

Available online at www.sciencedirect.com

ScienceDirect

www.compseconline.com/publications/prodclaw.htmComputer Law
&
Security Review

Intermediaries' liability for online copyright infringement in the EU: Evolutions and confusions

Tatiana-Eleni Synodinou^{*}

Law Department, University of Cyprus, Cyprus

ABSTRACT

Keywords:

Intermediary liability

Telekabel

Delfi v. Estonia

E-Commerce Directive (2000/31/EC)

Nearly fifteen years ago and since the adoption of the E-commerce Directive 2000/31/EC the issue of the intermediaries' liability in Europe was thought to have been settled by the creation of a "safe harbor" regime, inspired by the American model. This article focuses on two recent jurisprudential interpretations on the question of intermediaries' liability: the Court of Justice of the European Union (CJEU) *Telekabel* judgment and the Judgment of the European Court of Human Rights (ECtHR) in the case *Delfi v Estonia*. The author analyses these evolutions and submits that intermediaries' asylum is in fact much less absolute than it looks. The article also demonstrates that intermediaries' safe harbor will have to deal with the recognition of human rights that could open new horizons to the development of the regulation of the intermediaries' liability.

© 2015 Tatiana-Eleni Synodinou. Published by Elsevier Ltd. All rights reserved.

1. Introduction

14 years have passed since the establishment of the Internet intermediaries' safe harbor regime in the E-Commerce Directive 2000/31/EC. Since 14 years is more or less an age, which can be seen as antediluvian in terms of Internet, it could have been reasonably assumed that the question was more or less settled and the legal answers refined in most instances. Nonetheless, the question of E-Commerce's intermediaries' asylum still remains enigmatic for national courts, both in respect of the question of liability and of the injunctions against intermediaries as third parties. Recent jurisprudential

evolutions, from the Court of Justice of the European Union and the European Court of Human Rights, have added some more haze to the landscape of intermediaries' asylum and liability. Heterogeneity and diversification in respect of the status of liability of Internet intermediaries among various Member States is an inherent ingredient of the E-Commerce Directive's regulation: the latter harmonized only the question of exoneration from liability of three main archetypes of intermediaries leaving to national member states the thorny question of liability.¹ Indeed, as Christina Angelopoulos notes "the veneer of approximation that the safe harbors supply masks the persisting fragmentation of substantive liability law along European borders."²

^{*} Law Department, University of Cyprus, University House "Anastasios G. Leventis" 1 Panepistimiou Avenue, Aglantzia, Nicosia, P.O. Box 20537, 1678 Nicosia, Cyprus.

E-mail address: synodint@ucy.ac.cy.

¹ M. Walter, in: M. Walter, S. von Lewinski, European Copyright Law, A Commentary, Oxford University Press, 2010, p. 1088, no 11.8. 13·Pablo Baistrocchi, Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce, 19 Santa Clara High Tech. L.J. 111 (2002). Available at: <http://digitalcommons.law.scu.edu/chtj/vol19/iss1/3>.

² Chr. Angelopoulos, Beyond the Safe Harbors: Harmonizing Substantive Intermediary Liability for Copyright Infringement in Europe, Intellectual Property Quarterly, 2013–3, p. 254. <http://dx.doi.org/10.1016/j.clsr.2014.11.010>

0267-3649/© 2015 Tatiana-Eleni Synodinou. Published by Elsevier Ltd. All rights reserved.

This article focuses on two recent jurisprudential interpretations on the question of intermediaries' liability: the CJEU's *Telekabel* judgment³ and the Judgment of ECtHR in the case *Delfi v Estonia*.⁴ In both cases the dominant human rights rhetoric, while expressed in completely different terms in each case, led somewhat surprisingly to a similar outcome: to incommode and make much more delicate the position of intermediaries by detailing even more the circumstances surrounding their involvement and of their liability for Internet copyright infringements.

2. The growing influence of human rights on intellectual property enforcement

Balancing of interests has engaged academic copyright debate as an internal challenge for copyright law. The main idea is that the contours of the protectable subject matter, the threshold of originality, the distinction between ideas and expression and mainly copyright exceptions/limitations shall be interpreted under a human rights vision in order to reconcile copyright with the society and technological trends.

The Lernaean Hydra of piracy has unavoidably shifted the human rights copyright debate in the field of intellectual property rights (IPR) enforcement. The rise of human rights rhetoric in IP enforcement is a constant trend in CJEU's case law dealing with the role of intermediaries in cases of copyright infringement.

The IP enforcement strategies of right holders have passed various stages in response to emerging trends of copyright infringement. After suing the distributors of peer to peer software⁵ and then the individual users at significant social cost,⁶ the focus was given to Internet intermediaries due to their organically indispensable role in making available of copyright infringing content.

Depending on the target of the enforcement strategy against Internet copyright infringement, different fundamental rights are at stake and this has been naturally reflected in the CJEU's case law in the field of intellectual property rights. In claims of direct copyright infringements which were brought against individual users, the focus has been given on the reconciliation of the right to respect for private life and personal data protection with intellectual property law, since the identification of direct infringers presupposed the disclosure of their personal data to the claimants by Internet Service Providers (ISPs). In claims against intermediaries, either on the legal grounds of secondary infringement or in the form of injunctions against intermediaries as third parties, copyright

law clashes mainly with the freedom of ISPs to conduct business, the right of the public to receive and impart information and personal data protection.⁷

In the *Promusicae*,⁸ the *Tele2*⁹ and the *Bonnier Audio*¹⁰ cases the Court set as a fundamental principle of IP enforcement the proper calibration of different fundamental rights. According to the Court, each Member State has to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the right to protection of property (including intellectual property rights) and to an effective remedy on the other. Furthermore, it stated that the authorities and courts of the Member States shall ensure that they do not rely on an interpretation of their national laws in a way that would be in conflict with fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

In the *Scarlet*¹¹ and the *Netlog*¹² cases, the Court, following the *Promusicae* case, stated that a fair balance must be struck between the protection of copyright and the fundamental rights of persons affected by such measures, since nothing in the Charter of Fundamental Rights of the European Union suggests that copyright is inviolable.¹³ Installing a system for filtering all electronic communications passing through its service would infringe the fundamental rights both of the ISP's and of their customers, namely the ISP's freedom to conduct business,¹⁴ their customers' right to protection of their personal data¹⁵ and their customers' freedom to receive or impart information, since a filtering system would identify users' Internet Protocol (IP) addresses and could lead to the blocking of lawful communications of information.¹⁶

Nonetheless, apart from setting as a fundamental principle of IP enforcement the balancing of fundamental rights, the Court's rulings are rather vague,¹⁷ sparing and elliptic, since

⁷ See: CJEU, *Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)*, Case C-70/10, Judgment of 24 November 2011, par. 50: "Moreover, the effects of that injunction would not be limited to the ISP concerned, as the contested filtering system may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively".

⁸ CJEU, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Case C-275/06, Judgment of 29 January 2008.

⁹ CJEU, *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele 2 Telecommunication GmbH (Tele2)*, Case C-557/07, Judgment of 19 February 2009.

¹⁰ CJEU, *Bonnier Audio AB v Perfect Communication Sweden AB (ePhone)*, Case C-461/10, Judgment of 19 April 2012.

¹¹ CJEU, *Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)*, op.cit.

¹² CJUE, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, Judgment of 16 February 2012.

¹³ See: CJEU, *Scarlet Extended*, op.cit., at par. 43.

¹⁴ Article 16 of the Charter.

¹⁵ Article 8 of the Charter.

¹⁶ Article 11 of the Charter.

¹⁷ J. Griffiths, *Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law*, *European Law Review* 2013, 38(1), p. 74 (The author notes that "In the recent copyright cases, the application of the "fair balance" concept is vague").

³ CJEU, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C314/12, Judgment of 27 March 2014.

⁴ Case of *Delfi AS v Estonia*, (Application no. 64569/09), Judgment of 10 October 2013. The case was referred to the Grand Chamber in 17/02/2014.

⁵ See in this respect: *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 545 U.S. 913 (2005) *Universal Music Australia Pty Ltd. v Sharman License Holdings Ltd* (2005) 220 A.L.R. 1.

⁶ These actions have not won general approval from the public at large. See: Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 *Berkeley Tech. L.J.* 571, 589 (2005).

Download English Version:

<https://daneshyari.com/en/article/466500>

Download Persian Version:

<https://daneshyari.com/article/466500>

[Daneshyari.com](https://daneshyari.com)