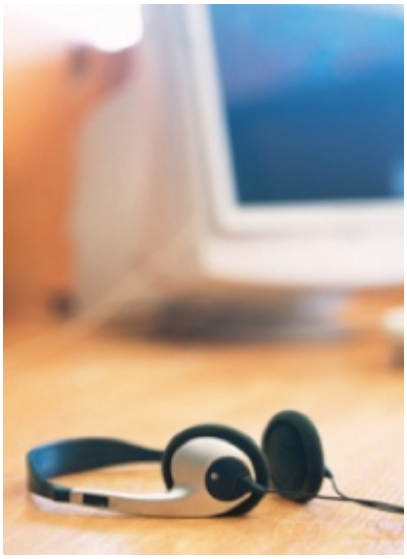
Written by **Joe Wolverton, II, J.D.** on November 28, 2011

EU Court Rules ISPs Can't be Forced to Monitor Activity



The complainant, SABAM (a Brussels-based consortium of artists, authors, composers, and publishers), was asking the court to force ISPs to aid its mission to fight file sharing of material copyrighted by its members.

The ruling is a significant victory for ISPs who rely on the ability to promise anonymity to their subscribers.

According to the text of the European court's decision, copyright holders can still request that service providers take down websites that provide links to copyrighted content, but ISPs are not required to proactively search out and block pirated material offered by any of the various sites they host.

The case came to the ECJ on appeal from a lower court ruling that an Internet service provider, Scarlet, prevent its users from trading files on a peer-to-peer (P2P) network. The files at issue were songs and videos owned by SABAM members.

In 2004, SABAM filed the original complaint against Scarlet and requested an injunction from the Brussels Court of First Instance. That court sided with SABAM and ordered Scarlet to filter the material on the offending websites and to block the ability of its subscribers to upload or download any files contained in the SABAM catalog.

In its appeal of the lower court's decision, Scarlet (a telecommunications company operating in the Benelux) argued that the court's injunction would essentially force it under penalty of law to snoop on its customers, watching all their online activity. Such electronic surveillance, it insisted, was a violation of applicable European Union law prohibiting such activity, a statute known as the E-Commerce directive.

The appeals court requested a preliminary ruling on the EU law from the ECJ as to whether courts in EU member states could abrogate continental law and demand that ISPs based within their borders monitor online activity and block access to sites offering access to allegedly pirated material.

The ECJ ruled that they could not.

In its opinion, the court wrote:

> In the present case, the injunction requiring the installation of a filtering system involves monitoring, in the interests of copyright holders, all electronic communications made through the network of the internet service provider concerned. That 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. What is more, the effects of the injunction would not be

> limited to Scarlet, as the filtering system would also be liable to infringe the fundamental rights of its customers, namely their right to protection of their personal data and their right to receive or impart information, which are rights safeguarded by the Charter of Fundamental Rights of the EU.

SABAM responded to the ECJ's decision in a press release. The respondents wrote:

> The Court of Justice has rejected a legal obligation for the Internet access providers to filter and block all works exchanged without authorization by way of peer-to-peer systems on their networks. If the Court has excluded general filtering, it has not ruled out any other measure. Consequently, SABAM shall take the time to thoroughly analyze some alternatives.
>
> In concrete terms, the Court has refused that Scarlet be compelled to set up a computer system allowing a general filtering of all electronic communications passing through its network for the reason that such a measure would be disproportionate.
>
> The Court acknowledges in the grounds of its judgement that the author's right is a fundamental right and that authors must be able to force access providers to take measures in order to fight against counterfeiting, including in order to prevent future infringements on authors' rights.
>
> However, according to the Court, the disproportion would stem from the fact that this measure would bring about excessive costs and a too complex technical work for the provider. Besides, it would infringe on the protection of the Internet users' personal data and it might block licit communications. SABAM takes note of this decision and shall propose alternative measures in order to protect the authors and their works.

The central issue in the *SABAM v. Scarlet* case has been addressed by several courts around the world. Jurist provided a brief history of a few of the attempts by copyright owners/managers to stymie online pirating by forcing ISPs to carry out search and destroy missions among its hosted sites.

> The United Kingdom's High Court of Justice [official website] ruled [JURIST report] in July for the Motion Picture Association (MPAA) [corporate website], requiring Internet provider British Telecom (BT) [corporate website] to block access to a file-sharing website, Newzbin2 [official website]. The Tribunal de Grande Instance de Paris [official website, in French] in October ordered [JURIST report] French Internet service providers to block access to Copwatch Nord Paris I-D-F, a website designed to allow civilians to post videos of alleged police misconduct. United States courts have also been asked to weigh in on legal issues concerning the Internet. The American Civil Liberties Union of Louisiana (ACLU) [advocacy website] in August filed a complaint [JURIST report] in federal court seeking to block a new Louisiana law that limits Internet use for registered sex offenders.

On one side of the argument in the *SABAM v. Scarlet* case is the goal of protecting the ability of authors, composers, and other artists to profit from their work; on the other side is the legitimate fear that governments, if given an inch of power, will take a mile of liberties.

The ECJ was correct in its opinion that taking even the first few steps down the road of forced filtering 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."

The current state of the relevant statutes in the United States was described in a recent article

published by PC Mag:

> In the U.S., the Digital Millennium Copyright Act (DMCA) essentially gives service providers the benefit of the doubt as long as they take steps to remove pirated content when alerted to its existence. If someone posts a pirated TV show on YouTube, for example, the person or entity that owns that TV show can issue a takedown notice. YouTube must pull it down immediately and examine its content; if it's found to infringe, it remains down, but if not, YouTube will place it back online.
>
> That works for legitimate companies like the Google-owned YouTube, but for years, regulators have tried to come up with an effective way to shut down "rogue" Web sites that contain pirated content. However, the anonymity of the Web, as well as the fact that many offending sites are located overseas, have complicated the matter. Congress has pushed several legislative solutions, including the Combating Online Infringement and Counterfeits Act and the Protect IP Act, but the latest, and possibly most controversial, bill is the Stop Online Piracy Act, or SOPA.

Current Republican presidential hopeful, Congressman Ron Paul (R-Texas) wrote the following warning in a letter to the sponsor of the bill, Congressman Lamar Smith (R-Texas):

> You've previously stated that this legislation is intended to target "rogue" foreign websites engaging in copyright infringement. While this is a laudable goal and one we support, the SOPA's overly broad language … would target legitimate domestic websites, creating significant uncertainty for those in the technology and venture capital industries.

The battle between creators and purveyors of copyrighted material is sure to continue in courtrooms around the world.

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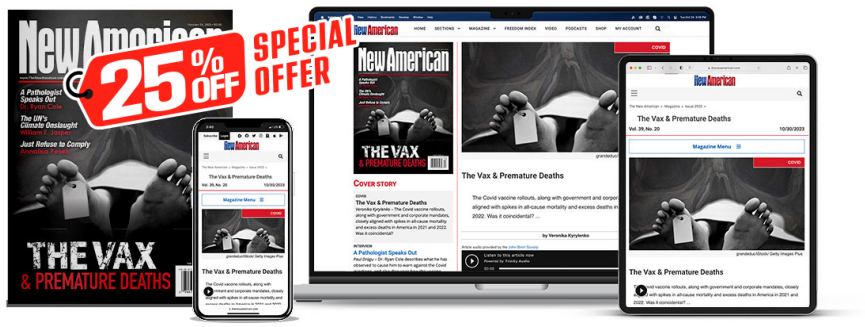

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