EU Court Decision re: Online Legality

Michael Byrne and Roisin Walsh analyses a recent judgment of the Court of Justice of the European Union (CJEU) in the joined cases of *YouTube* (C-628/18) and *Cyando* (C-683/19). They say the judgment will be welcomed by internet service providers (ISPs) and social media platforms

The judgment explored the degree of knowledge of illegal activity required on the part of online platforms before they will be unable to avail of the *"hosting defence"* provided for in the eCommerce Directive (2000/31EC). In reaching its decision, the Court weighed up the importance of freedom of expression and the need to balance liability of online platforms against the fundamental rights of internet users.

Background

The cases of *YouTube* (C-628/18) and *Cyando* (C-683/19) both originated in Germany and were subsequently referred to the CJEU. The Court joined the cases together as both concerned alleged infringements of intellectual property (IP) rights by users of the video sharing platform, YouTube, and the file-hosting and sharing platform operated by *Cyando*. Both *YouTube* and *Cyando* sought to rely on the *"hosting defence"* under the eCommerce Directive in order to avoid liability for the alleged breaches of law on their respective platforms.

What is the "Hosting Defence"?

The *"hosting defence"* is provided for under Article 14 of the eCommerce Directive. It states that *"information society services"* (i.e. companies which host information online) are not liable for the information stored on their systems by their users on the condition that they:

- do not have actual knowledge of illegal activity or information; and
- upon obtaining such knowledge or awareness, act expeditiously to remove or to disable access to the information.

To date, the meaning of *"actual knowledge of illegal activity or information"* has been a matter of some debate and legal argument. In practice, it often arises that companies hosting information online receive complaints relating to content which is alleged by the complainant to be illegal but where it is not immediately apparent to the host whether that content is, in fact, illegal. A good example of this arises where a complaint is received in relation to online content which is alleged to be defamatory (any thereby potentially illegal) but it is not clear to the host whether a valid legal defence might be available to the person who posted the content, such as the defence of truth. This type of uncertainty has often made it difficult for the host to know whether it is obliged to remove the content in order to avoid liability under Article 14.

What is the Level of Knowledge Required?

The Opinion of the Advocate General in relation to these cases (which is an independent opinion considered by the CJEU before it delivers judgments)

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had commented on the logic of *"notice and take down"* under the hosting defence and noted that such mechanisms seek to strike a balance between the rights of different users at stake including, in particular, the freedom of expression of users. The Opinion stated that a notification of illegality was intended to give a service provider sufficient evidence to verify the illegal nature of information and that a provider was obliged to remove such information only where its illegal nature was *"apparent"* or *"manifest"*. The Opinion stated that this requirement was *"to avoid forcing a provider itself to come to decisions on legally complex questions and, in doing so, turn itself into a judge of online legality"*.

The Opinion highlighted the risk of *"over-removal"* by service providers (ie, the risk that, in all ambiguous situations, providers would tend towards systematically removing information on its servers in order to avoid any risk of liability vis à vis the rights holders). The Opinion further observed that service providers will often consider it easier to remove information to avoid possible actions for liability. The Opinion emphasised that such *"over-removal"* poses an obvious problem in terms of freedom of expression. For those reasons, the Opinion stated that the infringing character of information can only be regarded as *"apparent"* under the hosting defence where the provider has been given a notification providing it with evidence that would allow a *"diligent economic operator"* to *"establish that character without difficulty and without conducting a detailed legal or factual examination"* (emphasis added). The Opinion noted that this is the only interpretation of the eCommerce Directive that can *"avert the risk of intermediary providers becoming judges of online legality and the risk of "over-removal..."*.

In its judgment, delivered on 22 June 2021, the CJEU referenced these comments of the Opinion with approval and noted that *"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"* (emphasis added).

Conclusion

While the *YouTube* and *Cyando* cases relate specifically to the infringement of intellectual property rights, the Court's comments on the level of knowledge required to remove the *"hosting defence"* must be considered to be of more general application for internet service providers seeking to rely on this defence under the eCommerce Directive. That being the case, the judgment provides welcome clarity on what has been a sometimes tricky issue for companies hosting content online.

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