

Kluwer Copyright Blog

YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement?

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As readers of this blog will be aware, on 22 June the European Court of Justice (CJEU) handed down its ruling in joined cases [C-682/18 \(YouTube\)](#) and [C-683/18 \(Cyando\)](#) concerning the liability of online platforms for copyright-infringing uploads made by their users. Two



specific platforms were at issue: the popular video-sharing platform YouTube and Uploaded, a file-hosting and sharing platform. The case was multi-dimensional, the referring *Bundesgerichtshof* (German Federal Court of Justice) having submitted multiple questions for consideration. This blog has previously published two posts on the Court's responses on the right of [communication of the public in the Information Society Directive \(ISD\)](#) and the [hosting safe harbour of Article 14\(1\) of the E-Commerce Directive \(ECD\)](#). This post will focus on the third big issue tackled in the ruling: the scope of injunctions against intermediaries used by third parties to infringe copyright.

Legal context: the relevant rules and their interpretation

In such cases, according to [Article 8\(3\) ISD](#), EU Member States have an obligation to ensure that copyright holders are in a position to apply for injunctions against the intermediaries. In Germany, this effect is achieved through the so-called *Störerhaftung* doctrine. Often translated as 'interferer liability', this holds that injunctive orders can be issued against intermediaries to take action against infringing content if those intermediaries have violated a conduct obligation (see §121). In the case of host service providers, this is understood to be the case if the provider was notified by the rightholder of an infringement occurring on its website but failed expeditiously to delete or block the content and to prevent it from being reposted with the result that the infringement is repeated (§122). The national court sought the CJEU's guidance on whether making, in this way, injunctions available to rightholders only after a notification and repetition would be compatible

with Article 8(3) ISD.

A key consideration in assessing injunctions against intermediaries is the intersection of Article 8(3) ISD with the provisions of the ECD, in particular [Article 15\(1\) ECD](#) (§128). This prohibits Member States from imposing on host service providers (such as those at issue in this case) what have come to be known as ‘general monitoring obligations’:

‘Member States shall not impose a general obligation on providers, [...] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’

The prohibition applies equally to obligations imposed by law and by injunctive orders. The definition of general monitoring is therefore of crucial importance. Although the ECD was adopted over two decades ago, there is a surprising lack of clarity on this point – if anything, over time the provision has become increasingly controversial. As Prof. Martin Senftleben and I explain in a [recent working paper](#), the following main interpretations of ‘general monitoring’ have emerged over the years:

- **Option A:** monitoring is general if all or most of the content handled by a provider is monitored *in general*. It follows that the ban on general monitoring obligations prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary.
- **Option B:** the generality of the monitoring is not determined by what is being monitored, but by the objective of the monitoring. Intermediaries can therefore be required to monitor all or most of the information they handle, as long as such monitoring is not targeted at locating any illegal content *in general*, but only violations of a specific right – e.g. infringements of a particular trade mark or copyright-protected work. Two main flavours of this approach exist:
 - **Option B1:** some argue that obligations to monitor all the information handled by an intermediary in order to address a ‘specific’ piece of illegal content are only permissible if they are imposed by a court.
 - **Option B2:** others suggest that obligations to monitor all the information handled by an intermediary may also be rendered sufficiently ‘specific’ via a prior notification, e.g. by a right-holder.

As detailed in the paper, in the area of intellectual property law the CJEU has favoured Option A: monitoring all content is general monitoring. In 2019, however, in its decision in the defamation case *Eva Glawischnig-Piesczek*, the CJEU embraced Option B1. Specifically, the ruling suggested that monitoring all the content on an intermediary’s website is permissible as long as the objective is to locate content which is identical or equivalent to content previously declared to be unlawful. It is currently unclear whether this development indicates a horizontal shift, so that B1 should be understood to apply in copyright as well.

	OPTION A: BASIC INTERPRETATION <u>What are you looking at?</u>	OPTION B: BASIC INTERPRETATION MINUS <u>What are you looking for and what is the authority of the requester?</u>	
		B1: Basic Single Minus	B2: Basic Double Minus
INTERPRETATION	The ban on general monitoring prohibits the imposition of obligations to monitor all or most of the information handled by an intermediary <i>in general</i> .	Basic interpretation minus injunctions = monitoring all of the information handled by an intermediary is permitted, if there is a court order identifying 'specific' illegality, e.g. a particular defamatory attack or infringements of a particular copyright-protected work.	Basic interpretation minus injunctions minus notifications = monitoring all of the information handled by an intermediary is permitted, if there is a court order or rightholder notification identifying 'specific' illegality, e.g. infringements of a particular trade mark or copyright-protected work.
CONSEQUENCES	1. Monitoring all or most of the information handled by an intermediary <i>in general</i> can never be classified as monitoring 'in a specific case'. 2. General monitoring for the purpose of finding violations of a specific right is prohibited → no filtering obligations	Monitoring all or most of the information handled by an intermediary for the purpose of identifying violations of a specific right is permitted if ordered by a court → court-ordered filters ok	1. The generality of the monitoring is not determined by what is being monitored, but by the objective of the monitoring. 2. General monitoring for violations of a specific right is not prohibited if ordered by a court or triggered by a notification → filters ok
APPLICATION	<ul style="list-style-type: none"> • <i>L'Oréal v eBay</i> (trade marks) • <i>Scarlet Extended</i>; <i>SABAM v Netlog</i>; <i>McFadden</i> (copyright) 	<ul style="list-style-type: none"> • <i>Eva Glawischnig-Piesczek</i> (defamation); • <i>AG in Peterson</i> (copyright) 	<ul style="list-style-type: none"> • <i>AG in Poland v Parlament</i> (copyright)

Figure 1: Interpretations of 'general monitoring'

The Court's decision

In *YouTube and Cyando*, the Court started by observing that – contrary to what had been suggested by the referring *Bundesgerichtshof* (§36) – injunctions can be imposed on intermediaries even if they fulfil the conditions of the hosting safe harbour (§131). Nevertheless, according to Article 14(3) ECD, Member States are also allowed to establish procedures governing the removal of or disabling of access to illegal information. According to the Court, such procedures may precede the issue of Article 8(3) ISD injunctions, thus enabling less invasive action against intermediaries that are not liable as a result of the safe harbour (§132).

At the same time, any measures taken must respect Article 15(1) ECD (§134). In this regard, the Court took its cue from its 2011 and 2012 rulings in *Scarlet Extended* and *SABAM v Netlog*. The Court compressed the teachings of these two rulings into the following take-away message:

‘measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights [is] incompatible with Article 15(1) of the Directive on Electronic Commerce’ (§135).

On this basis, the CJEU reasoned that the German courts' condition was permissible. If no

notification of an infringement were to be required, intermediaries would be deprived of the opportunity, prior to the commencement of court proceedings, to ‘remedy such an infringement and to take the necessary measures to prevent [it] from recurring’. If that were the case, according to the Court, the provider would be required:

‘in order to prevent infringements of that type and to avoid being the subject of an injunction and being exposed to those costs on account of those infringements, actively to monitor all the content uploaded by users of that platform.’ (§136)

The Court also concluded that the condition would not be incompatible with a ‘fair balance’ between the various implicated fundamental rights, as long as it does not result in the cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder. This is because the condition would allow for providers to be protected against negative consequences to their freedom to conduct a business (Article 16 of the Charter), while rightholders would still be in a position effectively to terminate and prevent infringements (Article 17(2) of the Charter) (§140).

No guidance was provided on assessing what counts as ‘disproportionate damage’ to copyright. End-users’ right to their freedom of expression and information (Article 11 of the Charter) was mentioned (§140) as relevant to the ‘fair balance’ analysis, but no further insight was given on how it should be factored in. End-users’ right to the protection of their personal data, which had been listed as a consideration in earlier rulings on injunctions, was not referenced at all (see *Scarlet Extended*, §50-54 and *SABAM v Netlog*, §§48-52).

Comment

The Court’s response to the submitted question is unsurprising. There is nothing in EU legislation to indicate that Article 8(3) ISD injunctions cannot be made dependent on reasonable conditions. In fact, Recital 59 ISD explicitly states that the conditions and modalities relating to such injunctions are left to national law. If anything, the judgment raises the question whether the condition at issue would be obligatory for all Member States.

What is more interesting is the CJEU’s handling of Article 15(1) ECD in its analysis. Can the ruling provide indications of what the Court thinks constitutes general monitoring? Certainly, the central argument that imposing injunctions without prior notification would amount to a general monitoring obligation holds true regardless of which interpretation of general monitoring is correct: it would require monitoring *all content* in order to identify *any infringement of any intellectual property right*, thereby violating both Options A and B for the interpretation of general monitoring.

That being said, it is significant that the Court grounds its analysis in *Scarlet* and *SABAM v Netlog*. This indicates that *Eva Glawischnig-Piesczek* has not completely overwritten this earlier IP-focused case law on the meaning of general monitoring.

Instead, the Court's focus and conclusion are clear: §136 *in fine* confirms that obligations to monitor *all the content* uploaded by users are not compatible with Article 15 ECD. This statement is made without qualification pursuant to the purpose of the monitoring.

It could perhaps be argued that the Court's use of the words 'such an infringement' and 'infringements of that type' (§136) in its discussion of appropriate post-notification behaviour by intermediaries suggests a *Glawischnig*-style shift in copyright law towards interpretative Option B1. This is particularly so given the case's origins in Germany and *Störerhaftung*: the German courts have generally been happy to allow court orders against 'interferer' intermediaries requiring them to employ filtering to prevent any infringement which is similar at its core to a pre-identified infringement – that is, they have embraced Option B1. Could the Court be signalling that monitoring to prevent copyright infringements which are identical or equivalent to an infringement brought before a court is not general monitoring? The words 'any future infringement' (§135) in the Court's description of screening that amounts to general monitoring could even be taken to suggest a tighter definition that covers only monitoring to prevent any infringement of any *unspecified* intellectual property right.

The historical interpretative context argues against this. The words 'such an infringement' and 'infringement of that type' should instead be taken as a description of the requirements of *Störerhaftung*. The paragraphs from *Scarlet* and *SABAM v Netlog* that are referenced by the Court (*Scarlet Extended*, §§36-40 and *SABAM v Netlog*, §§34-38) make clear that the focus is on what is being monitored. While the two rulings did talk about action to prevent 'any future infringement' (see *Scarlet Extended*, §40 and *SABAM v Netlog*, §38), they also emphasised as problematic the active observation of almost all content handled by an intermediary that would have been required by the preventive monitoring which they discussed (*Scarlet Extended*, §39 and *SABAM v Netlog*, §37). Moreover, the filtering proposed in the two cases would not in fact have involved requiring the intermediary to locate infringements of *any* work, but only infringements of works included in the repertoire of collecting society SABAM – yet even this was considered excessive. Similarly, the earlier trade mark case *L'Oréal*, to which these rulings (and the words 'any future infringement') can be traced (§139), also concerned the infringement of specific trade marks.

This conclusion was later made explicitly clear in *McFadden*, in which the Court dropped the reference to 'any future infringement' altogether and instead stated in very straightforward terms that

'monitoring all of the information transmitted [by an intermediary] must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31' (*McFadden*, §87).

McFadden was a case that concerned a single pre-identified phonogram, about which the defendant had been notified (*McFadden*, §25-27) – thereby excluding Option B1.

The judgment in *YouTube and Cyando* does imply that after receiving a notification providers have

an obligation to remedy the infringement and prevent it from recurring. However, this should not be taken as an endorsement of monitoring obligations to prevent future infringement. To the contrary, it has always been accepted that preventive action by intermediaries against the infringement of intellectual property rights may be required (see *Scarlet Extended*, §31 and *SABAM v Netlog*, §29, referencing *L'Oréal*, §131), but that there are limits to the measures that providers can be required to adopt for this purpose. Filtering has been rejected by the case law multiple times and other options have instead been proposed (see e.g. *L'Oréal*, §§141-142).

The final conclusion is that – while the possibility that the Court will rethink its definition of general monitoring in intellectual property law remains – *YouTube and Cyando* does not support the idea that this has already occurred and flows directly from *Glawischnig*. In this judgment, the Court's focus is still on what is being monitored rather than the objective of the monitoring. Admittedly, the lateral way in which the issue is approached does not allow the issue to be put to rest. It is noteworthy that, in his recent [Opinion in *Poland v Parliament and Council*](#), AG Saugmandsgaard-Øe did not feel that the CJEU's decision in *YouTube and Cyando* provided a reason for him to revise his advice that the definition of general monitoring has been changed as a result of *Eva Glawischnig-Piesczek* also in the area of copyright, so that obligations to monitor content which is identical or similar to content that has been brought to the provider's attention via a notification would not amount to a general monitoring obligation, as long as sufficient safeguards are put in place (see §§111-115 of that Opinion). The AG's (unconvincing) analysis is a matter for another blog post.

Given the high stakes and controversial nature of the issue, a clearer statement from the CJEU will be necessary. It would have been helpful if the German referring court had submitted an additional question on this harder issue. In the meantime, nothing has been said to suggest a change of heart on general monitoring in the area of copyright. Until it says otherwise, the Court should be taken at its word: obligations actively to monitor all the content uploaded by users of a platform are general monitoring obligations.

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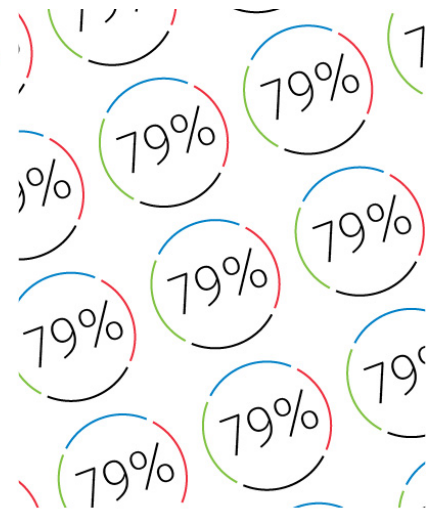
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