

INTRODUCTORY NOTE TO JOINED CASES C-682/18 and C-683/18
PETERSON V. GOOGLE & YOUTUBE AND ELSEVIER V. CYANDO (C.J.E.U.)
BY JUSTIN HUGHES*
[June 22, 2021]

Introduction

Since its inception, the internet has challenged many basic principles of international copyright law. While some key “digital copyright” issues have been addressed in multilateral treaties,¹ one of the most vexing issues with the global digital network remains—the question of the responsibility of third-party intermediaries for copyright infringements by internet users.

Instead of a multilateral treaty, what emerged in the late 1990s and early 2000s was a kind of “invisible hand” coordination, with major economies adopting similar legal norms regarding the responsibility of internet service providers or “platforms.”² Roughly similar standards emerged in the § 512 provisions³ of the United States’ 1998 Digital Millennium Copyright Act, in Articles 12–14 of the European Union’s 2000 e-Commerce Directive,⁴ and in Japan’s 2002 Provider Liability Limitation Law. In China, the same basic framework was adopted by the Supreme People’s Court in interpretative guidelines issued in December 2000.⁵ During this period, rough harmonization was furthered by U.S. free trade agreements that encouraged Singapore, Australia, and other jurisdictions to adopt similar norms. The basic idea of these “safe harbor” laws has been that an internet service provider is *not* liable for infringements caused by its users as long as the service provider does not know about the infringements and acts “expeditiously” to disable or remove infringing materials when alerted by copyright owners.

By the late 2010s, this consensus on the limited responsibility of platforms began to unravel in the face of the unanticipated dominance and social role of Facebook and Google as well as the evolving problem of internet intermediaries with infringement-based business models. As a Canadian Government ministry noted in 2021, the internet platforms’ “more active role in user activities involving copyright-protected content . . . brought into focus the liability and obligations of online intermediaries, which is an evolving area of law around the world.”⁶ The 2021 *YouTube and Cyando* decision from the Court of Justice of the European Union (CJEU) is part of that ongoing reassessment.

The Case Before the Court

As the name implies, *YouTube and Cyando* was a consolidation of two cases. In Case C-682/18, *Peterson v. Google, YouTube*, Peterson held various copyright rights in audio and video recordings of Sarah Brightman [20–23];⁷ he sued Google in Germany over the repeated unauthorized posting of these works on the YouTube video-sharing platform. The Hamburg Higher Regional Court held that while YouTube was not directly liable for communicating Peterson’s works to the public, it was liable under German copyright law as a “interferer” (*Störer*) because YouTube had failed in its duty to expeditiously remove or disable the infringing material. The Hamburg Court also made extensive findings regarding YouTube’s terms of service with uploaders; its “various technical measures to stop and prevent infringements”; and its search functionality [30].

In Case C-683/18, *Elsevier v. Cyando*, the publishing house Elsevier had brought an action, also in Germany, against Cyando’s file hosting and sharing platform for communicating to the public three Elsevier Science works [46]. Cyando offered limited downloading for free with premium subscription services that permit greater gigabyte downloads and faster download speeds [41, 43]. Unlike YouTube, Cyando does not offer its own indexing and search functions for hosted materials, effectively functioning as a cyberlocker from which uploaders can share “download links sent to them by Cyando, in particular in blogs, forum, or even in ‘link collections’” [42].

In both cases, the questions referred to the CJEU asked the Court to evaluate (1) the conditions under which a hosting platform should be found to have engaged itself in acts of communication to the public under Article 3(1) of the EU 2001 Copyright Directive, and (2) the conditions for a hosting platform to enjoy the “safe harbor” of Article 14 of the

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2000 e-Commerce Directive [39, 57]. Both cases also raised questions regarding enforcement obligations for national law under the 2001 Copyright Directive and the EU Enforcement Directive [39(5), 57(5)].

As to when a hosting platform might itself engage in “communication to the public,” the CJEU reaffirmed its case law that the platform’s role must be both “indispensable” and “deliberate” [68]. Once the platform user makes their upload available to the public, the “indispensable” requirement appears easily met [75–77], but the platform’s role in communication to the public will only be considered “deliberate” if the platform:

- has “specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it” [102]; or
- where it “knows or ought to know, in a general sense, that users of its platform are making protected content available illegally to the public,” the platform
 - “refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation”; or
 - “participates in selecting protected content illegally communicated to the public”; or
 - “provides tools . . . specifically intended for the illegal sharing of such content”; or
 - “adopts a financial model that encourages users of its platform illegally to communicate protected content to the public” [84, 102]⁸

Based on these criteria, the CJEU’s analysis pointed toward YouTube *not* directly engaging in communication to the public [92–96], but left the status of Cyando’s cyberlocker more uncertain [100, 101].

As to the “safe harbor” of Article 14 of the e-Commerce Directive, the CJEU emphasized that the safe harbor is reserved for platforms whose activity is “neutral” and of a “mere technical, automatic and passive nature” [105, 106]; that automatic indexing of uploaded content does *not* give that platform specific knowledge of infringements [114]; and that once the platform has knowledge of “specific illegal acts”—either through its own investigation or through an adequate notice from a copyright holder—it loses the safe harbor unless it acts expeditiously to disable the infringing material.

Finally, as to German law permitting injunctive relief against an “interferer” only after the copyright holder has informed the platform of the infringement (and the platform has failed to act), the CJEU found that it is permissible under Article 8(3) of the Copyright Directive for Germany to provide for a procedure that precedes injunctive relief [132]. However, the Court also emphasized that this was not necessary, as “a service provider may have imposed on it injunctions adopted on the basis of the national law” even if it qualifies for the Article 14 safe harbor [131]. In short, the Court reaffirmed that under the scheme of EU directives, *responsibility* to prevent infringements is separate from *liability* for infringements that occur.⁹

Significance of the Decision

YouTube and Cyando is consistent with the general body of CJEU case law in this area and, by itself, this decision will be helpful in copyright enforcement efforts against cyberlockers with infringement-based business models. However, the decision has additional importance as background to the continuing struggle over implementation of Article 17 of the EU’s 2019 Digital Single Market Directive (DSM).¹⁰

Still in the process of implementation in the EU Member States, DSM Article 17 removes “online-content sharing service providers (OCSSPs)” such as YouTube and Facebook from the safe harbors of the e-Commerce Directive and imposes liability directly on these large platforms for communication to the public. Article 17 then requires the OCSSPs to engage in best efforts to license content and, where that doesn’t happen, to make “best efforts to ensure the unavailability of specific works . . . for which the rightholders have provided the service providers with the relevant and necessary information,”¹¹ language which is commonly interpreted to mean automated filtering. At the same time, Article 17 requires that any copyright enforcement efforts do not frustrate internet users’ exercise of copyright exceptions and limitations, with an express requirement that each EU member state recognize

copyright exceptions in the online environment for quotation, criticism, and parody.¹² In all these requirements, DSM Article 17 is the biggest break yet from the late 1990s/early 2000s consensus limiting the role of internet service providers in online copyright enforcement.

Passage of DSM Article 17 does not seem to have quieted its opponents, some of whom believe that any (or practically any) *ex ante* filtering of user uploaded content would be a violation of users' freedom of expression.¹³ The CJEU's endorsement of "appropriate technological measures" as a way for a hosting platform to avoid direct liability for user uploads sends a signal that the Court believes some filtering systems—such as YouTube's ContentID—can be used in the DSM Article 17 balancing act of copyright rights and user freedom of expression.¹⁴ Where DSM Article 17 sets a standard that platforms make "best efforts to ensure the unavailability of specific works . . . in accordance with high industry standards of professional diligence," the CJEU's interpretation of *pre-DSM directives* is that a platform like Facebook or Google can avoid direct liability for communication to the public if the platform has "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." The phrase "reasonably diligent operator" appears to be new to EU jurisprudence in this area. Contrasting "*best efforts*" according to "*high industry standards*" (DSM Article 17) with "*appropriate technological measures that can be expected from a reasonably diligent operator*," a reader of tea leaves might conclude that the Court is more tolerant of (or hopeful about) technological solutions for copyright enforcement than critics of Article 17.

Finally, the decision is helpful in its emphasis of the basic principle that the standards for injunctive relief against intermediaries to prevent copyright infringements are independent of the e-Commerce Directive safe harbors, and a platform can have a responsibility to help curb infringement without financial liability for the infringements that do occur.

ENDNOTES

- 1 WORLD INTELLECTUAL PROPERTY ORGANIZATION COPYRIGHT TREATY (WCT), adopted Dec. 20, 1996, S. TREATY DOC. No. 105–17 (1997), 2186 U.N.T.S. 152 (entered into force March 6, 2002); WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT), adopted Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), 2186 U.N.T.S. 203 (entered into force May 20, 2002); BEIJING TREATY ON AUDIOVISUAL PERFORMANCES, adopted June 24, 2012, S. TREATY DOC. No. 114-8 (2016), 51 ILM 1214 (entered into force on April 28, 2020).
- 2 For a contemporaneous discussion of this phenomenon, see Justin Hughes, *The Internet and the Persistence of Law*, 44 BOSTON COL. L. REV. 359 (2003).
- 3 17 U.S.C. § 512.
- 4 See 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, 2000 O.J. (L 178), arts 12–14, [hereinafter e-Commerce Directive].
- 5 INTERPRETATION BY THE SUPREME PEOPLE'S COURT OF SEVERAL ISSUES RELATING TO ADJUDICATION OF AND APPLICATION OF LAW TO CASES OF COPYRIGHT DISPUTES ON COMPUTER NETWORK, Adopted at the 1144th meeting of the Adjudication Commission of the Supreme People's Court, December 21, 2000, www.cpahkltd.com/Archives.
- 6 Innovation, Science, and Economic Development Canada, *Copyright Policy* (last modified Sept. 21, 2021), http://www.ic.gc.ca/eic/site/693.nsf/eng/h_000006.html.
- 7 Here and in the rest of this introduction, bracketed numbers, i.e., "[68]" are paragraph numbers in the CJEU opinion.
- 8 On the other hand, the CJEU also said that "deliberateness"—and, therefore, direct responsibility for communication to the public—could not be inferred from "the mere fact that the operator of a video-sharing platform or a file-hosting and sharing platform has the aim of making a profit" [86] and that the presumption of communication to the public from linking that the CJEU recognized in its 2016 *GS Media* decision did not extend to hosting activities [87].
- 9 The CJEU had already adopted this view in the context of remedial actions for defamation. In *Glawischnig-Piesczek v. Facebook*, C-18/18 (2019), the Court had said, at paragraph 25, "[i]t follows that, as the Advocate General stated in point 32 of his Opinion, a host provider may be the addressee of injunctions adopted on the basis of the national law of a Member State, even if it satisfies one of the alternate conditions set out in Article 14(1) of Directive 2000/31, that is to say, even in the event that it is not considered to be liable."
- 10 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 [hereinafter DSM Directive].
- 11 DSM Directive Article 17(4)(b).
- 12 DSM Directive Article 17(7). Recital 66 of the DSM Directive provides a good encapsulation of the balance sought.
- 13 Shortly after the Directive was adopted, the Polish government challenged certain parts of Article 17 through an action for annulment before the CJEU. See Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union. For an analysis that assumes only very limited

automated filtering would be acceptable under EU law, see Christophe Geiger and Bernd Justin Jütte, *Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU?*, 43 EUR. INT. PROP. REV. 625 (2021). For a more favorable perspective on the possibilities for Article 17, see Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, 2020

ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELLECTUAL PROPERTY JOURNAL (ZGE/IPJ) 123 (2020).

- 14 This is consistent with the *Glawischnig-Piesczek v. Facebook* opinion in which the Court concluded that ordering a platform to monitor for and block access to information that was “equivalent to the content of information which was previously declared to be unlawful” did not run afoul of the E-Commerce Directive’s prohibition on any general obligation on internet platforms to monitor the information they host or transmit. *Id.* ¶ 53.

JOINED CASES C-682/18 and C-683/18
PETERSON V. GOOGLE & YOUTUBE AND ELSEVIER V. CYANDO (C.J.E.U.)*
[June 22, 2021]

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 filehosting 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)

In Joined Cases C682/18 and C683/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decisions of 13 September 2018 and 20 September 2018 respectively, received at the Court on 6 November 2018, in the proceedings

Frank Peterson

v

Google LLC,

YouTube Inc.,

YouTube LLC,

Google Germany GmbH (C682/18),

and

Elsevier Inc.

v

Cyando AG (C683/18),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.C. Bonichot, M. Vilaras, E. Regan and M. Ilešič (Rapporteur), Presidents of Chambers, E. Juhász, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2019,

after considering the observations submitted on behalf of:

- Frank Peterson, by P. Wassermann and J. Schippmann, Rechtsanwälte,
- Elsevier Inc., by K. Bäcker, U. Feindor-Schmidt and M. Lausen, Rechtsanwälte,

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**Language of the case: German.

- Google LLC, YouTube Inc., YouTube LLC and Google Germany GmbH, by J. Wimmers and M. Barudi, Rechtsanwälte,
- Cyando AG, by H. Waldhauser and M. Junker, Rechtsanwälte,
- the German Government, by J. Möller, M. Hellmann and E. Lankenau, acting as Agents,
- the French Government, by A.L. Desjonquères, A. Daniel and R. Coesme, acting as Agents,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the European Commission, by T. Scharf, S.L. Kalèda and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,
gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 3(1) and Article 8(3) of 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; ‘the Copyright Directive’), of Article 14(1) of 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; ‘the Directive on Electronic Commerce’), and of the first sentence of Article 11 and Article 13 of 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; ‘the Enforcement Directive’).

2 The requests have been made in proceedings between Mr Frank Peterson, on the one hand, and Google LLC and YouTube LLC, on the other (Case C682/18), and between Elsevier Inc. and Cyando AG (Case C683/18) concerning several infringements of the intellectual property rights held by Mr Peterson and Elsevier committed by users of the videosharing platform operated by YouTube and the file-hosting and -sharing platform operated by Cyando, respectively.

LEGAL CONTEXT

International law

3 On 20 December 1996 the World Intellectual Property Organisation (WIPO) adopted in Geneva the WIPO Copyright Treaty (‘the WCT’), which was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6) and which entered into force, as regards the European Union, on 14 March 2010 (OJ 2010 L 32, p. 1).

4 Article 8 of the WCT, headed ‘Right of Communication to the Public’, provides:

‘Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention [for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971) as amended on 28 September 1979)], authors of literary and artistic works shall enjoy the exclusive right of authorising 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 these works from a place and at a time individually chosen by them.’

5 Agreed Statements Concerning the WCT were adopted by the Diplomatic Conference on 20 December 1996.

6 The Agreed Statement Concerning Article 8 of the WCT is worded as follows:

‘It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. . . .’

EU law*The Copyright Directive*

7 Recitals 4, 5, 8 to 10, 16, 23, 27, 31 and 59 of the Copyright Directive state:

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

...

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. . . . Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

(16) . . . This Directive should be implemented within a timescale similar to that for the implementation of [the Directive on Electronic Commerce], since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. . . .

...

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. . . .

...

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities

to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

8 Article 3(1) of that directive, that article being headed 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'Member States shall 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.'

9 Article 8 of that directive, headed 'Sanctions and remedies', provides:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall 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.'

The Directive on Electronic Commerce

10 Recitals 41 to 46, 48 and 52 of the Directive on Electronic Commerce are worded as follows:

'(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national

level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

...

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

...

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.'

11 Article 14 of that directive, headed 'Hosting', provides:

'1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) 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

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

12 Article 15(1) of that directive, that article being headed 'No general obligation to monitor', provides:

'Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.'

13 Article 18(1) of the Directive on Electronic Commerce, that article being headed 'Court actions', provides,:

'Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

The Enforcement Directive

14 Recitals 17, 22 and 23 of the Enforcement Directive state:

'(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

...

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.

(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in [the Copyright Directive]. Article 8(3) of [the Copyright Directive] should therefore not be affected by this Directive.'

15 Article 3 of that directive, headed 'General obligation', provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

16 Article 11 of that directive, headed 'Injunctions', provides:

'Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the [competent] judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of [the Copyright Directive].'

17 Article 13 of the Enforcement Directive, headed 'Damages', provides:

'1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.'

THE DISPUTES IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

Case C682/18

18 Mr Peterson is a music producer and claims to be the owner of the company Nemo Studios.

19 YouTube operates the eponymous online platform on which users can upload their own videos free of charge and make them available to other internet users. Google is the sole shareholder and the legal representative of YouTube. YouTube Inc. and Google Germany GmbH are no longer parties to the proceedings.

20 On 20 May 1996, the company Nemo Studio Frank Peterson entered into a worldwide exclusive artist contract with the performer Sarah Brightman covering the use of audio and video recordings of her performances. In 2005, that contract was amended by a further agreement. On 1 September 2000, Mr Peterson concluded a licence agreement, in his own name and on behalf of Nemo Studios, with Capitol Records Inc. covering the exclusive distribution of the recordings and performances of Sarah Brightman by Capitol Records.

21 The album *A Winter Symphony*, containing works performed by Sarah Brightman, was released in November 2008. On 4 November 2008, Sarah Brightman began a tour called the '*Symphony Tour*' in which she performed the works she had recorded for the album.

22 On 6 and 7 November 2008, works taken from that album and private recordings from concerts on that tour could be accessed on the YouTube online platform, accompanied by still and moving images. By letter of 7 November 2008, Mr Peterson, who produced, in support of his request, screenshots intended to establish the facts alleged, contacted Google Germany and demanded that both Google Germany and Google issue cease-and-desist declarations under threat of penalties. Google Germany then approached YouTube, which used the screenshots sent by Mr Peterson to find the internet addresses (URLs) of the videos in question manually and blocked access to them. The parties disagree as to the extent to which access was blocked.

23 On 19 November 2008, audio recordings from Sarah Brightman's performances, accompanied by still and moving images, could once again be accessed on YouTube's online platform.

24 Consequently, Mr Peterson brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) against Google and YouTube ('the defendants in the main proceedings') seeking an injunction, disclosure of information and a declaration that they were liable to pay damages. In support of that action, he relied on his own rights as the producer of the album *A Winter Symphony*, as well as his own rights and rights deriving from those of Sarah Brightman associated with the performance of the works on that album, which was created with his artistic participation as both producer and backing vocalist. He also submits, with regard to the recordings of the '*Symphony Tour*' concerts, that he is the composer of and author of the lyrics of various works on the album. In addition, he holds, as publisher, rights derived from those of the authors in respect of various musical works.

25 By judgment of 3 September 2010, the court hearing the case upheld the action in so far as it related to three musical works and dismissed the action as to the remainder.

26 Mr Peterson and the defendants in the main proceedings brought appeals against that decision before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany). Mr Peterson requested that the defendants in the main proceedings be prohibited from making available to the public, in the form of versions that are either synchronised or are otherwise linked to third-party content or to advertisements, 12 audio recordings and performances appearing on the album *A Winter Symphony* by Sarah Brightman, which he produced, and 12 musical works composed by him taken from the '*Symphony Tour*' concerts or, in the alternative, from allowing third parties to make the relevant works available to the public. He also required that information be provided concerning the illegal activities and the turnover or profits generated through those activities. In addition, he claimed that YouTube should be ordered to pay damages and that Google should be ordered to return sums that constituted unjust enrichment. In the alternative, he requested information on the users of the YouTube online platform who had uploaded the works in question under pseudonyms.

27 By judgment of 1 July 2015, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) reversed in part the judgment delivered at first instance and ordered the defendants in the main proceedings to prevent third

parties, in respect of seven musical works, from making available to the public versions that are either synchronised or are otherwise linked to third-party content or to advertisements of audio recordings or performances by the artist from the album *A Winter Symphony*. Further, it ordered the defendants in the main proceedings to provide the names and postal addresses of the users of the platform who had uploaded the musical works to that platform using a pseudonym or, in the absence of a postal address, the email address of those users. The appeal court dismissed the action as to the remainder as being inadmissible in part and unfounded in part.

28 As regards seven musical works from the album *A Winter Symphony*, the appeal court found that Mr Peterson's rights had been infringed by the fact that those works were posted, without his permission, on YouTube's video-sharing platform and were accompanied by moving images, such as films taken from Sarah Brightman's promotional video. The appeal court found that YouTube was not liable for those infringements as the perpetrator or as a participant, since it did not play any active role in the creation or posting of the content at issue on the platform and, moreover, did not adopt that third-party content as its own. In addition, it did not demonstrate the intent required in order to be liable as a participant, as it had no knowledge of the specific acts of infringement. The appeal court held that YouTube was nevertheless liable as an 'interferer' (*Störerin*), since it had failed to discharge its obligations as to its own conduct. Thus, as regards those works, although it had been notified of illegal activities relating to those works, it had not immediately deleted the content at issue or blocked access to that content.

29 By contrast, YouTube had not infringed any conduct obligations in respect of the recordings of the '*Symphony Tour*' concerts. It is true that the videos featuring those musical works were unlawfully posted by third parties on the video-sharing platform. However, YouTube either did not have sufficient information about those infringements, or blocked access to the content in question in good time or, in certain cases, could not be accused of having infringed the obligation to block that content immediately.

30 The appeal court made, inter alia, the following findings of fact:

- Almost 35 hours of video recordings are uploaded per minute and several hundred thousand videos are uploaded each day onto the YouTube online platform. The videos are uploaded to Google's servers by means of an automated process without being viewed or checked beforehand by the defendants in the main proceedings.
- In order to be able to upload videos to the YouTube online platform, it is necessary to create an account, with a user name and password, and to accept that platform's terms of service. A user who, after having registered himself or herself, uploads a video can choose to leave it in 'private' mode or to publish it on the platform. In the second case, the video in question can be streamed by any internet user from that platform.
- Under YouTube's terms of service, each user grants YouTube, in respect of the videos that he or she uploads to the platform and until they are removed from the platform, a worldwide, non-exclusive, royalty-free licence to use, reproduce, distribute and create derivative works and to display and perform those videos in connection with the provision of YouTube's platform and activities, including advertising.
- In accepting those terms of service, the user confirms that he or she holds all the necessary rights, agreements, consents and licences for the videos that he or she uploads. In addition, in the 'Community guidelines', YouTube asks users of its platform to respect copyright. They are also clearly informed on making each upload that no videos infringing copyright may be published on the platform.
- YouTube has introduced various technological measures to stop and prevent infringements on its platform. Anyone can notify YouTube of an illegal video in writing or by fax, email or webform. A notification button has been created, with which indecent or illegal content can be reported. By means of a special alert procedure, copyright holders are also able to have up to 10 specifically disputed videos removed from the platform by indicating the relevant internet addresses (URLs).
- YouTube has also set up the 'Content Verification Program' which makes it easier for the rightholder to identify the videos that he or she considers to infringe his or her rights by checking them off in a list of

videos. That programme is made available only to undertakings which have registered specifically for that purpose, and not to individuals. If a video is blocked because it has been flagged by the rightholder, the user who uploaded it is notified that his or her account will be blocked in the event that the infringement is repeated.

- In addition, in order to identify illegal content, YouTube has developed content-recognition software called ‘Content ID’ or ‘YouTube Audio ID’ and ‘YouTube Video ID’. To that end, the rightholder must provide an audio or video reference file which enables YouTube to identify on its platform other videos having the same content in whole or in part. If such a video is identified, the rightholder is informed of this by YouTube. The rightholder may then either have the content in question blocked or authorise that content and receive advertising revenue.
- YouTube offers a search function and assesses the geographical relevance of the search results summarised on the home page in the form of ‘rankings’ under the headings ‘currently watched videos’, ‘promoted videos’ and ‘trending’. Other overviews of what is available can be found in the categories ‘videos’ and ‘channels’ under the sub-categories ‘entertainment’, ‘music’ or ‘film and animation’. If a registered user uses the platform, he or she will be given an overview of the ‘recommended videos’, the content of which varies according to the videos which he or she has already viewed.
- There are advertising banners of third-party providers specific to the region in question around the outside of the home page. It is also possible to generate advertising revenue on YouTube through video messages which may be inserted where a separate agreement has been concluded between the user uploading the video and YouTube. As regards the videos at issue in the present case, however, there does not appear to be any connection to advertising.

31 The Bundesgerichtshof (Federal Court of Justice, Germany) gave leave for an appeal on a point of law (*Revision*) against the judgment on appeal, but limited it to the grounds of appeal which had been found to be admissible by the appeal court. Mr Peterson maintains his grounds of appeal in the context of his appeal on a point of law (*Revision*) despite the fact that the appeal court held that they were unfounded. In their appeal on a point of law (*Revision*), the defendants in the main proceedings claim that the action should be dismissed in its entirety.

32 The referring court notes that the success of Mr Peterson’s appeal depends, in the first place, on whether YouTube’s conduct in the dispute in the main proceedings constitutes a communication to the public within the meaning of Article 3(1) of the Copyright Directive. It takes the view that that could be the case only in respect of the seven musical works from the album *A Winter Symphony* which YouTube did not expeditiously remove or block despite having been informed of the fact, established by the appeal court, that those works were illegally made available to the public via its platform.

33 That court goes on to state that, by operating its platform, YouTube does not play a role that is indispensable, within the meaning of the case-law of the Court, which is a prerequisite of its conduct being classified as an act of communication if, after having been made aware that content-infringing copyright is being made available to the public, it deletes that content or immediately blocks access to it. In order for YouTube to be regarded as having such a role, it is necessary for it to be fully aware of the consequences of its conduct and, in particular, of the lack of authorisation from the rightholder. Since videos are uploaded automatically, YouTube has no knowledge that copyright-infringing content is being made available to the public until it is informed of this by the rightholder. The referring court states that YouTube informs users, in its terms of service, and then subsequently during the upload process, that they are prohibited from infringing copyright via its platform and provides rightholders with tools which they can use to take action against such infringements.

34 The referring court states that, if YouTube’s conduct at issue in the main proceedings cannot be classified as a communication to the public within the meaning of Article 3(1) of the Copyright Directive, it is then necessary to determine, in the second place, whether the activity of the operator of a videosharing platform, such as YouTube’s, comes within the scope of Article 14(1) of the Directive on Electronic Commerce, so that that operator may benefit

from an exemption from liability in respect of the information stored on its platform. That court notes that, as is apparent from the findings made by the appeal court, YouTube did not associate the videos infringing Mr Peterson's copyright with advertising. However, the question arises whether YouTube nevertheless played an active role, which would preclude the application of that provision, in view of the other circumstances of the present case, as summarised in paragraph 30 of the present judgment.

35 In the event that YouTube's role is to be classified as neutral and, therefore, that its activity falls within the scope of Article 14(1) of the Directive on Electronic Commerce, the question arises, in the third place, as to whether 'actual knowledge of illegal activity or information' and '[awareness] of facts or circumstances from which the illegal activity or information is apparent', within the meaning of that provision, must relate to specific illegal activities or information. In the view of the referring court, that question should be answered in the affirmative. It follows from the wording and scheme of that provision that it is not sufficient that the provider was generally aware that its services are used to engage in some illegal activities. An infringement must therefore be notified to the provider in a manner that is clear and precise so as to allow the provider to establish that infringement without conducting a detailed legal or factual examination.

36 The referring court states that, if YouTube's conduct at issue in the main proceedings falls within the scope of Article 14(1) of the Directive on Electronic Commerce, the question also arises, in the fourth place, as to whether it is compatible with Article 8(3) of the Copyright Directive that the rightholder should not be in a position to obtain an injunction against the operator of a video-sharing platform, whose services have been used by a third party to infringe copyright or related rights, unless the operator, after having been notified of a clear infringement of such a right, has not acted expeditiously to delete the content in question or to block access to it and to ensure that such infringements do not recur. In the view of that court, that question should be answered in the affirmative, since it follows from Article 14(1) and Article 15(1) of the Directive on Electronic Commerce that an injunction against such an operator may be provided for under the national law of the Member States only where that operator has actual knowledge of the illegal activity or information.

37 In the event that YouTube's conduct does not fall within the scope of Article 14(1) of the Directive on Electronic Commerce, the question arises, in the fifth place, as to whether YouTube must, even in the absence of a communication to the public, within the meaning of Article 3(1) of the Copyright Directive, be regarded as an 'infringer' who, unlike an 'intermediary', may, under Articles 11 and 13 of the Enforcement Directive, be the subject not only of an injunction, but also of an order to pay damages or to recover profits.

38 Once again, in the situation referred to in the previous paragraph and in the event that the Court were to concur, in that regard, with the referring court's view that YouTube should be regarded as an infringer, the question arises, in the sixth and last place, whether the obligation of such an infringer to pay damages, under Article 13(1) of the Enforcement Directive, may be made subject to the condition that it acted deliberately with regard both to its own illegal activity and the specific illegal activity of the third party.

39 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the operator of a video-sharing platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of [the Copyright Directive] if:

- the operator earns advertising revenue by means of the platform,
- the upload process takes place automatically and without material being seen or monitored in advance by the operator,
- in accordance with the terms of service, the operator receives a worldwide, non-exclusive and royalty-free licence for the videos for the duration for which the videos are posted,
- in the terms of service and during the upload process, the operator points out that copyright-infringing content may not be posted,

- the operator provides tools with which rightholders can take steps to block videos that infringe their rights,
- on the platform, the operator prepares search results in the form of rankings and content categories, and displays to registered users an overview of videos recommended on the basis of videos previously seen by those users,

if the operator is not specifically aware of the availability of copyright-infringing content or, after having become aware, immediately deletes that content or expeditiously disables access thereto?

(2) If Question 1 is answered in the negative:

Does the activity of the operator of a video-sharing platform under the conditions described in Question 1 come within the scope of Article 14(1) of [the Directive on Electronic Commerce]?

(3) If Question 2 is answered in the affirmative:

Must the actual knowledge of the illegal activity or information and the awareness of the facts or circumstances from which the illegal activity or information is apparent relate to specific illegal activities or information pursuant to Article 14(1) of [the Directive on Electronic Commerce]?

(4) Also if Question 2 is answered in the affirmative:

Is it compatible with Article 8(3) of [the Copyright Directive] if the rightholder is in a position to obtain an injunction against a service provider whose service consisting of the storage of information provided by a recipient of the service has been used by a recipient of the service to infringe copyright or a related right, only if such an infringement has been repeated after notification of a clear infringement has been provided?

(5) If Questions 1 and 2 are answered in the negative:

Is the operator of a video-sharing platform under the conditions described in Question 1 to be regarded as an infringer within the meaning of the first sentence of Article 11 and Article 13 of [the Enforcement Directive]?

(6) If Question 5 is answered in the affirmative:

Can the obligation of such an infringer to pay damages pursuant to Article 13(1) of [the Enforcement Directive] be made subject to the condition that the infringer acted intentionally with regard both to his own illegal activity and to the illegal activity of the third party, and knew, or ought reasonably to have known, that users use the platform for specific acts of infringement?

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40 Elsevier is an international specialist publisher, which holds the exclusive rights to use the works at issue in the main proceedings.

41 Cyando operates the ‘Uploaded’ file-hosting and -sharing platform, which can be accessed via the websites uploaded.net, uploaded.to and ul.to. That platform offers all internet users, free of charge, storage space for uploading files regardless of content. In order to be able to upload files to that platform, it is necessary to create an account, with a user name and password, by providing, inter alia, an email address. The uploading of a file by a user happens automatically without the material being seen or monitored in advance by Cyando. Each time a file is uploaded, Cyando automatically creates a download link which allows direct access to the file concerned and automatically sends that link to the user who uploaded it.

42 Cyando offers neither a directory nor a search function for the files stored on its platform. Users may nevertheless share on the internet the download links sent to them by Cyando, in particular in blogs, forums or even in ‘link collections’. Those collections, which are provided by third parties, index those links, provide information on the content of the files to which those links refer and thus enable internet users to search for the files that they wish to download. In that way, other internet users can access the files stored on Cyando’s platform.

43 The downloading of files from Cyando's platform is free of charge. The quantity of downloads and the download speed are nevertheless limited for unregistered users and for users who have a free subscription. Users with a paid subscription have a daily download volume of 30 GB, up to a cumulative maximum of 500 GB with no restriction on download speed. They can download an unlimited number of files simultaneously with no waiting time between downloads. The price for such a subscription ranges between EUR 4.99 for two days and EUR 99.99 for two years. Cyando pays remuneration to users who have uploaded files according to how many times those files are downloaded. For example, up to EUR 40 is paid for 1 000 downloads.

44 According to Cyando's general terms and conditions, users of its platform are prohibited from infringing copyright via that platform.

45 The referring court states that that platform is used both in ways which are lawful and in ways which infringe copyright. Cyando was informed that more than 9 500 works had been uploaded to its platform, in respect of which, in breach of copyright, download links were shared on the internet on approximately 800 different websites (link collections, blogs, forums).

46 In particular, on the basis of searches carried out from 11 to 19 December 2013, Elsevier notified Cyando, by two letters dated 10 January 2014 and 17 January 2014, that three works in respect of which it holds exclusive rights of use, namely *Gray's Anatomy for Students*, *Atlas of Human Anatomy* and *Campbell-Walsh Urology*, may be consulted as a file on the Uploaded platform, via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

47 Elsevier brought an action against Cyando before the Landgericht München I (Regional Court I, Munich, Germany). Elsevier requested, inter alia, that a prohibitory injunction be issued against Cyando, principally, as the party responsible for the copyright infringements with respect to the works at issue in the main proceedings, in the alternative, as a participant in those infringements and, in the further alternative, as an 'interferer' (*Störer*). Elsevier also requested that Cyando be ordered to provide it with certain information and to pay damages to it in respect of those infringements.

48 By judgment of 18 March 2016, the Landgericht München I (Regional Court I, Munich) issued a prohibitory injunction ordering Cyando, as a participant, to cease infringing copyright in three of the works at issue in the main proceedings, namely those cited in the letters of 10 January 2014 and 17 January 2014.

49 Elsevier and Cyando each brought an appeal against that decision before the Oberlandesgericht München (Higher Regional Court, Munich, Germany).

50 By judgment of 2 March 2017, the appeal court varied the judgment at first instance. That court issued a prohibitory injunction ordering Cyando, as an 'interferer', to cease infringing copyright in the three works referred to in the letters of 10 January 2014 and 17 January 2014 and dismissed the action as to the remainder.

51 The appeal court held, inter alia, that Elsevier could not pursue a claim against Cyando as the party infringing the rights of copyright in question. Cyando's contribution was limited to providing the technical means allowing the works at issue to be made available to the public. As it had no knowledge that users of its platform were carrying out such infringements, Cyando could also not be regarded as a participant in those infringements. However, as an interferer, Cyando was required to ensure that the infringements of the copyright in the three works cited in the letters of 10 January 2014 and 17 January 2014 were brought to an end. By contrast, as regards another work, entitled *Robbins Basic Pathology*, which is also at issue in the main proceedings, Cyando had not infringed its monitoring obligations, since that work was not republished until two and a half years after the first infringement was determined, which triggered those monitoring obligations. Furthermore, as an 'interferer', Cyando was not required to pay damages.

52 In its examination, the appeal court found, inter alia, that, by virtue of the way in which Cyando's remuneration system is structured, the fact that it provides download links which allow direct access to uploaded files and the fact that it is possible to use its platform anonymously, Cyando gives significant encouragement to the use of its platform for illegal purposes. Users interested in downloading files are more likely to take out a paid subscription, which gives them the right to a preferential account, where they can, via that platform, download desirable works protected by copyright. Cyando encourages its users to upload files which, it can be assumed, will often be downloaded, by

remunerating them according to how frequently the files they have uploaded are downloaded and by allowing them to benefit from the revenue generated when new users are acquired. Since that remuneration is dependent on the number of times a file is downloaded and, therefore, on how attractive that file is to the public, users are encouraged to upload copyright-protected content, access to which would otherwise have to be paid for. Furthermore, the fact that download links give direct access to uploaded files allows users who have uploaded the files easily to share those files with users who are interested in downloading, in particular by way of link collections. Last, the fact that the platform can be used anonymously reduces users' risk of being subject to legal proceedings for copyright infringements.

53 On the other hand, although Elsevier had claimed at the appeal stage that copyright-infringing content represented between 90 and 96% of the files that could be consulted on Cyando's platform, which is disputed by Cyando, the appeal court made no finding as to the proportion of the files on that platform which had been uploaded legally as compared with the proportion of the files there which had been uploaded illegally.

54 By its appeal on a point of law (*Revision*), in respect of which leave was given by the Bundesgerichtshof (Federal Court of Justice) and which Cyando seeks to have dismissed, Elsevier maintains its claims.

55 The referring court states that the question of whether the appeal is well founded turns, in the first place, on whether the conduct of the operator of a file-hosting and -sharing platform, such as Cyando, constitutes a communication to the public within the meaning of Article 3(1) of the Copyright Directive. It takes the view that Cyando could be regarded as playing a role that is indispensable, within the meaning of the Court's case-law, which is a prerequisite of its conduct's being classified as an act of communication. In that regard, the referring court notes that it is true that Cyando does not know that protected content is illegally being made available until the rightholder informs it of what is happening, since that content is uploaded by third parties. Furthermore, Cyando informs its users in the conditions of use of its platform that they are prohibited from infringing copyright via that platform. However, Cyando does know that a large volume of protected content is illegally communicated to the public via its platform. Moreover, Cyando significantly increases the risk that its platform is used for illegal purposes by virtue of its remuneration system, the fact that it provides download links which allow direct access to uploaded files and the fact that it is possible to use its platform anonymously.

56 Should the Court find that the conduct of the operator of a file-hosting and sharing platform, such as Cyando's, does not constitute a communication to the public within the meaning of Article 3(1) of the Copyright Directive, the referring court asks, in essence, questions that are the same as the second to sixth questions referred in Case C682/18.

57 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Does the operator of a [file-hosting and -sharing platform] via which files containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of [the Copyright Directive] if:

- the upload process takes place automatically and without being seen or monitored in advance by the operator,
- in the conditions of use, the operator indicates that copyright-infringing content may not be posted on the platform,
- it earns revenue through the operation of the service,
- the [platform] is used for lawful applications, but the operator is aware that a considerable amount of copyright-infringing content (over 9 500 works) is also available,
- the operator does not offer a directory of the content or a search function, but the unlimited download links provided by it are posted by third parties on the internet in link collections that contain information regarding the content of the files and make it possible to search for specific content,

- via the structure of the remuneration for downloads that are paid by it in accordance with demand, the operator creates an incentive to upload content protected by copyright that users could otherwise only obtain by payment therefor

and

- by providing the possibility of uploading files anonymously, it increases the probability that users that will not be held legally accountable for copyright infringements?

(b) Does this assessment change if the copyright-infringing content provided by the [file-hosting and -sharing platform] accounts for 90% to 96% of the overall use?

(2) If Question 1 referred is answered in the negative:

Does the activity of the operator of a [file-hosting and -sharing platform] under the conditions described in Question 1 come within the scope of Article 14(1) of [the Directive on Electronic Commerce]?

(3) If Question 2 referred is answered in the affirmative:

Must the actual knowledge of the unlawful activity or information and the awareness of the facts or circumstances from which the unlawful activity or information is apparent relate to specific unlawful activities or information pursuant to Article 14(1) of [the Directive on Electronic Commerce]?

(4) Also if Question 2 is answered in the affirmative:

Is it compatible with Article 8(3) of [the Copyright Directive] if the rightholder is in a position to obtain an injunction against a service provider whose service consisting of the storage of information provided by a recipient of the service has been used by a recipient of the service to infringe copyright or related rights, only if such an infringement has recurred after notification of a clear infringement has been provided?

(5) If Questions 1 and 2 are answered in the negative:

Is the operator of a [file-hosting and -sharing platform] under the conditions described in Question 1 to be regarded as an infringer within the meaning of the first sentence of Article 11 and Article 13 of [the Enforcement Directive]?

(6) If Question 5 is answered in the affirmative:

Can the obligation of such an infringer to pay damages pursuant to Article 13(1) of [the Enforcement Directive] be made subject to the condition that the infringer must have acted intentionally with regard both to his or her own unlawful activity and to the unlawful activity of the third party, and knew, or ought reasonably to have known, that users use the platform for specific acts of infringement?'

58 By decision of the President of the Court of 18 December 2018, Cases C682/18 and C683/18 were joined for the purposes of the written and oral procedure and the judgment.

CONSIDERATION OF THE QUESTIONS REFERRED

59 As a preliminary point, it should be noted that the questions referred in the present cases concern the Copyright Directive, the Directive on Electronic Commerce and the Enforcement Directive as applicable at the material time of the main proceedings. The interpretations provided by the Court in answer to those questions do not concern the set of rules established by Article 17 of 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 (OJ 2019 L 130, p. 92), which came into force subsequently.

First question referred in Cases C 682/18 and C683/18

60 By the first question referred in each of the two cases, the referring court asks, in essence, whether Article 3(1) of the Copyright Directive must be interpreted as meaning 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, itself

makes a ‘communication to the public’ of that content, within the meaning of that provision, in conditions such as those at issue in the main proceedings.

61 Under Article 3(1) of the Copyright Directive, 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.

62 Under that provision, authors thus have a right which is preventive in nature and which enables them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (judgment of 9 March 2021, *VG Bild-Kunst*, C392/19, EU:C:2021:181, paragraph 21 and the case-law cited).

63 As the Court has previously held, the concept of ‘communication to the public’, within the meaning of Article 3(1) of the Copyright Directive, should, as is underlined by recital 23 of that directive, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. It is, indeed, clear from recitals 4, 9 and 10 of that directive that the principal objective of that directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place (judgment of 9 March 2021, *VG Bild-Kunst*, C392/19, EU:C:2021:181, paragraphs 26 and 27).

64 At the same time, it follows from recitals 3 and 31 of the Copyright Directive that the aim of the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, on the other, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest (judgments of 8 September 2016, *GS Media*, C160/15, EU:C:2016:644, paragraph 31, and of 29 July 2019, *Pelham and Others*, C476/17, EU:C:2019:624, paragraph 32 and the case-law cited).

65 It is clear that, for the purposes of the interpretation and application of the Copyright Directive, and in particular Article 3(1) thereof, that fair balance must be sought taking into account also the particular importance of the internet to freedom of expression and of information, as safeguarded by Article 11 of the Charter (see, to that effect, judgment of 8 September 2016, *GS Media*, C160/15, EU:C:2016:644, paragraph 45).

66 As the Court has held more than once, the concept of ‘communication to the public’, within the meaning of Article 3(1) of that directive, includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public, and requires an individual assessment (judgment of 9 March 2021, *VG Bild-Kunst*, C392/19, EU:C:2021:181, paragraphs 29 and 33 and the case-law cited).

67 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Those criteria must, moreover, be applied both individually and in their interaction with each other, in so far as they may, in different particular situations, be present to widely varying degrees (judgment of 9 March 2021, *VG Bild-Kunst*, C392/19, EU:C:2021:181, paragraph 34 and the case-law cited).

68 Amongst those criteria, the Court has, first, emphasised 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 (see, to that effect, judgment of 14 June 2017, *Stichting Brein*, C610/15, EU:C:2017:456, paragraph 26 and the case-law cited).

69 Second, the Court has specified that the concept of ‘public’ refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of people (judgment of 28 October 2020, *BY (Photographic evidence)*, C637/19, EU:C:2020:863, paragraph 26 and the case-law cited).

70 The Court has also stated that, according to settled case-law, in order to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holder when it authorised the initial communication of its work to the public (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C263/18, EU:C:2019:1111, paragraph 70 and the case-law cited).

71 In this instance, it should be noted at the outset that potentially illegal content is uploaded to the platform concerned not by the operator, but by users, who act autonomously and who are responsible for their own actions.

72 In addition, it is the users of the platform who determine whether the content they have uploaded is made available to other internet users via that platform so that those other internet users can obtain access to it at any time and from wherever they may individually choose.

73 As regards the Uploaded file-hosting and -sharing platform, it is common ground that a download link allowing access to uploaded content is communicated only to the user who uploaded the file and that the platform does not make it possible to share that link and, therefore, the content uploaded with other internet users. Thus, in order to share that content, the user must either send the download link directly to the persons to whom he or she wishes to give access to that content or must publish that link on the internet, for example in blogs, forums or ‘link collections’.

74 As regards the YouTube video-sharing platform, it appears that, although the principal function of that platform consists in allowing its users to share videos publicly with all internet users, it also enables its users to upload content ‘privately’, and thus to choose whether and, as the case may be, with whom they wish to share that content.

75 Consequently, it must be held, first, that the users of the platforms at issue in the main proceedings carry out an ‘act of communication’, within the meaning of the case-law referred to in paragraph 68 of the present judgment, where, without the rightholders’ consent, they give other internet users access, via those platforms, to protected works which those other internet users would not have been able to enjoy without the intervention of those users. Second, it is only if those users make the uploaded content available to the ‘public’, within the meaning of the case-law referred to in paragraph 69 of the present judgment, by sharing that content with any internet user on the YouTube platform or by publishing on the internet download links giving access to that content on the Uploaded platform, that those users and, consequently, the operator of the platform used as the intermediary for making that content available, may make a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive.

76 By its first question in each of the two cases, the referring court seeks to ascertain whether the operator of a video-sharing platform or a file-hosting and -sharing platform itself carries out an ‘act of communication’, in addition to that made, as the case may be, by a user of that platform.

77 In that regard, it should be noted that the operator of such a platform plays a role that is indispensable when its users make potentially illegal content available. If that platform were not provided and managed, it would be impossible or, at the very least, more complex freely to share that content on the internet (see, by analogy, judgment of 14 June 2017, *Stichting Brein*, C610/15, EU:C:2017:456, paragraphs 36 and 37).

78 However, as is apparent from the case-law cited in paragraphs 67 and 68 of the present judgment, whether the role played by the operator of a video-sharing platform or a file-hosting and -sharing platform is indispensable is not the only criterion which must be taken into account in the context of the individual assessment that must be made; it must, on the contrary, be applied in its interaction with other criteria, in particular the criterion relating to whether the intervention of such an operator is deliberate.

79 If the mere fact that the use of a platform is necessary in order for the public to be able actually to enjoy the work, or the fact that it merely facilitated the enjoyment of that work, automatically resulted in the intervention of the platform operator being classified as an ‘act of communication’, any ‘provision of physical facilities for enabling or making a communication’ would constitute such an act, which is, however, what recital 27 of the Copyright Directive – which reproduces, in essence, the Agreed Statement Concerning Article 8 of the WCT – expressly precludes.

80 Accordingly, the importance of both the role that such intervention by the platform operator plays in the communication made by the platform user and of the deliberate nature of that intervention must guide the assessment of whether, given the specific context, that intervention must be classified as an act of communication.

81 In that regard, it is clear from the case-law cited in paragraph 68 of the present judgment that it is, *inter alia*, the act of intervening in full knowledge of the consequences of doing so, with the aim of giving the public access to protected works, which may lead that intervention to be classified as an ‘act of communication’.

82 In accordance with that case-law, the Court has held that the making available and managing of the online file-sharing platform The Pirate Bay – which, by indexing metadata relating to protected works and providing a search engine, allowed users of that platform to locate those works and to share them in the context of a peer-to-peer network – constituted a communication to the public. In that regard, the Court stated, *inter alia*, that The Pirate Bay’s operators had intervened in full knowledge of the consequences of their conduct, to provide access to protected works, that they had made explicit, on blogs and forums available on that platform, their purpose of making protected works available to users, and that they had encouraged the latter to make copies of those works (see, to that effect, judgment of 14 June 2017, *Stichting Brein*, C610/15, EU:C:2017:456, paragraphs 36, 45 and 48).

83 In order to determine whether the operator of a video-sharing platform or a file-hosting and -sharing platform intervenes in the illegal communication of protected content by users of its platform, in full knowledge of the consequences of its conduct in order to give other internet users access to such content, it is necessary to take into account all the factors characterising the situation at issue which make it possible to draw, directly or indirectly, conclusions as to whether or not its intervention in the illegal communication of that content was deliberate.

84 In that regard, relevant factors include, *inter alia*, the circumstance that such an 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, and the circumstance that that operator participates in selecting protected content illegally communicated to the public, that it provides tools on its platform specifically intended for the illegal sharing of such content or that it 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.

85 On the other hand, the mere fact that the operator knows, in a general sense, that protected content is made available illegally on its platform is not sufficient ground to conclude that it intervenes with the purpose of giving internet users access to that content. The situation is, however, different where that operator, despite having been warned by the rightholder that protected content is being communicated illegally to the public via its platform, refrains from expeditiously taking the measures necessary to make that content inaccessible.

86 Moreover, although the profit-making nature of the intervention at issue is not irrelevant (see, to that effect, judgment of 14 June 2017, *Stichting Brein*, C610/15, EU:C:2017:456, paragraph 29 and the case-law cited), the mere fact that the operator of a video-sharing platform or a file-hosting and -sharing platform has the aim of making a profit neither establishes that its intervention in the illegal communication of protected content by some of the users of that platform was deliberate, nor gives rise to an presumption that that is the case. The fact that it provides information society services for profit does not mean in any way that the provider of such services consents to their being used by third parties to infringe copyright. In that regard, it is apparent, *inter alia*, from the scheme of Article 8 of the Copyright Directive, in particular paragraph 3 thereof, read in conjunction with recital 27 of that directive, that there cannot be a presumption that mere providers of physical facilities which are intended to enable or to make a communication, and other intermediaries whose services are used by a third party to infringe copyright, themselves carry out an act of communication to the public, even though, as a general rule, they have the aim of making a profit.

87 A presumption to that effect cannot be inferred from the judgment of 8 September 2016, *GS Media* (C160/15, EU:C:2016:644).

88 By means of its interpretation of Article 3(1) of the Copyright Directive in that judgment, the Court limited the liability of persons posting hyperlinks to protected works on account of the particular importance of such links for the exchange of opinions and information on the internet and the difficulties associated with ascertaining whether the publication of a work on another website is legal. The Court has held that providing a hyperlink constitutes an act of communication to the public, within the meaning of Article 3(1) of the Copyright Directive, where the person who posted the link knew or ought to have known that the link provides access to a work published on the internet illegally, where that link makes it possible to circumvent restrictions taken by the site where the protected work is located or where the posting of that link is carried out for profit, in which case the person who posted the link has to carry out the necessary checks to ensure that the work concerned is not published illegally on the website to which that hyperlink leads (see, to that effect, judgment of 8 September 2016, *GS Media*, C160/15, EU:C:2016:644, paragraphs 44 to 55).

89 However, the situation of a person posting a hyperlink who acts on his or her own initiative and who, at the time of posting, knows the content to which that link is supposed to lead, is not comparable to that of the operator of a video-sharing platform or of a file-hosting and -sharing platform where that operator does not know specifically what protected content is uploaded to that platform by users and does not contribute, beyond merely making that platform available, to giving the public access to such content in breach of copyright. Consequently, the interpretation adopted by the Court in that judgment cannot be transposed to such an operator in order to establish the deliberate nature of its intervention in the illegal communication of protected works to the public, within the meaning of Article 3(1) of the Copyright Directive.

90 As regards the operators of the two platforms at issue in the main proceedings, it is for the referring court to determine, in the light, *inter alia*, of the criteria set out in paragraph 84 of the present judgment, whether those operators themselves carry out acts of communication to the public, within the meaning of Article 3(1) of the Copyright Directive, of the protected content that is uploaded to their platform by platform users.

91 The Court can, however, provide that court with some clarification in relation, in particular, to the facts referred to in the questions.

92 In Case C682/18, it is apparent from the order for reference that YouTube does not intervene in the creation or selection of content uploaded to its platform by platform users, and that it does not view or monitor that content before it is uploaded; that content is uploaded to that platform automatically.

93 It is also apparent that YouTube clearly informs its users, in its terms of service and every time a file is uploaded, that it is forbidden to post protected content on that platform in breach of copyright. It also calls upon its users, in its 'Community guidelines', to respect copyright. Furthermore, where a video is blocked due to a report by the rightholder, the user who has uploaded it is warned that his or her account will be blocked in the event of repeated infringements.

94 In addition, YouTube has put in place various technological measures in order to prevent and put an end to copyright infringements on its platform, such as, *inter alia*, a notification button and a special alert procedure for reporting and arranging for illegal content to be removed, as well as a content verification program for checking content and content recognition software for facilitating the identification and designation of such content. Thus, it is apparent that that operator has adopted technological measures to counter credibly and effectively copyright infringements on its platform.

95 In addition, according to the referring court, although YouTube, first, processes the search results on its platform in the form of rankings and content categories and, second, offers registered users an overview of recommended videos on the basis of videos already viewed by those users, those rankings, content categories and overviews of recommended videos are not intended to facilitate the illegal sharing of protected content or to promote such sharing.

96 Moreover, although YouTube derives advertising revenue from its platform and enables both the users who have uploaded content and copyright holders to benefit from that revenue, it does not appear that that platform's financial model is based on the fact that there is illegal content on it or that the aim of that model is to encourage

users to upload such content, or that the purpose or principal use of YouTube is the illegal sharing of protected content.

97 In Case C683/18, it is apparent from the order for reference that Cyando, the operator of the Uploaded file-hosting and -sharing platform, does not create, select, view or check content uploaded to its platform either. Furthermore, it informs its users, in the conditions of use of its platform, that they are prohibited from infringing copyright via that platform.

98 Moreover, as has been noted in paragraph 73 of the present judgment, the uploading of protected content by users to the Uploaded platform does not enable those users to make that content directly available to the public, since uploaded content can be accessed exclusively by means of a download link which is sent only to the user who has uploaded the content. It is also common ground that that platform does not itself make it possible to share that link and, therefore, the uploaded content with other internet users. Thus, not only does Cyando not provide tools specifically intended to facilitate the illegal sharing, on its platform, of protected content or to promote such sharing, but, more generally, the platform does not comprise any tool that enables other internet users to know what content is stored on that platform or to access it. Furthermore, Cyando does not participate in the posting of any download links on third-party sources, such as blogs, forums or ‘link collections’. Additionally, there are various ways in which a file-hosting and -sharing platform such as Uploaded can be used legally.

99 However, Elsevier argues that the files containing illegal content represent between 90 and 96% of files which can be consulted on Uploaded, which is disputed by Cyando, which maintains that only 1.1% of all the files actually consulted are copyright-protected content, which corresponds to 0.3% of the total volume of data stored.

100 In that regard, it must be borne in mind, first, that, as was noted in paragraph 75 of the present judgment, it is only when a user of the platform decides to make uploaded content available to the ‘public’ that that user and, consequently, the operator of the platform used as an intermediary may make a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive. Second, it should be noted that, if it were to transpire that the main or predominant use of the platform operated by Cyando consists in making protected content available to the public illegally, that circumstance would be one of the relevant factors for the purposes of determining whether that operator intervened deliberately. The relevance of such a circumstance would be all the more significant if the operator failed to implement the appropriate technological measures which can be expected from a reasonably diligent operator in its situation to counter credibly and effectively copyright infringements on its platform.

101 Last, irrespective of whether Elsevier’s claim regarding the high proportion of protected content communicated illegally to the public via Uploaded is well founded, the deliberate nature of the platform operator’s intervention could result from the fact – which it is for the referring court to verify – that the financial model adopted by that operator is based on the availability of illegal content on its platform and is designed to encourage its users to share such content via the platform.

102 In the light of all the foregoing, the answer to the first question referred in each of the two cases is that Article 3(1) of the Copyright Directive must be interpreted as meaning 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 that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. 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.

Second and third questions referred in Cases C682/18 and C683/18

103 By its second and third questions referred in each of the two cases, which it is appropriate to examine together, the referring court asks whether Article 14(1) of the Directive on Electronic Commerce must be interpreted as meaning that the activity of the operator of a videosharing platform or a file-hosting and -sharing platform falls within the scope of that provision, to the extent that that activity covers content uploaded to its platform by platform users. If that is the case, that court wishes to know, in essence, whether Article 14(1)(a) of that directive must be interpreted as meaning that, for that operator to be excluded, under that provision, from the exemption from liability provided for in Article 14(1), it must have knowledge of specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

104 Under Article 14(1) of the Directive on Electronic Commerce, 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 that the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove the information or to disable access to it.

105 According to settled case-law, that provision must be interpreted not only in the light of its wording, but also of its context and the objectives of the legislation of which it forms part (judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie*, C16/19, EU:C:2021:64, paragraph 26 and the case-law cited). In order for the provider of a service on the internet to fall within the scope of that provision, it is essential that it be an ‘intermediary service provider’ within the meaning intended by the legislature in the context of Section 4 of Chapter II of the Directive on Electronic Commerce. In that regard, it follows from recital 42 of that directive that the exemptions from liability established therein cover only cases in which the activity of the information society service provider is of a mere technical, automatic and passive nature, which means that that service provider has neither knowledge of nor control over the information which is transmitted or stored (see, to that effect, judgment of 23 March 2010, *Google France and Google*, C236/08 to C238/08, EU:C:2010:159, paragraphs 112 and 113).

106 Therefore, in order to ascertain whether the operator of a video-sharing platform or a file-hosting and -sharing platform may be exempted, under Article 14(1) of the Directive on Electronic Commerce, from liability for the protected content which users illegally communicate to the public via its platform, it is necessary to examine 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 (see, by analogy, judgment of 12 July 2011, *L’Oréal and Others*, C324/09, EU:C:2011:474, paragraph 113 and the case-law cited).

107 In that regard, it should be noted that, if the referring court were to find, in its examination of Article 3(1) of the Copyright Directive, that either YouTube or Cyando contributes, beyond merely providing its platform, to giving the public access to protected content in breach of copyright, the operator concerned would not be able to rely on the exemption from liability provided for in Article 14(1) of the Directive on Electronic Commerce.

108 It is true, as the Advocate General observed in points 138 to 140 of his Opinion, that the question whether such an operator makes a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive is not, in itself, decisive for the purposes of assessing whether Article 14(1) of the Directive on Electronic Commerce applies. However, the fact remains that where such an operator contributes, beyond merely making the platform available, to giving the public access to such content in breach of copyright, that operator cannot be regarded as fulfilling the conditions laid down in that provision governing its application, as recalled in paragraphs 105 and 106 of the present judgment.

109 In the event that the referring court reaches a finding contrary to that referred to in paragraph 107 above, it must be noted that, in addition to the circumstance, mentioned in paragraphs 92 and 97 of the present judgment, that the platform operators at issue in the main proceedings do not create, select, view or monitor content uploaded to

their platforms, the fact, referred to by that court, that the operator of a video-sharing platform, such as YouTube, implements technological measures aimed at detecting, among the videos communicated to the public via its platform, content which may infringe copyright, does not mean that, by doing so, that operator plays an active role giving it knowledge of and control over the content of those videos, unless information society service providers who adopt measures which seek specifically to combat such infringements are to be excluded from the rules on exemption from liability under Article 14(1) of the Directive on Electronic Commerce.

110 It remains necessary that the operator at issue comply with the conditions laid down by that provision governing the exemption from its liability.

111 As regards the condition laid down in Article 14(1)(a) of the Directive on Electronic Commerce, that condition cannot be regarded as not being satisfied solely on the ground that that operator is aware, in a general sense, of the fact that its platform is also used to share content which may infringe intellectual property rights and that it therefore has an abstract knowledge that protected content is being made available illegally on its platform.

112 As the Advocate General stated in points 172 to 190 and in point 196 of his Opinion, it is apparent from the wording, objective and scheme of Article 14(1) of the Directive on Electronic Commerce and from the overall context in which it occurs that the situations mentioned in Article 14(1)(a) – namely the situation where the service provider concerned has ‘actual knowledge of illegal activity or information’ and the situation where such a provider is ‘aware of facts or circumstances from which the illegal activity or information is apparent’ – refer to specific illegal information and activities.

113 In that regard, in addition to the fact that, according to the wording of Article 14(1)(a) of the Directive on Electronic Commerce, the illegality of the activity or information must be a matter of actual knowledge or must be apparent, that is to say, it must be specifically established or readily identifiable, it should be noted that, as is clear from recitals 41 and 46 of that directive, Article 14(1) reflects the balance which the directive seeks to strike between the various interests at stake, which include observance of freedom of expression, as safeguarded by Article 11 of the Charter. Thus, first, the providers of the services concerned cannot, in accordance with Article 15(1) of that directive, be subject to a general obligation to monitor the information which they transmit or store or to a general obligation actively to look for facts or circumstances indicating illegal activity. Second, pursuant to Article 14(1)(b) of the Directive on Electronic Commerce, those providers must, as soon as they actually obtain knowledge or awareness of illegal information, act expeditiously to remove or to disable access to that information, and must do so with due regard to the principle of freedom of expression. As the referring court has also pointed out, it is only in relation to specific content that such a provider is able to fulfil that obligation.

114 In that regard, the fact that the operator of an online content-sharing platform automatically indexes content uploaded to that platform, that that platform has a search function and that it recommends videos on the basis of users’ profiles or preferences is not a sufficient ground for the conclusion that that operator has ‘specific’ knowledge of illegal activities carried out on that platform or of illegal information stored on it.

115 As regards, more specifically, the second of the situations provided for in Article 14(1)(a) of the Directive on Electronic Commerce, namely the situation relating to ‘[awareness] of facts or circumstances from which the illegal activity or information is apparent’, the Court has held that it is sufficient that the service provider concerned has become aware, in one way or another, of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b). That includes, *inter alia*, the situation in which such a provider uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to such a provider, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality (judgment of 12 July 2011, *L’Oréal and Others*, C324/09, EU:C:2011:474, page 122).

116 In that context, it should be observed that a notification that protected content has been illegally communicated to the public via a video-sharing platform or a file-hosting and -sharing platform must contain sufficient information to enable the operator of that platform to satisfy itself, without a detailed legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression.

117 In the light of all the foregoing, the answer to the second and third questions referred in each of the two cases is that Article 14(1) of the Directive on Electronic Commerce must be interpreted as meaning that the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision, provided that that operator 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.

118 Article 14(1)(a) of the Directive on Electronic Commerce must be interpreted as meaning that, for such an operator to be excluded, under that provision, from the exemption from liability provided for in Article 14(1), 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.

Fourth question referred in Cases C682/18 and C683/18

119 By the fourth question referred in each of the two cases, the referring court asks whether Article 8(3) of the Copyright Directive must be interpreted as precluding a situation where the rightholder is not able to obtain an injunction against an intermediary whose services are used by a third party to infringe the rights of that rightholder unless that infringement has previously been notified to that intermediary and that infringement is repeated.

120 It is apparent from the orders for reference that, by that question, the referring court is seeking clarity on whether it is compatible with Article 8(3) of the Copyright Directive to apply, in situations such as those at issue in the main proceedings, the rules on ‘interferer liability’ (*Störerhaftung*) provided for under German law in the event that it were to be found that YouTube and Cyando do not themselves make a communication to the public of illegal content uploaded by users of their respective platforms and that they do fall within the scope of the rules on exemption from liability under Article 14(1) of the Directive on Electronic Commerce.

121 The referring court states, in that regard, that, according to its case-law, intermediaries whose services are used by a third party to infringe an intellectual property right may have an action seeking a prohibitory injunction brought against them as ‘interferers’. Thus, in the case of such an infringement, a person who – without being the perpetrator of or a participant in that infringement – deliberately contributes in any way, and with an adequate causal link, to the infringement, despite being legally and materially in a position to prevent that infringement, may have an action brought against him or her as an ‘interferer’. For ‘interferer’ liability to be incurred, there must be a breach of conduct obligations, the scope of which depends on whether and to what extent the ‘interferer’ can reasonably be required to check or monitor third parties in order to prevent infringements of intellectual property rights from occurring.

122 The referring court states that, in the event that the ‘interferer’ is a service provider whose service consists in storing information provided by a user, in principle that service provider can be the subject of a prohibitory injunction only if, after notification of a clear infringement of an intellectual property right has been provided, that right is infringed again or continues to be infringed because that service provider has not intervened expeditiously after that notification to remove the content in question or to block access to it and to ensure that such infringements do not recur.

123 It is apparent, moreover, from the orders for reference that that rule is intended to apply only where, up until the date on which such an infringement is notified, the service provider had no ‘knowledge’ or ‘awareness’ of that infringement, within the meaning of Article 14(1)(a) of the Directive on Electronic Commerce.

124 It follows that, by the fourth question referred in each of the two cases, the referring court seeks, in essence, to ascertain whether Article 8(3) of the Copyright Directive must be interpreted as meaning that it precludes the situation under national law in which the rightholder can obtain an injunction against the intermediary, whose service has been used by a third party to infringe its right without that intermediary having had knowledge or awareness of that infringement, within the meaning of Article 14(1)(a) of the Directive on Electronic Commerce, only where,

before legal proceedings are commenced, that infringement has previously been notified to that intermediary and the latter has not acted expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur.

125 Article 8(3) of the Copyright Directive provides that ‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or a related right’.

126 According to the Court’s settled case-law, the jurisdiction conferred on national courts, in accordance with that provision, must allow them to order such intermediaries to take measures aimed not only at bringing to an end infringements already committed against copyright or related rights using their information society services, but also at preventing further infringements (see, to that effect, judgment of 16 February 2012, *SABAM*, C360/10, EU:C:2012:85, paragraph 29 and the case-law cited).

127 As is apparent from recital 59 of the Copyright Directive, the rules for the operation of the injunctions for which the Member States must provide under Article 8(3) of that directive, such as those relating to the conditions to be met and to the procedure to be followed, are a matter for national law (see, to that effect, judgment of 16 February 2012, *SABAM*, C360/10, EU:C:2012:85, paragraph 30 and the case-law cited).

128 The rules established by the Member States, and their application by national courts, must however be consistent with the objectives of the Copyright Directive (see, by analogy, judgment of 7 July 2016, *Tommy Hilfiger Licensing and Others*, C494/15, EU:C:2016:528, paragraph 33 and the case-law cited) and the limitations arising from that directive as well as the sources of law to which that directive makes reference. Thus, in accordance with recital 16 of that directive, those rules cannot undermine the provisions of the Directive on Electronic Commerce relating to liability and, specifically, Articles 12 to 15 thereof (see, to that effect, judgment of 16 February 2012, *SABAM*, C360/10, EU:C:2012:85, paragraphs 31 and 32, and the case-law cited).

129 The referring court notes, in that regard, that the condition laid down by German law that a rightholder who believes that his or her copyright or related right has been infringed by his or her work being communicated to the public via a storage space of a service provider must first inform that service provider of that fact in order to enable it to bring that infringement expeditiously to an end and to prevent its recurrence, without that provider being liable for, inter alia, court costs, aims specifically to take into account the logic inherent in Article 14(1) of the Directive on Electronic Commerce, and the prohibition under Article 15(1) of that directive on imposing on such a service provider a general obligation to monitor the information that it stores or actively to look for facts or circumstances indicating illegal activity.

130 In that regard, it should be noted, first of all, that Article 14 of the Directive on Electronic Commerce does not require Member States to lay down such a condition.

131 It is apparent from Article 14(3) of the Directive on Electronic Commerce, read in the light of recital 45 thereof, that the exemption from liability provided for in Article 14(1) is without prejudice to the power of the national courts or administrative authorities to require the provider concerned to terminate or prevent an infringement, including by removing the illegal information or by disabling access to it. It follows that a service provider may have imposed on it injunctions adopted on the basis of the national law of a Member State, even if it satisfies one of the alternate conditions set out in Article 14(1) of that directive, that is to say, even in the event that it is not considered to be liable (judgment of 3 October 2019, *Glawischnig-Piesczek*, C18/18, EU:C:2019:821, paragraphs 24 and 25).

132 That said, it should be noted that Article 14(3) of the Directive on Electronic Commerce also allows Member States to establish procedures governing the removal of illegal information or the disabling of access to such information. Thus, while Member States are required, under Article 8(3) of the Copyright Directive, to guarantee to rightholders covered by that directive a legal remedy against providers whose services are used by third parties to infringe those rights, Member States may, however, provide for a procedure which precedes the exercise of that legal remedy, which takes account of the fact that, in accordance with Article 14(1) of the Directive on Electronic Commerce, the service provider concerned is not liable for the infringement in question.

133 In the context of such a preliminary procedure, a Member State may lay down a condition such as the one referred to in paragraph 129 of the present judgment. While such a condition allows illegal information to be removed or blocked, it is also intended to require the rightholder, first, to give the service provider the opportunity expeditiously to bring the infringement concerned to an end and to prevent its recurrence, without that service provider, who is not liable for that infringement in accordance with Article 14(1) of the Directive on Electronic Commerce, being exposed unduly to court costs and without the rightholder being deprived, second, of the option of applying for an injunction to be issued against that same service provider, where that provider does not fulfil its obligations, on the basis of Article 8(3) of the Copyright Directive.

134 Next, Article 15(1) of the Directive on Electronic Commerce prohibits Member States from imposing a general obligation on a service provider to monitor the information which it stores or actively to look for facts or circumstances indicating illegal activity.

135 The Court has held on numerous occasions that measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights were incompatible with Article 15(1) of the Directive on Electronic Commerce (see, to that effect, judgments of 24 November 2011, *Scarlet Extended*, C70/10, EU:C:2011:771, paragraphs 36 to 40, and of 16 February 2012, *SABAM*, C360/10, EU:C:2012:85, paragraphs 34 to 38).

136 A condition such as that laid down by German law for the adoption of injunctions has the specific effect of preventing the situation in which a service provider, such as the operator of an online content-sharing platform, is exposed to such injunctions and related court costs even though, prior to the commencement of court proceedings, it had not been informed of an infringement of an intellectual property right by a user of that platform and, therefore, had not had the opportunity to remedy such an infringement and to take the necessary measures to prevent such an infringement from recurring. In the absence of such a condition, such an operator would be required, in order to prevent infringements of that type and to avoid being the subject of an injunction and being exposed to those costs on account of those infringements, actively to monitor all the content uploaded by users of that platform.

137 In those circumstances, it must be held that a condition such as that laid down by national law in the main proceedings is compatible with Article 15(1) of the Directive on Electronic Commerce.

138 Finally, as regards the compatibility of a condition, such as that at issue in the main proceedings, with the objectives pursued by the Copyright Directive, it must be recalled that it follows from paragraphs 63 and 64 of the present judgment and from the Court's case-law that it is for the national authorities and courts, in the context of measures adopted to protect rightholders, to strike a fair balance between, on the one hand, the protection of the intellectual property right enjoyed by those rightholders under Article 17(2) of the Charter, and, on the other, the right to the freedom to conduct a business enjoyed by service providers under Article 16 of the Charter and the right to freedom of expression and of information, safeguarded for internet users under Article 11 of the Charter (see, to that effect, judgments of 24 November 2011, *Scarlet Extended*, C70/10, EU:C:2011:771, paragraphs 45 and 46, and of 16 February 2012, *SABAM*, C360/10, EU:C:2012:85, paragraphs 43 and 44).

139 A condition such as the one laid down under German law for the adoption of injunctions is not incompatible with that balance.

140 In particular, such a condition, while protecting the service provider against the consequences set out in paragraph 136 of the present judgment, does not deprive the rightholder of the possibility of effectively putting an end to the infringements by third parties of his or her copyright or related right via the service in question and of preventing further infringements. Thus, it is sufficient for the rightholder to notify the service provider of an infringement in order for the latter to be required expeditiously to remove the content in question or to block access to it, and to take appropriate measures to prevent further infringements from being committed, failing which the rightholder is entitled to apply for an injunction to be issued.

141 It is, however, for the national courts to satisfy themselves, when applying that condition and, in particular, when interpreting the adverb 'expeditiously', that that condition does not result in the actual cessation of the infringement of the copyright or related right being delayed in such a way as to cause disproportionate damage to the

rightholder, taking account, for that purpose, of the rapidity with which such damage may occur, and the geographical extent thereof, in the context of information society services, as is pointed out in recital 52 of the Directive on Electronic Commerce.

142 In that context, it should also be borne in mind that, under Article 18(1) of the Directive on Electronic Commerce, Member States are to ensure that legal remedies available under national law concerning information society service activities allow for the rapid adoption of measures, including interim measures, the aim of which is to bring to an end any alleged infringement and to prevent any further infringement of the interests concerned.

143 In the light of all the foregoing, the answer to the fourth question referred in each of the two cases is that Article 8(3) of the Copyright Directive must be interpreted as not precluding a situation under national law whereby a copyright holder or holder of a related right may not obtain an injunction against an intermediary whose service has been used by a third party to infringe his or her right, that intermediary having had no knowledge or awareness of that infringement, within the meaning of Article 14(1)(a) of the Directive on Electronic Commerce, unless, before court proceedings are commenced, that infringement has first been notified to that intermediary 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.

Fifth and sixth questions referred in Cases C682/18 and C683/18

144 Since those questions have been referred only in the event that both the first and second questions referred are answered in the negative, there is no need to answer them.

COSTS

145 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 3(1) of 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 must be interpreted as meaning 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 that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. 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.

2. Article 14(1) of 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’) must be interpreted as meaning that the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision,

provided that that operator 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.

Article 14(1)(a) of Directive 2000/31 must be interpreted as meaning that, for such an operator to be excluded, under that provision, from the exemption from liability provided for in Article 14(1), 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.

3. Article 8(3) of Directive 2001/29 must be interpreted as not precluding a situation under national law whereby a copyright holder or the holder of a related right may not obtain an injunction against an intermediary whose service has been used by a third party to infringe his or her right, that intermediary having had no knowledge or awareness of that infringement, within the meaning of Article 14(1)(a) of Directive 2000/31, unless, before court proceedings are commenced, that infringement has first been notified to that intermediary 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.

[Signatures]