



Reports of Cases

Joined Cases C-682/18 and C-683/18

Frank Peterson
v
Google LLC and Others

and

Elsevier Inc.
v
Cyando AG

(Requests for a preliminary ruling from the Bundesgerichtshof)

Judgment of the Court (Grand Chamber), 22 June 2021

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Making available and management of a video-sharing platform or a file-hosting and -sharing platform – Liability of the operator for infringements of intellectual property rights by users of its platform – Directive 2001/29/EC – Article 3 and Article 8(3) – Concept of ‘communication to the public’ – Directive 2000/31/EC – Articles 14 and 15 – Conditions for exemption from liability – No knowledge of specific infringements – Notification of such infringements as a condition for obtaining an injunction)

1. *Approximation of laws – Copyright and related rights – Directive 2001/29 – Harmonisation of certain aspects of copyright and related rights in the information society – Aim*
(*Charter of Fundamental Rights of the European Union, Arts 11 and 17(2); European Parliament and Council Directive 2001/29, recitals 3, 9, 10, 23 and 31*)

(see paragraphs 63-65)

2. *Approximation of laws – Copyright and related rights – Directive 2001/29 – Harmonisation of certain aspects of copyright and related rights in the information society – Communication to the public – Concept – Operator of a video-sharing platform or a file-hosting and -sharing platform – Users of that platform illegally making protected content available to the public – Precluded – Exception – Scope*
(*European Parliament and Council Directive 2001/29, Art. 3(1)*)

(see paragraphs 66-75, 77-86, 92-102, operative part 1)

3. *Approximation of laws – Electronic commerce – Directive 2000/31 – Liability of intermediary service providers – Scope – Liability of operators of a video-sharing platform or a file-hosting and -sharing platform for infringements of intellectual property rights by users of its platform – Included – Condition – No knowledge of specific infringements (European Parliament and Council Directive 2000/31, Art. 14(1)(a))*

(see paragraphs 106, 107, 109, 111, 112, 116-118, operative part 2)

4. *Approximation of laws – Copyright and related rights – Directive 2001/29 – Harmonisation of certain aspects of copyright and related rights in the information society – Remedies – Possibility for the copyright holder or the holder of a related right to obtain an injunction against the operator of an online platform – Platform used by a third party to infringe the right of a rightholder without the operator’s knowledge – Whether permissible – Condition – Verification a matter for the national court (Charter of Fundamental Rights of the European Union, Arts 11, 16 and 17(2); European Parliament and Council Directives 2000/31, Art. 14(1)(a), and 2001/29, Art. 8(3))*

(see paragraphs 128-130, 133, 136-143, operative part 3)

Résumé

As EU law currently stands, operators of online platforms do not, in principle, themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms

However, those operators do make such a communication in breach of copyright where they contribute, beyond merely making those platforms available, to giving access to such content to the public

In the dispute giving rise to the first case (C-682/18), Frank Peterson, a music producer, is bringing an action against YouTube and its legal representative Google before the German courts in respect of the posting online, on YouTube, in 2008, of a number of recordings over which he claims to hold various rights. Those recordings were posted by users of that platform without his permission. They are songs from the album *A Winter Symphony* by Sarah Brightman and private audio recordings made during concerts on her ‘*Symphony Tour*’.

In the dispute giving rise to the second case (C-683/18), the publisher Elsevier is bringing an action against Cyando before the German courts in respect of the posting online, on the ‘Uploaded’ file-hosting and -sharing platform, in 2013, of various works over which Elsevier holds exclusive rights. Those works were posted by users of that platform without its permission. They are *Gray’s Anatomy for Students*, *Atlas of Human Anatomy* and *Campbell-Walsh Urology*, which could be consulted on Uploaded via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

The Bundesgerichtshof (Federal Court of Justice, Germany), which is hearing the two cases, referred a number of questions to the Court for a preliminary ruling so that the latter can provide clarification on, inter alia, the liability of the operators of online platforms as regards copyright-protected works illegally posted online on such platforms by platform users.

The Court has examined that liability under the set of rules, applicable at the material time, under Directive 2001/29 on copyright,¹ Directive 2000/31 on electronic commerce,² and Directive 2004/48 on the enforcement of copyright.³ The questions referred do not concern the set of rules established by Directive 2019/790 relating to copyright and related rights in the Digital Single Market,⁴ which came into force subsequently.

In its Grand Chamber judgment, the Court finds, *inter alia*, that, as EU law currently stands, operators of online platforms do not themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms unless those operators contribute, beyond merely making those platforms available, to giving access to such content to the public in breach of copyright. Moreover, the Court finds that such operators may benefit from the exemption from liability under Directive 2000/31 on electronic commerce unless they play an active role of such a kind as to give them knowledge of or control over the content uploaded to their platform.

Assessment by the Court

In the first place, the Court examines the question whether 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 carries out, in circumstances such as those at issue in the present cases, a ‘communication to the public’ of that content within the meaning of Directive 2001/29 on copyright.⁵ At the outset, the Court states the objectives and definition of the concept of a ‘communication to the public’ as well as the associated criteria which must be taken into account when making an individual assessment of what that concept means.

Amongst those criteria, the Court emphasises the indispensable role played by the platform operator and the deliberate nature of its intervention. That platform operator makes an ‘act of communication’ when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.

In that context, the Court finds 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, does not make a ‘communication to the public’ of that content, within the meaning of Directive 2001/29 on copyright, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1).

³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92). That directive establishes, for operators of online platforms, a new specific liability regime in respect of works illegally posted online by users of those platforms. That directive, which must be transposed by each Member State into its national law by 7 June 2021 at the latest, requires, *inter alia*, those operators to seek permission from rightholders – for example, by concluding a licencing agreement – for works posted online by users of their platform.

⁵ Article 3(1) of Directive 2001/29 on copyright. Under that provision, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

That is the case, *inter alia*, where that 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 illegally to communicate protected content to the public via that platform.

In the second place, the Court looks at the question whether the operator of online platforms may benefit from the exemption from liability, provided for in Directive 2000/31 on electronic commerce,⁶ in respect of protected content which users illegally communicate to the public via its platform. In that context, the Court examines whether the role played by that operator is neutral, that is to say, whether its conduct is merely technical, automatic and passive, which means that it has no knowledge of or control over the content it stores, or whether, on the contrary, that operator plays an active role that gives it knowledge of or control over that content. In that regard, the Court finds that such an operator can benefit from the exemption from liability provided that it 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. On that point, the Court specifies that, for such an operator to be excluded from the exemption from liability provided for in that directive, 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.

In the third place, the Court clarifies the circumstances in which, under Directive 2001/29 on copyright,⁷ rightholders can obtain injunctions against operators of online platforms. It finds that that directive does not preclude a situation under national law whereby a copyright holder or the holder of a related right may not obtain an injunction against an operator whose service has been used by a third party to infringe his or her right, that operator having had no knowledge or awareness of that infringement, within the meaning of Directive 2000/31 on electronic commerce,⁸ unless, before court proceedings are commenced, that infringement has first been notified to that operator 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 that condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder.

⁶ Article 14(1) of Directive 2000/31 on electronic commerce. Under that provision, where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States are to ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

⁷ Article 8(3) of Directive 2001/29 on copyright. Under that provision, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

⁸ Article 14(1)(a) of Directive 2000/31 on electronic commerce.