European Court of Justice positions the right to privacy above the rights of copyright holders

By Bart Cammaerts

In one of its strongest statements to date concerning the tension between some fundamental human rights such as privacy and freedom of information and the private interests of copyright holders, the European Court of Justice (ECJ) has unequivocally chosen the side of human rights. The ECJ was called upon by the Belgian courts in a dispute between the ISP scarlet and the copyright organization SABAM. Advocate General Pedro Cruz Villalón was adamant when stating:

> 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.
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> …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.

This advice, from an advocate general of the ECJ, relates to a Belgian case that was brought against the ISP Scarlet, by SABAM, the main Belgian copyright collecting organization. In 2007, the Belgian court of First Instance ruled that Scarlet was liable for the infringements taking place on its network. The court ordered Scarlet to put in place a quite intrusive system to monitor, filter and potentially block peer-2-peer activities by its clients if and when those clients might be sharing and downloading copyright protected content produced by members of SABAM.

Scarlet evidently appealed this ruling and the Belgian Court of Appeal decided in 2010 to address two questions to the ECJ:

- Does European legislation allow Member States to authorise a national court to order ISPs to install, as a preventive measure, a system filtering all electronic communications passing through their service to identify files containing work which a claimant alleges to enjoy the rights of, and to then block the transfer of such files?
- If so, are national courts required to apply the principle of proportionality when asked to rule over the efficacy and dissuasive effect of the requested measure?

The statements of Pedro Cruz Villalón relate to these two questions and as can be seen in the quotes above – the answer to these questions seems to be a resolute no.

This is, however, not yet a ruling, although these statements carry enough weight for the Belgian courts to consider them very carefully. Besides this, those engaged in similar court cases throughout Europe will be watching carefully what the ECJ will say on these matters and what the Belgian court ultimately decides. Finally, it is also highly likely that the ECJ will be called upon again in future to cast its judgment in this increasingly principled battle of interests and rights.

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