

CASE TRANSLATION: BELGIUM

CASE CITATION:

P. 11.1906.N/1

NAME AND LEVEL OF COURT:

**Hof van Cassatie – Cour de cassation
(Court of Cassation of Belgium)**

DATE OF DECISION:

4 September 2012

Web based e-mail; the judicial authority of a Belgian Public Prosecutor; whether restricted to within the territory of Belgium; article 46bis, §2 of the Code of Criminal Procedure

Court of Cassation of Belgium

Judgment

Number P.11.1906.N

ATTORNEY-GENERAL AT THE COURT OF APPEAL OF BRUSSELS,

plaintiff,

against

YAHOO! Inc., based in CA 94089 Sunnyvale (United States of America), First Avenue 701

accused,

defendant,

as counsel to Mr Jan Dhont and Mr Bertold Theeuwes, lawyers at the Brussels' Bar

I. PROCEEDINGS BEFORE THE COURT

The appeal is directed against the ruling of the Court of Appeal in Brussels, Criminal Chamber, dated 12 October 2011, rendered on relegation after the judgment of the Court [of Cassation] of 18 January 2011.

The plaintiff forwards four grounds of appeal in a memorandum that is attached to this judgment.

Judge Filip Van Volsem presented his report.

Advocate-General Patrick Duynslaeger presented his conclusions.

II. DECISION OF THE COURT

Assessment

Second ground

First part

1. This part invokes a violation of articles 1319, 1320 and 1322 of the [Belgian] Civil Code and article 46bis of the [Belgian] Code of Criminal Procedure: the appellate judges decided incorrectly that no evidence has been adduced of a valid request, addressed by the Public Prosecutor to the defendant, within the meaning of article 46bis of the [Belgian] Code of Criminal Procedure; the probative documents that the Court has been able to take into consideration indicate the opposite; the Public Prosecutor did formulate a legally binding request on the Belgian territory and addressed it, from the Belgian territory, to an entity to whom such a request could be addressed.
2. Article 46bis, §1, first section of the [Belgian] Code of Criminal Procedure provides that the Public Prosecutor is entitled to require the cooperation from an operator of an electronic communications network or from a provider of an electronic communication service by means of a reasoned and written decision, in order to obtain the information mentioned in that decision.

Article 46bis, §2, first section of the [Belgian] Code of Criminal Procedure provides that each operator of an electronic communications network and each provider of an electronic communication service, who has been required to communicate the information referred to in paragraph 1, must communicate this information to the Public Prosecutor.

According to article 46bis, §2, fourth section of the [Belgian] Code of Criminal Procedure, the refusal to communicate the information shall be punished with a fine between 26 and 10.000 euro.

3. The circumstance that the Public Prosecutor sends his written request within the meaning of article 46bis of the [Belgian] Code of Criminal Procedure, whereby the cooperation is required from the operator of an electronic communications network or the provider of an electronic communications service established outside the Belgian territory, from Belgium to a foreign address, does not render the request invalid.

4. The judgment decides that:

- in principle, the Belgian government exercises its sovereign power on and within the Belgian territory.
- as a matter of principle, the Public Prosecutor has no authority to perform official acts, and specifically to perform or to order acts of investigation, outside the Belgian territory.
- no evidence has been adduced of a valid request addressed by the Public Prosecutor within the Belgian territory to the defendant, to communicate the information within the meaning of Article 46bis, §2 of the [Belgian] Code of Criminal Procedure.
- for that purpose, the mere fact that it is technically possible, amongst others, for the Public Prosecutor to contact the defendant from the Belgian territory by means of electronic or other means of communication, is not sufficient.

On those reasons, the judgment decides that the defendant did not commit a violation of article 46bis, §2, of the [Belgian] Code of Criminal Procedure. Thus, the decision is not duly reasoned on the legal grounds.

The part is well-founded to this extent.

Further objections

5. The other objections, that cannot lead to an annulment without relegation, do not require an answer.

Dictum

The Court

Annuls the contested judgment.

Orders that this decision shall be mentioned in the margins of the annulled judgment. Leaves the costs at the charge of the State.

Refers the case to the Court of Appeal in Antwerp.

Determines the costs at 275,67 euros.

This decision has been rendered in Brussels by the Court of Cassation, Second Chamber, composed of the Chairman of the Department Paul Maffei, as chairman, and judges Luc Van Hoogenbempt, Filip Van Volsem, Antoine Lievens and Erwin Francis, and pronounced at the public hearing of 4 September 2012, by Chairman of the Department Paul Maffei, in the presence of Advocate-General Patrick Duynslaeger, with assistance of the Registrar Frank Adriaensen.

F. Adriaensen	E. Francis	A. Lievens
F. Van Volsem	L. Van hoogenbempt	P. Maffei

With thanks to Johan Vandendriessche for reviewing this translation

Commentary: Still no end to the Yahoo! case

By Johan Vandendriessche

The translated decision of the Court of Cassation of 4 September 2012 is yet another step in what appears to be a never-ending legal dispute between the Public Prosecutor of the judicial district of Dendermonde (Belgium) and Yahoo! Inc.¹

This dispute involves the interpretation and scope of article 46bis of the Code of Criminal Procedure, which imposes on the ‘operator of an electronic communications network’ or the ‘provider of an electronic communications service’ the obligation to cooperate with the public prosecutor, at the latter’s request, in the detection of crimes and misdemeanours.

In the present case, the public prosecutor held the view

¹ For a translation and commentary to the previous decisions in this legal dispute, see Johan Vandendriessche, *Digital Evidence and Electronic Signature Law Review*, 8

(2011) 194 – 218 and Johan Vandendriessche, *Digital Evidence and Electronic Signature Law Review*, 9 (2012) 102 – 105.

that this obligation to cooperate applies to any operator of an electronic communications network or provider of an electronic communications service that is located in Belgium, either by means of a local presence or by means of a virtual presence. For this 'virtual presence', the public prosecutor was also of the opinion that it suffices that a foreign company offers electronic communications services in Belgium and that it can be reached from Belgium (e.g. by e-mail through an on-line customer service, as is the case with Yahoo!).

Yahoo however took the view that, in the absence of a local presence, it cannot be held to cooperate directly with the public prosecutor. Any such request must, according to Yahoo!, be made through the channels provided in the Treaty on Mutual Legal Assistance in Criminal Matters.

In its decision of 12 October 2011, the Court of Appeal of Brussels held the view that the order had not been validly communicated to Yahoo! Inc. In other words, the Court of Appeal of Brussels rejected the application of the 'virtual presence'.

The Public Prosecutor disagreed with this view and brought the case a second time before the Court of Cassation. In the second decision of the Court of Cassation, the (second) appeal verdict is yet again annulled. The Court of Cassation held the view that the mere fact that the order has been sent from Belgium to an entity located outside Belgium does not render the order invalid. In other words, the Court of Cassation does not seem to object to applying the concept of 'virtual presence'. As the Court of Cassation established that the appeal decision is not duly reasoned, it annulled the decision and relegated the case to the Court of Appeal of Antwerp.

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Johan Vandendriessche is a member of the editorial board.