

Case C-299/17

Request for a preliminary ruling

Date lodged:

23 May 2017

Referring court:

Landgericht Berlin (Germany)

Date of the decision to refer:

8 May 2017

Applicant:

VG Media Gesellschaft zur Verwertung der Urheber- und
Leistungsschutzrechte von Medienunternehmen mbH

Defendant:

Google Inc.

Landgericht Berlin

Order

...

In the case of

VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte
von Medienunternehmen mbH, ...

... Berlin,

applicant,

...

v

Google Inc.,

...

... Mountain View CA ...,

United States,

defendant,

...

on 8 May 2017, the 16th Civil Chamber of the Landgericht Berlin (Regional Court, Berlin) ... made the following order:

- I. The proceedings are stayed.
- II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 1(2), (5) and (11) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998):
 1. Does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute, under Article 1(2) and (5) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998), a rule which is not specifically aimed at the services defined in that point,

and, if that is not the case,
 2. does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute a technical regulation within the meaning of Article 1(11) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998), namely a compulsory rule on the provision of a service.

Grounds

I.

The applicant is a company which administers vis-à-vis users the rights regulated in Paragraph 87f of the Urheberrechtsgesetz (Law on copyright) of holders of related rights in digital publishing content.

On 1 August 2013 the related right for press publishers which is regulated in Paragraphs 87f to 87h of the Urheberrechtsgesetz came into effect in Germany. The draft legislation was not the subject of a notification procedure in accordance with Article 8(1) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998).

The national provisions, in so far as they are relevant here, read as follows:

Paragraph 87f(1) of the Urheberrechtsgesetz

(1) The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes unless individual words or very short text excerpts are involved. Where the press product has been produced within an undertaking, the owner of the undertaking shall be regarded as the producer.

Paragraph 87g(4) of the Urheberrechtsgesetz

(4) It shall be permissible to make press products or parts thereof available to the public unless this is done by commercial providers of search engines or commercial service providers which edit content accordingly. Moreover, the provisions of Chapter 6 of Part 1 shall apply mutatis mutandis.

Against this background, the applicant concludes with right holders the ‘administration agreement for television, radio and publishers’, in which the right holders grant it, for exclusive administration, the rights and claims to which they are currently entitled, and those still falling to them during the term of the agreement, in respect of press products produced by them as referred to in Paragraph 87f(2) of the Urheberrechtsgesetz (online, non-print). The rights in question are the right to make parts of press products available to the public through commercial search engines (Paragraphs 87f(1), first alternative in the first sentence of Paragraph 87g(4) of the Urheberrechtsgesetz) and/or the right to make parts of press products available to the public through services which edit content accordingly (Paragraph 87f(1), second alternative in the first sentence of Paragraph 87g(4) of the Urheberrechtsgesetz).

The defendant operates the well-known search engine for finding websites (Google search) under the domains www.google.de and www.google.com. After

the search term has been entered and the search function has been initiated, a short text or text excerpt (snippet) appears with a thumbnail image, which is intended to enable users to gauge the relevance of the displayed website for their specific need for information. It consists of a word combination from the displayed website formed from a number of words connected with the search term.

The search engine also contains a menu, using which users are able to access further specialised search services, such as Google Image Search, Google Video Search and Google News Search ('News' on the menu).

In addition, the defendant operates the Google News service, which can be accessed separately in Germany under news.google.de or news.google.com, in which it displays news from a limited number of news sources in magazine form. Here the 'snippet' consists of a brief summary from the website, in many cases using the introductory sentences.

Through its AdWords and AdSense services the defendant places third-party advertisements on its own websites and on third-party websites for a fee.

By the action, the applicant objects to the defendant's past use, for its own services, of text excerpts (snippets) and images from content produced by the applicant's members, without paying a fee for such use. It is therefore seeking a declaration of liability for damages in respect of the use of text excerpts, images and video for displaying search results and news summaries from 1 August 2013. It is also claiming disclosure of information and damages.

II.

The decision in these proceedings depends on the extent to which Paragraphs 87f to 87g of the Urheberrechtsgesetz are applicable as, in the view of the Chamber, the action is well founded at least in part. According to the case-law of the Court of Justice, rules which were introduced in breach of the duty of communication/notification under Article 8(1) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998) are unenforceable against individuals. They are inapplicable (judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 54).

The question thus arises whether the abovementioned national rules constitute a technical regulation within the meaning of Article 8(1) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998). Under Article 1(11) of the directive, the term 'technical regulation' includes rules on services. A 'rule on services' is described

in Article 1(5) of the directive as a ‘requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.’ Article 1(2) of the directive, to which reference is made, defines ‘service’ as ‘any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

In the view of the Chamber, the national rule at issue fulfils these conditions.

Paragraph 87f of the Urheberrechtsgesetz confers on the producer of a press product the exclusive right to make the press product or parts thereof (excluding individual words or very short text excerpts) available to the public. Paragraph 87[g](4) of the Urheberrechtsgesetz provides that it is permissible to make press products or parts thereof available to the public unless this is done by commercial providers of search engines or commercial service providers which edit content accordingly. It follows that it is unlawful to make press products or parts thereof available to the public only where they are supplied by a commercial provider of search engines or a commercial service provider which edits content accordingly, but it is still permissible where this is done by other users, including other commercial users. The law grants holders of related rights a *ius prohibendi* only vis-à-vis commercial providers of search engines or service providers which edit content accordingly, while it does not exist for making available to the public by other users, including commercial users.

Providers of search engines supply an Information Society service within the meaning of Article 1(2) of Directive 98/34/EC 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 (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998). They provide that service at a distance, that is, without the parties being simultaneously present, by electronic means and at the individual request of a recipient of services, who initiates the search after a search term has been entered. Nevertheless, Paragraph 87g(4) of the Urheberrechtsgesetz in conjunction with Paragraph 87f(1) of the Urheberrechtsgesetz constitutes a ‘rule on services’ within the meaning of Article 1(5) of the directive only if it is a rule concerning the pursuit of services within the meaning of point 2, in particular a provision concerning the service provider, the services and the recipient of services. Any rules which are not specifically aimed at the services defined in that point are expressly excluded. The decision in these proceedings therefore depends on whether Paragraph 87g(4) of the Urheberrechtsgesetz in conjunction with Paragraph 87f(1) of the Urheberrechtsgesetz constitutes a requirement of a general nature relating to the pursuit of a service within the meaning of Article 1(5). As the national provision is addressed only to providers of search engines and service providers which edit content accordingly, it is, in the view of the Chamber, a general rule concerning the provision of services and not a provision which has

effects on the provision of services only indirectly. If the directive is to be interpreted in that way, that is to say, to the effect that the classification of the national rule as a general rule on services is to be determined by reference to those to whom the national rule is addressed, this would mean that the draft legislation would have required notification in accordance with Article 8(1) of the directive and, because the provision has not been the subject of a notification procedure, it may not be applied by the national court.

...