Online Intermediary Liability in the European Union

Trevor Cook†
Bird & Bird LLP, 15 Fetter Lane, London, EC4A 1JP, UK

Received 14 February 2012

One of the greatest challenges faced by legal systems throughout the world in recent times has been how they approach the question of the liability of online intermediaries for the infringement of intellectual property rights that can take place, without actual knowledge on their part, over their networks or on their platforms. Such online intermediaries can take a wide variety of forms, but specific types of ‘real-life’ online intermediary whose activities have now been the subject of a considerable body of litigation, both in the EU and elsewhere, are access providers, search engines, the operators of online marketplaces, and those who provide platforms for user generated content. In the EU the status of the first three such online intermediaries has now been considered by the Court of Justice of the EU (CJEU).

Keywords: Online intermediary, liability, safe harbour

Three main types of legal issues are encountered with online intermediaries. The first lies in identifying a legal basis on which they can be the subject of an action against them, on the assumption that they are not in general primarily responsible for the infringements that their services enable. The second involves the extent to which online intermediaries can rely on those statutory defences or ‘safe harbours’ that the EU and the USA provide for certain types of online intermediary. The third is what remedies can be awarded against online intermediaries directed to preventing future infringement, even absent any showing of fault or liability on the part of such online intermediary.

Although the law throughout the EU has been harmonized to a large extent as to the last two such issues, this cannot be said of the first. Here, there remain enormous national differences as to the approach to ‘accessorial liability’ the basis for which differences lies in their different approaches to this in tort law generally, which, unlike intellectual property, is little or not at all harmonized within the Member States of the EU. Thus some countries’ civil codes make no express distinction between different types of liability, but key liability to fault based on a breach of a duty of care, whereas in Germany, as another civil law country, the code makes specific provision for what is called, in translation, ‘disturber’ liability1 and has been used to secure injunctions against online intermediaries.2 The UK, as a common law country, approaches such matters differently and through the law of joint tortfeasance, although as with some other common law countries outside the EU (with the notable exception of the USA) it can also address such issues in the context of copyright infringement by means of the separate restricted act of ‘authorizing’ copyright infringement. However, the practical significance within the EU of these differences is reduced considerably by EU legislation, as interpreted by the CJEU, which harmonizes the approach to ‘safe harbours’ for online intermediaries and the availability and scope of injunctions against them irrespective of fault on their part.

Safe Harbours for Certain Online Intermediaries

Articles 12 through 14 of Directive 2000/31/EC of 8 June 2000 on electronic commerce mandate the Member States of the EU to establish defences, under both civil and criminal law, for the benefit of certain types of online intermediary. Such defences must not however affect ‘the possibility for a Court or administrative authority, in accordance with Member States’ legal systems, to require the [online intermediary] to terminate or prevent an infringement.’ However, by Article 15 Member States are not to impose a general obligation on such online intermediaries, ‘to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’

†Email: Trevor.Cook@twobirds.com
Such safe harbours are available for those online intermediaries involved in ‘mere conduit’ (this covers access providers), or in ‘caching’ or in ‘hosting,’ each as defined. Unlike the corresponding measure in the USA on which these safe harbours were based, but which applied only to copyright, Directive 2000/31/EC has horizontal application, and thus applies for example also to trademarks. None of the defences are available in the case of actual knowledge on the part of the online intermediary and the defences for ‘caching’ and ‘hosting’ are not available in the case of a failure to ‘take down’ infringing material as to which the online intermediary has been put on notice. The EU measure, unlike that in the USA, lacks an express safe harbour for search engines (although some Member States included one when implementing Directive 2000/31/EC) but ‘hosting’ was interpreted by the CJEU in Case C-236/08 Google France as covering ‘an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.’

**Injunctions against Online Intermediaries Irrespective of Fault**

Directive 2001/29/EC on Copyright in the Information Society (as to copyright) and Directive 2004/48/EC on the Enforcement of Intellectual Property Rights (as to intellectual property rights other than copyright) mandate EU Member States to give rights holders the right to seek an injunction against those online intermediaries whose services are used by a third party to infringe an intellectual property right. This has been interpreted as not requiring any showing of fault on the part of such intermediary, but it was not until relatively recently that the CJEU has been called on by national courts to consider the circumstances in which such orders can be made and, if so made, their proper scope. The courts have had to consider two main types of injunction against online intermediaries; those seeking disclosure of the identity of directly infringing users, so that proceedings can be brought against such users, and those seeking to block infringing sites or to apply filtering techniques to material on the network or platform of an online intermediary.

In the former case the degree of harmonization achieved by EU law is in practice limited, because account must also to be taken of the right of privacy of the allegedly infringing user. Thus in Case C-275/06 Promusicae v Telefonica, the CJEU held that the three Directives mentioned above had to be balanced against the provisions of Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. The balance struck did not necessarily require Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil (as opposed to criminal) proceedings. The CJEU went onto hold that EU law ‘requires that, when transposing those Directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the [EU] legal order.’ It also observed that ‘when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of [EU] law, such as the principle of proportionality.’ Thus Spain, the laws of which had been under consideration in this particular case, was entitled not to include in its civil, as opposed to criminal, law any provision which would entitle a rights owner to seek an order against an online intermediary obliging it to disclose the identity of a user associated with a certain IP address which had in turn been identified as being associated with an allegation of infringement. In contrast, the UK allows such orders to be sought in its courts in civil proceedings, and the judgment of the CJEU does not suggest that it is wrong so to do. Such differences reflect differing cultural approaches to matters of privacy within Europe which the CJEU will, within the rather broader margins of appreciation permitted to national legislatures as to this under EU law, respect.

However, a considerably greater degree of harmonization is being seen in the case of orders against online intermediaries seeking to block infringing sites or to apply filtering techniques to material on the network or platform of an online intermediary. Here privacy features to a lesser degree, and there is recent guidance form the CJEU in two cases, one concerning online marketplaces and the other access providers. In the first of these, Case C-324/09 L’Oreal SA v eBay, the CJEU held that
Directive 2004/48/EC required ‘the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind.’ It went on to hold that those injunctions ‘must be effective, proportionate, dissuasive, and must not create barriers to legitimate trade’ and provided further guidance as to what this meant in the body of its judgment, although it left open for further clarification what precisely is meant by ‘of that kind.’ In the second of these, Case C-70/10 Scarlet v SABAM the CJEU held that national courts, despite having power under Directive 2001/29/EC to grant injunctions against online intermediaries whose services are used by a third party to infringe copyright, could not grant an injunction against an internet service provider that required it to install, as a preventative measure applying indiscriminately to all its customers, exclusively at its expense, and for an unlimited period, a system for filtering all electronic communications passing via its services, and in particular those involving peer-to-peer software. The CJEU held that such an injunction, as had initially been granted by the national court at first instance in this particular case, was tantamount to a general obligation to monitor, which was incompatible with Article 15 of Directive 2000/31/EC. Moreover, such an injunction did not respect the balance between the fundamental right to property, including intellectual property, the freedom to conduct business enjoyed by operators such as Internet service providers, and the rights of the customers of such operators to the protection of their personal data, and to their freedom to receive or impart information.

Conclusion
Thus this last year has seen flesh being put on the bones of the statutory provisions as to online intermediaries that were enacted in the EU some ten or so years ago. A large measure of harmonization has been achieved despite not seeking to harmonize the underlying legal basis for liability on the part of such online intermediaries. Instead it has been achieved by harmonizing the defences available to such online intermediaries and ensuring that injunctions can be granted against them without necessarily showing any fault on their part. In so far as the harmonization has not been entirely effective, this in large part reflects different cultural approaches to matters of privacy in different Member States and a consequential reluctance on the part of the EU legislature, and the CJEU, to be overly prescriptive in this particular respect.

References
1 The ‘storerhaftung’ principle has its basis in property law and allows a rights owner to seek an injunction, but not damages, as against the ‘disturber’.
3 The Digital Millennium Copyright Act, 1998.
4 Despite this in the USA, the Second Circuit Court of Appeals has recently, in eBay v Tiffany (600 F.3d 93 (2d Cir 2010), so construed liability by reason of contributory infringement to establish by case law a safe harbour for online marketplaces as against trademark infringement of similar scope to that which exits by virtue of statute for copyright.
5 Case C-236/08 Google France (CJEU 23 March 2010). The case concerned keywords made available to prospective advertisers, as to which the CJEU went on to say that if such internet referencing service provider ‘has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.’
6 Case C-275/06, Promusicae v Telefonica (CJEU 29 January 2008).
7 Case C-324/09, L’Oreal SA v eBay (CJEU 12 July 2011).
8 Case C-70/10, Scarlet v SABAM (CJEU 24 November 2011); Case C-360/10, SABAM v Netlog(CJEU 24 November 2011).