

**Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018 — Elsevier Inc. v Cyando AG**

**(Case C-683/18)**

(2019/C 82/04)

*Language of the case: German*

**Referring court**

Bundesgerichtshof

**Parties to the main proceedings**

*Applicant:* Elsevier Inc.

*Defendant:* Cyando AG

**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 <sup>(1)</sup> 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 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? <sup>(2)</sup>

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? <sup>(2)</sup>

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?

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<sup>(1)</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

<sup>(2)</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1).

<sup>(3)</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

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**Request for a preliminary ruling from the Juge d'instruction du tribunal de grande instance de Paris  
(France) lodged on 29 October 2018 — Procureur de la République v X**

**(Case C-693/18)**

(2019/C 82/05)

*Language of the case: French*

**Referring court**

Juge d'instruction du tribunal de grande instance de Paris

**Parties to the main proceedings**

*Applicant:* Procureur de la République

*Defendant:* X

*Other parties:* Parties claiming damages

**Questions referred**

**1. Interpretation of the concept of 'design'**

1(1): What is covered by the concept of 'element of design' in Article 3.10 of Regulation (EC) No 715/2007, <sup>(1)</sup> which defines 'defeat device'?

1(2): May a program integrated in the engine control calculator or more generally acting on that calculator be considered to be an element of design within the meaning of that article?