

CASE TRANSLATION: BELGIUM

CASE CITATION:

Gent 30 juni 2010, onuitg.

NAME AND LEVEL OF COURT:

Hof van Beroep (The Court of Appeal in Ghent, third chamber, sitting in criminal matters)

DATE OF DECISION: **30 June 2010**

Web based e-mail; meaning of ‘operator of an electronic communication service’ and ‘provider of an electronic communications service’ ; ability of a Belgian Public Prosecutor to obtain e-mails from another jurisdiction outside the scope of Mutual Legal Assistance in Criminal Matters

The Court of Appeal in Ghent, third chamber, sitting in criminal matters

In the case of the Public Prosecutor

Against

YAHOO! Inc.,
701 First Avenue, Sunnyvale, CA 94089 (U.S.A.)

Matter complained of:

In the judicial district of Dendermonde and connected therewith elsewhere in the Kingdom, at least in the period from 10.12.2007 until the date of the summons, and in any case on 10.12.2007, on 10.3.2008 and on 7.7.2008,

having directly committed the crime or misdemeanour or having participated thereto or by having provided such assistance that the crime or the misdemeanour could not have been committed, or by having directly provoked the crime or the misdemeanour by means of gifts, promises, threats, abuse of authority or of power, machinations or criminal mischief, as a perpetrator within the meaning of article 66 of the Criminal Code:

having committed a breach of article 46bis § 2 of the Belgian Code of Criminal Procedure, by having refused, in the capacity of an operator of an electronic communications network or provider of an electronic

communications service from whom the public prosecutor required the communication of the data referred to in paragraph 1 of article 46bis of the Code of Criminal Procedure, to have this advanced data to communicated to the public prosecutor,

In this case, and as the operator of an electronic communications network or as the provider of an electronic communications service active on Belgian territory, after having been required, by order from the public prosecutor in Dendermonde dated 21.11.2007 pursuant to article 46bis of the Belgian Code of Criminal Procedure, with respect to the following e-mail accounts:

ptbeannl@yahoo.com;
shoolajohn@yahoo.com;
lan_are@yahoo.com;
leo4john@yahoo.com;
garcialaurindo@yahoo.com;
raadwijkdr@yahoo.com;
robjanssennl@yahoo.com;

to communicate the following information:

1. the full identification/registration data of the person who created/registered the account, including the IP address, date and time (+ time zone) of the registration;
2. the e-mail address associated with the profile;
3. any other personal information that could lead to identification of the user(s) of the account;

having refused to communicate this data to the public prosecutor.

By judgment of the court of first instance in Dendermonde, 13th chamber, sitting in criminal matters, dated 2 March 2009, given after full argument from both

sides, Yahoo Inc. was declared guilty and sentenced to a fine of **TEN THOUSAND EUROS**, plus a surtax of 45 per cent, being thus in total 55,000.00 euros, as well as to the legal costs determined at 38.62 euros, and also ordering it to pay a special fee for the conduct of criminal proceedings of 25.00 euros, and a solidarity contribution of 25.00 euros, increased with a surtax of 45 per cent, being thus in total 137.50 euros, as a contribution to the financing of the Fund to assist the victims of deliberate acts of violence;

and the accused is ordered to communicate the information stated in the written order of 21.11.2007 of the public prosecutor in Dendermonde pursuant to article 46*bis* of the Code of Criminal Procedure, under forfeiture of a penalty of 10,000 euros per day of delay, as from the date this judgment becomes final.

* * * * *

Against the aforementioned judgment was appealed:

- On 4 March 2009 by Yahoo Inc. against all the decisions;
- On 12 March 2009 by the Public Prosecutor against Yahoo Inc.

* * * * *

Heard at the public hearing in the Dutch language:

- Mr G. Warson in place of Mr P. Londers and Mr J. Dhont, all lawyers in Brussels, representing Yahoo Inc. in its means of defence;
- Mr J. Kerkhofs, Deputy Public Prosecutor of Dendermonde in his claim.

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PROCEDURE

01. The case was originally brought before the criminal court in Dendermonde by direct summons (for brevity hereinafter referred to as 'introductory summons').

02. This court rendered its judgment on 2 March 2009.

03. The case was brought before this Court by the appeal against that decision (hereinafter for brevity

referred to as 'appealed judgment') by:

a. The accused Yahoo! Inc., on 4 March 2009 (filed against all decisions within this judgment against the accused);

b. The Public Prosecutor, on 12 March 2009 (filed against the said accused);

04. After the proper service of a summons, the case was referred to the third chamber of this Court – sitting in criminal matters (except in the case of article 205 of the Code of Criminal Procedure, a matter is brought before the court of appeal by a declaration that is correctly registered by the Court Registrar, so that the writ of summons of the public prosecutor to appear before the Court only serves the purpose to inform the parties about the place, date and hour of the examination of the appeal).

05. The case was heard on the merits by this chamber of the Court, composed exclusively by the judges indicated in the minutes of the hearing dated 19 May 2010 (see also article 780 of the Code of Civil Proceedings).

06. The accused did not appear in person, but was represented by its counsel.

07. This judgment is pronounced at a public hearing, having due regard to the provisions of article 782*bis* of the Code of Civil Proceedings (as applicable as from 26/06/2008).

I. ASSESSMENT

08. Each appeal is lodged on time and is valid as to form.

09. The accused is being tried for an alleged violation of article 46*bis*, § 2 of the Belgian Code of Criminal Procedure.

10. Under article 46*bis* § 1 of this provision, the 'operator of an electronic communications network' or the 'provider of an electronic communications service' are held to cooperate with the public prosecutor in the detection of crimes and misdemeanours. If they do not, they are liable to punishment. Only those who have one of the indicated capacities are punishable.

11. According to the documents of the criminal file, it can

be deduced that a number of people (third parties – not involved in this case) gained access to the (world wide) internet via an internet access provider (abbreviated IAP – service that provides access to the internet) and thus obtained access to the portal site of Yahoo Inc. (www.yahoo.com) in order to obtain a free e-mail address from Yahoo. They later used this Yahoo e-mail address to send messages to other owners of e-mail addresses. The public prosecutor argues that these third parties are guilty of criminal conduct in Belgium (conduct that is not the subject of assessment in this matter).

12. It is against this general background that the public prosecutor asked the accused to cooperate. The public prosecutor wanted to identify the applicants of an e-mail account at Yahoo. For this purpose, a number of items of identification data were requested from Yahoo. This application was made electronically and in writing.

13. According to the public prosecutor, the accused, Yahoo Inc. 701 First Avenue, Sunnyvale, CA 94089, United States of America, refused to cooperate. The criminal offence that is subject to assessment in this case, is located in the introductory summons in the judicial district of Dendermonde, and connected therewith elsewhere in the Kingdom, at least in the period from 10 December 2007 until the date of the summons (note by the Court: 22/09/2008), and in any case on 10/12/2007, 10/03/2008 and from 07/07/2008.

14. At the hearing, the public prosecutor set out that 'Yahoo is territorially present in Belgium, commercially as service provider, and in any case, at least virtually through the internet.' It is immediately noted that the public prosecutor has not indicated in which specific capacity Yahoo (i.e. as an operator of a network or as a provider of a communications service) is being prosecuted.

15. According to the accused, the free 'Yahoo webmail' system consists essentially in providing a software application that allows the user to obtain a Yahoo! e-mail address to send and receive messages from any location.

16. This statement of the accused is credible and has not been plausibly refuted by the public prosecutor in this case at any time.

17. The Court finds in general that:

a. Sending text messages via electronic communication networks has existed for many decades. The 'world wide web (hereinafter abbreviated 'www')' is used on a large scale by the general public since the end of the last century. The 'www' is a general network of web sites that can easily be viewed with a web browser.

b. The Court defines electronic mail as: 'any text, voice, sound or image which is sent over a public communications network and which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient' (see and compare Art. 2, 2^o of the Law of 11 March 2003 on certain legal aspects of information society services (electronic commerce law)). This definition is consistent with the definition which can be found in the European directive on privacy and electronic communications, although the concept of e-mail is used and the term recipient is used instead of customer ((article 2 h) of Directive 2002/58/EG of 12 July 2002 concerning the processing of personal data and protection of privacy in the electronic communications sector – hereinafter referred to as electronic privacy directive).

c. An e-mail in a narrow sense is, in the opinion of this Court, the electronic message sent via the internet and which is based on the so-called SMTP (simple message transfer protocol), being a system of rules or standards designed to connect computers with each other and with peripheral equipment.

d. Electronic communication is a broader term than e-mail.

e. Electronic communication is, according to this Court, is any information exchanged or conveyed between a finite number of parties through a public electronic communications service (article 2, d) electronic privacy directive).

f. Surfing the internet is an example of an electronic communication which, in principle, is not included in electronic mail.

g. The confidentiality of electronic communications (including electronic mail) are protected by article 122 of the Act of 13 June 2005 on electronic communications – (see below).

h. In principle, an electronic message is not directly transmitted from the sender to the receiver but, as with analogue post, use is made of an intermediate

communications service (mostly internet service providers, specific e-mail service providers or operators of mobile networks).

i. To send and receive an e-mail, use is made of mail servers (mainly the so-called SMTP servers for sending messages and the POP server to receive them) and DNS (Domain name system: a system for translating verbal domain names into IP addresses and vice versa – IP addresses are unique identification addresses on the internet which are expressed in numbers).

j. To the users of e-mail, the mail client (i.e. a program used to send and receive e-mail via a mail server) provides a so-called e-mail account with an associated e-mail address.

18. The Court establishes in particular that:

a. The e-mail accounts, in relation to which the public prosecutor applied article 46bis of the Code of Criminal Procedure, in requiring the accused to provide the identification data, were issued and designated to various persons (physical persons or legal persons). It has become credible – and, in any case, insufficiently disproven to the satisfaction of the Court – that the relevant e-mail accounts were requested and created at the request of persons who were at that time not located in Belgium.

b. This e-mail accounts belong to the accused. Their use was assigned by the latter to the third party-applicants (physical persons or legal persons), probably not located in Belgium at the time of this use (see the information contained in the criminal file – not refuted by the public prosecutor).

c. It has proven credible – and in any case legally insufficiently disproven – that at the time of application and the granting of these accounts, the third-party applicants were located outside Belgium, and that consequently they probably have not used operators of a communications network or the services of a provider of an electronic communication service established in Belgium.

d. The accounts themselves are apparently located in American territory, within a ‘webmail’ system managed there by the accused. This system is accessible by ‘surfing’ to the portal website of Yahoo in America. (i.e. to interact electronically to reach the site of Yahoo in America). By typing a user name and password, the

third-party applicants obtained permission to use these accounts. The ‘transfer’ or ‘transmission’ of all this communicated data, including the interconnection(s) on the www, were probably done through networks owned by different operators and with the intervention of so-called electronic service providers, without it being proven that the accused intervened in this conveyance or committed any act constituting the elements of the act. It has not been established at all in this case that Yahoo would dispose of such public network infrastructure or that it would intervene in a capacity of public service provider in the transfer or transmission of such data (known as ‘bits and bytes’) from Belgium or any other country in the world to the Yahoo portal site in America.

e. All the identification data requested at the time by the public prosecutor are also located in American territory (i.e. the (electronic) equipment, belonging to the accused and being part of the internal webmail system, developed and owned by the accused). This identification data cannot be consulted or rendered visible from Belgium (as a matter of fact, this is the reason why the public prosecutor directed an order at the accused).

f. It has not been rendered credible by the public prosecutor that the accused would have any establishment in Belgium. The accused has no place of business or company offices here. Nor does it employ a workforce here.

g. The fact that the public prosecutor can reach the portal site of the accused in America from Belgium (via a private e-mail account that is not owned by the accused) by electronic means is only due to the fact that the prosecution has its own connection through its own operator of a network and/or a provider of an electronic communications service (in Belgium) and can thus obtain access to the internet. The portal site of the accused in America could only be reached in that manner (that is to say, virtually displayed on a screen in Belgium). It is only through this way and this portal that the webmail system from the accused could be addressed and reached. A message posted in Belgium will then be delivered to Yahoo through the existing public networks and services.

h. Nowhere in this case has it been adequately established that Yahoo, either as an operator of a network, or as a provider of an electronic communications service, fulfils any role (or has fulfilled)

or interferes or intervenes in the conveyance of data from Belgium to the Yahoo portal site.

i. It has become credible that all equipment or infrastructure owned by the accused (e.g. server) is located in America. The portal site of Yahoo! Inc. is clearly located in America and is controlled and managed from there. With the intervention of network operators and providers of electronic communications services, this site can be reached from Belgium and it can be visualized (on the computer screen) by Belgian surfers (see above). Such access is possible by the presence of networks, existing interconnections and providers of electronic communications services, without any intervention from the accused. There is no convincing evidence that Yahoo would intervene as an intermediary, let alone that it would act in a manner which constitutes 'conveyance or transmission acts' or that it would be responsible for such acts.

j. It is not because a foreign company can be made visible in one or other manner in Belgium via a computer, belonging to individuals or companies, that it must be concluded solely for this reason that this foreign company should be considered to be established here and that it would commit actions which fall within the scope of article 46bis of the Code of Criminal Procedure. Likewise, such (virtual) visibility does not allow the recipient of a message or communication sent from Belgium to qualify as a network operator or a provider of a communications service within the meaning of article 46bis of the Code of Criminal Procedure.

k. In particular, it was not sufficiently verified in this case whether other (switching and routing) devices, which enable access to the portal site of Yahoo from Belgium (via the internet), are owned by the accused and/or managed by the accused. The Court considers it credible that this is not the case. In the absence of adequate evidence to the contrary, this Court is of the opinion that the possibility exists that the infrastructure and equipment, as well as access to the world wide web, may be provided by persons (natural or legal persons) other than Yahoo, and which may in Belgium be regarded as (end) users, subscribers, operators of an electronic communications network or as providers of an electronic communications service within the meaning of article 46bis §§ 1 and 2 of the Code of Criminal Procedure and article 2 of the Law of 13 June 2005 (see also below). The path to the portal site of the accused is apparently provided through such existing

networks and services, owned or operated by persons other than the accused. The accused solely uses the (existing) infrastructure and existing communications ('networks' and 'services' within the meaning of article 46bis of the Code of Criminal Procedure) for purposes of its webmail service. The public prosecutor has not proven the contrary in this matter.

l. Existing Belgian legislation (see the Law of 13 June 2005 on electronic communications) includes the following definitions of (1) operators of an electronic communications network and (2) providers of electronic communications services (see article 2 of the Law of 13 June 2005 – underlined by the Court):

- 'Electronic communications network': the active or passive transmission and, where appropriate, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, provided they are used for the transmission of signals other than radio broadcasting and television;

- 'Electronic communications service': a service normally provided for remuneration which consists wholly or mainly in the conveyance, including switching and routing operations of signals on electronic communications, except (a) services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, except (b) information society services as defined in article 2 of the Law of 11 March 2003 on certain legal aspects of information society services, which do not wholly or mainly consist of the conveyance of signals on electronic communications network and excluding (c) radio broadcasting and television;

m. The provision of such services or networks in Belgium, under article 9 of this Law, subject of a notification to the Belgian Institute for Postal Services and Telecommunications.

n. The Law of 13 June 2005 contains also definitions of other 'actors' or market players that can operate within the global 'www', namely:

i. article 2 – 12° 'user': a natural or legal entity using or requesting a publicly available electronic communications service;

ii. article 2 – 13° 'end user': a user not providing a public electronic communications network or publicly available

electronic communications services;

iii. article 2 – 14° ‘consumer’: a natural person who uses or requests a publicly available electronic communications service for purposes other than commercial or professional purposes;

iv. article 2 – 15° ‘subscriber’: a natural or legal person who holds a number assigned by an operator for the provision of electronic communications services and who is using an electronic communications service under a contract concluded with an operator;

o. Articles 125 to 127 of the Law provide that the King can determine practical arrangements with regard to:

i. the further rules and the resources that must be used to enable the identification, detection, location, listening, accessing to and recording of electronic communications;

ii. the conditions under which the operators register and store traffic data and the identification of end users, for the purpose of the detection and prosecution of criminal offences;

iii. technical and administrative measures that are imposed on operators or on end users in order to:

1° to identify the emergency call line within the context of an emergency call;

2° to be able to identify, trace, locate, listen, obtain access to and record private communications under the conditions provided by the articles 46*bis*, 88*bis* and 90ter to 90decies of the Code of Criminal Procedure and by the Law of 30 November 1998 regulating the intelligence and security services.

p. The Court noted that the Law of 13 June 2005 on electronic communications is the transposition in Belgian law of:

- Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 24 April 2002, L 108/33);

- Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of electronic communications networks and services

(Authorisation Directive) (OJ 24 April 2002, L 108/21);

- Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 24 April 2002, L 108/7);

- Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 24 April 2002, L 108/51);

- Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 31 July 2002, L 201/37);

- and Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Competition Directive) (OJ 17 September 2002, L 249/21).

q. The explanatory memorandum and the discussion on the draft law amending article 46*bis* of the Code of Criminal Procedure (Parliamentary Documents of the Senate, session 2005-2006, 31 July 2006, document nr. 3 – 1824/1) indicates that the legislator intended to use the same terminology in article 46*bis* of the Code of Criminal Procedure as in the Law of 13 June 2005. The meaning and content of the terms ‘operator of electronic communications networks’ and ‘provider of electronic communications services’ in article 46*bis* of the Code of Criminal Procedure and in the Law of 13 June 2005 are the same.

r. These concepts should be interpreted in a strict manner, in applying the criminal law and in the prosecution of individuals.

19. Contrary to the determination of the judgment under appeal, this Court concludes that it has not convincingly been established that the accused would have to be considered as an ‘operator of an electronic communications network’ or as a ‘provider of an electronic communications service’ within the meaning of article 46*bis* Code of Criminal Procedure (see above). The webmail system, as developed by Yahoo! and made available to the users of the internet, cannot be

qualified as an electronic communications service in accordance with Belgian law. It is plausible that the Yahoo system itself only uses the global (world wide) network, built and managed by network operators and providers of electronic communications services that must be distinguished from Yahoo.

20. In this case, it has not been demonstrated in a sufficiently convincing manner that the provision, application and use of software in an electronic communications environment (in this case, in particular, the provision of a webmail system) constitutes an act that would in itself be the subject of a notification to the Belgian Institute for Postal Services and Telecommunications.

21. The latter institute has not been involved in any further detailed investigation in this matter. Little or no attention has been given to the technical aspects of the case during the investigation, but these aspects are nevertheless important for a proper legal assessment.

22. In particular, it was never made plausible that the accused has the necessary infrastructure or services to provide external (i.e. outside the walls or boundaries of the accused) electronic communications services. Nor has it convincingly been established which active or passive transmissions systems and, if so, which switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, the accused would make available to consumers. It has not even been verified, let alone proven to the satisfaction of the Court, that the accused itself takes care of the transmission of signals beyond its own premises or systems, let alone that it would ensure such transmission or transfer.

23. The provision of webmail through a portal site (an activity committed by the accused) can under those circumstances not be regarded as an electronic communications service pursuant to article 46bis of the Code of Criminal Procedure. The e-mail system of the defendant credibly appears as a network application, i.e. software whose application is not aimed at establishing and maintaining network connections and network transport. It is the view of this Court that it is a program that uses network connections and network transport (like other e-mail programs that are network applications, such as Pegasus Mail and Eudora, and internet browsers such as Microsoft Internet Explorer

and Netscape Communicator). There is, given the meagre (technical) information which was presented to this Court, only uncertainty concerning the fact whether or not the accused has committed acts that can be regarded as the transport and routing of electronic signals or information on an electronic communications network. The existing information only permits this Court to establish that it was made plausible that the e-mails are communicated only through an operator of an existing network and through the intermediary of a communication service provider (which do not identify with the accused) from one mailbox (located in Belgium) to another mailbox (located in America). The webmail system of Yahoo! Inc. thus manifestly concerns only an application (software) that is executed on an existing network (the copper wire network of Belgacom or the coaxial network of Telenet) with the intervention of a provider of an electronic communications service (which is responsible for the provision of access to the internet to Belgian residents). In the absence of adequate rebuttal by the public prosecutor, it has remained plausible under such circumstances that it is the provider of internet access that is fully responsible for the effective conveyance or transmission of signals over the internet. The internet access provider is the provider of an electronic communications service. The persons whose network is used, are the providers of the electronic communications network. Market players can combine these two roles (e.g. Telenet in Belgium).

24. Nowhere has it been established that the accused, as a mere provider of webmail, would have had control over the electronic communications service offered or over the electronic communications network. Likewise, there have been no indications that Yahoo! Inc. is in this case the one who is responsible for the management of the network or the infrastructure and would have had control over it.

25. Given all this, it has not been sufficiently established in this case that the material conditions for applying article 46bis of the Code of Criminal Procedure are fulfilled. There is no evidence that the conditions necessary to establish the guilt and criminality of the accused are fulfilled.

26. The request for a reference for a preliminary ruling, as proposed by the public prosecutor, is rejected. It is obvious from what has been explained in this judgment, and according to the information submitted to this Court, that the accused in this case cannot be regarded

at all as an operator of a network or a provider of a service within the meaning of article 46bis of the Code of Criminal Procedure. The answer to proposed reference for preliminary ruling is not essential to rule and there is apparently no violation within the meaning of article 26 § 1 of the Law on the Constitutional Court.

27. The appealed judgment shall be reformed. The accused is acquitted from prosecution.

28. The costs of both instances, made by the public prosecutor, shall be borne by the State.

FOR THESE REASONS,

the Court, judgment given after full argument on both sides;

in application of articles:

- indicated above in this judgment;
- 211 and 212 of the Code of Criminal Procedure;
- 24 of the law of 15/06/1935 on the use of languages in court cases.

Rejecting all other and conflicting conclusions,

Declares every appeal admissible and deciding on them:

Annuls the appealed judgment and decides again:

Acquits the accused from prosecution concerning the fact described in the introductory summons.

Orders the costs of both instances, made by the public prosecutor, be borne by the State.

This judgment is given by the third chamber of the Court of Appeal in Ghent, composed of the magistrates that have presided and judged in this case:

K. DEFOORT

Judge

M. MINNAERT

Judge

B. DESMET

President of the Chamber

and pronounced at the public hearing on THIRTY JUNE TWO THOUSAND AND TEN by President of the Chamber, B. Desmet,

in the presence of E. Vanhorenbeeck, Solicitor General;

J. Kerkhofs, Deputy Public Prosecutor,

with the assistance of D. Bamps, Court Registrar.

(signatures)

D. BAMPS

Registrar

B. DESMET

President of the Chamber

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