CJEU defends (fundamental) right of civil enforcement against online infringers

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"One could say that the CJEU by its decision in the Bonnier-case has "defended" or "safeguarded" the right of civil enforcement by right holders against direct online infringers."

As with enforcement of rights in the analogue environment, enforcement of copyright online presupposes that the infringer is identified or that an intermediary takes action. However, it can often be difficult to identify the infringer, for example as regards so-called (illegal) file sharers. The only information related to the alleged infringer which is normally known to the right holder is the IP number – related to a specific internet connection (subscription) – used by the alleged infringer at the time of the alleged infringement. Data or information on the identity of the person behind the IP number at a specific time is however not known to the right holder.

Article 8 of Directive 2004/48/EC on the civil enforcement of intellectual property rights aims to, to some degree, provide a solution to this problem. By providing right holders with a "right of information", they can ask an Internet Service Provider (ISP) to provide information related to an alleged infringer, such as his or her identity. This provision on right of information is crucial – if not indispensable – for the civil enforcement by right holders against online infringers such as (illegal) file sharers (as compared to criminal enforcement or enforcement against contributory or secondary infringers such as Internet Service Providers).

However, any provision on right of information in national law presupposes that the ISP has retained the relevant information/data on the identity of the alleged infringer. As present there is no specific EU legislation taking aim at the mandatory retention of such data for the purpose of civil enforcement of copyright in the online environment. Hence, any provision on data retention for the purpose of civil enforcement of copyright online, including inter alia the relationship between Article 8 of Directive 2004/48/EC and Article 6 of Directive 2006/24/EC, must be interpreted as not precluding the application of national legislation.

In its judgment, the CJEU effectively rejected the opinion by the Advocate General (AG), who had held that the information – on the subscriber to whom the internet service provider provided an IP address which was allegedly used in an infringement – must have been retained in order to be disclosed and used for that purpose. In my opinion this possibility is fundamental. Without the possibility of enforcement, the right holders have no true "exclusive rights". One can just imagine what the consequences would have been for the protection of copyright in the online environment if the CJEU had sided with the AG. In any case, the European Commission is considering amending Directive 2004/48, as the Commission deems that "it has become apparent that the Directive was not designed with the challenge posed by the Internet to the enforcement of intellectual property rights in mind."

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