Kluwer Copyright Blog

YouTube/Cyando – an Important Ruling for Platform Liability – Part 1

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The European Court of Justice (CJEU) ruling in joined cases C-682/18 (YouTube) and C-683/18 (Cyando), concerning platform liability for copyright-infringing user uploads under Art. 3 (1) InfoSoc Directive, has been eagerly awaited for a long time. Such a long time – almost a year has passed since the Advocate General opinion (see here) – that a casual observer of copyright law may conclude that the judgment has lost its practical significance. After all, on 7 June 2021, a new copyright liability regime for certain online platforms entered into effect: Art. 17 of the Directive on Copyright in the Digital Single Market (DSM Directive). In this blog post, we explain why the judgment is still highly significant, coming at a time when the fundamental rights compatibility of Art. 17 DSM Directive is acutely in question, very few Member States have implemented the DSM Directive and the

legislative process on the Digital Services Act (DSA), attempting to modernize EU law on platform regulation, is in full swing. In part 1, we analyse the Court's clarification of the circumstances under which a platform performs an act of communication to the public, as well as the overall balancing of fundamental rights on which the judgment is based. Part 2 looks at the impact of the judgment beyond copyright law, by examining the Court's application of the hosting safe harbour of Art. 14(1) E-Commerce Directive (ECD) and drawing conclusions for the upcoming DSA.

Historical Footnote? Why the decision matters today

While the judgement concerns the legal situation before the introduction of the special liability regime in Art. 17 DSM Directive, its reasons are not only a historical footnote. On the contrary, the decision is likely to have significant repercussions. Firstly, because Art. 17 introduces direct liability only for a certain subset of online platforms, since its scope is limited to *online content-sharing service providers* (OCSSPs). For platforms that host third-party content and do not qualify as OCSSPs, the question of liability under Art. 3 (1) InfoSoc Directive and its interpretation in the present judgment remain important.

The decision may therefore have a direct impact on one of the parties involved, the file-hosting service Uploaded. Uploaded is not likely to qualify as an OCSSP, either because it does not make large amounts of copyright-protected material available to the public by default or because it does not compete with license-based streaming services. The reasons of the judgment support the former argument, as the Court held that the making available of large numbers of works uploaded by its users is not a main functionality of Uploaded.

However, the ruling may also have implications for YouTube, for which there is little doubt regarding its status as OCSSP. Should the CJEU find in the parallel proceedings in case C-401/19 that Art. 17 DSM Directive is partly or as a whole incompatible with the Charter of Fundamental Rights of the EU (the Charter), its liability regime could be null and void. In the absence of a special liability regime, YouTube and other OCSSPs would be subject to the general liability rules under Art. 3(1) InfoSoc Directive and their interpretation by the CJEU.

Focus on Fundamental Rights

With its first question, the German Federal Court of Justice asked in essence whether YouTube and Uploaded 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.

It becomes clear at the outset of the decision that the CJEU is taking a fundamental rights-based approach in the interpretation of Art. 3(1) InfoSoc Directive. In its previous case law on communication to the public in the context of platforms, the CJEU had mostly confined itself in setting out its standard of review to emphasizing the importance of a high level of protection for authors and the basis of this notion in secondary law (see for instance *Stichting Brein v Ziggo*, para. 22). In the present decision, the Court puts a stronger focus on fundamental rights that it had developed in *GS Media*, adding that Art. 3(1) requires a fair balance between the interests and fundamental rights of copyright holders, users and the general interest, in particular their freedom of expression and information (Art. 11 Charter).

The CJEU adds that the fair balance between the competing fundamental rights in the application of Art. 3 (1) InfoSoc Directive must also consider the *"particular importance of the internet to freedom of expression and information"*. By emphasizing the importance of the freedom of expression and information in internet-related contexts, the CJEU makes it clear that the freedom of expression has a particular weight in the balancing of the competing rights. In this way, the CJEU seems to be moving closer to the European Court of Human Rights (ECtHR), which reiterates the particular importance of the internet for the freedom of expression and information enshrined in Art. 10 (1) of the European Charter of Human Rights (ECHR) in its case law on restrictions of communication online (see for instance here, para. 33).

This special emphasis on the fundamental rights dimension of communication on internet platforms is reflected later in the judgment, where the CJEU takes a nuanced approach and a case-by-case assessment based on all relevant factors to determine if the acts of a platform fall within the scope of Art. 3(1) InfoSoc Directive, precluding liability for platforms in cases where they do not participate deliberately in the sharing of illegal content.

Communication to the Public Requires a Deliberate Intervention

Regarding the first question referred, the CJEU concludes that video-sharing or file-hosting platforms do not themselves make a communication to the public by merely providing the platform infrastructure. However, platforms are not completely excluded from the scope of Art. 3(1) InfoSoc Directive. Rather, the national courts must assess on a case-by-case basis whether acts by platform operators constitute a deliberate intervention in the sharing of illegal content, thus triggering direct liability under Art. 3(1).

To determine whether a platform carries out an act of communication, an individual assessment must be made, taking into account "several complementary criteria, which are not autonomous and are interdependent" and must be "applied both individually and in their interaction with each other", in particular that the operator acts deliberately, meaning that the operator of a platform intervenes in "full knowledge of the consequences" with the aim of giving the public access to

copyright-protected works.

The Court goes on to provide a non-exhaustive list of factors that can be considered by the national courts to assess whether the platform operator acted deliberately, based on *all relevant factors* in the individual case. These include:

1. That the platform operator knows or ought to know in a general sense that users are making protected content available illegally via its platform.
2. That the platform operator refrains from putting in place appropriate technical measures that can be expected from a diligent operator to counter copyright infringements.
3. That the platform operator participates in selecting content illegally communicated to the public.
4. That the platform operator provides tools in its platform intended for the illegal sharing of content.
5. That the platform operator knowingly promotes such sharing which may be attested by the fact that the operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.
6. That the main or predominant use of the platform consists of making available content illegally (paras. 84 and 100).

The CJEU does not specify how exactly these criteria are to be applied and weighted in individual cases. However, the Court points out that abstract knowledge that users make available content illegally and the profit-making nature of a platform are not sufficient to prove the deliberateness of an intervention.

Upload filters not required

The CJEU leaves it to the referring court to apply these factors and decide whether YouTube and Uploaded carry out a communication to the public. The Court does, however, provide a "clarification" that suggests that the Court considers YouTube and Uploaded not to be liable under Art. 3(1) InfoSoc Directive. In the case of YouTube, the Court concludes that it is apparent that YouTube has taken "credible and effective measures" to counter copyright infringements. The Court lists several measures that YouTube has implemented in this respect, inter alia that it informs its users in various contexts that the upload of copyright infringing material is forbidden, and that YouTube has – in addition – put in place various technical measures to prevent copyright infringements on its platform, such as different notification and alert procedures for reporting illegal content as well as content verification and recognition software.

The enumeration of various measures shows that the Court does not consider upload filters as the only appropriate technological measure to prevent illegal uploads. Automated filtering software is mentioned as one of several tools which together the Court considers appropriate to prevent copyright infringements on YouTube. The consideration of whether a platform has implemented appropriate technological measures therefore does not amount to a legal obligation to use upload filters. On the contrary, the list of appropriate technological measures considered by the Court in the example of YouTube shows the variety of conceivable measures to prevent copyright infringements.

It is nevertheless a concern that platform operators will voluntarily implement upload filters as one means to demonstrate that they are not deliberately intervening in copyright infringements

performed by their users. Regarding the importance that the Court places on the freedom of expression and information online, it would have been desirable for the Court to clarify that "appropriate technological measures" do not equate to upload filters, which are – according to the Court's own case law – not suitable for striking a fair balance between the affected fundamental rights.

As for Uploaded, the Court notes that Uploaded does not provide tools specifically intended for facilitating illegal content sharing or for promoting such sharing, that Uploaded does not participate in the sharing of download links and that there are various legal uses for file-hosting platforms such as Uploaded. The CJEU does not engage with the factual questions that are disputed between the parties in the main proceedings, Elsevier and Cyando, namely what proportion of the files stored on Uploaded infringe copyright and whether the financial model adopted by Uploaded is based on the availability of illegal content. As a consequence, unless the referring court sides with the plaintiffs on these factual questions, Uploaded is unlikely to fall within the scope of application of Art. 3(1) InfoSoc Directive.

Having established that the CJEU seems to lean toward the conclusion that neither YouTube nor Cyando performed acts of communication to the public in the circumstances of the main proceedings, part 2 of this blog post will consider the Court's application of the hosting safe harbour of Art. 14 (1) ECD. Only if the platforms meet the requirements of the safe harbour will they be exempt from (at least intermediary or secondary) liability for copyright infringing acts of their users. More importantly, as a horizontal rule, the interpretation of the hosting safe harbour has implications far beyond the realm of copyright law.

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