

Max Planck Institute
for Innovation and Competition

Communication/making available to the public – questions regarding UUC platforms under EU law

Copyright in the Digital Age
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Overview

1. Who is a user under EU (and some Member States') law in case of UUC platforms and similar services?
2. How has Art. 14 E-Commerce Directive been interpreted by the CJEU, with a view to its application to UUC platforms?
3. Would Art. 13 and recital (38) of the proposed DSM Directive change EU law in this respect?



1. Who is a user under EU (and some Member States') law in case of UUC platforms and similar services?

- What conditions must be fulfilled for a communication/making available to the public according to the CJEU?
 - Offering of works to the public suffices (e.g., Svensson)
 - Also any transmission, irrespective of technical means or procedure
 - To the public: indeterminate number of people, not too small (yes); in case of UUC platforms or the like: no new public needed (only for secondary transmission)



1. Who is a user under EU (and some Member States') law in case of UUC platforms and similar services?

- Who performs this act in case of UUC and similar platforms and is thus a user according to the CJEU?
 - “indispensable role of user” (ex.: operator of hotel, pub)
 - Access possible “only as a result of deliberate intervention of that operator”
 - Possible that several actors perform the act jointly (here: consumers who upload works, platform that makes them accessible): *Airfield*; AG Szpunar in *Pirate Bay*
 - National law of Member States not uniform in this respect



1. Who is a user under EU (and some Member States') law in case of UUC platforms and similar services?

- Recital 27 Directive 2001/29 (and WCT/WPPT Declaration): mere provision of physical facilities is not communication – CJEU:
 - Installation of TV sets in hotel rooms vs enabling transmission of signal by means thereof (SGAE)
 - “Simple activity of sale or rental of television sets by specialized enterprises” vs. deliberately rendering accessible works to guests by connecting TV sets to central antenna (Organismus Sillogikis)
 - Comparison with UUC services: offering of server space vs. rendering works uploaded by consumers available to the public in a structured way, etc.



2. How has Art. 14 E-Commerce Directive been interpreted by the CJEU, with a view to its application to UUC platforms?

- e-Bay/L'Oréal:
- ISP not a provider in the meaning of Art. 14 E-Commerce Directive if:
 - It does not provide its services *'neutrally by a merely technical and automatic processing of the data provided by its customers,'*
 - but if it *'plays an active role of such kind as to give it knowledge of, or control of, those data'*
- Active role in particular if ISP *'has provided assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting those offers'*;



3. Would Art. 13 and recital (38) of the proposed DSM Directive change EU law in this of questions 1 and 2?

- No:
 - According to CJEU interpretation, UUC and similar platforms perform an act of communication to the public/making available (jointly with consumers)
 - Recital (38) only repeats two examples for an active role as described by CJEU
- Text of recital (38) should better be placed in the article itself, and expressed clearer





Thank you for your attention!

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