

Illegal uploads – CJEU’s landmark ruling for the platform economy

SIMONT
BRAUN

On 22 June 2021, the Grand Chamber of the Court of Justice of the European Union (“CJEU”) issued a ruling on the liability of platform operators with regard to illegal uploads of copyrighted content by their users. In this much-awaited decision (available [here](#)), the CJEU confirmed to a large extent the opinion of its Advocate General. As highlighted below, this decision contains key takeaways for the platform economy.

In a nutshell, the CJEU finds that internet users are in principle responsible for carrying out illegal uploads of copyrighted content, whereas platform operators may benefit from a liability exemption for the illegal content hosted at their users’ request.

RELEVANT FACTS

YouTube and Cyando are online platform operators. While YouTube’s platform makes it possible to upload and watch videos free of charge, Cyando’s platform allows registered users to upload and share files through hyperlinks. Respectively in 2008 and 2013, both operators were brought before the German courts by copyright holders, seeking injunctive relief for the illegal upload of protected works by internet users on YouTube and Cyando’s platforms.

In those circumstances, the German Federal Court of Justice stayed both proceedings and referred a series of questions to the CJEU for a preliminary ruling on the interpretation of:

- the author’s exclusive right of communication to the public, pursuant to Article 3(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and;
- the intermediaries liability exemption for the content they store at the request of their users, pursuant to Article 14(1) of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

KEY TAKEAWAYS

1. Platform operators do not, in principle, carry out acts of “communication to the public” with regard to illegal uploads of copyrighted content by their users

As a rule, the CJEU held that it is primarily the users, rather than the platform operator, that carry out acts of communication to the public when they upload illegal content online. Even if the role of the operator is “indispensable” for its users to make illegal content available on its platform, this

does not automatically result in the operator's intervention being qualified as a "communication to the public", within the meaning of Article 3(1) of Directive 2001/29/EC.

In that regard, the "deliberate" nature of the platform operator's intervention is decisive in assessing whether that intervention must be qualified as a communication to the public. In particular, it must be determined whether, given the specific context, the operator acted "in full knowledge" of the consequences of its conduct to give users access to copyrighted content.

To that end, the CJEU deems it relevant to examine whether:

- the operator refrains from putting in place appropriate technological measures against copyright infringements on its platform, although he knows or ought to know about the general presence of illegal content on that platform;
- the operator participates in selecting protected content illegally communicated to the public;
- the operator provides tools specifically intended for the illegal sharing of such content on its platform;
- the operator knowingly promotes such sharing, for instance, by adopting a financial model that encourages users to illegally communicate protected content to the public via its platform and;
- the purpose or principal use of the platform is to make protected content available to the public illegally – which is all the more significant if the operator fails to implement appropriate technological measures that can be expected from a reasonably diligent operator in its situation to counter copyright infringements on its platform.

However, the following circumstances are not sufficient to conclude that the platform operator's intervention in the illegal communication of protected content was deliberate:

- the operator knows, in a general sense, that protected content is made available illegally on its platform ;
- the operator has the aim of making a profit with its platform.

Based on the foregoing, platform operators whose services are not predominantly based on the making available of illegal uploads and who do not encourage illegal uploads through their financial model, should in principle not be considered as contributing to the acts of communication to the public carried out by their users.

2. Platform operators may, in principle, benefit from a liability exemption with regard to illegal uploads of copyrighted content by their users

As a rule, operators that "merely provide their platform" may benefit from the liability exemption introduced in favour of intermediaries regarding the content stored at their users' request, pursuant to Article 14(1) of Directive 2000/31/EC.

However, that exemption ceases to apply when the platform operator starts playing an “active role” that gives it actual knowledge of or control over that content, in conformity with the CJEU’s previous findings in the “L’Oréal/eBay” case (C-324/09).

Considering that online intermediaries cannot be subject to a general monitoring obligation pursuant to Article 15(1) of Directive 2000/31/EC, the Court holds that a platform operator only gains “actual knowledge” of illegal activities on its platform with regard to “specific” content.

Pursuant to Article 14(1) of Directive 2000/31/EC, such knowledge is acquired:

- when a platform operator uncovers, on its own initiative, a specific illegal activity, and/or;
- when a platform operator is notified by a third party that protected content has been illegally communicated to the public via its platform, on the condition that the notification contains sufficient information to determine, without detailed legal examination, that the content is illegal and that its removal is compatible with freedom of expression.

In that regard, the following circumstances are not sufficient to conclude that an operator has “specific” knowledge of illegal activities being carried out on its platform:

- the operator implements technological measures aimed at detecting, among the videos communicated to the public via its platform, content which may infringe copyright;
- the operator knows, in a general sense, that protected content is being made available illegally on its platform;
- the operator automatically indexes content uploaded to that platform;
- that platform has a search function;
- the platform recommends videos on the basis of users’ profiles or preferences.

Based on the foregoing, platforms operators should, in principle, only be held liable for specific illegal content hosted at the request of their users when it can be proved that they had actual knowledge thereof and failed to remove it expeditiously.

LESSONS LEARNED: MAKE IT MAKE SENSE...

Following to a large extent the opinion of its Advocate General, the CJEU provided insightful lessons for the platform economy. In the future, increased attention is likely to be paid to the actual operation and characteristics of online platforms, particularly the financial model put in place by their operator in relation to the illegal upload of copyright content by their users.

It bears reminding that the CJEU’s Grand Chamber issued the present ruling. The Grand Chamber only sits when the Court considers that a case is of exceptional importance. Its decisions have a special authority to ensure a uniform interpretation of EU law.

Be that as it may, the findings of the CJEU remain hard to reconcile with the specific liability

regime introduced by Article 17 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market. Under that new regime, an “online content sharing service provider” which covers a platform operator such as YouTube, is in principle liable for illegal uploads made by its users, when it fails to obtain the authorisation of rightholders to give public access to their protected content, for instance by concluding a licensing agreement.

As outlined by the CJEU at the beginning of its ruling, Article 17 of Directive (EU) 2019/790 was not in force at the material time of the main proceedings. Therefore, the CJEU did not take it into account when providing guidance in the present case. In turn, it remains to be seen how the CJEU case law will evolve when it will have to construct Article 17 of the Directive (EU) 2019/790.

Last but not least, it must be borne in mind that, on 24 May 2019, the Republic of Poland brought an action before the CJEU seeking the annulment of part of Article 17 of Directive (EU) 2019/790 based on the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union. Very much like the present case, the action’s outcome may have a significant impact on the platform economy. A story to follow up...

For more information or any question, please contact the authors:

Emmanuel Cornu – emmanuel.cornu@simontbraun.eu

Romain Meys – romain.meys@simontbraun.eu

+32 (0)2 543 70 80