

Case C-442/19**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:**

12 June 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

7 June 2019

Appellant:

Stichting Brein

Respondent:

News-Service Europe BV

Subject matter of the main proceedings

Appeal in cassation on the liability of News-Service Europe BV ('NSE'), a former Usenet services provider, for the distribution via Usenet of protected works without the consent of the rightholders, whose interests Stichting Brein represents.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of the concept of communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC in the context of a platform on which users can find and download protected works through an overview of newsgroups and/or a unique Message-ID, and the relationship between Article 3(1) of Directive 2001/29/EC and Article 14(1) of Directive 2000/31/EC. Article 267 TFEU.

Questions referred for a preliminary ruling

1. Has an operator of a platform for Usenet services (as NSE has been), under the circumstances as described in [points 1 to 7] and [16 hereof], made a communication to the public within the meaning of 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 (OJ 2001 L 167, p.10; ‘the Copyright Directive’)?

2. If the answer to question 1 is in the affirmative (and there is thus a communication to the public):

Does the finding that the operator of a platform for Usenet services has made a communication to the public within the meaning of Article 3(1) of the Copyright Directive preclude the application of Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p.1; ‘Directive on electronic commerce’)?

3. If the answer to question 1 or 2 is in the negative (and recourse to the exemption under Article 14(1) of the Directive on electronic commerce is therefore possible in principle):

Has the operator of a platform for Usenet services, who provides services as described in [points 1 to 7] and [16 hereof], played an active role that would in some other way preclude reliance on Article 14(1) of the Directive on electronic commerce?

4. Can the operator of a platform for Usenet services who has made a communication to the public and who is entitled to rely on Article 14(1) of the Directive on electronic commerce be prohibited from continuing the infringement, or can an injunction be imposed on it that goes beyond what is stated in Article 14(3) of the Directive on electronic commerce, or is that contrary to Article 15(1) of the Directive on electronic commerce?

Provisions of European Union law cited

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: recital 27; Article 3(1) and (2)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce): Article 14(1) and (3); Article 15(1)

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC: Article 17(1) and (3)

European Union case-law cited

Judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764

Judgment of 23 March 2010, *Google France and Google*, Joined Cases C-236/08 to C-238/08, EU:C:2010:159

Judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474

Judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379

Judgment of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300

Judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456

Judgment of 7 August 2018, *SNB-REACT*, C-521/17, EU:C:2018:639

Provisions of national law cited

Burgerlijk Wetboek (Netherlands Civil Code, 'BW'): Article 6:196c(1), (4) and (5)

Brief summary of the facts and the procedure in the main proceedings

- 1 According to its statutes, Stichting Brein has the objective of combating the unlawful exploitation of information carriers and information and of promoting the interests of the rightholders of that information and of its legitimate operators.
- 2 NSE was an operator of a platform for Usenet services. After the judgment of the Rechtbank Amsterdam (Amsterdam District Court) in the present proceedings, NSE ceased its operations as a Usenet provider.
- 3 Usenet has been in existence since 1979 and is part of the internet. It is a worldwide platform for exchanging messages. Usenet consists of a series of discussion groups (newsgroups), which are hierarchically classified by topic. Usenet users can also create new newsgroups themselves. They can place (upload or post) messages in a newsgroup to be determined by them. The header of the posted message is included in the overview of the newsgroup and on that basis other users can find the message in the newsgroup. The messages also have a unique Message-ID that is automatically generated when a user posts the message. The messages can also be found on the basis of that Message-ID. Usenet users can thus retrieve messages by selecting a message in the overview of the newsgroup,

or directly by using the unique Message-ID. If they wish, they can download the messages they have found.

- 4 Usenet is supported by a large number of providers. If a message is posted by a user of a particular Usenet provider, it is exchanged on a one-off basis with all other Usenet providers. That process is called synchronisation or peering. The Usenet providers store the messages they receive from their own users on their servers, as well as the messages that they receive from other Usenet providers through synchronisation. The oldest messages are automatically removed to make room for new messages. The period for which messages remain stored is called the retention time. In May 2011, the retention time at NSE was 400 days. As a result of synchronisation or peering, the supply of articles from all Usenet providers is basically the same. Any differences are caused by variations in retention time (and possibly by malfunctions or by removal due to a so-called notice and takedown procedure; hereinafter: ‘NTD procedure’).
- 5 Usenet is used, among other things, for distributing messages containing images, sound or software. To that end, a binary file (which contains, for example, a feature film, music track or game) is split up on the user’s computer by means of software and encoded in a large number of alphanumeric messages, which are then placed on Usenet. The messages that are created through the coding and splitting of a binary file are called binaries. Those binaries can be collected by other users and can then, using software, be reassembled and decoded to obtain the original binary file. The required software is available on the internet free of charge. That software is not developed, offered or supplied by NSE. There are various search engines and software applications that enable a user (by means of the Message-IDs) to find the music or feature film of his choice on Usenet.
- 6 Customers of NSE were, for example, internet service providers who included access to Usenet in their package of internet services for consumers. The customer could also be a so-called reseller, who sold subscriptions to consumers that gave direct access to the NSE servers. In both cases, the consumer was enabled to download content from the NSE servers. NSE did not do business directly with consumers.
- 7 NSE introduced an NTD procedure at some point after 6 April 2009. At some point before 24 May 2011, NSE also introduced a so-called Fast Track Procedure. That procedure gives certain parties the right to remove unlawful articles from NSE’s servers directly (without NSE’s intervention).
- 8 In the present proceedings, Stichting Brein is seeking, in short (i) rulings that NSE is infringing the copyrights and related rights of the rightholders whose interests Stichting Brein represents; (ii) a ruling that NSE is liable for the damage suffered as a result of the infringing acts; and (iii) a cease and desist order limited to binaries. Stichting Brein has based its claims on the fact that NSE itself is infringing the copyright and related rights of its affiliated rightholders and is also acting unlawfully by maintaining a download system for commercial gain

whereby large amounts of protected content are stored and distributed without the necessary consent having been obtained.

- 9 The Amsterdam District Court gave the rulings referred to in point 8(i) above and issued the injunction referred to under point 8(iii). The District Court dismissed the claim for a ruling referred to in point 8(ii) above, on the ground that it was insufficiently substantiated.
- 10 The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) set aside the judgment of the District Court and ordered NSE to introduce an NTD procedure in the event of the resumption of its operations as a Usenet provider. The grounds for its ruling were as follows.
- 11 By making articles available to users from its servers, NSE is performing an intervention that results in a new public being reached. With regard to the transmission of messages posted by its own users to other Usenet providers, NSE is entitled to invoke Article 6:196c(1) BW ('mere conduit'). With regard to the storage of articles on its servers during the retention time, NSE is entitled to invoke the exclusion of liability as referred to in Article 6:196c(4) BW (hosting). The Court of Appeal proceeds on the assumption that the NSE services are of a mere technical, automatic and passive nature. The exclusion of liability under Article 6:196c BW also means that anyone who is entitled to invoke that Article is not liable as a perpetrator of an unlawful act on the ground that he is independently infringing the rights of others merely because he facilitates the infringements committed by third parties. The Court of Appeal therefore sees no grounds for giving the rulings sought by Stichting Brein. After all, underlying them would be the assumption that NSE is jointly liable as an infringer.

Any order to be imposed cannot, according to the Court of Appeal, be based on the liability of NSE as perpetrator of an unlawful act. That does not alter the fact that, in view of Article 6:196c(5) BW, an order or injunction may be issued. However, the injunction issued by the District Court is not in line with the role of NSE as the service provider by means of which the infringement was committed, a situation that is more complex than the role of the infringer and lends itself to other kinds of injunctions (judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474). That injunction implies a general obligation on the part of NSE to monitor the information which it transmits and stores, which is contrary to Article 15 of Directive 2000/31. An appropriate measure is an order to introduce an NTD procedure.

Main submissions of the parties to the main proceedings

- 12 According to Stichting Brein, NSE has infringed the exclusive right of authors whose interests it represents by communicating their works to the public within the meaning of Article 3(1) of Directive 2001/29. Stichting Brein argues in cassation that the Court of Appeal has failed to recognise that NSE played an active role with regard to the messages it stored, in the sense that it had knowledge

of or control over the data stored by it. It points out in that regard that the opinion of the Court of Appeal that NSE's services are of a mere technical, automatic and passive nature is incorrect or is insufficiently (comprehensibly) reasoned in the light of its opinion that NSE performed an intervention which led to a new public being reached.

- 13 Stichting Brein also argues that the Court of Appeal has failed to recognise that there is an infringement if a service provider, such as NSE, makes a communication to the public (as the Court of Appeal has assumed) and that recourse to Article 6:196c BW does not then preclude the giving of the rulings sought and an injunction.
- 14 NSE submits that, by means of its platform for Usenet services, it merely provided physical facilities for enabling a communication to the public, as referred to in recital 27 of Directive 2001/29, and that it therefore did not itself make a communication to the public. In its view, that is also apparent from the finding of the Court of Appeal that its services are of a mere technical, automatic and passive nature. It complains that the judgment of the Court of Appeal that it made a communication to the public is incorrect or has been incomprehensibly reasoned.
- 15 NSE maintains that under Article 6:196c(4) BW (whereby Article 14 of Directive 2000/31 was transposed into Dutch law), it is exempt from any liability.

Brief summary of the reasons for the referral

- 16 It is common ground that, through NSE as intermediary, protected works were made available to the public without the consent of the rightholders because at least some of the binaries contain infringing material. At issue is the question whether NSE has made a communication to the public within the meaning of Article 3(1) of Directive 2001/29, in particular by providing a platform through which users of Usenet are able to locate and download protected works by means of an overview of newsgroups and/or a unique Message-ID. In addition, it must be assessed whether NSE's actions preclude the applicability of Article 14(1) of Directive 2000/31, and therefore of Article 6:196c(4) BW.
- 17 Directive 2001/29 does not specify what should be understood by 'communication to the public'. That is an autonomous concept of EU law which, according to recital 23 of the Directive, should be understood in a broad sense. However, the (mere) provision of physical facilities for enabling or making a communication does not amount to communication within the meaning of Directive 2001/29 (recital 27). According to the Court of Justice, there is no question of mere provision of physical facilities for enabling or making a communication to the public in the case of the sale of multimedia players on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available without the consent of the rightholders. There is a communication to the public in that case (judgment of 26 April 2017, *Stichting*

Brein, C-527/15, EU:C:2017:300). Similarly, the operators of the online file-sharing platform, The Pirate Bay, cannot be considered to be responsible merely for the ‘provision’ of physical facilities for enabling or making a communication. That platform actually indexes torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by its users. The operators of The Pirate Bay are making a communication to the public since, by means of indexation of metadata referring to protected works and the provision of a search engine, they allow users of that platform to locate and to share those works (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456).

- 18 The Court has consistently held that the exemption from liability laid down in Article 14(1) of Directive 2000/31 applies only to cases where the activity of the information society service provider is of a mere technical, automatic and passive nature, which implies that that provider has neither knowledge of nor control over the information stored by the recipient of its services. By contrast, the exemption does not apply if an information society provider has played an active role.
- 19 Directive 2019/790 contains a new regime for communication to the public in the case of online services for sharing copyright-protected works or other protected subject matter and for the conditions under which a provider of such a service is liable for cases of unauthorised communication to the public (Article 17). However, it is not clear whether and to what extent that regime constitutes new law and how it should be assessed under the law that applied before that regime came into force.
- 20 The Hoge Raad (Supreme Court of the Netherlands) is of the opinion that there is some doubt about the answer to the question whether NSE has made a communication to the public. On the one hand, the Court of Appeal has ruled that the NSE services are of a mere technical, automatic and passive nature. To that extent, it cannot be ruled out that NSE must be considered to have merely provided facilities as referred to in recital 27 of Directive 2001/29. On the other hand, through NSE as intermediary, protected works have been made available to the public without the consent of the rightholders. NSE has facilitated the locating of those works and their downloading by the users of the platform by means of an overview of newsgroups and/or a unique Message-ID.
- 21 In view of the broad meaning to be given to the concept of ‘communication to the public’, it cannot be excluded that NSE’s conduct must be regarded as a communication to the public within the meaning of Article 3(1) of Directive 2001/29. Question 1 relates to this.
- 22 In the event of an affirmative answer to question 1, the question arises as to whether the finding that NSE has made a communication to the public within the meaning of Article 3(1) of Directive 2001/29 precludes the application of Article 14(1) of Directive 2000/31. Question 2 relates to this.

- 23 It is possible that Article 14(1) of Directive 2000/31 is intended to limit liability for hosting services, irrespective of whether there is a communication to the public within the meaning of Article 3(1) of Directive 2001/29. It is also possible that, even if it has been established that NSE has made a communication to the public, it must be assumed that NSE has played an active role that precludes recourse to Article 14(1) of Directive 2000/31.
- 24 If Question 1 or Question 2 is answered in the negative, the question arises as to whether, by providing its services, NSE has played an active role which in some other way precludes the application of Article 14(1) of Directive 2000/31. Question 3 relates to this.
- 25 If it is considered that NSE has made a communication to the public and that it is also entitled to rely on the exemption under Article 14(1) of Directive 2000/31, the question arises as to whether a cease and desist order could have been imposed on NSE — as an infringer — or whether some other injunction could have been imposed that goes beyond what is stated in Article 14(3) of Directive 2000/31. Question 4 relates to this.
- 26 In *L'Oréal and Others*, it was considered that an injunction against an infringer entails, logically, preventing that person from continuing the infringement, whilst the situation of the service provider by means of which the infringement is committed is more complex and lends itself to other kinds of injunctions (paragraph 129). Article 14(3) of Directive 2000/31 provides that Article 14 is not to affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement. However, under Article 15 of Directive 2000/31, Member States may not impose a general obligation on service providers, when providing the services covered by Article 14, to monitor the information which they store, nor an obligation actively to seek facts or circumstances indicating illegal activity.