[AT] Austrian Supreme Court decides whether YouTube is responsible for content posted online before the implementation of the DSM Directive

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In principle, the operator of a video-sharing platform or a file-hosting and sharing platform (in this case, YouTube) does not make a "communication to the public" of content that users illegally make available to the public. The Austrian *Oberste Gerichtshof* (Supreme Court – OGH) concluded that this was the case, at least prior to the implementation of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive).

In a decision published on 17 September 2021, the OGH considered whether YouTube was responsible for content published on its platform by users and whether its use of such content was subject to copyright law ("communication to the public"). It examined the legal situation prior to Austria's belated implementation of the DSM Directive on 1 January 2022.

The OGH had initially suspended the proceedings pending a decision of the CJEU following a request from the German *Bundesgerichtshof* (Federal Supreme Court – BGH) for a preliminary ruling in the joined cases C-682/18 and C-683/18.

The key question in the proceedings was whether YouTube was responsible for a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC (or Article 18a of the Austrian Copyright Act – UrhG) if it provided access to unlawful content uploaded by users.

The OGH decided that, in the case at hand, a "communication to the public" had not taken place because YouTube had not played an active role in giving the public access to content that infringed copyright and because videos, about which complaints were lodged, were always removed as soon as YouTube was made aware of copyright infringements.

In its decision, the CJEU ruled that although the platform operator played a central role in making available user-uploaded content, this alone was not sufficient to constitute "communication to the public". Rather, other criteria had to be taken into account, in particular whether the operator had acted deliberately. Relevant factors included the circumstance that such an operator, despite the fact that it knew or ought to know, in a general sense, that users of its platform were making

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protected content available to the public illegally via its platform, refrained from putting in place the appropriate technological measures that could be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform. Also, the circumstance that that operator participated in selecting protected content illegally communicated to the public, that it provided tools on its platform specifically intended for the illegal sharing of such content, or that it knowingly promoted such sharing, which could be attested by the fact that the operator had adopted a financial model that encouraged users of its platform illegally to communicate protected content to the public via that platform. The mere fact that the operator knew, in a general sense, that protected content was made available illegally on its platform was not sufficient ground to conclude that it intervened with the purpose of giving Internet users access to that content. The situation was, however, different where that operator, despite having been warned by the rightholder that protected content was being communicated illegally to the public via its platform, refrained from expeditiously taking the measures necessary to make that content inaccessible. The fact that YouTube was trying to make a profit was irrelevant.

When examining these criteria, it must be taken into account that YouTube did not create or select the uploaded content, and did not view or monitor it before it was uploaded. It also informed its users, both in its terms of service and every time a file was uploaded, that it was forbidden to post protected content in breach of copyright, and blocked accounts in the event of repeated infringements. The technological measures in place (notification button, reporting procedure) showed that the operator was credibly and effectively countering copyright infringements. Its ranking system was not intended to facilitate the illegal sharing of content. It did not appear that the purpose or principal use of YouTube was the illegal sharing of protected content. Based on these CJEU findings, the OGH concluded that YouTube was not responsible for a "communication to the public" and therefore had not breached Article 18a UrhG.

Insofar as the first defendant was considered to be responsible for content uploaded by its users and therefore unable to rely on the exemption from liability contained in Article 14(1) of Directive 2000/31/EC (Article 16 of the Austrian *E-Commerce-Gesetz* (E-Commerce Act) [exemption from liability for storage of third-party content]) with regard to third-party infringements, the OGH referred to the CJEU's ruling that an operator was only excluded from the exemption from liability if it had knowledge of or awareness of specific illegal acts committed by its users relating to protected content uploaded to its platform.

The fact that the law had since become stricter (with the use of upload filters required under Article 17 of the DSM Directive) was immaterial because a parallel

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examination needed to be carried out. Injunctive relief would therefore only be granted if the conduct complained of infringed both the old and the new law. That being said, the directive had still not been transposed in Austria.

However, the provisions of the DSM Directive entered into force in Austria on 1 January 2022. Large online platforms such as YouTube are now, therefore, responsible for illegally uploaded content.

OGH 4 Ob 132/21x, 17.09.2021

https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20210917_OGH0002_0040OB00132_21X0000_000/JJT_20210917_OGH0002_0040OB00132_21X0000_000.pdf

Austrian Supreme Court, 4 Ob 132/21x, 17 September 2021

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