

## ECJ Ruling Outlaws Monitoring of Internet, but not Site Blocking

A recent ruling of the **European Court of Justice** (ECJ) has been heralded by many as taking the side of citizens and of freedom of information against the particularistic interests of the music industry. Peter Bradwell of the **Open Rights Group** was **quoted** on the BBC-website saying:

This judgment is a victory for freedom of expression online. It draws a thick line in the sand that future copyright enforcement measures in the UK cannot cross. [...] Invasive and general surveillance of users is unacceptable. This helps to nail down the limits of powers to curtail people's freedom to communicate online.

The court was asked by the Belgian internet operator Scarlet to determine whether or not a controversial ruling by a Belgian judge in 2004 was in compliance with EU-law. The ruling forced Scarlet to make peer-to-peer sharing of copyright protected content registered with the Belgian copyright organisation SABAM impossible for its users or face a daily fine of 2500€. Seven years later, the European Court accepted Scarlet's counter-arguments and deemed the imposed measure disproportionate and contravening EU law. **It concluded** that the measure imposed by the Belgian judge:

does not comply with the prohibition on imposing a general monitoring obligation on such a provider, or with the requirement to strike a fair balance between, on the one hand, the right to intellectual property, and, on the other, the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information.

Furthermore, the judge also considered that the measures proposed by the judge:

could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content with the result that its introduction could lead to the blocking of lawful communications.

Digging a bit deeper in **the ruling** by the ECJ reveals, however, that this is not as much the victory as it appears at first sight. While the court does deem the wide scale surveillance of internet users unacceptable in a democracy, it nonetheless accepts that copyright holders can demand that **ISPs block certain websites**. Besides this, the main justification used by the court to strike down the Belgian ruling is foremost economic, while arguments relating to civil liberties and privacy are much less prevalent in the ruling. The main reason why the measures imposed by the Belgian judge were revoked was that they contravene the **E-Commerce Directive**, which prohibits imposing a system of 'general monitoring'. Another reason the judge foregrounds is the high costs to ISPs of installing such a monitoring system.

monitoring, moreover, is not limited in time. Such an injunction would thus result in a serious infringement of Scarlet's freedom to conduct its business as it would require Scarlet to install a complicated, costly, permanent computer system at its own expense.

However, to be fair to the European Court, they also acknowledge that measures such as **imposed** by the Belgian judge, breach the EU's **charter of fundamental rights**, mainly in relation to **personal**

data protection and the freedom of information.

All in all we should be happy that there is an instance such as the European Court which safeguards democratic values and which has now put down a benchmark of what is acceptable for national courts and parliaments to impose when striking a balance between the 'right to intellectual property' on the one hand, and the rights 'to protection of personal data' and 'to receive or impart information', even if it is done mainly through economic arguments – i.e. 'the freedom to conduct business'.

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