Court of Justice of the European Union: Bonnier Audio AB and others v. Perfect Communication Sweden AB

IRIS 2012-6:1/4

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On 19 April 2012, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of Bonnier Audio AB and others v. Perfect Communication Sweden AB.

Bonnier Audio and others are publishing companies, which hold, inter alia, exclusive rights to the reproduction, publishing and distribution to the public of 27 audiobooks. The publishing companies claim that their exclusive rights are infringed by public distribution of the 27 audiobooks, without their consent, via an online filesharing programme. Based on Article 53c of the Swedish Copyright Act, the publishing companies applied to the Swedish District Court to order ePhone (the Internet Service Provider through which the file exchange took place), to disclose personal data (name and address) of the person using the IP address from which the files were sent. ePhone challenged this application arguing that the injunction sought is contrary to Directive 2006/24/EC on data retention (amending Directive 2002/58/EC). In the absence of implementation of Directive 2006/24/EC into Swedish law, Directive 2002/58 is still in force in Sweden.

The Swedish District Court granted the injunction requested. ePhone successfully appealed. The publishing companies then brought the case before the Swedish Supreme Court, which referred two preliminary questions to the CJEU to determine whether:

- Directive 2006/24 (in particular Articles 3 to 5 and 11), precludes the application of a national provision that is based on Article 8 of Directive 2004/48 (the IP enforcement Directive) and, in order to identify an Internet subscriber, permits an internet service provider in civil proceedings to be ordered to give a copyright holder information on the subscriber to whom the internet service provider assigned a specific IP address that was used in the alleged infringement;

- the answer to the first question is the same if that member state has not implemented Directive 2006/24 despite the fact that the time-limit for implementation has expired.

According to the CJEU, Directive 2006/24 must be interpreted as not precluding the application of national legislation based on Article 8 of Directive 2004/48. Directive 2006/24 on data retention deals exclusively with the handling and

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retention of data generated or processed by the providers of publicly-available electronic communications networks, for the purpose of investigating, detecting and prosecuting serious crime. Directive 2006/24 applies only to data retained specifically for that purpose. In this case, the national legislation at issue pursues a different objective, namely, the communication of data in order to establish an infringement of IP rights. That does not fall within the material scope of Directive 2006/24. It is therefore irrelevant whether the Directive has been implemented or not.

In this case, the CJEU applies Directive 2002/58 (Directive on Privacy and Electronic Communications) making use of its prerogative to consider EU law provisions that have not been referred by the national court. The CJEU recalls its judgment in Promusicae (see IRIS 2008-3/4) and states that the personal data sought by the publishing companies falls under Article 2 of Directive 2002/58 and therefore that Directive applies.

In the present case, the object of the communication of personal data is to ensure effective copyright protection that falls within the scope of Directive 2004/48. Article 8 of Directive 2004/48 does not preclude member states from imposing an obligation to disclose personal data in order to bring civil proceedings for copyright infringements. Article 53c of the Swedish Copyright Act contains this obligation.

The CJEU concludes that Directive 2002/58 and Directive 2004/48 must be interpreted as not precluding the application of national legislation in the main proceedings, in so far as that national legislation enables the national court to weigh the conflicting interests involved on the basis of the facts of each case and taking due account of the European Union law principle of proportionality.

It is left to the national courts how to weigh these conflicting interests.

Judgment of the Court of Justice of the European Union (Third Chamber), Case C-461/10, Bonnier Audio AB and others v. Perfect Communication Sweden AB, 19 April 2012

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