

AG Opinion on liability of streaming platforms and use of VPNs

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On 20 October 2022, Advocate General (AG) Szpunar delivered an Opinion in Case C-423/21, which concerned the important issue of the liability of streaming platforms under Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive), where users circumvent geo-blocking measures using virtual private networks (VPNs). Notably, the AG's Opinion considered that the Court of Justice of the European Union (CJEU) should hold that streaming platforms which transmit television programmes online do not infringe the exclusive right of communication to the public of works if users circumvent geo-blocking measures by means of a VPN service, unless the platform deliberately applied "ineffective" geo-blocking measures.

The case involved Grand Production, a Serbian company which produces entertainment programmes for the Serbian broadcaster Prva Srpska Televizija; and GO4YU Beograd, another Serbian company which operates a streaming platform, where Prva Srpska Televizija's entertainment programmes are available. Notably, GO4YU Beograd only had a licence to broadcast entertainment programme produced by Grand Production in Serbia and Montenegro, and geo-blocked access to these programmes for internet users outside Serbia and Montenegro. However, users could bypass this geo-block by using a VPN service, which hides the user's IP address and location. Grand Production alleged that GO4YU Beograd was aware of the possibility of circumventing the geo-block by using a VPN; and had also made Grand Production's entertainment programs available in Austria without restriction. In 2020, Grand Production sought an order in the Austrian courts against GO4YU Beograd to prohibit distribution of its programmes, and the case reached Austria's Supreme Court of Justice, which made a referral to the CJEU.

The main question concerned the liability under Article 3 InfoSoc Directive of a streaming platform which, respecting the rights of the rightholder, had applied a geo-block in a territory for which there was no authorisation for communication to the public of protected works, in this case the EU, but where users circumvented this blocking by using a VPN that allowed them to access the works as if they were in the territory for which the authorisation for communication to the public applied, namely Serbia or Montenegro.

The AG first stated that geo-blocking measures were among the tools for so-called digital rights management, which were different types of protections intended to prevent digital content from being used in a way that conflicted with the wishes of the provider of that content. Further, the CJEU had repeatedly pointed out that digital rights management tools could have legal effects under EU law, including with regard to the definition of "communication to the public" within the meaning of Article 3 InfoSoc Directive. Crucially, the AG considered that if the copyright holder (or its licensee) had applied such a block, its broadcast was only directed at the circle of persons who had access to the protected content from the territory defined by the rightholder. The rightholder therefore did not make any communication to the public outside that territory. As such, if the entertainment programmes produced by Grand Production on the streaming platform of GO4YU Beograd were geographically blocked in such a way that they were in principle only accessible from the territory of Serbia and Montenegro, GO4YU Beograd had not communicated these programmes to the public in the territory of the EU. However, the AG recognised that various technical means, including VPN services, made it possible to bypass geo-blocks. Crucially, the AG stated that this "does not mean that an entity whose geographic blocking of access to a protected work by users is circumvented makes a communication of that work to the public in the area where access is blocked. Such a conclusion would make territorial management of copyright on the Internet impossible – any communication to the public of a work on the Internet would in principle be global in nature."

Finally, the AG emphasised that it would be different if GO4YU Beograd had deliberately applied an "ineffective" geo-block, in order to actually allow access to those programmes to persons outside the territory where it had the right to communicate to the public programmes produced by Grand Production. In such a situation, it would have to be held that GO4YU Beograd took measures to provide its customers with access to a protected work. The AG concluded that this was for the referring court to determine.

Opinion of Advocate General M. Szpunar, Case C-423/21, Grand Production d.o.o. v GO4YU GmbH and Others, 20 October 2022

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