Medlemsmøde den 23. juni
Ophavsretten Danmark og EU

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Program

- Velkomst v. Morten Rosenmeier og Jakob Plesner Mathiasen, Dansk Selskab for Ophavsret
- Åbningstale v. tidligere Statsminister Lars Løkke Rasmussen
- Inspirationsoplæg v. tidligere Generaladvokat Henrik Saugmandsgaard Øe
- Keynote address v. Førstegeneraladvokat Maciej Szpunar
- Keynote address v. Vicepræsident for EU-Domstolen Lars Bay Larsen

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Velkomst v. Morten Rosenmeier og Jakob Plesner Mathiasen

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Åbningstale v. tidligere Statsminister Lars Løkke Rasmussen

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Dansk Selskab for Ophavsret

Case C-401/19

Poland against European Parliament and Council

Partner and former Advocate General
Henrik Saugmandsgaard Øe

23 June 2022

Gorrissen Federspiel

Summary of the case

- Action for annulment of Article 17(4)(b) and (c) in fine of the DSM directive (2019/790) or, alternatively, Article 17 in its entirety. Infringement of Article 11 of the Charter

- Providers of large online sharing services may be liable if users upload content that breaches copyrights or related rights
- Can be exempted if they can demonstrate that they have "***made best efforts to ensure the unavailability***" and to "***prevent future uploads***"

- ***YouTube-judgment (C-682/18 et C-683/18, paragraph 102):***
  The platform is not liable unless
    - *it has specific knowledge that protected content is available illegally and refrains from expeditiously deleting it or blocking access to it (**Article 14 of the e-commerce directive reversed**)*
    - *despite the fact that it has general knowledge, 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 (**New requirements**)*
    - *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 (**The Pirate Bay-situation**)*
- *The judgment has retroactive effect!*

Arguments of Poland

- The requirement for online service providers makes it necessary for them — in order to avoid liability — to carry out prior automatic verification (filtering) of content uploaded online by users
- Makes it necessary to introduce preventive control mechanisms
- Risk of “overblocking” content

- Undermines the essence of the right to freedom of expression and information
- Do not comply with the requirement that limitations imposed on that right be necessary and proportional

Article 17(4)(b) and (c)

4. *If no authorisation is granted, online content-sharing service providers **shall be liable** for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have*

   a) *made best efforts to obtain an authorisation, and*

   b) *made, in accordance with high industry standards of professional diligence, **best efforts to ensure the unavailability** of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event*

   c) *acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to **disable** access to, or to remove from their websites, the notified works or other subject matter, and made **best efforts to prevent their future uploads** in accordance with point (b)*

Article 17(7)

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State are able to rely on ***any of the following existing exceptions or limitations*** *when uploading and making available content generated by users on online content-sharing services:*

a) quotation, criticism, review;

b) use for the purpose of caricature, parody or pastiche.

Article 17(8)

The application of this Article shall not lead to any general monitoring obligation

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements

The Court of Justice – 26 April 2022

Conclusion: Court dismisses that action brought by Poland

- The specific liability regime has been accompanied by **appropriate safeguards** in order to ensure respect for the right to freedom of expression and information of the users (Article 52 (1) of the Charter)

- When transposing Article 17 into national law, MS must take care to act on the basis of an interpretation of that provision which allows **a fair balance** to be struck between the various fundamental rights

The platforms are important for the freedom of speech

- The internet has now become one of **the principal means** by which individuals exercise their right to freedom of expression and information

- "Internet sites, and in particular online content-sharing platforms, **play an important role in enhancing the public's access to news and facilitating the dissemination of information in general**, with user-generated expressive activity on the internet providing an unprecedented platform for the exercise of freedom of expression"

    - ECtHR, 1 December 2015, Cengiz and Others v. Turkey, § 52
    - ECtHR, 23 June 2020, Vladimir Kharitonov v. Russia, § 33

The details (limitation of the rights guaranteed by Article 11)

- Require *de facto* the service providers to carry out **a prior review of the content** that users wish to upload to their platforms, provided that the service providers have received from the rightholders the information or notices provided for in Article 17

- Forced to use **automatic recognition and filtering tools**

- Liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right guaranteed by Article 11

- Attributable to the EU legislature, since it is the direct consequence of the specific liability regime

Article 52 (1) of the Charter

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.

Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Requirements in Article 52 (1)

- A EU measure **must be interpreted, as far as possible**, in such a way as not to affect its validity and in conformity with primary law
- Does not prejudge any examination of the provisions adopted by Member States!

- **Provided for by law**
- Any limitation on the exercise of fundamental rights must be provided for by law

- The act which permits the interference must itself define the scope of the limitation on the exercise of the right concerned

- The need for safeguards all the greater where the interference stems from an automated process

- Can, however, be formulated in terms which are sufficiently open to be able to keep pace with changing circumstances (“best efforts”)

Respect the essence of freedom of speech

- Article 17 (7) is not limited to requiring providers of online content-sharing services to make their 'best efforts', but prescribes **a precise result to be achieved**:

> “shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.”

- Article 17 (9)

> “This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”

- Must “be strictly targeted”, judgment of 27 March 2014, UPC Telekabel Wien, C-314/12

Principle of proportionality

- Article 17 (4) do not disproportionately restrict the right to freedom of expression

- **Necessary** to protect intellectual property guaranteed in Article 17 (2) of the Charter
- alternative mechanism would not be as effective

- **Risk** of blocking lawful communications (a filtering system which might not distinguish adequately)
- Ensure that users in each Member State are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche
- Cf. Article 5 in Directive 2001/29

- Safeguards in (7), (8) and (9)
  - Information requirement (terms and conditions)
  - Procedural requirements: users must be able to submit a complaint if the content has been wrongly disabled or removed
  - Must be processed **without undue delay** and **be subject to human review**

Important: Paragraphes 90-92 (defining ”best efforts”)

- Must **not lead to any general monitoring obligation** - Article 17 (8)
- The providers cannot be required to prevent the uploading and making available to the public of **content which, in order to be found unlawful, would require an independent assessment** in the light of the information provided by the rightholders and of any exceptions and limitations to copyright
    - By analogy, judgment of 3 October 2019, *Glawischnig-Piesczek*, C-18/18, paragraphs 41 to 46
    - See also C-70/10, *Scarlet Extended,* and C-360/10, *SABAM*
- It cannot be excluded that in some cases **availability of unauthorised content** can only be avoided upon notification of rightholders.
- Sufficient information to enable the provider to satisfy itself, without a detailed legal examination, that the communication of the content at issue is illegal
- Paragraph 92: The **protection of intellectual property rights is not inviolable** and should not be protected as an absolute right
    - Judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, paragraph 72

My interpretation in point 198 of the Opinion

"Consequently, in order to minimise the risk of 'over-blocking' and, therefore, ensure compliance with the right to freedom of expression, an intermediary provider may, in my view, only be required to filter and block information which has first been established by a court as being illegal or, otherwise, information the unlawfulness of which is **obvious from the outset**, that is to say, it is manifest, without, inter alia, the need for contextualization"

- Communication from the Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market', p. 18-24

  (possible to 'earmark' subject matter the unauthorised uploading of which 'could cause significant economic harm to them'?)

- Obligation to block *ex ante* is not a requirement

Ensure a fair balance between the fundamental rights at stake

- Not only a conflict between Article 11 and the right of rightholders to intellectual property, protected by Article 17(2)
- But must also respect the freedom to conduct a business of service providers, guaranteed in Article 16

- Court in paragraph 75:

> "… to leave those service providers to determine the specific measures to be taken in order to achieve the result sought; accordingly, they can choose to put in place the measures which are best adapted to the resources and abilities available to them and which are compatible with the other obligations and challenges which they will encounter in the exercise of their activity"

- Member States must ensure a fair balance between the fundamental rights
- How should the DSM directive be implemented?

Questions?

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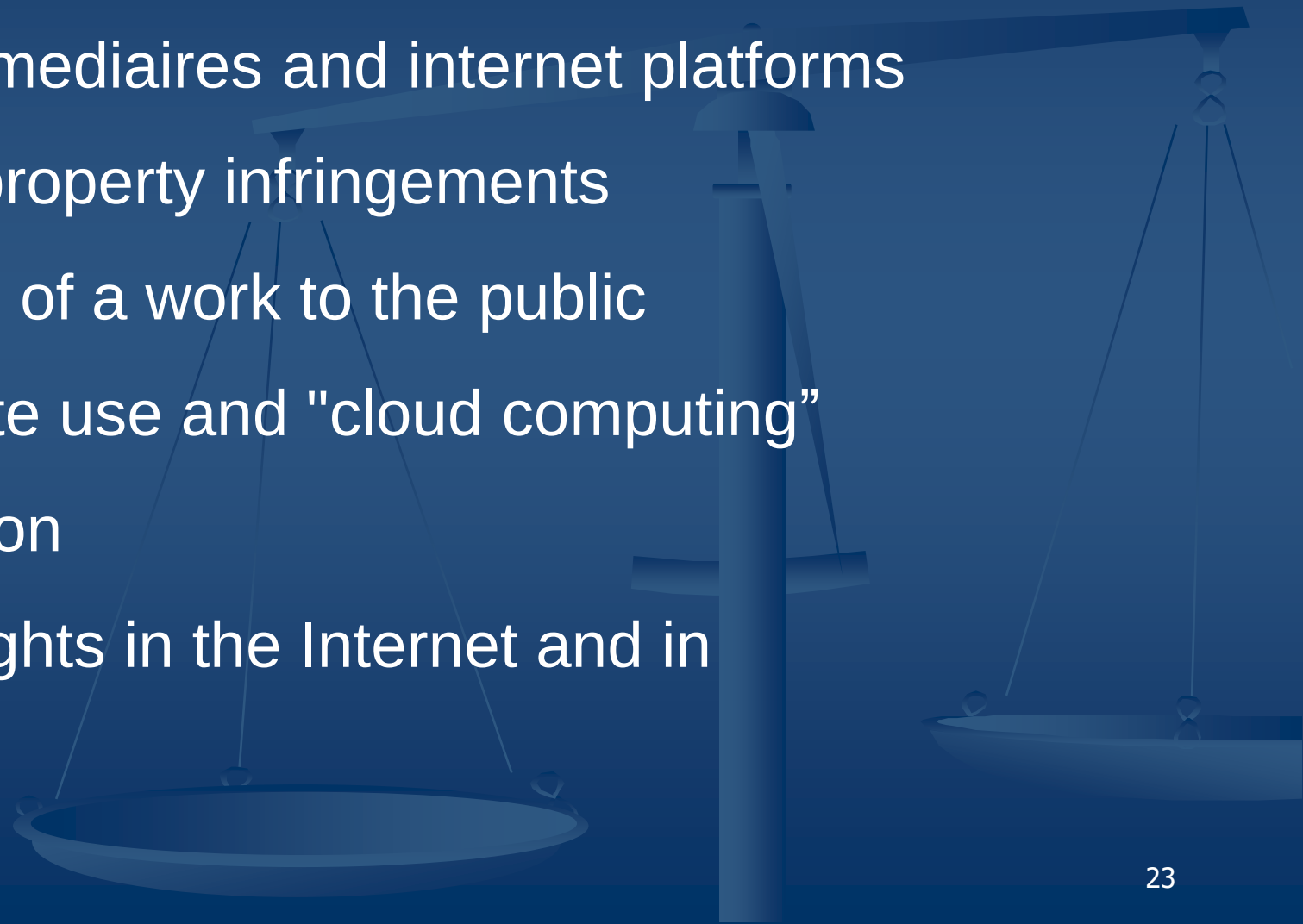
Copyright in the digital era

Maciej Szpunar

The Danish Copyright Association

Copenhagen, 23 June 2022

1. Introduction
2. Liability of intermediaires and internet platforms for intellectual property infringements
3. Communication of a work to the public
4. Permitted private use and "cloud computing”
5. Digital exhaustion
6. Fundamental rights in the Internet and in Copyright Law



Accountability & liability of intermediaries and internet platforms

Legal framework:

- Directive 2001/29/EC (Information Society Directive)
- Directive 2004/48/EC (on the enforcement of intellectual property rights)
- Directive 2000/31/EC (on electronic commerce)
- Directive 2019/790 (on copyright in the Digital Single Market)

IP Liability
of intermediaires and internet platforms

- Article 8(3) Directive 2001/29/EC:

  ‘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.’

- Article 11 Directive 2004/48/EC (third sentence):

  ‘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 Directive 2001/29/EC.’

Liability
of intermediaires and internet platforms

Directive 2000/31/EC (on electronic commerce) establishes some limitations of liability imposed on the entities providing the "information society services":

- Article 12 – "Mere conduit"
- Article 13 – "Caching"
- Article 14 – Hosting
- Article 15 – No general obligation to monitor

IP Liability of intermediaires and internet platforms

- C-275/06, Promusicae (copyright)
- C-324/09, L'Oréal v eBay (trademark)
- C-70/10, Scarlet Extended (copyright)
- C-360/10, Sabam (copyright)
- C-314/12, UPC Telekabel Wien (copyright)
- C-484/14, McFadden (copyright)
- C-18/18, Glawischnig-Piesczek (defamation)
- C-682/18 and C-683/18, YouTube (copyright)
- C-148/21 and C-184/21, Louboutin (trademark) - pending

Communication of a work to the public

Article 3(1) Directive 2001/29/EC :

‘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.’

Communication of a work to the public

- **Linking:**

C-466/12, Svensson

C-348/13, BestWater (Framing)

C-160/15, GS Media

C-392/19, VG Bild-Kust

Communication of a work to the public

1. Mediaplayer:

C-527/15, Stichting Brein (Filmspeler)

2. The Pirate Bay:

C-610/15, Stichting Brein

3. Incorporation of a photography

C-161/17, Renckhoff

Permitted private use and "cloud computing”

C-265/16, VCAST

Digital exhaustion

C-263/18, Tom Kabinet

Fundamental rights in the Internet

In the context of injunction

- C-314/12, UPC Telekabel Wien

In the context of private and family life

- C-149/17, Bastei Lübbe

In the context of defamation

- C-18/18, Glawischnig-Piesczek

Fundamental rights in Copyright Law

Freedom of information

- C-516/17, Spiegel Online

Notion of a quotation

- C-476/17, Pelham

Notion of a work

- C-469/17, Funke Medien

Copyright trolling

- C-597/19, Mircom

Thank you for the attention!

Keynote address v. Vicepræsident for EU-Domstolen Lars Bay Larsen

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