



Summaries of important judgments

May 2012

C-70/10 Scarlet Extended, judgment of 24 November 2011

Union law precludes an injunction made against an Internet service provider requiring it to install a system for filtering all electronic communications passing via its services, which applies indiscriminately to all its customers, as a preventive measure, exclusively at its expense and for an unlimited period, in order to prevent illegal downloads.

The Belgian company representing authors, composers and editors (SABAM) is seeking to end the growing practice of illegally downloading files containing protected musical works from the Internet. In 2004, it brought proceedings before the President of the Court of First Instance of Brussels, which ordered Scarlet, an Internet service provider (ISP), to bring to an end to these copyright infringements by making it impossible for its customers to send or receive in any way, by means of peer-to-peer software, electronic files containing musical works in SABAM's repertoire.

Scarlet lodged an appeal before the Brussels Appeal Court. The latter asked the Court of Justice whether Union law permits Member States to authorise a national court to order an ISP, as in the present case, to install, in general, as a preventive measure, exclusively at the cost of the latter and for an unlimited period, a system for filtering electronic communications, in order to identify illegal downloads of files. As the Court of Justice emphasises in its judgment, such an injunction would involve monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rights holders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works not yet created at the time when the system is introduced. It would then assume that the ISP not only identifies the peer-to-peer files, those of these files containing works in which holders of intellectual-property rights claim to hold rights and, among them, those which are shared unlawfully, but also blocks the sharing of these files.

The Court of Justice replies in the negative to the question raised by the Brussels Court of Appeal. To do so, it first recalls that although, under Directives 2001/29/EC and 2004/48/EC on copyright and intellectual property rights, the holders of such rights must be put in a position, under the provisions of national law, to apply for injunctions against intermediaries, such as ISPs, whose services are being used by third parties to infringe their rights, not only to bring an end to the infringements already established, but also to prevent further infringements, these injunctions must nevertheless observe the limitations arising from Directives 2001/29/EC and 2004/48/EC and from the sources of law to which those Directives refer.

In this respect, the Court points out firstly that the rules laid down on the subject by the Member States may not affect the provisions of Directive 2000/31/EC on electronic commerce, according to which the national authorities may not adopt measures which would require an Internet service provider to carry out general monitoring of the information that it transmits on its network. However, it finds that, in view of its technical characteristics, the implementation of the filtering system at issue would require the ISP to

http://ec.europa.eu/dgs/legal_service/arrets/index_en.htm

actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights, which would be in breach of those provisions.

The Court secondly assesses whether the injunction at issue is consistent with the fundamental rights at stake in this case, i.e. the intellectual property right, on the one hand, and the freedom to conduct a business, the right to protection of personal data and the freedom to receive or impart information, on the other hand. It considers that by adopting such an injunction, the national court concerned would not be respecting the requirement imposed upon it that a fair balance be struck between these fundamental rights.

In fact, in its opinion, in view of its characteristics, the injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business, since it would require it to install a complicated, costly, permanent computer system entirely at its own expense. This would also be contrary to the provisions of Directive 2004/48/EC, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.

Furthermore, the Court considers that the injunction at issue may also infringe the fundamental rights of that ISP's customers, which are safeguarded in particular by the Charter of Fundamental Rights, namely their right to protection of their personal data and their freedom to receive or impart information.