Liability of Intermediary Service Providers

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Outline

1. Internet Service Providers
2. Copyright law
3. Data protection law
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1 Internet Service Providers

2 Copyright law

3 Data protection law
Providers’ liability

The Electronic Commerce Directive

The liability of Intermediary Service Providers (ISPs) is governed by Directive 2000/31/EC. But the Electronic Commerce Directive (ECD) does not provide liability rules but exemptions: Articles 12–14.
# Liability exemptions

## Article 12 - Mere conduit

1. Does not initiate the transmission
2. Does not select the receiver
3. Does not select or modify the content

## Article 13 - Caching

1. Does not modify the information
2. “Notice and take down”
3. ...

## Article 14 - Hosting

1. Not aware of illegal activity
2. Notice and take down
“Active” vs. “passive” host

Active host
- Selects the provided content
- Does not benefit from the exemption

Passive host
- Does not select the provided content
- Can benefit from the exemption
Does this work?

Problems with the ECD

- The ECD dates back to 2000
- No Web 2.0
- No social networks
- No concept of user-generated content
  - (Not really: Usenet, forums, eBay...)
- “Hosting” mainly refers to web sites
- Today’s context is completely different
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Google/YouTube/Yahoo! cases

- Several decisions on the substance
  - T. Roma 2011
  - T. Milano 2014 (YouTube & Google)
  - C. App. Milano 2015

- No Cassation
General premises

- US: copyright liability requires intentional act
- There is violation
- Passive host, not content provider
- Applies exemption
- Reference decisions
  - C-236/08 (Google c. Louis Vuitton)
  - C-70/10 (Scarlet c. Sabam)
  - ...
- No prior checking
- “Notice and take down”
  - No participation in the crime
  - Best suited to stop violations
- PQM no liability
YouTube, in particular

- Not a decision but a *precautionary ordinance*
- Would be liable if informed
- “Notice and take down”
  - There was notice
  - No take down
  - Court
- Notice in any form, but specific
- Not liable for not taking down
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The Vividown case

The facts

▶ A child with the down syndrome was mocked and harassed by classmates
▶ A video was taken and uploaded to Google Video by a 12-year old girl
▶ The Vividown association raised the issue to courts

Three different criminal cases

▶ Against the classmates for mistreatment
▶ Against the teacher for not preventing the facts
▶ Against four managers of Google s.r.l. (Italian llc)
  1. for participation in the crime of defamation
  2. for violating the data protection law
## Premises

- Google operates as an active host (content provider)
- Business based on data stored (advertising)
- Driven by profit
- Google invites users to upload
- Google is a data controller, or maybe a data processor
- No analysis on the applicability of provisions
Tribunal decision

First charge
- Rejected
- The ISP must not prior check the uploaded content or prevent defamatory content
- Paralyze the activity of ISPs
- “Notice and take down” is a reasonable procedure

Second charge
- No obligation to acquire the consent of the data subject
  - The law does not require it with third parties
  - Infeasible
- Neglected the obligation to inform the users
- Condemned to six months (art. 167 privacy code)
Reactions to the decisions

In favor

- Google has technical means to detect defamatory content (filters)
- Strongly offensive title
- Inform the user of the risk of liability
- Data concerning health can never be disseminated (Italian law)
- Formerly: art. 2050 c.c.

Against

- No filters in 2006 (introduced after Youtube acquisition)
- Law requires information to the data subject
- The uploaders were not data subjects
- ISP liability for the case should be on a civil basis
- Advertising does not make Google an active provider
- Contradicts C-236/08 (no ISP liability if taken down)
Cassation decision (skipping the appeal)

- Relationship between Google s.r.l. and Google Inc.
- Google s.r.l. (advertiser) is an active provider
- No relationship with Cass. 23798/2012 (database sale)
- A.G. C-131/12: data controller only when managing indexes
- Google is not a data controller
- No application of data protection law
- No liability
Open discussion point

*Quid iuris* with respect to the C-131/12 decision that qualifies Google as a data controller inasmuch as it indexes the data (through automatic processing) and contributes to their dissemination?