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# Landmark ruling on Google's liability for YouTube in Austria

Vienna Commercial Court, judgment of 5 June 2018

In June 2018 the Vienna Commercial Court, at first instance, handed down a landmark decision on Google Inc.'s liability for copyright infringements on its YouTube platform, after Austrian broadcaster Puls4, whose content had been distributed via YouTube without its consent, filed a claim against Google arguing that the platform would not qualify as a host provider under the E-Commerce Directive (Directive (EU) 2000/31) ('the E-Commerce Directive'). The Vienna Commercial Court found that YouTube, rather than taking the role of intermediary, should in fact be treated as though the content in question belongs to Google.

In the past, several copyright holders and collective societies across Europe have challenged Google's role as operator of, and its liability for infringements by uploads of users on, YouTube. All those proceedings have had in common that the claimants generally accepted that YouTube is deemed to be a host provider, with the respective limitations of liability of the E-Commerce Directive being applicable. Right holders then argued that, in this limited liability framework, Google would have to react immediately if it were informed of a copyright infringement. There are already relevant court rulings in Italy, Germany and France. The decisions deviate as regards the quality of the notification required (on whether the infringements or the challenged content need to be specified precisely; whether it is even required that Google's programmes and procedures for identifying copyright infringements

are used; whether the programmes and procedures offered by Google are sufficient) and under what circumstances and to what extent the platform might be held liable for future similar infringements. The latter would, in the end, lead to a requirement for Google to monitor and police the content uploaded on YouTube in order to avoid future liability for such third-party content. In this regard the Court of Justice of the European Union ('CJEU') had held, in its early ruling in *SABAM* (C-360/10), that any order to filter content imposed on a host provider would conflict with the limitation of liabilities regime established under the E-Commerce Directive.

So far, so good. However, in the recent Austrian case, the claimant did not agree with those limitations being reasonably applied to platforms such as YouTube. Thus, the Austrian broadcaster Puls4, whose content had

been distributed via YouTube without its consent, filed a direct claim against Google, arguing that the platform would not qualify as a host provider under the E-Commerce Directive: YouTube would directly make use of the third-party content by promoting and commercially exploiting the uploads.

In its non-enforceable (appeals to the Higher Court of Vienna and subsequently to the Supreme Court are still possible), unpublished decision the Vienna Commercial Court agreed that YouTube would not take the neutral role of an intermediary but - by linking, sorting, filtering and connecting, and particularly by providing indexes of the content recording to preset categories, investigating user behaviour and submitting tailor-made recommendations and the offering of support, would act as though the content belonged to Google. As a result, Google, as the

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provider of YouTube, could not rely on the limitations of liability as granted in the E-Commerce Directive but would be directly liable for the copyright infringements of its users. Besides a direct claim for omission for actual infringements, YouTube would also be forced to set up filtering mechanisms to prevent future liability for third-party infringements. In other words, Google would be obliged to set measures that were denied by the CJEU for host providers in previous cases.

The crucial point is the question of Google's qualification in this case. Allegedly, the Vienna Commercial Court carried out thoughtful research on the mechanism and offerings on the platform and, on this basis, concluded that Google goes beyond the neutral role that a host provider should usually assume. The case is somehow reminiscent of a very early IT decision of the Austrian Supreme Court regarding the liability for linking: a service provider that was the biggest job portal in Austria did claim.

However, it did not really provide job advertisements created or generated on their own but merely links to another platform that copied all the employment ads of a daily newspaper that was really the leading platform in that field. The Austrian Supreme Court decided that, due to the provider's

proud announcement of being the biggest job platform in the country, the offering would be incomplete without the referred advertisements. Thus, the operator of the platform would have to assume liability for the copyright infringing third party content because of making use of it as if it were its own (*Zueigenmachen*; OGH 4 Ob 27400 y, 'Jobmonitor', 18 December 2000).

The decision is therefore ground breaking as it abandons the pre-existing trials as to the qualification of Google for the provision of YouTube, in order to place the monitoring and liability obligations on YouTube. However, it is, to some extent, in line with pre-existing Austrian court decisions and doctrine. In any case, it hits an interesting spot: namely, which criteria will apply for qualification as a host provider, and how practical changes in the E-Commerce Directive should be reflected in this assessment, particularly when it comes to limitation of liability.

This dispute or issue might also be seen in light of the recent legal and political developments that give the impression that the EU and the CJEU increasingly quit the mantra of enabling e-commerce in order to being competitive on the global market in favour of more control (data protection) and protection of rights holders. In any case, the pending proceedings are another good example

and highlight that both the E-Commerce Directive and the copyright framework urgently need revision in order to be fit for the already changed environment and particularly for digitalisation.

In any event, it does not come as a surprise that Google has challenged the decision of the court of first instance and has filed an appeal. Given the potential impact on other platform providers across Europe, and the underlying questions being based on European law (particularly those on the interpretation of the E-Commerce Directive), the CJEU will most likely have the final say in the case. However, it will take quite some time. The appeal procedures usually take between six and nine months. Since the appeal court does usually not refer cases to the CJEU, it will then take another couple of months until the highest Austrian court might decide to make a preliminary ruling.

Considering justified counter-arguments and scepticism on the claimant's move and the Vienna Commercial Court's confirmation, we must also remember that the CJEU's decision on required filtering activities of access providers, as ruled in *UPC (C-314/12)* started with an extraordinary decision by the Vienna Commercial Court. Thus, the further developments are of great interest and will be monitored internationally.