

Case C-264/19

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:

29 March 2019

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

21 February 2019

Applicant, appellant and respondent in the appeal on a point of law:

Constantin Film Verleih GmbH

Defendants, respondents and appellants in the appeal on a point of law:

YouTube LLC

Google Inc.

Subject matter of the case in the main proceedings

Action brought by the holder of exclusive film exploitation rights against the internet platform ‘YouTube’ and its parent undertaking ‘Google’, seeking to obtain information on the email address, telephone number and IP address of users who uploaded those films illegally onto YouTube

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Do the addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers, mentioned in Article 8(2)(a) of Directive

2004/48/EC and covered, as appropriate, by the information referred to in Article 8(1) of Directive 2004/48/EC, also include

- (a) the email addresses of service users and/or
 - (b) the telephone numbers of service users and/or
 - (c) the IP addresses used by service users to upload infringing files, together with the precise point in time at which such uploading took place?
2. If the answer to Question 1(c) is in the affirmative:

Does the information to be provided under Article 8(2)(a) of Directive 2004/48/EC also cover the IP address that a user, who has previously uploaded infringing files, last used to access his or her Google/YouTube user account, together with the precise point in time at which access took place, irrespective of whether any infringement was committed when that account was last accessed?

Provisions of EU law cited

Article 8 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45)

Provisions of national law cited

First sentence of Paragraph 101(1), Paragraph 101(2)(3), Paragraph 101(3)(1) of the Urheberrechtsgesetz (Law on Copyright) ('the UrhG')

Point 2 of the first sentence of Paragraph 111(1) of the Telekommunikationsgesetz (Law on telecommunications) ('the TKG')

Brief summary of the facts and procedure

- 1 The applicant is a German undertaking asserting exclusive rights to exploit the films 'Parker' and 'Scary Movie 5'. The first defendant operates the Internet platform 'YouTube', onto which video files can be uploaded and made available to other Internet users. The second defendant is the first defendant's parent undertaking and owner of the domain used by the first defendant for its Internet platform. In order to upload videos onto the Internet platform 'YouTube', users must first create a 'Google user account' with the second defendant and, in order to do so, provide a name, email address and date of birth. In order to post a video over 15 minutes long on the platform, a mobile phone number must also be provided, which is used to send the activation code needed to be able to post.

According to the defendants' joint terms of service and privacy policies, platform users consent to server logs, including the IP address, date and time of use as well as individual requests, being stored and to those data being used by participating undertakings.

- 2 On 29 June 2013, the film 'Parker' was uploaded in full length and in German under the username N1 onto the first defendant's Internet platform and accessed over 45 000 times until it was blocked on 14 August 2013. In September 2013, the film 'Scary Movie 5' was uploaded in full length under the username N2 and accessed over 6 000 times until it was blocked on 29 October 2013. In addition, a copy of that film was uploaded again on 10 September 2014 under the username N3 and accessed more than 4 700 times until it was blocked on 21 September 2014.
- 3 The applicant seeks an order requiring the defendants to provide to it information on the users N1, N2 and N3, by indicating, for each of them, the following data stored by the defendants: (a) user's email address; (b) user's telephone number; (c) IP address used by the user to upload the file, together with the precise point in time at which the upload took place, mentioning the date and time of day, including minutes, seconds and the time zone ('the time of upload'); (d) IP address last used by the user to access his or her Google/YouTube user account, together with the precise point in time at which access took place, mentioning the date and time of day, including minutes, seconds and the time zone ('the time of access').
- 4 The Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) dismissed the application. On appeal by the applicant, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) partially upheld the appeal and ordered the defendants to provide information on the respective email addresses of the users. The applicant and the defendants have lodged an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany) against that ruling. The applicant maintains its claim that the defendants should be ordered to provide information on the users' telephone numbers and IP addresses also. By their appeal on a point of law, the defendants seek to have the action dismissed in its entirety.

Brief summary of the basis for the request

- 5 The applicant bases its right to information on the first sentence of Paragraph 101(1), Paragraph 101(2)(3) and Paragraph 101(3)(1) of the UrhG. That provision is intended to transpose Article 8 of Directive 2004/48 and is therefore to be construed in accordance with the directive. Whether the appeals on a point of law are successful depends on what information must be provided under Article 8(2)(a) of Directive 2004/48. The applicant's appeal on a point of law will be successful if it can also request information on the users' telephone numbers, as well as the IP addresses used by them to upload the infringing files. The

defendants' appeal on a point of law will be well founded if they are not required to provide information on the users' email addresses.

- 6 Question 1(a): This centres on whether the provision of information on 'names and addresses' within the meaning of Article 8(2)(a) of Directive 2004/48 covers email addresses. The referring court is of the opinion that the protective purpose of Paragraph 101(3) of the UrhG and of Article 8(2)(a) of the directive requires that email addresses must also be covered by it. A right to information asserted against third parties should allow the rightholder to identify the infringer. Since only a (fictitious) username and email address are recorded when a user of the first defendant's platform creates an account, it would be difficult from the outset to identify the infringer if the rightholder were unable to obtain any information on that email address. This, however, would be contrary to the objective of Directive 2004/48 (see recital 3 of the directive).
- 7 Question 1(b): It is unclear whether the term 'address' in Article 8(2)(a) of Directive 2004/48 also covers telephone numbers. According to the clear wording of that provision, telephone numbers are not covered by it.
- 8 An argument to the contrary is that, due to the anonymity guaranteed to users on platforms such as that of the first defendant, the defendants by definition generally cannot provide any information on 'names and addresses', meaning first and last name and postal address. By contrast, a telephone number is not only requested but also verified by sending an activation code when a user wishes to post a video over 15 minutes long on the first defendant's platform. When telephone numbers are assigned, the name and address of the subscriber must be stored pursuant to point 2 of the first sentence of Paragraph 111(1) of the TKG. Given that this is not the case when email addresses are assigned, the provision of information on telephone numbers may constitute the only effective and meaningful means of enforcing intellectual property rights in respect of the infringements at issue.
- 9 Also in support of that opinion is the fact that modern telecommunication technology makes it possible to send letters by SMS, MMS or via instant messaging services to a telephone or other mobile terminal. Telephone numbers then serve as an 'address' for such written communications.
- 10 Question 1(c): The question arises as to whether Article 8(2)(a) of Directive 2004/48 also covers the IP address used to upload the infringing files.
- 11 Its function may argue against this. IP addresses are not assigned to a specific person, but rather — and in the case of dynamic IP addresses, moreover, only temporarily — to the network interface of a device that is communicating with the Internet. They do not, therefore, make it possible for a specific person to be identified. Furthermore, IP addresses identify only the device that is communicating with the Internet on the network interface, but no additional devices connected to that device.

- 12 A further argument against is that IP addresses constitute personal data (see judgment of 19 October 2016, *Breyer*, C-582/14, EU:C:2016:779). Therefore, it is necessary to balance the fundamental rights concerned. When interpreting national legislation in accordance with a directive, the courts of the Member States must ensure a fair balance between the various fundamental rights protected in the EU legal order. When transmitting personal data to third parties for the prosecution of copyright infringements, the following, in particular, must be taken into consideration in the balancing exercise: the right to respect for private life (Article 7 of the EU Charter of Fundamental Rights) and the protection of personal data (Article 8 of the EU Charter of Fundamental Rights), on the one hand, and the right to property (Article 17(2) of the EU Charter of Fundamental Rights), on the other hand.
- 13 According to Article 8(2)(a) of Directive 2004/48, users must accept (only) the transmission of their name and address. The provision of information on IP addresses used by them could affect their right to respect for private life. Furthermore, it should be noted that the provision of information on a (dynamic) IP address, which always also extends to the precise time of access because it is the only way in which it may make it possible for the terminal to be identified, also reveals the precise point in time at which the Internet communication took place, including the time zone, and details of the communication activities, which are protected by Articles 7 and 8 of the EU Charter of Fundamental Rights (see judgment of 8 April 2014, *Digital Rights Ireland und Seitlinger and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 26 and 27). In addition, the provision of information on an IP address may affect the right to private life of uninvolved third parties if the subscriber is not the infringing party.
- 14 In support of the inclusion of IP addresses within the ambit of Article 8(2)(a) of Directive 2004/48 is the argument that the term ‘address’ may, by definition, include any type of address and therefore also an (electronic) IP address. That address, in the same way as a postal address and an email address, facilitates the identification of copyright infringers.
- 15 Also supporting that view is the purpose of Directive 2004/48, which, according to recital 3 thereof, is intended to contribute to the effective enforcement of intellectual property rights. That objective cannot be guaranteed as long as the traditional understanding of the terms ‘names and addresses’ is relied on. The provision of information on ‘names and addresses’ is regularly ineffective because those data are usually neither collected nor verified by platform operators such as the first defendant. The related serious infringement of the right to intellectual property protected by the Charter (Article 17(2) of the EU Charter of Fundamental Rights) may be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be reconciled (see judgment of 18 October 2018, *Bastei Lübbe*, C-149/17, EU:C:2018:841, paragraph 46). In that context, releasing an IP address together with an email address and possibly also a telephone number could represent an appropriate means to identify the

infringer and thereby contribute to the effective enforcement of intellectual property rights for the purposes of Directive 2004/48.

- 16 Should the answer to Question 1(c) be in the affirmative, the further question then arises as to whether information may also be requested on the IP address last used by the user — irrespective of any related infringing act — to access his or her Google/YouTube user account (Question 2).
- 17 In support of an affirmative answer is the argument that, since a dynamic IP address constantly changes, the respective latest IP address should come within the scope of the information to be provided because it is the only one that actually constitutes the ‘address’ of the service user for the purposes of Article 8(2)(a) of Directive 2004/48.
- 18 It would not be possible to extend the right of information to the latest IP address irrespective of any related infringing act if Article 8(2)(a) of Directive 2004/48 were to require a connection to an infringement. The IP address last employed to use a Google/YouTube user account is not necessarily linked to the infringing use at issue. The need to have such a link could, however, arise from the fact that the defendants can be sued under Article 8(1)(c) of Directive 2004/48 only because they provided a service used for infringing activities and the information to be provided under Article 8(2)(a) and (b) of Directive 2004/48 applies precisely to such infringing services.