



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_46520/2024
(Request for information regarding the design and coding scheme of video files)

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 on how the video files accessible via their respective streaming services have been encoded in the period from 28 August 2019 (date of publication of the grant of the patent in suit) to the present day.

The plaintiffs are suing the defendants in the underlying main proceedings for alleged contributory patent infringement in respect of 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 Republic 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) in the statement of claim as challenged embodiments for the respective defendants (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.

In their replies to the individual defences, the plaintiffs deepen their infringement allegations regarding the two streaming services described as examples in the statement of claim, for which the end user can no longer choose 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 (Annexes K19a to 19e) and defendant 3 (Annexes K20a to K20c) listed in the statement of claim under the Microsoft Edge browser. They argue that the defendants' video files are not (only) accessed directly from the defendants' original servers, but from the servers of a content delivery service.

Networks (CDN) on which the video copies are encoded in individual segments, as considered necessary by the defendants 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 if 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 plaintiffs are of the opinion that they should be provided with the requested information because, at least on the basis of the defendant's argumentation, it is relevant for the question of patent infringement in which specific embodiment and using which encoding scheme the video files of the accused streaming services are encoded. Since the defendant's submission on the alleged type of encoding is limited to the current embodiment, it is also conceivable that the encoding scheme has changed in the period relevant for the patent infringement. The plaintiffs were not able to do more than the analyses carried out in order to determine how the accused embodiments functioned. The coding scheme itself could not be further determined from accessible sources. Since the defendants sometimes based their non-infringement arguments on information about the coding scheme that could not be verified by the plaintiffs, the defendants 1, 3, 5 and 6 were obliged to provide information. In the Reply (p. 67 et seq.), the plaintiffs had shown concrete evidence that the video files were not encoded in the manner alleged by the defendants, at least on Cloudflare's CDN servers. 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. For the order mentioned in R. 191 Alt. 2 RoP mentioned in R. 191 Alt. 2, the order for the transmission of information other than that pursuant to Art. 67 UPCA lacks a necessary basis in the UPCA. Apart from that, as follows from Art. 67 UPCA, the order for the submission of information presupposes a patent infringement and therefore only comes into consideration in the final judgement or in any case when the question of infringement has been decided (for the instance). In any event, the requirements of R. 191 Alt. 2 RoP are not met in the case in dispute. For the streaming services www.brazzers.com and www.pornhub.com, the only streaming services substantively discussed in the statement of defence, the defendants had submitted in their statement of defence by way of substantiated pleading, disclosing confidential information and submitting a written witness statement, how video copies were created and encoded and how individual segments of these videos were generated. If, in addition, from the plaintiffs' point of view, questions of fact need to be clarified - as they do not - which they could only clarify with disproportionate effort in accordance with R. 191 RoP, they lack any concretisation. It would

clarified and reiterated in the duplicate that the statements in the statement of claim regarding the encoding of video copies and the creation of segments apply to the period since 28 August 2019.

The doubts cited by the plaintiffs regarding the defendant's submission do not exist, but are based on an incorrect understanding of the patent in suit and a technical misunderstanding of the task and functioning of CDNs. Already on the basis of the plaintiffs' submission in the Reply, CDNs only carried out the distribution of video segments after the video had already been encoded and (at least partially) segmented elsewhere. Servers that, like CDNs, serve as cache servers for the mere delivery of individual video segments are not servers in accordance with the patent. Irrespective of this, the submission in the statement of defence, which clearly referred to the original servers (and was also recognised by the plaintiffs), was correct. This will be explained in more detail in the upcoming duplicate.

Moreover, doubts about a party's factual submission could not justify an order for the submission of information against it, but would have to be assessed by the court by way of an assessment of the factual submission and the evidence offered, which would only be possible after the conclusion of the oral hearing.

Apart from this, the plaintiffs do not need the requested information to pursue their legal action because it is to be expected that the defendants will respond to the plaintiffs' replicating submission in the forthcoming duplicate within the period of admission to which they are entitled. In this situation, an order for the transmission of information should not, in principle, shorten the existing time limits for admission.

Reference is also made to the exchanged documents. The

plaintiffs request the following,

in accordance with R. 191 UPC RoP,

1. that the defendant to 1 provide information on the specific form and coding scheme of the data provided 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 offered and delivered video files have been encoded at any time in the period from 28 August 2019 to the present;

2. that the defendant (3) provide information on the specific form and coding scheme in which the video files offered and delivered 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 were (were) coded at any time in the period from 28 August 2019 to the present day;
3. that the defendant to 5 provide information on the specific form and coding scheme in which the video files offered and delivered by the streaming services www.mygf.com were (were) coded at any time in the period from 28 August 2019 to the present day;
4. that the defendant 6 provide information on the specific form and coding scheme in which the video files offered and delivered by the streaming services www.bangbros.com and www.bangpovbros.com were (were) encoded at any time in the period from 28 August 2019 to the present;
5. that the information requested under items 1 to 4 must be provided within fourteen days of the order to provide the information;
6. 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
7. 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.

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 reason to believe it is correct, without being accused of a breach of any 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) 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.

b) 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.

c) 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.

d) Apart from that, the order for the transmission of the requested information is not applicable because the plaintiffs do not need it.

The defendants have made submissions on the coding scheme on their origin servers in the statement of defence. The plaintiffs do not provide any specific information on the origin servers that they would need beyond the defendants' submission. Without providing specific information, the application amounts to an inadmissible investigation. Insofar as the plaintiffs consider the defendant's submission to be incorrect or doubt its accuracy, R. 191 Alt. 2 RoP is not relevant. As discussed, the order to transmit information within the meaning of R. 191 Alt. 2 RoP does not serve to compel the other party to make an allegedly correct submission on a disputed fact. Apart from that, the doubts raised by the plaintiffs are likely to be based primarily on the existence of CDNs, while the defendants probably wanted their submission in the statement of defence to relate primarily to their original servers. In any case, the defendants will have the opportunity in their duplicate to explain the alleged doubts and the circumstances of their original servers and the CDNs.

The specific organisation and coding scheme of the video files on the CDN servers is not the subject of the present request for information, as is evident from the fact that the distribution of the video files on the CDN servers and their coding there are inquired about in a simultaneous further independent application by the plaintiffs pursuant to R. 191 RoP (see App_46521/2024). Apart from that, such a request would not have to be granted for the reasons stated in the order on workflow App_46521/2024, especially since the defendant's defence in the context of its duplicate is still pending.

e) 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.

The plaintiffs have only analysed some streaming services and submitted Charles Proxy records for this purpose. Should this be the case, the plaintiffs would be required to proceed accordingly for the other streaming services. At best, it would then be justified, should this be possible contrary to the above, to order the defendants to provide the requested, sufficiently specific information on these streaming services in order to refute their possible allegations. The plaintiffs have not shown 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.

f) 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 provide the requested information.

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 specific design and coding scheme of the video files of the streaming services are rejected.

DETAILS OF THE ORDER

Order no. ORD_47058/2024 in PROCEDURE NUMBER: ACT_594191/2023

UPC number: UPC_CFI_471/2023

Nature of the action: Action for infringement

No. of the associated procedure Application No.:

46520/2024 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
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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.