

Déjà vu as EU court revisits online platform liability for infringing content uploaded by users

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by Ron Moscona



The European Union's highest court will have another opportunity to consider the issue of the liability of online platforms for copyright infringing content uploaded and shared by users. Two referrals from national courts (one Austrian and one German) are pending before

the Court of Justice, both concerning infringing videos posted on YouTube and both raising a similar set of questions.

Under current EU law, the question of liability focuses on the application of the 'take down' rules under the Electronic Commerce Directive of 2000 (the equivalent of the Digital Millennium Copyright Act in the U.S.). The rule essentially shields the hosting of content by an online platform if it acts expeditiously to remove the content upon gaining knowledge or awareness of the infringement.

However, as [previously reported in this blog](#), the EU's new directive on copyright in the Digital Single Market, which was adopted on 26th March 2019, is designed to shift the balance struck under the e-Commerce Directive between content creators and online platforms. Although the new directive will not abolish the existing 'take down' principle, these rules will be replaced, as far as content sharing platforms are concerned, with new rules that will give creators and rightholders more control over their content and impose more responsibility on the platform operators before they can enjoy protection against liability in relation to infringing content uploaded and shared by users on the platform. As German MEP Julia Reda suggested, the new directive means services would have to "buy licences for anything that users may possibly upload" and called it an "impossible feat". Google, which operates the YouTube platform has been a prominent advocate against the new directive.

The new legislation is yet to be implemented by EU member states into their national laws (they have two years to do so). For the time being, the Austrian and German courts are raising a familiar set of questions that concerning the current 'take down' rules under EU law, but the answers the court offers could also reflect on some aspects of the new

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legislation.

Firstly, they ask whether YouTube involve itself 'too much' in the infringing content so as to make it more than a "mere host". The principle established by the EU court is that the immunity from liability enjoyed by a 'hosting service' is only available to a service insofar as it stores data through automatic and neutral processes, without knowledge or awareness of actual infringements (or that it acts expeditiously to remove the infringing content upon becoming aware of the infringement).

The national courts ask whether YouTube exceed those parameters by providing a variety of added services to users on its platform that allegedly go beyond mere data storage, such as viewing recommendations and search facilities, as well as tips on how to use the platform and the placing of advertisements, in some cases linked to the content viewed by the users. It is also noted by the referring courts that YouTube takes a license to exploit any uploaded content and that its terms and conditions state that infringing content may be removed.

Both courts also seek guidance on whether knowledge or awareness of infringements in the context of the immunity from liability provisions for hosting services concerns only specifically identified infringements or whether an element of constructive knowledge is also relevant.

These are interesting questions, although they have already been considered by the EU court in previous cases, particularly in the *Google France* case, which concerned Google's Adword services, and in the *eBay International* case, both from 2010.

Both cases from 2010 concerned trade mark infringements rather than copyright. The *eBay International* case in particular touched on the question whether the operations of the online marketplace exceeded the limits of the legal immunity provided to a hosting service where it involved itself in the sale of infringing goods by promoting the goods through the use of search engine Adwords (to attract internet traffic to the platform), by providing search facilities and by placing advertisements using the relevant marks on its own platform. The court stated that a marketplace that provides assistance to the seller of infringing goods by optimising their presentation will not benefit from the protection from liability, but it left it to the national court to determine which activities of the marketplace actually amount to providing such assistance.

The two referrals by the Austrian and German national courts raise a further set of questions concerning the power of the courts to issue injunctions against intermediaries whose services are used by their users to engage in acts that infringe copyright. Several EU directives require member states to ensure that their national courts have the power to issue such injunctions. The referring courts seek guidance, among other things, on whether the jurisdiction to issue injunctions is limited to cases where the intermediary has actual knowledge of the infringements.

As with the issue above, the Court of Justice of the EU had already considered the issue of injunctions and in its decision in the *eBay International* case held that it was a matter

for national law to set out the conditions, parameters and procedures by which injunctions should be granted against intermediaries. It made it clear that a national court must have the power under national law to order intermediaries to remove specifically identified infringing content, but also that they should be able to order measures to be taken to prevent infringements. The e-Commerce Directive itself makes it plain that the protection against liability does not prevent a court from issuing an injunction against the platform operator. However, the court pointed out in the *eBay International* decision that injunctions against a hosting platform cannot amount to imposing an obligation to monitor the data of each user, as the e-Commerce Directive expressly states that platforms should not be placed under such obligation. It added that courts must ensure that when issuing injunctions against platforms to take measures against infringements, it must be done without stifling competition in the market and without unduly jeopardising free speech. It is, the court said, a matter of striking a fair balance.

The previous decisions of the EU court did not resolve the tension between the protections provided for under the e-Commerce Directive to hosting services and the provisions of EU law requiring courts to have the power to issue injunctions requiring platforms to take measures against infringements. The issue is further complicated by the fact that the new EU legislation requires content sharing platforms, as a pre-conditions to enjoying the protection from liability, to use 'best efforts to ensure the unavailability [on the platform] of specific works' that are notified to the platform by rightholders. This requirement reflects the same idea that courts should be able to order online platforms to take measures to prevent further infringements. What form these measures, or best efforts, should take, is the key question yet to be answered by legislatures and courts.

It remains to be seen whether the two new cases might prompt the EU court to provide more detailed guidance on the issue of injunctions as well as on the degree to which a platform operator can involve itself in the dissemination of user-generated data on the platform without losing the immunity from liability.

New guidance from the EU court on the current law will still be relevant for content sharing platforms when the new rules come into force, at least for areas outside of copyright (such as trade mark infringement). Such guidance may also be useful for legislatures in Member States who are looking at the implementation of the new copyright legislation.