Kluwer Copyright Blog

YouTube/Cyando – Lessons for the Egyptian Copyright Legislator

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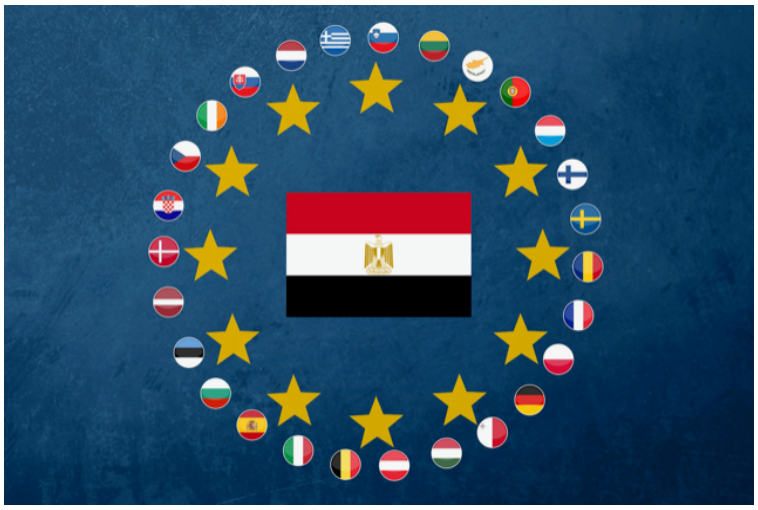

The so-called "conditional irresponsibility" of online content-sharing service providers (OCSSPs) with regards to copyright infringements is a never-ending, vexing, and daunting topic not only for scholars (see here, here, here and here), but also for the European Court of Justice itself (CJEU). The latter has recently rendered its eagerly awaited decision on the joined cases C-682/18 (YouTube) and C-683/18 (Cyando), almost a year since the Advocate General's opinion was released. Over the course of that period, the Digital Services Act (DSA) proposal was released. Since the ruling was handed down, the Advocate General's opinion on the Polish request for the partial annulment of article 17 of the Directive on Copyright in the Digital Single Market (CDSM) has also been published. The consequential delayed transposition of the latter by most member states is also relevant to consider. For these reasons, one can assume that this ruling has somehow lost its charm for copyright aficionados since it deals with the soon to be disposed of – if not entirely already overtaken in copyright-related matters – liability regime of the electronic commerce directive (ECD). The focus has been clearly shifting towards the CDSM directive and its thorny complications (see here, here and here).

Leastways, the purpose of this blog is not to further analyse or scrutinise the *YouTube/Cyando* ruling (for a detailed analysis see here, here and here), but rather to endeavour to highlight its significance and impact beyond the European borders. We believe that this ruling could be further amplified and magnified beyond its usually debated topics: communication to the public, content filtering, fundamental rights, etc. The aim of this blog is to briefly shift the focus from the digital single market to, what we would like to call one day, the Egyptian digital market. To that end, this blog addresses how the Egyptian copyright law (ECL) regulates intermediaries' liability when it comes to copyright-related infringements.

What lessons, if any, should the Egyptian copyright legislator retain from the CJEU's last words on the liability regime of the ECD?

Overview of the Egyptian Copyright Law

In Egypt, the framework for copyright protection is set under book three of *law no.82 of 2002* for the Protection of the Intellectual Property Rights (IPRs) (see also here). This, almost two-decade-old, legislation came into play following Egypt's accession to the WTO in 1995 and, subsequently, to honour its commitment to implement the TRIPS agreement. To comply with these novel international obligations, the Egyptian legislator abolished the historical *law no. 57 of 1939* for the Protection of Trademarks and Trade Information and the *law no.354 of 1954* for the Protection of Copyrights to, finally, put in place its first-ever IPR code. It's worth noting that the ECL remained faithful to its original "author's rights identity", similarly to its French counterpart. Hence, the ECL allocates right holders a wide bundle of exclusive rights (art. 147 ECL) and moral rights (art. 143 ECL) against all sorts of copyright infringements, including the making available of the work through the Internet. Right holders can therefore enforce their rights against any third party, including Internet intermediaries, exploiting any copyrighted work without prior consent and authorisation.

Briefly, copyright enforcement is guaranteed through two distinct, but parallel means, being civil and criminal suits. On one hand, the former allows right holders to directly claim damages sustained due to the unauthorised communication to the public of their work and to claim compensation for the unjust enrichment of the infringer according to the Egyptian Civil Code (ECC), notably before the Egyptian Economic Courts that possess exclusive jurisdiction in all copyright-related matters. On the other hand, criminal enforcement of copyright against unauthorised dissemination of any protected work is in parallel guaranteed by virtue of article 181 of the ECL. However, right holders must first file a complaint with the competent police authority, which subsequently investigates the latter. If there is sufficient proof that an infringement has indeed occurred according to the ECL, the matter will then be referred to the public prosecutor whereby criminal charges will be imposed and executed.

Enforcement of copyright under Egyptian law is therefore primarily addressed through criminal law, with the possibility of a civil suit based on showing of criminal infringement. However, it is important to note that if a right holder opts directly for a civil suit, the latter cannot, consequently, engage any criminal procedures against the infringer. Therefore, it is always recommended to commence both procedures in parallel to optimise and augment right holders' enforcement of their exclusive and moral rights.

The Ubiquitous *Lacunae* in the ECL and Platform Liability Regime

In view of the foregoing, we are not calling into question, by any means, the enforcement of copyright under the ECL and the ECC, but rather questioning the *status quo* of Internet intermediaries regarding such enforcement. It seems that the Egyptian legislator assimilates the latter to normal infringers with no regard whatsoever to any sort of safeguards like, for example, the *safe harbours* of article 14 of the ECD. By doing so, intermediaries and platforms are unequivocally left to the relatively brutal application of the ECC *droit common* rules and its various standards of care. Which in turn leaves them vulnerable to being liable for copyright infringements committed by their users. It is worth noting that scholars have formerly highlighted that, under the aforementioned rules, the only equivalent to a *safe harbour* therein lies, astonishingly, in the exceptions enumerated in articles 171 and 172 of the ECL. Or, if the work in question has fallen into the public domain prior to the infringing act.

It is thus indubitably clear that the rudimental rules of the ECL are neither adequate nor suitable for the ever-evolving technology of the Internet. It is vital to recall that the original catalyst for the promulgation of the IPR code was to modernise the nation's copyright rules and prepare it for the advent of the Internet. However, it is extremely regrettable that the Egyptian legislator missed out on regulating intermediaries' copyright liability within the body of the ECL itself, especially when considering that this legislation came into play almost two years after the adoption of the European ECD. There seems to be an omnipresent and ubiquitous *lacuna* in the ECL with regards to Internet intermediaries' and platforms' liability on "copyright" related matters.

Bearing in mind the current rigorous developments in the European digital single market, one can only ponder on how to construct and mould the ECL for the prospect Egyptian digital market. Especially in the wake of the *YouTube/Cyando* ruling that somehow saw these platforms escape liability following the application of article 14(1) of the ECD and not the eagerly anticipated article 17 of the CDSM.

Prospective Outlook on Egyptian Copyright

Despite stirring up heated debate, the *YouTube/Cyando* case could be very insightful for the Egyptian legislator. The latter has been actively making way for specialised digital legislation to add to its arsenal with the likes of *law no.151 of the year 2020* – Egypt's first standalone data protection law – that was largely inspired by the European GDPR. That is why we believe that this particular CJEU ruling could tip-off and sway the Egyptian copyright legislator into following the growing trend of adopting comprehensive "digital" laws in the country.

The *YouTube/Cyando* judgment confirms, in our view, not only the pertinence of adopting a specialised *lex specialis* on OCSSPs' copyright liability, but also its importance in building a strong digital single market. This landmark victory for platforms promises to be short-lived and there are no ifs, ands, or buts about it. Going forward, platforms in the EU are deemed directly liable for copyright infringements according to the rules of article 17 of the CDSM unless they satisfy certain requirements. The days of the *quasi*-systematic escape route via article 14(1) of the ECD are nearly over, if not already. Nevertheless, it will all come down to the eventual interpretation of article 17 of the CDSM and its infamous "best efforts" standard. On the other side of the Mediterranean, the Egyptian legislator should keep an eye on the developments of the latter, in the hope of one day filling the *lacunae* in the ECL with sufficient *safe harbour* safeguards for intermediaries and platforms operating in the Egyptian digital market.

In sum, the adoption of a text similar to the CDSM in Egypt could finally bestow the ECL with specialised legislation on OCSSPs' copyright liability, all while ensuring a pragmatic and dynamic legal framework based on the responsibility and accountability of the latter. By cautiously and prudently following in the footsteps of its European counterpart, the Egyptian legislator would, in our opinion, save the *démodé* ECL and its *vieux jeu* rules from its own demise. Not to mention how valuable the adoption of such rules would be in stimulating creativity and, most importantly, ameliorating the overall confidence of Internet actors in the Egyptian digital market. After all, nothing seems to be stopping the transposition of article 17 of the CDSM. The latter seems to be irrefutably, according to the Advocate General Saugmandsgaard-Øe and the European Commission (see here and here), in full equilibrium with stakeholders' interests and fundamental rights. Thus, probably making it the perfect specimen to bridge the chasms in the ECL, hence taking it one step closer to achieving a fully developed Egyptian digital market.

This case has provided a vital lesson for the Egyptian legislator. For further lessons, stay tuned…

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