



Press and Information

Court of Justice of the European Union

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Advocate General's 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

**According to Advocate General Saugmandsgaard Øe, as EU law currently stands, online platform operators, such as YouTube and Uploaded, are not directly liable for the illegal uploading of protected works by the users of those platforms**

*Irrespective of the question of the liability of those operators for the files stored, rightholders may obtain, under EU law, injunctions against those operators, which can impose obligations on the latter*

**Directive 2019/790** on copyright and related rights in the Digital Single Market<sup>1</sup> introduces, **for online platform operators such as YouTube, a new liability regime specific to works illegally uploaded by the users of such 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 obtain an authorisation from the rightholders, for example by concluding a licensing agreement, for the works uploaded by users of their platforms.

**That directive is not yet applicable to the cases at hand. The Court of Justice is therefore invited to specify the liability of those operators under the regime currently in force** by virtue of Directive 2000/31 on electronic commerce,<sup>2</sup> Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society<sup>3</sup> and Directive 2004/48 on the enforcement of intellectual property rights.<sup>4</sup>

In the dispute giving rise to the first case, Frank Peterson, a music producer, brought proceedings against **YouTube** and its parent company **Google** before the German courts regarding the uploading to YouTube, in 2008, of several phonograms to which he claims to hold various rights. The material was uploaded by users of that platform without his authorisation. The material concerned consists of tracks from the album 'A Winter Symphony' by the artist Sarah Brightman and private sound recordings made during her 'Symphony Tour' concerts.

In the dispute giving rise to the second case, the publishing group Elsevier brought proceedings against **Cyando** before the German courts regarding the uploading to its file-hosting and -sharing platform **Uploaded**, in 2013, of various works to which Elsevier holds the exclusive rights. The material was uploaded by users of that platform without its authorisation. The material in question is 'Gray's Anatomy for Students', 'Atlas of Human Anatomy' and 'Campbell-Walsh Urology', which could be freely consulted on Uploaded via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

The Bundesgerichtshof (Federal Court of Justice, Germany), which is hearing those two cases, referred several questions to the Court for a preliminary ruling.

<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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. 1).

<sup>4</sup> 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 rectification OJ 2004 L 195, p. 16).

In today's Opinion, **Advocate General Henrik Saugmandsgaard Øe proposes that the Court rule that operators such as YouTube and Cyando are not directly liable for an infringement of the exclusive right of authors, as recognised under Directive 2001/29,<sup>5</sup> to communicate their work to the public, when users of those operators' platforms illegally upload protected works.**

According to the Advocate General, operators such as YouTube and Cyando do not, in principle, carry out an act of 'communication to the public' themselves in such a case. The role played by those operators is, in principle,<sup>6</sup> that of an intermediary providing physical facilities which enable users to carry out a 'communication to the public'. **Any 'primary' liability arising from that 'communication' is therefore borne, as a rule, solely by those users.**

Advocate General Saugmandsgaard Øe observes that the process of uploading a file to a platform such as YouTube or Uploaded, once initiated by the user, is automatic, without the platform operator selecting or determining in any other way the content that is published. Any, possibly automated, check made in advance by that operator does not constitute selection in so far as that check is confined to identifying illegal content and does not therefore reflect its intention to communicate certain (and not other) content to the public.

The Advocate General further notes that **Directive 2001/29 is not intended to govern 'secondary' liability**, that is to say, the liability of persons who facilitate third parties in carrying out illegal 'communications to the public'. That liability, which generally involves knowledge of unlawfulness, comes under the national law of the Member States.

**Moreover, platform operators such as YouTube and Cyando may, in principle, benefit from the exemption from liability** provided for by Directive 2000/31<sup>7</sup> **for the files they store at the request of their users**, provided that they did not play an 'active role' of such a kind as to give them 'knowledge of, or control over' the information in question, a role which, in principle, they do not play. The exemption in question provides that the provider of an information society service, which consists of the storage of information provided by the recipient of the service, cannot be held liable for the information thus stored, unless, upon obtaining knowledge or awareness that the users' information or activities are illegal, it has not expeditiously removed or disabled access to that information.

According to the Advocate General, that exemption applies, horizontally, to all forms of liability, which the providers in question may incur in respect of any kind of information stored at the request of the users of their services, whatever the source of that liability, the field of law concerned and the characterisation or exact nature of that liability. That provision therefore covers, in his view, both primary and secondary liability for the information provided and the activities initiated by those users.

The Advocate General specifies that **the situations in which the exoneration at issue does not apply** — namely when the service provider has 'actual knowledge of illegal activity or information' or is 'aware of facts or circumstances from which the illegal activity or information is apparent' — **refer, in principle, to specific illegal information.** Otherwise, there would be a **risk of platform operators becoming judges of online legality and a risk of 'over-removal' of content stored by them at the request of users of their platforms in so far as they also remove legal content.**

**Advocate General Saugmandsgaard Øe also proposes that the Court rule that, irrespective of the question of liability, rightholders may obtain, under EU law, injunctions against the**

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<sup>5</sup> Article 3 of that directive.

<sup>6</sup> On the other hand, according to the Advocate General, a service provider goes beyond the role of an intermediary where it intervenes actively in the 'communication to the public' of works. That is the case, in particular, if that service provider selects the content transmitted, determines it in some way, or presents it to the public in such a way that it appears to be its own. In those circumstances, the provider carries out the 'communication', together with the third party that initially provided the content.

<sup>7</sup> Article 14 of that directive.

**operators of online platforms, which can impose obligations on the latter.** Rightholders must be able to apply for such an injunction where it is established that third parties infringe their rights through the service provided by platform operators, without the need to wait for an infringement to take place again and without the need to show improper conduct by the intermediary.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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