

Case C-682/18

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 November 2018

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

13 September 2018

Applicant:

LF

Defendants:

1. Google LLC
 2. YouTube Inc.
 3. YouTube LLC
 4. Google Germany GmbH
-

Subject matter of the main proceedings

Action for an injunction and damages on grounds of copyright infringement

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Does the operator of an internet video platform on which videos containing content protected by copyright are made publicly accessible by users without

the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC if

- the operator earns advertising revenue by means of the platform,
- the upload process takes place automatically and without material being seen in advance or controlled by the operator,
- in accordance with the conditions of use, the operator receives a worldwide, non-exclusive and royalty-free licence for the videos for the duration for which the videos are posted,
- in the conditions of use and during the upload process, the operator points out that copyright-infringing content may not be posted,
- the operator provides tools with which rightholders can take steps to block infringing videos,
- on the platform, the operator prepares search results in the form of rankings and content categories, and displays to registered users an overview that is oriented towards previously seen videos and that contains recommended videos which can be displayed to registered users,

if the operator is not specifically aware of the availability of copyright-infringing content or, after having become aware, expeditiously deletes that content or expeditiously disables access thereto?

2. If Question 1 is answered in the negative:

Does the activity of the operator of an internet video platform under the conditions described in Question 1 come within the scope of Article 14(1) of Directive 2000/31/EC?

3. If Question 2 is answered in the affirmative:

Must the actual knowledge of the illegal activity or information and the awareness of the facts or circumstances from which the illegal activity or information is apparent relate to specific illegal activities or information pursuant to Article 14(1) of Directive 2000/31/EC?

4. Also if Question 2 is answered in the affirmative:

Is it compatible with Article 8(3) of Directive 2001/29/EC if the rightholder is in a position to obtain an injunction against a service provider whose service consists of the storage of information provided by a recipient of the service, and whose service has been used by a recipient of the service to infringe a copyright or related right, only if such an infringement has taken place again after notification of a clear infringement has been provided?

5. If Questions 1 and 2 are answered in the negative:

Is the operator of an internet video platform under the conditions described in Question 1 to be regarded as an infringer within the meaning of the first sentence of Article 11 and Article 13 of Directive 2004/48/EC?

6. If Question 5 is answered in the affirmative:

Can the obligation of such an infringer to pay damages pursuant to Article 13(1) of Directive 2004/48/EC be made subject to the condition that the infringer acted intentionally with regard both to his own infringing activity and to the infringing activity of the third party, and knew, or ought reasonably to have known, that users use the platform for specific acts of infringement?

Provisions of EU 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, in particular Articles 3 and 8

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'), in particular Articles 14 and 15

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, in particular Articles 11 and 13

Provisions of national law cited

Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights; 'the UrhG'), in particular Paragraphs 97, 99, 101, 102a

Telemediengesetz (Law on telemedia; 'the TMG'), in particular Paragraph 10

Brief summary of the facts and procedure

- 1 The applicant is a music producer and was the co-proprietor of the music publishing company 'Petersongs Musikverlag KG'. He claims that he is the proprietor of 'Nemo Studios'.
- 2 The third defendant operates the internet platform YouTube, on which users upload their own video files free of charge and can make them accessible to other

internet users. The first defendant, Google LLC, is the sole shareholder and legal representative of the third defendant.

- 3 On 20 May 1996, ‘Nemo Studio LF’ and the artist ME entered into a worldwide exclusive artist contract relating to the use of audio and audiovisual recordings of her performances.
- 4 The album ‘A Winter Symphony’ containing musical works interpreted by the artist was released in November 2008. ME began her ‘Symphony Tour’ on 4 November 2008, on which she performed the works included on the album.
- 5 On 6 and 7 November 2008, music pieces from the album ‘A Winter Symphony’ and from private ‘Symphony Tour’ concert recordings, linked to still and moving images, were posted on the internet platform operated by the third defendant. The applicant thereupon requested that Google issue cease-and-desist declarations. On the basis of the screen printouts sent by the applicant, the third defendant manually determined the internet addresses (URLs) of the videos and disabled access.
- 6 On 19 November 2008, sound recordings from the artist’s performances, linked to still and moving images, could once again be retrieved on the third defendant’s internet platform.
- 7 The applicant brought an action for an injunction, disclosure of information, and a declaration of liability for damages against the first and third defendants. He based these claims on his own rights as a producer of the audio recording ‘A Winter Symphony’ and on his own rights and those derived from the artist.
- 8 After the action was partly successful at first and second instance, the applicant pursued his claims by way of his appeal on a point of law.

Brief summary of the basis for the request

- 9 The court dealing with the appeal on the merits assumed that, in relation to specific music tracks, the applicant was able to bring an action against the first and third defendants for an injunction on the basis of Paragraphs 97 and 99 UrhG and for disclosure of information on the basis of Paragraph 101 UrhG. Although, as the hosting service provider, the third defendant benefited from the exemption under Article 14(1) of Directive 2000/31 and Paragraph 10 TMG, it did not play any active role in the posting of the content on the platform and did not adopt that third-party content as its own either. It lacked the intent required in order to be liable as a participant, as it did not have knowledge of specific acts of infringement. However, owing to the infringement of the applicant’s rights over seven specifically designated tracks of the studio album, the third defendant was liable to an injunction as the ‘Störer’, a person under German law who, without being the author of the infringement or complicit in it, contributes to the infringement intentionally. It failed to discharge its obligations as to conduct in

this respect, because it had been notified of specific acts of infringement and did not expeditiously delete or disable access to the content objected to.

- 10 The court dealing with the appeal on the merits also assumed that, as the third defendant was liable only as the ‘Störer’, it was not obliged to pay damages, meaning that the claim for disclosure of information regarding the extent of the acts of infringement and the sales generated thereby was unfounded. By contrast, the first and third defendants had to specify the names and addresses and, if no postal addresses were available, the email address — but not the IP addresses and bank details — of the users who had uploaded music tracks to the platform under a pseudonym.
- 11 The success of the applicant’s appeal on a point of law depends on whether, under the circumstances established in the case in dispute, the third defendant’s conduct constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29 (in this regard, see **Question 1 referred**). If this is answered in the negative, the question then arises as to whether the activity of the third defendant comes within the scope of Article 14(1) of Directive 2000/31 (in this regard, see **Question 2 referred**). If this question is to be answered in the affirmative, the question then arises as to whether the actual knowledge of the unlawful activity or information and the awareness of the facts or circumstances from which the unlawful activity or information is apparent must relate to specific unlawful activities or information pursuant to Article 14(1) of Directive 2000/31 (in this regard, see **Question 3 referred**). The question then also arises as to whether it is compatible with Article 8(3) of Directive 2001/29 if the rightholder is in a position to obtain an injunction against a service provider whose service consists in storing information provided by a recipient of the service, and has been used by a recipient of the service to infringe copyright or a related right, only if such an infringement has taken place again after notification of a clear infringement has been provided (in this regard, see **Question 4 referred**).
- 12 If the conduct of the third defendant neither constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29 nor comes within the scope of Article 14(1) of Directive 2000/31, the question then arises as to whether the third defendant must nevertheless be regarded as an infringer within the meaning of the first sentence of Article 11 and Article 13 of Directive 2004/48 (in this regard, see **Question 5 referred**). If this question is to be answered in the affirmative, the question then arises as to whether the obligation of such an infringer to pay damages pursuant to Article 13(1) of Directive 2004/48 can be made subject to the condition that the infringer must have acted intentionally with regard both to his own infringing activity and to the infringing activity of the third party, and knew, or ought reasonably to have known, that users use the platform for specific acts of infringement (in this regard, see **Question 6 referred**).

Question 1 referred

- 13 As the rights of communication to the public in the form of making subject matter available to the public that were asserted by the applicant constitute a harmonised right pursuant to Article 3(1) and (2)(a) and (b) of Directive 2001/29, the corresponding provisions of the German UrhG must be interpreted in accordance with the directive.
- 14 The concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 requires an individual assessment, in the context of which it is necessary to take into account several complementary criteria. Amongst those criteria, the Court of Justice has emphasised the indispensable role played by the user and the deliberate nature of his intervention (see, most recently, judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraphs 23 to 26).
- 15 It is doubtful whether, under the circumstances established in the case in dispute, the activity of the third defendant constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29. The present Chamber takes the view that this may be assumed, at best, in relation to the seven tracks from the album ‘A Winter Symphony’, in respect of which, according to the findings of the court dealing with the appeal on the merits, the third defendant knew that they had been provided illegally and either did not delete or disable access to them or did not do so in good time.
- 16 Regarding the criterion of the indispensable role played by the user and the deliberate nature of his intervention, an act of communication requires that the user intervenes in full knowledge of the consequences of his conduct — that is to say, in a deliberate and targeted manner — to provide third parties with access to a protected work or to a protected service. In this respect, it is sufficient if third parties have access to a protected work or to a protected service irrespective of whether they avail themselves of that opportunity (cf. judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 31).
- 17 The application of the criteria laid down by the Court of Justice militates against the assumption of an indispensable role on the part of the third defendant if it does not have knowledge of the posting of copyright-infringing content. It is true that the assumption of an indispensable role does not preclude the possibility that the third defendant does not post content on its platform itself, but rather enables third parties, through the provision of the video portal, to make content that may include copyright infringing content available to users of the portal (cf. judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 36). The third defendant’s intervention also involves a commercial interest, because it earns advertising revenue via the operation of the portal. However, the assumption of an indispensable role requires full knowledge of the consequences of the conduct, and that knowledge must also relate to the absence of consent of the copyright holder (cf. judgment of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 41). On account of the fact that the posting of the videos takes place

automatically, the third defendant did not have any knowledge of the availability of copyright-infringing content up to the point at which it was notified by the copyright holder. In its conditions of use and during the upload process, it informs users that the posting of copyright-infringing content is not permitted. It also provides tools with which copyright holders can take action against the availability of copyright-infringing content. The present Chamber takes the view that the assumption of an indispensable role is therefore conceivable, at best, if, after becoming aware of the availability of copyright-infringing content, the third defendant did not expeditiously delete it or did not expeditiously disable access to it.

Question 2 referred

- 18 It is true that, as a hosting service, offering an internet platform for storing information provided by third parties does in principle come within the scope of Article 14(1) of Directive 2000/31 (cf. judgment of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, paragraph 27). However, the liability exemption under Article 14(1) of Directive 2000/31 is not applicable to a hosting service provider where the hosting service provider, instead of confining itself to providing the hosting service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data (cf., in this regard, judgment of 12 July 2011, *L'Oréal*, C-324/09, EU:C:2011:474, paragraphs 112 to 116).
- 19 Although, according to the findings of the court dealing with the appeal on the merits, the third defendant did not associate the copyright-infringing videos with advertising in the case in dispute, the question that arises — and requires clarification from the perspective of EU law — is whether the defendant played an active role that precludes the application of Article 14(1) of Directive 2000/31 under the other circumstances of the case in dispute (see, in this regard, Question 1 referred).

Question 3 referred

- 20 The present Chamber takes the view that this question should be answered in the affirmative. It is not sufficient if the provider is generally aware or knows that its services are used for illegal activities of any nature. This is evident just from the wording of the provision and from the use of the definite article to refer to the unlawful activity or information. Moreover, this follows from the fact that it is only in relation to specific information that the provider can fulfil its obligation to remove or to disable access to the unlawful information as soon as he has obtained such knowledge or awareness (Article 14(1)(b) of Directive 2000/31). A notification regarding copyright infringement must therefore be specific enough for the recipient to be able to identify the copyright infringement without difficulty and without conducting a detailed legal or factual examination. If a legal position protected by copyright law is being asserted, it is therefore necessary to

identify the works protected or the service protected and to describe the form of infringement objected to, and to provide sufficiently clear evidence of the entitlement under copyright law of the parties concerned.

Question 4 referred

- 21 Pursuant to Article 8(3) of Directive 2001/29, Member States are required to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.
- 22 According to the case-law of the Bundesgerichtshof (Federal Court of Justice), a person who — without being a perpetrator or participant — deliberately contributes to the infringement of the protected legal interest in any way may have an action brought against him as a ‘Störer’. This liability requires the infringement of duties as to conduct, the scope of which is determined by what can reasonably be expected in each individual case. According to the case-law of the Bundesgerichtshof, if the ‘Störer’ is a service provider whose service consists in storing information provided by a user, in principle he can be obliged to refrain by way of an injunction only if such an infringement has taken place again after notification of a clear infringement has been provided.
- 23 The present Chamber takes the view that Question 4 referred should be answered in the affirmative. Pursuant to Article 15(1) of Directive 2000/31, it is not possible to impose on a service provider whose service consists of the storage of information provided by a recipient of the service a general obligation to monitor the information which it stores, or a general obligation actively to seek facts or circumstances indicating unlawful activity. Moreover, pursuant to Article 14(1) of Directive 2000/31, such a service provider is not liable for the information stored at the request of a recipient of the service, on condition that (a) the provider does not have actual knowledge of unlawful activity or information and, as regards claims for damages, is also not aware of facts or circumstances from which the unlawful activity or information is apparent, or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. According to this, the operator of an internet platform for storing information provided by third parties that does not have actual knowledge of unlawful activity or information is not liable for an injunction either.

Question 5 referred

- 24 Directive 2004/48, which, pursuant to Article 2(1), is applicable to any infringement of intellectual property rights as provided for by EU law or by the national law of the Member State concerned, applies without prejudice to Articles 2 to 6 and Article 8 of Directive 2001/29 (Article 2(2) of Directive 2004/48) and does not affect Articles 12 to 15 of Directive 2000/31 (Article 2(3) of Directive 2004/48). It draws a distinction between the infringer and intermediaries whose services are used by a third party to infringe an intellectual

property right (cf. Articles 11 and 13 of the directive). If their services are used by a third party to infringe an intellectual property right or related right, such intermediaries are also referred to as intermediaries in Article 8(3) of Directive 2001/29 and, if their services consist of the storage of information provided by a recipient of the service, they are referred to as service providers in Article 14(3) of Directive 2001/31.

- 25 If the conduct of the third defendant constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29, the third defendant is to be regarded as an infringer within the meaning of Directive 2004/48, against which an action for an injunction (the first sentence of Article 11 of Directive 2004/48/EC; Paragraph 97(1) UrhG), the payment of damages (Article 13(1) of Directive 2004/48; Paragraph 97(2) UrhG) and the recovery of profits (Article 13(2) of Directive 2004/48; Paragraph 102a UrhG) can be brought. If the conduct of the third defendant comes within the scope of Article 14(1) of Directive 2000/31, the third defendant is to be regarded as an intermediary within the meaning of Directive 2004/48 the liability of which is excluded if the requirements of (a) and (b) of that provision have been met and which, failing that, is liable as an infringer.
- 26 It is questionable whether the third defendant is also to be regarded as an infringer within the meaning of Directive 2004/48 — which can be liable not only for an injunction, but also for the payment of damages and the recovery of profits — if its conduct neither constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29 nor comes within the scope of Article 14 of Directive 2000/31. The present Chamber takes the view that this question should be answered in the affirmative because, pursuant to Directive 2004/48, a person who participates in an act of infringement must be either an intermediary or an infringer, and can therefore be an infringer only if his participation is not confined to the provision of services that are used by a third party to infringe an intellectual property right. According to this, the recipient of a service who plays an indispensable role in the act of communication to the public and who intervenes in full knowledge of the consequences of his conduct — that is to say, in a deliberate and targeted manner — to provide third parties with access to a protected work or to a protected service is an infringer; the present Chamber takes the view that the service provider who does not confine himself to a neutral role in the act of communication to the public by users of his platform, but rather plays an active role in that act is in fact also an infringer.

Question 6 referred

- 27 Pursuant to the first sentence of Article 13(1) of Directive 2004/48, Member States are required to ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages commensurate with the actual prejudice suffered by him as a result of the infringement.

- 28 Pursuant to the first sentence of Paragraph 97(2) UrhG, a person who unlawfully infringes copyright or another right protected under the UrhG is obliged to pay the aggrieved party damages for the resulting loss if he commits the act intentionally or negligently. According to the case-law of the Bundesgerichtshof, the question of whether someone is liable for a criminal offence such as the infringement of a property right as a perpetrator or participant under civil law must in principle be assessed in accordance with the legal principles developed in criminal law. For the third defendant, who is to be regarded as an infringer within the meaning of the first sentence of Article 11 and Article 13 of Directive 2004/48 because it played an active role in the infringement of rights of the applicant by the users of its platform, liability as an accessory comes into consideration according to these principles. An accessory is someone who has intentionally provided someone else with assistance with their intentionally committed unlawful act.
- 29 The question then arises as to whether the obligation of such an infringer to pay damages pursuant to the first sentence of Article 13(1) of Directive 2004/48 can be made subject to the condition that the infringer acted intentionally with regard both to his own infringing activity and to the infringing activity of the third party.
- 30 It is possible that, in such situations also, it must be sufficient for a claim for damages pursuant to the first sentence of Article 13(1) of Directive 2004/48 if the infringer reasonably ought to have known that he was committing an act of infringement. Liability for damages on the part of the accessory would then come into consideration as soon as there is negligence. The liability of a service provider that plays an active role would therefore be stricter than that of a service provider that plays a neutral role and therefore comes within the scope of Article 14 of Directive 2000/31; pursuant to Article 14(1)(a) of Directive 2000/31, the liability of the latter requires actual knowledge of the unlawful activity or information.
- 31 The further question then also arises as to what requirements are to be imposed on the intent or — if it is sufficient — the negligence of the infringer in relation to the third party's act of infringement. According to the case-law of the Bundesgerichtshof, in relation to the main act of the third party the participant must have at least conditional intent, which must include awareness of the illegality. Thus, the intent and the awareness of the illegality must relate to a specific main act. For the assumption of liability for damages as a participant on the part of the operator of an internet platform, it is therefore not sufficient that the operator knew that users use the platform to infringe intellectual property rights if that knowledge does not relate to specific acts of infringement.
- 32 In the judgments of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 50) and of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 45), the Court of Justice found that it was sufficient that the respective defendants knowingly carried out a high-risk act and generally expected unlawful uses. If, for a claim for damages against a service provider that plays an active role, it were sufficient that it only generally knew or reasonable ought to have

known that rights were being infringed on the platform, its liability would also be stricter in this respect than that of a service provider that plays a neutral role and therefore comes within the scope of Article 14 of Directive 2000/31.

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