



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-70/10
Scarlet Extended v Société belge des auteurs compositeurs et éditeurs
(Sabam)

According to Advocate General Cruz Villalón, a measure ordering an internet service provider to install a system for filtering and blocking electronic communications in order to protect intellectual property rights in principle infringes fundamental rights

In order to be permissible, such a measure must comply with the conditions laid down in the Charter of Fundamental Rights to govern restrictions on the exercise of rights. It must therefore be adopted, inter alia, on a legal basis that meets the requirements concerning 'the quality of the law' at issue

Belgian courts may, under national legislation, issue an order for any infringement of an intellectual property right to be brought to an end. In particular, the legislation provides that, where a third party uses the services of an intermediary to perpetrate an infringement of that type, the courts are authorised to issue such an order against that intermediary.

The Société belge des auteurs compositeurs et éditeurs (Sabam) applied for interim relief against Scarlet Extended SA, an internet service provider (ISP). Sabam sought first of all a declaration that the copyright in musical works contained in its repertoire had been infringed because of the unauthorised sharing, through the use of Scarlet's services, of music files – in particular, by means of peer-to-peer software. Sabam also sought an order requiring Scarlet to bring such infringements to an end, on pain of a penalty payment, by blocking or making impossible the sending or the receiving by its customers in any way of files containing a musical work, using peer-to-peer software, without the permission of the copyright holders.

By judgment of 26 November 2004, such copyright infringements were found to have taken place. After a report had been obtained from a technical expert, Scarlet was ordered, by another judgment, delivered on 29 June 2007, to bring those copyright infringements to an end by making it impossible for its customers to send or to receive in any way, by means of peer-to-peer software in particular, files containing a musical work in Sabam's repertoire, and to do so within a period of six months¹, on pain of a penalty payment of €2 500 per day should Scarlet fail to comply with the judgment.

Scarlet has appealed against that judgment to the Cour d'appel de Bruxelles (Court of Appeal, Brussels), which must decide whether to uphold the measure adopted against Scarlet. In that context, the Court of Appeal, Brussels, is seeking a ruling from the Court of Justice on whether European Union law and, in particular, the fundamental rights guaranteed by the Charter of Fundamental Rights, permit a national court to order an internet service provider to install a system for filtering and blocking electronic communications.

In today's Opinion, the Advocate General notes that the system to be installed must, first, filter all data communications passing via Scarlet's network, in order to detect data which involve a copyright infringement. As a result of such filtering, the system must, secondly, block communications which actually involve copyright infringement, either at the point at which they are requested or at the point at which they are sent.

¹ However, application of the penalty payment was ultimately suspended until 31 October 2008.

Advocate General Cruz Villalón considers that the court order thus constitutes a **general obligation which, it is intended, will be extended in the longer term on a permanent basis to all internet service providers**. In particular, the Advocate General points out that the court order would have a lasting effect for an unspecified number of legal or natural persons irrespective of whether they have a contractual relationship with Scarlet and regardless of their State of residence. The system must be capable of blocking any file sent by an internet user who is one of Scarlet's customers to another internet user – who may or may not be one of Scarlet's customers and who may or may not live in Belgium – where that file is thought to infringe a copyright managed, collected or protected by Sabam. It must also be capable of blocking receipt by an internet user who is one of Scarlet's customers of any file infringing copyright which has been sent by any other internet user. Moreover, the court order would apply *in abstracto* and as a preventive measure, which means that a finding would not first have been made that there had been an actual infringement of an intellectual property right or even that an imminent infringement was likely.

The Advocate General also states that the court order at issue is a **new obligation**. It would impose on Scarlet an obligation with regard to the result to be achieved, in respect of the protection of copyrights defended by Sabam through the filtering and blocking system, with a penalty payment for failure to comply. Also, it would make Sabam responsible for the cost of installing the filtering and blocking system. Thus, through that system, the legal and economic responsibility for combating illegal downloading of pirated works from the internet would largely be delegated to the internet service providers.

In view of those characteristics, Advocate General Cruz Villalón considers that **the installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights. By the same token, the deployment of such a system would restrict freedom of information, which is also protected by the Charter of Fundamental Rights.**

The Advocate General **points out**, however, **that the Charter of Fundamental Rights accepts that the exercise of the rights and freedoms which it guarantees may be restricted, on condition, *inter alia*, that any such restriction is 'in accordance with the law'**. Applying the case-law developed in this field by the European Court of Human Rights, the Advocate General considers that the legal basis for any restriction on the exercise of the rights and freedoms guaranteed by the Charter of Fundamental Rights must meet requirements concerning 'the quality of the law' at issue. Thus, in his view, **a restriction on the rights and freedoms of internet users such as that at issue would be permissible only if it were adopted on a national legal basis which was accessible, clear and predictable.**

According to the Advocate General, it cannot be held that **the obligation on internet service providers to install the filtering and blocking system at issue, entirely at their own expense, was laid down expressly, and in clear, precise and predictable terms, in the Belgian statutory provision at issue**. In fact, the obligation imposed on internet service providers is both special and 'new' (unexpected, even). In addition, the Advocate General states that 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 coupled with adequate safeguards.

Consequently, **the Advocate General proposes that the Court of Justice should declare that EU law precludes a national court from making an order, on the basis of the Belgian statutory provision, requiring an internet service provider to install, in respect of all its customers, *in abstracto* and as a preventive measure, entirely at the expense of the internet service provider and for an unlimited period, a system for filtering all electronic communications passing via its services (in particular, those involving the use of peer-to-peer software) in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which a third party claims rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at the point at which they are sent.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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