Case C-683/18

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:

20 September 2018

Applicant:

Elsevier Inc.

Defendant:

Cyando AG

Subject matter of the main proceedings

Action for an injunction and damages owing to copyright infringement

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. (a) Does the operator of a shared hosting service via which files 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 upload process takes place automatically and without being seen in advance or controlled by the operator,

– in the conditions of use, the operator indicates that copyright-infringing content may not be posted,

– it earns revenue through the operation of the service,

– the service is used for lawful applications, but the operator is aware that a considerable amount of copyright-infringing content (over 9 500 works) is also available,

– the operator does not offer a directory of the content or a search function, but the unlimited download links provided by it are posted by third parties on the internet in link collections that contain information regarding the content of the files and make it possible to search for specific content,

– via the structure of the remuneration for downloads that are paid by it in accordance with demand, it creates an incentive to upload content protected by copyright that users could otherwise only obtain for a charge

and

– by providing the possibility to upload files anonymously, the probability of users not being held accountable for copyright infringements is increased?

(b) Does this assessment change if copyright-infringing offerings are provided by the shared hosting service and account for 90% to 96% of the overall use?

2. If Question 1 referred is answered in the negative:

Does the activity of the operator of a shared hosting service under the conditions described in Question 1 come within the scope of Article 14(1) of Directive 2000/31/EC?

3. If Question 2 referred is answered in the affirmative:

Must 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 relate to specific unlawful 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 copyright or related rights, 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 a shared hosting service 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 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?

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 and 102a

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

Brief summary of the facts and procedure

1 The applicant is an international specialist publishing company and holder of the exclusive rights of use to works.

2 The defendant operates the shared hosting service ‘uploaded’, which can be accessed via the websites uploaded.net, uploaded.to and ul.to. This service offers everyone free storage space for uploading files that can contain any content. For each uploaded file, the defendant automatically creates a download link to the file storage space and automatically shares the link with the user. The defendant offers neither a directory of the content nor a content search function for the files stored with it. However, users can place the download links on the internet in so-called link collections. These are offered by third parties and contain information regarding the content of the files stored on the defendant’s service. In this way, other users can access files stored on the defendant’s servers.

3 To a certain extent, files can be downloaded from the defendant’s platform free of charge. Paying users receive a larger download quota with higher download speeds. The defendant pays download remuneration to the users who upload files. The defendant pays its users up to EUR 40 for 1 000 downloads.

4 The defendant’s service is used both for lawful applications and for those that infringe the copyrights of third parties. The defendant has already received a large number of notifications in the past regarding the availability of copyright-infringing content from service companies acting on behalf of rightholders. It has been notified of over 9 500 works, to which copyright-infringing links had been posted on approximately 800 websites known to it (link collections, blogs, forums), the number of which is constantly growing. According to the defendant’s terms and conditions, users are prohibited from committing copyright infringements via the defendant’s platform.

5 The applicant considers its rights of use over specific works to have been infringed. By its action, it has brought proceedings for an injunction, disclosure of information, and a declaration of liability for damages against the defendant, primarily as the perpetrator, and, in the alternative, as a participant and, further in the alternative, as a ‘Störer’ of a copyright infringement, being a person under German law who, without being the author of the infringement or complicit in it, contributes to the infringement intentionally.

6 On the basis of the request in the alternative, the court dealing with the appeal on the merits imposed an injunction on the defendant, as a ‘Störer’ with regard to three works, and dismissed the action as to the remainder. The applicant has pursued its claims by way of its appeal on a point of law.

Brief summary of the basis for the request

7 As in the case of the main proceedings in the parallel request for a preliminary ruling in Case C-682/18, 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 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 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 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 a copyright or 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**).

8 If the conduct of the 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 the arises as to whether the 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 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

9 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.

10 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).

11 It is doubtful whether, under the circumstances established in the case here in dispute, the activity of the defendant constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29.

12 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).

13 The application of the criteria laid down by the Court of Justice militates in favour of the assumption of an indispensable role on the part of the defendant. The assumption of an indispensable role does not preclude the possibility that the defendant does not post content on its platform itself, but rather enables third parties, through the provision of the shared hosting service, to make content that may include copyright-infringing content available to users of the service (cf. judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 36). The defendant's intervention also involves a commercial interest, because it earns revenue through the operation of the service. The assumption of an indispensable role also requires full knowledge of the consequences of the conduct, and that knowledge must also relate to the lack of the consent of the copyright holder (cf. judgment of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 41). It is true that, as the files provided in its service are uploaded by third parties, the 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 terms of service, it also informs users that the posting of copyright-infringing content is not permitted. However, the defendant is aware that a significant quantity of copyright-infringing content is available in its service. At the same time, the defendant significantly increases the risk of copyright-infringing use as a result of the structure of its remuneration system, the provision of unlimited download links and the possibility to use its service anonymously.

Question 2 referred

14 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 host service provider in the case where the 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).

15 The question that arises — and requires clarification from the perspective of EU law — is whether the defendant played an active role which precludes the

application of Article 14(1) of Directive 2000/31 under the circumstances of the case in dispute (see, in this regard, Question 1 referred).

Question 3 referred

16 The present Chamber of the Bundesgerichtshof (Federal Court of Justice) takes the view that Question 3 referred should be answered in the affirmative. It is not sufficient if the provider is generally aware or knows that its services are used for unlawful activities. This is evident just from the wording of the provision and 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 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

17 Under 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.

18 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 presupposes 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.

19 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, nor a general obligation actively to seek facts or circumstances indicating illegal 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 to an injunction either.

Question 5 referred

20 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 makes 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 rights, 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 Articles 14(3) of Directive 2001/31.

21 If the conduct of the defendant constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29, the 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; 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 defendant comes within the scope of Article 14(1) of Directive 2000/31, the 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.

22 It is questionable whether the defendant is also to be regarded as an infringer within the meaning of Directive 2004/48 — who 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 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 who rather plays an active role in that act, is in fact also an infringer.

Question 6 referred

23 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.

24 Pursuant to the first sentence of Paragraph 97(2) UrhG, a person who unlawfully infringes copyright or other 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 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 in their intentionally committed unlawful act.

25 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.

26 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 which 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 illegal activity or information.

27 The 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.

28 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 which 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 which plays a neutral role and therefore comes within the scope of Article 14 of Directive 2000/31.