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**OPINION in respect of some of the questions from the Federal Court of Justice of Germany for preliminary ruling by the CJEU, Case C-682/18 (YouTube)**

## I. Introduction

ALAI has become aware of case C-682/18 in which the Federal Court of Justice of Germany ("YouTube") has referred six questions to the Court of Justice of the European Union (CJEU), of which the first two are addressed in this opinion:

1. *If the operator of an online video platform on which users make copyright protected content available to the public without the authorisation of the rightholder, can this be considered to be an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC if:*
   - *the operator earns advertising revenue from the platform,*
   - *the uploading process is automated and there are no prior checks or control by the operator, according to its terms of use, the operator receives a free of charge, worldwide, non-exclusive licence for the uploaded videos for the period the videos are on the platform,*
   - *the operator states in its terms of use and in the course of the upload process that copyright infringing content may not be posted,*
   - *the operator provides tools which can help rightholders to block videos which infringe their rights,*
   - *the operator organises the search results on the platform in the form of rankings and categories of content and displays an overview of recommended videos to registered users based on the videos the user has previously watched*
   - *where the operator has no specific knowledge of the availability of copyright infringing content or, upon becoming aware of such content, expeditiously removes or disables access to it?*

2. *If Question 1 is answered in the negative: Does the activity of operator of an internet video platform, under the circumstances in Question 1, fall within the scope of Article 14(1) of Directive 2000/31/EC?*

## II. ALAI

The International Literary and Artistic Association (ALAI)[1] is an independent learned society

[1] For more information about ALAI please visit our webpage: www.alai.org.

dedicated to studying and discussing legal issues arising in connection with the protection of the interests of creative individuals. ALAI was founded in 1878 by the French writer Victor Hugo, and, through it legal studies, paved the way to the adoption of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1886. ALAI considers it as one of its main objectives to elucidate the interpretation of the principles and the rules of the international copyright acquis, especially the Berne Convention and the WIPO Copyright Treaty (WCT), in their application to the newest copyright developments.

To that aim, ALAI deems it of special importance also to share its views on certain ground breaking questions in copyright with leading courts such as the CJEU. It recalls in this respect that the CJEU has consistently taken the position that "Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community" (Cf, *inter alia*, judgment of 7 December 2006, case C-306/05, SGAE v Rafael Hoteles, paragraph 35). It states that numerous decisions of the CJEU give evidence of great care in taking the international treaties into account.

ALAI notes that the facts of this case are liable to give rise to an interpretation of the **right of making available and the right of communication to the public**. Therefore, these questions do not only concern Art. 3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive 2001/29) as European Union law but also the provisions of the Berne Convention and, more in particular, the WCT. Art. 3 of the Copyright Directive 2001/29 obliges Member States to provide for the exclusive right of communication including making available to the public for authors, as well as the exclusive making available right for certain related rights' owners. It thereby implements Article 8 of the WCT and Articles 10 and 14 of the WIPO Performances and Phonograms Treaty (WPPT).

ALAI is of the opinion that in the light of the rules and principles of the WCT, which one finds endorsed, to a great extent, by the already existing jurisprudence of the CJEU, the first question should be answered in the affirmative, and the second one (in case the CJEU would answer the first in the negative) should be answered in the negative, based on previous case law of the CJEU and on the underlying international law. The reasons are set out below in more detail.

## III. Analysis

### 1. Question 1 (Communication /making available to the public by an operator of an online video platform on which users make copyright protected content available to the public without the authorisation of the rightholder)

The making available right is provided in Article 3 of the Copyright Directive 2001/29, which provision implements Article 8 of the WCT and Articles 10 and 14 of the WPPT. It covers '*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*'.

**This act occurs in particular when a work is uploaded on a UUC platform (such as that in the given case) so as to be thereby offered to the public; it also covers the transmission to the public once that transmission occurs**, i.e., when a member of the public individually accesses the work on the platform.[2]

[2] Cf. http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf, in particular p. 3.

According to the CJEU, the right covers **any transmission, irrespective of the technical means or procedure,**[3] and Recitals 9, 10 and 23 of the Copyright Directive 2001/29 must be taken into account, which require, respectively, a high level of protection; stress the needs of authors and performers to receive an appropriate reward for the use of their work, and of producers in order to be able to finance this work; and require a broad interpretation of the communication right.

Other criteria developed by the CJEU are also regularly fulfilled in case of UUC platforms: their users represent an indeterminate and extremely large number of persons that constitute the "public"; the new public criterion is not at issue in this case where works are uploaded without the consent of the rightholder. Furthermore, UUC platforms as that in the given case act for profit. Accordingly, an act of communication to the public occurs without doubt.

In the YouTube case, the central question is **whether it is the operator of the platform who can be considered to perform an act of communication to the public including the making available of the works.**

Three questions are considered crucial: (1) Is it the operator of the platform who performs an act of communication to the public; (2) Can the operator of the YouTube platform argue that he merely provides facilities for enabling or making a communication; (3) Can the operator of the YouTube platform invoke as a defense that it does not intervene in full knowledge of the consequences of its action.

ALAI considers that in particular the CJEU judgment of 14 June 2017, case 610/15, Brein v Ziggo ("The Pirate Bay"), may give guidance. As in the case that is now submitted to the CJEU, the decision in The Pirate Bay concerned the activities of a *platform*. The Pirate Bay furthermore strongly built on former established case law of the CJEU, and on the central notions that in the CJEU's case law underpin the concept of making available to the public.

*(1) Is it the operator of the platform who performs an act of communication to the public ?*

In "The Pirate Bay," the CJEU took the view that the operators of the online sharing platform TPB, by making that platform available and managing it, provided their users with access to the works concerned, and could therefore be regarded as playing an essential role in *making the works in question available*. While in "The Pirate Bay" case, the platform served as a conduit to content stored on other users' computers, in the YouTube case the platform is even more closely implicated in the act of communication to the public because the works are actually *uploaded* to the platform on which the users make copyright protected content available, as follows from the facts stated by the referring CJEU. In this regard, it is also relevant that the operator receives from the uploading users, as the referring court states, a worldwide license for the uploaded videos. That license would be unnecessary were it not the operator that communicates those works. In effect, by requiring such a license from its users, the operator itself admits that it performs a communication.

*(2) Can the operator of the YouTube platform argue that it merely provides facilities for enabling or making a communication?*

According to Recital 27 of the Copyright Directive 2001/29, and Agreed Statement concerning Article 8 of the WCT, the **mere provision of physical facilities** does not constitute an act of communication to the public. However, in "The Pirate Bay", the CJEU clarified that that platform, by **indexing and classifying the user-uploaded files so that they can be easily located, etc., did more than merely providing facilities,** and that it had to be considered as

[3] E.g. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0117&rid=3, 38.

performing an act of communication to the public ("The Pirate Bay", paragraphs 38 and 39). The referring Court has established that **the UUC platform operator organises the search results on the platform** in the form of rankings and categories of content **and displays an overview** of recommended videos to registered users based on the videos the user has previously watched. It follows that the acts of the operator far exceed the mere provision of physical facilities and that the operator performs an act of making available to the public.

ALAI emphasizes that the strictly worded Recital (27) is directly based on the Agreed Statement concerning Article 8 of the WCT.[4] Here too, it must concern the *mere* provision of physical facilities. Even in that case, this mere provision does not *in itself* amount to a communication,[5] which means that, depending on the context of the act of providing the physical facilities, there might still be a communication to the public. The Agreed Statement concerning Article 8 of the WCT was adopted in response to concerns raised by telecommunications organizations and Internet Service Providers. While these clearly may have a justified interest in the exception for the mere provision of physical facilities, it is also clear that YouTube's activities as set out in the previous paragraph stretch much further than those of a mere telecom company or mere ISP simply providing cables or other physical facilities. The CJEU's interpretation in "The Pirate Bay" is therefore well founded, but its result is also prescribed by the rules of an international Treaty (the WCT) to which the EU and its Member States have adhered.

*(3) The YouTube platform intervenes in full knowledge of the consequences of its action*

From the viewpoint of conventional copyright law, the subjective knowledge with the user of the consequences of his intervention is irrelevant for the question whether the work has been communicated to the public. In this light, the acceptance of absence of knowledge as a defense should be kept as restricted as possible. For example if, in its judgment of 8 September 2016, case C-160/15, GS Media v Sanoma ("GS Media"), the CJEU allowed to exempt certain users on the ground of the 'knowledge' criterion, this possibility was strictly limited to (1) individuals who (2) did not pursue a profit ("GS Media", paragraphs 47, 49 and 51).

Knowledge with YouTube may be assumed on three grounds: it organizes the search results; it is a company acting for profit; it acts on such a scale that it cannot ignore that it uses a considerable number of works eligible for copyright without the consent of the rightholders.

The CJEU ruled in its judgment in "The Pirate Bay" that as a rule, *any* act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an "act of communication" for the purposes of Article 3(1) of the Copyright Directive 2001/29 (paragraph 34).

For the providing of clients with access to protected works, all acts that go beyond the mere provision of physical facilities are relevant. By making available and managing their online sharing platform, the operators of "The Pirate Bay" were considered to intervene, "with full knowledge of the consequences of their conduct, to provide access to protected works, **by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network**" (paragraph 36), and therefore as playing an essential role in making available the works (paragraph 37).

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[4] The Agreed Statement concerning Article 8 WCT reads: "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."

[5] Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*, para 12.55 at p. 745; Silke von Lewinski in Reinbothe/von Lewinski, *The WIPO Treaties on Copyright – A Commentary on the WCT, WPPT and BTAP,* para. 7.8.43.

The referring Court established that **in the YouTube case, the operator organizes the search results on the platform in the form of rankings and categories of content and displays an overview of recommended videos to registered users** based on the videos the user has previously watched. The behavior of the operators of the YouTube platform is therefore no different from the operators of the Pirate Bay platform. They rank, they categorize, they display overviews and they recommend.

Knowledge with YouTube may also be assumed, according to the CJEU, when YouTube is a **company acting for profit**. The referring Court established that *the operator earns advertising revenue from the platform*. That means that YouTube makes available for profit. With regard to the posting of hyperlinks, the CJEU ruled in "GS Media" that where this is carried out for profit, it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, posting a hyperlink to a work which was illegally placed on the internet according to the CJEU constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

Finally, **UUC and similar platform providers generally know** that, through their deliberate intervention, the works uploaded by users are made available to the public; this is sufficient to establish liability according to the CJEU, which requires that the user intervenes 'in full knowledge of the consequences of its action', 'intentionally', or 'deliberately'.[6] In "The Pirate Bay", the Court of Justice held that it was clear from the order for reference that the operators of the online sharing platform TPB could not be unaware that this platform provides access to works published without the consent of the rightholders, given that a very large number of torrent files on the TPB platform related to works published without the consent of the rightholders (paragraph 45). The same is true for UUC platform providers. Although the referring court put no question as to this issue, it seems to interpret the CJEU's jurisprudence in the sense that the platform would need to have full knowledge of the consequences of its action', 'intentionally', or 'deliberately' – "including of the lack of authorization from right holders" (according to the referring court, para 41 in the CJEU's judgment of 26 April 2017, case C-527/15, Stichting Brein v Jack Frederik Wullems, "Filmspeler"). The knowledge would need to be specific, but cannot be, since the videos are uploaded by an automated system. As a consequence, that knowledge (and therefore an "indispensable role") could only exist after notice from the right holder and lack of take down by the platform. However, the reference to paragraph 41 of the "Filmspeler" decision seems to be incorrect – that paragraph does not require such specific knowledge, and furthermore deals with hyperlinks rather than making available of uploaded works. It is rather the judgement in "The Pirate Bay" which should guide the CJEU also as regards the knowledge aspect, as stated above.

As a **result**, an operator of an online video platform on which users upload copyright protected content without the authorisation of the rightholder, can be considered as performing an act of communication to the public within the meaning of Article 3(1) of the Copyright Directive 2001/29.

**2. "If Question 1 is answered in the negative: Does the activity of an operator of an internet video platform, under the circumstances in Question 1, fall within the scope of Article 14(1) of Directive 2000/31/EC?"**

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[6] E.g. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0306&rid=3, 42; http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1491346429670&uri=CELEX:62008CJ0403, 195-196; http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62009CO0136&qid=1491347112709&from=EN, 39.

From a systematic point of view, Article 14 of the Directive 2000/31/EC on electronic commerce (E-Commerce Directive 2000/31) aims at exempting host provider services from liability for acts of third persons, under certain conditions. In contrast, where someone is liable for his or her own act (in particular, an act of communication to the public), primary liability applies; he must thus acquire licenses for performing such act. As the CJEU held in particular for a service offering a platform to which users upload files ("The Pirate Bay"), such a service does perform an act of communication to the public, and is thus primarily liable, if it indexes and classifies the user-uploaded files so that they can be easily located, etc. Although ALAI thus considers that Question 1 has to be answered in the affirmative (i.e., that such an operator performs an act of communication/making available to the public), it would like to answer Question 2 in case the CJEU would answer Question 1 in the negative.

It is recalled that the CJEU held that a service provider is covered by Article 14 of the E-Commerce Directive 2000/31, if it supplies its '*service neutrally by a merely technical and automatic processing of the data provided by its customers*', or simply '*stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers'*. However, it is not covered if it '**plays an active role** of such kind as to give it knowledge of, or control of, those data', which in the context of online marketplaces has been held to include providing assistance which entails, in particular, **optimizing the presentation of the offers for sale in question or promoting those offers'.**[7]

The conditions regarding knowledge in Article 14(1)(a) of the E-Commerce Directive 2000/31 and those under lit (b) only become relevant if the service provider is covered by Article 14, i.e. if he performs a passive rather than active role.[8] See also the Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means by ALAI.[9]

As a **result**, ALAI considers that the activity of operator of an internet video platform, under the circumstances in Question 1, does not fall within the scope of Article 14(1) of the E-Commerce Directive 2000/31.

## IV. Conclusions

As discussed above, the act of an operator of an online video platform described in the first question of the Federal Court of Justice of Germany constitutes an act of communication/making available to the public within the meaning of Article 3(1) of Directive 2001/29/EC. Should the Court need to decide question 2, ALAI considers that such act does not fall within the scope of Article 14(1) of Directive 2000/31/EC.

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[7] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0324&qid=1491347782696&from=EN, 112, 113, 115-116. Also see Tribunale di Roma 3512/2019, published 15.2.2019: copyright infringement accepted where a Facebook page published links that did not lead to content published by right holder RTI itself through its own platform, but rather content published through a third-party site (YouTube) not authorized by RTI to making available the audiovisual content at issue. See http://ipkitten.blogspot.com/2019/02/facebook-found-liable-for-hosting-links.html.

[8] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0324&qid=1491347782696&from=EN, 118 et seq.

[9] http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf , IV 1.