

BVMI on today's ECJ ruling on YouTube and Cyando:

European Court of Justice on making available to the public by video-sharing or share-hosting platforms

Berlin, June 22, 2021 – The German Music Industry Association (BVMI) takes note of the judgment of the European Court of Justice (ECJ) in the cases "Peterson v. Google & YouTube" and "Elsevier Inc. v. Cyando AG (Uploaded)". In the judgment, the Court states that "in the current state of EU law, there is in principle no making available to the public by the operators of internet platforms of copyright-protected content unlawfully uploaded by users, unless the operators contribute, beyond the mere provision of the platforms, to giving the public access to such content in breach of copyright". The ECJ thus speaks out against a general making available of copyright-protected works by the operators of internet platforms, however, according to the legal situation before European harmonisation. The court also emphasises that making available to the public is to be affirmed if the platform fulfils further aspects such as knowing or having to know the infringing content, is involved in the selection of the protected content or knowingly promotes such sharing.

Dr. **Florian Drücke**, Chairman & CEO of BVMI: "The clarifications of the ECJ on platform liability, which many had hoped for, have unfortunately only taken place to a limited extent according to initial assessments. Even under the old law, internet platforms should not be able to invoke "technical neutrality" and the so-called "safe harbour" provisions of the E-Commerce Directive from the early days of the internet. The ECJ also emphasises that liability is to be affirmed if certain aspects are taken into account. The ECJ is critical of the Uploaded service because the "chosen business model is based on the availability of infringing content" and its users may be tempted to share such content. For years, we have been pointing out that business models of sharehosting services such as Uploaded almost inevitably lead to mass infringements of rights on the internet due to the anonymous possibility of use and the bonus system created by the operators in favour of the uploaders."

Drücke continues: "The proceedings concern an important question of principle that guided the European legislator in the European copyright reform two years ago with regard to services such as YouTube and which it decided in favour of the European digital single market. In the meantime, as we know, the German legislator has taken action and chosen its own path, which we view very critically. It now remains to be seen how the scope of application will be assessed by the courts, in particular how the FCJ will decide in the specific cases after the referral back. In general, it can be said that the legal certainty we hoped for in the course of the copyright amendment in the area of digital licences, the lifeline of our industry, has not been achieved in the long term."

The YouTube case deals with the central question of whether said "user uploaded content" (UUC) platforms engage in an act of making available to the public. This is to be assumed if the service plays a central role in making protected content available. The question of making available to the public is relevant for the platforms for liability reasons. They are responsible for content and liable as perpetrators if they grant third parties access to copyrighted works with full knowledge of the consequences of their conduct and the communication is made to the public (ECJ, 14.06.2017, C-610/15, paras 34, 36, 45 - Stichting Brein/Ziggo - The Pirate Bay).



The operators of sharehosting services such as Uploaded promote the uploading of copyright-infringing content to a considerable extent through the design of their remuneration system. Without Uploaded's business model, the mass distribution of copyrighted content would be neither possible nor lucrative. While the storage space is free of charge, the download is, on the one hand, only conveniently usable against payment, and users are remunerated for the mass download of their files posted to the service through a bonus system. The anonymity of the usage option thereby increases the probability of not being held accountable for copyright infringements.

With regard to the liability of such services, the ECJ has now made further clarifications, which will have to be decided by the FCJ after referral back in the specific case. The two cases (Case No. I ZR 140/15 and Case No. I ZR 53/17) had been referred to the ECJ by the Federal Supreme Court for a preliminary ruling on questions of the liability of internet platforms. The ECJ decision will also have an impact on the application of the recently adopted copyright amendment (press release 20.05.2021).'

About Bundesverband Musikindustrie e. V.:

The German Music Industry Association (BVMI) represents the interests of around 200 record producers and music companies, which account for more than 80 percent of the German music market. The association advocates the concerns of the music industry in German and European politics and serves as a central point of contact for the public regarding the music industry. In addition to determining and publishing market statistics, BVMI's portfolio includes industry-related services. Since 1975, it has awarded the most successful artists in Germany with GOLD and PLATIN, since 2014 also with DIAMOND, and since 1977 the Official German Charts have been compiled on behalf of BVMI. The PLAYFAIR initiative was launched in 2013 to guide consumers in their use of music on the Internet.

Further information: www.musikindustrie.de