Case C-597/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 August 2019

Referring court:

Ondernemingsrechtbank Antwerpen, afdeling Antwerpen (Belgium)

Date of the decision to refer:

29 July 2019

Applicant:

M.I.C.M. Mircom International Content Management & Consulting Limited

Defendant:

Telenet BVBA

Subject matter of the main proceedings

In the main proceedings, Mircom (applicant) claims that Telenet (defendant) should hand over identification data in respect of thousands of its customers, which Telenet refuses to do. According to Mircom, the customers concerned have uploaded films from its catalogue using BitTorrent-technology, which, in its view, constitutes an unlawful communication of those films to the public.

Subject matter and legal basis of the request

Interpretation of 'communication to the public' in Article 3(1) of Directive 2001/29; interpretation of Chapter II of Directive 2004/48 and of the term 'prejudice' in Article 13 thereof; relevance of the specific circumstances of the case for the assessment of proportionality when weighing up the enforcement of intellectual property rights and the rights and freedoms enshrined in the Charter; legitimacy of the systematic registration of IP-addresses on the basis of Article 6(1)(f) of Regulation 2016/679. Article 267 TFEU.

Questions referred for a preliminary ruling

1(a) Can the downloading of a file via a peer-to-peer network and the simultaneous provision for uploading of parts ('pieces') thereof (which may be very fragmentary as compared to the whole) ('seeding') be regarded as a communication to the public within the meaning of Article 3(1) of Directive 2001/29, even if the individual pieces as such are unusable?

If so,

(b) is there a *de minimis* threshold above which the seeding of those pieces would constitute a communication to the public?

(c) is the fact that seeding can take place automatically (as a result of the torrent client's settings), and thus without the user's knowledge, relevant?

2(a) Can a person who is the contractual holder of the copyright (or related rights), but does not himself exploit those rights and merely claims damages from alleged infringers – and whose economic business model thus depends on the existence of piracy, not on combating it – enjoy the same rights as those conferred by Chapter II of Directive 2004/48 on authors or licence holders who do exploit copyright in the normal way?

(b) How can the licence holder in that case have suffered 'prejudice' (within the meaning of Article 13 of Directive 2004/48) as a result of the infringement?

3. Are the specific circumstances set out in questions 1 and 2 relevant when assessing the correct balance to be struck between, on the one hand, the enforcement of intellectual property rights and, on the other, the rights and freedoms safeguarded by the Charter, such as respect for private life and protection of personal data, in particular in the context of the assessment of proportionality?

4. Is, in all those circumstances, the systematic registration and general further processing of the IP-addresses of a 'swarm' of 'seeders' (by the licence holder himself, and by a third party on his behalf) legitimate under the General Data Protection Regulation, and specifically under Article 6(1)(f) thereof?

Provisions of EU law relied on

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Article 13, Article 6(2), Article 8 and Article 9(2) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Charter of Fundamental Rights of the European Union

Article 4(2) and Article 6(1)(f) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Provision of national law relied on

Article XI.165, Paragraph 1, fourth subparagraph, Wetboek Economisch Recht (Code of Economic Law)

Succinct presentation of the facts and procedure in the main proceedings

1 Mircom is the holder of certain rights in respect of a large number of pornographic films produced by eight United States and Canadian undertakings. It is neither producer nor distributor of the films but is engaged only in claiming damages from alleged infringers, part of which it repays to the producers.

2 Through a system developed by a German university, it is in possession of thousands of IP-addresses assigned to customers of the internet service provider Telenet. According to Mircom, those customers have shared films from its catalogue on a peer-to-peer network by means of the BitTorrent-protocol.

3 Mircom claims that Telenet should be ordered to produce the identification data in respect of those customers. Telenet objects to that as a matter of principle and contends that Mircom should be ordered to indemnify it against any order or judgment that may be given against it as a result of any order for disclosure.

4 BitTorrent-technology entails the segmentation of a file into many small parts (pieces), which can be downloaded by the user and reconstituted to form the original file. The initial uploading process is called ‘seeding’. A file that is made available in this way can be downloaded by many users simultaneously. The group of downloaders is referred to as a ‘swarm’. It is a particular feature of this technology that there is no further need for a link between the original seeder and the downloaders: each user can download each piece from a different user. Downloaders generally become seeders themselves; the software is typically now set up in such a way that the operation of the BitTorrent-system depends on that.

The essential arguments of the parties in the main proceedings

5 Mircom claims that the Telenet customers are responsible for the unlawful communication to the public of the films concerned.

In its submission, whilst it is possible to obtain a preview of the file once a certain percentage has been downloaded, it is necessarily fragmentary and of highly dubious quality. It also has a self-imposed limit of 20%: anyone who downloads less than 20% of a file (and therefore by definition cannot seed more than that), is left undisturbed.

6 As regards the question whether the safeguards under Directive 2004/48 could simply be enforced against Mircom, Telenet refers to the special situation of that undertaking, which does not itself carry out any acts of exploitation but merely claims damages, and is thus acting as a copyright troll.

7 So far as concerns the question whether the collection of the IP-addresses constitutes the legitimate processing of personal data, Mircom refers to German case-law in arguing 'that there is no problem with respect to the GDPR'.

Succinct presentation of the reasoning in the request for a preliminary ruling

Question 1: Communication to the public

8 In its judgment of 14 June 2017, *Stichting Brein* v *Ziggo*, C-610/15, EU:C:2017:456, the Court of Justice ruled that the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network, constitutes communication to the public.

9 According to the referring court, the essence and basis of BitTorrent-technology, however, is that a user himself becomes a seeder of the pieces which he has already downloaded. Although seeding can be disabled by some programs, that is in fact the basic position, given that the operation of the peer-to-peer file sharing system depends upon it. 'Pieces' are not merely 'fragments' of the original file but stand-alone, encrypted files that are ultimately reconstituted to form the original file. As such, they are thus unusable.

10 That is why the referring court wishes to know whether the seeding of pieces of a copyright-protected work *per se* constitutes a communication to the public, or whether other matters must be taken into account, such as the percentage download or the fact that seeding may take place without the user's knowledge.

Question 2: Mircom's particular situation

11 According to the referring court, Mircom's situation differs fundamentally from that of an author or licence holder. Mircom matches the definition of a copyright troll almost perfectly: it holds limited exploitation rights in respect of works created by third parties, which it does not however exploit but in respect of which it is entirely engaged in claiming damages from alleged infringers.

12 According to Article 13(1)(a) of Directive 2004/48, the EU legislature did not envisage the situation of an undertaking such as Mircom, but that of the true author or a rightholder or licence holder who actually exploits the rights and does therefore suffer loss as a result of forgery or piracy.

13 The referring court thus wishes to know whether Mircom may enjoy the rights conferred by Directive 2004/48 in the same way as authors and rightholders, and whether the compensation it seeks to obtain falls within the concept of 'prejudice' within the meaning of that directive.

Question 3: Proportionality test

14 The referring court refers to the circumstances of the case – the particular feature of the BitTorrent-protocol whereby seeding can, in some circumstances, take place unnoticed, and Mircom's particular situation as outlined above – and wishes to know whether those circumstances have any effect on the assessment of proportionality in the weighing up of the various fundamental rights protected by the EU legal order.

Question 4: IP-addresses as personal data

15 The means by which Mircom acquires the IP-addresses concerned raises questions, according to the referring court.

16 Mircom claims to have obtained those addresses via the German undertaking Media Protector GmbH, which searches the internet for the distribution of works. It systematically records IP-addresses and supplies these to Mircom, which, according to the referring court, clearly falls within the concept of 'processing' within the meaning of Article 4(2) of the General Data Protection Regulation. Serious questions do, however, arise with regard to the transparency and lawfulness of that processing.

17 The referring court would therefore like to know whether the Court of Justice considers this to constitute a legitimate processing of personal data.