

Civil Marco Internet

The Superior Court of Justice provides guidance on liability of ISP in case of copyright infringement.

By **Gabriel Leonardos** | gabriel.leonardos@kasznarleonardos.com
and **Aline Ferreira de Carvalho da Silva** | aline.ferreira@kasznarleonardos.com

In the trial of Special Appeal # 1.512.647 (decided on the 13th of May and published on the 5th of August), the Superior Court of Justice (in charge of standardizing the jurisprudence in Brazilian Courts) provided some guidance on liability of ISP in case of copyright infringement – an issue that was not codified by the Civil Basis for the Internet (“Marco Civil”). In the case at stake, a video producer filed a lawsuit against Google demanding the removal of several Orkut communities that were offering for sale a range of unauthorized copies of educational videos. The producer also requested the payment of damages. According to the producer, Google failed to remove the Orkut communities after receiving a cease and desist letter, whereas Google alleged that such C&D letter did not inform the URLs of the infringing pages.

The Special Appeal was lodged by Google against a decision rendered by the State Court of Appeals of Minas Gerais. This decision ordered the company (i) to pay damages to the producer in an amount to be fixed by an Expert or, in case that was not feasible, in accordance with article 103 of Brazilian Copyright Act; and (ii) to remove the infringing pages. In brief, Google alleged that the company could not comply with the Court order, as the producer did not inform the URLs of the infringing pages. Moreover, the company argued that it was a case of subjective liability and Google did not perform any activity that was deemed as copyright infringement.

Although this case happened before the Civil Basis for the Internet entered in force, the Reporting Justice Luís Felipe Salomão understood that it was desirable to render a decision that was in line with the principles enshrined by that Act. Therefore, he confirmed that it was a case of subjective liability, and underlined that, since the matter was not codified by the Civil Basis for the Internet, the Brazilian Copyright Act applies.

As the Brazilian Copyright Act does not have specific rules for copyright infringement in the digital environment, the Reporting Justice understood that it was necessary to analyze whether Google contributed to the infringement and if there was a link between the alleged damages and Google's behavior. The Reporting Justice found that Google was not liable in this case, because Google did not practice any of the conducts described as copyright infringement by articles 102 to 104 of the Copyright Act. Moreover, unlike Pirate Bay and Napster, Orkut was not designed to be a website whose business model was to ease copyright infringement and stimulate the sharing of infringing content. Regarding this last point, the Reporting Justice emphasized that Orkut could be used as means for both legal and illegal activities, and the social network did not have

¹A social network that was owned by Google.

²A State in Southeast Brazil.

³That establishes a presumption of selling of 3,000 (three thousand) infringing copies.

Kasznar ¹⁹¹⁹
Leonardos

INTELLECTUAL
PROPERTY
BRAZIL

09/15

12

WWW

Cláudio Roberto Barbosa |
Eduardo Colonna Rosman |
Elisabeth Kasznar Fekete |
Fabiano de Bem da Rocha |
Filipe Leonardos | Gabriel Leonardos |
Gustavo Barbosa | João Luis Vianna |
Liz Starling | Nancy Caigawa |
Rafael Lacaz Amaral | Ricardo Boclin |
Ronaldo Varella Gomes | Tatiana Silveira |

kasznarleonardos.com

tolls enabling the exchange and download of files. At last, the Reporting Justice compared the situation with holding the mail liable because of the contents of the letters it delivers. However, the lower Court decision was upheld to order Google to remove the infringing pages whose URLs were informed by the producer.

Although this decision is not binding, it is important as it express a changing of understanding in the Superior Court of Justice. That is because the Superior Court of Justice established that (i) the mere inertia of the ISP after receiving a C&D letter does not imply in civil liability; and (ii) establishing a link between an action performed by the ISP and the alleged damages is a requirement for civil liability. Moreover, this decision was rendered by the 2nd Section of the Superior Court of Justice (which corresponds to the reunion of the 3rd and 4th Chambers, both in charge of private law matters). That certainly strengthens the authority of this precedent.

In case you need legal advice in copyright and internet matters, our team in Rio and São Paulo is available to assist you.

Kasznar Leonardos follows up this important issue and is fully available to provide you further information. Please feel free to contact us, whether in written or by phone, directly to your usual contact within our office or to

Gabriel.Leonardos@kasznarleonardos.com