

# AG's opinion on Peterson/ YouTube: Clarifying the liability of online intermediaries for the violation of copyright-protected works?

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On the 16 July 2020, the Advocate General (AG) Saugmandsgaard Øe delivered his much-awaited opinion on the case of *Peterson v YouTube* (joined cases C-682/18 and 683/18), referred to the CJEU by the German Federal Court of Justice. Having explicitly precluded the consideration of provisions of the Copyright in the Digital Single Market (DSM) Directive due to its ongoing implementation into EU Member States, the AG offered a clarification with regard to the application of Article 3(1) of the InfoSoc Directive, construed the scope of Article 14(1) of the e-Commerce Directive and set forth a list of requirements for issuing blocking injunctions under Article 8(3) of the Enforcement Directive. His interpretation is controversial, while at the same time leaving many unanswered questions.



The case concerns a dispute between Frank Peterson, a German music producer and YouTube, an online music exchange platform, alleging copyright infringement. On 7 November 2008, Mr Peterson requested the removal of videos including music tracks of artist Sarah Brightman's performances that had been uploaded by internet users without his permission in which Mr Peterson claims to own copyright and related rights. Whilst YouTube took down the allegedly infringing videos, on 19 November 2008 users uploaded them again on the online platform. Mr Peterson then sought legal redress against YouTube requesting a blocking injunction. The dispute reached the German Federal Court of Justice, which decided to stay the proceedings and send a preliminary reference to the CJEU asking for clarification of EU copyright law. Its questions mainly address the concept of communication to the public as per Article 3(1) of the InfoSoc Directive, the scope of application of Article 14(1) of the e-Commerce Directive and the conditions for issuing an injunction against an online intermediary under Article 8(3) of the Enforcement Directive.

The AG opined that online intermediaries are not directly liable for copyright violations committed by their users. This is because online intermediaries do not communicate the works to the public within the meaning of Article 3(1) of the InfoSoc Directive. Rather, it is the internet users who engage in an act of communication to the public when they share content on the online platform. What is more, the AG concluded that the act of communication to the public is about the transmission of the work (para. 55-58, 66). Against this background, he argued that online intermediaries do not transmit content themselves. Instead, the AG placed internet users at the epicenter of this transmission and suggested that they play an essential and a more fundamental role (para. 73, 74). In this way, the AG appears to offer a new interpretation of the concept of communication to the public and one that deviates from the condition of provision of access. As the existing case law demonstrates, the concept of communication to the public has been examined through this lens so far. For instance, in *Svensson* (C-466/12), *GS Media* (C-160/15) and *Best Water* (C-348/13) the CJEU leaned in favour of copyright infringement in the case of circumvention of access restrictions to the content.

With regard to the concept of knowledge, as per Article 14(1) of the e-Commerce Directive, the AG clarified that this should be assessed in relation to specific illicit content (para. 172). This clarification is very much welcome since there has been so far a lack of guidance at the European level. However, this understanding is not new. National trends support the correlation of knowledge with a specific infringement. For instance, in Italy, in *Delta TV v YouTube*, the Court of Torino found that the provision of a mere title of infringed videos does not constitute valid notification and thus does not trigger knowledge of the unlawful act. Rather, the right holders must provide the URL of the infringing video. Only then would the online intermediaries have knowledge of the specific illicit activity as indicated by the URL.

Another striking point of the AG's opinion is to be found in the relationship between the application of the rules on primary and secondary liability in the context of host service providers. Undoubtedly, the boundaries between Article 14(1) of the e-Commerce Directive and Article 3(1) of the InfoSoc Directive are clearly carved out. However, the AG's opinion leans in favour of a close correlation between these two provisions, thus blurring their dividing lines. In particular, the AG states in para. 128 that the liability exemptions for online intermediaries could apply under both primary and secondary liability regimes.

Interestingly, this understanding is not novel as it was already supported by AG Szpunar in the *Stichting Brein v Ziggo* ruling (C-610/15, para. 59, 63), as well as by academic scholarship. However, the correlation between Article 14(1) of the e-Commerce Directive and Article 3(1) of the InfoSoc Directive could be problematic. This is because the application of a direct infringement, and thus primary liability, in the liability exemption provisions might come into conflict with the legal nature of Article 14 of the e-Commerce Directive. The imposition of primary liability rules goes against the rationale of the secondary liability theories that have been the cornerstone of e-commerce since 2000 and that safeguard the operation of many online intermediaries and the internet as a space for exchanging information between users (AG Poiares Maduro in joined cases C-236/08, C-237/08 and C-238/08, para. 142).

Further, the AG makes a distinction between stay-down obligations deployed by online intermediaries themselves and those that are issued by the courts through injunctions (para. 194-195). Yet, this distinction might be artificial and not consistent with existing law. This is because in both cases, the stay-down obligations require the use of filtering technology. As has been noted in *Scarlet v Sabam* (C-70/10), *Netlog v Sabam* (C-360/10) and *McFadden* (C-484/14), the use of filtering technology amounts to general monitoring, which is prohibited under Article 15 of the e-Commerce Directive.

Finally, the AG sets forth the requirements for stay-down obligations through injunctions. The AG appears to offer a middle ground interpretation of the removal of the illegal content, bridging gaps between existing trends in the case law at the European level. More specifically, he states that a stay-down obligation must relate to specific infringements and may extend not only to identical infringements, but also to equivalent infringements. In this vein, drawing upon *Scarlet v Sabam* (Case C-70/10), which rejected filtering as a prohibited general monitoring obligation, and *Glawischnig v Facebook* (C-18/18), which enabled the issue of stay-down injunctions on a worldwide basis, the AG states that online intermediaries may be required by injunctions to identify and take-down not only identical infringements of the work, but also equivalent ones (para. 221). Those injunctions, however, should be granted with due respect for proportionality.

What is more, although locating identical works might be easy, the AG accepted that it is challenging to identify equivalent copies of a specific infringement (para. 222). This is because online intermediaries might not have the know-how to develop filter-based technological tools, might lack the resources to acquire them or might own filter-based tools with a high margin of error. Insofar as the latter is concerned, the removal of lawful content such as parodies or works that belong to the public domain have been evidenced, while a study conducted by Jacques, Garstka, Hviid and Street concludes with regard to YouTube's ContentID that "the current system does not sit well with copyright exceptions."

Finally, the AG offers a new interpretation of equivalent copies. In particular, he deviates from the interpretation of the CJEU in *Glawischnig v Facebook* (C-18/18, para. 39) and construes equivalent content as the use of "the protected work in the same way." Yet, this interpretation requires further clarification. For instance, the question arises as to what is meant by using the work in the same way and how this differs from the concept of identical copies since, in that case, the infringing works could also be used in the same way.

It will be interesting to see whether the CJEU will follow the AG's opinion in addressing the referred issues. A clear articulation of the legal principles governing these questions is crucial in current times in light of the ongoing implementation of the DSM Directive and the recent publication of the *Proposal for the Digital Services Act* by the European Commission. Otherwise, one of the priorities of the Digital Single Market, which is to break down barriers between the EU's national markets and create a single one, could be in jeopardy.