Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Mannheim Local Chamber

UPC_CFI_471/2023

Order
of the Court of First Instance of the Unified Patent Court, issued on: *20/10/2024*

concerning EP 2 479 680
concerning
App_46521/2024
(Request for information concerning content delivery networks)

PLAINTIFFS/APPLICANTS

1) **DISH Technologies L.L.C.**
- 9601 South Meridian Boulevard - 80112
- Englewood – US

represented by Denise Benz

2) **Sling TV L.L.C.**
- 9601 South Meridian Boulevard - 80112
- Englewood – US

represented by Denise Benz

DEFENDANTS/RESPONDENTS

1) **AYLO PREMIUM LTD**
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zone - 2540 - Nicosia - CY

represented by Tilman Müller-Stoy

3) **AYLO FREESITES LTD**
- 195-197 Old Nicosia-Limassol Road, Block 1
Dali Industrial Zone - 2540 - Nicosia - CY

represented by Conor McLaughlin/Tilman Müller-Stoy

5) **BROCKWELL GROUP LLC**
- 19046 Bruce B. Downs Boulevard #1134 - 33647 -
Tampa - US

represented by Tilman Müller-Stoy

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

OTHER DEFENDANTS INVOLVED:

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

PATENT IN CONTENTION:

European Patent No. EP 2 479 680

DECISION-MAKING BODY:

Local Chamber Mannheim

PARTICIPATING JUDGES:

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

German

SUBJECT: Application for an order to disclose information pursuant to Rule 191 of the Rules of Procedure

FACTS:

The plaintiffs request, pursuant to R. 191 VerfO, an order for the provision of information by defendants 1, 3, 5 and 6, respectively, regarding which content delivery networks (CDNs) they use in the context of the delivery of video files by certain streaming services, or which they have used from 28 August 2019 (date of publication of the grant of the patent in suit) to the present, where the servers of the respective CDNs are located or were located during the aforementioned period, and whether the video files on the servers of the CDNs whose services they use or used during the aforementioned period are divided into several files and how these files are encoded.

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

and the Kingdom of Sweden. The defendants have filed counterclaims for annulment.

According to the statement of claim, defendants 1, 3, 5 and defendant 6 (the latter only in conjunction with defendants 1 and 5) operate streaming services which are specified in detail (but not exhaustively) in the statement of claim as infringing embodiments for the respective defendants (see statement of claim, p. 28, item 1, p. 12, items 2 and 4), while defendants 2 and 4 provide payment processing services for this purpose. The requests for information relate to the video files available via these streaming services.

In the statement of claim, the plaintiffs cited the streaming service www.brazzers.com of the first defendant and the streaming service www.pornhub.com of the third defendant, both accessed via the Microsoft Edge browser, each with the dynamic playback quality setting "auto" (for automatic) using the analysis tool Charles Web Debugging Proxy (hereinafter Charles Proxy) and the source code of the media player used, which is publicly available via Microsoft Edge DevTools under the Microsoft Edge browser (statement of claim, pp. 35 ff. and 76 ff.) and asserting in general terms that the statements apply accordingly to all other contested embodiments (statement of claim, p. 34). Charles Proxy is an HTTP web testing proxy server application that allows users to view all HTTP and SSL/HTTPS traffic between their computer and the internet, in particular requests and responses, including HTTP headers and metadata (e.g. cookies, caching and encoding information), while throttling the bandwidth available to the end user station for streaming. The plaintiffs submitted the information obtained in this way for the first-mentioned streaming service as Annexes K6 (Charles proxy records) and K7 (source code) and for the second-mentioned streaming service as Annexes K8 (Charles proxy records) and K9 (source code) to the statement of claim.

In their statements of defence, the defendants denied patent infringement by the streaming services www.brazzers.com and www.pornhub.com. In this regard, they interpret the patent in suit differently in some respects and present a partially different view of the technical functioning of the two streaming services, whereby they attribute a different meaning to the Charles proxy records and source codes submitted than the plaintiffs do. Contrary to the requirements of the patent in suit, the videos available on the aforementioned websites are neither encoded with a specific bit rate nor stored as multiple files (streamlets) on a set of servers as in a mere data cabinet. With regard to the other streaming services named in the statement of claim as contested embodiments, they complain about the complete lack of a conclusive, or at least substantiated, presentation on the use of the teaching of the patent in suit. Since, according to the statement of claim, the two streaming services discussed in the statement of claim are designed differently, the blanket reference that the others function in the same way is meaningless. Furthermore, they complain about the lack of arguments in the statement of claim regarding a domestic connection of the websites of the contested streaming services and the locations of the servers used within the meaning of the patent in suit, and dispute that such servers, for example those of the streaming service www.brazzers.com, are located within the territory of the EPG member states listed in the statement of claim.

In their replies to the individual statements of defence, the plaintiffs elaborate on their infringement arguments regarding the two streaming services explained by way of example in the statement of claim.

in which the end user no longer has the option of selecting the "auto" playback quality setting. In addition, they provide comparisons of the source code of the media players of other (but not all) of the streaming services of defendants 1 and 5 (Annexes K19a to 19e) and defendant 3 (Annexes K20a to K20c) listed in the statement of claim under the Microsoft Edge browser. They believe that the defendants' video files are not (only) accessed directly from the defendants' origin servers, but from servers of a content delivery network (CDN) on which the video copies are encoded in individual segments, as deemed necessary by the defendants in their interpretation of the patent. In any case, the video files stored on the CDN servers are encoded in accordance with the patent. A CDN is a service provided by a service provider that caches the pages of a website on servers distributed across geographically strategic locations in order to enable faster delivery of web pages and avoid latency. For this reason, origin servers are generally used in conjunction with CDN services. Only if requested content is not cached in the CDN is it retrieved from the origin server and then cached in the CDN cache for future requests, with the duration of caching varying. As the Charles Proxy records and the results of the tracing programme "TRACERT" (Trace Route) showed that the streaming service www.brazzers.com of the first defendant uses CDN servers of the service providers Reflected Networks, Inc. and Edgecast, Inc., located in Frankfurt and Munich, the streaming service www.pornhub.com of the third defendant uses CDN servers of the service provider Cloudflare, Inc., located in Frankfurt, and the streaming services www.mygf.com and www.bangbros.com of the fifth and sixth defendants and the first and sixth defendants use CDN servers of the service provider Reflected Networks, Inc., located in Frankfurt.

The plaintiffs are of the opinion that the requested information on the identity of the CDNs used already constitutes information within the meaning of R. 191 EPG VerfO in conjunction with Art. 67 (1) (a) and (c) EPGÜ on the distribution channels of the infringing process and on the identity of all third parties involved in the application of the infringing process. In any case, this is information that the plaintiffs reasonably need for their legal proceedings. In any case, based on the defendant's argument, it was of decisive importance where the servers on which the video files were encoded were located and how the video files were stored on the servers, even if, according to the correct legal opinion, the location of the servers in the EPG member states was irrelevant. Since it is conceivable that the various CDNs encode the video files on their respective servers in different ways, this is information that the plaintiffs reasonably needed for their legal proceedings. The plaintiffs had exhausted the possibilities of conducting their own investigations. It can be assumed that defendants 1, 3, 5 and 6 have the requested information or could at least reasonably obtain it from their contractual partners. The plaintiffs have reason to believe that the defendants' statements in their responses to the action regarding the locations of the servers and the manner in which the video files are encoded on the servers are incorrect or, at any rate, incomplete, as the investigations set out in the reply regarding the locations of the CDNs used by defendants 1 and 3 and the manner in which the video files stored there are encoded show. at least incomplete, as shown by the investigations set out in the reply regarding the locations of the CDNs used by defendants 1 and 3 and the manner in which the video files stored there are encoded. Any third-party interests of the CDN operators could be sufficiently protected by confidentiality requests. Therefore, the plaintiffs' interests in the requested transfer of information outweigh any other interests.

The defendants oppose the applications. They argue that these are unclear and vague in factual terms, are also belated and constitute inadmissible discovery requests. An order for information within the meaning of Rule 191(1) of the Rules of Procedure, Article 67 of the EPGÜ, can only be issued in a final judgment if

a positive decision has been made regarding infringement and (in the case of a counterclaim for nullity) the legal validity of the patent in suit. The same applies to an order for information within the meaning of Rule 191(2) of the Rules of Procedure. Furthermore, in the case of Rule 191(2) of the Rules of Procedure, there is already a lack of a necessary basis in the EPC. If application outside of a final judgment were nevertheless possible, Rule 191(2) of the Rules of Procedure would in any case require the court to be convinced of the existence of patent infringement at the time of the order. Which CDNs were entrusted with the distribution of video segments and where their servers were located was also irrelevant to the decision of the legal dispute. The defendants had never claimed otherwise. As the plaintiffs themselves recognised in their reply, the arguments they put forward in their statement of defence referred to the origin servers. Even if the CDN servers were to be decisive, the requirements of R. 191 Alt. 2 VerfO would not be met because the plaintiffs did not need the requested information from the defendants. The plaintiffs could determine the operators and locations of CDN servers themselves, as they had allegedly already done in part, according to their reply. The defendants had already presented arguments in their statement of defence and submitted a written witness statement regarding the encoding scheme used to create video copies and the manner in which individual segments were generated from these video copies. CDNs do not encode or segment the defendants' videos. This is also evident, for example, from the excerpt from the relevant text on the Cloudfare website included in the reply. CDNs are not servers covered by the patent. The plaintiffs certainly did not need the requested information for a period of five years in order to substantiate their claims. Apart from that, the plaintiffs did not need the requested information for legal proceedings because it was to be expected that the defendants would comment on the plaintiffs' reply in the upcoming rejoinder within the response period to which they were entitled. In this situation, an order to transfer information should not, in principle, shorten the existing response periods. The request for information, especially at this stage of the proceedings, was disproportionate, especially for the requested period. For reasons of proportionality, the plaintiffs would have to obtain any necessary information on the server locations directly from the CDN operators.

Reference is also made to the exchanged pleadings. The

plaintiffs request that

that, pursuant to Rule 191 EPGVerfO,

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

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

2. that the third defendant provide information on which content delivery networks it uses in connection with the storage and delivery of video files by the streaming services www.pornhub.com, www.pornhubpremium.com, www.youporn.com, www.youporn-gay.com, www.redtube.com, www.pornmd.com, www.thumbzilla.com and www.tube8.com;

3. that the fifth defendant provide information on which content delivery networks it uses or has used in the period from 28 August 2019 to the present day for the storage and delivery of video files by the streaming services www.mygf.com;

4. that the sixth defendant provide information on which content delivery networks it uses or has used in the period from 28 August 2019 to the present day for the storage and delivery of video files by the streaming services www.bangbros.com and www.bangpovbros.com;

5. that defendants 1, 3, 5 and 6 provide information on the location of the servers of the respective content delivery networks whose services they use or have used in the period from 28 August 2019 to the present;

6. that defendants 1, 3, 5 and 6 provide information on whether the video files on the servers of the CDNs whose services they use or have used in the period from 28 August 2019 to the present day are divided into several files and how these files are encoded;

7. that the information requested in points 1 to 4 must be provided within fourteen days of the order to provide information;

8. in accordance with R. 190.4 (b), 190.7 EPGVerfO, that in the event that the defendants in 1, 3, 5 and 6 fail to comply with their obligation under the order to provide information, this failure shall be taken into account in the decision on the matter in question and the plaintiffs' plausible submission regarding the location of the servers and the manner in which the video files are encoded on the servers shall be assumed to be correct; and

9. in the event of a violation, the payment of an appropriate penalty at the discretion of the court in accordance with Art. 82 (4) EPGÜ.

The defendants request that

to dismiss the application in its entirety.

ORDER

The requested orders to provide information cannot be considered for several reasons.

1. According to Rule 191 of the Rules of Procedure, the Court may, upon reasoned request by a party, order that information within the control of the other party or a third party, or information reasonably required by the requesting party for the purpose of pursuing legal action, be provided by the other party or third party. As can be seen from the wording and structure, a distinction must be made between information within the meaning of Art. 67 EPGPÜ, R. 191 Alt. 1 VerfO and information within the meaning of R. 191 Alt. 2 VerfO. Accordingly, the additional requirement that the applicant needs the information for the purpose of legal proceedings initially refers to the second alternative of the provision.

Art. 67 EPGÜ, R. 191 Alt. 1 VerfO must be interpreted in accordance with Directive 2004/48/EC, in particular Art. 8 thereof.

The order, at the request of the plaintiff in a patent infringement action against the defendant, to provide information within the meaning of Article 67 EPC, Rule 191(1) RPO, serves to identify further infringers in the distribution and supply chain and to determine and calculate the damage caused by the patent infringement. It does not serve to obtain information within the meaning of Art. 67 EPC, Rule 191(1) RPO in order to establish the patent infringement by the defendant in the first place.

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

Whether the applicant reasonably needs information within the meaning of Rule 191(2) VerfO for the purpose of legal prosecution is assessed on the basis of the circumstances of the individual case from the perspective of a reasonable party. As a rule, only specifically named information may be the subject of the transfer of information; unspecific investigation is generally not considered.

The order to provide information within the meaning of Rule 191(2) of the Rules of Procedure serves solely to provide the applicant with the information required. On the other hand, it cannot, in principle, be used to compel the other party, who has made a statement on a fact on which the applicant bases his claims or objections, to make a correct statement if the applicant considers the other party's statement to be incorrect. Rather, it is the task of the court to assess, within the framework of its evaluation of the mutual presentation of facts and the evidence offered, whether a disputed fact is true. Within this framework, the party that believes it needs the fact may assert this fact and offer evidence for it, even if it is not certain but has good reasons for assuming its

correctness, without being accused of violating any duty of truthfulness.

Against this background, an order to provide information is generally not considered as long as the other party has not commented on the applicant's submission, for which it can generally make use of the time limits applicable to comments on the submission.

The order pursuant to R. 191 Alt. 2 VerfO is at the discretion of the court and must not be disproportionate. When exercising its discretion, the circumstances of the individual case must be taken into account, including the mutual interests and the principle of efficient conduct of proceedings (see (on the order to produce evidence) Court of Appeal, order of 24 September 2024, UPC_CoA_298/2024, UPC_CoA_299/2024, UPC_CoA_300/2024, paras. 47, 53). The applicant has a particular interest in obtaining the information, while the respondent has a particular interest in protecting confidential information. For reasons of proportionality and in order not to overburden the distribution of the burden of proof and presentation (see Court of Appeal, order of 26 February 2024, UPC_CoA_335/2023, GRUR 2024, 527 marginal no. 94), an order to disclose information within the meaning of Rule 191(2) of the Rules of Procedure must not amount to an impermissible investigation. An order to transmit information within the meaning of Rule 191(2) of the Rules of Procedure during the legal dispute is generally ruled out if the requested information is not relevant to the claims or objections pursued in the legal dispute. In this case, the order to transmit it is generally at least disproportionate.

The discretion of the rapporteur, the presiding judge or the panel of judges with regard to the powers of procedural management when deciding on a request for the transmission of information within the meaning of R. 191 Alt. 2 VerfO also includes determining the order in which points of dispute are to be decided. In exceptional cases, a previously requested and sufficiently justified disclosure of information, the relevance of which to the decision to be made only becomes apparent to the court during the oral hearing, may lead to an adjournment in order to order the transmission of information within the meaning of Rule 191 Alt. 2 VerfO. In this respect, no principles other than those applicable to the ordering of the submission of evidence pursuant to Rule 190 VerfO apply (see Court of Appeal, order of 24 September 2024, UPC_CoA_298/2024, UPC_CoA_299/2024, UPC_CoA_300/2024 para. 54 et seq.).

According to general principles, the burden of proof and presentation lies with the applicant to demonstrate that the conditions for an order to provide information are met.

2. According to these criteria, an order to disclose the requested information is not possible for several reasons.

a) Contrary to their opinion, the plaintiffs cannot rely on R. 191 Alt. 1 VerfO, Art. 67 (1) (a), (c) EPGÜ for the requested disclosure of the CDNs used. Insofar as information about the distribution and delivery channels can be ordered against the defendant of a patent infringement during the ongoing legal dispute before a decision has been made on the patent infringement for the instance, the special circumstances required for this are lacking in the case in dispute. The plaintiffs have not demonstrated sufficient grounds for R. 191 Alt. 1 VerfO, Art. 67 (1) (a), (c) EPGÜ as to why they need the information before the decision on the merits of their patent infringement action. As discussed, the fact that the information may be necessary for legal proceedings against the defendants is not sufficient. What function

CDNs have and whether and, if so, under what conditions their operators are part of the distribution or supply chain within the meaning of Art. 67 (1) (a), (c) EPGÜ does not therefore need to be decided.

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

aa) It can be left open whether the plaintiffs have sufficiently demonstrated in their application the conditions for issuing the requested orders, in particular whether they have sufficiently demonstrated what specific information is required and for what reasons.

bb) Furthermore, there is currently no need for a final clarification as to the extent to which the court must examine all streaming services described in the statement of claim as infringing embodiments, which may differ in relevant features, for patent infringement in the present case, and whether the plaintiffs therefore need information on each streaming service for the purpose of legal prosecution.

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

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

The plaintiffs' requests concern general information and are not limited to the specific information that could be relevant to the present legal dispute. For example, the plaintiffs do not need the names of all CDNs indiscriminately for their legal proceedings in the present case, but at most those that could be relevant to the alleged patent infringements under certain circumstances. If the server locations for domestic reference were to be decisive, one location in each of the EPG member states for which the claims are asserted would suffice for each streaming service. The location of the servers is otherwise irrelevant. The request for information on the video files also generally asks about their division and encoding, without limiting itself to a specific type of division and encoding which, in the plaintiffs' opinion, is sufficient for an infringement depending on the interpretation of the patent in suit. The plaintiffs' reference to the fact that video files in CDNs could be encoded and stored differently, without the plaintiffs having presented any evidence relating to the encoding and storage of most streaming services, underlines the nature of the inadmissible investigation.

In the case in dispute, the inadmissible investigation leads to the applications being rejected in their entirety. It is not the task of the court to specify the applications and reduce them to a core that could possibly become significant depending on the interpretation of the patent in suit.

ee) Furthermore, an order to transfer information is not an option for most streaming services because the plaintiffs have not exhausted all reasonable sources of information available to them.

In their statement of claim and their replies, the plaintiffs analysed only a few streaming services using the analysis tools Charles Proxy and TRACERT and obtained information on the CDN operator, the encoding and storage of the video files, the selection options for the end user's country of residence and the location of the CDN servers. They did not submit such analyses for the majority of streaming services. If this were to be relevant at all, the plaintiffs would be required to submit corresponding analyses for the streaming services that were not analysed. Only then, if the other requirements for an order were met, would it be justified from a proportionality perspective to require the defendants to provide sufficiently specific information on these streaming services in order to fill the remaining information gaps. The plaintiffs have not demonstrated that such a course of action would be unreasonable for the other streaming services. In particular, the fact that the other streaming services are predominantly fee-based does not automatically mean that it would be unreasonable.

c) Finally, the current state of the art and the dispute regarding the interpretation, infringement and legal validity of the patent in suit do not justify imposing the obligation on the defendants to provide the requested information. With regard to the server locations, it is also not yet clear at this stage of the proceedings whether they are legally necessary to establish a domestic connection in individual cases, or whether it is sufficient for this purpose that the circumstances, such as the selection option for the end user's country of residence, indicate that the streaming services are aimed at end users residing in the EPG member states that are the subject of the dispute and are actually used from there.

3. Against this background, it can be left open whether R. 191 Alt. 2 VerfO lacks a necessary basis in the EPGÜ and whether an order to submit information pursuant to R. 191 VerfO can only be issued in the first instance final decision on the merits of the infringement dispute.

4. Should this be relevant, in particular in the event of a change in circumstances, future orders for the provision of information by means of the present order are not excluded if the defendant's submissions contain significant gaps and the missing specific information is relevant to the decision of the dispute.

5. All defendants were to be involved in the ancillary proceedings concerning the dispute over the disclosure of information. It is irrelevant that the disclosure is only sought from defendants 1, 3, 5 and 6, because the plaintiff intends to use the information to be disclosed in the present legal dispute to prove patent infringements in which defendants 2 and 4 are also involved, according to the plaintiff's submission. This means that the interests of these defendants are also affected by the dispute.

6. With the information on legal remedies below, only
R. 191 p. 2 in conjunction with 190.6 p. 2 VerfO and is not intended to imply that appeals against orders pursuant to R. 191 VerfO are to be treated in accordance with Art. 59, 73(2)(a) EPGÜ.

ORDER:

The plaintiffs' requests of 9 August 2024 for information regarding the CDNs used, the locations of the CDN servers and the distribution and coding of the video files on the CDN servers are rejected.

DETAILS OF THE ORDER

Order No. ORD_47055/2024 in PROCEEDINGS NUMBER: ACT_594191/2023
UPC number: UPC_CFI_471/2023
Type of case: Infringement action
No. of the associated proceedings Application no.: 46521/2024
Type of application: Template for procedural application

NAMES AND SIGNATURES

Issued in Mannheim on 20 October 2024

DirkAndreas Böttcher

Digitally signed by Dirk Andreas Böttcher
Date: 2024.10.20 21:02:31

Böttcher
Rapporteur

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