

# Kluwer Copyright Blog

## Historic conviction of the administrators of a downloads site: Youkioske Judgment handed down by the Spanish National High Court (Criminal Chamber) on 5 March 2015

Patricia Mariscal (Elzaburu) · Tuesday, March 24th, 2015



On 5 March 2015, the Spanish National High Court convicted the administrators of the website Youkioske of an aggravated intellectual property offence and of promoting and establishing a criminal organisation. The [judgment](#) can be deemed ‘historic’ since it is the first time that the operators of a downloads site have faced a penalty of this magnitude – no less than 6 years’ imprisonment, a fine equivalent to a period of 20 months at a rate of 10 Euros per day, disqualification from operating websites professionally for a period of five years and the attachment of the almost 200,000 Euros that had been made from the unlawful activities. It does not end there, however, for the guilty parties will also have to pay the injured parties compensation to be determined when the judgment is enforced. In this respect, the Public Prosecutor has claimed the sum

of 3,695,004 Euros for AEDE (Association of Spanish Newspaper Publishers) alone.

Between June 2009 and May 2012, the guilty parties (two Spanish citizens) made a substantial profit by making protected literary content (books, magazines, newspapers, etc.) available to the public on the website [www.youkioske.com](http://www.youkioske.com) without having obtained the rightholders’ consent. Their *modus operandi* was the following: the content, primarily magazines and newspapers from all over the world, was uploaded onto the Internet by a group of individuals based in the Ukraine and acting under the orders of the guilty parties, with the latter telling them what material to upload and when. Those publications were hosted on virtual servers abroad (primarily in the USA), and users accessed them via ‘streaming’ on the website [www.youkioske.com](http://www.youkioske.com), which was registered in the name of a company domiciled in Belize and hosted, in turn, on a server in a Canadian company. This activity generated a considerable profit for the two guilty parties thanks to the advertising, in the form of banners and pre-roll videos, that they included on the website. To that end, they had incorporated, together with a third party, another company through which they invoiced that revenue.

The Youkioske website provided access to over 17,000 different publications from a number of countries (Russia, Germany, Holland, England, Italy and Portugal), although the bulk of the publications were Spanish.

As highlighted in the judgment, the abundant incriminating material in this case left no glimmer of doubt as regards the criminal nature of the website operators' conduct. The protected material was made available to the public in full awareness of the fact that it belonged to others, and there was an obvious and express intention of obtaining commercial gain. It was precisely the absence of that awareness that the material belonged to somebody else which led one of the three defendants to be acquitted. That individual had held a merely formal relationship with the fraudulent company, since he stood as its administrator but did not actually perform any administrative tasks in relation to the downloads site.

When legally classifying the conduct, the Court followed in the wake of a number of judgments delivered over the last year by the Appeal Courts, particularly the [judgment](#) handed down by Castellón Court of Appeal on 12 November 2014 in the case *bajatetodo.com*. In that case, the owners of the website [www.bajatetodo.com](http://www.bajatetodo.com) included links directed, as the name suggests, to all kinds of copyright-protected content (movies, music, videogames, computer programs, etc.) available to the public. The judgment had a huge impact in Spain since it was the first time that the Spanish courts had echoed the CJEU's judgment in the *Svensson* case ([judgment](#) of 13 February 2014) and held that setting up links to protected content, which had not been made available to the public previously by the rightholders, constituted an act of public communication. Moreover, the Appeal Court was conclusive in finding that the guilty parties' conduct was directly aimed at making a profit, since it had been proven that they had received income from the advertisements placed on the website. In that case, the sentence consisted of 18 months' imprisonment.

Similarly to the case of *bajatetodo.com*, in this case the National High Court considered that the defendants' activities, consisting of placing at users' disposal links which enable protected content that the defendants had previously selected, indexed and referenced to be viewed via streaming, without the need for downloading, to constitute an act of unauthorised, direct public communication. Part of the judgment is devoted to arguing that the defendants' activities were not those of a mere technical intermediary, since they controlled the content that was accessed by users at all times. For that reason, it ruled that they could not have recourse to the exemption from liability regime provided under the Spanish Information Society Services Act for certain subjects (for instance, services which provide links to content or search instruments). In actual fact, it was not even necessary to rule on that point, given that the defendants had not 'merely' selected, indexed and included the links to the content, but rather, it was they themselves who uploaded the protected material onto the Internet. As far as commercial gain was concerned, the High Court, contrary to what the Spanish courts had held for a long time, was clear in finding that obtaining income from advertising placed on a links site denoted the existence of an intention of making a profit in the strict sense of the term.

In this case, therefore, all of the elements comprising the category of offence laid down in [Article 270](#) of the Spanish Criminal Code were present, essentially, unauthorised public communication, awareness that the exploited material belonged to others (criminal intent), the intention of making a profit, and damage to third parties. Moreover, the particular seriousness of the facts, based primarily on the financial value of the damages sustained, meant that in this case the offence was deemed to be aggravated under [Article 271](#) of the Spanish Criminal Code, and so the penalty provided for the basic category of offence was doubled.

Likewise, since the conduct constituting an offence had been carried out by more than two individuals, who had in that regard acted in a manner that was concerted, coordinated and stable over time, the owners of *youkioske.com* were also convicted of the offence of promoting and

constituting a criminal organisation classified under [Article 570 bis](#) of the Spanish Criminal Code.

This is certainly a landmark decision in the judicial handling of online content piracy in criminal proceedings. The Spanish courts have, on a considerable number of occasions, sought refuge in the principle of minimum intervention and refused to issue a conviction for such conduct in criminal proceedings. However, with this finding, which can be added to the as yet brief list of judgments from lower courts, it seems that the judicial protection of rightholders against conduct of this kind under criminal law is starting to become a reality for the first time in Spain.

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