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The *Youkioske* case: an unprecedented judgment by the Spanish courts for a transnational IP infringement

On 5 March 2015, the Spanish National High Court (*Audiencia Nacional*) rendered a judgment¹ sentencing the owners of the website www.youkioske.com ('Youkioske') to six years imprisonment for intellectual property (IP) criminal infringement and criminal association.

The judgment declared that the website illegally hosted over 17,000 works infringing the IP rights of publishers from countries including Spain, Germany, France, Portugal, Italy, Russia, the Netherlands and the US. Within a five-month period, the website received approximately 20.7 million accesses from at least 50 different countries.

The facts

The judgment declares that the following facts have been proven:

- Youkioske operated from at least June 2009 to 21 May 2012, when the website was judicially shutdown.
- The website offered users free access to all sorts of daily press and weekly and monthly magazines from a significant number of countries. The content was displayed online on the website itself using extremely high-quality streaming techniques, rather than redirecting the user to other websites.
- The website operated through servers located in Virginia (US), California (US) and Paris (France).
- Its internet protocol address was registered in the name of a Canadian company.
- The domain belonged to a company registered in Belize.
- The two defendants – both Spanish nationals – managed the content of the website and its exploitation for advertising purposes.



THE YOUKIOSKE CASE

The defendants obtained profit from the advertising displayed on Youkioske through banners and pre-roll videos. The defendants collected the profits through a Spanish company and in bank accounts in Spain.

- The defendants ran an organisation consisting of several people who were in charge of uploading the content onto the website every day and who used several nicknames in order to give the impression that the works had been posted by the online community. This organisation consisted of at least five individuals who operated from Ukraine and who have not been identified.
- The owners of the IP rights sent numerous letters to the defendants demanding that the contents be removed from the website. The defendants disregarded all of them.

The court

The case was tried by the Spanish National High Court (*Audiencia Nacional*) because of its complexity and transnational aspects. The National High Court (the 'court') has jurisdiction to try: (1) certain complex criminal economic offences; and (2) criminal offences perpetrated abroad. In this case, the Court declared its jurisdiction based on both circumstances: that the IP infringements were committed in Spain and Ukraine through servers based in a number of other foreign countries and that the offence affected a large number of victims in Spain and abroad.

The investigation

The criminal proceedings started in 2011 with a criminal complaint, which was filed before the Public Prosecutor's Office by the *Asociación de Editores de Diarios Españoles* – an association comprising all the major Spanish newspapers' owners.

The public prosecution sent the case to the competent investigative judge,² requesting a judicial order for intercepting and monitoring the defendants' cell phones and asymmetric digital subscriber line (ADSL) traffic.

According to the judgment, the wire tapping proved that the defendants controlled the content of Youkioske and received the profits from its exploitation through advertising insertions. At this point the investigative judge ordered the defendants' arrest and issued search warrants for their homes and the seizure of all their information technology equipment.

On 21 May 2012, the judge ordered the website to be shutdown.

The IP criminal infringement

Elements of the criminal offence

The elements of the criminal offence analysed by the judgment are discussed below.

WRONGFUL ACT

The wrongful act consists of the reproduction, distribution and communication to the public or plagiarising of a work subject to IP protection.

The judgment considers that the defendants communicated works protected by IP legislation to the public. The defence quoted the recent Court of Justice of the European Union's (ECJ) judgment of 13 February 2014 (Case 466/2012, *Svensson and others v Retriever Sverige AB*) according to which 'the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public' as referred to in 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. The reasoning for this conclusion is that: 'where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site [...] there is no new public [and] the authorisation of the copyright holders is not required for a communication to the public.'

However, the Court ruled out the application of said precedent in the case at issue, based on the fact that most of the works inserted in Youkioske had not been made freely available to the public by the corresponding copyright owners but rather could only be accessed by paying a fee or subscription.

WILLFUL INTENT

Willful intent in an IP criminal offence requires the following elements: (1) the author is aware that he/she does not own the copyright of the work and that he/she does not have the copyright owner's authorisation to use it (even if he/she is not aware of the actual identity of the copyright owners); and

(2) he/she acts with the intention of obtaining a profit to the detriment of a third party.

KNOWLEDGE

The defence alleged that the defendants were mere administrators of a website and worked as mere intermediaries between users. They also alleged that when demanded to do so by the copyright owners, they always removed the illegal content. Therefore, they could not be held responsible for the unlawfulness of the content uploaded by the users.

The Court dismissed these allegations based on the evidence provided. In accordance with Spanish Act 34/2002 on information society services and e-commerce, an intermediary is a website that limits its activity to providing links to contents posted on other websites, including the management of search engines that facilitate the access to content inserted in other websites. In view of this, the Court concluded that Youkioske did not work as a mere intermediary but rather provided the users with the possibility of accessing content directly on the website itself via streaming. Furthermore, the Court considered that a large part of the works have been proven to have been posted by members of the criminal organisation purporting to be users but who were actually acting under the supervision and direction of the defendants. In conclusion, the Court excluded the argument that Youkioske could be considered an intermediary for the peer to peer exchange of works.

However, for the avoidance of doubt, the Court analysed the requirements of the private exchange of IP works which could exclude any liability for IP infringement:

- Websites that provide users with software that enables them to connect directly with other users in order to privately share copies of works subject to IP protection do not fall into the category of IP criminal infringement, without prejudice to any possible civil infringements.
- Websites that provide general and indiscriminate access to protected works – even within a decentralised system – could be held civilly or criminally liable for IP infringement.

Moreover, the Court summarised the case law concerning the criminal nature of IP infringements committed by means of websites that provide links to other websites, taking into account the nature of the link:

- In the case of surface links that provide access to the homepage of another website

that hosts the IP protected content, the first website cannot be held liable for the IP infringements made by the second site, unless it is proven that they both belong to the same organisation or alliance.

- Deep links that connect the user directly to the IP protected content inserted on another website. In this case, the first website could be held liable for the IP infringements perpetrated by the second site.

INTENT TO OBTAIN A PROFIT TO THE DETRIMENT OF THE VICTIM

According to Spanish Supreme Court jurisprudence, the general rule is that ‘profit’ includes any sort of economic advantage that the offender obtains from the criminal offence. Applying the general rule to criminal IP infringements would have meant having to prosecute peer-to-peer (P2P) users who exchange private copies of IP protected works and therefore obtain the advantage of not having to pay for accessing protected works. For this reason, the case law regarding IP criminal infringements makes a restrictive interpretation of this subjective element and limits the intent required by the criminal offence to obtaining a ‘commercial profit’. This interpretation is an exception to the general rules regarding the extension of the required intent to obtain profit when applicable to other economic offences.

In the *Youkioske* case, the Court concluded that the offenders did indeed act with the required intent to obtain a commercial profit as their purpose was to economically exploit the website through advertising.

The criminal association

The Court also sentenced the defendants for the criminal offence of constituting and participating in a criminal association. The Court considered that it was proven that the defendants created an association that: (1) was comprised of, at least, seven individuals; (2) was an established association that had been operating for over two years; (3) was structured, that is, the members had distinct functions and acted in a coordinated manner; and (4) the sole purpose of the association was to perpetrate criminal infringements of IP rights.

The civil liability

Finally, the Court sentenced the defendants to cover the civil liabilities resulting from the criminal IP infringements, which were



determined by applying the rules established in Spanish IP law. Given the difficulties in determining said civil liabilities, the general practice is that the exact amount of the civil liabilities shall be calculated by the Court in charge of executing the sentence within the limits and in accordance with the guidelines set out by the Court in charge of trying the case. In this case, the limit set out by the Court in the judgment was approximately €3.7m, which will be used to indemnify the owners of the infringed IP rights.

Conclusion

This case is highly relevant not only because of the importance of the sentence handed down to the defendants and the damage caused by the website but also because it has opened two new avenues for the investigation

and prosecution of IP criminal infringements. This was the first case in which the National High Court – specialised in trying complex transnational economic crimes – declared its jurisdiction for investigating and trying criminal IP infringements. Investigative techniques such as lawful interception or search and seizure were also used for the first time for the investigation of criminal IP infringements on the internet. These investigative techniques allowed the necessary evidence to be obtained in order to make the conviction, which can be quite difficult to gather in these kinds of cases.

Notes

- 1 Judgment 6/2015, of 5 March 2015, rendered in case 5/2014 of Chamber No 2 of the National High Court. The judgment is not final and binding as the deadline for an appeal before the Supreme Court has not expired.
- 2 Please note that under the Spanish criminal procedural system, pre-trial investigation is led by a judge.