

ISSN 1127-8579

Pubblicato dal 15/03/2012

All'indirizzo <http://www.diritto.it/docs/33203-ipr-vs-data-protection-and-other-fundamental-rights-recent-judgments-by-european-court-of-justice-in-these-acta-days>

Autore: Marcoccio Gloria

IPR vs data protection and other fundamental rights: recent judgments by European Court of Justice in these ACTA days



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March, 2012

G.Marcoccio

While spotlights are still following the EU positions regarding the thorny ACTA issues¹, two very recent judgments of the European Court of Justice add another piece to the complicated puzzle about the networked society and the respect of rights of players involved.

Both the judgments focus on the right to intellectual property (IPR) in balancing with other EU fundamental rights, such as the right to the protection of personal data, and take origin from disputes started by SABAM (*Société belge des auteurs, compositeurs et éditeurs*) in Belgian courts and concerning requests of general monitoring obligations, to be fulfilled by internet service providers.

First case C-70/10² is regarding the dispute between SABAM and Scarlet Extended SA, a Belgian internet service provider offering peer-to-peer sharing information services. SABAM declared that users of this service were downloading works in SABAM's catalogue from internet without authorisation and without paying royalties. SABAM requested the Belgian court to order Scarlet to cease those copyright infringements by making it impossible for its customer to send or receive in any way electronic files containing a musical work in SABAM's repertoire.

Second case C-360/10³ is regarding the dispute between SABAM and Netlog NV, a Belgian company who runs an online social networking platform, daily used by millions of individuals, where the registered users can create their profiles and share information, photos and videos. Also in this case, SABAM made an application to a Belgian court requesting Netlog be ordered immediately to cease unlawfully processing of musical or audio-visual work's from SABAM repertoire.

In both the cases the fulfillment of the injunctions involves for the service providers concerned the general obligation to implement and operate a system for actively monitoring and filtering information with a view to preventing SABAM copyright's infringements.

The concerned national courts decided to stay the proceedings and to refer questions to the European Court of Justice (ECJ) for a preliminary ruling, regarding whether a national court may issue an injunction to order a service provider to introduce, for all its customer and as a preventive measure, at its own cost and for an unlimited period, a filtering system in order to identify works, in respect of which SABAM claims to hold rights and consequently to block their use.

¹ Anti-counterfeiting Trade Agreement, http://en.wikipedia.org/wiki/Anti-Counterfeiting_Trade_Agreement#European_Union_2

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0070:EN:HTML>

³ <http://curia.europa.eu/juris/document/document.jsf?text&docid=119512&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=158253>



ECJ analysed the question in particular in light of the EU legal context with the directives concerning e-commerce (2000/31/EC), harmonization of certain aspects of copyrights and related rights (2001/29/EC), enforcement of intellectual property rights (2004/48/EC), personal data protection (95/46/EC), personal data and privacy in electronic communications (2002/58/EC).

In order to assess whether the injunctions are consistent with the EU law, ECJ has considered the requirements stemming from the protection of the applicable fundamental rights, listed in the Charter of Fundamental Rights of the European Union ⁴(the Charter).

This Charter applies to EU body and institutions and also to all EU member states when they are acting within the scope of the EU law. Therefore, for the SABAM vs Scarlet and vs Netlog cases, which involve EU law (the transposition into national law of the above mentioned EU directives), the Charter is directly enforceable in EU national courts and for this reason it has been extensively used by ECJ in its ruling for the cases in subject.

ECJ pointed out the protection of intellectual property is a right enshrined in the Charter but, at the same time, it cannot be assessed as an inviolable right and for this reason absolutely protected (assertion made considering the wording on the provision and the Court's case-law). Therefore a fair balance between the protection of copyright and the protection of other fundamental rights of individuals is to be achieved.

ECJ has underlined in its judgments the need to balance the SABAM intellectual property right (Charter – Article 17) with the Netlog/Scarlet right to conduct business (Charter - Article 16), the right of everyone to receive and impart information (Charter – Article 11), the right of everyone to the protection of personal data (Charter – Article 8).

Consequently, ECJ ruled in terms of precluding injunctions made against a hosting provider (Netlog case) and ISP (Scarlet case) which requires to install the contested filtering system, since it would result in not respecting the above mentioned rights of the individuals and of the service providers.

These ECJ judgments represent fundamental steps in the process of clarifying the complex relationships among the fundamental rights of the several players involved in the networked society.

Hopefully such judgments will have the widest publicity among the general public and professionals, thereby helping to increase the awareness of interested parties about their rights in the networked society, and to minimize the risk of decisions which may improperly limit the use of services made available via internet and other modern means of electronic communications.

⁴ The Charter, signed and proclaimed in 2000 by the European Parliament, the European Commission and by the EU member states comprising the European Council, and combines in a single set the rights reported in a range of sources. It includes the European Convention on Human Rights and Fundamental Freedoms (ECHR).
http://www.europarl.europa.eu/charter/default_en.htm