



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 17 December 2020¹

Case C-597/19

Mircom International Content Management & Consulting (M.I.C.M.) Limited

v

**Telenet BVBA,
Other parties:
Proximus NV,
Scarlet Belgium NV**

(Request for a preliminary ruling
from the ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium))

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Concept of ‘communication to the public’ – Downloading via a peer-to-peer network of a file containing a protected work and the simultaneous making available of pieces of that file with a view to being uploaded by other users – Directive 2004/48/EC – Article 3(2) – Misuse of measures, procedures and remedies – Article 4 – Persons entitled to request the application of measures, procedures and remedies – Article 8 – Right of information – Article 13 – Concept of ‘prejudice’ – Regulation (EU) 2016/679 – Article 6(1)(f) – Protection of natural persons with regard to the processing of personal data – Lawfulness of processing – Fundamental rights – Charter of Fundamental Rights of the European Union – Articles 7 and 8 and Article 17(2))

Introduction

1. The trend of sharing works that are protected by copyright and related rights on peer-to-peer networks without the authorisation of the holders of those rights is, for creators and the culture and entertainment industry, one of the biggest headaches connected with the internet. This problem is considerable and results in billions in lost revenue each year.² It is also extremely difficult to tackle, in particular because of the decentralised nature of peer-to-peer networks and a level of popular support for the idea of free access to culture and entertainment. It is therefore not surprising that new legal issues are constantly arising in this field.

2. The Court has already had occasion to hold that the making available and management of a sharing platform on the internet which allows users of that platform to locate copyright-protected works and to share them in the context of a peer-to-peer network constitute a communication of those works to the public where they are made available on that network without the rightholders’ consent.³ However, it would appear that a much more fundamental question is also problematic: do the users of a

¹ Original language: French.

² See, for recent estimates, D. Blackburn, J.A. Eisenach, D. Harrison Jr., ‘Impacts of Digital Video Piracy on the U.S. Economy’, June 2019, study commissioned by the U.S. Chamber of Commerce.

³ Judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, operative part).

peer-to-peer network themselves carry out acts of communication to the public? While at first sight it may appear obvious that this should be answered in the affirmative, ingenious arguments based on the specific technical features of the operation of such networks support the opposite response. The fact that thousands of people have access to works without paying for them would then be a miracle. In the present case, the Court will have the opportunity to clarify this point.

3. In view of these legal difficulties, some holders of copyright and related rights have decided to retaliate against the users of peer-to-peer networks. Specialised companies or law firms acquire limited exploitation rights in respect of works for the sole purpose of being able to use legal procedures in order to obtain the names and addresses of those users, having previously identified the IP addresses of their internet connections. Claims for compensation in respect of alleged damage suffered by those companies are then sent to those users, under the threat of legal action. However, in most cases, instead of bringing an action before the courts, those companies offer an amicable settlement in return for the payment of a sum which, although sometimes exceeding the actual damage, is well below the compensation which could be claimed in court. Therefore, even if only a fraction of the persons contacted agree to pay, the companies in question are able to generate revenue from those claims which sometimes exceeds that derived from the legal exploitation of the work, revenue which they then share with those who hold rights in respect of those works.

4. Although, literally speaking, the process is lawful, it nevertheless amounts to exploiting not the economic rights of the author, but the infringements of those rights, thus creating a source of income based on infringement of the law. The copyright is therefore not used for its original purpose and is used, if not abused, for purposes outside of its scope.

5. A company which acts in this way is often referred to by legal writers as a copyright troll.⁴ The United States legal system appears to be particularly conducive to copyright trolls, but the phenomenon is also found in several Member States of the European Union. In the present case, the Court is called upon to answer the question as to the extent to which the system to protect intellectual property rights established in EU law allows, or requires, account to be taken of such misuse, if proven, when applying the legal instruments contained in that system.

6. That answer will have to take into account the relationship between, on the one hand, the necessary judicial protection of intellectual property rights and, on the other, protecting the personal data of possible offenders.

Legal framework

7. The request for a preliminary ruling in the present case contains no description of the national legal framework. I shall confine myself, therefore, in this part of the Opinion, to setting out the EU legal framework. It will be for the national court to adapt the interpretation of that law given by the Court to its own national legal framework.

⁴ Although the concept of copyright trolling is used mainly in connection with infringements committed on the internet, the very idea of abusing copyright in order to extort compensation precedes the internet by over a century: the first 'copyright troll before the term was invented' identified in legal literature is Thomas Wall, who operated in the United Kingdom in the 1870s, see, inter alia, B.A. Greenberg, 'Copyright Trolls and Presumptively Fair Uses', *University of Colorado Law Review*, 2014, No 85, p. 53 to 128, in particular p. 63). The phenomenon is not limited only to copyright and is well known, inter alia, in patent law.

Intellectual property law

8. Under Article 3(1) and (2)(c) of 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:⁵

‘1. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(c) for the producers of the first fixations of films, of the original and copies of their films;

...’

9. In accordance with Article 8 of that directive:

‘1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall 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.’

10. Article 2 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights⁶ provides:

‘1. Without prejudice to the means which are or may be provided for in [EU] or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by [EU] law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in [EU] legislation concerning copyright and rights related to copyright, notably those found ... in Directive [2001/29] and, in particular, ... Article 8 thereof.

⁵ OJ 2001 L 167, p. 10.

⁶ OJ 2004 L 157, p. 45.

3. This Directive shall not affect:

(a) ... Directive 95/46/EC ^[7] ...

...'

11. Chapter II of that directive governs the 'measures, procedures and remedies' necessary to ensure the enforcement of intellectual property rights. Under Article 3 of that directive:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

12. Article 4 of that directive provides:

'Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Chapter:

- (a) the holders of intellectual property rights, in accordance with the provisions of the applicable law,
- (b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,
- (c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law,
- (d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.'

13. Under Article 8 of Directive 2004/48:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

...

(c) was found to be providing on a commercial scale services used in infringing activities; or

...

⁷ Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

- (a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

...

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

...

- (e) govern the protection of confidentiality of information sources or the processing of personal data.’

14. Finally, under Article 13(1) and (2) of that directive:

‘1. Member States shall 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 appropriate to the actual prejudice suffered by him/her as a result of the infringement.

...

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.’

Electronic communications law

15. Under Article 2(a) and (c) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive),⁸ as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009⁹ (‘Directive 2002/21’):

‘For the purposes of this Directive:

- (a) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

...

- (c) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content

⁸ OJ 2002 L 108, p. 33.

⁹ OJ 2009 L 167, p. 37.

transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC,^[10] which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;’

16. Article 1(1) and (2) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),¹¹ as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009¹² (‘Directive 2002/58’), provides:

‘1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the [Union].

2. The provisions of this Directive particularise and complement Directive [95/46] for the purposes mentioned in paragraph 1. ...’

17. Under Article 2 of Directive 2002/58:

‘Save as otherwise provided, the definitions in Directive [95/46] and in Directive [2002/21] shall apply.

The following definitions shall also apply:

- (a) “user” means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;
- (b) “traffic data” means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

...

- (d) “communication” means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. ...’

18. In accordance with Article 5(1) of that directive:

‘Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.’

¹⁰ Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

¹¹ OJ 2002 L 201, p. 37.

¹² OJ 2009 L 337, p. 11.

19. Article 6(1) of that directive provides:

‘Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).’

20. Finally, under Article 15(1) of that directive:

‘Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6 ... of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive [95/46]. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of [Union] law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.’

General provisions on the protection of personal data

21. Article 4(1), (2), (7) and (9) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),¹³ provides:

‘For the purposes of this Regulation:

- (1) “personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (2) “processing” means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- ...
- (7) “controller” means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- ...

¹³ OJ 2016 L 119, p. 1.

(9) “recipient” means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. ...’

22. Under Article 6(1)(f) of that regulation:

‘Processing shall be lawful only if and to the extent that at least one of the following applies:

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.’

23. Under Article 9 of that regulation:

‘1. Processing of ... data concerning a natural person’s sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

...

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

...’

24. In accordance with Article 23(1)(i) and (j) of the same regulation:

‘Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as in Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

...

(i) the protection of the data subject or of the rights and freedoms of others;

(j) the enforcement of civil law claims.’

25. Finally, Articles 94 and 95 of Regulation 2016/679 are worded as follows:

‘Article 94

Repeal of Directive [95/46]

1. Directive [95/46] is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. ...

Article 95

Relationship with Directive [2002/58]

This Regulation shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive [2002/58].'

Facts, procedure and the questions referred for a preliminary ruling

26. Mircom International Content Management & Consulting (M.I.C.M.) Limited ('Mircom') is a company incorporated under Cypriot law. Under contracts concluded with several producers of erotic films established in the United States and Canada, it holds licences for the communication to the public of their films on peer-to-peer networks and internet file-sharing networks, in particular in the territory of 'Europe'. Moreover, under those contracts, Mircom is required to investigate acts of infringement of those producers' exclusive rights committed on peer-to-peer networks and file-sharing networks and, in its own name, to take legal action against the perpetrators of those infringements in order to obtain compensation, 50% of which it must pass on to the producers.

27. Telenet BVBA, Proximus NV and Scarlet Belgium NV are internet service providers in Belgium.

28. On 6 June 2019, Mircom brought an action before the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium) seeking, inter alia, that Telenet be ordered to produce the identification data for its customers whose internet connections had been used to share, on a peer-to-peer network by means of the *BitTorrent* protocol, films from the Mircom catalogue. The IP addresses of those connections were collected on behalf of Mircom by Media Protector GmbH, a company incorporated under German law, using specialised software. Telenet challenges that claim.

29. Proximus and Scarlet Belgium, which are also the subject of similar actions brought by Mircom, have been granted leave by the referring court to intervene in the main proceedings in support of the form of order sought by Telenet.

30. The ondernemingsrechtbank Antwerpen (Companies Court, Antwerp) has doubts as to the merits of Mircom's application. In the first place, it is unsure whether, in view of the specific nature of peer-to-peer networks, users carry out acts of communication to the public of the works they share on those networks. In the second place, that court has doubts whether a company such as Mircom is able to benefit from the protection conferred by EU law in respect of the enforcement of intellectual property rights, since Mircom does not actually exploit the rights acquired by the film producers, but is merely claiming damages from alleged infringers. Such conduct corresponds almost precisely to the definition in legal literature of a 'copyright troll'. Finally, in the third place, that court has doubts as to the lawfulness of collecting the IP addresses of internet users who have allegedly shared protected works on peer-to-peer networks.

31. It was in those circumstances that the ondernemingsrechtbank Antwerpen (Companies Court, Antwerp) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. (a) Can the downloading of a file via a peer-to-peer network and the simultaneous provision for uploading of parts (“pieces”) thereof (which may be very fragmentary as compared to the whole) (“seeding”) be regarded as a communication to the public within the meaning of Article 3(1) of Directive 2001/29, even if the individual pieces as such are unusable?

If so,
 - (b) is there a *de minimis* threshold above which the seeding of those pieces would constitute a communication to the public?
 - (c) is the fact that seeding can take place automatically (as a result of the torrent client’s settings), and thus without the user’s knowledge, relevant?
2. (a) Can a person who is the contractual holder of the copyright (or related rights), but does not himself exploit those rights and merely claims damages from alleged infringers – and whose economic business model thus depends on the existence of piracy, not on combating it – enjoy the same rights as those conferred by Chapter II of Directive 2004/48 on authors or licence holders who do exploit copyright in the normal way?
 - (b) How can the licence holder in that case have suffered “prejudice” (within the meaning of Article 13 of Directive 2004/48) as a result of the infringement?
3. Are the specific circumstances set out in questions 1 and 2 relevant when assessing the correct balance to be struck between, on the one hand, the enforcement of intellectual property rights and, on the other, the rights and freedoms safeguarded by the [Charter of Fundamental Rights of the European Union (“the Charter”)], such as respect for private life and protection of personal data, in particular in the context of the assessment of proportionality?
4. Is, in all those circumstances, the systematic registration and general further processing of the IP-addresses of a “swarm” of “seeders” (by the licence holder himself, and by a third party on his behalf) legitimate under Regulation [2016/679], and specifically under Article 6(1)(f) thereof?

32. The request for a preliminary ruling was received at the Court on 6 August 2019. Written observations were submitted by the parties to the main proceedings, the Italian, Austrian and Polish Governments and the European Commission. The parties to the main proceedings and the Commission were represented at the hearing held on 10 September 2020.

Analysis

33. The first question referred for a preliminary ruling raises the fundamental issue of whether there is indeed an infringement of copyright and related rights where works are shared on peer-to-peer networks. Questions 2 to 4 concern different aspects of the situation of a player such as Mircom in the light of provisions of EU law relating to enforcement of those rights, as well as the protection of personal data. Naturally, it is therefore appropriate to start with the first question.

The first question referred for a preliminary ruling

34. By its first question, the referring court asks, in essence, whether the exclusive right to make protected works available to the public, in accordance with Article 3 of Directive 2001/29, includes the sharing of those works on peer-to-peer networks by the users of those networks. The referring court mentions Article 3(1) of that directive, however it would appear that it is above all Article 3(2)(c) of the directive which comes into play in the case in the main proceedings in respect of the rights of film producers. However, it cannot be ruled out that those producers also hold the copyright in respect of their productions, as well as other related rights. Therefore, both provisions must be taken into consideration. They provide equivalent protection as regards the specific form of communication of works to the public, which is that they are made available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

35. In their observations, Telenet, Proximus and Scarlet Belgium categorically deny that there has been any communication to the public on the part of users of peer-to-peer networks, in any event in respect of users who download files on those networks. Relying on the specific features of the operation of current peer-to-peer networks, those parties submit that the pieces of files containing the works in question which may be uploaded¹⁴ by those users are unusable in themselves and too small, in any event below a certain threshold, to be treated as a work or even a part of a work. Moreover, those users are often unaware of the fact that, when downloading the works on those networks, they are simultaneously uploaded to other users. Accordingly, those parties submit that the communication to the public of works on peer-to-peer networks is carried out only by the persons who are responsible for a work being made available on the networks, together, in accordance with the case-law of the Court,¹⁵ with the operators of file indexing websites. By contrast, the ordinary users of peer-to-peer networks merely provide facilities which enable that communication to the public to be made. Those arguments would appear to form the basis of the first question referred for a preliminary ruling.

36. To answer the question, it is appropriate to note how peer-to-peer networks based on the technology of the *BitTorrent* protocol operate.¹⁶

How the BitTorrent protocol operates

37. The *BitTorrent* protocol is a protocol which enables the sharing of files on peer-to-peer networks. Its operation requires users to download specific software: the 'BitTorrent client'.¹⁷ The software works using 'torrent files'. Torrent files do not contain the data which make up the digital copy of the shared work,¹⁸ but metadata which enable, inter alia, the retrieval of a specific file containing a work. A torrent file is created for each file containing the work. Torrent files can be downloaded from

14 In this Opinion, I shall use the terminology adopted by the EU legislature in Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92), thus 'download' for transmission from the network to the client computer and 'upload' for transmission from the client computer to the network.

15 Judgment of 14 June 2017, *Stichting Brein* (C-610/15, ECLI:EU:C:2017:456).

16 See, also, judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraphs 9 and 10), and my Opinion in that case (C-610/15, EU:C:2017:99, points 19 to 24).

17 BitTorrent Client is also the own name of BitTorrent client software manufactured by BitTorrent Inc. However, other similar software does exist, one of the most popular at the present time being μ Torrent, developed by the same company.

18 In this Opinion I shall not address the question of whether a digital file constitutes a copy of the work (I set out my position on this subject in my Opinion in *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:459, point 44). It has been established that the recording of a work in digital format constitutes its reproduction. Such recording is possible only in the form of a file. Consequently, that file 'contains' the work, in the sense that it contains the data which make it possible, using a computer and software, to read and present the work. For further considerations, see, inter alia, Ph. Gaudrat, 'Forme numérique et propriété intellectuelle', *Revue trimestrielle de droit commercial et de droit économique*, 2000, p. 910.

indexing sites on the internet.¹⁹ After the torrent file relating to the work sought (more specifically, a file containing that work) is downloaded, the BitTorrent client first contacts a special server, the tracker, which informs it as to which computers participating in the peer-to-peer network have the file in question.²⁰ The BitTorrent client then makes direct contact with those computers²¹ in order to download the file. The computers sharing the same file form the peer-to-peer network itself (swarm).

38. The special feature of the *BitTorrent* protocol is that the files are not uploaded in their entirety, but are broken down into small pieces. Those pieces are downloaded non-sequentially from various computers in the swarm. The information on the different pieces needed to complete the download file is found on the torrent file. The BitTorrent client then assembles those pieces to (re)create the file containing the work. Another special feature of the *BitTorrent* protocol is that each piece of a downloaded file may be uploaded simultaneously to other peers, until the entire file has been downloaded. This enables the downloading speed for all peers to be increased significantly since this depends, inter alia, on the number of peers who are able to upload each piece. Moreover, the BitTorrent client will download the rarest pieces to the swarm first, in order to increase the number of them.

*Making works available to the public on peer-to-peer networks*²²

39. A work is available for sharing on a peer-to-peer network for as long as a complete file containing that work is in a file which the BitTorrent client can access from a user of a network and the user's computer is connected to the internet. Where no users are available to share a file containing the work, it will not be possible to download the torrent file from the indexing platform (it is 'dead').

40. The act by which a person allows persons who are not part of his private circle to download protected works stored in the memory of his computer falls within the scope of the exclusive right to authorise or prohibit the making available to the public of those works in such a way that members of the public may access them from a place and at a time individually chosen by them, within the meaning of Article 3 of Directive 2001/29.

41. According to the case-law of the Court, in order for there to be an act of making available, it is sufficient that a work is made available to a public in such a way that the persons comprising that public may access it, from wherever and whenever they individually choose, irrespective of whether they avail themselves of that opportunity.²³ In other words, where a work is made available to the public, it is irrelevant whether a transmission of the work has actually taken place. All that matters is that there is the opportunity for such a transmission, which then might be taken up by a member of the public who wishes to have access to the work. That feature is critical for the purposes of assessing the sharing of works on peer-to-peer networks from the point of view of copyright and, in particular, the right to make works available to the public.

42. Three situations can be distinguished in which the users of a peer-to-peer network may find themselves with regard to the uploading of content.

19 Such as the website *The Pirate Bay*, which was at issue in the case which gave rise to the judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456): since those indexing sites do not contain files of works, but only torrent files, their operators were able to claim that they had not committed any infringement of copyright. The abovementioned judgment dispelled that argument.

20 There are also new protocols which do not use a central tracker as the peers perform that task. This is irrelevant to the present case.

21 Using their IP addresses provided by the tracker.

22 Contrary to what one might think, this issue has not been analysed in detail in legal literature. See, for one of the few contributions on this subject, J. Zygmunt, 'Przesyłanie plików za pośrednictwem sieci peer-to-peer a rozpowszechnienie utworu w rozumieniu prawa autorskiego', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 2017, No 1, p. 44 to 62.

23 Judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 31).

– Seeders

43. The first concerns users who have a complete file and who share that file by uploading pieces to interested persons. Those users are called seeders and may be both persons who share a file to which they have access from sources other than the peer-to-peer network and persons who, after having downloaded the entire file, leave the BitTorrent client running in order to respond to requests from other users to upload pieces of that file.

– Peers

44. The second situation involves persons who are downloading a file but who do not yet have the file in its entirety. Those persons, or, more precisely, their computers, are called peers.²⁴ The operational principle of BitTorrent clients is that, when they download pieces of a file, they automatically and simultaneously upload the pieces that have already been downloaded to other peers who are looking for those pieces, until all of the pieces that make up the complete file have been downloaded. Then, the user decides either to stop the BitTorrent client and, therefore, the uploading of pieces of the file, or to leave it running, thus becoming a seeder.

45. From the point of view of the right to make works available to the public, seeders and peers are, in my view, in a comparable situation. While the peer is downloading a file, he simultaneously – and inevitably – makes the pieces of the file in his possession available to the swarm, that is to say his BitTorrent client will respond to upload requests from other peers. Since the downloading does not stop, unless there is a technical error, until the entire file has been downloaded, as the pieces are not usable before the complete file is compiled, the making available to the public therefore involves the entire file containing the work. The same is true of the seeder, who continues to make the file available to the public (the members of the swarm) after having downloaded it in its entirety.

46. However, the actual uploading of pieces of the file and the quantity of pieces uploaded depends on whether or not there are peers interested in downloading them, the number of seeders of the same file and the upload speed of the user concerned's internet connection. The same applies in respect of both peers and seeders: a seeder does not upload anything if nobody is interested in his file, a peer does not upload anything if he only has pieces that other members of the swarm already have or if other peers are able to upload them more quickly. Therefore, both seeders and peers may potentially not upload any pieces of a file or may upload either an indeterminate number of those pieces or the entire file. However, that factor has no bearing from the point of view of the right to make works available to the public since, as I have already explained, whether or not the transmission of the work in question has actually taken place is irrelevant for the purposes of determining whether it has been made available to the public: the mere fact that such transmission is possible is sufficient. There is therefore no need to apply a threshold in respect of the amount of data uploaded, as mentioned in question 1(b).

47. Moreover, the operation of peer-to-peer networks, as file-sharing networks, is based on the *do ut des* ('I give so that you may give': *quid pro quo*) principle: in order to be able to download, data must be uploaded. Accordingly, indexing sites require users to adhere to a certain ratio between uploading and downloading, which is normally set at around 1.²⁵ Users whose ratio is too low may be banned. The fact alone that internet connections often have slower upload than download speeds means that

²⁴ As is often the case with the internet, the terminology relating to peer-to-peer networks has not always been developed in a very rational manner. For the sake of clarity, in this Opinion I shall use the term 'seeders' for users who have an entire file and make it available to other users, 'peers' for users who are downloading a file and uploading pieces to other peers and, finally, 'leechers' for users who download without uploading.

²⁵ The ratio of 1 means that the user has uploaded the same amount of data as he has downloaded.

merely uploading pieces of files at the same time as they are being downloaded is not sufficient to maintain the ratio at the required level.²⁶ Therefore more time must be spent uploading than downloading. Any regular user of a peer-to-peer network will therefore have to become a seeder and make available to the public the files in his possession.

48. The arguments raised by Telenet, Proximus and Scarlet Belgium that the pieces exchanged on peer-to-peer networks are not parts of works which enjoy copyright protection are therefore unfounded. Those pieces are not parts of works, but parts of files containing those works. Those parts are merely the mechanism for transmitting those files under the BitTorrent protocol. However the fact that the pieces which are *transmitted* are unusable in themselves is irrelevant since what is *made available* is the file containing the work, that is to say the work in digital format. If, from the point of view of the right to make works available to the public, it is immaterial whether or not the work has been transmitted, the technical process used in order to carry out that transmission is even more inconsequential.²⁷

49. Finally, in that regard, the operation of peer-to-peer networks is not substantially different from the way in which the World Wide Web operates. The publication of a work online merely means that the file containing that work is stored on a server connected to the internet and has a URL (uniform resource locator) address to enable it to be accessed. The work as an object that is perceptible to humans exists on the web only from the point at which a client computer accesses the server in question, reproduces the file and displays that work on the screen (or reproduces its sounds). However, merely placing the file containing the work on a server which can be accessed using the World Wide Web is sufficient for there to be an act of communication (making available). Moreover, the internet works in accordance with the principle of packet switching: the file containing the work in question is divided into small packets²⁸ of data which are routed between the server and the client in a random order and by different channels. Those packets are unusable in themselves or, in any event, are too small to contain original parts of the work, and it is only once they have been forwarded that they are reassembled to form the file containing the work. However, there is no doubt that there has been a communication to the public on the World Wide Web. The right to make works available to the public was conceived precisely for the use of works on the internet, in the first place on the World Wide Web.

– *Leechers*

50. The third situation in which the users of peer-to-peer networks find themselves is of being a user who downloads files without uploading them, either during the download or afterwards. Some BitTorrent clients allow such a set-up.²⁹ Those users are called leechers. By blocking the option to download pieces of files from their computers, leechers do not make files available to the public and therefore there is no infringement of that exclusive right.

51. That said, first, leechers nonetheless infringe the exclusive right of reproduction protected by Article 2 of Directive 2001/29. Although the reproduction of the file containing the protected work resulting from its downloading is for private purposes, it is settled case-law that a reproduction does not benefit from the private copying exception provided for in Article 5(2)(b) of that directive where that reproduction came from an unlawful source.³⁰ That is precisely the case where a work that is

26 Unlike the exclusive right of making works available to the public, only actual uploads are taken into account in order to calculate the ratio; merely making the file available is not sufficient.

27 See, to that effect, judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 38).

28 These are often even smaller than the pieces of files shared in accordance with the BitTorrent protocol.

29 By contrast, certain other software makes it possible only to limit the upload speed which, in accordance with the considerations set out above, does not preclude the act from being classified as making the work available to the public.

30 Judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 41).

made available on a peer-to-peer network is downloaded without the authorisation of the holder of the copyright and related rights. However, infringement of the right of reproduction has not been invoked in the main proceedings. Moreover, in some national legal systems, taking advantage of an infringement committed by a third party is an offence in itself.

52. Secondly, the operation of peer-to-peer networks is based on a mechanism of sharing, that is to say every download must be uploaded in return. If not enough network users upload files, the network does not work well as the download speed is too slow. When there are no more seeders, the network stops operating completely and the torrent file is ‘dead’. For that reason, trackers discriminate against users who do not upload content (leechers) by reducing their download speed or even blocking access. The strategy of downloading without uploading can therefore work only for occasional uses of peer-to-peer networks and leechers are, by definition, a marginal phenomenon on those networks.

53. It follows that, although the act of having blocked the upload function of the BitTorrent client may constitute a ground of defence in judicial proceedings seeking compensation for the prejudice caused by the infringement of the right to make works available to the public, the fact that protected works have been downloaded on a peer-to-peer network is, in my opinion, sufficient evidence that such an infringement is likely at the stage where the rightholder who has suffered harm seeks to obtain the personal data of the persons concerned from the IP addresses of their internet connections.

The requirement of having full knowledge of the facts and the indispensable role of the user

54. Telenet, Proximus and Scarlet Belgium also raise the argument that the users of peer-to-peer networks may not be aware of the fact that, by downloading works on those networks, they are also uploading them. In any event, those users do not play an indispensable role in the making available to the public of works shared on those networks. In accordance with the case-law of the Court, full knowledge of the facts and whether the role played by the user is indispensable are conditions which must be fulfilled in order to establish that there has been an act of communication to the public.

55. First, as regards users of peer-to-peer networks having knowledge of the facts, it should be noted that BitTorrent clients are not standard software normally found on a computer. Their installation, configuration and use require specific know-how which, however, is fairly easy to acquire nowadays, in particular with the help of the many tutorials that are available on the internet. Any tutorial will clearly inform readers that downloading from a peer-to-peer network automatically involves uploading the same content. Some of those tutorials will also explain how to disable that feature.

56. Secondly, as I have already explained,³¹ the users of peer-to-peer networks are notified of their upload/download ratio as a ratio that is too low may result in them being banned from the indexing site. They are therefore fully aware of the fact that participation in peer-to-peer networks presupposes not only downloading content, but also uploading it.

57. I am therefore not convinced that those users are allegedly unaware. However, this is of minor relevance since, to me, full knowledge of the facts is not required in order for there to be an act of making available to the public in cases such as this one.

58. It is true that, in a series of judgments, the Court has emphasised the importance of the deliberate nature of the intervention by the user in order to establish whether there has been an act of communication to the public. That was the case in particular in the case which gave rise to the judgment in *Stichting Brein*, which concerned the operators of a file indexing website on a

³¹ See point 47 of this Opinion.

peer-to-peer network.³² However, I share the Commission's view that that requirement of deliberate intervention was necessary in those cases in which the Court had attributed the act of communication to the public to players who were not responsible for the initial communication of the work. Without that deliberate intervention, those players would merely be passive intermediaries, or even suppliers of technical installations, to whom no act of communication can be attributed.

59. By contrast, where the users concerned themselves give rise to the communication to the public (making available), those users' knowledge of the facts does not constitute the act in question. Article 3 of Directive 2001/29 does not contain any details in that regard. The fact that the infringer is unaware of his conduct may, at most, be taken into account when setting the damages, as expressly provided for in Article 13(2) of Directive 2004/48, however this has no bearing from the point of view of the lawfulness of that conduct. That provision is also a further indication of the fact that the deliberate nature of an intervention is not, as a general rule, a constituent element of an infringement of an intellectual property right protected by EU law.

60. The same applies with regard whether the intervention by the user is indispensable in order to give the public access to the work. That criterion is decisive in order to be able to attribute the communication to a person who is not at its source.³³ That indispensable role consists in allowing a new public to have access to the work, that is to say a public which was not the target of the initial communication.³⁴

61. The users of a peer-to-peer network are not in that situation. Although they make available to other peers the pieces of files which, in most cases, they have downloaded previously on the same network, those files are now stored on their own computers³⁵ and therefore their making available is an initial or, in any event, autonomous communication. Similarly, the Court did not hesitate in finding that such an act had taken place in respect of the publication on a website of a work that was already freely accessible on another website.³⁶ Therefore, the indispensable role played by those users is not decisive in order to establish that an act of communication has taken place.³⁷

The existence of a new public

62. According to the settled case-law of the Court, the communication of a protected work to the public involves the act of communication and a public.³⁸ The sharing of files on a peer-to-peer network is, usually, aimed at an indeterminate number of potential recipients and involves a large number of persons. The existence of a public is therefore established.³⁹

32 See judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 26). See, also, judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 31).

33 Such as the manager of a hotel who routes the television signal to the bedrooms of that hotel (judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 42) or the operators of a file indexing website on the peer-to-peer network (judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 36).

34 Judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 46).

35 Which, depending on the way in which the BitTorrent protocol operates, therefore play the same role as servers in the operation of the World Wide Web.

36 Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, operative part).

37 I would add for the sake of completeness that, in my view, the users of a peer-to-peer network where works which are accessible elsewhere, but for a charge, are shared, make those works available to the public for profit. As I explained above, following the logic of how peer-to-peer networks operate, uploading is the consideration for being able to download. Accordingly, the users of a network of that kind upload in order to obtain an economic advantage, namely the opportunity to access free of charge works for which they would normally have to pay. There is therefore clearly a profit-making objective.

38 Judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 36).

39 See, to that effect, judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraphs 42 and 43).

63. Moreover, the requirement that the public concerned must be a new public applies only in the case of secondary communication. The new public is defined as the public that was not taken into account by the copyright holders when they authorised the initial communication.⁴⁰ Since the making available of protected works by the users of a peer-to-peer network has the features of an initial communication,⁴¹ the criterion of a new public is not applicable in the present case.

64. In any event, even if that criterion were to apply, since no public has been taken into account by the holders of the copyright or related rights when those works are shared without the authorisation of those rightholders, any public for whom the communication is intended, in the present case the users of the peer-to-peer network, must therefore be regarded as new.

Proposed answer

65. Accordingly, by offering the possibility to download pieces of files containing copyright-protected works from their computers, whether at the time that those files are downloaded or independently of that download, the users of peer-to-peer networks make those works available to the public within the meaning of Article 3 of Directive 2001/29.

66. I therefore propose that the answer to the first question referred for a preliminary ruling should be that Article 3 of Directive 2001/29 must be interpreted as meaning that the act of making pieces of a file containing a protected work available for download within the context of a peer-to-peer network, even before the user concerned has himself downloaded that file in its entirety, falls within the scope of the right to make works available to the public in accordance with that article, and that user's knowledge of the facts is not decisive.

The second question referred for a preliminary ruling

67. By its second question, the referring court asks, in essence, whether a company such as Mircom which, although it has acquired certain rights over protected works, does not exploit them but merely claims damages from individuals who infringe those rights, in the present case, by making those works available to the public on peer-to-peer networks, may benefit from the measures, procedures and remedies provided for in Chapter II of Directive 2004/48. The referring court also has doubts as to whether such a body may be regarded as having suffered any prejudice within the meaning of Article 13 of that directive.

Mircom's status as a licensee

68. The four categories of players who must have the status to be able to benefit from the measures, procedures and remedies provided for in Directive 2004/48 in order to ensure the enforcement of intellectual property rights are listed in Article 4(a) to (d) of that directive. They are the holders of those rights, other persons authorised to use those rights, in particular licensees, intellectual property collective rights-management bodies and professional defence bodies which have a right to represent holders of intellectual property rights. With regard to the latter three categories, they have the status to be able to benefit from the provisions of Directive 2004/48 only if and to the extent that this is provided for in the applicable national law.

⁴⁰ Judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 44).

⁴¹ See point 61 of this Opinion.

69. It is established, in the main proceedings, that Mircom is not the holder of any copyright or related rights in respect of the works in question. Article 4(a) of Directive 2004/48 therefore does not apply to it.

70. However, Mircom claims to have acquired licences enabling it to communicate the works at issue in the main proceedings to the public on peer-to-peer networks. At first sight, that company should therefore be regarded as a licensee and, accordingly, benefit from the provisions of Directive 2004/48 pursuant to Article 4(b) thereof. The EU legislature regards licensees as persons injured by the infringing activities, in so far as those activities may hinder the normal exploitation of licences or even reduce the income from them.

71. It is again for the referring court to check the validity of the licensing agreements concluded by Mircom in the light of the law applicable to those contracts as well as the *locus standi* of a licensee of that kind in the light of the procedural rules applicable to the dispute.

72. That court observes, however, that Mircom does not in fact exploit those licences, but merely seeks compensation from individuals who infringe the copyright and related rights in respect of the works at issue by making them available to the public on peer-to-peer networks. According to the referring court, Mircom's conduct corresponds perfectly to the definition of what is often referred to as a copyright troll.

73. I recall that a copyright troll is a person who, having acquired limited exploitation rights in respect of protected works, does not in fact exploit them, but merely seeks compensation from individuals who infringe those rights, in particular on the internet, in most cases on file-sharing networks such as peer-to-peer networks. Moreover, a copyright troll brings legal proceedings with the sole aim of obtaining the names and addresses of infringers in order to then offer them an amicable settlement in return for the payment of a certain sum, in most cases without pursuing those court proceedings. The copyright troll's income therefore comes mainly from sums that are paid 'voluntarily' by infringers, which it shares with the holders of the copyright and related rights in respect of the works in question. This procedure appears to be particularly effective in so far as infringements of copyright and related rights in respect of pornographic films are concerned since, in addition to the threat of significant damages which may possibly be awarded, the feeling of embarrassment which is deliberately induced among alleged infringers may be exploited.⁴² Therefore, in many cases, the persons concerned may be inclined to pay the sums demanded without considering any measures to defend themselves, or even without being the actual perpetrators of the infringements of the rights in question.⁴³

74. Mircom itself acknowledged at the hearing that it did not exploit the licences acquired in respect of the works at issue in the main proceedings, nor did it have the intention to do so. Moreover, although peer-to-peer networks may constitute the lawful means of distributing some content that is protected by copyright, considerable effort is required in order to overcome the technical difficulties associated with such a distribution channel and to ensure it is profitable. Merely acquiring licences is therefore not enough and Mircom does not appear to have the intention to make such efforts.

⁴² It is often sufficient to cite the explicit titles of the works which are the subject of the alleged infringements.

⁴³ The persons designated are those who own the internet connections and whose names are identified on the basis of the IP addresses of those connections. Therefore, these are not necessarily the persons who have committed the infringements.

75. On the contrary, the referring court refers to judicial decisions, inter alia in the United Kingdom, in which it was found that Mircom's actions were typical of a copyright troll, in particular as it used the data of alleged infringers obtained in previous judicial proceedings in order to contact those infringers and offer them 'arrangements', without bringing legal proceedings against those who refused those arrangements.⁴⁴

76. It therefore appears that Mircom's conduct does indeed correspond to that of a copyright troll. However, that concept is unknown in EU law. Moreover, Mircom's conduct is not illegal per se. As the Commission rightly notes, there is nothing to prevent an interested party from refraining from bringing legal proceedings if it considers them to be inappropriate or from seeking an amicable settlement in disputes between it and infringers of copyright.

77. However, in EU law, there is a general legal principle that EU law cannot be relied on for abusive or fraudulent ends. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law. That is the case where the provisions of EU law are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.⁴⁵

78. In so far as the principle of prohibition of abuse of rights is applicable in a wide variety of fields of EU law,⁴⁶ I cannot see any reason to prevent its application in the field of intellectual property. Moreover, Directive 2004/48 stipulates in Article 3(2) that safeguards must be provided for against the abuse of the measures, procedures and remedies provided for in that directive.

79. It could be considered that, in acquiring exploitation licences which it does not intend to execute, Mircom is in reality seeking to rely on those licences improperly in order to acquire licensee status enabling it to initiate the judicial proceedings provided for in Directive 2004/48 with the aim of obtaining the data of those who have infringed the copyright and related rights in respect of the works to which those licences relate. By having those data, it is able to contact those infringers to threaten them with legal proceedings in order to obtain a lump sum payment as an amicable settlement.

80. Accordingly, having formally satisfied the conditions to enjoy licensee status, Mircom could rely on that status for a purpose other than that for which Directive 2004/48 confers legal standing on licensees in cases where intellectual property rights are infringed. The EU legislature's aim was to give licensees an instrument to protect the normal exploitation of their licences, whereas Mircom's aim is solely to punish infringements of the copyright and related rights and to obtain a financial advantage from them. That conduct would therefore fall under the definition of an abuse of rights which is prohibited under EU law.

81. A finding of such abusive conduct requires an assessment of the facts which must therefore be carried out by the national court. If it were to find that Mircom is effectively trying to misuse its licensee status in order to benefit from the measures, procedures and remedies provided for in the provisions adopted in the transposition of Directive 2004/48, that court should then refuse to grant it the benefit of those measures, procedures and remedies in so far as that benefit is based on licensee status.

44 Judgment of the England and Wales High Court (Chancery Division) of 16 July 2019, *Mircom International Content Management & Consulting Ltd & Ors v Virgin Media Ltd & Anor* [2019] EWHC 1827.

45 See, most recently, judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 to 98 and the case-law cited).

46 See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 100 and the case-law cited). See, also, R. de la Feria, S. Vogenauer, (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford – Portland, 2011.

Mircom's status as the assignee of the claims

82. However, in the light of the contracts concluded between Mircom and the film producers presented to the Court, it would appear that it may be possible to analyse the status of that company differently. It would be for the referring court to ascertain whether those contracts are different in nature from licensing agreements. If that were the case, it would not be a matter of an abuse of rights but of a different legal relationship from that which is apparent, at first sight, from those contracts.

83. In particular, Mircom claims to be not only a licensee of the producers of the films at issue in the main proceedings, but also an assignee of those producers' claims as a result of infringements of the copyright and related rights in respect of those films. The question therefore arises as to whether such an assignee of claims may benefit from the measures, procedures and remedies provided for in Directive 2004/48.

84. I recall that the categories of persons on whom Directive 2004/48 confers the benefit of the measures, procedures and remedies laid down therein are listed in paragraphs 4(a) to (d) of that directive. Article 4(a) of the directive concerns the holders of intellectual property rights, a category which, undoubtedly, does not include the assignees of claims relating to infringements of those rights.

85. By contrast, Article 4(b) of Directive 2004/48 mentions 'all other persons authorised to use [intellectual property rights]'. As I have stated, Mircom could in principle, in its status as a licensee, benefit from that provision provided that its licenses are not considered to have been acquired for an improper purpose. It is now necessary to determine whether that company might be able to benefit from that provision as an assignee of claims relating to infringements of intellectual property rights.

86. In my view, this is not the case. The concept of 'use of intellectual property rights' must be interpreted as covering the exercise of exclusive powers deriving from those rights. As regards subject matter which is protected by copyright and related rights, this includes, inter alia, acts of reproduction, communication to the public and distribution of copies of that subject matter. It is the persons who are authorised to exercise those powers who, like rightholders, have a direct interest in the protection of those rights, referred to in recital 18 of Directive 2004/48,⁴⁷ because any infringement of those rights potentially conflicts with those powers.

87. The acquisition and recovery of claims relating to those infringements does not constitute the exercise of the exclusive powers of holders of intellectual property rights, rather this is a mechanism, which is common in civil law, to obtain compensation for damage resulting from those powers being undermined. In my opinion, Article 4(b) of Directive 2004/48 must therefore be interpreted as meaning that the category of persons authorised to use the intellectual property rights referred to in that provision does not include the assignees of claims relating to infringements of those rights.

88. The fact remains that the holders of intellectual property rights may have an interest in transferring their claims relating to infringements of those rights, in particular on account of difficulties they may face recovering those claims themselves. Such claims would be more likely to be taken up if assignees were able to benefit from the mechanisms intended to facilitate the establishment and recovery of those claims, such as those provided for in Chapter II of Directive 2004/48.

⁴⁷ According to that recital, 'the persons entitled to request application of those measures, procedures and remedies should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible'.

89. I therefore cannot rule out that national law may confer on the assignees of such claims the status to be able to benefit from measures adopted when transposing Directive 2004/48. According to the case-law of the Court, that directive merely establishes a minimum level of protection which may be increased by the Member States.⁴⁸ However, it does not require them to do so.

90. In particular, such a requirement is not apparent, in my opinion, in the judgment in *SNB-REACT*.⁴⁹ It is true that, in that judgment, the Court, relying inter alia on recital 18 of Directive 2004/48, held that '(i) where a body in charge of the collective management of intellectual property rights and recognised as having standing to represent the holders of those rights is regarded by national law as having a direct interest in the defence of those rights, and (ii) that law allows that body to bring legal proceedings, the Member States are required to recognise that body as a person entitled to seek application of the measures, procedures and remedies provided for by that directive, and to bring legal proceedings for the purpose of enforcing such rights'.⁵⁰ However, as the text of that judgment indicates, at issue was an intellectual property collective rights management body, that is to say an entity belonging to one of the categories mentioned in Article 4 of Directive 2004/48 (in Article 4(c)). It follows from recital 18 of Directive 2004/48 that, according to the EU legislature, persons belonging to those categories have a direct interest in the enforcement of intellectual property rights. However, that recital cannot require that bodies which do not fall under any of those categories, such as the assignees of claims relating to infringements of intellectual property rights, are given the same status, even if they had to be regarded as also having a direct interest. While a recital may explain the choices made by the legislature, and therefore guide the interpretation of the provisions of an act of EU law, it does not have any legislative value of its own which applies independently of those provisions.

91. Moreover, contrary to the argument raised by Telenet at the hearing, neither the fact that the transfer to Mircom concerns claims which did not exist at the time when the contracts at issue were concluded, nor the fact that those contracts were concluded for a specified period of time, would appear to me to preclude a transfer of claims. If permitted by the applicable law, that transfer may concern future claims and may be reversible in the event that the claim is not recovered. However, the referring court will have to verify, first, the validity of those transfers in the light of the law that is applicable to the contracts in question and, secondly, the enforceability of those transfers against debtors, in the light of the applicable legislation, including the procedural rules before the court having jurisdiction.

Mircom's other potential statuses

92. Also relying on the judgment in *SNB-REACT*,⁵¹ Telenet submits that Mircom must be regarded as an intellectual property collective rights management body. Like Proximus, Scarlet Belgium and the Commission, I take the view that that interpretation is incorrect. Mircom does not manage the copyright and related rights of its contractual partners, but solely seeks to obtain compensation for damages resulting from infringements of those rights. Likewise, Mircom does not appear to satisfy the requirements imposed on collective management organisations by Directive 2014/26/EU.⁵² Moreover, Mircom itself maintains that it is not a collective management organisation.

⁴⁸ Judgment of 25 January 2017, *Stowarzyszenie Oławska Telewizja Kablowa* (C-367/15, EU:C:2017:36, paragraph 23 and the case-law cited).

⁴⁹ Judgment of 7 August 2018, *SNB-REACT* (C-521/17, EU:C:2018:639).

⁵⁰ Judgment of 7 August 2018, *SNB-REACT* (C-521/17, EU:C:2018:639, paragraph 34).

⁵¹ Judgment of 7 August 2018 (C-521/17, EU:C:2018:639).

⁵² Directive of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).

93. Finally, I share the view taken by the Polish Government, that every holder of copyright or a related right is entitled to authorise someone else, by means of a mandate or a different legal authorising act, to exercise their rights on their behalf, in particular in order to claim the compensation which must be paid as a result of the infringement of its right. Moreover, Article 4(d) of Directive 2004/48 expressly provides for such a situation. That however does not appear to be the case in the main proceedings. It has been established before the referring court that Mircom is not acting in the name and on behalf of the producers of the films at issue, but in its own name and on its own account. That company cannot therefore be regarded as a defence body having a right to represent holders of intellectual property rights within the meaning of Article 4(d) of Directive 2004/48.

Proposed answer

94. I propose that the answer to the second question referred for a preliminary ruling should be that Article 4(b) of Directive 2004/48 must be interpreted as meaning that a body which, although it has acquired certain rights over protected works, does not exploit them and merely claims damages from individuals who infringe those rights, does not have the status to benefit from the measures, procedures and remedies provided for in Chapter II of that directive, in so far as the court having jurisdiction finds that the acquisition of rights by that body was solely for the purpose of obtaining that status. That directive neither requires nor precludes the Member State from attributing that status, in its national legislation, to an assignee of claims relating to infringements of intellectual property rights.

The third question referred for a preliminary ruling

95. By its third question, the referring court asks to what extent the circumstances set out in connection with the first two questions must be taken into account in the assessment of the correct balance to be struck between, on the one hand, the enforcement of intellectual property rights and, on the other, the rights and freedoms of users, such as respect for private life and the protection of personal data.

Preliminary observations

96. It is clear from the present request for a preliminary ruling that the referring court is aware of the Court's case-law on the disclosure to private persons of personal data in order to enable them to bring civil proceedings for copyright infringements. According to that case-law, such disclosure is authorised, but is not required, by Article 8(3) of Directive 2004/48 in conjunction with Article 15(1) of Directive 2002/58.⁵³ However, the Court took the view that, when transposing, inter alia, Directives 2002/58 and 2004/48 into national law, it is for the Member States to ensure that they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order. Furthermore, when implementing the measures transposing those directives, the authorities and courts of Member States must not only interpret their national law in a manner consistent with them, but must also make sure that they do not rely on an interpretation of them which would conflict with those fundamental rights or with the other general principles of European Union law, such as the principle of proportionality.⁵⁴

⁵³ Judgment of 19 April 2012, *Bonnier Audio and Others* (C-461/10, EU:C:2012:219, paragraph 55 and the case-law cited).

⁵⁴ Judgment of 19 April 2012, *Bonnier Audio and Others* (C-461/10, EU:C:2012:219, paragraph 56 and the case-law cited).

97. That case-law must be read in the light of more recent case-law which appears to focus on the obligation on Member States to ensure that holders of intellectual property rights are actually able to obtain compensation for damages resulting from infringements of those rights. Accordingly, the Court held, in a case in which the facts in the main proceedings concerned file sharing, that EU law (Directives 2001/29 and 2004/48) precluded national legislation or practice before the courts under which the owner of an internet connection that has been used for copyright infringements could avoid being held liable merely by naming a family member who might have had access to that connection, without providing any further details, thus leaving the copyright holder as the injured party with no real possibility of a remedy, without that legislation giving the rightholder other options to obtain compensation, for example by establishing liability on the part of the owner of the internet connection.⁵⁵ If the fact that the owner of an internet connection that has been used for copyright infringements acknowledges that he is liable for those infringements or indicates who is liable is a condition for the holder of those rights being able to obtain compensation for the damage suffered, this is a fortiori the case in respect of the preliminary step, namely the identification of the owner of the connection, which is often possible only on the basis of the IP address and information provided by the internet service provider.

98. However, the Court has just delivered its judgment in *La Quadrature du Net and Others*,⁵⁶ which is significant as regards the stage prior to any disclosure of data such as IP addresses, namely the retention of that data. Although that judgment is based on previous case-law, it provides important clarification. It is difficult not to see a certain degree of tension between that judgment and the case-law cited in the preceding points concerning the disclosure of IP addresses in actions seeking the protection of intellectual property rights.

99. In the judgment in *La Quadrature du Net and Others*, the Court acknowledges that, ‘where an offence is committed online, the IP address might be the only means of investigation enabling the person to whom that address was assigned at the time of the commission of the offence to be identified’.⁵⁷ The same is true in respect of infringements of civil law that are committed online, such as infringements of intellectual property rights. The Court also took the view that ‘that category of data [IP addresses] is ... less sensitive than other traffic data’.⁵⁸

100. Thus, according to the Court, ‘the general and indiscriminate retention [that is to say concerning the IP addresses of all natural persons who own terminal equipment permitting access to the internet] of only IP addresses assigned to the source of a connection^[59] does not, in principle, appear to be contrary to Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, provided that that possibility is subject to strict compliance with the substantive and procedural conditions which should regulate the use of that data’.⁶⁰

101. Nevertheless, according to the Court, ‘in the light of the seriousness of the interference entailed by that retention with the fundamental rights enshrined in Articles 7 and 8 of the Charter, only action to combat serious crime, the prevention of serious threats to public security and the safeguarding of national security are capable of justifying that interference’.⁶¹ Consequently, the Court held that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, precluded legislative measures which, for the purposes laid down in Article 15(1), provide, as

55 Judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, paragraphs 51 to 53 and operative part).

56 Judgment of 6 October 2020 (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

57 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 154).

58 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 152).

59 This is likely to be a communication (see paragraph 152 of that judgment).

60 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 155).

61 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 156).

a preventive measure, for the general and indiscriminate retention of traffic and location data, with the exception of, inter alia, a general and indiscriminate retention of IP addresses assigned to the source of a connection (communication) for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security.⁶²

102. Since, under Article 6(1) of Directive 2002/58, providers of electronic communications services have an obligation to erase traffic data or make them anonymous, including IP addresses, when they are no longer needed for the purpose of the transmission of a communication,⁶³ only a measure by the Member State, taken on the basis of Article 15(1) of that directive, may allow those providers to retain those data.⁶⁴

103. Admittedly, the judgment in *La Quadrature du Net and Others* concerns the retention of data only for reasons relating to public security and combating crime. However, the standard of protection in that judgment was set at a particularly high level and, in my opinion, it will be difficult to ignore this in other fields, such as the protection under civil law of the rights of others. In my view, it is doubtful whether the interests relating to the protection of intellectual property rights are as important as those underlying the safeguarding of national security, combating serious crime and preventing serious threats to public security. Therefore, the retention of IP addresses for the purposes of such protection, and their disclosure to interested parties in the context of proceedings concerning that protection, even where those addresses are retained for other purposes,⁶⁵ would be contrary to Directive 2002/58, as interpreted in that judgment. The holders of intellectual property rights will therefore be deprived of the main, if not the only, way of identifying the perpetrators of the infringements of those rights online where, as is the case with peer-to-peer networks, those perpetrators act anonymously, which risks undermining the balance between the various interests at stake which the Court has endeavoured to establish.⁶⁶

104. In the present case, the request for a preliminary ruling contains no indication as to the legal basis for the retention of the IP addresses Mircom is requesting be disclosed. However, according to Telenet, that retention is based on Article 126 of the *Wet betreffende de elektronische communicatie* (Law on electronic communications) of 13 June 2005,⁶⁷ which was at issue in one of the cases⁶⁸ which gave rise to the judgment in *La Quadrature du Net and Others*.⁶⁹ If the retention of IP addresses on the basis of that provision or, at the very least, their use for purposes other than those considered to be lawful in that judgment were to be regarded as contrary to EU law, the main proceedings and, consequently, the present request for a preliminary ruling, would become devoid of purpose.⁷⁰

62 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, point 1 of the operative part).

63 The IP addresses of internet connections are often assigned on a 'dynamic' basis, that is to say a new address is assigned each time the internet connection starts which enables access providers to connect more customers than they have available IP addresses. The data concerning the allocation of an IP address to a particular customer must therefore be erased relatively quickly.

64 See, to that effect, judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 154).

65 See, to that effect, judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 166).

66 See the case-law cited in points 96 and 97 of this Opinion.

67 *Belgisch Staatsblad*, 2005, p. 28070.

68 Case C-520/18, *Ordre des barreaux francophones et germanophone and Others*.

69 Judgment of 6 October 2020 (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

70 It is true that Telenet, as well as Proximus and Scarlet Belgium, state in their observations that that national provision does not permit the disclosure of IP addresses to Mircom, which therefore calls into question the purpose of the main proceedings. However, the assessment of whether such a possibility exists and, therefore, the relevance of the questions referred for a preliminary ruling, is a matter for the referring court. This, however, is different from the question as to the validity of that provision in the light of EU law.

105. The fact remains that, in the present case, the referring court wishes to ascertain how the criteria established in the Court's case-law cited in point 96 of this Opinion must be interpreted in circumstances such as those of the dispute in the main proceedings. At issue is, first, the doubts expressed by the referring court with regard to the existence of an infringement of copyright and related rights in the case of file sharing on peer-to-peer networks and, secondly, the equivocal role played by Mircom in pursuing those infringements.

The existence of an infringement of intellectual property rights

106. As regards the existence of an infringement of copyright and related rights, I consider that the proposed answer to the first question referred for a preliminary ruling clarifies the situation sufficiently. First, the making available to the public of pieces of a file containing a protected work on a peer-to-peer network falls within the exclusive rights of the holder of the copyright and related rights over that work and infringes those exclusive rights where it is carried out without that holder's authorisation. As that making available is usually associated with the downloading of files on peer-to-peer networks, since it is an inherent part of their operation, that downloading is sufficient evidence of a probable infringement of copyright or related rights in order to justify the request for information concerning the identity of those who own the internet connections used for that purpose from the provider of that connection. Of course, the holder of the rights in question must demonstrate that the files containing the works in respect of which it holds the rights have been shared without its authorisation using the internet connections in question.

107. Next, the owner of the internet connection may, in order to defend himself, submit evidence to demonstrate that he is not responsible for the infringement in question, that he merely downloaded the files without making them available to other users on the network, that he was not aware that the files would automatically be made available, etc. That is, however the next stage: a procedure aimed at establishing potential liability. However, the protection of personal data cannot provide immunity from any justified request for disclosure of the information needed to initiate fair judicial proceedings seeking compensation.⁷¹

108. Telenet, Proximus and Scarlet Belgium also raise the argument that the disclosure of the names of the owners of internet connections with which the films in respect of which Mircom holds the rights have been shared constitutes, on account of the explicit titles of those films, if I understand this correctly, a processing of data concerning a natural person's sex life or sexual orientation within the meaning of Article 9 of Regulation 2016/679. Such processing is in principle prohibited under Article 9(1) of that regulation.

109. However, even assuming that being the owner of an internet connection which has been used in order to share erotic films on peer-to-peer networks constitutes information concerning the data subject's sex life or sexual orientation, I take the view that the exceptions laid down in Article 9(2)(f) and (g) of Regulation 2016/679 apply in the present case. Therefore, I do not think that Article 9(1) of that regulation can preclude the disclosure of the names of those owners of internet connections in an action for compensation based on damage resulting from sharing.

The applicant's role

110. The issues raised by the role of an entity such as Mircom and its conduct are more delicate.

⁷¹ I shall leave aside here the question of Mircom's specific mode of operation, which I will analyse below. However, it is true that the judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791), referred to in points 98 to 101 of this Opinion, sheds a different light on that question.

111. First, Article 8(1) of Directive 2004/48 stipulates that the request for information must be made ‘in the context of proceedings concerning an infringement of an intellectual property right’. The Court has already had occasion to hold that that expression cannot be understood as referring solely to proceedings seeking a finding of an infringement of an intellectual property right.⁷² It acknowledged that the right to information may also be exercised in separate proceedings, after the infringement has been found.⁷³ Like the Commission, I think that that right may be exercised all the more before such a finding, in particular where the request for information concerns the data relating to possible offenders which are needed in order to initiate any proceedings.

112. The difficulty in the present case arises from the fact that the referring court appears to doubt that Mircom intended to bring such actions; according to that court, it is rather a matter of encouraging the persons concerned to accept its offer of an amicable settlement.

113. However, I think that the expression ‘in the context of proceedings concerning an infringement of an intellectual property right’ is sufficiently broad to include a process such as the one adopted by Mircom. Its action certainly has a close connection with the infringements of the copyright and related rights and is a method, although a morally dubious one, to defend those rights. It is also not illegal *per se*. Moreover, seeking an amicable solution is often a prerequisite for bringing legal action as such. In the same way as legal proceedings, it is necessary to know the name and address of the alleged infringer.

114. I therefore do not think that the referring court can refuse Mircom’s request by taking the view that it has not been made in the context of proceedings concerning an infringement of an intellectual property right, as required by Article 8(1) of Directive 2004/48.

115. Secondly, Article 8(1) of Directive 2004/48 provides that the request for information must be justified and proportionate. On this point, the referring court should, in my view, take account of the way in which Mircom operates.

116. If that court were to consider that the purpose of Mircom’s acquisition of exploitation licences for the films at issue was abusive, its request should be found to be unjustified. Moreover, even if Mircom’s status as a licensee was deemed valid, in so far as that company did not intend to exploit those licences, it did not actually suffer any prejudice in respect of which it could subsequently claim compensation under Article 13 of Directive 2004/48. Its action would then be devoid of purpose and its request unjustified.

117. It would still be possible to regard Mircom as an assignee of the claims of film producers resulting from infringements of the right to make the films in question available to the public. In such a case, in accordance with my proposed answer to the second question, Mircom’s *locus standi* would be based solely on national law. It is therefore on the basis of that law that the referring court will have to assess the request for information.

118. Finally, thirdly, Article 3(2) of Directive 2004/48 provides that the measures, procedures and remedies provided for in that directive must be applied in such a manner as to provide for safeguards against their abuse. It is therefore for the referring court to provide such safeguards. In a situation such as that at issue in the main proceedings, two factors appear to indicate that the request for information concerning the identity of alleged infringers of intellectual property rights is unlawful.

⁷² Judgment of 18 January 2017, *NEW WAVE CZ* (C-427/15, EU:C:2017:18, paragraph 20).

⁷³ Judgment of 18 January 2017, *NEW WAVE CZ* (C-427/15, EU:C:2017:18, operative part).

119. The first concerns the improper acquisition of the status needed in order to seek the benefit of the measures, procedures and remedies provided for in Directive 2004/48, in particular the right of information governed by Article 8 of that directive. I have analysed that issue in the context of the answer to the second question referred for a preliminary ruling.

120. The second factor more generally concerns Mircom's mode of operation. As the Commission rightly observes, a number of elements – the fact that these are merely alleged infringements and alleged infringers, the massive scale of the request for information,⁷⁴ the nature of the films in question, the fact that Mircom assesses the compensation due at a flat rate of EUR 500 per person without taking account of the specific circumstances of each case and, finally, the doubts as to whether Mircom really intends to bring legal proceedings in the event of a refusal to reach an amicable settlement – give reason to assume that its request for information may be used, improperly, not for the purpose of obtaining proportionate compensation for harm, but for the purpose of extorting a form of ransom under the guise of a proposal to settle the dispute amicably. Moreover, the referring court does not refer to any action by Mircom directed against platforms for indexing torrent files relating to the films in respect of which it is a rightholder, despite the fact that the case-law of the Court⁷⁵ gives it the opportunity to do so. This is an additional factor which may lead the referring court to take the view that it is not a question of eradicating the infringement, but of profiting from it.

121. The finding of such abuse is fully within the scope of the assessment of the facts of the case in the main proceedings and, therefore, comes under the jurisdiction of the referring court. With respect to EU law, the law permits, and even requires, such an analysis and a refusal, where appropriate, of entitlement to the right of information provided for in Article 8 of Directive 2004/48.

Proposed answer

122. I therefore propose that the answer to the third question should be that Article 8(1) of Directive 2004/48, read in conjunction with Article 3(2) thereof, must be interpreted as meaning that the national court must refuse to grant entitlement to the right of information provided for in Article 8 of that directive if, in the light of the circumstances of the dispute, it finds that the request for information is unjustified or unlawful.

The fourth question referred for a preliminary ruling

123. By its fourth question, the referring court asks, in essence, whether Article 6(1)(f) of Regulation 2016/679 must be interpreted as meaning that the recording of the IP addresses of persons whose internet connections have been used to share protected works on peer-to-peer networks, such as that carried out by Media Protector on behalf of Mircom, constitutes the lawful processing of personal data.

124. That question is based on the premiss that those IP addresses are personal data and their recording constitutes processing. That premiss is correct, however, only if the referring court grants Mircom the necessary status to benefit from the measures, procedures and remedies provided for in Directive 2004/48 and, in particular, grants its request pursuant to Article 8 of that directive.

⁷⁴ According to the information contained in the request for a preliminary ruling, the request for information at issue in the main proceedings concerns over 2 000 IP addresses.

⁷⁵ Judgment of 14 June 2017, *Stichting Brein* (C-610/15, ECLI:EU:C:2017:456).

125. The Court has already had occasion to hold that IP addresses, including dynamic addresses, constitute personal data since the controller of those IP addresses has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.⁷⁶ In such a case, there is no doubt that the recording of those addresses for the purposes of their subsequent use in legal proceedings corresponds to the definition of processing contained in Article 4(2) of Regulation 2016/679.

126. That would be the situation if Mircom, on behalf of whom Media Protector collects the IP addresses, had a legal means of identifying the owners of the internet connections in accordance with the procedure provided for in Article 8 of Directive 2004/48. However, if Mircom were to be denied the benefit of that procedure, the IP addresses at issue in the present case could not be regarded as being personal data as they would not relate to identified or identifiable persons within the meaning of Article 4(1) of Regulation 2016/679. Therefore, that regulation would not apply.

127. As regards the interpretation of Article 6(1)(f) of Regulation 2016/679, it lays down three cumulative conditions in order for the processing of personal data to be lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.⁷⁷

128. The condition relating to the need to process personal data for the purposes of the legitimate interests pursued appears to me to be satisfied. A peer-to-peer network, technically speaking, is a network of computers⁷⁸ which communicate with each other. That communication takes place using the IP addresses which identify the various computers (or more specifically, the routers which provide their connection to the internet). Any finding of an act of sharing a file on a network of that kind and, therefore, an infringement of copyright and related rights, where the file contains a protected work and has been shared without the authorisation of the holders of those rights, necessarily involves the identification and recording of the IP address from which that act was carried out. It is only subsequently that it is possible to identify the owner of the internet connection to which the IP address in question was attributed at a given moment. Although that owner is not always behind the act in question, he is usually able to provide information concerning the person who is responsible or may himself be held liable for the acts committed using his internet connection.⁷⁹

129. It follows that, in order to claim compensation for the damage caused by the unauthorised sharing of protected works on peer-to-peer networks, the IP addresses of the users of those networks must be recorded.

130. The condition relating to the pursuit of a legitimate interest by the data controller or by a third party is closely linked to the circumstances set out in connection with the second and third questions referred for a preliminary ruling and their assessment by the referring court. I can make the same comments here as those made with regard to the request for the disclosure of the names of persons to whom the IP addresses recorded under Article 8 of Directive 2004/48 were assigned. Were the

⁷⁶ Judgment of 19 October 2016, *Breyer* (C-582/14, EU:C:2016:779, paragraph 49).

⁷⁷ See, in respect of Article 7(f) of Directive 95/46, which is the equivalent of Article 6(1)(f) of Regulation 2016/679, judgment of 4 May 2017, *Rīgas satiksme* (C-13/16, EU:C:2017:336, paragraph 28).

⁷⁸ The term 'peer' designates, strictly speaking, a computer connected to a network.

⁷⁹ See, to that effect, judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, operative part).

referring court to consider that that request is unjustified or unlawful, the recording of IP addresses which precedes that request cannot be regarded as having been made in the pursuit of a legitimate interest. However, in such a case, the IP addresses would cease being personal data and Regulation 2016/679 would not apply.⁸⁰

131. By contrast, the recovery of claims in the prescribed manner by an assignee of those claims may constitute a legitimate interest justifying the processing of personal data in accordance with Article 6(1)(f) of Regulation 2016/679. However, for such processing to be justified, the assignee must then be able to use those data in order to identify the debtors of the claims acquired. Therefore, whether that processing is justified will depend in any case on the outcome of the request for disclosure of the names of the owners of the internet connections identified by the IP addresses in question.

132. Finally, as regards the condition that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence over the legitimate interest behind the processing of personal data at issue, this is a question of the existence of any circumstances that are specific to the case on account of which the processing would not be lawful *despite* the existence of a legitimate interest. It is for the court having jurisdiction to assess whether any such specific circumstances exist.

133. I therefore propose that the answer to the fourth question referred for a preliminary ruling should be that Article 6(1)(f) of Regulation 2016/679 must be interpreted as meaning that the recording of the IP addresses of persons whose internet connections have been used to share protected works on peer-to-peer networks constitutes the lawful processing of personal data where that recording is carried out in the pursuit of a legitimate interest of the controller or a third party, in particular in order to file a justified request for the disclosure of the names of the owners of the internet connections identified by the IP addresses pursuant to Article 8(1)(c) of Directive 2004/48.

Conclusion

134. In the light of all the foregoing, I propose that the questions referred for a preliminary ruling by the ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium) should be answered as follows:

- (1) Article 3 of 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 must be interpreted as meaning that the act of making pieces of a file containing a protected work available for download within the context of a peer-to-peer network, even before the user concerned has himself downloaded that file in its entirety, falls within the scope of the right to make works available to the public, in accordance with that article, and that user's full knowledge of the facts is not decisive.
- (2) Article 4(b) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as meaning that a body which, although it has acquired certain rights over protected works, does not exploit them, but merely claims damages from individuals who infringe those rights, does not have the status to benefit from the measures, procedures and remedies provided for in Chapter II of that directive, in so far as the national court finds that the acquisition of rights by that body was solely for the

⁸⁰ See point 126 of this Opinion. I would add that only dynamic IP addresses, which are not linked to specific internet connections, do not constitute traffic data within the meaning of point (b) of the second paragraph of Article 2 of Directive 2002/58.

purpose of obtaining that status. Directive 2004/48 neither requires nor precludes the Member State from attributing that status, in its national legislation, to an assignee of claims relating to infringements of intellectual property rights.

- (3) Article 8(1) of Directive 2004/48, read in conjunction with Article 3(2) thereof, must be interpreted as meaning that the national court must refuse to grant entitlement to the right of information provided for in Article 8 of that directive if, in the light of the circumstances of the dispute, it finds that the request for information is unjustified or unlawful.
- (4) Article 6(1)(f) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC must be interpreted as meaning that the recording of the IP addresses of persons whose internet connections have been used to share protected works on peer-to-peer networks constitutes the lawful processing of personal data where that recording is carried out in the pursuit of a legitimate interest of the controller or a third party, in particular in order to file a justified request for the disclosure of the names of the owners of the internet connections identified by the IP addresses pursuant to Article 8(1)(c) of Directive 2004/48.