

Internet Service Providers and its Role of Hosting User Generated Content under the United Kingdom and European Union Regime

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Abstract

It cannot be argued that the most vital steering force of the development of the Internet is the existence of the Internet Service Providers (ISPs). Essentially, the ISP's crucial task is to provide access, however, the nature of the Internet has rendered these ISPs to act beyond providing a mere 'access' and extend their services onto other spheres, which include both commercial and non-commercial aspects. Accordingly it is not surprising to find that many ISPs also play the role of host for much of the content online. That is to say, content creators can make their materials available online by telling the ISPs to store a copy of any material they upload to web pages. Therefore, as the host of these contents, the ISPs no longer merely providing general access to the Internet but also hosting and allowing these contents to be accessible by their subscribers. In fact, many large ISPs also offer their own additional content services and, as a result, this event has led to a much disputed discussion concerning the role of the ISP's that has become overlapped between being an access provider and the content provider. The essay will accordingly examined and discuss the complications of the content provider role the ISPs play in nowadays digital society.

Keywords: Internet Service Provider, User Generated Content, United Kingdom and European Union Regulations

ISP's Liability under the United Kingdom and the European Union Regime

The Internet Service Providers may be faced with certain prospect of litigations if they appear to contain illegal materials on their sites and services. As a response to the increasing need for a tool to regulate the Internet and especially the activities carried out by the ISPs, the Electronic Commerce Directive (2000/31/EC) is introduced. Essentially, The Directive is the basis of the self-regulatory framework in the European Union where it has laid down certain fundamental principles regarding the liability of the ISPs. In Article 12, it allows a safe harbour for the ISPs provided that they act only as a 'mere conduit'. That is to say, in order for the ISPs to rely on this immunity, they must not only refrain from moderating content, but also not initiate the transmission or select the receiver of the transmission. Moreover, the provision laid down in Article 14 also significantly and relatively concerns the ISPs who host material as part of their additional services. In this provision, the safe harbour only extends its scope to ISP's who have no 'actual' knowledge of any illegal content they are hosting, and that if they become aware of any such content they act 'expeditiously' to remove or to disable access to the information. In essence, the ECD has laid down regulations to deal mainly with materials that infringe intellectual property rights, libellous and defamatory statements and the hosting and

transmitting of child pornography and other types of obscene or criminal content. Basically what the Directive has done is to set up the scope of liability for ISPs and the net normally has been casted over the cases where the ISP's acts the host of such content. However, as it would be absurd to expect ISP's to be pro-active and search for all the illegal contents and get rid of all of them, there is a level of exemptions granted and hence providing these hosts with the immunity against the legal proceedings. As mentioned in the above paragraph, in order for the ISPs to obtain such 'safe harbour' offered in Article 14, certain requirements must be satisfied. Nonetheless, the discussion concerning the scope of ISP's liability, the requirements to obtain the immunity and the defences used by the ISPs will be examined in the later part of this essay.

The Development of 'Limited Liability' Paradigm

Before the ISPs have enjoyed the protection offered in the Directive like nowadays, there had been an on-going cry for 'immunities' pleaded by the ISPs. That is to say, as the ISPs become aware of the essential need for pleading the authorities to adopt the limited liability approach when it comes to the case of the ISP's liability, a big movement towards this manifestation had resulted in the establishment of safe harbour regimes in both the US Digital Millennium Copyright Act (DMCA) and the EU Electronic Commerce Directive.

ISPs all around the world had tried to produce a case for obtaining the safe harbour. There were a number of topics argued by the ISPs claiming that, firstly, it would be impossible for them to check manually the legality of all the material which passed through their servers and even they would manage to succeed in doing so, they would still face with the legal complications of potentially violating rights and privacy of their subscribers. In *France v. Yahoo! Case*, although the court found that it was possible for Yahoo! to block access to 90 per cent of the French citizens in order to prohibit the selling of Nazi memorabilia items, the decision actually concerned the location-based blocking rather than the content-based blocking. Therefore, most informed opinions still agree that ISPs should not be held liable for acting as intermediary for it would be highly unlikely and unjustly to put such a great burden on them. Furthermore, as being only 'the mere messenger', the ISPs claimed that they would not actually aware of the illegal contents transmitted over their servers and consequently they should be entitled to rely on the fact that they were morally 'innocent'. Finally, perhaps at the time of the pleading, most of ISPs were considered as an access provider rather than a content provider, it would be outrageous to hold them responsible for the illegal content that were authored and produced by others. As a result, this event has led to a 'safe harbour' granted to the ISPs on the basis of 'innocent dissemination' defence in the US DMCA and the EU ECD provided that these ISPs were prepared to co-operate when asked to remove or block access to identified illegal materials.

Scope of the ISP's Protection

ISP's will enjoy the immunity provided by the ECD so long as they could establish that they have a proper defence against the alleged allegations. The most common and very successful defence produced by the ISP's is the defence of 'innocent dissemination'. As we have explored briefly earlier when we touched upon the provisions in Article 14 of the ECD, another major aspect of this Article is the clear establishment stating that ISP's does not own any general obligation to monitor the activities on the net, although due care is required in deleting and preventing access, of which such obligation could be viewed as some sort of filtering task required from the ISP's (Heikkinen, 2001).

In an American case of *Cubby, Inc. v. CompuServe Inc.* concerning defamation on the Internet, the defendant, CompuServe Inc., was sued by Cubby on the ground that there was a

false and defamatory statements about the plaintiff published on the site. CompuServe argued that it could not be held liable for such allegation for '*it acted as a distributor, and not a publisher, of the statements*'. They also went on claiming that '*it did not know and had no reason to know of the statements*'. Eventually the decision was reached and the judge found CompuServe to be only a distributor by asserting the question of whether or not the defendant knew or had reason to know of the allegedly libellous statements. The court also instructed that whether or not a party will be characterised as a publisher will depend upon how much editorial control is exerted over the publication. In *Cubby* case, it was found that the defendant had very limited control over the content; therefore, CompuServe could not be held liable. A different finding was deliberated in *Stratton Oakmont Inc v. Prodigy Services CO*. What renders the defendant, Prodigy, liable in this case was the fact that, in their attempt to provide a family-oriented online service, they edited the content of messages posted on their bulletin boards. Consequently, the court found Prodigy to be a publisher rather than a distributor on the basis that they possessed certain degree of editorial control over the posted contents and had indeed exercised such control.

In the UK case of *Godfrey v Demon Internet Ltd*, although the defendant had managed to establish that they were not the publisher of the defamatory statement and as a result they should be able to rely on the defence of innocent dissemination provided by section 1 of the Defamation Act 1996, Demon was nevertheless held liable due to the fact that they did not respond to the plaintiff's request of taking down the defamatory statement published on their server. Due to the omissive act on the part of the defendant, this has rendered the defendant to lose the Section 1 protection against its allegation.

Interestingly, as we have witnessed from the mentioned cases, it must be noted that there is also a limitation within the immunity provided by both US and EU legislations as well. The ECD has taken the 'Notify and Take-down' approach (NTD) and has applied the regime on all kinds of illegal content issues (Supra note 8). This is the same in the US DMCA where it particularly deals with copyright infringement materials. Moreover, the provisions concerning the NTD defined in the ECD Article 1 and 13 are also significantly replicated verbatim in the UK ECD Regulations 17 and 18 (Edwards & Waelde, 2009: 65).

The Commercial Content Providers

As mentioned in the first part of this essay, generally, most of major ISPs do not act only as a mere conduit but also performing and providing other additional services such as providing contents, filtering and storing information. Arguably, one of the main content providing services these ISPs offer is commercial related content. Large corporations such as Amazon.com and eBay.com have been regarded as being both access providers (ISPs) as well as content providers, which normally concern commercial based material in particular. On *prima facie*, it might seem permissible to assume that these ISPs who also act as a commercial content provider have in fact performed their roles beyond a 'mere conduit' and hence should not be able to rely on the safe harbour protection. Nevertheless, before we examine further into the extent of the immunity, of which these content providers should received, it is essential for us to explore in depth the roles and services these content providers perform and offer. For the purpose of this section, I will mainly discuss the commercial content providers who play their roles in the e-commerce sites and ones that offer additional services of search engines. Additionally, the legal concerns that will be examined closely as regard to this topic would be the intellectual property rights infringement, the violation of copyright rights in particular.

E-Commerce Sites

It cannot be denied that large ISPs such as Amazon and eBay have successfully established their standings in commercial sphere within the Internet community. Accordingly, it should be expected that the size of their businesses would normally attract certain issues of litigations. In the Internet community, websites that offers a large amount of contents, which is essentially related to commercial materials, would face with legal allegations regarding criminal contents and intellectual property rights related infringements in particular. Moreover, there is also a rapid growth of the User Generated Content sites (UGC) and even though some might argue that these sites vastly contain materials produced by their subscribers, the fact that these sites have generated a substantial amount of revenue should not be disregarded. Therefore, in this part of the essay, I will also include the UGC sites into the commercial related servers organised by the ISPs. *'The extraordinary growth of such sites (200 million users with Facebook accounts as of 2009; 100 million video clips served on Youtube, per day, even back in 2006) makes it far harder to say that the subscriber is the only content provider and the platform a mere innocent intermediary.'* (Edwards & Waelde, 2009: 67)

Mostly, the legal complications that have revolved around e-commerce sites concern the intellectual property rights infringement. In *Louis Vuitton v. eBay*, a French court held that the failure to prohibit replica items sold on its site rendered eBay to lose its immunity and hence we found liable and was fined £31.5 million (Edwards & Waelde, 2009: 68). However, in the US case between *eBay and Tiffany*, it was held that eBay could not be held responsible for the sale of counterfeit items regardless of their generalised knowledge that trademark infringement might be performing on their sites (Edwards & Waelde, 2009: 68-69).

In *Viacom v. Google 2007*, Viacom sued Google, as owner of Youtube, for Google's failure to regulate the unauthorised posting of clips owned by Viacom and \$1 billion damages were claimed. Viacom argued that Youtube business's model has constructed upon *'building traffic and selling advertising off of unlicensed content [and] is clearly illegal'*. Google argued that the NTD given by Viacom was swiftly handled with the identified content were removed. The action taken in this case is consistent with the provision of Section 512(c)(i) and Article 14(b) of the ECD, which holds that immunity will be granted provided that the ISPs respond to the NTD expeditiously (Edwards & Waelde, 2009: 70).

Search Engines and Hyperlinkers

Location Tool Services: It has been suggested in the Department of Trade and Industry (DTI) Consultation Document on the ECD that *'a location tool service refers to both an automated search engine and a human complied search tool such as an index or a directory. These services are developed to enable a person surfing the Internet to find sites of interest'* (Department of Trade and Industry, 2006). It has been observed that the vast majority of location tool services nowadays are fully automated, with a very limited monitoring function performed by human. For the benefit of this discussion, we will assume, basing from the definition provided in the DTI consultation paper, that, in essence, location tool services are considered substantially similar to search engines. Deriving the above notion, it would seem that providers of these search engines are *'literally unsighted as to the information that is trawled each time and thus contained in their searchable indexes'*. As many large location tool services also provide the public with the searching facility, it is inevitable that commercial organisations would compete and bid for the preferred ranking for their advertisement links (known as sponsored links) shown on the search result pages. The existence of sponsored search facility has generated income for the location tool service providers. Moreover, the extra revenue could be earned if the search engine service providers allow commercial parties to place advertisements and links nearby a particular search result.

Hyperlinkers: In the DTI Consultation, it is assumed that ‘*a hyperlink is a line of text or image on a webpage that is linked to another webpage, either on the same site or in another website*’. Therefore, by clicking on the link, it would direct the user ‘to another webpage, or to another place on the same page’. The DTI has grouped hyperlink into three main distinct types, which are ‘Linking’ (*which takes you to a home page of a particular website*), ‘Deep linking’ (*which takes you directly to a specific page of a website*) and ‘Framing’ (*where a webpage is linked to what appears in a ‘frame’ of the original website visited and the Uniform Resource Location (URL) remains that of the original website*).

Nevertheless, there are a number of legal concerns which have been raised around the issue of search engine services and hyperlinkers. First and foremost, it is questioned as to whether search engines, such as Google, can be held directly liable for illicit material they provide hyperlinks to on the search result page. This question could be resolved in the direction that search engine providers are held to be a mere information locator; in other words, they could not be regarded as the publisher of the illegal content. Consequently, unless the links presented on the search result webpage are substantially illegal per se, it is very unlikely that search engine service providers will be held directly liable for unlawful content shown on their database. Moreover, even though certain legal allegations could be brought against them, for instance on the ground of defamation or copyright infringement, the defence that these service providers can be certainly rely upon is the claim that they do not aware of the illegal content and that there is no appropriate reason for them to be aware of the material in question.

In the US DMCA 1988, the safe harbour regime has given these intermediaries the immunity against the allegation in relation to copyright infringement; nonetheless, such protection only covers the service provider who can show that he is unaware and have no actual knowledge regarding the infringing materials. Evidently, due to the absence of litigations against the ISPs in the US, it could be presumed that the US service providers enjoy the protection from liabilities under the safe harbour rule stipulated in the DMCA. The situation is less clear when considering its UK counterparts due to the fact that the EU ECD does not specifically established rules concerning the liability of the search engines and hyperlinkers in its provisions.

Should Commercial Content Providers Enjoy the Same Level of Immunity as the ISPs?

Objection on Extending the ISPs’ Immunity onto Commercial Content Providers

It should be asserted that, at present, especially the position in the US, commercial content providers, such as Google, Amazon and eBay, are still subjected to the protection from liabilities arising from illegal related content issues. Nevertheless, many commentators argue that indeed such Internet perpetrators should be excluded from the protection the law has handed to them. The first contention argued by the supporters of limiting the scope of protection from these providers is the profit-and-money driven nature of these perpetrators. It might seem obvious to question that ‘*if the site is making a financial or other benefit from the hosting of illegal or infringing content, should it not be at least jointly responsible for that content?*’ (Supra note 18). Also, in the case where there is an infringement of intellectual property related rights, should it be considered justified and acceptable for the commercial content provider to ‘turn a blind eye’ at the issue and get away with the alleged liability? It was commented by the L’Oreal spokesman that ‘*Ebay is not a victim because it gets a cut from each transaction and advertisement, real or fake*’ (Supra note 19).

Furthermore, although there is a specified provision addressing to this concern², such terms of the provision does not clarify the position of the common commercial content providers who, in reality, are, to a certain extent, aware of the activities undertaken on their sites, which would inevitably lead to the event of some sort of unlawful materials occurring within their pages. Therefore, there is yet a rather awkward question to be answered as to whether or not large providers like Google or Amazon, whose mainstream revenue has come from mostly advertisements posted by commercial bodies, should still enjoy the protection given by today's legislations.

Proposed 'Safe Harbour' for Commercial Content Providers

Despite the arguments contented above, many scholars have supported the view that these providers should be pardoned from liabilities incurred from illegal content related litigations. In the US, this provision has been upheld strongly due to the First Amendment establishment, which solidly emphasises the significance of freedom of expression (and information). Therefore, if these immunities are to be deprived from them, there would be a huge limitation on freedom of expression imposed on them 'unjustly' and perhaps 'unconstitutionally'.

More importantly, it cannot be overlooked that the undeniable growing significance of e-commerce has generated a large amount of revenue to both public and private sectors. This phenomenon has manifested notably due to the cheaper costs the Internet has facilitated for commercial transactions. This has allowed companies to compete efficiently in global market. It was reported in Fortune magazine that 'the e-commerce site Amazon's share capital was seventeen times greater than that of the world's largest bricks-and-mortar book chain, Barnes and Noble' (Lloyd, 2008: 470). What is more, as e-commerce is being conducted increasingly over the net, this allows greater competition within both domestic and world market. As the ranges of goods and services now available on cyberspace have been expanded significantly throughout the years, this facilitates the rise in choices for consumers; thus, enabling a higher consumer surplus and welfare.

'It has been estimated that 75 per cent of United Kingdom consumers engage in some form on Internet-based shopping. The value of these transactions is estimated to amount to £40 billion, a figure which is predicted will rise to £80 billion.' (Lloyd, 2008: 471)

Last but not least, as most of Internet based service providers are well aware of the prospect of legal litigations that could be brought against them, many have already been policing and monitoring their sites vigorously. In eBay's published list of prohibited and restricted items, the listing and selling of copyright and Trademark infringing items are strictly banned (eBay, 2017). Also, as most of these commercial content providers have adopted the policy of NTD, which they normally act in accordance with the rules stipulated in the law regarding the expedient take-down of illegal materials, this seems to be a fair balance status quo between the protection of individual's rights and the freedom of expression of the ISPs. Nevertheless, it should be noted that the NTD regime has been criticised due to its limitation to freedom of expression and the possibility that it would create a chilling effect as regard to freedom of expression. However, it is argued that the 'notify-and-put-back' doctrine established in the US DMCA has stricken a just balance between the conflicting rights. Still, the EU ECD has not yet incorporated this feature into its Directive.

² See Supra note 17, at 71: 'Under Section 512(1)(B)—the DMCA's more detailed equivalent of Article 14(2) of the ECD—the service provider does not benefit from the safe harbour if it 'receive[s] a financial benefit directly attributable to the infringing activity in a case in which the service provider has the right and ability to control such activity'.

Conclusion

As discussed above, I am of the opinion that commercial content providers should enjoy the same rights as regular ISPs have. Although it could be argued that these sites have triggered numerous illegal activities and intellectual property rights related violations, due to the significance of their business size as witnessed today in the world market, it cannot be denied that the imposing of rigid rules and limitations upon them would certainly, to a certain extent, immobilised them; hence, making them less competitive comparing to other nations with more flexible approaches on the ISPs liability. Accordingly, a safe harbour for these ISPs should be highly advocated.

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