the rules governing such injunctions are a matter for national law, national rules must be in conformity with limitations arising from EU law, such as the prohibition of general monitoring obligations as set out in Article 15 E-Commerce Directive. The Court established that the requirement that an ISP install a filtering system would violate this prohibition.

The Court then went on to examine the compatibility of a filtering injunction with the EU's fundamental rights framework. The Court noted that, although the protection of intellectual property is enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union, nothing in the wording of the provision suggests that the right in inviolable and must be absolutely protected. On the contrary, the protection of intellectual property must be balanced against

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the protection of other fundamental rights.

In this regard, the Court found that the sweeping and costly nature of the injunction under discussion, which would require the monitoring of all electronic communications made through the network of the ISP without limitation of time and at the ISPs expense, would result in a serious infringement of Scarlet's freedom to conduct business. In addition, adverse effects would also accrue for the ISP's customers: firstly, the injunction would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent, which constitute protected personal data. Secondly, since filtering systems cannot adequately distinguish between lawful and unlawful content, their introduction could lead to the blocking of lawful communications, undermining freedom of information. Consequently, according to the Court, the imposition of an injunction ordering an ISP to install filtering systems on its networks cannot be said to strike a fair balance between the rights of the intellectual property holders on the one hand and the rights of internet access providers and their customers on the other.

In light of this reasoning, the Court reached the conclusion that an injunction requiring the installation of a filtering system by an ISP is precluded by EU law.

Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24 November 2011

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