

No need for data discovery laws in copyright infringement cases

EU legislation does not oblige Member States to implement personal data discovery measures for copyright cases

1 February 2008

Introduction

On 29 January 2008 the European Court of Justice (ECJ) handed down a decision in the much debated *Promusicae vs. Telefonica* case. In this case the ECJ confirmed that Community law does not require Member States to implement in their national laws an obligation to disclose personal data in the context of civil proceedings in order to ensure the effective protection of copyright.

The facts

Promusicae, a Spanish non-profit association of producers and publishers of musical and audiovisual recordings, had instigated court proceedings against Telefonica in order to obtain from the company the names and the addresses of certain Internet users. According to Promusicae, the users, who were identified from the IP addresses they had been using at the time, had infringed its members' copyright and licensing rights by sharing music files via file sharing networks. Telefonica refused to meet the request on the basis of a Spanish law which stated that the

requested information only needed to be disclosed as part of a criminal investigation.

The Spanish court believed that this Spanish law might be incompatible with Art. 15 para. 2 and 18 of the E-Commerce Directive (Directive 2000/31/EC), Art. 8 paras. 1 and 2 of the Copyright Directive (Directive 2001/29/EC) and Art. 8 of the Enforcement Directive (Directive 2004/48/EC). These provisions state that, in certain circumstances, particularly where breaches of the law are suspected, information on the identification of individuals must be disclosed. The Spanish court therefore asked the ECJ whether Community law requires the Member States to lay down in their national laws, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

In her conclusion in this case the Advocate General had argued that the Directives mentioned above did not require Member States to implement such an obligation. She even suggested that in the

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case at hand, imposing such an obligation would be incompatible with the Directive on Privacy and Electronic Communications (Directive 2002/58/EC).

The judgment

Contrary to the conclusion of its Advocate General, the ECJ stated that the Directive on Privacy and Electronic Communications does not preclude the possibility of Member States providing for an obligation to disclose personal data in the context of civil proceedings. However, it also does not compel the Member States to lay down such an obligation. Neither do the E-Commerce Directive, the Copyright Directive or the Enforcement Directive.

The ECJ emphasised that the Member States must, when transposing the directives on intellectual property and the protection of personal data, rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal framework. Furthermore, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with the directives, but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

Commentary

Essentially, the ECJ leaves the question of how the various competing interests must be balanced to the individual Member States. From the point of view of intellectual property holders, this decision may seem a little disappointing. An affirmative answer of the ECJ would have given them the means to start civil proceedings against individuals offering a large number of copyright protected files on the internet in the whole European Union. Now they can only instigate civil proceedings against copyright infringing individuals in those Member States which have provided for an obligation to hand over the

personal data of infringers in the context of civil proceedings.

In the Netherlands, case law has made clear that providers can in certain circumstances be obliged to submit personal data in the context of civil proceedings. It is unlikely that the decision of the ECJ will influence the further development of this line of caselaw, since the interests of parties, fundamental rights, and the principles of proportionality and subsidiarity are already factors which have been taken into account by the Courts.

European Court of Justice, 29 January 2008, Promusicae vs. Telefonica.

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