

Liability of Intermediary Service Providers

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① Internet Service Providers

② Copyright law

③ Data protection law

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2 Copyright law

3 Data protection law

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.

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

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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- ▶ Several decisions on the substance
 - ▶ T. Roma 2011
 - ▶ T. Milano 2014 (YouTube & Google)
 - ▶ C. App. Milano 2015
- ▶ No Cassation

- ▶ 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

- ▶ 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 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

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)

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)

- ▶ 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

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?