Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 16 July 2020[1]

Joined Cases C-682/18 and C-683/18

Frank Peterson
v
Google LLC,
YouTube LLC,
YouTube Inc.,
Google Germany GmbH (C-682/18)
and
Elsevier Inc.
v
Cyando AG (C-683/18)

(Requests for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Article 3 — Communication to the public — Concept — Uploading of protected works on internet platforms by users of the platforms without the prior authorisation of the rightholders — No primary liability of the operators of those platforms — Secondary liability of those operators for copyright infringements committed by the users of their platforms — Matter coming outside the scope of Article 3 of Directive 2001/29 — Directive 2000/31/EC — Article 14 — Exemption from liability for providers of an 'information society service … that consists of the storage of information provided by a recipient of the service' — Concept — Possibility for those operators to be exempted from the liability that may result from the information that they store at the request of users of their platforms — Conditions to be met in order to benefit from that exemption from liability — Article 14(1)(a) — Expressions 'actual knowledge of illegal activity or information' and 'aware of facts or circumstances from which the illegal activity or information is apparent' — Specific illegal information — Article 8(3) of Directive 2001/29 — Injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right — Conditions to be met in order to apply for such an injunction)

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I. Introduction

1. The present requests for a preliminary ruling were made by the Bundesgerichtshof (Federal Court of Justice, Germany). They concern the interpretation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'),[2] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[3] and Directive 2004/48/EC on the enforcement of intellectual property rights.[4]

2. The requests were made in two disputes. In the first, Mr Frank Peterson, a music producer, is suing YouTube LLC and its parent company Google LLC for the uploading to the YouTube sharing platform of several phonograms to which he claims to hold rights, by users of that platform without his authorisation. In the second, Elsevier Inc., a publishing group, is suing Cyando AG for the uploading to the Uploaded file-hosting and -sharing platform operated by the latter company of various works in which Elsevier holds the exclusive rights, by users of that platform without its authorisation.

3. The six questions asked by the referring court in each of its requests for a preliminary ruling revolve around the extremely sensitive issue of the liability of online platform operators with regard to copyright-protected works illegally uploaded onto their platforms by their users.

4. The nature and scope of that liability depends in particular on the interpretation of Article 3 of Directive 2001/29, which confers on authors the exclusive right to communicate their works to the public, and Article 14 of Directive 2000/31, which gives intermediary service providers an exemption from liability for the information which they store at the request of users of their services. In the present cases, the Court is thus called on to clarify in particular whether the former provision is applicable to such platform operators, whether they may rely on the latter provision and how those provisions are interrelated.

5. This issue is characterised by profound divisions. For some, online platforms allow large-scale copyright infringement, from which their operators profit to the detriment of the rightholders, which justifies imposing on them extensive obligations to monitor the content uploaded to those platforms by users of their platforms. For others, imposing on those operators such obligations to monitor would significantly affect their activity and the rights of those users and would undermine freedom of expression and creativity online.

6. These divisions were brought to a head during the discussions surrounding the adoption by the EU legislature of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29.[5] Article 17 of that new directive establishes, with respect to operators such as YouTube, a specific liability regime for works illegally uploaded by users of their platforms. I should point out, however, that that directive, which entered into force in the course of the present preliminary ruling proceedings, is not applicable to the disputes in the main proceedings. These cases will therefore have to be determined through the lens of the legal framework prior to that, regardless of whatever approaches may just have been adopted by the EU legislature.

7. In this Opinion I will propose that the Court rule that platform operators such as YouTube and Cyando do not, in principle, carry out acts of 'communication to the public' within the meaning of Article 3 of Directive 2001/29 and are not therefore directly liable for an infringement of that provision when their users illegally upload protected works. I will also explain why those operators

2 Directive of the European Parliament and of the Council of 8 June 2000 (OJ 2000 L 178, p. 1).

3 Directive of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 1).

4 Directive of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

5 Directive of the European Parliament and of the Council of 17 April 2019 (OJ 2019 L 130, p. 92).

may, in principle, benefit from the exemption from liability laid down in Article 14 of Directive 2000/31, subject to conditions which I will outline. Lastly, I will explain that, pursuant to EU law, rightholders may obtain injunctions against those operators which can impose new obligations on the latter, the conditions for which I will clarify.

II. Legal framework

A. Directive 2000/31

8. Section 4 of Directive 2000/31, entitled 'Liability of intermediary service providers', includes Articles 12 to 15 of the directive.

9. Article 14 of the directive, entitled '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.'

10. Article 15 of that directive, entitled 'No general obligation to monitor', provides, in paragraph 1:

'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.'

B. Directive 2001/29

11. Recital 27 of Directive 2001/29 states 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 Directive'.

12. Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'1. 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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

…

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

13. Article 8 of the directive, entitled 'Sanctions and remedies', provides, in paragraph 3, 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 a copyright or related right'.

III. The disputes in the main proceedings

A. Case C-682/18

1. YouTube

14. YouTube is an internet platform operated by the company of that name, the sole shareholder and legal representative of which is Google. The platform, which takes the form of various websites and applications for smart devices, enables its users to share videos on the internet.

15. In order to upload a video to YouTube, it is necessary to create an account, with a username and password, and to accept the platform's terms of service. Any user who uploads a video after registering in this way can choose to make it 'private' or to publish it on the platform. In the latter case, the video in question can be streamed from the platform, shared by any user and commented on by other registered users. Registered users can also create 'channels' to collect together their videos.

16. Videos are uploaded on said platform automatically, without material being seen in advance or checked by Google or YouTube. Almost 35 hours of video content are published in this way on the platform every minute,[6] representing several hundred thousand videos each day.

17. YouTube includes a search function and processes the results of the search by, inter alia, evaluating the videos' relevance specifically according to the user's region. The results of that evaluation are summarised on the home page in categories such as 'currently watched videos', 'promoted videos' and 'trending'. YouTube indexes the available videos and channels under categories such as 'entertainment', 'music' and 'film and animation'. In addition, when registered users use the platform, they are given an overview of 'recommended videos', which depend, inter alia, on the videos watched previously by them.

18. YouTube receives from its platform, inter alia, advertising revenue. Advertising banners of third-party advertisers appear at the sides of the platform's home page. In addition, advertisements are inserted into certain videos, which requires a specific contract to be concluded between the users concerned and YouTube.

6 This is the figure established by the appeal court in the main proceedings. Google, on the other hand, mentions the figure of 400 hours of video per minute.

19. 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 withdrawn 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.

20. In accepting those general terms, users confirm that they hold all the necessary rights, agreements, consents and licences for the videos that they upload. In addition, in the 'Community guidelines', YouTube asks users of its platform to respect copyright. They are also informed on making each upload that no videos infringing copyright may be published on the platform.

21. YouTube has introduced various technical 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 infringing 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).

22. YouTube has also set up the Content Verification Program. That programme is available only to undertakings that are specially registered and not to private individuals. The programme offers the rightholders concerned various tools allowing them to check more easily how their works are being used on the platform. They can, in particular, check off directly in a list of videos those which they consider to infringe their rights. If a video is blocked because of such a report, the user who uploaded it is notified that his or her account will be blocked in the event that the infringement takes place again. YouTube also makes available to rightholders participating in that programme a piece of content-recognition software, called 'Content ID', which was developed by Google, the purpose of which is automatically to detect videos using their works. In that regard, according to the explanations given by Google, the rightholders should provide YouTube with audio or video reference files to identify the works in question. Content ID creates 'digital fingerprints' from those files, which are stored in a database. Content ID automatically scans each video uploaded to YouTube by a user and compares it to those 'fingerprints'. The software can thus recognise video and audio, including melodies where they have been reproduced or copied. Where a match is identified, the rightholders concerned are automatically notified. They have the option to block the detected videos in question. Alternatively, they can choose to track the use of those videos on YouTube through viewership statistics. They can also opt to monetise those videos by inserting advertisements or receiving a portion of the income generated by the advertisements inserted previously at the request of the users who uploaded the videos.

2. The action brought by Mr Peterson

23. On 6 and 7 November 2008, music tracks from the album *A Winter Symphony* by the artist Sarah Brightman and private sound recordings from the 'Symphony Tour' concerts, linked to still and moving images, were published on YouTube by users of that platform.

24. By letter of 7 November 2008, Mr Peterson, who claims copyright and related rights to the music tracks and recordings in question,[7] contacted Google Germany GmbH and, in essence, instructed that company and Google to remove the videos at issue on pain of sanction. To that end, Mr Peterson provided screenshots taken from those videos. Accordingly, using those screenshots, YouTube manually determined the internet addresses (URLs) of the videos and disabled access to them. The parties in the main proceedings nevertheless disagree on the extent of those blocking measures.

7 More precisely, Mr Peterson relies on his own rights as producer of the album *A Winter Symphony* and on his own rights and those derived from the artist in respect of the performance of music tracks on that album, which was created with his artistic participation as producer and choir member. He also claims, with regard to concert recordings from the 'Symphony Tour', that he is the composer and lyric writer of various tracks on the album. In addition, as publisher, he claims to have rights derived from those of the writers for several of those tracks.

25. On 19 November 2008, sound recordings from Sarah Brightman's performances, linked to still and moving images, were once again accessible on YouTube.

26. Subsequently, Mr Peterson brought an action against, inter alia,[8] Google and YouTube before the Landgericht Hamburg (Regional Court, Hamburg, Germany). Mr Peterson sought, in essence, to obtain an injunction prohibiting those companies from making available to the public 12 sound recordings or performances taken from the *A Winter Symphony* album and 12 works or performances taken from concerts on the 'Symphony Tour' or, in the alternative, from permitting third parties to do so. Mr Peterson also asked to be provided with information on the infringing activities in question and on the turnover or profits generated by YouTube through those activities. In addition, he requested that the court give a declaration that, inter alia, YouTube is required to pay him damages for making the videos at issue available to the public. Lastly, Mr Peterson requested, in the alternative, that information be provided on the users who uploaded those videos.

27. By a judgment of 3 September 2010, the Landgericht Hamburg (Regional Court, Hamburg) granted the action in respect of three music tracks and dismissed the action as to the remainder. Mr Peterson, YouTube and Google appealed against that decision.

28. By a judgment of 1 July 2015, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) reversed in part the judgment given at first instance. The Oberlandesgericht (Higher Regional Court) prohibited YouTube and Google, subject to a periodic penalty payment, from allowing third parties to make available to the public sound recordings or performances of seven tracks from the album *A Winter Symphony*. That court also ordered those companies to provide Mr Peterson with various pieces of information on the users who had uploaded the videos in question. The court dismissed the action brought by Mr Peterson as to the remainder.

29. Mr Peterson brought an appeal on a point of law at the Bundesgerichtshof (Federal Court of Justice). In these circumstances, by a decision of 13 September 2018, which was received by the Court on 6 November 2018, the Bundesgerichtshof (Federal Court of Justice) stayed the proceedings and made a reference to the Court.

B. Case C-683/18

1. Uploaded

30. Uploaded is a file-hosting and -sharing platform (commonly referred to as a file hosting service or a cyberlocker) operated by Cyando. The platform, which can be accessed via different websites, offers anyone, free of charge, storage space for uploading files that can contain any content. In order to use Uploaded, it is necessary to create an account with a username and a password by providing, inter alia, an email address. The uploading of files happens automatically without material being seen in advance or checked by Cyando. For each file stored by a user a download link is automatically created and sent to that user. Uploaded offers neither a directory nor a search function for the hosted files. However, users are free to share those download links on the internet, for example in blogs, forums, or even in 'link collections', which are sites that index those links, provide information on the files associated with those links and allow internet users to search for the files that they want to download.

8 Although Mr Peterson had also brought proceedings against YouTube Inc. and Google Germany, the referring court indicated that those companies are no longer parties to the dispute in the main proceedings.

31. Provided that one has an account and the appropriate links, files hosted on Uploaded can be downloaded free of charge. However, for users with free, standard access to the platform, download options are limited (in terms of maximum data download volume, download speed, number of simultaneous downloads, etc.). As an alternative, users can take out a paid subscription in order to benefit from a much higher daily download volume with no limit on speed or on the number of simultaneous downloads and no waiting time between downloads. In addition, Cyando has set up a 'partnership' programme where it pays remuneration to some users who upload files to Uploaded based on the number of downloads of the files in question.

32. The terms of service for Uploaded stipulate that that platform may not be used to infringe copyright. Nevertheless, it is established that the platform is in actual fact used for both legal applications and, 'to a large degree',[9] applications that infringe copyright, of which Cyando is aware. In this regard, Cyando had been notified of the presence on its servers of more than 9 500 protected works, uploaded without the prior authorisation of the rightholders, download links to which had been shared on approximately 800 websites (link collections, blogs and forums), of which it is aware.

2. The action brought by Elsevier

33. According to the order for reference in Case C-683/18, a number of protected works to which Elsevier holds the exclusive rights of use were hosted on the Uploaded platform and made available to the public, without the authorisation of that company, in link collections, blogs and other forums. In particular, on the basis of research conducted from 11 to 13 December 2013, Elsevier notified Cyando, by two letters sent on 10 and 17 January 2014, that files containing three of those works, namely *Gray's Anatomy for Students*, *Atlas of Human Anatomy* and *Campbell-Walsh Urology*, were stored on its servers and could be freely consulted via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

34. Elsevier brought an action, notified on 17 July 2014, against Cyando before the Landgericht München (Regional Court, Munich, Germany). By its action, Elsevier claimed, inter alia, that a prohibitory injunction should be imposed on Cyando, as the party which infringed the copyright of the works at issue, in the alternative as an accomplice to that infringement and, in the further alternative, as '*Störer*' ('interferer'). Elsevier also requested that Cyando be ordered to disclose certain information to it. In addition, the first company asked the court give a declaration that the second company is obliged to pay damages to it in respect of those infringements.

35. By a judgment of 18 March 2016, the Landgericht München (Regional Court, Munich) imposed a prohibitory injunction on Cyando on account of its participation in copyright infringement in respect of the three works referred to in the letters of 10 and 17 January 2014 and granted the claims made in the alternative by Elsevier. The court dismissed the action as to the remainder.

36. Elsevier and Cyando each appealed against that decision. By a judgment of 2 March 2017, the Oberlandesgericht München (Higher Regional Court, Munich, Germany) reversed the judgment given at first instance. That court imposed a prohibitory injunction on Cyando in respect of the three works cited in the letters of 10 and 17 January 2014 as '*Störer*' in accordance with the claim made in the further alternative by Elsevier. The appeal court dismissed the action as to the remainder.

37. Elsevier brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice). In these circumstances, by a decision of 20 September 2018, which was received by the Court on 6 November 2018, that court stayed the proceedings and made a reference to the Court.

9 The precise degree is disputed by the parties to the main proceedings and has not been established by the national courts.

IV. The questions referred for a preliminary ruling and the procedure before the Court

38. In Case C-682/18, the Bundesgerichtshof (Federal Court of Justice) referred the following questions to the Court for a preliminary ruling:

'(1) Does the operator of an internet video 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 [Directive 2001/29] if

- the operator earns advertising revenue by means of the platform,
- the upload process takes place automatically and without material being seen in advance or controlled by the operator,
- in accordance with the conditions of use, 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 conditions of use 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 infringing videos,
- on the platform, the operator prepares search results in the form of rankings and content categories, and displays to registered users an overview that is oriented towards previously seen videos and that contains recommended videos which can be displayed to registered users,

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

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

Does the activity of the operator of an internet video platform under the conditions described in Question 1 come within the scope of Article 14(1) of [Directive 2000/31]?

(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 [Directive 2000/31]?

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

Is it compatible with Article 8(3) of [Directive 2001/29] if the rightholder is in a position to obtain an injunction against a service provider whose service consists of the storage of information provided by a recipient of the service, and whose service has been used by a recipient of the service to infringe a copyright or related right, only if such an infringement has taken place again after notification of a clear infringement has been provided?

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

Is the operator of an internet video 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 [Directive 2004/48]?

(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 [Directive 2004/48] be made subject to the condition that the infringer acted intentionally with regard both to his own infringing activity and to the infringing activity of the third party, and knew, or ought reasonably to have known, that users use the platform for specific acts of infringement?'

39. In Case C-683/18, the Bundesgerichtshof (Federal Court of Justice) also referred six questions to the Court for a preliminary ruling, the second to sixth questions being identical, in essence, to those referred in Case C-682/18. Only the first question, which is reproduced below, is different:

'(1) (a) Does the operator of a [file-hosting and -sharing] service 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 [Directive 2001/29] if

– the upload process takes place automatically and without being seen in advance or controlled by the operator,

– in the conditions of use, the operator indicates that copyright-infringing content may not be posted,

– it earns revenue through the operation of the service,

– the service 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, it creates an incentive to upload content protected by copyright that users could otherwise only obtain for a charge

and

– by providing the possibility to upload files anonymously, the probability of users not being held accountable for copyright infringements is increased?

(b) Does this assessment change if copyright-infringing offerings are provided by the shared hosting service and account for 90% to 96% of the overall use?'

40. By decision of the President of the Court of 18 December 2018, Cases C-682/18 and C-683/18 were joined, in the light of the connection between them, for the purposes of the written and oral procedures and the judgment.

41. Mr Peterson, Elsevier, Google, Cyando, the German, French and Finnish Governments and the European Commission submitted written observations before the Court. Those parties and interested parties, with the exception of the Finnish Government, were represented at the hearing which was held on 26 November 2019.

V. Analysis

42. The present cases are set against the backdrop of 'Web 2.0' services. From the mid-2000s various changes, both technological (ranging from the increase in global bandwidth to the democratisation of broadband connections) and social (possibly resulting from a change in the attitudes of internet users towards privacy or from their willingness to share, to contribute and to create online communities) led to the development on the internet of dynamic and interactive services, such as blogs, social networks and sharing platforms, all constituting tools allowing their users to share online all kinds of content, referred to as user-created content or user-generated content. The providers of those services claim that they allow users to shift from being passive consumers of entertainment, opinions and information to being actively involved in the creation and exchange of that content on the internet. The network effect inherent in the success of such services has quickly enabled a small number of those service providers to grow from start-ups to dominant undertakings. [10]

43. The YouTube platform, which is at issue in Case C-682/18, is representative in this respect. The platform gives its users (who number more than 1.9 billion, if Google is to be believed) the opportunity to share their content and, in particular, their creations online. A multitude of videos is uploaded there every day, including cultural and entertainment content, such as musical compositions published by emerging artists looking for a wide audience, informative content on topics as diverse as politics, sport and religion, as well as 'tutorials' the purpose of which is to allow anyone to learn to cook, play the guitar, repair a bicycle, etc. Content is published on YouTube not only by private individuals, but also by public bodies and professionals, including established media companies such as television channels and record companies. YouTube is organised according to a complex business model, which includes, inter alia, selling advertising space on its platform. [11] In addition, YouTube has set up a system through which it shares a percentage of its advertising revenue with some content-providing users, which allows the latter to earn revenue from the platform. [12]

44. The Uploaded platform, which is at issue in Case C-683/18, reflects a related, but nevertheless different reality. Generally, a cyberlocker provides its users with online storage space allowing them, inter alia, to save all kinds of files 'in the cloud' to be accessed at any time, from anywhere they wish and through any device. As a file hosting service, Uploaded, also includes a function for sharing the files that it hosts. Users thus have the ability to send download links generated for each of the files uploaded to third parties. According to Cyando, this function is intended to enable anyone easily to transfer very large files to family members, friends or business associates. In addition, through that function users can share on the internet rights-free content or their own works. Cyberlockers adopt various business models. Uploaded generates revenue by selling subscriptions, which affect, among other things, file download capacity.

45. While platforms such as YouTube and Uploaded can be used legally, they are also used in an illegal way. Videos shared on YouTube may notably contain protected works and infringe copyright. Further, by virtue of its very capacity to store and share particularly large files, a file hosting service such as Uploaded is a practical tool for illegally exchanging copies of works, including films and music.

10 See, for further details, Organisation for Economic Cooperation and Development (OECD), 'Participative Web: User-Created Content', *Working Party on the Information Economy*, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007.

11 As was stated by the German Government, YouTube gathers a large amount of personal data concerning the internet users who visit its platform, how they use that platform, their preferences in terms of content, etc., so that the advertisements shown on the platform can be targeted according to the user. The questions raised by the widespread gathering of data and how they are processed is, however, beyond the scope of this Opinion.

12 See, for further details, Fontaine, G., Grece, C., Jimenez Pumares, M., 'Online video sharing: Offerings, audiences, economic aspects', *European Audiovisual Observatory*, Strasbourg, 2018.

46. Rightholders, such as Mr Peterson and Elsevier, which are supported in this instance by the French Government, thus paint a harsh picture of the platforms in question and their operators. By permitting the decentralised and unmonitored provision of content by any internet user on those platforms, those operators create a considerable risk of copyright infringement. That risk is exacerbated given the ubiquitous nature of the content published on those platforms, which can be viewed instantaneously by an indefinite number of users anywhere in the world.[13] The rightholders further invoke the difficulties which they encounter in suing the users responsible for those infringements carried out via those platforms, on account of their insolvency, anonymity or location.

47. The arguments put forward by the rightholders are not confined to the risk of infringement created by the activities of operators such as YouTube or Cyando. They complain more generally that such operators — YouTube in particular — have radically altered the value chain in the cultural economy at their expense. In essence, rightholders claim that those operators encourage the users of their platforms to upload attractive content which, in most cases, is protected by copyright. Those same operators monetise that content for their own account through, inter alia, advertising (the 'YouTube' model) or subscriptions (the 'Cyando' model) and profit from it significantly without, however, acquiring licences from the rightholders or paying them any remuneration. Those operators thus monopolise the vast majority of the value generated by the content to the detriment of the rightholders. This is the 'value gap' argument discussed in the context of the adoption of Directive 2019/790. In addition, platforms such as YouTube make it difficult for rightholders to engage in the normal exploitation of their works. In particular, the platforms compete unfairly with traditional media (radio and television channels, etc.) and digital content providers (Spotify, Netflix, etc.), which acquire the content that they disseminate from rightholders for remuneration and which, because of that unfair competition, are prepared to pay to the latter less remuneration in order to remain competitive.[14] Thus, in order to obtain the high level of protection of their intellectual property, which EU law seeks to ensure for them, and an appropriate remuneration for the use of their works,[15] rightholders should be able to turn to the platform operators themselves.

48. At this stage it is appropriate to note that Article 3(1) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit any 'communication to the public' of their works, including the making available to the public of those works in such a way that members of the public may access them from a place and at a time individually chosen by them.[16] That exclusive right is infringed where a protected work is communicated to the public by a third party without the prior authorisation of its author,[17] unless that communication is subject to one of the exceptions and limitations laid down exhaustively in Article 5 of that directive.[18]

13 See, by analogy, judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraph 80 and the case-law cited).

14 For more details, see International Federation of the Phonographic Industry (IFPI), 'Rewarding creativity: Fixing the value gap', *Global Music Report 2017*, and Bensamoun, A., 'Le value gap ou le partage de la valeur dans la proposition de directive sur le droit d'auteur dans le marché unique numérique', *Entertainment*, Bruylant, No 2018-4, pp. 278-287.

15 See recitals 4, 9 and 10 of Directive 2001/29.

16 I will use the expression 'communication to the public' to designate, in general terms, acts of communication to the public in the strict sense and acts of making available to the public. I will refer more precisely to one or other of these categories as necessary. Furthermore, Article 3 of Directive 2001/29 recognises, in paragraph 2(a) and (b), a right of making available to the public — but not the right of communication to the public in the strict sense — as a right related to copyright for performers in respect of fixations of their performances and for phonogram producers with regard to their phonograms respectively. That provision is also relevant in Case C-682/18 in so far as Mr Peterson has, in respect of some of the phonograms uploaded without his authorisation, related rights as a performer and/or producer (see footnote 7 of this Opinion). That being said, since the cases in the main proceedings concern acts of 'making available to the public', as I will explain below, and that concept has the same meaning in paragraph 1 and in paragraph 2 of Article 3 of Directive 2001/29, I will, for convenience, simply mention copyright under paragraph 1, although my analysis is transposable to related rights in paragraph 2.

17 Or, more generally, of the copyright holder for the work in question, who is not necessarily the author. I will use the terms 'author' and 'rightholder' interchangeably in this Opinion.

18 See, in particular, judgment of 14 November 2019, *Spedidam* (C-484/18, EU:C:2019:970, paragraph 38 and the case-law cited).

49. The rightholders consider that operators such as YouTube and Cyando carry out, together with the users of their platforms, the 'communication to the public' of the works uploaded by the latter. Consequently, for all files which those users intend to share, the operators should check, before they are uploaded, whether the files contain protected works, determine the existing rights to those works and themselves obtain, generally for remuneration, a licence from the rightholders or, failing that, prevent the file from being uploaded. Each time that the operators fail to comply with those obligations and, as a result, works are published illegally on their platforms, they are *directly liable* for that lack of compliance and that publication, under Article 3(1) of Directive 2001/29. On that basis, those same operators are required, under Article 13 of Directive 2004/48, inter alia to pay damages to the rightholders concerned.

50. YouTube and Cyando, supported in this instance by the Finnish Government and the Commission, respond that they are merely *intermediaries* which provide tools enabling users of their platforms to communicate works to the public. It is therefore not the operators, but the users that carry out the 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 when they share online, on those platforms, files containing protected works. Those users therefore bear any direct liability in the event of illegal 'communication'. In any event, those operators maintain that they are covered by Article 14(1) of Directive 2000/31. That provision exempts them from any liability which could arise from illegal files which they store at the request of users of their platforms, provided, in essence, that they were not aware of said files or that, where they became aware of the files in question, they removed them expeditiously. In addition, under Article 15(1) of that directive, those same operators may not be subject to a general obligation to monitor the files which they store or actively to seek facts or circumstances indicating illegal activity. YouTube and Cyando therefore maintain that under those provisions they are obliged not to monitor all files provided by users of their platforms before they are uploaded but, in essence, to be sufficiently reactive to notifications from rightholders pointing out that some of those files are illegal.

51. Against this background, the *first questions* asked by the Bundesgerichtshof (Federal Court of Justice) seek to determine whether the activity of platform operators such as YouTube and Cyando comes under the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. The *second questions* asked by that court seek to determine whether those operators may benefit from the exemption from liability under Article 14(1) of Directive 2000/31 for the files that they store at the request of their users. These questions are closely linked. The EU legislature intended, by Directives 2000/31 and 2001/29, to establish a clear framework of rules relevant to the issue of liability of intermediary service providers for copyright infringements at EU level.[19] Article 3(1) of the former directive and Article 14(1) of the latter must therefore be interpreted consistently.[20]

52. I will examine each of those provisions in turn in Sections A and B of this Opinion.[21]

19 See recital 50 of Directive 2000/31 and recital 16 of Directive 2001/29.

20 It is important to avoid, as far as possible, a situation where a service provider is liable under Article 3(1) of Directive 2001/29 while being exempt from liability under Article 14(1) of Directive 2000/31. See, for further details, points 137 to 139 of this Opinion.

21 In this Opinion I will not address the issue of copies of works created when they are uploaded to platforms such as YouTube or Uploaded and viewed or downloaded by the public. This issue is a matter of the interpretation of the right of reproduction under Article 2 of Directive 2001/29 and the exceptions and limitations to that right under Article 5 of that directive, about which the Court has not been asked. Moreover, except for Cyando, which has relied on the private copying exception under Article 5(2)(b) of that directive, this point has not been discussed before the Court.

A. The concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 (first questions)

53. By its first questions, the referring court asks, in essence, whether the operator of a video-sharing platform and the operator of a file-hosting and -sharing platform carry out an act of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 when a user of their platforms uploads a protected work there.

54. According to the Court's settled case-law, the concept of 'communication to the public' provided for in Article 3(1) of Directive 2001/29 is an autonomous concept of EU law, whose meaning and scope must be determined in light of the wording of that provision, the context in which it is set and the objectives pursued by that directive.[22] In addition, that expression must be interpreted, as far as possible, in the light of the equivalent concepts contained in the texts of international law which are binding on the Union.[23]

55. According to that case-law, the concept of 'communication to the public' involves two cumulative criteria, namely an act of 'communication' of a work and a 'public'.[24]

56. In this regard, first, as is made clear in recital 23 of Directive 2001/29, the concept of 'communication to the public' covers all *transmission* (or retransmission) of a work to a public not present at the place where the communication originates, irrespective of the technical process used.[25] In other words, a person carries out an act of 'communication' if he or she transmits a work and thus makes it perceptible[26] at a distance.[27] The typical example of such transmission, as that recital states, is the broadcasting of a work, while the term 'retransmission' includes, in particular, the simultaneous retransmission, by cable, satellite or internet, of a broadcast programme.

57. Furthermore, as I stated in point 48 of this Opinion, the concept of 'communication' includes that of 'making available'. As is made clear by recital 25 and Article 3(1) of Directive 2001/29, this latter category covers *interactive on-demand transmissions*, which are characterised by the fact that members of the public may access the work from a place and at a time individually chosen by them. The concept of 'making available' thus covers the situation where a person makes it possible for a certain work to be transmitted to a 'public' in those circumstances, typically by uploading it to a website.[28]

58. Second, the term 'public' refers to an 'indeterminate' and 'fairly large' number of persons. That term therefore covers persons in general, that is, not restricted to specific individuals belonging to a private group, and involves a certain *de minimis* threshold.[29]

22 See, in particular, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 17 and the case-law cited).

23 See, inter alia, judgment of 2 April 2020, *Stim and SAMI* (C-753/18, EU:C:2020:268, paragraph 29 and the case-law cited). In particular, Article 3(1) of Directive 2001/29 must be interpreted in the light of Article 8 of the World Intellectual Property Organisation (WIPO) Copyright Treaty, signed on 20 December 1996 in Geneva and approved on behalf of the European Union by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6; 'the WCT'), which the former provision serves to implement (see recital 15 of Directive 2001/29).

24 See, in particular, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraph 61 and the case-law cited).

25 See, in particular, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 49 and 62 and the case-law cited).

26 More precisely, it is a question of enabling recipients to perceive, by any appropriate means (aurally for a phonogram etc.), all or some of the elements which comprise the work and which are the expression of the intellectual creativity of the author. See, by analogy, judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 47).

27 'Conventional' forms of communication to the public which are live representations or performances, such as live performances before a public that is in direct physical contact with the performer of the works, do not fall within the scope of Article 3(1) of Directive 2001/29. See, in particular, judgment of 24 November 2011, *Circul Globus București* (C-283/10, EU:C:2011:772, paragraphs 35 to 41).

28 See judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 41 to 44 and 63).

29 See, in particular, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraph 66 and the case-law cited).

59. In this case, in the light of the foregoing, it is indisputable that when a protected work is shared online on a platform such as YouTube or Uploaded, that work is 'made available to the public' for the purposes of Article 3(1) of Directive 2001/29.

60. Where a video containing a protected work is published on YouTube, anyone can stream it on that platform, from a place and at a time individually chosen by them. The same holds where a file containing a work is hosted on Uploaded and the download link for that file is freely shared on the internet, in link collections, blogs or forums.[30] In both cases, the work is made available to a 'public'[31] even though it is viewed or downloaded at the request of individuals in a context of 'one-to-one transmission'. In that regard, account should be taken of the number of persons able to access it at the same time and in succession.[32] In the abovementioned scenario, the work can be viewed or downloaded, as the case may be, by all actual and potential visitors to YouTube or to the website on which the link is shared, which is clearly an 'indeterminate' and 'fairly large' number of persons.[33]

61. Consequently, if a protected work is published online from a platform such as YouTube or Uploaded by a third party without the prior authorisation of its author and that publication is not covered by the exceptions and limitations laid down in Article 5 of Directive 2001/29, there is an infringement of the exclusive right of 'communication to the public' conferred on the author by Article 3(1) of that directive.

62. That being so, the question is who — the user uploading the work concerned, the platform operator or both of them together — carries out that 'communication' and bears any potential liability for it.

63. At this stage, it should be stated that on this point Mr Peterson and Elsevier put forward an argument based on a different logic. In their view, operators such as YouTube and Cyando are liable under Article 3(1) of Directive 2001/29 because, first, they are *actively involved* in the 'communication to the public' of the works uploaded by users of their platforms, such that they carry out that 'communication' themselves, second, they have *knowledge* of the fact that those users share protected works illegally and, moreover, they *deliberately incite* them to do so and, lastly, they are *negligent* by failing to comply with certain duties of care imposed on them as a counterpart to the risk of infringement created by their activity.[34]

64. I think that this argument confuses two issues. On the one hand, if operators such as YouTube and Cyando carried out the 'communication to the public' of works uploaded by users of their platforms, those operators would potentially bear direct (or 'primary') liability under Article 3(1) of Directive 2001/29. It is an objective question whether that is the case, to the exclusion of considerations such as knowledge or negligence. In principle, the response to that question depends solely on whether those

30 The fact that a work is viewed on a platform such as YouTube by being streamed and that this does not result in the member of the public in question having a permanent copy is irrelevant for the purposes of Article 3(1) of Directive 2001/29 (see, in particular, Walter, M.M., and von Lewinski, S., *European Copyright Law — A Commentary*, Oxford University Press, Oxford, 2010 p. 983). Furthermore, the fact that a work is downloadable from Uploaded and that members of the public can thus, conversely, obtain such a copy does not exclude the application of that provision in favour of the right of distribution under Article 4(1) of that directive (see judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 40 to 45 and 51)).

31 However, there is no 'making available to the public' where a user uploads a work to YouTube which he or she makes 'private' and possibly shares only with his or her family or friends. The same holds where a user of Uploaded uploads a work to that platform and does not share his or her download link or shares it only with those people. In such cases that is not a 'public', but a private group (see point 58 of this Opinion).

32 See, in particular, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 44, 67 and 68 and the case-law cited).

33 See, by analogy, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 45). It goes without saying that in both cases the 'public' is not present at the place where the communication originates. Moreover, it is irrelevant whether that 'public' actually views or downloads the work. The critical act is the making available of the work to the public, thus the offering of a work on a publicly accessible site (see, in particular, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 63 and 64)).

34 See points 46 and 47 of this Opinion.

operators carry out acts of 'communication' and whether those acts are carried out without the authorisation of the authors of the works concerned. In Section 1, I will explain, employing this analytical framework and examining only the relevant arguments, why, in principle, only users who upload protected works carry out the 'communication to the public' of those works. Any primary liability arising from that 'communication' is therefore borne, as a rule, only by those users.

65. On the other hand, the question whether operators such as YouTube and Cyando are liable for copyright infringements committed by users of their platforms because, for example, those operators had knowledge and deliberately refrained from acting, they incited those users to commit such infringements or they were negligent does not, in my view, come within the scope of Article 3(1) of Directive 2001/29. As I will explain in Section 2, although the Court seems to have interpreted this provision, in *GS Media*,[35] *Stichting Brein I* ('Filmspeler')[36] and *Stichting Brein II* ('The Pirate Bay'),[37] to the effect that it may cover liability on the part of third parties (known as 'incidental', 'subsidiary', 'secondary' or 'indirect' liability), as I understand it, that liability is not actually harmonised in EU law. It is therefore covered by the rules on civil liability laid down in the law of the Member States. In the alternative, in Section 3 I will examine the activity of those operators in the light of the analytical framework resulting from those judgments and the related arguments.

1. The fact that the operators of platforms such as YouTube or Cyando do not, in principle, carry out acts of 'communication to the public'

66. As I explained in points 55 to 58 of this Opinion, an act of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 corresponds to the transmission of a protected work to a public. In this context, an act of 'making available' consists in offering members of the public the possibility of such transmission, which can be carried out at their request from a place and at a time individually chosen by them.

67. That being said, as a rule, any transmission of a work to a public requires a chain of interventions carried out by several persons who are involved in different ways and to various extents in that transmission. For example, the possibility for television viewers to watch a work broadcast on their television sets is the result of combined efforts, including those of a broadcasting organisation, one or more distributers, the operator of the terrestrial network and the suppliers of the viewers' aerials and television sets.

68. These interventions cannot all be considered acts of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. Otherwise any link in the chain would be liable vis-à-vis the authors, whatever the nature of its activity. In order to avoid the risk of such a broad interpretation, the EU legislature specified, in recital 27 of that directive, that the 'mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [that directive]'.[38]

69. A distinction should therefore be drawn, within the chain of interventions inherent in any transmission of a work to a public, between the person[39] carrying out the act of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and providers who, by providing 'physical facilities' for such transmission, act as *intermediaries* between that person and the public.[40]

35 Judgment of 8 September 2016 (C-160/15, EU:C:2016:644; '*GS Media*').

36 Judgment of 26 April 2017 (C-527/15, EU:C:2017:300; '*Stichting Brein I* ("Filmspeler")').

37 Judgment of 14 June 2017 (C-610/15, EU:C:2017:456;'*Stichting Brein II* ("The Pirate Bay")').

38 That recital reproduces the joint declaration concerning Article 8 of the WCT adopted by the Diplomatic Conference on 20 December 1996.

39 This may be a single person or several persons. I will use the singular for the sake of convenience.

40 Article 8(3) of Directive 2001/29 follows the same logic when it refers to the possibility for rightholders to obtain an injunction against 'intermediaries whose services are used by a third party to infringe a copyright or related right'. See also recital 59 of that directive.

70. In the present instance, I am of the opinion that, as is argued by Google, Cyando, the Finnish Government and the Commission, the role played by operators such as YouTube and Cyando in the 'communication to the public' of works uploaded by users of their platforms is, in principle, the role of an *intermediary*. The objection of Mr Peterson, Elsevier and the German and French Governments, according to which those operators go beyond that role reflects, in my view, a misunderstanding of the distinction between such 'mere provision of physical facilities' and an act of 'communication'.

71. I note that the principles governing this distinction were laid down in the Court's very first decision on Article 3(1) of Directive 2001/29 in *SGAE*.[41] In that judgment, the Court ruled that the reception by a hotel of a broadcast and its distribution by means of television sets to customers staying in its rooms constitutes an act of 'communication to the public' of the works contained in that programme. While the installation of the television sets in rooms in itself constituted a 'provision of physical facilities', the action by the hotel was not limited to such provision. By distributing the broadcast to those television sets, the hotel intentionally[42] transmitted the works contained therein to its customers — who constituted not only a 'public', but a 'new public', that is, persons who had not been considered by the authors of those works when they authorised their broadcast[43] — who, although physically within the broadcast's catchment area, would not, in principle, be able to enjoy those works without its intervention.[44]

72. According to that judgment, where a work is transmitted to a public, the person who carries out the act of 'communication' — by contrast with the providers who 'provide the physical facilities' — is the person who intervenes intentionally to transmit that work to a public such that, in the absence of its intervention, that public would be unable to enjoy it. By acting in this way, that person plays — to use the expression established by the Court in its subsequent case-law — an 'essential role'[45] in that transmission.

73. This explanation could be misunderstood. In absolute terms, any intermediary plays an important, or even crucial, role in that transmission, as it is one of the links in the chain making it possible. However, the role played by the person in question is more fundamental. The role is 'essential' because it is that person who decides to transmit a given work to a public and who actively initiates that 'communication'.

74. Conversely, intermediary providers whose services are used to allow or carry out a 'communication' do not decide, on their own initiative, to transmit works to a public. They follow the instructions given by users of their services in this regard. The latter decide to transmit the specific content and actively initiate their 'communication' by providing that content to the intermediaries and by thus introducing

41 Judgment of 7 December 2006 (C-306/05, EU:C:2006:764).

42 More specifically, the Court stated that the hotel intervened 'in full knowledge of the consequences of its action' (see judgment of 7 December 2006, *SGAE*, (C-306/05, EU:C:2006:764, paragraph 42). In my view, that expression is a synonym for intentional intervention (see point 100 of this Opinion).

43 According to the Court, when authors authorise the broadcast of their works, they are deemed to consider only the owners of television sets who receive the programme personally or within their own private or family circles. See judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 41).

44 See judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraphs 36 to 44). The Court has followed the same reasoning in similar situations. See, in particular, judgments of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 183 to 207); of 27 February 2014, *OSA* (C-351/12, EU:C:2014:110, paragraphs 22 to 36); and of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraphs 35 to 65).

45 See, in particular, judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 46). In some judgments this reasoning is expressed as two criteria: the 'essential role' played by the person carrying out the act of communication and the 'deliberate nature of his intervention' (see, in particular, *Stichting Brein II* ('The Pirate Bay'), paragraph 26). As I will explain below, in fact, these criteria are inextricably linked (see footnote 88 of this Opinion).

it into a process involving the transmission of that content to a 'public'.[46] It is therefore those users alone, in principle, who play the 'essential role' envisaged by the Court and carry out the acts of 'communication to the public'. Without their intervention, the intermediaries would have nothing to transmit and the 'public' would not be able to enjoy the works in question.[47]

75. On the other hand, a service provider goes beyond the role of an intermediary where it *intervenes actively in the 'communication to the public'* of works.[48] That is the case if the provider selects the content transmitted, determines it in some other way or presents it to the public in such a way that it appears to be its own.[49] In those circumstances, the provider carries out the 'communication', together with the third party that initially provided the content.[50] This is also the case if that same provider, on its own initiative, makes further use of that 'communication' by retransmitting it to a 'new public' or via a 'different technical means'.[51] In all these circumstances, a service provider does not merely 'provide physical facilities' within the meaning of recital 27 of Directive 2001/29. In fact, it plays an 'essential role'[52] as it makes an intentional decision to communicate a given work to a public.[53]

76. It follows from the above considerations that, contrary to the assertion put forward by Mr Peterson and the German Government, the mere fact that platforms such as YouTube or Uploaded allow the public to access protected works does not mean that their operators carry out the 'communication to the public' of those works within the meaning of Article 3(1) of Directive 2001/29.[54]

46 See the notes to the proposal for the WCT, No 10.10, which explain that, in 'making available', the decisive act is the *initial act of making the work available*, not the provision of server space or an electronic communication service. See also Koo, J., *The Right of Communication to the Public in EU Copyright Law*, Hart Publishing, Oxford, 2019, pp. 161-162.

47 For example, in broadcasting the 'communication to the public' is carried out by the broadcasting organisation which determines the transmitted works and actively initiates their 'communication' by introducing them into the technical process for their transmission to the 'public' (see, to that effect, Opinion of Advocate General Szpunar in *Stim and SAMI* (C-753/18, EU:C:2020:4, point 23) and Article 1(2)(a) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15)). On the other hand, distributers, which follow the instructions of that organisation, engage in the 'mere provision of physical facilities'.

48 See, to that effect, Opinion of Advocate General Szpunar in *Stim and SAMI* (C-753/18, EU:C:2020:4, points 32 to 37).

49 See, in Germany, the case-law of the Bundesgerichtshof (Federal Court of Justice), in the field of media law, according to which a provider makes a third-party statement its own when it identifies with it and integrates it into its own chain of thought in such a way that it appears to be its own (see, in particular, Bundesgerichtshof (Federal Court of Justice), 17 December 2013, VI ZR 211/12, § 19). This approach has been envisaged for intellectual property (see Bundesgerichtshof (Federal Court of Justice), 30 April 2008, I ZR 73/05).

50 See, by analogy, in the United Kingdom, section 6(3) of the Copyright, Designs and Patents Act 1988, which states, with regard to broadcasts, that the person(s) carrying out the act of 'communication to the public' are '(a) … the person transmitting the programme, if he has responsibility to any extent for its contents, and (b) … any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission'.

51 See judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147). In that judgment, the Court ruled that the capture of a broadcast programme by an organisation and its simultaneous, unaltered and unabridged retransmission by being streamed live on the internet constitutes a further use of that programme equivalent to an independent act of 'communication to the public' on the ground that such retransmission used a 'specific technical means' different from the broadcast.

52 As I will explain in my analysis of the second questions referred, the Court interprets Articles 12 to 14 of Directive 2000/31 to the effect that an intermediary provider may not rely on the exemptions from liability provided for therein if it plays 'an active role of such a kind as to give it knowledge of, or control over' the information provided by the users of its service (see judgments of 23 March 2010 *Google France and Google* (C-236/08 to C-238/08, '*Google France*', EU:C:2010:159, paragraphs 112 to 114), and of 12 July 2011 *L'Oréal and Others* (C-324/09, '*L'Oréal* v *eBay*', EU:C:2011:474, paragraph 113)). My suggested approach for drawing the distinction between an 'act of communication' and the 'mere provision of physical facilities' is close to this reasoning and allows Article 3(1) of Directive 2001/29 and Article 14(1) of Directive 2000/31 to be interpreted consistently. See, to that effect, Husovec, M., *Injunctions Against Intermediaries in the European Union — Accountable But Not Liable*?, Cambridge University Press, Cambridge, 2017, pp. 55 to 57.

53 For example, in the case that gave rise to the judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764), the hotel did not simply intervene passively in a transmission determined by the broadcasting organisation. It had decided, on its own initiative, to make a further use of the broadcast programme, not envisaged by the broadcasting organisation, by retransmitting it to its customers. Similarly, as the Court ruled in the judgment of 13 October 2011, *Airfield and Canal Digitaal* (C-431/09 and C-432/09, EU:C:2011:648, paragraphs 74 to 82), a satellite package provider which brings together a number of broadcasts from various broadcasting organisations for its customers does not simply engage in the 'provision of physical facilities' because it is actively involved in offering a package of television channels selected by it to a public defined by it. In addition, as the Court ruled in the judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913, paragraphs 37 to 51), a provider which picks up broadcast programmes and allows users of its service to record their desired programmes 'in the cloud' also does not merely engage in such 'provision'. That provider actively involves itself in the 'communication' as, inter alia, it selects the channels included in its service.

54 Further, the fact that operators such as YouTube and Cyando host protected works on their servers and transmit them when they receive a request to do so from a member of the public is not decisive.

77. *First of all*, as is asserted by Google and the Finnish Government, in so far as the works in question were uploaded by users of those platforms,[55] the users play an 'essential role' in making them available to the public. The users have decided to communicate the works to the public through those platforms by selecting the appropriate option in the case of YouTube and by sharing the relevant download links on the internet in the case of Uploaded.[56] Without their intervention, the operators of those platforms would have nothing to transmit and the public would not be able to enjoy the works.

78. *Second*, I note that the process of uploading a file to a platform such as YouTube or Uploaded, once initiated by the user, is automatic,[57] without the platform operator selecting or determining in any other way the content that is published there. I wish to state that any, possibly automated, check made in advance by that operator does not, in my view, constitute selection[58] in so far as that check is confined to identifying illegal content and does not therefore reflect its intention to communicate certain (and not other) content to the public.[59]

79. *Lastly*, those operators do not make further use of the 'communications to the public' initiated by their users since they do not retransmit the works concerned to a 'new public' or via a 'different technical means'.[60] There is, in principle, only one 'communication', which is determined by the users in question.

80. In my view, it follows that, in principle, operators such as YouTube and Cyando merely provide 'physical facilities', as envisaged in recital 27 of Directive 2001/29, which enable users of their platforms to carry out a 'communication to the public', within the meaning of Article 3(1) of that directive, of works chosen by the latter. In my view, none of the arguments presented before the Court calls this interpretation into question.

81. *First*, unlike Mr Peterson, Elsevier and the German and French Governments, I consider that neither the fact that an operator such as YouTube structures how the videos uploaded by users are presented on the platform by integrating them into a standard viewing interface and indexing them under different categories, nor the fact that the operator provides a search function and processes the search results, which are summarised on the home page in various categories, is relevant.[61]

55 YouTube also has a channel on which it broadcasts its 'own' content. That operator makes the 'communication to the public' of that content because it has produced and/or selected it.

56 See Opinion of Advocate General Szpunar in *VCAST* (C-265/16, EU:C:2017:649, point 27).

57 See points 16 and 30 of this Opinion.

58 The check that those operators carry out afterwards, inter alia, to react expediently to the notifications that they receive from rightholders cannot, a fortiori, be regarded as being the same as selection.

59 YouTube carries out such a check through its 'Content ID' software (see point 22 of this Opinion). In my view, it is not decisive that a check in advance is *automated*. In absolute terms, it is possible to imagine a content selection process carried out by software which determines algorithmically the content that best matches that which the operator wishes to have on its platform. However, that is not the case for a simple check of legality.

60 I wish to emphasise that the criteria of a 'new public' and a 'specific technical means' are relevant only with respect to further use of an initial communication. Those criteria make it possible to identify, among further uses, those which must be regarded as being 'secondary communications' (or 'retransmissions') requiring specific authorisation (for example, retransmission by cable of a broadcast programme). Those circumstances should not be confused with the situation in which a work, which has been communicated to the public in the past, is the subject of a new communication to the public that is independent from the first. In that regard, in accordance with Article 3(1) and (3) of Directive 2001/29, each of those communications to the public must be authorised, even if they are both targeting the same public or using the same technical means. Consequently, it is irrelevant whether the works uploaded to YouTube or Uploaded are legally available on another website. Those two uploads are independent and must each be the subject of an authorisation. See, to that effect, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634).

61 This question does not arise for a platform such as Uploaded, which does not have search or index functions for the hosted files. In that respect, I am not convinced by the argument put forward by Elsevier and the German Government that the lack of these functions is not a determining factor on the ground that third-party websites which act as link collections enable the public to find works that they wish to download from among the hosted content. Aside from the fact that, in my view, those functions are in any case not relevant for the purposes of determining whether a service provider carries out a 'communication to the public', it seems appropriate that the focus here should be on the acts of that provider and not on those of third parties with which it does not have any relationship.

82. In that regard, I note that that presentation structure and those various functions are intended to rationalise the organisation of the platform, to facilitate its use and, by doing so, to optimise access to the hosted videos. The requirement, which is implied by recital 27 of Directive 2001/29, that a service provider does not carry out a 'communication to the public' provided that it simply engages in the 'mere' provision of physical facilities does not, in my view, mean that the provider cannot optimise access to the content transmitted by organising its service.[62] Indeed, nothing requires the 'physical facilities' to be, in themselves, 'mere'. In my eyes, the fact that an online platform has some degree of sophistication, the purpose of which is to facilitate the use of that platform, is therefore unimportant. The line that the provider cannot cross is, in my view, active intervention in the communication to the public of works, as envisaged in point 75 of this Opinion.

83. A presentation structure and such functions are not, in my eyes, capable of demonstrating that the operator crosses that line. They do not suggest, inter alia, that it determines the content uploaded by users on the platform. Optimising access to the content should not, in particular, be confused with optimising the content itself. The operator would determine what makes up that content only in the second case.[63] Furthermore, the fact that a platform such as YouTube includes a standard viewing interface does not, in my view, allow it to be concluded that the operator presents the content to the public in such a way that it appears to be its own, provided that that interface indicates which user uploaded each video.

84. *Second*, the fact that, on a platform such as YouTube, registered users are presented with an overview of 'recommended videos' is also not decisive in my view. It is not disputed that those recommendations influence the content viewed by those users. However, to the extent that the recommendations are generated automatically based on the videos previously viewed by the user in question and have as their sole purpose facilitating that user's access to similar videos, they do not reflect the operator's decision to communicate a given work to a public. In any event, the fact remains that that operator does not determine in advance which works are available on its platform.

85. *Third*, contrary to the submissions made by Mr Peterson and Elsevier, the fact that an operator such as YouTube stipulates, in the terms of service for its platform, that each user grants that operator a worldwide, non-exclusive, royalty-free licence to use the videos uploaded by them does not call into question my suggested interpretation, as this kind of stipulation,[64] which authorises the platform operator to disseminate the content uploaded by its users and by which it further claims automatically and systematically to acquire rights to all that content,[65] does not demonstrate, in itself, that the operator intervenes actively in the 'communication to the public' of works, as envisaged in point 75 of this Opinion. Since that stipulation applies, specifically, systematically and automatically to any content uploaded, it tends not to show that that operator decides what content is transmitted. On the other hand, if that same operator reuses, under that licence, content uploaded by users of the platform,[66] it carries out, to that extent, acts of 'communication to the public'.

62 On the contrary, bringing together third parties wishing to communicate content and the public is a characteristic of an intermediary. See OECD, *The Economic and Social Role of Internet Intermediaries*, April 2010, p. 15.

63 Furthermore, contrary to the assertion made by Elsevier, it is not relevant, in my view, that an operator such as YouTube converts uploaded videos into a number of formats in order to adapt them for different players and connection speeds, as these are technical operations enabling and facilitating data transmission and thus playback of those videos by members of the public in their browsers (or a dedicated application). Such technical operations cannot be compared with a modification of content by the provider. See, by analogy, judgment of 13 October 2011, *Airfield and Canal Digitaal* (C-431/09 and C-432/09, EU:C:2011:648, paragraphs 60 and 61).

64 According to my research, such a stipulation can often be found in the terms of service of online platforms. See, in particular, those of Facebook (version of 31 July 2019, point 3.3, 'The permissions you give us', available at https://m.facebook.com/terms?locale=en_EN).

65 The question arises whether such a stipulation and the generous licence for use provided for therein is compatible with other provisions of intellectual property law or, as far as non-business users are concerned, with EU consumer law. Nevertheless, this question falls outside the scope of this Opinion. I will simply state that for business users the relevant rules are now laid down in Article 3(1)(e) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ 2019 L 186, p. 57).

66 I am thinking, in particular, of compilations such as 'YouTube Rewind'.

86. *Fourth*, I am not convinced by the argument put forward by Mr Peterson and Elsevier, according to which the business model adopted by operators such as YouTube or Cyando demonstrates that they do not merely engage in the 'provision of physical facilities' within the meaning of recital 27 of Directive 2001/29, but carry out the 'communication to the public' of works uploaded by users of their platforms. The applicants in the main proceedings assert in this regard that the remuneration received by those operators, which is generated inter alia from the sale of advertising space (the 'YouTube' model) or from subscriptions (the 'Cyando' model), is not the consideration for a technical service — in particular, the operators do not charge users for storage space as such — but depends on the attractiveness of the content uploaded on their platforms. In the case of YouTube, the advertising revenue earned increases with the number of visitors to the platform and in the case of Cyando the prospect of being able easily to make multiple downloads of attractive content encourages internet users to subscribe.

87. In general, the profit-making purpose pursued by a service provider is, to my mind, an element having entirely relative value in distinguishing acts of 'communication to the public' from such 'provision'. On the one hand, I recall that, after reflection,[67] the Court ruled in *Reha Training*[68] — rightly in my view — that a profit-making nature *is not a criterion* for determining the concept of 'communication to the public', but may be taken into account in calculating any remuneration or reparation due to the author for such 'communication'[69]. Thus, a profit-making nature can, at the most, be an *indicator* of the existence of such 'communication'.[70] However, the profit-making purpose pursued by a service provider is an even less useful indicator in making such a distinction where, on the other hand, the provision of 'physical facilities' enabling a 'communication to the public' is generally carried out for such a purpose.[71] In particular, the vast majority of online intermediaries provide their services for remuneration.

88. More specifically, the fact that the remuneration received by operators such as YouTube and Cyando depends on the attractiveness of the content published on their platforms by users of those platforms does not indicate that the operators themselves carry out the 'communication to the public' of any works to be found there. I would reiterate that, in my view, the decisive criterion is whether the service provider intervenes actively in that 'communication', as explained in point 75 of this Opinion. That mere fact does not, in my eyes, allow that criterion to be established.[72]

67 The Court had successively, first, reserved the question whether the existence of a 'communication to the public' depends on its profit-making nature (see judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 44)); second, ruled, cautiously, that it is an element which 'is not irrelevant' (see judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 204 to 206)); third, held, clearly, that a profit-making nature is a 'criterion' in the concept of 'communication to the public' and its absence rules out such 'communication' (see, to that effect, judgment of 15 March 2012, *SCF* (C-135/10, EU:C:2012:140, paragraphs 97 to 99)), before, fourth, affirming that a profit-making nature 'is not necessarily an essential condition' and 'does not determine conclusively' whether that is the case (judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraphs 42 and 43)).

68 Judgment of 31 May 2016 (C-117/15, EU:C:2016:379, paragraphs 49 and 62 to 64).

69 It is immaterial for the purposes of Article 3(1) of Directive 2001/29 whether the 'communication to the public' has a profit-making nature. As I have stated, the existence of such communication is an objective fact. Furthermore, as that provision confers an exclusive right on the author, in principle any 'communication to the public' of a work by a third party without the author's authorisation infringes that right, whether or not the third party seeks to make a profit. However, under Article 5(3)(a), (b) and (j) of that directive, Member States may provide for exceptions for certain non-profit-making 'communications'.

70 For example, the fact that a person transmits works for profit suggests that he does this not for a private group, but for persons in general, that is, a 'public'. In my view, this status as a mere indicator explains why in several judgments the Court has characterised certain acts as 'communications to the public' without raising the issue of the profit-making nature. See judgments of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76); of 27 February 2014, *OSA* (C-351/12, EU:C:2014:110); of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913); of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634); and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111).

71 See Opinion of Advocate General Szpunar in *Stim and SAMI* (C-753/18, EU:C:2020:4, points 43 and 44).

72 Moreover, the advertising revenue received by a platform such as YouTube is contingent on the platform's popularity across its possible uses. Similarly, subscriptions such as those offered by Cyando afford various advantages in terms of content downloads, but also, it would seem, in terms of storage capacity. Against this background, the line between 'consideration for the service' and 'consideration for the content' seems to be fine. Conversely, as the Court ruled in the judgment of 13 October 2011, *Airfield and Canal Digitaal* (C-431/09 and C-432/09, EU:C:2011:648, paragraph 80), the subscription fee paid by the public to a satellite package provider is (undeniably) the consideration for access to the works communicated by satellite.

89. I believe that my suggested interpretation is confirmed by the Court's case-law on trade mark law. In that regard, I note that, in *Google France*, the Court, sitting as the Grand Chamber, ruled that the use, as keywords in an internet referencing service such as the AdWords service provided by Google, of signs which are identical with or similar to trade marks, without the authorisation of their proprietors, constitutes a prohibited use of those trade marks within the meaning of EU law. Nevertheless, that use is made by the user of the referencing service, which chose those signs as keywords, and not by the service provider, which merely gives the user the means to do so. It is irrelevant that the provider is paid by its clients for the use of those signs. According to the Court, 'the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign'. [73]

90. Similarly, in *L'Oréal* v *eBay*, the Court, once again sitting as the Grand Chamber, ruled that the use, in offers for sale published in an online marketplace, of signs corresponding to trade marks, without the authorisation of their proprietors, constitutes a prohibited use of those trade marks. Nevertheless, there too, it is not the operator of the marketplace, but the users who published those offers for sale that engage in that use. To the extent that the operator simply allows users of its service to post such offers for sale and, in some cases, to use such signs on that marketplace, it does not make use of those signs itself. [74]

91. It is not disputed that, in particular, eBay structures the overall presentation of the advertisements of its user/sellers, indexes them under various categories and has put in place a search function. That operator makes recommendations to user/buyers, automatically, of offers similar to those which they have previously viewed. Furthermore, the operators' remuneration in the cases that gave rise to the judgments in *Google France* and in *L'Oréal* v *eBay* depends on the attractiveness of the content provided by the users of their services. In the AdWords service Google is paid on the basis of the number of clicks on advertising links using the keywords chosen by the user/advertisers. [75] eBay charges a percentage on transactions completed on the basis of the offers for sale posted in its marketplace. [76] These different factors clearly did not seem to be decisive or relevant to the Court, which did not even mention them in its reasoning. I therefore wonder why in the present cases they should be given the importance suggested by the applicants in the main proceedings. [77]

92. In the light of all the above considerations, I suggest that the Court answer the first questions to the effect that the operator of a video-sharing platform and the operator of a file-hosting and -sharing platform do not carry out an act of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 when a user of their platforms uploads a protected work there.

93. Consequently, those operators cannot be held *directly liable* under Article 3(1) of Directive 2001/29 where third parties make protected works available to the public through their platforms without the prior authorisation of the rightholders and without an exception or limitation being applicable. That conclusion does not rule out the possibility of some form of *secondary liability* on the part of those operators. This question must, however, be examined in the light of the rules on civil liability laid down by the Member States, which must observe the limits imposed by Articles 14 and 15 of Directive 2000/31. [78]

73 See *Google France*, paragraphs 50 to 57 and 104.

74 See *L'Oréal* v *eBay*, paragraphs 98 to 105. See also, to that effect, judgment of 2 April 2020, *Coty Germany* (C-567/18, EU:C:2020:267, paragraphs 34 to 48).

75 See *Google France*, paragraph 25.

76 See *L'Oréal* v *eBay*, paragraphs 28 and 110.

77 Moreover, by analogy, in the judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraphs 27 and 40), the Court proceeded from the premiss that the operator of a social networking platform merely provides a service enabling its users to communicate works to the public within the meaning of Article 3(1) of Directive 2001/29. I do not therefore see any reason to depart from this approach in the present instance.

78 See, by analogy, *Google France*, paragraph 57, *L'Oréal* v *eBay*, paragraph 104, and judgment of 2 April 2020, *Coty Germany* (C-567/18, EU:C:2020:267, paragraph 49).

2. The fact that Article 3(1) of Directive 2001/29 does not govern the secondary liability of persons facilitating the carrying out, by third parties, of illegal acts of 'communication to the public'

94. As a preliminary point, it should be noted, first, that in *GS Media* the Court ruled, in line with its judgment in *Svensson and Others*,[79] that the fact of posting, on a website, hyperlinks to works published illegally on another website may constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. In essence, the Court held that, by posting such links, the person plays an 'indispensable role' because he or she gives the public 'direct access' to the works concerned. Nevertheless, such posting of links constitutes a 'communication to the public' only if it is shown that the person who posted them *knew or ought to have known* that those hyperlinks provided access to works illegally published on the internet; such knowledge must be presumed where that person pursued financial gain.[80]

95. Then, in *Stichting Brein I* ('Filmspeler'), the Court ruled that the sale of a multimedia player on which there are pre-installed add-ons containing hyperlinks to websites illegally streaming protected works constitutes a 'communication to the public'. In that case, the Court held that the seller of the player was not simply engaged in a 'provision of physical facilities' but rather played an 'essential role' in the communication of the works on the ground that without the add-ons which it had pre-installed in the player, the purchasers of the player 'would find it difficult to benefit from those protected works', since the streaming websites concerned are not readily identifiable by the public. Furthermore, the Court focused on the fact that the seller of that multimedia player had *knowledge* of the fact that those add-ons enabled access to works broadcast on the internet *illegally*.[81]

96. Lastly, in *Stichting Brein II* ('The Pirate Bay'), the Court ruled that the making available and management of an internet platform which stores and indexes torrent files uploaded by its users, allowing them to share and download protected works in the context of a peer-to-peer network, constitutes a 'communication to the public'. According to the Court, the operators of that platform did not simply engage in a 'mere provision of physical facilities' but played an 'essential role' in making the works available on the ground that, on the platform, they offered various ways, including a search function and an index of hosted torrent files, to make it easy to locate those files. Thus, without their intervention, 'the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex'. In that case too, the Court stressed the fact that the operators of the platform had *knowledge* of the fact that works shared by the intermediary on that platform were generally shared *illegally*.[82]

97. In principle, as I explained in point 56 of this Opinion, and as is stated in recital 23 of Directive 2001/29 and has been held by the Court on many occasions,[83] a 'communication to the public' within the meaning of Article 3(1) of that directive corresponds to the *transmission* of a work to a public. That recital specifies, in addition, that that provision 'should not cover any other acts'. If, in the case of a work being made available, it is sufficient that the person at issue gives the public access to the work, that access must involve, as I noted in point 57 of this Opinion, making it possible for that work to be transmitted, at the request of a member of the public.

79 Judgment of 13 February 2014 (C-466/12, EU:C:2014:76).

80 See *GS Media*, paragraphs 40 to 51.

81 See *Stichting Brein I* ('Filmspeler'), paragraphs 41 to 51.

82 See *Stichting Brein II* ('The Pirate Bay'), paragraphs 35 to 46.

83 See, in particular, judgments of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 193); of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 38); and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111, paragraphs 49 and 62). In the judgment of 24 November 2011, *Circul Globus București* (C-283/10, EU:C:2011:772, paragraph 40), the Court also held that Article 3(1) of Directive 2001/29 does not cover any activity which does not involve a 'transmission' or a 'retransmission' of a work.

98. However, none of the acts at issue in those three judgments examined in this section consist, to my mind, in the actual or potential transmission of a work to a public. *Stichting Brein II* ('The Pirate Bay') provided the most representative example in this regard. Because the works shared on the peer-to-peer network were not published on the platform at issue, its administrators were not physically able to transmit them to the public. In fact, that platform merely *facilitated* transmissions made by its users on that network.[84] The same applied in *GS Media* and *Stichting Brein I* ('Filmspeler'). The posting of the hyperlinks and the sale of the multimedia player at issue in those judgments *facilitated* access to the works illegally made available to the public on the websites in question.[85]

99. To sum up, in my view, in those judgments the Court brought within the scope of Article 3(1) of Directive 2001/29 acts which, strictly speaking, do not constitute actual or potential transmissions of works, but which *facilitate* the carrying out of such illegal transmissions by third parties.[86]

100. In addition, in those same judgments, the Court incorporated into the concept of 'communication to the public' a criterion relating to *knowledge of the illegal act*. However, as Elsevier and the French Government maintain, that concept does not, in principle, include such a criterion. Although the Court consistently rules that the existence of such 'communication' requires that the person concerned intervenes 'in full knowledge of the consequences of its action', 'deliberately', 'intentionally' or in a 'targeted' manner,[87] these different terms, in my view, simply seek to indicate, in principle, that, as I explained in point 72 of this Opinion, that concept implies an *intention to transmit* a work to a public.[88] That matter is, on the face of it, different from the issue of whether the person who carried out the 'communication to the public' of a work without the authorisation of the author is aware of the fact that that 'communication' is, in principle, illegal.

101. In that regard, as I stated in point 64 of this Opinion, under Article 3(1) of Directive 2001/29, the existence of a 'communication to the public' is — subject to the qualification mentioned in the preceding point — generally considered to be an *objective fact*. Whether that 'communication' is legal or illegal also does not, in principle, depend on the knowledge of the person who carries it out, but essentially on whether the author has authorised that 'communication'.[89] The knowledge of that person is nevertheless taken into consideration at the stage at which it is decided what penalties may be imposed and what compensation that person may be ordered to pay. In particular, it is apparent from Article 13 of Directive 2004/48 that a person who infringes an intellectual property right *knowingly* or *with reasonable grounds to know* is obliged to pay to the rightholder damages appropriate to the actual prejudice suffered by him or her as a result of the infringement. Conversely, where a person did not *knowingly* or *with reasonable grounds to know* infringe, a lesser order in the form of the recovery of the profits that that person has made or the payment of pre-established damages may be delivered.[90]

84 I note that the liability of users of a peer-to-peer network under Article 3(1) of Directive 2001/29 is the subject of the pending Case C-597/19, *M.I.C.M.*

85 The question of hyperlinks falls outside the scope of this Opinion. The Court will have an opportunity to examine it again in the pending Case C-392/19, *VG Bild-Kunst*.

86 See, in that context, Opinion of Advocate General Wathelet in *GS Media* (C-160/15, EU:C:2016:221, points 54 to 61). Moreover, in paragraph 26 of the judgment in *Stichting Brein II* ('The Pirate Bay'), the Court modified the initial definition of 'essential role', which is now understood as being where a person 'intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, *or would be able to do so only with difficulty*' (my emphasis).

87 See, in particular, judgments of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 42); of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 194); of 15 March 2012, *SCF* (C-135/10, EU:C:2012:140, paragraphs 91 and 94); and of 27 February 2014, *OSA* (C-351/12, EU:C:2014:110, paragraph 26).

88 The unintended transmission of a work to a public — for example, music played in a private home on loud speakers set on a high volume which passers-by hear from the street — does not therefore constitute a 'communication to the public'. The intentional character of a communication can be inferred from objective factors relating to the very nature of the intervention by the person in question. This explains why, apart from in *GS Media*, *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay'), the Court has never carried out a separate examination of this point and has rightly presented it as being inextricably linked to the 'essential role' of the person in question.

89 See, by analogy, Opinion of Advocate General Campos Sánchez-Bordona in *Stichting Brein* (C-527/15, EU:C:2016:938, point 71).

90 Moreover, certain measures provided for in Directive 2004/48 are available only for acts carried out on a commercial scale, which excludes acts carried out by end-consumers acting in good faith. See recital 14 and Article 6(2), Article 8(1) and Article 9(2) of that directive.

102. That being said, the fact that a person — in particular, an intermediary provider — knowingly facilitates the carrying out of illegal acts of 'communication to the public' by third parties is evidently reprehensible conduct. Nevertheless, it is generally accepted that that is a question of *secondary liability*, which falls within the rules on civil liability laid down by the Member States.[91] That secondary liability for infringements of copyright by third parties generally also involves some mental element such as knowledge of unlawfulness or intent.[92]

103. I consider that, because Article 3(1) of Directive 2001/29 harmonises the material content of the right of 'communication to the public', it determines acts falling within that exclusive right and, to that extent, *primary liability* borne by those who commit such acts illegally. On the other hand, nothing in the wording of that provision or in the other provisions of that directive suggests that it was intended to govern matters of *secondary liability*.[93] That is especially notable as, when the EU legislature wishes for such questions to be covered by the measures which it adopts, it does not fail to stipulate this.[94]

104. On those grounds, I have reservations about the reasoning applied by the Court in *GS Media*, *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay'). Irrespective of whether it would be desirable for there to be a uniform solution at EU level for the actions of persons who deliberately facilitate the carrying out by third parties of illegal acts, and even though such uniformity would help to ensure a high level of copyright protection, the fact remains that, in my view, no such provision is made in EU law as it stands at present.[95] It would be for the EU legislature to introduce a secondary liability regime into EU law.

105. I wish to emphasise that posting hyperlinks to works illegally published on a website when fully aware that it is illegal to do so, selling a multimedia player such as the 'Filmspeler' or managing a platform such as 'The Pirate Bay' must, of course, all constitute offences. However, it is not necessary to bring such actions within the field of application of Article 3(1) of Directive 2001/29 in order to achieve that result. I consider that a response to such actions can and must be found in the rules on civil liability or even the criminal law of the Member States. My suggested interpretation therefore does not leave authors unprotected in that regard.

91 In Germany, liability for complicity is laid down in Paragraph 830 of the *Bürgerliches Gesetzbuch* (Civil Code, BGB) (see, on this subject, my analysis of the fifth and sixth questions referred). In the United Kingdom, authorisation, procurement of the means or incitement to commit an infringement constitutes a tort (see Arnold, R., and Davies, P.S., 'Accessory liability for intellectual property infringement: the case of authorisation', *Law Quarterly Review*, No 133, 2017, pp. 442-468). See, also, by analogy, in the United States, the rules on contributory infringement (see Ginsburg, J.C., 'Separating the *Sony* Sheep from the *Grokster* Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs', *Arizona Law Review*, vol. 50, 2008, pp. 577-609).

92 See, in particular, Leistner, M., 'Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators', *Journal of Intellectual Property Law & Practice*, 2017, vol. 12, No 2, pp. 136-149; Angelopoulos, C., 'Communication to the public and accessory copyright infringement', *Cambridge Law Journal*, 2017, vol. 76, No 3, pp. 496-499; Koo, J., op. cit., p. 117, and Ohly, A., 'The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?', *Journal of Intellectual Property Law & Practice*, 2018, vol. 13, No 8, pp. 664-675.

93 With the exception, however, of the rules on injunctions against intermediaries in Article 8(3) of Directive 2001/29 (see my analysis of the fourth questions).

94 Many directives include an article requiring Member States to make it an offence to incite, aid or abet the acts which they seek primarily to penalise. See, in particular, Article 7 of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1); Article 8 of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ 2013 L 218, p. 8); Article 6 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ 2014 L 173, p. 179); Article 5 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29); and Article 4 of Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ 2018 L 284, p. 22).

95 See Opinion of Advocate General Poiares Maduro in Joined Cases *Google France and Google* (C-236/08 to C-238/08, EU:C:2009:569, point 48); Opinion of Advocate General Jääskinen in *L'Oréal and Others* (C-324/09, EU:C:2010:757, points 55 and 56); and Opinion of Advocate General Szpunar in *Stichting Brein* (C-610/15, EU:C:2017:99, point 3).

106. Moreover, in *Google France* and *L'Oréal* v *eBay*, the Court opted not to extend, in trade mark law, the scope of primary liability to acts by intermediaries which could contribute to trade mark infringements committed by users of their services. The Court rightly referred to the rules on civil liability provided for in the law of the Member States and the limits laid down by Directive 2000/31.[96] I am therefore unsure that it is necessary to depart from that approach in the field of copyright, as EU legislation has been harmonised to a similar degree and pursues the same objective of a high level of protection of intellectual property in both these fields.

3. In the alternative — whether operators such as YouTube and Cyando deliberately facilitate the carrying out by third parties of illegal acts

107. Should the Court consider it appropriate, in the present cases, to apply the analytical framework adopted in *GS Media*, *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay'), despite the reservations I have expressed in the preceding section, I will offer, in the alternative, an examination of the present cases with regard to that analytical framework.

108. As I understand those judgments, the intervention of a person in the transmission of a work to a public, other than the person who, having determined that transmission, carries out the act of 'communication to the public' in the strict sense, must be treated in the same way as such an act of 'communication' if two criteria are satisfied.

109. *First*, the person in question must play an 'essential role' in the transmission. As it is understood in those judgments, a person plays that 'role' where they facilitate that transmission.[97] In this instance, operators such as YouTube and Cyando clearly satisfy that criterion.

110. *Second*, the intervention by that person must have a 'deliberate nature', which means that he or she must have knowledge that the communication that he or she is facilitating is illegal. The manner in which this criterion is to be interpreted in the present cases is much less clear. The problem arises because there is no framework in EU law relating to this mental element. I can therefore only speculate, drawing inspiration from the judgments in *GS Media*, *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay'), national case-law on secondary liability and the logic stemming from the conditions which intermediary providers must meet under Article 14(1)(a) and (b) of Directive 2000/31 in order to benefit from the exemption from liability under that provision.[98]

111. In this regard, as the referring court states and as the Commission asserts, an operator such as YouTube or Cyando can, without any great difficulty, be considered to intervene 'deliberately' in the illegal 'communication to the public' of a particular work carried out through its platform if it had knowledge or awareness of the existence of the file containing the work in question — in particular if it had been notified of this — and it did not act expeditiously, upon obtaining such knowledge or awareness, to remove or to disable access to that file.[99] In such a situation, it is reasonable to take the view that, by failing to act when it had the power to do so, the operator approved that illegal

96 See *Google France*, paragraph 57, and *L'Oréal* v *eBay*, paragraph 104.

97 See, to that effect, *Stichting Brein I* ('Filmspeler'), paragraphs 41 and 42, and *Stichting Brein II* ('The Pirate Bay'), paragraphs 26, 34, 36 and 37. See, with regard to the concept of 'essential role', as it is understood, in my view, in other judgments of the Court, point 72 of this Opinion.

98 If the Court wishes to maintain a criterion of knowledge of the illegal act for the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it will have to follow the principles stemming from Article 14(1) of Directive 2000/31, if there is not to be a risk of the situation mentioned in footnote 20 of this Opinion where a service provider is liable under the former provision, but exempt under the latter.

99 See Opinion of Advocate General Szpunar in *Stichting Brein* (C-610/15, EU:C:2017:99, points 51 and 52) and, by analogy, judgment in *GS Media*, paragraph 49.

'communication' or demonstrated manifest negligence. The questions of the circumstances in which an operator obtains such knowledge or awareness and whether, if necessary, it acted 'expeditiously' should, in my view, be determined on the basis of the same principles as are applied in connection with the conditions laid down in Article 14(1)(a) and (b) of Directive 2000/31.[100]

112. On the other hand, like the Commission, and unlike Mr Peterson, Elsevier and the German and French Governments, I do not think that knowledge of the illegal act can be *presumed* merely because the operator in question pursues a profit-making purpose.

113. It is true that in *GS Media* the Court ruled that when the person who posts on a website hyperlinks to protected works published without the authorisation of their author on another website does so for the purpose of making a profit, it must be presumed (subject to rebuttal) that that person had knowledge of the protected nature of those works and of that lack of authorisation.[101] However, aside from the fact that, in its subsequent case-law, the Court seems to have confined this approach to hyperlinks,[102] I think that, in any event, this presumption cannot be applied in this present cases.

114. In *GS Media*, the operator of the website at issue had posted the contested links itself. It therefore had knowledge of the content to which those links led. As Cyando maintains, this circumstance formed the basis for a presumption of fact. On that basis, the Court could expect that operator to carry out the 'necessary checks' prior to posting to ensure that the works were not protected works, illegally published on the website to which those links led.[103]

115. By contrast, I note that it is not generally the platform operator that uploads the content. To apply the approach adopted in *GS Media* in this context would be tantamount to saying that because the operator pursues a profit-making purpose in general, it could be presumed not only to have knowledge of all the files on its servers, but also to be aware of whether or not they are illegal, it being for the operator to rebut that presumption by showing that it made the 'necessary checks'. Such an approach would amount to imposing on such an operator the general obligation to monitor the information which it stores and actively to seek facts or circumstances indicating illegal activity, contrary to the prohibition laid down in this regard in Article 15(1) of Directive 2000/31.[104]

116. It must still be examined whether, as Mr Peterson, Elsevier and the French Government claim, operators such as YouTube and Cyando could be held liable because *they had knowledge, in general and in the abstract*, of the fact that their platforms are used by third parties (inter alia) to share protected works online illegally.

100 I therefore refer, on these points, to my analysis of the third questions referred. I would state, however, that the idea of 'awareness' (which refers to the sentence of Article 14(1)(a) of Directive 2000/31, according to which 'the provider … (is) aware of facts or circumstances from which the illegal activity or information is apparent') corresponds to the idea mentioned in paragraph 49 of the judgment in *GS Media* that a person is liable if he 'ought to have known' that he was facilitating an illegal communication.

101 See *GS Media*, paragraph 51.

102 In paragraph 49 of *Stichting Brein I* ('Filmspeler'), the Court mentioned the presumption made in *GS Media*. However, although the multimedia player in question was sold for profit, it did not really apply that presumption (see paragraph 51 of the judgment). Furthermore, in *Stichting Brein II* ('The Pirate Bay'), the Court did not even mention that presumption.

103 See *GS Media*, paragraph 51.

104 See Opinion of Advocate General Szpunar in *Stichting Brein* (C-610/15, EU:C:2017:99, point 52). Up to now, the Court has specified the limits imposed by Article 15(1) of Directive 2000/31 with regard to the injunctions which may be issued against a provider storing information provided by users of its service (see, inter alia, the judgment in *L'Oréal* v *eBay*, paragraph 139). In my view, account must be taken of that provision beyond the question of those injunctions. An interpretation of EU law cannot be adopted which effectively *imposes ex ante* such an obligation on such a provider. Furthermore, even if, on the second questions, the Court were to rule that operators such as YouTube or Cyando do not come within the scope of Articles 14 and 15 of that directive, a general obligation to monitor and actively to seek illegal activity would be incompatible with other provisions of EU law (see Section F of this Opinion).

117. This question is highly complex. Like the YouTube and Uploaded platforms, many goods or services can be used both for legal or even socially desirable purposes and for illegal purposes. In my view, the provider of such goods or services cannot be held liable for illegal uses of them by third parties solely because it knows about or suspects such uses. Such a low liability standard would be likely to discourage the production and marketing of such goods or services to the detriment of their legal uses and, by extension, to inhibit the development of similar or innovative goods or services. [105]

118. The mere fact that a provider profits from those illegal uses also cannot be decisive. In this connection, Mr Peterson, Elsevier and the French Government have highlighted that YouTube is financed, inter alia, through advertising on the platform, that the advertising revenue earned by it increases as attractive content is published there and it is 'commonly accepted' that in 'the vast majority of cases' the content is protected works uploaded without the authorisation of their authors. Aside from the fact that this logic seems somewhat simplistic for a platform such as YouTube, [106] I would point out that the revenue generated by advertisements placed indiscriminately on that platform is contingent on the overall number of visitors and therefore depends on both its legal uses and its illegal uses. Any provider of goods or services that might be subject to both kinds of use will inevitably derive some of its profits from users who purchase or utilise them for illegal purposes. Other facts must therefore be demonstrated.

119. In that regard, the purpose of a secondary liability regime should be borne in mind. As is clear from point 117 of this Opinion, in my view, such a regime must seek to discourage conduct that facilitates copyright infringements without, however, discouraging innovation or hindering any legal use of goods or services that can also be used for illegal purposes.

120. In that context, I concur with the Finnish Government that a service provider can be held liable, without it being necessary to show that that provider had knowledge or an awareness of specific copyright infringements, if it is shown that it had the *intention*, in providing its service, to facilitate the carrying out of such infringements by third parties. I consider that the judgments in *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay') must be understood to this effect. In the first judgment, the Court stated that the seller of the 'Filmspeler' had general knowledge of the fact that the player could be used for illegal purposes. [107] In the second judgment, the Court held that the operators of 'The Pirate Bay' platform knew, in general, that it facilitated access to shared works without the prior authorisation of their authors and that, in any event, they could not be unaware of it, given that a very large number of torrent files on the platform related to such works. [108] In those cases, those persons *openly expressed their intention* to facilitate, through their player or platform, the carrying out of illegal acts of 'communication to the public' by third parties. [109]

105 See Supreme Court of the United States, *Sony Corp. of America* v. *Universal City Studios Inc.*, 464 US 417 (1984). In that case, the rightholders sought to establish the secondary liability of Sony for manufacturing and marketing the 'Betamax' video tape recorder on the ground that, through that video tape recorder, Sony provided third parties with the means to commit copyright infringements (in particular the unlawful copying of television broadcasts) and it could reasonably know that such infringements would occur. However, their action was dismissed on the ground that, while that video tape recorder could be used for unlawful purposes, it could also be used for a substantial number of lawful purposes.

106 I note in this regard that while YouTube very definitely benefits from the fact that its platform hosts popular works, such as television programmes, films or music videos from major performers, there is often nothing illegal about their presence on the platform. As Google has asserted without being contradicted, many content providers and rightholders publish content on YouTube. In addition, Google has asserted, again without being contradicted, that YouTube provides access to cultural, informative and educational content created by users which is, in itself, attractive (see point 43 of this Opinion).

107 See, to that effect, *Stichting Brein I* ('Filmspeler'), paragraph 50.

108 See *Stichting Brein II* ('The Pirate Bay'), paragraph 45.

109 See *Stichting Brein I* ('Filmspeler'), paragraphs 18 and 50, and *Stichting Brein II* ('The Pirate Bay'), paragraph 45. As I will explain in my analysis of the third questions referred, an online provider demonstrating such an intention also loses, to my mind, the benefit of the exemption from liability under Articles 12 to 14 of Directive 2000/31. See, by analogy, Supreme Court of the United States, *MGM Studios Inc.* v. *Grokster Ltd.*, 545 US 913, 2005. In that judgment, two companies which provided software enabling file-sharing on a peer-to-peer network were held to be liable for copyright infringements committed by users of the software because the companies had openly promoted its potential illegal use.

121. In this instance, neither YouTube nor Cyando openly touts the possibilities for illegal uses of their platforms. Mr Peterson and Elsevier nevertheless argue that those operators should be held liable *in view of the way in which they have organised their services*. On this point, the applicants in the main proceedings rely on several lines of reasoning: first, the operators showed wilful blindness to illegal uses of their platforms (by enabling their users to publish content there in an automated manner and without being checked in advance); second, they incite them to use those platforms illegally; and, third, they were negligent vis-à-vis those uses (because they failed to fulfil duties of care by not carrying out in advance any check of uploaded content either). [110]

122. Some clarification is needed at the outset. In my view, an operator cannot be held liable, on grounds of wilful blindness or negligence, merely because it enables users of its platform to publish content there by an automated process and it does not carry out a general check on that content before it is uploaded. First, it cannot reasonably be claimed, although Elsevier does so, that by organising its platform in this way, the operator is quite simply seeking to evade any liability. [111] Second, Article 15 of Directive 2000/31 prevents such a provider from being expected to monitor in a general and abstract manner the information which it stores and actively to seek illegal activity on its servers. It is not therefore possible to consider that the fact that it does not carry out such general monitoring is tantamount to wilful blindness or negligence. [112] Furthermore, and more generally, the mere negligence of a provider should not, by definition, be sufficient — without prejudice to the situation envisaged in point 111 of this Opinion — to show that that provider is intervening 'deliberately' to facilitate the copyright infringements committed by users of its service.

123. That being said, in my view, the way in which a provider organises its service can, in some circumstances, actually show the 'deliberate nature' of its intervention in illegal acts of 'communication to the public' committed by users of that service for the purposes of Article 3(1) of Directive 2001/29, as interpreted by the Court in *GS Media*, *Stichting Brein I* ('Filmspeler') and *Stichting Brein II* ('The Pirate Bay'). Such is the case where characteristics of that service demonstrate the bad faith of the provider in question, which may take the form of an intention to incite or wilful blindness towards such copyright infringements. [113]

124. In that regard, it is appropriate, in my view, to check, first, whether the characteristics of the service in question have an objective explanation and offer added value for legal uses of that service and, second, whether the provider took reasonable steps to combat illegal uses of that service. [114] On this point, the provider again cannot be expected, in accordance with Article 15(1) of Directive 2000/31, to monitor in a general manner all the files which users of its service intend to publish before they are uploaded. The second part of the test should, to my mind, rather constitute a defence for service providers. In that respect, the fact that the provider generally complies diligently with the obligations to remove content under Article 14(1)(b) of that directive or any obligations which might have been imposed on it by an injunction or the fact that that provider voluntarily took other measures, will tend to show its good faith.

125. In the present instance, it is for the national court to apply that test to operators such as YouTube and Cyando. Nevertheless, it seems appropriate to me to offer some guidance in that respect.

110 See point 63 of this Opinion

111 Elsevier is actually referring to the liability of 'conventional' content providers, which select the content which they transmit. As I have endeavoured to show, platforms do not play the same role.

112 I repeat that, even if the Court had to consider that operators such as YouTube or Cyando fell outside of the scope of Articles 14 and 15 of Directive 2000/31, other provisions of EU law would prevent such a solution.

113 By acting in that way, a service provider also loses, in my view, the benefit of the exemption from liability laid down in Article 14(1) of Directive 2000/31.

114 See, to that effect, Stallings, E., 'Improving Secondary Liability Standards in Copyright by Examining Intent: Why Courts Should Consider Creating a Good-Faith Standard for Secondary Liability', *Journal of the Copyright Society of the U.S.A.*, vol. 57, No 4, 2010, pp. 1017-1038.

126. *In the first place*, in my view it is difficult, given the characteristics of a platform such as YouTube, to accept that its operator intends to facilitate illegal uses of that platform. In particular, the fact that the platform's search and indexing functions facilitate, where appropriate, access to illegal content cannot constitute an indicator of that intention. Those functions have an objective explanation and offer added value for legal uses of that platform. Although in *Stichting Brein II* ('The Pirate Bay') the Court highlighted the fact that the operators of the platform at issue had introduced a search engine and indexed the hosted files as an indicator of the 'deliberate nature' of their intervention in the illegal sharing of protected works,[115] that assessment cannot be seen in isolation from the particular context of that case, characterised by an intention, expressed by the operators, to facilitate copyright infringements.

127. Furthermore, contrary to the assertion made by Elsevier, I consider that the fact that a platform operator such as YouTube enables some users to insert advertisements into their videos and pays them a proportion of the revenue generated[116] is not sufficient to indicate an intention to incite users to upload protected works without the authorisation of their authors. On the contrary, it is not in dispute that, in the case of YouTube, those advertisements are inserted via Content ID, which is intended to ensure that this possibility is available only to rightholders, as it automatically detects video uploads by third parties containing protected works and, where necessary, allows those rightholders themselves to place advertisements in the video in question and to receive the advertising revenue from it.[117]

128. This leads me to the fact that YouTube also put in place tools, that software in particular, in order to combat copyright infringement on its platform.[118] That fact goes some way towards demonstrating that operator's good faith as regards the illegal use of its platform, as I indicated in point 124 of this Opinion.[119]

129. *In the second place*, I fear, however, that matters are less clear for Uploaded. In that regard, on the one hand, I do not concur with Elsevier that the fact that an operator allows users of its platform to upload files 'anonymously' there shows its intention to facilitate infringements. It is clear from the documents before the Court that in order to upload a file to Uploaded it is necessary to create an account, providing a first name, surname and email address. Elsevier thus criticises the fact that Cyando does not check the accuracy of the information provided by the user by means of an identity verification or authentication system. Although the possibility for anyone to use the internet and online services without an identity check can indeed be misused by ill-intentioned individuals for wrongful activities, I consider that that possibility is, however, protected, above all, by such fundamental norms as the right to privacy, freedom of expression and conscience and data protection, particularly in EU law[120] and international law.[121] Identity verification or authentication systems thus may be used, in my view, only for specific services in certain circumstances laid down in law.

115 See *Stichting Brein II* ('The Pirate Bay'), paragraphs 36 and 38.

116 It should be borne in mind that, according to the referring court, the videos at issue in Case C-682/18 do not, a priori, contain such advertisements.

117 See point 22 of this Opinion.

118 See points 21 and 22 of this Opinion.

119 I note that that interpretation does not mean that every service provider should put in place such software and that, if it fails to do so, it should be liable on the basis of wilful blindness. As EU law stands at present, nothing obliges it to do so — without prejudice, however, to the possibility of requiring a service provider, by means of an injunction, in well-defined circumstances and according to its resources, to use a filtering tool (see my analysis of the fourth questions referred).

120 In addition to the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') concerning the rights in question, see, in a similar field, recitals 9, 33, 34, Article 6(1) and Article 9(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

121 See Council of Europe, Declaration on freedom of communication on the Internet adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies, Principle 7; Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, *Freedom of expression and the Internet*, paragraphs 130 to 136; and United Nations, General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/29/32, 29 May 2015, pp. 12, 16 and 56.

130. The mere fact that a file hosting service such as Uploaded generates download links for hosted files and permits users to share them freely also fails, to my mind, to demonstrate an intention to facilitate copyright infringements. Those links have an objective explanation and offer added value for legal uses of the service. Even the proportion of illegal uses of Uploaded — for which the parties in the main proceedings offer radically different estimates [122] — cannot, in my eyes, in itself demonstrate that that operator has that intention, in particular if the latter has taken reasonable steps to combat such uses.

131. *On the other hand*, I am, nevertheless, unsure about the 'partnership' programme implemented by Cyando. I recall that under that programme Cyando pays remuneration to some users according to the number of downloads of the files uploaded by them. [123] I harbour doubts as to the objective explanation and the added value of such a programme for legal uses of the service. On the other hand, it has been established before national courts that that programme has the effect of encouraging users to upload popular works so that they can be downloaded illegally. I therefore cannot rule out that the 'deliberate nature' of a provider's intervention in illegal acts committed by its users may be inferred from the implementation of that programme. [124] This would, where appropriate, be for the national court to verify.

B. The field of application of the exemption from liability under Article 14(1) of Directive 2000/31 (second questions)

132. As I have mentioned, Section 4 of Directive 2000/31 contains a number of provisions relating to the liability of intermediary service providers. Within that section, Articles 12, 13 and 14 of the directive each envisage, in their paragraph 1, a 'safe harbour' for 'mere conduit', 'caching' and 'hosting' activities respectively. [125]

133. Article 14(1) of Directive 2000/31 applies, more precisely, where 'an information society service is provided that consists of the storage of information provided by a recipient of the service'. That provision stipulates, in essence, that the provider of such a service *cannot be held liable* for the information which it stores at the request of its users unless the provider, upon obtaining knowledge or awareness that the recipient's information is illegal, has not expeditiously removed or disabled access to it.

134. I must point out that the purpose of this provision is not to determine *positively* the liability of a provider. It simply limits *negatively* the situations in which it can be held liable on that basis. In addition, the exemption laid down by that provision concerns *only liability that may result from the information* provided by users of its service. It does not cover *any other aspect* of that provider's activity. [126]

122 Elsevier submits that copyright-infringing content represents between 90 and 96% of the files hosted on Uploaded, which is why, in Question 1(b) in Case C-683/18, the Bundesgerichtshof (Federal Court of Justice) asks about the relevance of this fact. It also explains that, if this were actually a relevant factor, that claim would have to be proven by Elsevier when appeal proceedings are reopened. Cyando affirms that only a very low percentage (1.1%) of all files actually viewed represent the making available to the public of content protected by copyright, corresponding to 0.3% of the total volume of data stored.

123 This amounts to tens of thousands of euro per one thousand downloads. See point 31 of this Opinion.

124 See, in the same vein, Bundesgerichtshof (Federal Court of Justice), 15 August 2013, I ZR 80/12 (*File-Hosting Service*), GRUR 1030, § 38. Such a programme is vastly different from sharing the revenue derived from advertising on a video-sharing platform such as YouTube. First, while it is possible to explain revenue sharing in the context of such a platform, a 'partnership' programme seems more curious in the context of a platform the purpose of which is to host files. Second, I note that, in the case of YouTube, that revenue is shared securely.

125 Articles 12 to 15 of Directive 2000/31 draw inspiration from the Digital Millennium Copyright Act, adopted by the US federal legislature in 1998, which established similar exemptions from liability specifically for copyright (Title 17, Chapter 5, section 512 of the United States Code).

126 See the Opinion of Advocate General Jääskinen in *L'Oréal and Others* (C-324/09, EU:C:2010:757, point 153)

135. By its second questions, the Bundesgerichtshof (Federal Court of Justice) wishes, in essence, to know whether operators such as YouTube and Cyando can benefit from Article 14(1) of Directive 2000/31 with regard to the files that they store at the request of users of their platforms.

136. In my view, that is generally the case. I do, however, consider it necessary, before I explain my position, to clarify one point concerning the relationship between that provision and Article 3(1) of Directive 2001/29.

137. I note that the referring court has asked its second questions only if the Court answers the first questions in the negative — as I have suggested that it should — to the effect that operators such as YouTube and Cyando do not carry out the 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 of works uploaded — at times illegally — by users of their platforms. It thus seems to presume that, on the (contrary) hypothesis that those operators are directly liable under Article 3(1) for such illegal 'communications', they may not, *as a matter of principle*, rely on the exemption under Article 14(1) of Directive 2000/31. [127]

138. However, Article 14(1) of Directive 2000/31 applies, horizontally, to *all forms of liability* which the providers in question may incur in respect of any kind of information which they store at the request of the users of their services, whatever the source of that liability, the field of law concerned and the characterisation or exact nature of the liability. That provision therefore covers, in my view, *both primary and secondary* liability for the information provided and the activities initiated by those users. [128]

139. Therefore, in my view, while Article 14(1) of Directive 2000/31 is, as a matter of principle, inapplicable where a provider communicates to the public its 'own' content, that provision may, on the other hand, be applicable where, as is this case in this instance, the content communicated was provided by the users of its service. [129] That interpretation is, in my eyes, substantiated by the fact that neither that provision nor Article 3(1) of Directive 2001/29 makes an exception for providers which carry out the 'communication to the public' of works provided by users of their services. On the contrary, recital 16 of Directive 2001/29 states that the directive applies 'without prejudice to provisions relating to liability in [Directive 2000/31]'.

140. It follows that, if, contrary to what I suggest, the Court answered the first questions in the affirmative, it should still answer the second questions in order to provide the referring court with an answer which will be of use to it. That being so, the criteria governing a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and the conditions for the application of Article 14(1) of Directive 2000/31 can be interpreted consistently, as I will explain, in order to avoid, in practice, any overlap between these articles.

141. Having given that clarification, it is clear from Article 14(1) of Directive 2000/31 that the scope of that provision depends on two cumulative conditions: first, an 'information society service' must be provided; second, that service must '[consist] of the storage of information provided by a recipient of the service … at the request of a recipient of the service'.

127 I note that the Court has expressly been asked this question in the pending cases C-442/19, *Stichting Brein*, and C-500/19, *Puls 4 TV*.

128 See recital 16 of Directive 2001/29; Opinion of Advocate General Szpunar in *Mc Fadden* (C-484/14, EU:C:2016:170, point 64); Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM(1998) 586 final (OJ 1999 C 30, p. 4)), pp. 27 and 29; and Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 21 November 2003, First Report on the application of [Directive 2000/31] (COM(2003) 702 final), p. 13. The exemption from liability laid down in Article 14(1) of Directive 2000/31 nevertheless applies without prejudice to the possibility under paragraph 3 of that article to obtain an injunction against a service provider (see my analysis of the fourth questions referred).

129 The application of that provision is also excluded, as a matter of principle, where the user who has provided the information at issue was acting under the authority or the control of the provider (see Article 14(2) of Directive 2000/31).

142. Interpreting the *first condition* does not raise any difficulties in the present cases. I note in this regard that the concept of 'information society service' means 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service'.[130] The services provided by operators such as YouTube and Cyando are manifestly provided 'at a distance', 'by electronic means' and 'at the individual request of a recipient of service'.[131] In addition, those services are provided 'for remuneration'. The fact that an operator such as YouTube is remunerated in particular from advertising and that it does not require payment directly from users of its platform[132] does not call this interpretation into question.[133]

143. As far as the *second condition* is concerned, the situation is, prima facie, less evident. On the one hand, it seems clear that an operator such as Cyando provides, in the case of Uploaded, a service that 'consists of the storage' on its servers of files, that is to say, 'information'[134] which is 'provided by a recipient of the service', namely the user making the upload, 'at the request of' that user, as he or she determines the files in question.

144. However, on the other hand, although it is not in dispute that an operator such as YouTube stores videos uploaded by users of its platform, that is only one of numerous aspects of its activity. It is therefore important to determine whether that fact prevents that operator from benefiting from Article 14(1) of Directive 2000/31.

145. To my mind, that is not the case. Although that provision requires that the provider's service 'consists of the storage of information provided by a recipient of the service', it does not require that that storage is the *sole object, or even the main object*. That condition is, on the contrary, worded very broadly.

146. In my view, it follows that Article 14(1) of Directive 2000/31 may, in principle, cover any provider of an 'information society service' which, such as YouTube or Cyando, engages, as part of that service, in the storage of information provided by its users at their request.[135] Nevertheless, I repeat that the exemption provided for in that provision is, in any case, limited to liability that may result from that information and does not extend to other aspects of the activity of the provider in question.

147. The Court's existing case-law adopts this approach. Thus, in *Google France*, the Court ruled that an internet referencing service provider, such as Google in respect of the AdWords service, can avail itself of Article 14(1) of Directive 2000/31. The Court held, on the one hand, that that service 'consists of the storage of information provided by a recipient of the service' within the meaning of that

130 More precisely, Article 2(a) of Directive 2000/31 defines the concept of 'information society services' by reference to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18). Directive 98/34 was replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Article 1(1)(b) of which reproduces the same definition.

131 See, by analogy, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraphs 47 and 48). In this regard, under Article 2(d) of Directive 2000/31, 'recipient of the service' means 'any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible'. The concept thus covers both the user who uploads a file and the user who views or downloads it.

132 The service cannot, however, be described as being 'free' for users. As I noted in footnote 11 of this Opinion, YouTube gathers a large amount of personal data concerning its users, that data representing, in themselves, a price. See, in that respect, recital 24 and Article 2(7) and Article 3 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ 2019 L 136, p. 1).

133 See recital 18 of Directive 2000/31 and judgment of 11 September 2014, *Papasavvas* (C-291/13, EU:C:2014:2209, paragraphs 26 to 30).

134 The 'information' envisaged in Article 14(1) of Directive 2000/31 should be understood in a broad sense (see Proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the internal market, p. 27).

135 See, to that effect, Montero, E., 'Les responsabilités liées au web 2.0.', *Revue du Droit des Technologies de l'Information*, 2008, No 32, p. 368 and Van Eecke, P., 'Online Service Providers and Liability: A Plea for a Balanced Approach', *Common Market Law Review*, 2011, vol. 47, p. 1473. This interpretation is supported by the Report on the application of that directive, p. 13, which refers broadly to 'different scenarios in which third party content is stored'.

provision, because, as part of that service that provider stores certain information, such as the keywords selected by user/advertisers, advertising links and accompanying commercial messages, as well as the addresses of the advertisers' sites.[136] The Court evidently did not consider it problematical that the storage of the information is part of a broader activity.

148. The Court nevertheless made a qualification. It held that a service provider may benefit from the exemption from liability under Article 14(1) of Directive 2000/31 for information which it stores at the request of its users only if its conduct is limited to that of an 'intermediary service provider' within the meaning intended by the legislature in the context of Section 4 of that directive. In the light of recital 42 of that directive, the Court ruled that it is necessary to examine 'whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores' or whether, by contrast, it plays 'an *active role* of such a kind as to give it knowledge of, or control over, the data stored'.[137]

149. Similarly, in *L'Oréal* v *eBay*, the Court ruled that an operator of an online marketplace such as eBay may benefit from Article 14(1) of Directive 2000/31. In that case too, the Court held that the service provided by that operator consists, inter alia, of the storage of information provided by the users of the marketplace. This was, in particular, data relating to their offers for sale. It also noted that a service provider may benefit from the exemption from liability under that provision in respect of such information only if it is an 'intermediary service provider'. That is not the case where that service provider, 'instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data'.[138]

150. It is clear from those judgments that operators such as YouTube and Cyando which engage, as part of their activity, in the storage of information provided by users of their platforms, can benefit, with regard to the liability that may result from the illegal nature of some of that information, from the exemption laid down in Article 14(1) of Directive 2000/31, as long as they have not played an 'active role' of such a kind as to give them knowledge of, or control over the information in question.

151. In this regard, I note that, as the Commission claims, any service provider storing information provided by its users necessarily has some control over that information. In particular, it has the technical capacity to remove or to disable access to that information. This is precisely why it is expected, under Article 14(1)(a) and (b) of Directive 2000/31, to act in this manner with regard to illegal information of which it is made aware.[139] This control capacity cannot, in itself, illustrate that a service provider plays an 'active role', otherwise Article 14(1) of Directive 2000/31 would be deprived of any effectiveness.[140]

152. In fact, the 'active role' envisaged by the Court quite rightly relates *to the actual content* of the information provided by users. I understand the Court's case-law to mean that a provider plays an 'active role' of such a kind as to give it 'knowledge of, or control over', the data which it stores at the request of users of its service where it does not simply engage in the processing of that information, which is neutral vis-à-vis its content, but where, by the nature of its activity, it is deemed to acquire *intellectual control of that content*. That is the case if the provider selects the stored

136 See *Google France*, paragraphs 110 and 111.

137 See *Google France*, paragraphs 112 to 114 and 120 (my emphasis).

138 See *L'Oréal* v *eBay*, paragraphs 110, 112 and 113.

139 See judgment of 15 September 2016, *Mc Fadden* (C-484/14, EU:C:2016:689, paragraphs 61 to 64). That finding led Advocate General Jääskinen to conclude, in his Opinion in *L'Oréal and Others* (C-324/09, EU:C:2010:757, points 139 to 142), that, in his view, recital 42 of Directive 2000/31, to which the Court had regard in *Google France* in establishing the requirement of the 'neutral role' of the provider in respect of information provided by users of its service, does not refer to hosting activity, but only to mere conduit and caching.

140 See, to that effect, *L'Oréal* v *eBay*, paragraph 115.

information,[141] if it is actively involved in the content of that information in some other way or if it presents that information to the public in such a way that it appears to be its own. In those circumstances, the provider goes outside of the role of an intermediary for information provided by users of its service: it appropriates that information.[142]

153. In my view, however, operators such as YouTube and Cyando do not, in principle, play an 'active role' of this kind in relation to the information which they store at the request of the users of their platforms.

154. *First*, files are uploaded to such platforms automatically without material being seen or selected in advance by the operators of those platforms. As is claimed, in essence, by the Finnish Government and the Commission, those operators do not therefore acquire control of that information when it is uploaded.

155. *Second*, contrary to the submission made by Elsevier, the fact that the information stored can be viewed or downloaded directly from those platforms is not indicative of an 'active role' on the part of their operators. In that regard, it is immaterial that a provider *controls access* to the information which it stores at the request of the users of its service. For example, in order to access advertisements uploaded via AdWords, the Google search engine must be used.[143] Similarly, in order to access offers for sale uploaded on eBay, it is necessary to visit its marketplace.[144] The Court did not consider this fact to be relevant in *Google France* or in *L'Oréal* v *eBay*, and rightly so. The only relevant factor is whether the provider *controls the content* of the information stored. This is not suggested by the fact that the information is accessible on the provider's platform or website as it is viewed or downloaded at the individual request of a user by 'merely technical and automatic' processing.

156. *Third*, despite the suggestion made by Elsevier, I am not convinced that an operator such as YouTube or Cyando presents to third parties the information which it stores at the request of its users and to which it gives access on its platform in such a way that it appears to be its own. First, that is not the case where an operator such as YouTube clearly indicates, for each video published on its platform, which user uploaded it. Second, an average internet user who is reasonably circumspect knows that the files stored using a file-hosting and -sharing platform such as Uploaded do not, as a rule, originate from the operator.

157. *Fourth*, I consider that neither the fact that an operator such as YouTube[145] structures how the videos provided by users are presented on the platform by integrating them into a standard viewing interface and indexing them under different categories, nor the fact that the platform includes a search function and the operator processes the search results, which are summarised on the home page in the form of a ranking of the videos in various categories, are such as to demonstrate that that operator plays an 'active role' in those videos.

141 To that effect, in the judgment of 11 September 2014, *Papasavvas* (C-291/13, EU:C:2014:2209, paragraphs 45 and 46), the Court ruled that a newspaper publisher which posts an online version of a newspaper on its website has knowledge about the information which it posts and exercises control over that information — because it selects it — with the result that the publisher cannot be considered to be an 'intermediary service provider' within the meaning of Article 14(1) of Directive 2000/31.

142 See, to that effect, Husovec, op. cit., pp. 56 and 57.

143 See *Google France*, paragraph 117.

144 Elsevier further asserts that in an online marketplace such as eBay it is not the operator, but the user/seller, that gives the public access to the products sold, as it is the latter who supplies those products to buyers. Conversely, in the case of YouTube, it is the operator that provides access to videos. In my view, this argument is based on a misunderstanding. The 'information' stored at the request of the users of a marketplace is not the *products* offered for sale, but the *offers* for sale themselves. eBay gives access to that 'information' in the same way as YouTube gives access to 'information' consisting in the videos uploaded by its users. In both cases, the different 'information' is provided by the users.

145 That is not the case, I reiterate, for the Uploaded platform.

158. On the one hand, to my mind, it is immaterial that a provider structures how the information provided by the users of its service is presented on its platform or on its website in order to facilitate its use and thus optimise access to that information. I think that the argument to the contrary put forward by Mr Peterson and the French Government in particular reflects a misunderstanding of the judgment in *L'Oréal* v *eBay*. Although the Court ruled in that judgment that a provider such as eBay plays an 'active role' where it provides assistance to certain sellers, in the case of certain offers for sale, which entails 'optimising the presentation [of those offers]',[146] the Court had in view the fact that eBay sometimes provides *individual assistance* on how to optimise, exploit and structure the *content of specific offers*.[147] By providing such assistance, eBay is actively involved in the content of the offers in question, as envisaged in point 152 of this Opinion.[148]

159. By contrast, the Court did not have in view the fact that eBay structures the general presentation of offers for sale posted on its marketplace.[149] The fact that a provider controls the conditions for the presentation of the information which it stores at the request of the users of its service cannot demonstrate that it controls the content of that information. To my mind, only individual assistance relating to specific information is relevant in that regard. In summary, provided that a operator such as YouTube does not offer users of its platform individual assistance on how to optimise their videos,[150] it does not play an 'active role' in relation to the hosted videos.

160. With regard to the search and indexing functions, on the other hand, aside from the fact that such functions are indispensable for allowing platform users to find the information that they wish to view, I reiterate that those functions are automated. They therefore involve 'merely technical and automatic processing' of information stored at the request of users, as envisaged by the Court in its case-law.[151] The fact that the provider developed tools and, in particular, an algorithm to enable that processing and, because of this, it controls, inter alia, the *conditions for displaying* the search results, does not show that it has control over the *content* of the information searched.[152]

161. *Fifth*, contrary to the claim made by Mr Peterson and the French Government, the fact that an operator such as YouTube provides registered users on its platform with an overview of 'recommended videos' is also not such as to demonstrate an 'active role' on the part of the operator. Once again, this argument reflects a misunderstanding of the judgment in *L'Oréal* v *eBay*. In finding, in that judgment, that a provider such as eBay plays such an 'active role' where it provides assistance to some sellers in relation to particular offers for sale, which entails 'promoting those offers',[153] the Court was referring to the fact that eBay sometimes itself *promotes certain offers outside its marketplace* on the internet, in particular through the AdWords referencing service.[154] eBay acquires intellectual control of those offers because it uses them to advertise its marketplace, thus appropriating said offers.

146 See *L'Oréal* v *eBay*, paragraphs 114 and 116.

147 See *L'Oréal* v *eBay*, paragraph 31.

148 See, in the same vein, *Google France*, paragraph 118, where the Court considered the 'role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords' to be relevant.

149 This is evidenced by the fact that the Court focused on the idea of optimising 'the presentation *of the offers for sale in question*' (*L'Oréal* v *eBay*, paragraph 116) (my emphasis). If the Court had had in view the general structure of offers for sale presented on the marketplace, it would not have given clarification to that effect and would also not have left it to the national court to determine whether eBay had played an 'active role' 'in relation to the offers for sale at issue in the case before it' (paragraph 117 of that judgment). eBay played an 'active role' in respect of any offer for sale, as they are all part of that general structure.

150 For example, by modifying certain parts of their videos, choosing better background music, improving the editing, etc.

151 See, by analogy, *L'Oréal* v *eBay*, paragraph 113.

152 See, by analogy, *Google France*, paragraphs 115 and 117.

153 *L'Oréal* v *eBay*, paragraph 116.

154 See *L'Oréal* v *eBay*, paragraphs 38, 39 and 114.

162. By contrast, to my mind, it is not decisive that an operator such as YouTube automatically recommends to users of its platform videos similar to those they have previously viewed. It is not disputed that eBay also recommends to users of its marketplace, in the same way, offers similar to those which they have viewed in the past. Nevertheless, in my view, the Court did not take this fact into account in *L'Oréal* v *eBay*.[155] Once again, this is, a priori, 'merely technical and automatic processing' of the information stored. Again, the fact that the provider developed tools and, in particular, an algorithm to enable that processing and, because of this, controls, inter alia, the *conditions for displaying* the recommended information, does not show that it controls the *content* of the latter.[156]

163. *Sixth*, contrary the claim made by Mr Peterson and Elsevier, the business model adopted by operators such as YouTube and Cyando is not such as to demonstrate that they play an 'active role' in relation to the information which they store at the request of users of their platforms.

164. In that regard, the fact that a provider is remunerated in exchange for its service is one of the characteristic conditions of an 'information society service'. It is therefore, by extension, a requirement for coming under Article 14(1) of Directive 2000/31. In addition, in my view it is not relevant that the remuneration consists in particular in advertising revenue, which does not depend on the storage space provided, but on the attractiveness of the information stored at the request of users of the platform.[157] I note in this regard that the EU legislature wished to include within the scope of that directive service providers that are financed, inter alia, through advertising.[158] In addition, there is nothing in the wording of Article 14(1) of that directive to indicate that such a provider should be denied the benefit of that provision on the ground that it is remunerated in this way.

165. Moreover, I note that, in *Google France* and *L'Oréal* v *eBay*, the Court ruled that the mere fact that a service is subject to payment and that the provider sets the payment terms cannot show that it plays an 'active role'.[159] The fee payable to Google for the AdWords service depends on the attractiveness of the information stored since, in particular, that remuneration varies on the basis of the number of clicks on advertising links using the keywords chosen by the user/advertisers.[160] Similarly, eBay's remuneration also depends on the information stored, since eBay charges a percentage on transactions completed on the basis of offers for sale.[161] The Court thus recognised, in those judgments — implicitly, but necessarily — that that circumstance is irrelevant.[162]

166. *Seventh*, a provider cannot be considered to play an 'active role' with regard to the information it stores merely because it proactively carries out certain checks, such as those made by YouTube via Content ID, to detect the presence of illegal information on its servers. As the Finnish Government states, it is clear from recital 40 of Directive 2000/31 that the provisions of that directive relating to liability of intermediary providers 'should not preclude the development and effective operation … of technical surveillance instruments made possible by digital technology'. Moreover, in my view, it is

155 Once again, this is shown by the fact that if the Court had had these kinds of recommendations in mind, it would not have left it to the national court to determine whether eBay had played an 'active role' 'in relation to the offers for sale at issue in the case before it' (*L'Oréal* v *eBay*, paragraph 117). That 'active role' would have existed for all the offers on the marketplace, as any of them can potentially be recommended to a particular user, depending on how the algorithm is programmed.

156 See, by analogy, *Google France*, paragraph 115. That is without prejudice to the fact that it is possible that, where a service provider controls an algorithm, that service provider may be held liable for *the damage caused by the functioning of that algorithm in itself*. That could be the case, inter alia, if that algorithm discriminated unlawfully against certain content or certain users. I repeat that the exemption under Article 14(1) of Directive 2000/31 covers only liability for stored information.

157 See, by analogy, Cour de cassation (Court of Cassation, France), First Civil Chamber, judgment No 165 of 17 February 2011, Carion v. Société Dailymotion, No 09-67.896.

158 See recital 18 of Directive 2000/31.

159 See *Google France*, paragraph 116, and *L'Oréal* v *eBay*, paragraph 115.

160 See *Google France*, paragraph 25.

161 See *L'Oréal* v *eBay*, paragraphs 28 and 110.

162 This is all the more remarkable given that, in his Opinion in *Google France and Google* (C-236/08 to C-238/08, EU:C:2009:569, points 144 and 145), Advocate General Poiares Maduro had suggested the opposite approach to the Court.

necessary to avoid an interpretation of the concept of 'active role' that could produce the paradoxical result whereby a service provider conducting research on its own initiative into the information which it stores, in particular in order to combat copyright infringements in the interest of rightholders, would lose the benefit of the exemption from liability laid down in Article 14(1) of that directive and would, therefore be treated more severely than a provider which does not.[163]

167. *Lastly*, I note that in *SABAM*[164] and in *Glawischnig-Piesczek*[165] the Court held that 'it is common ground' that social network platform operators can rely on Article 14(1) of Directive 2000/31 in respect of the information that they store at the request of their users. Although, as the French Government pointed out at the hearing, the expression 'it is common ground' emphasises that in those judgments the Court relied on a premiss which was not disputed by the parties or the referring courts, I nevertheless observe that the Court does not fail, in giving preliminary rulings, to challenge premisses concerning the interpretation of EU law that seem doubtful to it.[166] However, it did not do so in those instances.[167]

168. In the light of the considerations above, I suggest that the Court's answer to the second questions should be that the operator of a video-sharing platform, such as YouTube, and the operator of a file-hosting and -sharing platform, such as Cyando, can, in principle, benefit from the exemption laid down in Article 14(1) of Directive 2000/31 in respect of all liability that may result from the files that they store at the request of users of their platforms.[168]

C. The condition for the exemption, concerning a lack of knowledge or awareness of illegal information, laid down in Article 14(1)(a) of Directive 2000/31 (third questions)

169. As I explained in my analysis of the second questions, operators such as YouTube or Cyando can, in principle, rely on Article 14(1) of Directive 2000/31. Under that provision, a provider cannot be held liable for the information which it stores at the request of users of its service provided (a) it does not have 'actual knowledge of illegal activity or information' and, as regards claims for damages, it is not 'aware of facts or circumstances from which the illegal activity or information is apparent'[169] or (b) upon obtaining such knowledge, it acted 'expeditiously to remove or to disable access to the information'.

170. By its third questions, the referring court asks the Court about the interpretation of the condition mentioned in Article 14(1)(a). It seeks to ascertain, in essence, whether that condition refers to specific illegal information.

163 See, to that effect, recital 26 of Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online (OJ 2018 L 63, p. 50). Furthermore, it follows implicitly but necessarily from the judgment in *L'Oréal* v *eBay* that a service provider can conduct its own research without, for that reason, losing its 'neutral role' (see paragraphs 46 and 122 of said judgment).

164 Judgment of 16 February 2012 (C-360/10, EU:C:2012:85, paragraph 27).

165 Judgment of 3 October 2019 (C-18/18, EU:C:2019:821, paragraph 22).

166 See, in particular, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraphs 16 to 26).

167 Furthermore, the EU legislature itself seems to consider that a platform operator such as YouTube may come under Article 14(1) of Directive 2000/31, since various provisions of EU law envisage the application that article to such an operator. See, in particular, Article 28a(5) of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive') in view of changing market realities (OJ 2018 L 303, p. 69), which states that 'Articles 12 to 15 of Directive [2000/31] shall apply to video-sharing platform providers deemed to be established in a Member State' (see also Article 28b of that directive).

168 Without prejudice, however, to the limit referred to in point 146 of this Opinion.

169 For convenience, in this Opinion I use the term 'actual knowledge' to refer to the situation in the first sentence of Article 14(1)(a) of Directive 2000/31 and the term 'awareness' to refer to the situation in the second sentence of that provision.

171. The answer to that question has significant implications wherever the liability of a service provider is sought for illegal information which it stores. In essence, the question is whether, in order to deny the provider concerned the benefit of the exemption under Article 14(1) of Directive 2000/31, the applicant must show that the provider had 'knowledge' or 'awareness' *of that information in particular* or whether it need only demonstrate that the provider had *general and abstract* 'knowledge' or 'awareness' of the fact that it stores illegal information and that its services are used for illegal activities.

172. In my view, the situations referred to in Article 14(1)(a) of Directive 2000/31 actually relate to specific illegal information.

173. As the referring court points out and as Google and the German and French Governments assert, this interpretation is clear from the very wording of Article 14(1)(a) of Directive 2000/31, which [in French] uses a definite article ('*l*'activité ou … *l*'information illicites' and '*l*'activité ou *l*'information illicite') (my emphasis) [170]. If the EU legislature had wished to refer to general knowledge or awareness that illegal information is on the provider's servers or that its services are used for illegal activities, it would have chosen to use an indefinite article ('*une* activité ou *une* information illicite' or '*d'activités* ou *d'informations illicites*'). I also note that Article 14(1)(b) of that directive also uses a definite article ('retirer *les* informations ou rendre l'accès à *celles-ci* impossible') (my emphasis).

174. This interpretation is also necessary having regard to the overall context of Article 14(1) of Directive 2000/31 and the objective pursued by that provision.

175. In this regard, it should be recalled that, in laying down exemptions from liability in Section 4 of Directive 2000/31, the EU legislature intended to allow intermediary providers to supply their services without a disproportionate risk of liability for the information which they process at the request of their users. In particular, Article 14(1) of that directive seeks to prevent those providers being generally held liable by reason of the illegality of information which they store — the volume of such information often being large — and of which they do not, for that reason, in principle, have intellectual control. The legislature intended to strike a balance between the different interests at stake. On the one hand, those providers cannot, under Article 15(1) of that directive, be made subject to the general obligation to monitor the information which they transmit or store or a general obligation actively to seek facts or circumstances indicating illegal activity. On the other hand, those same providers must, as soon as they obtain actual knowledge or awareness of illegal information, act expeditiously to remove or to disable access to that information, in the observance of the principle of freedom of expression and of procedures established for this purpose at national level. [171]

176. Therefore, the purpose of Article 14(1) of Directive 2000/31 is to form a basis for the development, at Member State level, of so-called 'notice and take down' procedures [172] and, consequently, the conditions laid down in points (a) and (b) thereof reflect the logic of those procedures: where *specific illegal information* is brought to the attention of a service provider, [173] it must expeditiously remove it.

170 That is also the case in the vast majority of other language versions of Directive 2000/31. Mr Peterson and Elsevier contend that the English version of that directive supports the opposite interpretation. I am not convinced. It is true that the first sentence of Article 14(1)(a) of the directive in that version does not include a definite article ('… the provider does not have actual knowledge *of illegal activity* or information …'). However, the second sentence does use a definite article ('… is not aware of facts or circumstances from which *the* illegal activity or information is apparent …') (my emphasis).

171 See recitals 40, 41 and 46 of Directive 2000/31.

172 See recital 40 and Article 14(3) of Directive 2000/31. Unlike section 512 introduced by the Digital Millennium Copyright Act ('the DMCA'), Directive 2000/31 does not therefore provide for a harmonised notice and take down procedure.

173 By this I mean brought to the attention of an employee of the service provider. A provider cannot be considered to have 'knowledge' or 'awareness' of illegal information which it stores within the meaning of Article 14(1) of Directive 2000/31 on the ground that, for example, it engages in automated processing of that information. Such an interpretation would render that provision ineffective as any provider hosting information needs to carry out such processing.

177. Mr Peterson and Elsevier nevertheless contend that platforms such as YouTube and Uploaded give rise to a significant number of illegal uses, of which their operators are regularly notified. Accordingly, the applicants in the main proceedings assert once again that those operators should be subject to duties of care to prevent and actively to seek infringements committed on their platforms. They cannot therefore rely on their ignorance of specific illegal information on those platforms. In that regard, their 'knowledge' or 'awareness' should be presumed.

178. In my view, this interpretation suggested by the rightholders is quite simply incompatible with EU law as it stands at present.

179. At the outset, an argument on these lines is not compatible with the first sentence of Article 14(1)(a) of Directive 2000/31, which relates to 'actual knowledge'. In order to demonstrate such 'actual knowledge', attention should be paid not to the fact that the provider would have known had it been diligent, but to what it really knew. [174]

180. Further explanations must be given with regard to the situation of 'awareness' in the second sentence of Article 14(1)(a) of Directive 2000/31. The Court gave various clarifications in this regard in *L'Oréal* v *eBay*. In the case that gave rise to that judgment, the liability of eBay was sought for certain offers for sale posted on its marketplace which might infringe trade marks owned by L'Oréal. In that content, the Court held that, in order to determine whether the operator of a marketplace has 'awareness' of such offers within the meaning of that provision, it must be ascertained whether it had been 'aware 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) of that directive]'. This may be the case in 'every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances' and, in particular, where it 'uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information' or if it 'is notified of the existence of such an activity or such information'. [175]

181. It is clear from that judgment that a service provider is in fact subject to certain duties of care under Article 14(1) of Directive 2000/31. On that basis, such a provider may sometimes lose the benefit of the exemption from liability under that provision because it ought to have known that particular information was illegal and, despite this, it did not remove it.

182. However, these duties of care are much more specific than is suggested by the applicants in the main proceedings. In my view, it cannot be inferred from that judgment that, in order to act as a 'diligent economic operator', a service provider should, as soon as it has abstract knowledge of the fact that there is illegal information on its servers, actively seek such illegal information in general and it would therefore be presumed to have 'awareness' of all that information.

183. It is evident that, given the number of offers for sale published each day on a marketplace such as eBay, the operator of such a marketplace knows that a number of them are likely to infringe intellectual property rights. Nonetheless, in *L'Oréal* v *eBay*, the Court did not find that such an operator is deemed to have 'awareness' of any of those infringing offers. In fact, the Court held that it had to be ascertained whether facts or circumstances *in relation to the offers for sale at issue* were brought to the knowledge of the provider. According to the Court, it should be determined in particular whether the provider was given sufficiently precise or adequately substantiated notification *concerning these offers*. [176]

174 See Opinion of Advocate General Jääskinen in *L'Oréal and Others* (C-324/09, EU:C:2010:757, points 162 and 163).

175 *L'Oréal* v *eBay*, paragraphs 120, 121 and 122 respectively.

176 See *L'Oréal* v *eBay*, paragraph 122.

184. It follows that the situation referred to in the second sentence of Article 14(1)(a) of Directive 2000/31, in which a service provider is 'aware of facts or circumstances from which the illegal activity or information is apparent', refers to the case where the provider has (actual) knowledge of objective factors *relating to specific information on its servers* which should be sufficient, provided it shows due diligence, for it to realise that the information is illegal and to remove it pursuant to Article14(1)(b) of that directive.

185. In short, a service provider is obliged diligently to process facts and circumstances brought to its knowledge, in particular by notifications, concerning specific illegal information. This should not be confused with an obligation actively to seek facts or circumstances in general. Such an interpretation would reverse the logic of Article 14(1) of Directive 2000/31 and would be incompatible with Article 15 of that directive. [177]

186. In addition, it should not be forgotten that, as I have stated, the logic of 'notice and take down' underlying Article 14(1) seeks to strike a balance between the different interests at stake, and, in particular, to safeguard the freedom of expression of users.

187. In this context, the logic of notifications is not only intended to enable a service provider to discover the existence and the location of illegal information on its servers. A notification is also intended to give it sufficient evidence to verify the illegal nature of the information. In accordance with Article 14(1), a provider must remove such information only where its illegal nature is 'apparent', that is to say *manifest*. [178] That requirement seeks, in my view, 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.

188. While the illegal nature of some information is immediately obvious, [179] that is not the case with copyright as a rule. The assessment of the infringing character of a file requires a number of contextual elements and may call for thorough legal analysis. For example, in order to establish whether a video uploaded on a platform such as YouTube infringes copyright it is necessary, in principle, to determine whether, first, the video contains a work, second, the complaining third party holds rights to that work, and third, the use made of the work infringes his or her rights, the latter point requiring an evaluation whether, in the first place, the use was made with his or her authorisation, and, in the second place, an exception is applicable. The analysis is further complicated by the fact that any rights and licences for the work are likely to vary from one Member State to another, as are the exceptions, according to what law is applicable. [180]

189. If a service provider were to be obliged to actively seek the information infringing copyright on its servers, without the assistance of the rightholders, that would compel it to assess itself, in general and without the necessary contextual elements, what constitutes such an infringement and what does not. While some situations leave little room for doubt, [181] many others are ambiguous. For example, it is rarely easy to determine who hold the rights over a work. [182] In addition, where an extract of a

177 See, to that effect, Riordan, J., *The Liability of Internet Intermediaries*, Oxford University Press, Oxford, 2016, pp. 407 and 408. Furthermore, in paragraph 139 of the judgment in *L'Oréal* v *eBay*, the Court made clear that the measures which can be required of a service provider such as eBay 'cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website'. Similarly, the statement made by the Court in paragraph 120 of that judgment that a provider may uncover facts or circumstances from which the illegal act is apparent in its own research simply suggests that Article 14(1) of Directive 2000/31 *authorises* a provider to carry out such research. Where appropriate, that provider must, of course, remove the illegal information that it discovers. This cannot mean that it would be *obliged* to carry out such research in general.

178 See Conseil constitutionnel (Constitutional Council, France), decision No 2004-496 of 10 June 2004.

179 I refer to child pornography images, for example. For information of this kind which is, in itself, manifestly and undeniably illegal, Directive 2000/31 does not, in my view, prohibit the provider being required to be proactive in the removal of such material. See, to that effect, recital 48 of that directive and, with regard to child pornography specifically, recital 47 and Article 25 of Directive 2011/93.

180 See, in particular, judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 50).

181 For example, where an unknown user uploads a poor-quality copy, filmed using a camcorder, of a recent theatrical release.

182 It is clear from the order for reference in Case C-682/18 that a significant part of the judgment on appeal is dedicated to ascertaining whether, and to what extent, Mr Peterson holds the rights to the works concerned.

protected work is included in a video posted by a third party, certain exceptions could apply, such as where it is used for the purpose of criticism or parody.[183] The risk is that in all these ambiguous situations the provider tends towards systematically removing the information on its servers in order to avoid any risk of liability vis-à-vis the rightholders. It will often find it easier to remove information rather than having to claim itself in the context of a possible action for liability that an exception applies. Such 'over-removal' would pose an obvious problem in terms of freedom of expression.[184]

190. For those reasons, as the referring court states, the infringing character of information can be regarded as 'apparent' within the meaning of Article 14(1)(a) of Directive 2000/31 only where the provider concerned has been given a notification providing it with evidence that would allow a 'diligent economic operator' in its situation to establish that character without difficulty and without conducting a detailed legal or factual examination. Specifically, that notification must identify the protected work, describe the alleged infringement and provide sufficiently clear indications of the victim's alleged rights to the work. I would add that, where the application of an exception is not automatically precluded, the notification must contain reasonable explanations why it should be. In my view, only this interpretation can avert the risk of intermediary providers becoming judges of online legality and the risk of 'over-removal' mentioned in the preceding points.[185]

191. Having clarified that point, two final details must also be added. In the first place, I think that there is one case where a service provider cannot hide behind the fact that it did not have actual 'knowledge' or 'awareness' of the specific illegal information for which its liability is sought and in which general and abstract knowledge of the fact that it stores illegal information and that its services are used for illegal activities should be sufficient. This is the case where the provider *deliberately facilitates* the carrying out of illegal acts by users of its service. Where objective factors demonstrate the bad faith of the provider,[186] in my view the provider loses the benefit of the exemption from liability under Article 14(1) of Directive 2000/31.[187]

192. In the second place, Mr Peterson and Elsevier argue that, where a service provider has been given sufficiently precise or adequately substantiated notification concerning illegal information, Article 14(1)(b) of Directive 2000/31 requires that the provider not only removes or disables access to the information, but also that it takes the necessary measures to 'block' that information, that is, to prevent it *being re-uploaded*. In other words, if a provider were given such notification, it would be deemed to have 'awareness' not only of the information currently on its servers, but also of all possible future uploads of the same information, without a fresh notification being required for each of them.

183 See Article 5 of Directive 2001/29.

184 I note in particular that Directive 2000/31 does not offer any safeguards for users such as a 'counter-notification' procedure for disputing the 'over-removal' of their information. Recital 46 of that directive merely states that Member States may establish 'specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information'.

185 See, to that effect, Riordan, J., op. cit., p. 406. In general, the question whether the 'facts or circumstances' brought to the knowledge of a service provider are sufficient to give it 'awareness' of illegal information for the purposes of Article 14(1)(a) of Directive 2000/31 depends on all the circumstances of each case, in particular the degree of precision of the notification, the complexity of the analysis required to understand the illegality of the information and the resources available to the provider. The same applies to the question whether the provider acted 'expeditiously' within the meaning of Article 14(1)(b) of that directive.

186 On that matter, I refer the reader to points 120 to 131 of this Opinion.

187 In my view, it is inconceivable, for example, that the operators of the 'The Pirate Bay' platform can rely on Article 14(1) of Directive 2000/31 to evade their secondary liability under national law for the information stored on that platform. As the French Government claims, that provision seeks to protect service providers that generally act in good faith, not providers whose very intention is to facilitate copyright infringements.

193. In this regard, the rightholders consistently assert that the information to which a notification relates and which has been removed by a service provider is often re-uploaded soon afterwards. Consequently, they are forced continually to monitor all websites that are likely to host their works and to increase the number of notifications. The solution suggested by those rightholders, in order to remedy the problem, is to interpret Article 14(1) of Directive 2000/31 as underlying a system not merely of notice and *take* down, but notice and *stay* down.

194. I consider that incorporating a 'stay down' obligation into Article 14(1) of Directive 2000/31 would significantly alter the scope of that provision. Removing information requires the service provider to react (diligently) to a notification. Blocking information, on the other hand, necessitates the introduction of technology to filter the information which it stores. It is a question of preventing not only a particular computer file from being uploaded again, but also any file *with equivalent content*. Even though some providers, including YouTube it would seem, have technologies allowing a 'stay down' of this nature which they employ voluntarily, it seems difficult to incorporate such an obligation into that provision, by way of a 'dynamic' interpretation, and thus to impose it on any service provider, including those that do not have the necessary resources to implement such technology. [188]

195. In contrast, I do consider that, in conditions which I will clarify in my analysis of the fourth questions, a stay down obligation may be imposed on certain service providers, depending on their capacities in particular, in an injunction pursuant to Article 8(3) of Directive 2001/29.

196. In the light of all the above considerations, I suggest that the Court answer the third questions to the effect that Article 14(1)(a) of Directive 2000/31 must be interpreted as meaning that, in principle, the situations mentioned therein — namely the situation where a service provider 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.

D. The conditions to be met in order to apply for an injunction against an intermediary in accordance with Article 8(3) of Directive 2001/29 (fourth questions)

197. If the Court ruled that platform operators such as YouTube and Cyando can rely on Article 14 of Directive 2000/31, they would be exempt from all liability that may result from the files that they store at the request of users of their platforms as long as they satisfy the conditions laid down in paragraph 1 of that article.

198. However, as is stated in paragraph 3 thereof, that article does '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'. In other words, that same article does not prevent a service provider being the subject of an *injunction*, even if it satisfies these conditions. [189]

199. In this regard, Article 8(3) of Directive 2001/29 requires Member States to 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'. [190]

188 In contrast, a stay down obligation does appear in Article 17(4) of Directive 2019/790. I note, however, that the legislature made an exception for 'small' service providers that do not have the resources or technology needed to implement that obligation.

189 See also recital 45 of Directive 2000/31.

190 This obligation also appears in the third sentence of Article 11 of Directive 2004/48, which applies to infringements of various intellectual property rights, including copyright (see Article 2(1) of that directive). Nevertheless, as it makes clear, that provision is 'without prejudice' to Article 8(3) of Directive 2001/29. In any event, as Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48 are worded almost identically and those directives pursue the same objective of a high level of protection of intellectual property (see recital 9 of Directive 2001/29 and recital 10 of Directive 2004/48), those provisions must be given the same interpretation in my view.

200. By its *fourth questions*, the Bundesgerichtshof (Federal Court of Justice) asks the Court to clarify the conditions to be met by rightholders in order to be able to apply for such an injunction pursuant to Article 8(3) of Directive 2001/29.

201. Specifically, that court asks about the compatibility of its case-law with EU law. According to that case-law, Article 8(3) is implemented in German law through '*Störerhaftung*' ('liability of the interferer'), a longstanding form of indirect liability, whereby, in the case of an infringement of an absolute right such as an intellectual property right, a person who, without being the perpetrator of or an accomplice to that infringement, contributes to it in some way, deliberately and with an adequate causal link, can be sued as an 'interferer' (*Störer*). It may be sufficient, in that context, that the person in question supports or exploits the conduct of the third party who perpetrated the infringement, acting on his or her own authority, if that person had the possibility, in law and in practice, to prevent the infringement which had been committed. [191]

202. As the referring court explains, in order not to extend '*Störerhaftung*' unduly to persons who are neither perpetrators of nor accomplices to infringements, that form of liability *presupposes a breach of obligations of conduct*. The scope of those obligations depends on whether the 'interferer' can reasonably be expected, in view of the circumstances, to check or monitor third parties in order to prevent such infringements and, if so, to what extent. This must be determined in each case in the light of the functions and duties of the 'interferer' and the personal liability of the perpetrators of those infringements.

203. In this context, an intermediary service provider which stores information provided by the users of its service may be sued as an 'interferer' and be the subject of a prohibitory injunction on that basis if, *first*, it has been given sufficiently precise or adequately substantiated notification concerning specific illegal information and, *second*, an infringement has taken place again because the provider either did not act expeditiously to remove or to disable access to the information in question or failed to take the necessary measures to prevent that information being re-uploaded. [192] Consequently, rightholders cannot apply for an injunction against an intermediary from the moment when their rights have been infringed by a user of its services.

204. In essence, it must be determined whether Article 8(3) of Directive 2001/29 precludes the possibility for rightholders to apply for an injunction against an intermediary being made conditional on the infringement taking place again.

205. The referring court does not consider this to be the case. Google, Cyando and the German and Finnish Governments take the same view. I am inclined to agree with Mr Peterson, Elsevier, the French Government and the Commission that Article 8(3) of Directive 2001/29 effectively precludes that requirement.

191 '*Störerhaftung*' allows an injunction to be obtained. It is not therefore a basis for the award of damages, unlike the primary liability of the perpetrator of an offence and complicit liability, which is provided for, inter alia, in Paragraph 830 of the BGB (see my analysis of the fifth and sixth questions).

192 See, in particular, Bundesgerichtshof (Federal Court of Justice), judgments of 26 July 2012, I ZR 18/11, GRUR 2013, 370 — *Alone in the Dark* and of 19 March 2015, I ZR 94/13, GRUR 2015, 1129 — *Hotelbewertungsportal*. According to that court's case-law, operators such as YouTube and Cyando are not, as a rule, directly liable for copyright infringements committed through their platforms in so far as they do not carry out the 'communication to the public' of the works which are uploaded there. Nor are those operators held liable, in principle, as accomplices to those infringements under Paragraph 830 of the BGB as, for a negative finding on that basis, it is necessary to demonstrate an intention and knowledge relating to a specific offence (see my analysis of the fifth and sixth questions referred). It is therefore mainly through injunctions based on '*Störerhaftung*' that that court regulates the conduct of such operators. In the cases in the main proceedings, the appeal courts thus found against YouTube and Cyando as 'interferers' for failing to comply with their obligations of conduct.

206. *First*, it should be recalled that Article 8(3) confers on rightholders the right to apply for an injunction against 'intermediaries', 'whose services are used by a third party' to 'infringe a copyright or related right'. According to the Court's case-law, any provider of a service capable of being used by other persons to infringe such an intellectual property right constitutes an 'intermediary' within the meaning of that provision.[193] That is certainly the case with YouTube and Cyando. Their services are 'used by a third party' to 'infringe a copyright or related right' whenever one of their users publishes a protected work online on their platforms illegally.

207. *Second*, while recital 59 of Directive 2001/29 states that the conditions and modalities relating to such injunctions are, in principle, left to the national law of the Member States, it follows only that the latter enjoy discretion in this regard. Those conditions and procedures must, in any event, be designed in such a way that the objective pursued by Article 8(3) of that directive may be achieved.[194] That discretion cannot therefore allow those States to alter the scope and thus the substance of the right conferred on rightholders by that provision.

208. In this connection, I note that the possibility for rightholders to obtain an injunction against an intermediary service provider in accordance with the conditions for '*Störerhaftung*' depends on the conduct of that intermediary. As I have stated, an injunction granted on the basis of that principle is a *prohibitory* injunction. It implies that the provider has breached certain *obligations of conduct*[195] and allows its judicial enforcement to be obtained.

209. However, Article 8(3) of Directive 2001/29 proceeds from a different logic. Unlike injunctions against infringers, as envisaged in paragraph 2 of that article, injunctions against intermediaries under paragraph 3 of that article *do not seek (only) to bring an end to certain misconduct* on their part. Even intermediaries that are 'innocent', in so far as they generally satisfy all the obligations imposed on them by law, are covered by that provision. It permits rightholders to require them to be more involved in combating copyright infringements committed by users of their services on the ground that they are generally best placed to bring those infringements to an end. With this in mind, that provision permits *new obligations* to be imposed on those intermediaries by injunctions. This is, in effect, a form of enforced cooperation.[196]

210. This difference in logic might not be problematical in itself. As I have stated, only the result achieved by the Member States is significant, not the means by which they implement Article 8(3) of Directive 2001/29. Strictly speaking, the only crucial factor in this regard is that it is possible for rightholders to obtain an injunction ordering intermediaries to adopt certain conduct which protects their interests. It is immaterial whether, theoretically, that injunction is presented as penalising pre-existing obligations of conduct or as imposing new obligations.

193 See, by analogy, judgment of 7 July 2016, *Tommy Hilfiger Licensing and Others* (C-494/15, EU:C:2016:528, paragraph 23 and the case-law cited).

194 See *L'Oréal* v *eBay*, paragraph 136.

195 The obligations of conduct imposed specifically on service providers engaged in an activity consisting, inter alia, in the hosting of files provided by third parties, in accordance with the case-law of the Bundesgerichtshof (Federal Court of Justice), reflect the condition laid down in Article 14(1)(b) of Directive 2000/31. Those obligations nevertheless go further than that provision, as I understand them; that court requires the provider not only to have removed the notified information, but also to have blocked the information, employing a stay down logic.

196 See recital 59 of Directive 2001/29, and Husovec, op. cit., pp. XV, XVI, 8 and 10 to 13. In my view, the fact that the intermediaries benefit financially, to some degree, from illegal uses of their services also justifies that they have to accept such injunctions.

211. However, the consequence of making the grant of such an injunction subject to the breach of pre-existing obligations of conduct by the intermediary is *to impede and, as such, to limit* the right which Article 8(3) of Directive 2001/29 confers on rightholders.[197] In practice, as Mr Peterson asserts, rightholders may apply for an injunction against an intermediary only if a first infringement relating to illegal information has been committed and was duly notified to the intermediary (giving rising to obligations of conduct) and, in addition, the infringement was repeated (which indicates the intermediary's failure to comply with those obligations).

212. To my mind, a rightholder must be able to apply for an injunction where it is established that third parties infringe its rights through the service provided by the intermediary, without the need to wait for an infringement to take place again and without the need to show improper conduct by the latter.[198] I wish to make clear that Article 8(3) of Directive 2001/29 does not, in my view, run counter to the rules for '*Störerhaftung*' as such. Rather, it prevents the situation where rightholders have no other legal basis, under German law, on which they can apply for an injunction against an intermediary in those circumstances.

213. I do not think that this interpretation is called into question by the argument put forward by the referring court and reiterated by Google, Cyando and the Finnish Government that allowing rightholders to apply for an injunction against an intermediary pursuant to Article 8(3) of Directive 2001/29 even before an infringement has taken place again would effectively impose on the intermediary a general obligation to monitor and actively to seek illegal activity, contrary to Article 15(1) of Directive 2000/31. In their view, accepting that possibility would be tantamount to saying that, even before being given sufficiently precise or adequately substantiated notification, the intermediary should have removed the information in question and blocked its re-uploading, which would require it to monitor its servers and actively to seek, in general, any illegal information that may be found there.

214. My suggested interpretation does not have this consequence. The fact that rightholders may apply for an injunction against an intermediary in a particular case does not mean that the intermediary was necessarily obliged to act in a certain way *before* the injunction was issued. It should be reiterated that the injunctions envisaged in Article 8(3) of Directive 2001/29 are intended in principle not to penalise a failure by intermediaries to comply with pre-existing duties of care, but to impose on them new obligations for the future.

215. *Lastly*, I am well aware that, as the referring court stated, the purpose of the condition for '*Störerhaftung*' relating to infringement of obligations of conduct by the intermediary is to limit the group of persons that are potentially subject to an injunction. However, my suggested interpretation does not mean that rightholders should be able to apply for any injunction against any intermediary service provider. In my view, national courts must apply the principle of proportionality in determining the scope of the obligations that may reasonably be imposed on a particular provider, in the light, inter alia, of its position in relation to the copyright infringements at issue. In some cases, a provider might be too far removed from those infringements for it to be proportionate to demand its cooperation. In any case, this question does not arise in the present instance. Operators such as YouTube and Cyando are close to the infringements committed by the users of their platforms as they store the corresponding files on their servers.

197 See, to that effect, Nordemann, J.B., 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) — The German Approach', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, vol. 2, No 1, 2011, p. 40.

198 See, in the same vein, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 29 November 2017, Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (COM(2017) 708 final), p. 19: 'the competent judicial authorities cannot require applicants to demonstrate that the intermediary is liable, even indirectly, for an (alleged) infringement, as a condition for an injunction to be granted'.

216. The parties in the main proceedings have also raised before the Court the question of the scope of injunctions that may be imposed on intermediaries. The rightholders take the view that the case-law of the Bundesgerichtshof (Federal Court of Justice) does not go far enough in this regard, whereas, conversely, the platform operators consider that the case-law goes beyond what is permitted by EU law. Because this question has not been put to the Court by the Bundesgerichtshof (Federal Court of Justice), but is closely linked to the problems generally raised in the cases at hand, I will make a few brief comments on the subject.

217. The Court has already clarified that an injunction granted under Article 8(3) of Directive 2001/29 may order an intermediary to take measures that contribute not only to *bringing to an end* copyright infringements committed by the users of its service, but also to *preventing* further infringements of that nature.[199] The measures which may be imposed on it by such an injunction must be effective, proportionate and dissuasive, must strike a fair balance between the various rights and interests at stake and must not create barriers to legal uses of the service.[200]

218. Furthermore, these measures must observe the limits imposed by Article 15(1) of Directive 2000/31.[201] In the present instance, it must be ascertained in particular whether an injunction may require an operator to detect and block illegal uploads of protected works on its platform, and to what extent. As I have stated,[202] this will generally require the provider to use technology to filter the information that it stores. It must therefore be ascertained whether such an injunction is necessarily to be regarded as involving general obligations to monitor and actively to seek illegal activity, which is prohibited by that provision.

219. On that point, I note, first, that in *SABAM*[203] the Court ruled that Article 15(1) of Directive 2000/31 precludes the operator of a social networking platform from being compelled to install a system for filtering information stored at the request of the users of its service, which applies indiscriminately to all of those users, as a preventative measure, exclusively at its expense and for an unlimited period, which is capable of identifying files containing work in respect of which the applicant for the injunction holds intellectual property rights, with a view to preventing those works from being made available to the public. The Court also stressed that such a measure would involve, for the operator, monitoring all or most of the information which it stored, would be directed at all future infringements and would be intended to protect not only existing works, but also works that had not yet been created at the time when the system was introduced.

220. Second, in *Glawischnig-Piesczek*,[204] which this time concerns attacks on people's honour, the Court ruled that an injunction may require an intermediary provider to detect and block a *particular piece of information*, the content of which was examined and assessed by a court, which, following its assessment, declared it to be illegal. A court is thus able to require the provider to block access to *identical information*, irrespective of the user who requested its storage. An injunction can also extend to *equivalent information*, provided it contains specific elements which are properly identified in the injunction and the provider is not required to carry out an independent assessment of their defamatory nature but, on the contrary, it may have *recourse to automated search tools and technologies*. For the Court, such an injunction involves only *specific* obligations to monitor and actively to seek illegal activity, which are consistent with Article 14(1) of Directive 2000/31.[205]

199 See, by analogy, *L'Oréal* v *eBay*, paragraph 131.

200 See Article 3 of Directive 2004/48 and, by analogy, *L'Oréal* v *eBay*, paragraphs 140 to 144. That directive also applies to copyright. The requirements laid down in its general provisions must therefore be complied with in an injunction granted pursuant to Article 8(3) of Directive 2001/29.

201 See judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraphs 31 to 33).

202 See point 194 of this Opinion.

203 Judgment of 16 February 2012 (C-360/10, EU:C:2012:85, paragraphs 35 to 38).

204 Judgment of 3 October 2019 (C-18/18, EU:C:2019:821, paragraphs 33 to 47).

205 See recital 47 of Directive 2000/31.

221. It is clear from those judgments that, according to the Court, Article 15(1) of Directive 2000/31 does not preclude any obligation to detect and block. Although, under that provision, a provider may not be compelled, by way of injunction, to undertake general filtering of the information it stores *in order to seek any infringement*,[206] it does not, a priori, prevent the provider from being compelled to block a *specific file* that uses a protected work that has been held to be illegal by a court. According to my understanding of the Court's case-law, that provision does not, in that context, preclude the provider from being obliged to detect and block not only *identical* copies of that file, but also other *equivalent* files, namely, to my mind, those that use the protected work in the same way. To that extent, the same provision does not, therefore, preclude a 'stay down' obligation from being imposed on an intermediary provider.

222. Nevertheless, I note that the measures taken against an intermediary provider under an injunction must be proportionate. On that basis, account must be taken of the resources of that provider. In particular, although it seems relatively easy to block an identical copy of a file that is deemed to constitute an infringement,[207] it is much more complex to detect other files that use the work in question in the same way.[208] While YouTube claims to be able to do this,[209] not every provider has the necessary technology or the resources to acquire it.[210] I also note that the measures imposed by way of injunction must ensure a fair balance between the various rights and interests at play and must not create obstacles to the legal use of the service. In particular, the purpose or effect of an obligation to block cannot, to my mind, be to prevent users of a platform from uploading legal content and, in particular, legally using the work concerned.[211] It would be for the national courts to determine what can reasonably be expected of the provider in question.

223. In the light of the above considerations, I suggest that the Court answer the fourth questions to the effect that Article 8(3) of Directive 2001/29 precludes rightholders from being able to apply for an injunction against a provider whose service that consists of the storage of information provided by a user is used by third parties to infringe a copyright or related right only if such an infringement has taken place again after notification of a clear infringement has been provided.

206 See, also, *L'Oréal* v *eBay*, paragraph 139.

207 Copies of the same file can be identified using MD5 filters or hash filters, which seem to be common.

208 For example, in the case of a cinematographic work, a multitude of variations are possible in terms of format, image quality, length, etc.

209 According to the explanations given by Google, once a reference file for a work has been entered into the Content ID database, that software would automatically recognise (nearly) all files containing that work when they are uploaded.

210 According to the information provided by Google, it has spent more than 100 million United States dollars (around EUR 88 million) developing Content ID.

211 See, to that effect, judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 50). In particular, an injunction must not obstruct users of a platform from using protected works in accordance with the exceptions and limitations laid down in Article 5 of Directive 2001/29. For a platform such as YouTube, these would include allowing users to share videos using works for purposes such as criticism, review or parody in accordance with the conditions set out in Article 5(3)(d) and (k). For a cyberlocker, these include not depriving users of their right to private copying laid down in Article 5(2)(b) of that directive (see, in that regard, Opinion of Advocate General Szpunar in *VCAST* (C-265/16, EU:C:2017:649, points 23 to 28).

E. In the alternative — the concept of 'infringer' within the meaning of Article 13 of Directive 2004/48 (fifth and sixth questions)

224. The Bundesgerichtshof (Federal Court of Justice) has asked its *fifth and sixth questions* only if the Court answers both the first and second questions in the negative. The referring court thus has in view the situation where, on the one hand, the activity of operators such as YouTube and Cyando does not come under the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and, on the other, those operators cannot benefit from the exemption laid down in Article 14(1) of Directive 2000/31 for any liability arising from information which they store at the request of users of their platforms.[212]

225. By its *fifth questions*, that court asks whether, in that situation, the operators should be regarded as 'infringers' within the meaning, inter alia, of Article 13(1) of Directive 2004/48 on the ground that they played an 'active role' with regard to the files containing protected works illegally uploaded by users of their platforms.

226. If the answer is in the affirmative, by *its sixth questions* that court asks about the compatibility with Article 13(1) of Directive 2004/48 of the rules on complicity laid down in Paragraph 830 of the BGB. The latter provision, which provides for a form of secondary liability, permits a victim of an infringement, unlike in the case of '*Störerhaftung*', to obtain damages from a person who is complicit in it. A person who has deliberately incited a third party to commit an infringement intentionally or who has assisted it to that end would be considered as such. Accessory liability would nevertheless require, in addition to objective participation in a specific infringement, an at least partial intention in relation to the infringement and must extend to awareness of illegality. In practice, an intermediary service provider could therefore be held liable as an accomplice only for *specific infringements* of copyright committed by the users of its service, of which it has knowledge and which it has deliberately facilitated. However, the referring court asks whether, under Article 13(1), it should be sufficient, for an intermediary service provider to be ordered to pay damages to rightholders, if it has knowledge or awareness, *in a general and abstract manner*, that its service is used to infringe copyright.

227. In my view, Article 13(1) of Directive 2004/48 is quite simply not intended to regulate the conditions governing the liability of intermediary service providers for copyright infringements committed by users of their services.

228. It should be borne in mind in this regard that, under that provision, 'the competent judicial authorities, on application of the injured party, [must] 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/her as a result of the infringement'. For the purposes of that provision, the 'infringer' is thus the person who engages in an 'infringing activity' or, in other words, infringes an intellectual property right.

212 In my view, Article 3(1) of Directive 2001/29 and Article 14(1) of Directive 2000/31 must be interpreted consistently. In particular, the 'essential role' within the meaning of the Court's case-law on the former provision should, in practice, for intermediary service providers which store information provided by users of their services, correspond to the 'active role' envisaged its case-law on the latter. I will therefore respond to the fifth and sixth questions only briefly and in the alternative.

229. Nevertheless, the sole purpose of Article 13(1) of Directive 2004/48 is to lay down procedural rules relating to the award and determination of damages in the event that such an infringement is committed. That provision is not intended to determine in advance what intellectual property rights are protected, what acts infringe those rights, who is liable for them and who is the 'rightholder' to whom damages must be paid. All these questions fall under the substantive rules of the law on intellectual property.[213] In general, Directive 2004/48 harmonises only certain procedural aspects of intellectual property, to the exclusion of such substantive questions.[214]

230. In the field of copyright, the relevant substantive rules appear in particular in Directive 2001/29. A person engages in an 'infringing activity', and thus becomes an 'infringer', if he carries out an act covered by an exclusive right which that directive confers on the author — who, in this context, is generally the 'rightholder' — without his or her prior authorisation and without an exception or limitation being applicable.

231. It should be recalled that the fifth and sixth questions are based on the hypothesis that operators such as YouTube and Cyando do not carry out acts of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. In that situation, those operators cannot be regarded as 'infringers' engaging in 'infringing activities' within the meaning of Article 13(1) of Directive 2004/48.

232. That being so, Directive 2004/48 establishes only minimal harmonisation.[215] As the Commission noted, Member States are therefore free to establish in their national law, for rightholders who are victims of 'infringing activities', the right to obtain damages from persons other than the 'infringer' within the meaning of Article 13 of that directive, including intermediary service providers which facilitated such activities. In any event, as I have stated several times in this Opinion, the conditions governing such secondary liability are a matter for national law.

F. The fact that the objective of a high level of copyright protection does not justify a different interpretation of Directives 2000/31 and 2001/29

233. Unlike Mr Peterson and Elsevier, I do not consider that the objective of Directive 2001/29, which is to ensure a high level of copyright protection, calls for a different interpretation of that directive and of Directive 2000/31 from that suggested in this Opinion.

234. I emphasise at the outset that this interpretation does not effectively leave rightholders without protection against the illegal uploading of their works on platforms such as YouTube and Uploaded.

235. In particular, the rightholders have the option, *first*, to take legal action against users who have made such illegal uploads. To that end, among other things, Directive 2004/48 gives rightholders the right to obtain certain useful information from operators such as YouTube and Cyando, including the names and addresses of those users.[216] *Second*, those rightholders may notify the operators of the presence on their platforms of files containing their works which have been uploaded illegally. Under Article 14(1) of Directive 2000/31, those operators are required to react expeditiously to such notification, removing or disabling access to the files concerned. Failing this, those operators lose the benefit of the exemption from liability under that provision and may, in some circumstances, be held liable under the applicable national law. In addition, if an operator deliberately facilitated the carrying out of illegal acts by users of its platform, the application of that provision would, to my mind, be

213 See, in particular, Article 4 of Directive 2004/48, which states that 'Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this chapter: (a) the holders of intellectual property rights, *in accordance with the provisions of the applicable law*' (my emphasis). These can be substantive rules laid down either in EU law or in national law (see Article 2(1) of that directive).

214 See recital 15 and Article 2(3)(a) of Directive 2004/48.

215 See Article 2(1) of Directive 2004/48.

216 See Article 8(1)(c) and (2) of Directive 2004/48. See also, on this subject, my Opinion in *Constantin Film Verleih* (C-264/19, EU:C:2020:261).

automatically excluded. *Lastly*, the rightholders may in any event obtain injunctions against platform operators on the basis of Article 8(3) of Directive 2001/29, by which supplementary obligations can be imposed on them in order to bring to an end copyright infringements committed by users of their platforms and to prevent such infringements.

236. Rightholders do not therefore encounter the difficulties in enforcing their rights and combating illegal uploads of files containing their works on platforms such as YouTube and Uploaded which they experience in the context of such file-sharing on a peer-to-peer network facilitated by a platform such as 'The Pirate Bay'. In the latter case, given the decentralised organisation inherent in any such network,[217] the measures envisaged in the preceding point lose their effectiveness. In the present cases, however, the files are stored centrally on the servers of YouTube and Cyando, the latter each having the capacity to remove them, as envisaged by the EU legislature in Article 14(1) of Directive 2000/31.[218] An interpretation of the concept of 'communication to the public' like that adopted by the Court in *Stichting Brein II* ('The Pirate Bay') would therefore be even less justified in the present cases.

237. The rightholders contend that the exclusive rights that they hold over their works are not respected since the measures in question are in essence *reactive* rather than *proactive* — as they do not prevent any uploading of illegal content in advance, but allow, in particular, such content to be removed and, in some cases, blocked subsequently — and since those measures require their collaboration. In their view, a high level of protection of their rights would be ensured only if platform operators established a system that did not require such cooperation and which allowed the legality of all content to be checked before it is uploaded.

238. In its case-law the Court generally does not follow a simplistic logic whereby a broad (and unlimited) interpretation is necessarily given to the exclusive rights laid down in Articles 2 to 4 of Directive 2001/29, any more than it interprets strictly, in any event, the exceptions and limitations envisaged in Article 5 of that directive. In my view, where the Court both delimits those rights[219] and specifies the scope of the exceptions and limitations,[220] it seeks to arrive at a *reasonable* interpretation which safeguards the purpose pursued by those different provisions and maintains the 'fair balance' which the EU legislature intended to establish in the directive between various fundamental rights and opposing interests. Thus, Article 3(1) of that directive does not necessarily have to be interpreted in a manner which ensures *maximum protection* for rightholders.[221]

239. Similarly, although copyright is protected as a fundamental right, in Article 17(2) of the Charter in particular, that right is not absolute and must generally be balanced with other fundamental rights and interests.

240. Such a balance is necessary in the present instance. First, platform operators can rely on the freedom to conduct a business guaranteed in Article 16 of the Charter, which protects them, in principle, from obligations which may have a significant impact on their activity.

217 I note that the shared works are stored on the computers of different users on the network and a platform such as 'The Pirate Bay' simply hosts the torrent files allowing those works to be found on that network.

218 See Opinion of Advocate General Szpunar in *Stichting Brein* (C-610/15, EU:C:2017:99, points 19 and 20).

219 See judgments in *GS Media*, paragraphs 44 and 45, and of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 41).

220 See, in particular, judgments of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraphs 22 to 27); of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraphs 51, 58 and 65 to 76); and of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraphs 36, 38 and 50 to 59).

221 In particular, the fact that rightholders do not have *maximum* protection of their intellectual property means, in my view, that they can be required to show a certain level of vigilance towards users of their works online and cooperation with operators of platforms. See, by analogy, in the field of trade mark law, the Opinion of Advocate General Cruz Villalón in *Backaldrin Österreich The Kornspitz Company* (C-409/12, EU:C:2013:563, point 83).

241. Second, the fundamental rights of users of those platforms cannot be ignored. These include freedom of expression and information, which is guaranteed by Article 11 of the Charter,[222] which, I note, encompasses freedom to hold opinions and to receive and impart information and ideas. It is clear from the case-law of both the Court of Justice and the European Court of Human Rights that the internet is of particular importance in this respect.[223] More specifically, the latter court has held that YouTube is an important means by which individuals exercise that freedom.[224] That is also the case for freedom of the arts, which is guaranteed by Article 13 of the Charter and is closely linked to freedom of expression, given the large number of people using online platforms such as YouTube to share their creations online.

242. Requiring online platform operators to check, in a general and abstract manner, all the files which their users intend to publish before they are uploaded in search of any copyright infringement would introduce a serious risk of undermining these different fundamental rights. Given the potentially considerable volume of hosted content, it would be impossible to carry out such a check in advance manually and, furthermore, the risk in terms of liability for those operators would be excessive. In practice, the smallest of them would be at risk of not surviving that liability and those with sufficient resources would be forced to carry out general filtering of their users' content, without judicial review, which would result in a substantial risk of 'over-removal' of that content.

243. I note in this regard that in *SABAM*[225] the Court ruled that imposing on a platform operator a general obligation to filter the information that it stores would not only be incompatible with Article 15(1) of Directive 2000/31, but also would not strike a 'fair balance' between the protection of the intellectual property right enjoyed by rightholders and that of the freedom to conduct a business enjoyed by service providers pursuant to Article 16 of the Charter. Such an injunction would result in a serious infringement of that freedom since it would require that operator to install a complicated, costly, permanent computer system at its own expense.[226] In addition, such an obligation to carry out general filtering would undermine the freedom of expression of the users of that platform under Article 11 of the Charter, since the filtering tool might not distinguish adequately between illegal content and legal content, with the result that its introduction could lead to the blocking of the latter category of content.[227] I will add that such a result would introduce a risk of undermining online creativity, which would be contrary to Article 13 of the Charter. The danger in that regard is that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society.[228]

222 I note that Article 11 contains rights which correspond to those guaranteed by Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and that the former article must therefore be interpreted in the light of the relevant case-law of the European Court of Human Rights on the latter article. See, in particular, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 73).

223 See, in particular, *GS Media*, paragraph 45, and ECtHR, 18 December 2012, *Ahmet Yildirim v. Turkey*, CE:ECHR:2012:1218JUD000311110, § 54; ECtHR, 1 December 2015, *Cengiz and Others v. Turkey*, CE:ECHR:2015:1201JUD004822610, § 49. See also, in the same vein, ECtHR, 10 March 2009, *Times Newspapers Ltd v. United Kingdom (Nos 1 and 2)*, CE:ECHR:2009:0310JUD000300203, § 27, and ECtHR, 10 January 2013, *Ashby Donald and Others v. France*, CE:ECHR:2013:0110JUD003676908, § 34.

224 ECtHR, 1 December 2015, *Cengiz and Others v. Turkey*, CE:ECHR:2015:1201JUD004822610, § 51-52. See also, to that effect, judgment of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122, paragraphs 56 and 57).

225 Judgment of 16 February 2012 (C-360/10, EU:C:2012:85).

226 I repeat, in that regard, that not all service providers have the same capacities and resources as YouTube.

227 See judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraphs 44 to 52). Thus, even assuming that platform operators do not come within the scope of Articles 14 and 15 of Directive 2000/31, the obligation to monitor all files uploaded by users *ex ante* would, in any case, be contrary to the fundamental rights guaranteed by the Charter.

228 That is the case for videos such as online tutorials and other videos that aim to entertain or to inform, which can, in principle, use protected works in certain circumstances in accordance with certain exceptions laid down in Article 5 of Directive 2001/29. In that regard, I note that there are questions surrounding YouTube's Content ID software, which, it would seem, has previously mistaken innocent videos for protected works uploaded illegally and has blocked videos because they have used a few seconds of such works (see, in particular, Signoret, P., 'Sur YouTube, la détection automatique des contenus soumis à droit d'auteur ne satisfait personne', *Le Monde*, Pixels blog, 5 July 2018). In that regard, YouTube acknowledges that Content ID does not detect the application of any copyright exceptions (see the video YouTube Creators, 'Content ID sur YouTube', accessible at: https://youtu.be/9g2U12SsRns).

244. In short, it seems to me that the balance to be struck is distinctly more delicate than rightholders claim. [229]

245. Against this background, Directives 2000/31 and 2001/29 reflect a balance between these different rights and interests, as desired by the EU legislature when they were adopted. By Directive 2000/31, the EU legislature intended to promote the development of intermediary providers in order to stimulate more generally the growth of electronic commerce and 'information society services' in the internal market. It was therefore important not to impose on those providers a liability which could jeopardise the profitability of their activity. The interests of copyright holders should be safeguarded and balanced against the freedom of expression of users of those services essentially in the context of 'notice and take down' procedures. [230] The EU legislature maintained that balance in Directive 2001/29, stating that the interests of rightholders would be adequately safeguarded by the possibility of obtaining injunctions against those intermediary providers. [231]

246. Circumstances have undoubtedly changed since those directives were adopted. Intermediary providers are no longer the same and this balance is perhaps no longer justified. In any event, although such changes in circumstances can be taken into account to some extent by the Court when it exercises the scope for interpretation left by EU law, it is mainly for the EU legislature to assess them and, if necessary, to make changes to that legislation by substituting a new balance for the one it had initially established.

247. It should be recalled that the EU legislature has in fact recently re-evaluated this balance of rights and interests in the field of copyright for the future. In the course of the present preliminary ruling proceedings, Directive 2019/790 entered into force. [232] Article 17(1) of that directive now requires Member States to provide that an 'online content-sharing service provider [233] performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users'. Accordingly, as is stated in paragraph 2 of that article, such a 'provider' must itself obtain an authorisation from the rightholders, for instance by concluding a licensing agreement, for the works uploaded by its users. Furthermore, paragraph 3 of that article states that where such a 'provider' performs an act of communication to the public or of making available to the public under the conditions laid down in that directive, the exemption from liability provided for in Article 14(1) of Directive 2000/31 does not apply.

248. Article 17(4) of Directive 2019/790 further provides that, if no such authorisation is obtained, 'online content-sharing service providers' are liable for illegal acts of communication to the public carried out via their platform . Under that provision, however, those 'providers' are not liable if they demonstrate that they have (a) made 'best efforts' to obtain an authorisation, (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

229 In addition, the complexity of that issue is increased further, in my view, by the ambivalent nature of the internet and, more specifically, platforms such as YouTube, with regard to infringements. Although YouTube offers tools that can be used to infringe copyright, those tools, in particular search engines, also facilitate the detection of those infringements.

230 See recitals 40, 41, 45 to 49 of Directive 2000/31 and Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, pp. 4, 12, 16.

231 See recitals 16 and 59 and Article 8(3) of Directive 2001/29.

232 See Article 31 of Directive 2019/790.

233 Article 2(6) of Directive 2019/790 provides that, for the purposes of that directive, 'online content-sharing service provider' means 'a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes'. See also recitals 62 and 63 of that directive.

uploads in accordance with point (b)'.[234] Paragraphs 5 and 6 of that article provide that the intensity of the obligations to use best endeavours to which those 'providers' are thus subject varies according to different factors, including 'the type, the audience and the size of the service', while small providers also benefit from less stringent obligations.[235]

249. One last point must be examined. Mr Peterson and the French Government argued at the hearing that, as is stated in recital 64 of Directive 2019/790,[236] in adopting Article 17 of that directive, the EU legislature simply intended to 'clarify' how the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 should always have been understood and applied to platform operators such as YouTube. I infer from their argument that Article 17 also merely 'clarified' the fact that Article 14(1) of Directive 2000/31 had never been applicable to those operators. Article 17 of Directive 2019/790 thus constitutes a kind of 'interpreting law', simply clarifying the meaning that Directives 2000/31 and 2001/29 should always have had. Solutions based on that new Article 17 should therefore apply retroactively, even before the expiry of the deadline for the transposition of Directive 2019/790 on 7 June 2021,[237] including in the cases in the main proceedings.

250. I cannot accept that argument. In my eyes, it would be contrary to the principle of legal certainty to infer such retroactive application from the mere use of an ambiguous term in a recital that is of no binding legal value.[238]

251. Moreover, I note that, aside from recital 64, no provision of Directive 2019/790 tends to indicate that the EU legislature intended to give a retroactive interpretation of Article 3(1) of Directive 2001/29 and Article 14 of Directive 2000/31, despite taking the care to clarify the temporal application of Directive 2019/790 as regards protected works and other subject matter,[239] and to lay down a transitional provision for the application of another of its provisions.[240] Furthermore, Article 17 of Directive 2019/790 itself states, in paragraphs 1 and 3, that the concept of 'communication to the public' provided for applies 'for the purposes of this Directive' and 'under the conditions laid down in this Directive'. The envisaged direct liability of 'providers' for acts of communication committed by users of their platforms, provided for in Article 17, is not simply the consequence of the way in which Article 3 of Directive 2001/29 should always have been understood, but 'arises' from Article 17.[241] Therefore, even supposing that the EU legislature can, almost 20 years after the adoption of a directive, provide its authentic interpretation, I consider that that question is not relevant in the present instance.

234 As I have stated, whilst Article 14(1)(b) of Directive 2000/31 provides, in my view, for a take down obligation, Article 17(4)(c) of Directive 2019/790 now establishes a general and *ex ante* stay down obligation.

235 More precisely, it follows from Article 17(6) of Directive 2019/790 that, in essence, 'providers' which have operated for less than three years whose turnover is below EUR 10 million need only prove their best efforts to obtain authorisation from rightholders and are not subject to a take down obligation.

236 According to that recital, 'it is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. …'

237 See Article 29 of Directive 2019/790.

238 See, inter alia, judgment of 11 June 2015, *Zh. and O.* (C 554/13, EU:C:2015:377, paragraph 42 and the case-law cited). Moreover, although, according to the Court's case-law, such a recital may explain the content *of the act of which it forms part*, in the present instance, this would amount to clarifying the meaning not of Directive 2019/790, but of Directives 2000/31 and 2001/29.

239 See Article 26 of Directive 2019/790, which states that the directive applies in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021 and that it is without prejudice to any acts concluded and rights acquired before that date.

240 See Article 27 of Directive 2019/790, which states that agreements for the licence or transfer of rights of authors and performers are subject to the transparency obligation set out in Article 19 of that directive as from 7 June 2022.

241 See recital 65 of Directive 2019/790.

252. As the Commission pointed out at the hearing, the EU legislature did not 'clarify' the law as it should always have been understood. It created a *new liability regime* in the field of copyright for certain online intermediaries. The idea was 'to adapt and supplement' the existing Union copyright framework.[242] As the Commission stated, Article 17 of Directive 2019/790 reflects a political choice by the EU legislature to support the creative industries.[243]

253. Article 17 also forms part of a series of public consultations,[244] communications from the Commission[245] and new sectoral regulations[246] which, with a view to 'adapting' and 'modernising' EU law to the new circumstances mentioned above, tends to demand more proactive involvement from intermediaries in order to prevent a proliferation of illegal online content.[247]

254. Furthermore, it is necessary to bear in mind the consequences that would stem from the retroactive application suggested by Mr Peterson and the French Government. As a result of the 'clarification' given by Article 17(1) and (3) of Directive 2019/790, platforms operators would be generally liable for all the acts of communication to the public carried out by their users and would not be able to benefit from the exemption laid down in Article 14(1) of Directive 2000/31. However, paragraphs 4 onwards of Article 17, which, as I have stated, lay down, inter alia, an exemption regime for those operators, would not themselves apply retroactively. By laying down the latter provisions, the EU legislature sought, to my mind, to ensure a balance between the various rights and interests at play.[248]

255. Thus, not only would applying Article 17(1) of Directive 2019/790 retroactively in cases such as those in the present instance fail to respect the balance desired by the EU legislature when Directives 2000/31 and 2001/29 were adopted, but it would equally not respect the balance desired by that legislature when Directive 2019/790 was adopted. In reality, that approach would not reflect, in my view, *any balance at all*.

242 See recitals 3 and 4 of Directive 2019/790.

243 By providing that operators such as YouTube carry out acts of 'communication to the public' of the works that their users upload to that platform, the EU legislature sought to remedy the 'value gap' put forward by rightholders (see point 47 of this Opinion). See, in that regard, recitals 3 and 61 of Directive 2019/790 and Proposal for a Directive of the European Parliament and of the Council of 14 September 2016 on copyright in the Digital Single Market (COM(2016) 593 final), pp. 2 and 3.

244 See, in particular, in 2010, 'Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)'; in 2012, 'A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries' and, in 2015, 'Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy'. Similarly, in the United States, after a public consultation launched in 2015, the US Copyright Office delivered, on 21 May 2020, a report recommending that the United States Congress modernise the provisions in section 512 introduced by the DMCA (see *United States Copyright Office*, *Section 512 Study*, available at https://www.copyright.gov/policy/section512/).

245 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 January 2012, 'A coherent framework for building trust in the Digital Single Market for e-commerce and online services' (COM(2011) 942 final), pp. 13 to 16; of 6 May 2015, 'A Digital Single Market Strategy for Europe' (COM(2015) 192 final), pp. 4, 8 and 12 to 14; of 9 December 2015, 'Towards a modern, more European copyright framework' (COM(2015) 626 final), pp. 2, 3 and 10 to 12; and of 25 May 2016, 'Online Platforms and the Digital Single Market — Opportunities and Challenges for Europe' (COM(2016) 288 final), pp. 8 to 10.

246 See Directive 2018/1808, which brings video-sharing platforms within the scope of the rules on 'audiovisual media services' and obliges the operators of such platforms to take appropriate, practicable and proportionate measures to protect minors from videos which may impair their development and the general public from videos containing incitement to violence, hatred or terrorism (see Article 1(1)(b) and Articles 28a and 28b of Directive 2010/13, added by Directive 2018/1808). See, also, Recommendation on measures to effectively tackle illegal content online and Proposal for a Regulation of the European Parliament and of the Council of 12 September 2018 on preventing the dissemination of terrorist content online (COM(2018) 640 final).

247 See, also, for explanations to that effect, Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies), and ECtHR, 16 June 2015, *Delfi AS v. Estonia*, CE:ECHR:2015:0616JUD006456909.

248 In particular, it seems that the rules laid down in paragraphs 4 onwards of Article 17 of Directive 2019/790 seek to offer certain guarantees to the operators concerned as well as to users of their platforms. I note, however, that the details of the new liability regime under Article 17 of Directive 2019/790 fall outside the scope of this Opinion. I also do not intend to give a view in this Opinion on its compatibility with the fundamental rights guaranteed by the Charter. In that regard, the Court is hearing an action for annulment (see Case C-401/19, *Poland* v *Parliament and Council*) which will give it the opportunity to rule on that issue.

VI. Conclusion

256. In the light of all the above considerations, I propose that the Court answer the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany) in Cases C-682/18 and C-683/18 as follows:

(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 and the operator of a file-hosting and -sharing platform do not carry out an act of 'communication to the public' within the meaning of that provision when a user of their platforms uploads a protected work there.

(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, in principle, the operator of a video-sharing platform and the operator of a file-hosting and -sharing platform can benefit from the exemption under that provision in respect of all liability that may result from the files that they store at the request of users of their platforms.

(3) Article 14(1)(a) of Directive 2000/31 must be interpreted as meaning that, in principle, the situations mentioned in that provision, namely the situation where a service provider 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.

(4) Article 8(3) of Directive 2001/29 must be interpreted as precluding rightholders from being able to apply for an injunction against a provider whose service that consists of the storage of information provided by a user is used by third parties to infringe a copyright or related right only if such an infringement has taken place again after notification of a clear infringement has been provided.