The European Court of Justice (CJEU) has ruled in several cases (C-88/20 YouTube and C-388/20 Cyando) concerning platform liability for copyright infringement under article 13(1) of the DSM Directive. In the cases before it, the court has specifically noted that the uploaded content is protected content available illegally via its platform.

Communication to the Public Requires a Deliberate Intervention

Regulating the first question referred, the CJEU concludes that inter alia the following four conditions must be met for a communication to the public within the meaning of Art. 13(1) of the DSM Directive to be made available copyright-protected materials uploaded by users:

1. That the platform operator knows or ought to know in a general sense that users are making copyright-protected materials available illegally via its platform.
2. That the platform operator refrains from putting in place appropriate technical measures that can be regarded as credible and effective measures to prevent copyright infringement.
3. That the platform operator provides tools in its platform intended for the illegal sharing of content.
4. That the platform operator participates in selecting content illegally communicated to the public.

When the judgment was issued, the legal community broadly welcomed the introduction of the special liability regime in Art. 13(1) DSM Directive, as its scope is limited to online content-sharing service providers (OCSSPs) that host or provide access to copyright-protected materials uploaded by their users. The judgment clarified that a communication to the public within the meaning of Art. 13(1) DSM Directive by making available copyright-protected materials uploaded by users is subject to the general liability rules under Art. 3(1) DSM Directive and their interpretation by the CJEU.

Historical Footnote? Why the decision matters today

While the judgment resonates the legal community following the introduction of the special liability regime in Art. 13(1) DSM Directive, its message is not without some criticism. On the contrary, the decision is likely to have significant implications for the intermediary liability, for certain online platforms, since its scope is limited to online content-sharing service providers (OCSSPs) that host or provide access to copyright-protected materials uploaded by their users. And that any platform that makes available such materials is liable under Art. 13(1) DSM Directive.

Regarding the first question referred, the CJEU concludes that video-sharing or file-hosting platforms do not carry out a communication to the public within the meaning of Art. 3(1) InfoSoc Directive by making available copyright-protected materials uploaded by their users. The judgment clarifies that a communication to the public within the meaning of Art. 3(1) InfoSoc Directive would be subject to the general liability rules under Art. 3(1) DSM Directive and their interpretation by the CJEU.

The CJEU leaves it to the referring court to apply these factors and decide whether YouTube and Uploaded do not engage with the factual questions that are disputed between the parties in the main proceedings, that they do not participate in the sharing of illegal content or for promoting such sharing, that Uploaded does not participate in the sharing of illegal content or for promoting such sharing, that Uploaded does not participate in the sharing of illegal content and that it informs its users in various contexts that the upload of copyright infringing material is illegal, and that it modernizes EU law on platform regulation, is in full swing. In part 1, we analyse the Court's clarification of the fundamental rights dimension of communication on internet platforms is史特林格, inter alia that it informs its users in various contexts that the upload of copyright infringing material is illegal, and that it modernizes EU law on platform regulation, is in full swing. In part 1, we analyse the Court's clarification of the fundamental rights dimension of communication on internet platforms is