

COMMERCIAL COURT NO. 7

MADRID

C/ GRAN VÍA., 53
55700

General Identification Number: 28079 1 0000904 /2008

Proceedings: ORDINARY PROCEEDINGS 150 /2008 **SECTION:**

Concerning OTHER MATTERS

Of Mr./Ms. GESTEVISION TELECINCO SA, TELECINCO CINEMA SAU

Court Procedural Representative Mr./Ms.
MANUEL SÁNCHEZ-PUELLES GONZÁLEZ-
CARVAJAL, MANUEL SÁNCHEZ-PUELLES
GONZÁLEZ-CARVAJAL,

Versus Mr./Ms. YOUTUBE LLC

Court Procedural Representative Mr./Ms. RAMÓN
RODRÍGUEZ NOGUEIRA

JUDGMENT NO. 289 /2010

In Madrid, on the twentieth day of September of the year two thousand and ten.

Mr. ANDRÉS SÁNCHEZ MAGRO, JUDGE of Commercial Court 7 of Madrid and its District, having considered these Ordinary Proceedings no. 150/2008 pursued in this Court, between the parties, on the one hand, as plaintiff, GESTEVISION TELECINCO S.A., TELECINCO CINEMA S.A.U., with Court Procedural Representative Mr. Manuel Sánchez-Puelles, and on the other hand, as defendant, YOUTUBE LLC., with Court Procedural Representative Mr. Ramón Rodríguez Nogueira, concerning a violation of intellectual property rights.

FACTS

ONE. This Court was assigned a claim in ordinary proceedings concerning violation of intellectual property rights, filed by the Court Procedural Representative Mr. Manuel Sánchez-Puelles, on behalf of GESTEVISION TELECINCO S.A. and TELECINCO CINEMA S.A.U., against YOUTUBE LLC, with Court Procedural Representative Mr. Ramón Rodríguez Nogueira, in which, after stating the facts and legal grounds appearing therein, it requested that a judgment be delivered in accordance with its petitions, with an express order for costs against the defendant.

TWO.- The claim having been admitted for consideration, it was decided to summon the defendants, who within the statutory period duly appeared and presented a defense opposing the petitions in the claim in accordance with the facts and legal grounds stated in its written submission.

THREE.- It was decided to call the parties to the preliminary hearing, which was held on the day set. At the above-mentioned hearing, after trying to reach a settlement, the plaintiff ratified its claim and the defendant ratified its defense. The procedural issues which could hinder the continuance of the proceedings having been resolved, and all other measures envisaged by law having been carried out, the facts on which a dispute exists were established and the parties were granted the possibility to propose evidence: the plaintiff proposed the examination of the defendant, public documents, private documents, experts' opinion and judicial inspection and testimony; whereas the defendant proposed documentary evidence, further documentary

evidence, witnesses testimony and expert evidence, a date then being set for the trial at which the evidence admitted would be taken.

FOUR.- The trial was held on the date set and the parties appearing attended. Upon commencement the evidence was taken in order, with the result shown in the record of the proceedings. The Judge ordered an adjournment of the hearing to be resumed on April 9, 2010, at which the parties were given the opportunity to verbally state their closing arguments, which they did so in the manner which is documented in the record of the proceedings, after which the proceedings were concluded for the delivery of judgment.

FIVE.- In the hearing of these proceedings the statutory requirements have been observed.

LEGAL GROUNDS

ONE.- Given the peculiar nature of the subject-matter of the dispute, it is advisable to systematically arrange the parties' claims in well-defined blocks of subjects which, in the development of their arguments they unify without homogenizing them, both the factual and legal grounds which make up the core of the dispute.

The plaintiff, formed by two companies of the Telecinco Group, files several actions for alleged violation of intellectual property rights against the company Youtube LLC on the grounds that the transmission through the defendant's website of various audiovisual recordings owned by the plaintiff constitutes a violation of the intellectual property rights of Telecinco, which has caused it a huge loss and damages, the exact quantification of which must be established in a subsequent procedure.

The defendant's opposition lies on a harmonized group of exceptions which concern both the nature of the activity carried on, and the legislation and case law applicable and which directly refer us to the collection of issues which we identify below.

It is necessary, first of all, to clarify the nature of the activity carried on by the defendant in relation to the recordings transmitted, and, in particular, whether it is limited to providing intermediary services for the users of its website or it provides and creates contents, in relation to which it must be held liable according to the general terms of the intellectual property law.

Next, it is necessary to define precisely the scope of the defendant's liability as a mere information service provider in relation to the contents circulated on its platform by third parties.

The last of the blocks of controversial arguments concerns the damages claimed by the plaintiff which, due to its nature, is subject to the analysis of the preceding issues.

TWO.- YOUTUBE'S ACTIVITY. PROVISION OF INTERMEDIARY SERVICES VS. PROVISION OF CONTENTS.

Given the focus of the litigation, the nature of the defendant's activity constitutes one of the core issues on which the proceedings depend, because both the group of obligations and rights and the liability system differ completely depending on whether we accept the plaintiff's theory which claims that despite appearances, the defendant's web page does not merely serve as a platform so that third parties may circulate its contents, but rather YouTube is directly or indirectly involved in creating them, or on the contrary, following the defendant's arguments, we consider its activity to be limited to what the Information Society Services Law calls intermediary services.

In order to analyze such a substantial issue, we will follow the scheme, as a line of argument, prepared by the plaintiff in its claim and we will do so for systematic reasons, because precisely the argument concerning the elements or parameters which, according to the plaintiff, distort the nature of YouTube's activity as a mere provider of services will allow us to investigate the essence of that activity and reach a sufficiently verified opinion in relation to it.

According to the theory put forward in the claim, YouTube holds itself out as a mere intermediary service provider when in reality it acts as a content provider. For this purpose, it uses a language with community and common ideals tone, artificially giving prominence to the users, camouflaging its editorial work by technical and automatic presentation of the selection processes, etc. ... and all of this for the purpose of violating the intellectual property rights of third parties who have not granted their consent to the transmission of the recordings.

The plaintiff highlights certain peculiar features which, in its opinion, would allow YouTube to be classified as a content provider. We will analyze them below.

It is claimed in the statement of claim that YouTube commercially exploits the videos for its own benefit as a licensee of the users as, otherwise, the defendant would not need any license of the rights holders for the operation of the web site. The request for a license included in the so-called Terms of Use allegedly proves, it claims, that the defendant does not merely provide intermediary services.

However, the truth is that the request for a license from the users who upload contents is not incompatible with the existence of an intermediary service, which admits several variants as, for example, the so-called hosting web 2.0 which, unlike pure hosting, has as its purpose the upload by the participating users of materials for circulation and the sharing of them with other users, which is precisely the service which is provided by YouTube and in which the service provider is often a licensee of the user.

The second of the characteristic features which allegedly proves the plaintiff's theory is that the defendant performs what it calls "editorial work" in a process of selection and monitoring of the contents displayed on the webpage. This allegedly happens with the so-called "featured videos" which appear in a special section and are chosen by YouTube's employees. This is also allegedly proven by the supervision and discrimination of certain videos which, without being unlawful, are incompatible with the editorial policy advocated by the defendant.

Regardless of the legal scope of this allegation, the fact is that the evidence produced does not prove, even to a minimum extent, the theory which is put forward in the claim.

As has been stated by the witness Victoria Grand at the hearing, it is physically impossible to supervise all the videos which are made available to the users because, at present, there are over 500 million videos. The contents, whatever they are, are always identified in advance by the users who flag and point them out so that YouTube removes them.

Nor is any editorial work performed when certain videos are selected for the "featured videos" section because those videos are identified on the basis of a series of parameters, such as the popularity of the video among the users, which are of a more or less objective nature. In any event, the selection of certain videos according to certain criteria previously defined by the users does not involve any editorial work of creation or provision of contents.

Nor does the fact that access to the videos which the defendant makes available to the users on its website is provided on a webpage designed by YouTube and distinguished by its trademark seem to contradict the nature of the provision of intermediary services.

The plaintiff also claims that the defendant commercially exploits its website for gain, but one fails to understand the relation between this fact and the nature of the provision of the intermediary service, because precisely the Information Society Services Law considers that any service provided under it will normally be for consideration and this is also the theory confirmed in a recent judgment of the European Union Court of Justice when it points out that "the mere fact that the referencing service is remunerated, that Google establishes the forms of remuneration, or even that it is general information for its customers, cannot mean that Google is excluded from the exemption from liability provided by Directive 2000/31" (ECJ judgment of March 23, 2010).

It is appropriate next to describe in detail both the process of provision of hosting services and of search engine which is offered by the defendant and the system which it has established to verify the contents or, more precisely, to detect unlawful contents, because this is extremely important both to establish and specify the nature of the defendant's activity and to define the scope of its liability.

At the hearing, Mr. Javier Arias provided a detailed account of the process which, in general terms, can be described as follows: the process starts when the user, who must be previously registered and have an account opened, takes the decision to upload a video on YouTube's website. The user must assign a title to it and also some key words which are called tags, to allow the video to be located. It should be pointed out that it is precisely the user who takes the decision regarding the use of the video and who is also responsible for its content.

Next, YouTube processes the video through its Flash format by means of a totally automatic conversion process and it is stored in YouTube's servers. From that moment any person with Internet access can view the videos which other users have uploaded to the website. Again, the decision is entirely up to the user.

It must also be pointed out that the defendant does not offer or supply any kind of tool to the users to allow the downloading of the videos. It is true that through other platforms said download can be carried out but these are services which are completely unrelated to those provided by the defendant.

Next it is appropriate to describe, although briefly, the procedures which the defendant has installed for the notification and take down of unlawful contents.

Rights holders which are considered to be prejudiced by the broadcast of any recording can request the removal of unlawful content by identifying the complete URL of the reproduction page, together with an explanation and proof of their right. Once that notification has been received, the video is automatically removed from YouTube's site. That notification is subsequently sent to the user, who may issue what is called a counter-notification.

The content is verified by means of a program called Video ID, which requires the cooperation of the rights holder so that he provides YouTube with the so-called reference files of each video owned by him which he wishes to remove. Once the video has been identified, the owner may opt to automatically block that recording so that it will not be published on YouTube's website, to monitor it, or to try to generate revenue by inserting advertising associated with the video.

The fact is that the system of detection, notification and verification installed by the defendant has been effective on each occasion on which Telecinco has requested the removal of contents from YouTube's website. On February 14, 2007, the plaintiff asked the defendant to remove certain unlawful contents in relation to several videos relating to series such as Los Serrano or Médico de Familia. On the same day, YouTube proceeded to remove the aforementioned videos. Likewise, in March 2007, the plaintiff asked the defendant to remove an episode of the series Los Serrano and the video was immediately removed from the webpage. This proves that when the contents have been identified through the URL, the system of protection of property installed by the defendant has been effective. Therefore, it does not seem reasonable to claim that they are pretexts, excuses or systems of camouflage, bureaucratic and complicated, which cannot be carried out.

What this proves is that the defendant provides an intermediary service in the terms defined by the Information Society Services Law as "a service of the information society whereby the provision or use of other services of the information society or access to information is facilitated".

Thus, YouTube's system of liability for the provision of information services is established in Articles 14 to 17 of the Information Society Services Law. These provisions establish a system of partial exemption from liability for the service providers regarding contents hosted on websites.

From this perspective it is clear that in accordance with the Electronic Commerce Directive of June 8, 2000, and the content of the Spanish law transposing it, the Information Society Services Law, it is not possible to impose on any intermediary service provider a general obligation to supervise the data which are transmitted or hosted, and much less still to carry out active searches for facts or circumstances of unlawful activities.

YouTube is not a content provider and, therefore, is not obliged to supervise in advance the lawfulness of such contents which are hosted on its website; its only obligation is precisely to cooperate with the rights holders so as to proceed, when the infringement has been identified, to immediately remove the contents. That duty to cooperate is also contained in the Preamble of the Information Society Services Law and has been duly fulfilled by the defendant by means of the systems of detection, notification and verification established.

THREE.– LIABILITY OF SERVICE PROVIDERS. ACTUAL KNOWLEDGE.

The plaintiff files a second group of actions linked to the status of YouTube as an intermediary service provider.

It is claimed in the statement of claim that, having admitted that the reproduction of the videos on the YouTube website does not include any activity typical of the creation of contents, but rather of the provision of a technical service, even so, the defendant would have incurred liability in accordance with the general system established in the Information Society Services Law of July 11, 2002.

Article 13.2 of the above-mentioned law provides an exception to the system of general liability for intermediary services by providing that "in order to determine the liability of the service providers for the conduct of intermediary activities, the provisions of the following articles shall be observed".

Thus, under the heading of "Liability of hosting service providers", Article 16 of the Information Society Services Law, incorporating the content of Article 14 of the Electronic Commerce Directive, exempts hosting services providers from liability provided that: "a) they have no actual knowledge that the activity or the information which they store or to which they refer is illegal or it violates a third party rights liable for indemnity, b) if they do so, they act diligently to remove the data or prevent access to it".

As proven by the text quoted, the exemption from liability for intermediary services providers lies on a legal concept which is difficult to define, as is the concept of "actual knowledge".

The Spanish law seems to opt for a restricted and limited concept of actual knowledge of illegal activity by demanding that it is declared by a competent body which has ordered the removal of the information or which disables access to same. According to the Information Society Services Law competent body shall mean any judicial or administrative body which acts in the exercise of powers conferred by law. In fact, the only bodies competent to decide the lawfulness or unlawfulness of the information are the courts, as there is no administrative body with specific powers in this area.

A strict and orthodox interpretation of the legislation would require that, in order for YouTube to have "actual knowledge" of the unlawful nature of the contents hosted on its website and so that it could be considered liable for them, said unlawfulness should have been declared in advance by a court. (In this regard there is a judgment of the Provincial Court of Madrid of February 19, 2010).

The plaintiff proposes a more flexible interpretation of that concept which allows the actual knowledge to be derived from a non-judicial "competent body" or through other sources of knowledge in accordance with the criteria established in the judgment, on which it relies, of the Supreme Court of December 9, 2009.

The first thing which must be noted is that the above-mentioned judgment refers to a rather different scenario, in which the registered domain name was clearly defamatory, which does not occur in the case under consideration here.

Probably the most correct interpretation is that which, without being as strict as an orthodox interpretation which restricts the concept so as to render it equivalent to a judicial ruling, complies with the principles which underlie both the Directive and the Information Society Services Law, which quite clearly prohibit imposing a general control obligation on those who provide intermediary services.

What this means is that actual knowledge must be proven in detail, mere suspicion or rational indicia not being sufficient to prove it. That definition of actual knowledge undoubtedly requires the cooperation of the injured party. This is rightly held by the judgment of the TGI of Paris of April 15, 2008, which states that "actual knowledge of the clearly unlawful nature of a violation of the property or moral rights of authors or producers does not imply any prior knowledge and requires the cooperation of the victims of the infringement, who must inform the company which hosts the internet users' sites of what rights they consider affected".

What this means in the specific case is that, on the basis of the firmly-established general principle that the defendant has no obligation to monitor or supervise in advance the contents hosted on its website, it is up to the plaintiff to actually inform YouTube of the contents which may harm or infringe the ownership of its intellectual property rights. It must do so not in a mass scale or unconditional manner, but rather on an individual or specific basis, because, as the defendant rightly states, many of the videos which users have uploaded on YouTube's website may be fragments of information not protected by the intellectual property law or mere parodies of programs belonging to Telecinco which do not enjoy that protection either.

For this purpose, the defendant has established, as we saw earlier, a system of detection and verification which allows supervision by third parties affected by a potential violation of their intellectual property rights. It is true that we must agree that it is not a handy and easy procedure for the plaintiff, particularly because it bears the hard task of tracing and checking the contents which are hosted on the defendant's website. However, this is due precisely to the order of priorities which both the Community and the national legislator have established.

We know that there is an area of intersection, plagued by latent tension, between the intellectual property rights holders and the Internet intermediary services providers who host third parties' contents which may sometimes infringe those rights. However, the epicenter of that tension is not situated in possible fissures in the legislation. Because the law only answers, like a far echo, the sound which is heard to the strain of the rhythm of the social changes which occur in the deep layers of the economic structure.

There is probably a lot of rhetoric, of epic declamation in the defendant's repeated reliance on that principle, declared sacred, of freedom of expression, and the supposed function which it claims to carry out in that context. The fact is that, beyond that wild enthusiasm, there is evidence which we cannot ignore and of which these proceedings are a shining example, and it is precisely the value of information, which has become the most valuable merchandise in a digitalized world. The challenge for entrepreneurs in the new economic order does not consist so much of protecting vested rights as creating value in the transmission of those contents because the passage of time shows the uselessness of any artificial frontier.

FOUR.- THE DIRECT ACTION FOR CESSATION AGAINST THE INFORMATION SERVICE PROVIDER.

Finally, the companies of the Telecinco Group file an action for cessation against the defendant as intermediary services provider under the provisions of Articles 138 and 139 of the Intellectual Property Law, amended by Law 19/2006 of June 5 and Law 23/2006 of July 7.

The plaintiff claims that according to the reform carried out in Article 138 of the Intellectual Property Law, it is quite possible to bring an action against the intermediaries or services providers even where the acts of these intermediaries do not *per se* constitute an infringement.

This assertion is only partially true because both provisions, when providing for actions for cessation, establish an exception in their final paragraph by providing that "without prejudice to the provisions of Law 34/2002, of July 11, governing Information Society Services and Electronic Commerce." Therefore, it is blindingly obvious that the exception established by means of the expression "without prejudice" completely eliminates the possibility of bringing the action against services intermediaries and, in this respect, the Intellectual Property Law adds nothing to the exception envisaged in the Information Society Services Law.

In conclusion, on the basis of the arguments stated above, the claim must be dismissed.

FIVE.- In accordance with the provisions of Article 394 of the Civil Procedure Law, the plaintiff must be required to pay the costs.

RULING

I dismiss in full all the claims contained in the statement of claim, ordering the plaintiff to pay the costs incurred in these proceedings.

Notify this ruling to the parties, informing them that, since it is not final, they may file an appeal against it in writing in this Court for submission to the Provincial Court of MADRID, Section 28, within FIVE DAYS from the notification.

For the appeal to be admitted it is necessary to prove the lodgment in the Deposits and Lodgments Account of this Court, a deposit of 50 euros, unless the appellant is: a beneficiary of Free Legal Aid, the Public Prosecutor's Office, the State, an Autonomous Community, a Local Entity or Autonomous Body under the control of any of the aforementioned.

By this my judgment, I so rule, order and sign.

PUBLICATION.- I certify that the above judgment was read and made public by the Judge who signs it, at a public sitting on the date thereof.

