JUDGMENT OF THE COURT (Third Chamber)

24 November 2011 *

In Case C-70/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Belgium), made by decision of 28 January 2010, received at the Court on 5 February 2010, in the proceedings

Scarlet Extended SA

v

Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM),

intervening parties:

Belgian Entertainment Association Video ASBL (BEA Video),

* Language of the case: French.

Belgian Entertainment Association Music ASBL (BEA Music),

Internet Service Provider Association ASBL (ISPA),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and G. Arestis, Judges,

Advocate General: P. Cruz Villalón,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

— Scarlet Extended SA, by T. De Meese and B. Van Asbroeck, avocats,

— Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Belgian Entertainment Association Video ASBL (BEA Video) and Belgian Entertainment Association Music ASBL (BEA Music), by F. de Visscher, B. Michaux and F. Brison, avocats,

— Internet Service Provider Association ASBL (ISPA), by G. Somers, avocat,

— the Belgian Government, by T. Materne, J.-C. Halleux and C. Pochet, acting as Agents,

— the Czech Government, by M. Smolek and K. Havlíčková, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the Polish Government, by M. Szpunar, M. Drwięcki and J. Goliński, acting as Agents,

— the Finnish Government, by M. Pere, acting as Agent,

— the European Commission, by J. Samnadda and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directives:

— 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1);

— 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10);

— 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16);

— 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31); and

— 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

2 The reference has been made in proceedings between Scarlet Extended SA ('Scarlet') and the Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) ('SABAM') concerning Scarlet's refusal to install a system for filtering electronic communications which use file-sharing software ('peer-to-peer'), with a view to preventing file sharing which infringes copyright.

Legal context

European Union law

Directive 2000/31

3 Recitals 45 and 47 in the preamble to Directive 2000/31 state:

'(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such

injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

…

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.'

4 Article 1 of Directive 2000/31 states:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

…'

5 Article 12 of that directive, which features in Section 4, entitled 'Liability of intermediary service providers', of Chapter II thereof, provides:

'1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission;

and

(c) does not select or modify the information contained in the transmission.

…

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.'

6 Article 15 of Directive 2000/31, which also features in Section 4 of Chapter II, states:

'1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged unlawful activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

Directive 2001/29

7 Recitals 16 and 59 in the preamble to Directive 2001/29 state:

'(16) … This Directive should be implemented within a timescale similar to that for the implementation of [Directive 2000/31], since that Directive provides a harmonised framework of principles and provisions relevant, inter alia, to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

...

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

8 Article 8 of Directive 2001/29 states:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

...

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

Directive 2004/48

9 Recital 23 in the preamble to Directive 2004/48 provides:

'Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive [2001/29]. Article 8(3) of Directive [2001/29] should therefore not be affected by this Directive.'

10 Article 2(3) of Directive 2004/48 provides as follows:

'This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property … or Directive [2000/31], in general, and Articles 12 to 15 of Directive [2000/31] in particular;

…'

11 Article 3 of Directive 2004/48 provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

12 Article 11 of Directive 2004/48 states:

'Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive [2001/29].'

National law

13 Article 87(1), first and second subparagraphs, of the Law of 30 June 1994 on copyright and related rights (*Moniteur belge* of 27 July 1994, p. 19297) states:

'The President of the Tribunal de première instance (Court of First Instance) … shall determine the existence of any infringement of a copyright or related right and shall order that it be brought to an end.

He may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

14 Articles 18 and 21 of the Law of 11 March 2003 on certain legal aspects of information society services (*Moniteur belge* of 17 March 2003, p. 12962) transpose Articles 12 and 15 of Directive 2000/31 into national law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 SABAM is a management company which represents authors, composers and editors of musical works in authorising the use of their copyright-protected works by third parties.

16 Scarlet is an internet service provider ('ISP') which provides its customers with access to the internet without offering other services such as downloading or file sharing.

17 In the course of 2004, SABAM concluded that internet users using Scarlet's services were downloading works in SABAM's catalogue from the internet, without authorisation and without paying royalties, by means of peer-to-peer networks, which constitute a transparent method of file sharing which is independent, decentralised and features advanced search and download functions.

18 On 24 June 2004, SABAM accordingly brought interlocutory proceedings against Scarlet before the President of the Tribunal de première instance, Brussels, claiming that that company was the best placed, as an ISP, to take measures to bring to an end copyright infringements committed by its customers.

19 SABAM sought, first, a declaration that the copyright in musical works contained in its repertoire had been infringed, in particular the right of reproduction and the right of communication to the public, because of the unauthorised sharing of electronic music files by means of peer-to-peer software, those infringements being committed through the use of Scarlet's services.

20 SABAM also sought an order requiring Scarlet to bring such infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work using peer-to-peer software without the permission of the rightholders, on pain of a periodic penalty. Lastly, SABAM requested that Scarlet provide it with details of the measures that it would be applying in order to comply with the judgment to be given, on pain of a periodic penalty.

21 By judgment of 26 November 2004, the President of the Tribunal de première instance, Brussels, found that copyright had been infringed, as claimed by SABAM, but, prior to ruling on the application for cessation, appointed an expert to investigate whether the technical solutions proposed by SABAM were technically feasible, whether they would make it possible to filter out only unlawful file sharing, and whether there were other ways of monitoring the use of peer-to-peer software, and to determine the cost of the measures envisaged.

22 In his report, the appointed expert concluded that, despite numerous technical obstacles, the feasibility of filtering and blocking the unlawful sharing of electronic files could not be entirely ruled out.

23 By judgment of 29 June 2007, the President of the Tribunal de première instance, Brussels, accordingly ordered Scarlet to bring to an end the copyright infringements established in the judgment of 26 November 2004 by making it impossible for its customers to send or receive in any way files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.

24 Scarlet appealed against that decision to the referring court, claiming, first, that it was impossible for it to comply with that injunction since the effectiveness and permanence of filtering and blocking systems had not been proved and that the installation of the equipment for so doing was faced with numerous practical obstacles, such as problems with the network capacity and the impact on the network. Moreover, any attempt to block the files concerned was, it argued, doomed to fail in the very short term because there were at that time several peer-to-peer software products which made it impossible for third parties to check their content.

25 Scarlet also claimed that that injunction was contrary to Article 21 of the Law of 11 March 2003 on certain legal aspects of information society services, which transposes Article 15 of Directive 2000/31 into national law, because it would impose on Scarlet, *de facto*, a general obligation to monitor communications on its network, inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through its network.

26 Lastly, Scarlet considered that the installation of a filtering system would be in breach of the provisions of European Union law on the protection of personal data and the secrecy of communications, since such filtering involves the processing of IP addresses, which are personal data.

27 In that context, the referring court took the view that, before ascertaining whether a mechanism for filtering and blocking peer-to-peer files existed and could be effective, it had to be satisfied that the obligations liable to be imposed on Scarlet were in accordance with European Union law.

28 In those circumstances, the cour d'appel de Bruxelles decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that: "They [the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order an [ISP] to install, for all its customers, in

abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?

(2) If the answer to the [first] question … is in the affirmative, do those directives require a national court, called upon to give a ruling on an application for an injunction against an intermediary whose services are used by a third party to infringe a copyright, to apply the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measure sought?'

Consideration of the questions referred

29 By its questions, the referring court asks, in essence, whether Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction imposed on an ISP to introduce a system for filtering

— all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;

— which applies indiscriminately to all its customers;

— as a preventive measure;

— exclusively at its expense; and

— for an unlimited period,

which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which infringes copyright ('the contested filtering system').

30 In that regard, it should first be recalled that, under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, holders of intellectual property rights may apply for an injunction against intermediaries, such as ISPs, whose services are being used by a third party to infringe their rights.

31 Next, it follows from the Court's case-law that the jurisdiction conferred on national courts, in accordance with those provisions, must allow them to order those intermediaries to take measures aimed not only at bringing to an end infringements already committed against intellectual-property rights using their information-society

services, but also at preventing further infringements (see, to that effect, Case C-324/09 *L'Oréal and Others* [2011] ECR I-6011, paragraph 131).

32 Lastly, it follows from that same case-law that the rules for the operation of the injunctions for which the Member States must provide under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, such as those relating to the conditions to be met and to the procedure to be followed, are a matter for national law (see, *mutatis mutandis*, *L'Oréal and Others*, paragraph 135).

33 That being so, those national rules, and likewise their application by the national courts, must observe the limitations arising from Directives 2001/29 and 2004/48 and from the sources of law to which those directives refer (see, to that effect, *L'Oréal and Others*, paragraph 138).

34 Thus, in accordance with recital 16 in the preamble to Directive 2001/29 and Article 2(3)(a) of Directive 2004/48, those rules laid down by the Member States may not affect the provisions of Directive 2000/31 and, more specifically, Articles 12 to 15 thereof.

35 Consequently, those rules must, in particular, respect Article 15(1) of Directive 2000/31, which prohibits national authorities from adopting measures which would require an ISP to carry out general monitoring of the information that it transmits on its network.

36 In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as an ISP, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring

obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly (see *L'Oréal and Others*, paragraph 139).

37 In those circumstances, it is necessary to examine whether the injunction at issue in the main proceedings, which would require the ISP to install the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights.

38 In that regard, it is common ground that implementation of that filtering system would require

— first, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic;

— secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights;

— thirdly, that it determine which of those files are being shared unlawfully; and

— fourthly, that it block file sharing that it considers to be unlawful.

39 Preventive monitoring of this kind would thus require active observation of all electronic communications conducted on the network of the ISP concerned and, consequently, would encompass all information to be transmitted and all customers using that network.

40 In the light of the foregoing, it must be held that the injunction imposed on the ISP concerned requiring it to install the contested filtering system would oblige it to actively monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.

41 In order to assess whether that injunction is consistent with European Union law, account must also be taken of the requirements that stem from the protection of the applicable fundamental rights, such as those mentioned by the referring court.

42 In that regard, it should be recalled that the injunction at issue in the main proceedings pursues the aim of ensuring the protection of copyright, which is an intellectual-property right, which may be infringed by the nature and content of certain electronic communications conducted through the network of the ISP concerned.

43 The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected.

44 As paragraphs 62 to 68 of the judgment in Case C-275/06 *Promusicae* [2008] ECR I-271 make clear, the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.

45 More specifically, it follows from paragraph 68 of that judgment that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.

46 Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter.

47 In the present case, the injunction requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rightholders. 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 that have not yet been created at the time when the system is introduced.

48 Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48,

which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.

49 In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.

50 Moreover, the effects of that injunction would not be limited to the ISP concerned, as the contested filtering system may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

51 It is common ground, first, that the injunction requiring installation of the contested filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified.

52 Secondly, that injunction 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. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to

copyright which vary from one Member State to another. Moreover, in some Member States certain works fall within the public domain or can be posted online free of charge by the authors concerned.

53 Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

54 In the light of the foregoing, the answer to the questions submitted is that Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an ISP which requires it to install the contested filtering system.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directives:

— **2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce');**

— **2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;**

— **2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ;**

— **95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and**

— **2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),**

read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an internet service provider which requires it to install a system for filtering

— **all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;**

— **which applies indiscriminately to all its customers;**

— **as a preventive measure;**

— **exclusively at its expense; and**

— **for an unlimited period,**

which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

[Signatures]