



INTELLECTUAL PROPERTY

Liability of Online Platform Operators for User Copyright Infringement

by **Ciarán Markey, Peter Bolger**

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In July 2020, Advocate General Saugmandsgaard Øe handed down his non-binding opinion in Joined Cases C-682/18 Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH and C-683/18 Elsevier Inc. v Cyando AG. The AG opines that, under the current law, online platform operators, such as YouTube and Uploaded, are not directly liable for the illegal uploading of protected works by their users. Copyright holders can still seek injunctions against such platforms, however.

The CJEU, which is not obliged to follow the AG's opinion, will issue their ruling in the coming months.

The two cases brought before the German Courts both concerned the upload of protected works onto online platforms without authorisation from the copyright holders. In the case of Mr Peterson, several music tracks from the album *A Winter Symphony* by artist Sarah Brightman, and private sound recordings from the 'Symphony Tour' concert were uploaded to Youtube without permission. While three works in which Elsevier Inc hold copyright were uploaded without authorisation to Cyando's file-hosting and file-sharing platform Uploaded, which could be accessed via link collections on various websites.

In 2018 the German Federal Court referred a number of questions concerning the liability of the online platform operators were referred to the CJEU.

While, Directive 2019/790 on copyright and related rights in the Digital Single Market introduces a new liability regime specific to works illegally uploaded by users of online platforms such as Youtube and Uploaded, the deadline for transposition is 7 June 2021 and thus the current regime under Directives 2000/31, 2001/29 and 2004/48 is still applicable to these cases.

Assessing liability of the platforms under the current regime, the AG found that online platforms such as YouTube and Uploaded should not be directly liable for an infringement of the exclusive right of authors to communicate their work to the public, in circumstances where users illegally upload copyrighted works.

Communication to the public

The AG considered that such online platforms do not carry out an act of 'communication to the public' within the meaning of Directive 2001/29 and rather they are intermediaries that enable users to carry out such communications. The AG observed that the process of uploading content to such platforms is automatic and does not reflect an intention to communicate.

Secondary liability

The AG noted that Directive 2001/29 is not intended to govern secondary liability, and that it would be for

the EU legislature to introduce a secondary liability regime. A new liability regime now exists in Article 17 of the Copyright Directive, however it will not apply until transposed by individual Member States. Ireland has not yet transposed the Directive, and the UK will not be implementing it.

Exemption from liability

According to the AG, online platform operators could benefit from the exemption from liability under Section 4 of Directive 2000/31 which provides a 'safe harbour' for intermediary service providers. The exemption only applies where they do not play an 'active role' which would give them 'knowledge of, or control over' the information stored at their users' requests. The exemption applies to both primary and secondary liability, however, it will not apply where the platform has 'actual knowledge of illegal activity or information' or is 'aware of facts or circumstances from which the illegal activity or information is apparent'. This, in the opinion of the AG, avoids forcing online platforms to come to decisions on legally complex questions and, in doing so, becoming judges of online legality. The fact that a provider carries out certain checks to detect illegal content on its servers does not mean it should be regarded as playing an 'active role' and lose the benefit of the exemption.

While the AG's Opinion may be disappointing to copyright holders, it was noted that irrespective of the issue of liability, rightsholders may still obtain injunctions against the online platforms operators to enforce their rights, without the need to wait for infringement to take place again and without the need to show improper conduct by the intermediary online platform. The Irish Courts regularly grant such injunctions ordering disclosure of information which might identify infringers and ordering the removal of infringing content. LK Shields has acted regularly in these actions.

Copyright holders will also be able to benefit from the new liability regime introduced by the Copyright Directive once transposition has occurred. The EU also aims to reform the EU liability regime for online intermediaries through its Digital Services Act package.

For more information in relation to the enforcement of intellectual property rights, please contact Ciarán Markey at cmarkey@lkshields.ie or Peter Bolger at pbolger@lkshields.ie.

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