



Local division Mannheim
UPC_CFI_471/2023

order
of the Court of First Instance of the Unified Patent Court, issued
on: 20/10/2024
concerning EP 2 479 680
concerning
App_46521/2024
(Request for information regarding content delivery networks)

PLAINTIFFS/APPLICANTS

- 1) **DISH Technologies L.L.C.** represented by Denise Benz
- 9601 South Meridian Boulevard - 80112
- Englewood - US

- 2) **Sling TV L.L.C.** represented by Denise Benz
- 9601 South Meridian Boulevard - 80112
- Englewood - US

DEFENDANTS/RESPONDENTS

- 1) **AYLO PREMIUM LTD** represented by Tilman Müller-Stoy
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zo-ne - 2540 - Nicosia - CY

- 3) **AYLO FREESITES LTD** represented by Conor McLaughlin/
Tilman Müller-Stoy
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zo-ne - 2540 - Nicosia - CY

- 5) **BROCKWELL GROUP LLC** represented by Tilman
Müller-Stoy
- 19046 Bruce B. Downs Blvd #1134 - 33647 -
Tampa - US

- 6) **BRIDGEMAZE GROUP LLC** represented by Tilman
 - 12378 SW 82 AVENUE - 33156 - Miami - US Müller-Stoy

OTHER DEFENDANTS INVOLVED:

- 2) **AYLO Billing Limited** represented by Tilman Müller-Stoy
 - The Black Church, St Mary's Place, Dublin 7 -
 D07 P4AX - Dublin - IE
- 4) **AYLO BILLING US CORP.** represented by Tilman Müller-Stoy
 - 21800 Oxnard Ste 150 - 91367 - 7909 -
 Woodland Hills - US

PATENT IN DISPUTE:

European Patent No. EP 2 479 680

SPRING BODY:

Mannheim local division JUDGES:

This order was issued by judge-rapporteur Böttcher. LANGUAGE OF THE PROCEEDINGS:

German

SUBJECT: Application for an order to provide information pursuant to R. 191 RoP

PROPERTY:

Pursuant to R. 191 RoP, the plaintiffs request that the defendants 1, 3, 5 and 6 be ordered to provide information as to which content delivery networks (CDNs) they use in the context of the delivery of the video files by certain streaming services or have used from 28 August 2019 (date of publication of the patent in suit) until today.2019 (date of publication of the grant of the patent in suit) until today, where the servers of the respective CDNs are located or have been located in the aforementioned period and whether the video files on the servers of the CDNs whose services they use or have used in the aforementioned period are divided into several files and how these files are encoded.

The plaintiffs are suing the defendants in the underlying main proceedings for alleged contributory patent infringement with respect to the territory of the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Finland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese

and the Kingdom of Sweden. The defendants have brought actions for annulment.

According to the statement of claim, defendants 1, 3, 5 and 6 (these only together with defendants 1 and 5) operate streaming services, which are named in detail (not conclusively) for the respective defendants in the statement of claim as challenged forms of implementation (see statement of claim, p. 28 para. 1, p. 12 under paras. 2 and 4), while defendants 2 and 4 provide payment processing services for this purpose. The applications for the transmission of information relate to the video files that can be accessed via these streaming services.

In the statement of claim, the plaintiffs described the alleged patent infringement by way of example using the streaming service www.brazzers.com of defendant 1 and the streaming service www.pornhub.com of defendant 3, each accessed via the Microsoft Edge browser, each with a video accessed there in the dynamic playback quality setting "auto" (for automatic) using the analysis tool Charles Web Debugging Proxy (hereinafter Charles Proxy) and the publicly accessible source code of the media player used under the Microsoft Edge browser with the help of the Microsoft Edge DevTool (statement of grounds, pp. 35 et seq. and 76 et seq.) and generally asserted that the statements apply accordingly to all other challenged embodiments (statement of grounds, p. 34). Charles Proxy is an HTTP web-testing proxy server application that enables the user to view all HTTP and SSL/HTTPS traffic between his computer and the Internet, in particular requests and responses, including HTTP headers and metadata (e.g. cookies, caching and encoding information), while throttling the bandwidth available to the end user station for streaming. The information obtained in this way according to their submission was submitted by the plaintiffs for the first-mentioned streaming service as Annexes K6 (Charles proxy recordings), K7 (source code) and for the second-mentioned streaming service as Annexes K8 (Charles proxy recordings), K9 (source code) to the statement of claim.

In their statement of defence, the defendants have denied that the streaming services www.brazzers.com and www.pornhub.com infringe the patent. To this end, they interpret the patent in suit differently in some cases and submit some deviating statements on the technical functioning of the two streaming services, whereby they attribute a different content to the Charles Proxy recordings and source codes submitted than the plaintiffs. Contrary to the requirements of the patent in suit, the videos available via the aforementioned websites are neither encoded with a specific bit rate nor stored as several files (streamlets) on a set of servers as in a mere data cabinet. With regard to the other streaming services named in the statement of claim as challenged embodiments, they criticise the complete lack of a conclusive or at least substantiated submission on the use of the teaching of the patent in suit. Since, according to the statement of claim, the two streaming services discussed in the statement of claim are already designed differently, the blanket reference that the others function accordingly is meaningless. Furthermore, they criticise the lack of a statement of claim regarding a domestic connection of the websites of the challenged streaming services and the locations of the servers used within the meaning of the patent in suit and deny that such servers, for example of the streaming service www.brazzers.com, are located within the territory of the UPC Agreement member states listed in the application.

In their replies to the individual defences, the plaintiffs expand on their infringement allegations regarding the two streaming services described as examples in the statement of claim,

for which the end user can no longer select the playback quality setting "auto". In addition, they submit comparisons of the source code of the media players of other (but not all) of the streaming services of defendants 1 and 5 (Exhibits K19a to 19e) and defendant 3 (Exhibits K20a to K20c) listed in the statement of claim under the Microsoft Edge browser. They believe that the defendants' video files are not (only) accessed directly from the defendants' original servers, but from servers of a content delivery network (CDN) on which the video copies are encoded in individual segments, as the defendants consider necessary in the context of their patent interpretation. In any event, the video files held on the CDN servers are encoded in accordance with the patent. A CDN is a service provided by a service provider that caches the pages of a website on servers distributed geographically over strategically favourable locations in order to enable faster provision of websites to avoid latency. For this reason, origin servers are usually used in conjunction with CDN services. Only when a requested content is not cached in the CDN is it retrieved from the origin server and then cached in the CDN cache for future requests, with the duration of caching varying. As the Charles Proxy records and the results of the tracing programme

"TRACERT" (Trace Route), the streaming service www.brazzers.com of defendant 1 uses CDN servers of the service providers Reflected Networks, Inc. and Edgecast, Inc. located in Frankfurt and Munich, respectively, the streaming service www.pornhub.com of defendant 3 uses CDN servers of the service provider Cloudflare, Inc, located in Frankfurt, and the streaming services www.mygf.com and www.bangbros.com of defendants 5 and 6 and defendants 1 and 6, respectively, use CDN servers of the service provider Reflected Networks, Inc. located in Frankfurt.

The applicants are of the opinion that the requested information on the identity of the CDNs used is already information within the meaning of R. 191 UPC Agreement RoP in conjunction with Art. 67 (1) (a) and (c) UPCA. Art. 67 (1) (a) and (c) UPCA on the distribution channels of the infringing process and on the identity of all third parties involved in the application of the infringing process. In any event, this was information that the plaintiffs reasonably required for their legal action. In any event, on the basis of the defendant's argumentation, it is of decisive importance where the servers on which the video files are encoded are located and how the video files are stored on the servers, even if, according to the correct legal opinion, the location of the servers in the UPC Agreement member states is irrelevant. Since it is conceivable that the various CDNs encode the video files on their respective servers in different ways, this is information that the plaintiffs reasonably need for their legal action. The plaintiffs had exhausted the possibilities of their own investigations. It must be assumed that the defendants 1, 3, 5 and 6 had the requested information or could at least reasonably obtain it from their contractual partners. The plaintiffs have reason to believe that the defendants' submission in their defences regarding the locations of the servers and the way in which the video files are encoded on the servers is incorrect, or at least incomplete, as the investigations set out in the Reply regarding the locations of the CDNs used by defendants 1 and 3 and the way in which the video files stored there are encoded show. Any third-party interests of the operators of the CDNs could be adequately protected by confidentiality requests. Therefore, the interests of the plaintiffs in the requested transmission of information prevailed.

The defendants oppose the applications. These are unclear and inaccurate from a factual point of view, are also late and constitute inadmissible requests for information. An order for information within the meaning of R. 191 Alt. 1 RoP, Art. 67 UPCA can only be issued in a final judgement if

a positive decision has been made on the infringement and (in the case of an action for revocation) the legal validity of the patent in suit. The same applies to an order for information within the meaning of R. 191 Alt. 2 RoP. Moreover, in the case of R. 191 Alt. 2 RoP already lacks a necessary basis in the UPCA. Should an application outside of a final judgement nevertheless be possible, R. 191 Alt. 2 RoP presupposes the conviction of the court of the existence of a patent infringement at the time of the order. Moreover, which CDNs are entrusted with the distribution of video segments and where their servers are located is not relevant for the decision of the legal dispute. The defendants have never claimed otherwise. As the plaintiffs themselves recognised in their Reply, the submission they referred to in the statement of defence related to the original servers. Even if the CDN servers were relevant, the requirements of R. 191 Alt. 2 RoP were not met because the plaintiffs did not need the requested information from the defendants. The plaintiffs could determine the operators and locations of CDN servers themselves, as they had allegedly already done in part according to their Reply. The defendants had already stated in their statement of defence which coding scheme was used to create video copies and how individual segments of these video copies were generated, and had submitted written testimony. CDNs do not encode or segment the defendants' videos. This is also evident, for example, from the excerpt of the corresponding passage from Cloudflare's website shown in the Reply. CDNs are not patentable servers. The plaintiffs certainly did not need the requested information for a period of 5 years in order to substantiate their claims. Apart from that, the plaintiffs did not need the requested information to prosecute the case because it was to be expected that the defendants would comment on the plaintiffs' replicating submission in the forthcoming duplicate within the period of admission to which they were entitled. In this situation, an order for the transmission of information should not, in principle, shorten the existing time limits for the submission of observations. The request for information, particularly at this stage of the proceedings, is disproportionate, especially for the period requested. For reasons of proportionality, the plaintiffs would have to obtain the necessary information on the server locations directly from the operators of the CDNs.

Reference is also made to the exchanged documents. The

plaintiffs request the following,

in accordance with R. 191 UPC RoP,

1. that the defendant 1 provides information on which content delivery networks it uses in the context of the storage and delivery of video files by the streaming services www.brazzers.com, www.digitalplayground.com, www.men.com, www.babes.com, www.seancody.com, www.transangels.com, www.realitykings.com, www.mofos.com, www.twistys.com, www.whynotbi.com, www.fakehub.com, www.fakehub.com/fakedrivingschool, www.publicagent.com, www.faketaxi.com, www.lesbea.com, www.danejones.com, www.sexyhub.com, www.sexyhub.com/massagerooms, www.iknowthatgirl.com, www.milehighmedia.com, www.bang-bros.com, www.bangpovbros.com, www.sweetheartvideo.com, www.sweetsinner.com, www.realityjunkies.com, www.doghousedigital.com, www.familysinners.com, www.hentaipros.com, www.erito.com, www.transharder.com, www.metrohd.com, www.squirted.com, www.propertysex.com, www.transsensual.com, www.bromo.com, www.czechhunter.com, www.bigstr.com, www.spicevids.com,

www.trueamateurs.com, www.deviant.com, www.fakehostel.com, www.biempire.com, www.milfed.com, www.gilfed.com, www.dilfed.com, www.girlgrind.com, www.kinkyspa.com, www.shewillcheat.com, www.devianthard-core.com, www.familyhookups.com, www.realitydudes.com, www.noirmale.com and www.iconmale.com or has served in the period from 28 August 2019 to date;

2. that defendant 3 provides information about the content delivery networks it uses in the context of the storage and delivery of video files by the streaming services www.pornhub.com, www.pornhubpremium.com, www.youporn.com, www.youporn-gay.com, www.redtube.com, www.pornmd.com, www.thumbzilla.com and www.tube8.com or has used in the period from 28 August 2019 until today;
3. that the defendant 5 provide information on which content delivery networks it uses or has used in the period from 28 August 2019 to the present day for the storage and delivery of the video files by the streaming services www.mygf.com;
4. that the defendant 6 provides information on which content delivery networks it uses or has used in the period from 28 August 2019 to the present day for the storage and delivery of video files by the streaming services www.bangbros.com and www.bangpovbros.com;
5. that the defendants 1, 3, 5 and 6 provide information on the location of the servers of the respective content delivery networks whose services they use or have used in the period from 28 August 2019 to the present day;
6. that the defendants 1, 3, 5 and 6 provide information as to whether the video files on the servers of the CDNs whose services they use or have used in the period from 28 August 2019 to today are divided into several files and how these files are encoded;
7. that the information requested under items 1 to 4 must be provided within fourteen days of the order to provide the information;
8. applying mutatis mutandis R. 190.4 (b), 190.7 UPC RoP, that in the event that the defendants 1, 3, 5 and 6 fail to comply with their obligation under the order to provide information, that failure will be taken into account in the decision on the matter at issue and the plausible submission of the applicants as to the location of the servers and the way in which the video files are encoded on the servers will be presumed to be correct; and
9. in the event of non-compliance, the payment of an appropriate penalty payment at the discretion of the court in accordance with Art. 82 (4) UPCA.

The defendants claim,

dismiss the application in its entirety.

ORDER

The requested orders for the provision of information cannot be considered for several reasons.

1. Pursuant to R. 191 RoP, the court may, on the reasoned application of a party, order that information pursuant to Art. 67 UPCA which is in the possession of the other or a third party, or information which the applicant party reasonably requires for the purpose of prosecution, must be provided by the other or third party. As is clear from the wording and the system, a distinction must be made between information within the meaning of Art. 67 UPCA, R. 191 Alt. 1 RoP and information within the meaning of R. 191 Alt. 2 RoP must be distinguished. Accordingly, the additional requirement that the applicant needs the information for the prosecution initially relates to the second alternative of the provision.

Art. 67 UPCA, R. 191 Alt. 1 RoP are to be interpreted in conformity with Directive 2004/48/EC and in particular Art. 8 thereof.

The order on application by the plaintiff in a patent infringement action against the defendant to provide information within the meaning of Art. 67 UPCA, R. 191 Alt. 1 RoP serves to identify further infringers in the distribution and supply chain or to determine and calculate the damage caused by the patent infringement. It does not serve to obtain information within the meaning of Art. 67 UPCA, R. 191 Alt. 1 RoP to establish the patent infringement by the defendant in the first place.

No final decision is required as to whether an order against the defendant of a patent infringement to identify further infringers in the distribution and supply chain is already possible in the ongoing proceedings before the patent infringement has been finally decided for the instance. In any case, such an order would require special circumstances that would necessitate the early provision of information.

Whether the applicant reasonably requires information within the meaning of R. 191 Alt. 2 RoP for the purpose of legal prosecution is assessed according to the circumstances of the individual case from the perspective of a reasonable party. As a rule, only specifically named information can be the subject of the transfer of information; unspecific enquiry is generally out of the question.

The order to transmit information within the meaning of R. 191 Alt. 2 RoP serves the sole purpose of providing the applicant with the necessary information. In contrast, it cannot, in principle, be used to require the other party, who has stated a fact on which the applicant relies to substantiate his asserted claims or objections, to make a correct submission if the applicant is of the opinion that the other party's statement is incorrect. Rather, it is the task of the court to assess whether a disputed fact is true by evaluating the mutual factual submissions and the evidence offered at the appropriate time. Within this framework, the party that believes it needs the fact can assert this fact and offer evidence for it, even if it is not certain but has good grounds for believing it to be true.

accuracy, without it being able to be accused of any breach of the duty to tell the truth.

Against this background, the order for the transmission of information cannot be considered as long as the other party has not commented on the submission of the applicant, for which it can in principle exhaust the time limits applicable to the submission.

The order pursuant to R. 191 Alt. 2 RoP is at the discretion of the court and must not be disproportionate. When exercising discretion, the circumstances of the individual case must be taken into account, taking into account the mutual interests and the principle of efficient conduct of proceedings (see (on the order to produce evidence) Court of Appeal, order of 24 September 2024, UPC_CoA_298/2024, UPC_CoA_299/2024, UPC_CoA_300/2024 para. 47, 53). In particular, the applicant has an interest in obtaining the information, while the defendant has an interest in protecting confidential information. For reasons of proportionality and in order not to overplay the distribution of the burden of presentation and proof (see Court of Appeal, order of 26 February 2024, UPC_CoA_335/2023, GRUR 2024, 527 para. 94), an order for the transmission of information within the meaning of R. 191 Alt. 2 RoP must not amount to unauthorised spying. An order for the transmission of information within the meaning of R. 191 Alt. 2 RoP during the legal dispute is generally ruled out if the requested information is not relevant to the claims or objections being pursued in the legal dispute. In this case, the order to transmit the information is usually at least disproportionate.

The discretionary powers of the judge-rapporteur, the presiding judge or the panel with regard to the management of proceedings when deciding on an application for the transmission of information within the meaning of R. 191 Alt. 2 RoP also includes determining the order in which points in dispute are to be decided. In exceptional cases, a previously requested and sufficiently substantiated disclosure of information, the relevance of which for the decision to be made only becomes apparent to the court during the oral hearing, can lead to an adjournment in order to order the disclosure of information within the meaning of R. 191 Alt. 2 RoP. In this respect, no other principles apply than for the order to submit evidence pursuant to R. 190 RoP (see Court of Appeal, order of 24 September 2024, UPC_CoA_298/2024, UPC_CoA_299/2024, UPC_CoA_300/2024 para. 54 f.).

According to general principles, the burden of presentation and proof for the existence of the requirements for an order to provide information lies with the applicant.

2. According to these requirements, the order to transmit the requested information cannot be considered for several reasons.

a) Contrary to their opinion, the applicants cannot rely on R. 191 Alt. 1 RoP, Art. 67 (1) (a), (c) UPCA. Insofar as information on the distribution and supply channels can be ordered against the defendant of a patent infringement during the ongoing legal dispute before the patent infringement has been decided for the instance, the special circumstances required for this are in any case lacking in the case in dispute. The plaintiffs have not submitted an application for R. 191 Alt. 1 RoP, Art. 67 (1) (a), (c) UPCA as to why they need the information prior to the decision on the merits of their patent infringement action. The fact that the information may be needed for legal proceedings against the defendants is not sufficient, as discussed above. What function

CDNs and whether and, if so, under what conditions their operators are part of the distribution or supply chain within the meaning of Art. 67 (1) (a), (c) UPCA is therefore not necessary.

b) Contrary to their opinion, the plaintiffs cannot demand the requested information from the defendants on the basis of R. 191 Alt. 2 RoP from the defendants.

aa) It is irrelevant whether the plaintiffs have sufficiently set out the requirements for issuing the requested orders in the application, in particular whether they have sufficiently demonstrated which specific information is required and for what reasons.

bb) Furthermore, no conclusive clarification is currently required as to the extent to which the court in the present case of abstract applications must examine all streaming services designated in the statement of claim as attacked embodiments, which may differ in relevant features, for patent infringement and the plaintiffs therefore need information on each streaming service for the purpose of prosecution.

cc) The order for the requested transmission of information is already ruled out in the case in dispute because it is not yet clear at this point in time how the defendants will respond to the allegations in the Reply. There are no apparent reasons that would justify ordering the defendants to provide information in advance before the expiry of the duplicate deadline.

dd) Apart from this, the plaintiffs' applications constitute an inadmissible investigation. It is not apparent why such comprehensive information is required for the prosecution.

The plaintiffs' applications concern general information and are not limited to specific information that may be relevant to the present legal dispute. For example, the plaintiffs do not need the names of all CDNs indiscriminately for their legal action in the present legal dispute, but at most those that could be relevant to the asserted patent infringements under certain circumstances. Should the server locations be relevant for the domestic reference, one location in each of the UPC Agreement member states for which the claims are asserted would suffice for each streaming service. Where the server locations are otherwise located is irrelevant. The request for information on the video files also generally inquires about their division and encoding without limiting itself to inquiring about a specific type of division and encoding, which in the opinion of the plaintiffs is sufficient for an infringement depending on the interpretation of the patent in suit. The plaintiffs' reference to the fact that video files could be encoded and stored differently in CDNs, without the plaintiffs having provided any indications of the encoding and storage for most streaming services in relation to the respective streaming service, emphasises the character of inadmissible research.

In the event of a dispute, the inadmissible investigation means that the applications must be rejected in their entirety. It is not the court's task to concretise the applications and to reduce them to a core which could possibly gain significance depending on the interpretation of the patent in suit.

ee) In addition, an order for the transmission of information for most streaming services is also out of the question because the plaintiffs have not exhausted all sources of information reasonably available to them.

In their statement of claim and their Reply, the plaintiffs analysed only a few streaming services using the analysis tools Charles Proxy and TRACERT and provided findings on the CDN operator, the encoding and storage of the video files, the selection options of the end user's country of residence and the location of the CDN servers. They did not provide such analyses for the majority of streaming services. Should this be relevant at all, the plaintiffs would also be required to submit corresponding analyses for the streaming services not analysed. At best, if the other requirements for an order were met, it would then be justified from the point of view of proportionality to order the defendants to provide sufficiently specific information on these streaming services in the event of remaining information gaps. The plaintiffs have not demonstrated that such a procedure would be unreasonable for them with regard to the other streaming services. In particular, unreasonableness does not automatically follow from the fact that the other streaming services are predominantly fee-based.

c) Finally, the state of facts and disputes reached so far regarding the interpretation, infringement and validity of the patent in suit does not justify burdening the defendants with the order to transmit the requested information. With regard to the server locations, it is also not yet clear at this stage of the proceedings whether they are legally required at all to establish a domestic connection or whether it is sufficient that it is clear from the circumstances, such as the selection option for the end user's country of residence, that the streaming services are aimed at end users residing in the UPC Agreement member states at issue and are actually used by them.

3. Against this background, it is irrelevant whether R. 191 Alt. 2 RoP lacks a necessary basis in the UPCA and whether an order for the submission of information pursuant to R. 191 RoP can only be issued in the decision on the merits of the infringement dispute concluding the first instance.

4. Should this be the case, especially if the facts of the case change, future orders to provide information are not excluded by the present order if there are significant gaps in the defendant's submission and the lack of specific information is relevant to the decision in the dispute.

5. All defendants had to be involved in the ancillary proceedings relating to the dispute over the provision of information. It is irrelevant that the transmission is only requested by defendants 1, 3, 5 and 6, because the plaintiff intends to use the information to be transmitted in the present legal dispute to prove patent infringements in which defendants 2 and 4 are also involved according to the plaintiff's submission. Thus, the interests of these defendants are also affected by the dispute.

6. With reference to R. 191 RoP, the following information on legal remedies is only provided R. 191 p. 2 in conjunction with 190.6 p. 2 RoP is formally implemented and should not be linked to a determination that appeals against orders under R. 191 RoP are to be dealt with under Art. 59, 73 para. 2 lit. a UPCA.

ORDER:

The applicants' applications of 9 August 2024 for information regarding the CDNs used, the locations of the CDNs' servers and the distribution and encoding of the video files on the CDNs' servers are rejected.

DETAILS OF THE ORDER

Order no. ORD_47055/2024 in PROCEDURE NUMBER: ACT_594191/2023

UPC number: UPC_CFI_471/2023

Nature of the action: Action for infringement

No. of the related procedure Application No.:

46521/2024 Type of application:

Template for procedural application

NAMES AND SIGNATURES

Issued in Mannheim on 20 October 2024

Dirk Andreas
Cooper

Digitally signed

from Dirk Andreas
Cooper

Date: 2024.10.20
21:02:31 +02'00'

Cooper

judge-rapporteur

INFORMATION ON APPOINTMENT (Art. 73(2)(a), 59 UPCA, R. 190, R. 191, R. 220.1 (c), 224.1 (b))
RoP) The party adversely affected may appeal against this order within 15 days of its notification.