



Google sentenced to a prison term in Italy?

***Have Information Society Service
Providers developed a chink in their
armour?***

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Internet Intermediaries: the lifeblood of the internet

- 9.01am – Joe checks his “always on” internet connection. (Internet Service Provider)
- 9.02am – Joe opens a browser window and Googles “*Buses Malta*”. (Search Engine)
- 9.02am – Joe clicks on the first hit, a YouTube video uploaded by a Maltese user. Hilarious! (Hosting). He watches it again.
 - 9.10am – Joe updates his blog on Blogger (Hosting), “*Guys just watched the disco bus video, truly a case of only in Malta!*” (Creation of content).
 - 9.15am – Joe sends a link to the video to all his contacts via email. (Email)
 - 9.16am – Joe receives a reply from his boss telling him to stop wasting time at work!!



A little background...

- Pre-2000 European Commission noted the **existing and emerging disparity** between EU Member States as to liability of Intermediary Service providers.
- EU Directive 2000/31/EC (the “E-Commerce Directive”) adopted on 8th June, 2000 harmonising certain aspects of e-commerce and granting EU Intermediary Service Providers **certain Safe Harbour provisions which exempt same from liability**.
- Implemented in Malta through the E-Commerce Act (Cap. 426).

Why did the EU opt for a “Safe Harbour” regime?

- One regime applicable to all types of infringements.
- Makes it easier for Intermediary Service Providers to operate within (ie. no analysing of actual information content to understand applicable rule)
- Specific exemptions instead of general liability regime.

What is an Intermediary Service Provider?

- Key attributes (recitals to E-Commerce Directive):
 - “Activity is limited to the technical process of operating and giving access to a communication network”
 - “Has neither knowledge nor control over the information transmitted or stored.”
 - “Activity is of a mere technical, automatic and passive nature.”
 - “Does not modify the [content of the] information transmitted.”

The Three Intermediary Functions

- Three key functions:
 - Mere Conduit:
 - Access (e.g. ISPs)
 - Transmission (e.g. email, instant messaging)
 - Caching (e.g. Web archives)
 - Hosting (e.g. Web hosts, blogging sites)

Search Engines & other information location tools are not specifically caught (ECJ C-236-8/08 seems to indicate that possible if other factors present)

Safe Harbour – Mere Conduit

- **The Exemption:**
“...*the provider of such a service shall not be liable ... for the information transmitted.*”
- **The catch(s):**
Provided that the service provider **does not**
(a) *initiate the transmission,*
(b) *select the receiver, and*
(c) *select or modify the information contained in the transmission.*
Also does not apply where the provider is the subject of a prohibitory injunction.

Safe Harbour - Caching

- **The Exemption:**
"...the provider of such a service shall not be liable for damages for the automatic, intermediate and temporary storage of that information..."
- **The catch(es):**
Provided that the service provider:
 - (a) does not modify the information;
 - (b) complies with the conditions on access to the information;
 - (c) complies with any conditions regarding the updating of the information;
 - (d) does not interfere with the technology used to obtain data on the use of the information; and
 - (e) acts expeditiously to remove or to bar access to the information upon obtaining actual knowledge of any of the following:
 - (i) the information has been removed from the network;
 - (ii) access to it has been barred; or
 - (iii) the Court or other competent authority has ordered such removal or barring.

Safe Harbour - Hosting

- **The Exemption:**

"...the provider of such a service shall not be liable for the information stored at the request of a recipient of the service."

- **The catch:**

Provided that the service provider:

(a) does not have actual knowledge that the activity is illegal and is not aware of facts or circumstances from which illegal activity is apparent; or

(b) upon obtaining such knowledge or awareness acts expeditiously to remove or to disable access to the information.

The exemption also does not apply where the recipient is acting under the authority or the control of the service provider.

Article 21 E-Commerce Act

Requirement per Article 13 E-Commerce Directive

The General “no policing exemption”

- **The Exemption:**
“Nothing in this part of the Act shall be interpreted as imposing an obligation on information society service providers to monitor the information which they transmit or store or to actively seek facts or circumstances indicating illegal activity in connection with the activities [of mere conduit, caching or hosting.]”
- **The catch:**
“[if somehow aware] service providers shall promptly inform the public authorities competent in the matter of any alleged illegal activity undertaken or information provided by recipients of their service and shall grant to such authority upon request information enabling the identification of recipients of their service with whom they have storage agreements.”

Limitations of the Safe Harbour Provisions

- Data Protection (excluded by recital 14 of the E-Commerce Directive)
- Duty of care in order to detect and prevent certain types of illegal activities (allows Member States to require this per recital 48)
- Injunctions
- Copyright (excluded from scope)
- Divergence of interpretations and implementation amongst EU Member States
- What about Web 2.0 sites?

Google (YouTube) – Turin Bullying Video

- Video uploaded depicting disabled minor being bullied at school.
- Italian authorities advised YouTube of its illegality and they removed video.
- Court proceedings brought against Google for breach of minor's privacy rights in connection with the video (ie. his image in the video) and defamation.
- In its 111 page judgement the Court held that ISPs are not exempt from their data protection obligations.
- Court in Milan found Google guilty for the breach of privacy rules but not of defamation and sentenced three senior Google executives to 6 months imprisonment.

SABAM vs. Scarlet (Tiscali)

- Belgian Rights Society (SABAM) obtained judgement by Brussels 1st Court to impose a P2P filtering / blocking obligation upon Scarlett. Court reasoned that this is not a “general monitoring obligation”,
- Scarlett appealed before Brussels Court of Appeal. Reference made by Brussels Court to the ECJ for a Preliminary Ruling on the acceptability of such measures and their conformity with the E-Commerce Directive.
- Ruling pending.

Dailymotion Case – France

- Paris Court held that a video-sharing website (Dailymotion) was a hosting service provider (users were the content providers) but since it should have been aware of the offending material (a copyrighted video – “Joyeux Noel”) as it provided the tools to infringe copyright rules it could thus not benefit from the hosting safe harbour.

MySpace case - France

- Broadly similar facts as per the *Dailymotion case* but MySpace found to be a “content provider” not a host since it obtains ad revenue from its site and imposes a site structure (ie. not just passive storage).
- MySpace found liable for copyright infringement.

Google (again!) Case - France

- Google notified that a particular video was copyrighted and should be removed.
- Google removed video but other users re-posted the copyrighted video on three separate occasions.
- Action brought against Google before Paris Court.
- Court concluded that Google (YouTube) acts a hosting provider.
- However, the Court also concluded that the exemption on liability only applied the first time the video was posted and removed but did not apply to the re-posting(s) (Google should have filtered).

Seniorennet case - Belgium

- The Antwerp Court of first instance condemned the platform provider Seniorennet on the grounds that *“any operator of a platform has the obligation to take reasonable action to prevent damage from occurring to third parties”*.
- Therefore, and notwithstanding the fact that the Court did not hold Seniorennet liable for any copyright infringement, Seniorennet was obliged to prevent future exchange of copyright protected files through its platform (filtering).

Thank you