Court of Justice of the EU: Case Google/Cyando

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On 22 June 2021, the Grand Chamber of the Court of Justice of the EU (CJEU) issued a judgment on the joined cases C-682/18 and C-683/18. The case concerned several infringements of the intellectual property rights held by Mr Peterson and Elsevier committed by users of the video-sharing platform operated by YouTube and the file-hosting and -sharing platform operated by Cyando, respectively. The judgment follows the German *Bundesgerichtshof* (Federal Court of Justice) request for a preliminary ruling concerning the interpretation of Article 3(1) and Article 8(3) of the InfoSoc Directive, of Article 14(1) of the e-commerce Directive, and of the first sentence of Article 11 and Article 13 of the Enforcement Directive.

The first question referred to in each of the two cases concerned whether Article 3(1) of the Copyright Directive must be interpreted as meaning that the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, itself makes a 'communication to the public' of that content, within the meaning of that provision. The CJEU ruled that the said operator does not make a 'communication to the public' of that content unless, beyond merely making that platform available, it contributes to giving access to such content to the public in breach of copyright. This would be the case, inter alia, where the operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it; or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform; or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content, or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform to illegally communicate protected content to the public via that platform.

The CJEU analysed the second and third questions together. The referring court had asked whether Article 14(1) of the e-commerce Directive must be interpreted

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as meaning that the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision, to the extent that its activity covers content uploaded to its platform by platform users. If that were the case, the referring court wished to know, in essence, whether Article 14(1)(a) of said directive must be interpreted as meaning that, for that operator to be excluded under that provision from the exemption of liability provided for in Article 14(1), it must have knowledge of specific illegal acts committed by its users relating to protected content that was uploaded to its platform. The CJEU ruled that the activity of the operator falls within the scope of that provision, provided that that operator does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform. For such an operator to be excluded from the exemption from liability provided for in Article 14(1), it must have knowledge of, or awareness of, specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

The fourth question referred to concerned whether Article 8(3) of the InfoSoc Directive precludes a situation where the rightsholder is not able to obtain an injunction against an intermediary whose services are used by a third party to infringe the rights of that rightsholder unless that infringement has previously been notified to that intermediary and that infringement is repeated. The CJEU answered in the negative, with the exception that, before court proceedings are commenced,infringement has first been notified to that intermediary and the latter has failed to intervene expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur. It is, however, for the national courts to satisfy themselves, when applying such a condition, that the condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightsholder.

Judgment of the Court of Justice of the EU (Grand Chamber), Joined Cases C-682/18 and C-683/18, Frank Peterson v Google et al and Elsevier Inc. v Cyando AG, 22 June 2021

https://curia.europa.eu/juris/document/document.jsf;jsessionid=13F16B59740306B6EE23A141F8C00E3B?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21406025

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