

Internet Law: Class 3

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Class 3 (Friday, 15 July 2022)

1. Immunity and liability of internet service providers
2. Notice and takedown under the DMCA
3. DSM Directive
4. Immunity from suit under the CDA
5. Blocking orders

Internet Intermediaries

Who Are Internet Intermediaries?

- Entities that facilitate activities on the internet
 - Internet service providers (ISPs)
 - Other intermediaries (e.g., payment processors)

U.S. Communications Decency Act (1996)

47 U.S.C. 230

“Provider or a user of an interactive computer service”

“The term ‘**interactive computer service**’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

U.S. DMCA (Digital Millennium Copyright Act), 17 USC 512 (1998)

“...[T]he term “service provider” means an entity offering the **transmission, routing, or providing of connections for digital online communications**, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.” 17 USC 512(k)(1)(A)

- (a) Transitory communications (e.g., telephone companies)
- (b) Caching
- (c) Information storage (e.g., eBay, YouTube)
- (d) Information location tools (e.g., Google, Yahoo)

EU Electronic Commerce Directive

Directive 2000/31/EC

“ ‘Service provider’: any natural or legal person providing an information society service”

EU DSM Copyright Directive

Directive (EU) 2019/790

“**Online content-sharing services** provid[e] access to a large amount of copyright-protected content uploaded by their users.”

EU Digital Services Act Proposal (2020)

“‘**intermediary service**’ means one of the following services:

–a ‘mere conduit’ service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;

–a ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;

–a ‘hosting’ service that consists of the storage of information provided by, and at the request of, a recipient of the service”

EU Digital Markets Act Proposal (2020)

“(1) ‘**Gatekeeper**’ means a provider of core platform services designated pursuant to Article 3;

(2) ‘**Core platform service**’ means any of the following:

- (a) online intermediation services;
- (b) online search engines;
- (c) online social networking services;
- (d) video-sharing platform services;
- (e) number-independent interpersonal communication services;
- (f) operating systems;
- (g) cloud computing services;
- (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);”

EU Digital Markets Act Proposal (2020)

Article 3(1)

A **provider of core platform services** shall be designated as **gatekeeper** if:

- (a) it has a significant impact on the internal market;
- (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
- (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

Internet Intermediaries

Utility services?

Common carriers?

ISP Liability

U.S. defamation laws:

Publishers – are responsible for content by others

Distributors – are subject to liability if they know or have reason to know of the defamatory character of content published by others

Conduits – are not liable for content published by others, even if the conduits are aware of the content

Restatement (Second) of Torts §581 (1977)

47 USC 230 (Communications Decency Act, 1996)

(1) TREATMENT OF PUBLISHER OR SPEAKER

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 USC 230(c) PROTECTION FOR “GOOD SAMARITAN” BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

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Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997)

- Mere conduits, or distributors, are subject to a different standard of liability than publishers
- “The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher.”

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DIGITAL MILLENNIUM COPYRIGHT ACT

- Adopted in 1998
- Section 512
 - Liability of ISPs (“OSPs”)
- Sections 1201 ff.
 - Protection of digital rights management

§512 (k)

(k) Definitions.—

(1) Service provider. —

(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

§512 (i)

(i) Conditions for Eligibility.—

(1) Accommodation of technology. — The limitations on liability established by this section shall apply to a service provider only if the service provider —

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

17 USC 512 (Digital Millennium Copyright Act, 1998)

(a) Transitory communications (e.g., telephone companies)

(b) Caching

(c) Information storage (e.g., eBay, YouTube)

(d) Information location tool (e.g., Google, Yahoo)

} Notice & takedown

17 USC 512 (Digital Millennium Copyright Act, 1998)

1) Notification

2) Removal by ISP

3) ISP notifies the subscriber

4) Subscriber sends a counter-notification

5) ISP provides a copy of the counter-notification to the © owner

6) In 10 – 14 days following the receipt of the counter-notification, either the ISP replaces the removed material, or the rights owner files an action in court seeking to restrain the subscriber

15 U.S.C. 1114(2)(B)-(C) (Lanham Act, the trademark act)

(B) Where the infringement or violation complained of is contained in or is part of **paid advertising matter** in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of title 18, the remedies of the owner of the right infringed or person bringing the action under section 1125(a) of this title as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to **an injunction** against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to **innocent infringers and innocent violators**.

(C) Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 1125(a) of this title with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

eBay VERO

<https://www.ebay.com/sellercenter/ebay-for-business/verified-rights-owner-program#what-is-the-vero-program>

YouTube

<https://www.youtube.com/about/copyright/#support-and-troubleshooting>

17 USC 512 (Digital Millennium Copyright Act, adopted in 1998)

Problems

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(A) has **adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers;** and

(B) accommodates and does not interfere with standard technical measures.

§512(c)

(c) Information Residing on Systems or Networks at Direction of Users.—

(1) In general. — A service provider shall not be liable ... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -

(A) (i) does not have actual knowledge ...;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive 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; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 USC 512 (Digital Millennium Copyright Act, adopted in 1998)

Problems

- Notifications are misused to chill speech
- Although the periods in the DMCA are short, they may still be sufficient to effectively prevent certain speech
- A DMCA notification may establish personal jurisdiction over the copyright owner in the place of the alleged infringer (which the alleged infringer may use to file a declaratory judgment suit against the copyright owner)

LENZ V. UNIVERSAL

- The copyright owner “must consider the existence of fair use before sending a takedown notification under § 512(c).”
- The copyright owner must form a subjective good faith belief that the allegedly infringing material does not constitute fair use.
- Good faith belief is to be assessed based on actual knowledge.
- “[T]he willful blindness may be used to determine whether a copyright holder knowingly materially misrepresented that it held a good faith belief that the offending activity was not a fair use.”
- “[The plaintiff] did not show that the defendants subjectively believed there was a high probability that the video constituted fair use.”

IMPACT OF DMCA S. 512

- E.g., Google has received takedown notices for more than 5.8 billion URLs
Transparency Report, Google,
<https://transparencyreport.google.com/copyright/overview>, 14 July 2022
- Since 2002, “Chilling Effects”/“Lumen” database,
<https://www.lumendatabase.org/>
- Since 2011, Google’s “Transparency Report”
- J. Urban et al., *Notice and Takedown in Everyday Practice*, v. 2, revised in March 2017
<https://dx.doi.org/10.2139/ssrn.2755628>
- U.S. Copyright Office’s “Section 512 Study,” 21 May 2020
<https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

Section 512 of Title 17: A Report of the Register of Copyrights, U.S. Copyright Office, May 2020

“The Copyright Office concludes that the balance Congress intended when it established the section 512 safe harbor system is askew. ... While OSPs, supported in many aspects by user advocacy groups, report satisfaction with the current operation of the safe harbors, that view is not shared by the other intended beneficiaries of the section 512 system, including authors, creators, and rightsholders of all sorts and sizes.”

(p. 197)

Section 512 Report Recommendations (1)

- Clarify eligibility
 - “by reason of storage”
 - “temporariness”
- Repeat infringer policy
 - “a clear, documented, and publicly available repeat infringer policy”
 - “what constitutes “appropriate circumstances” for termination of a user’s account based upon repeated acts of infringement, and whether such circumstances can ever arise in the absence of a formal takedown notice from a rightsholder”

Section 512 Report Recommendations (2)

- Knowledge requirement
 - Clarification of the distinction between actual and red flag knowledge
 - Clarification of the relationship between the section on the intent to avoid the imposition of a duty to monitor and the section on knowledge requirements
 - Clarification of the willful blindness standard
- Details of a takedown notice
 - Clarify what is “information reasonably sufficient ... to locate” the infringing material
- Knowing misrepresentation and abusive notices or counter-notices
 - Increased penalties

Section 512 Report Recommendations (3)

- Copyright owner’s fair use analysis
 - Monitor the impact of the *Lenz* decision
- Notice requirements
 - Move to a regulatory process to make setting rules more flexible
- Alternative dispute resolution
 - Explore ADR as an option to address time frames
- Other proposals

Problems of ContentID

- Eligibility
- Subject matter
- Scope of Protection
- Defenses and dispute settlement

Directive 2019/790 on Copyright in the Digital Single Market

Article 17: Use of protected content by online content-sharing service providers

- A content-sharing service performs an act of communication to the public (or making available to the public)
- Must obtain an authorization from the rightholders
- Without an authorization the service provider is liable unless
 - Best efforts to obtain authorization,
 - Best efforts “to ensure the unavailability” if rightholders provide “the relevant and necessary information,” and
 - Upon a notice disable access to the notified works
- Must establish “an effective and expeditious complaint and redress mechanism”

Directive 2019/790 on Copyright in the Digital Single Market

- Special provision for small providers
- Exceptions for quotation, criticism, review, parody, ...
- No general monitoring obligation
- Transposition deadline: June 7, 2021

EU E-Commerce Directive (2000/31/EC)

- Safe harbor for internet service providers:
- Mere conduit (Article 12)
- Caching (Article 13)
- Hosting (Article 14)
- No obligation to monitor

EU Digital Services Act Proposal (2020)

Mere conduit

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the service provider shall not be liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

EU Digital Services Act Proposal (2020)

Caching

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider **acts expeditiously to remove or to disable access** to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

EU Digital Services Act Proposal (2020)

Hosting

Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on condition that the provider:

- (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
- (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.

ISPs as Enforcers of Rights

- ISPs may be used to block access to infringing content
 - To **remove** content from the internet (hosting ISPs, domain name ISPs)
 - To **de-list** content from the internet (e.g., from Google's search results)
 - To **block** users' access to content

Scarlet Extended v. Société Belge (SABAM)

- CJEU, 2011
- SABAM requested an order “requiring Scarlet to bring ... infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work using peer-to-peer software without the permission of the rightholders”
- Protection of fundamental rights
 - Copyright (rights holder)
 - Freedom to conduct business (ISPs)
 - Right to protection of personal data (customers)
 - Freedom to receive and impart information (customers)

Scarlet Extended v. Société Belge (SABAM)

- EU law “...preclud[es] an injunction made against an internet service provider which requires it to install a system for filtering

- all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;
- which applies indiscriminately to all its customers;
- as a preventive measure;
- exclusively at its expense; and
- for an unlimited period,

which is capable of identifying on that provider’s network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.”

UPC Telekabel v. Constantin Film Verleih

- CJEU, 2014
- Injunction for UPC to block access by customers to infringer's website as regards the copyright owners' works (par. 11)
- Rightholders may apply for an injunction against intermediaries whose services are used by a third party to infringe their copyrights (par. 26)
- Is UPC an "intermediary" covered by Article 8(3) of EU Directive 2001/29 (the Info Soc Directive)? (pars. 30 – 40)
 - How is UPC different from Scarlet in this context?
 - Is a relation between the infringer and the ISP necessary?

UPC Telekabel v. Constantin Film Verleih

- The design of the injunction must respect the protection of fundamental rights
 - Copyright (rights holder) (pars. 61 – 63)
 - Freedom to conduct business (ISPs) (pars. 49 – 54)
 - Freedom to receive and impart information (customers) (pars. 55 – 57)

Territorial Scope of ISP Measures

- EU “right to be forgotten”
 - Google initially de-listed results only from national versions of its website (e.g., .es), but eventually decided to geoblock users and de-list results from all versions of its website that were accessible from a given country
 - Fleischer, P., “Adapting Our Approach to the European Right to Be Forgotten,” March 4, 2016, <http://googlepolicyeurope.blogspot.com/2016/03/adapting-our-approach-to-european-right.html>
- French authorities requested a global removal
 - Fioretti, J., “France Fines Google over “Right to Be Forgotten,” Reuters, March 24, 2016, <http://www.reuters.com/article/us-google-france-privacy-idUSKCN0WQ1WX>

Equustek Solutions v. Google

- Supreme Court of Canada, 2017
- Equustek v. Datalink lawsuit
- 1992 request that Google de-list Datalink’s website
- 1992-1993 Google’s de-listing of Datalinks webpages

Equustek Solutions v. Google (2017)

- A question of the territorial scope of the order
 - [Google acted voluntarily as far as google.ca]
- International comity?
- Google's freedom of expression?
- Inconvenience to Google?
- Temporary or permanent relief?
- Effectiveness of the remedy?

Google v. Equustek

- **U.S. District Court for the District of Northern District of California, 2017**
 - Preliminary injunction issued in November 2017 (permanent injunction in December 2017)
 - Canadian judgment unenforceable
- **Supreme Court of British Columbia, April 2018**
 - Google's motion to bar or set aside the global injunction dismissed
 - "The U.S. decision does not establish that the injunction requires Google to violate American law."
 - "Google has not demonstrated that the injunction violates core American values."
 - "The effect of the U.S. order is that no action can be taken against Google to enforce the injunction in U.S. courts. That does not restrict the ability of this Court to protect the integrity of its own process through orders directed to parties over whom it has personal jurisdiction."

Glawischnig-Piesczek v. Facebook

- Interim order - Facebook disabled access to the post for users connecting from Austria
- A host provider may be the addressee of the injunction under the E-Commerce Directive
- Facebook had knowledge of the illegal information and did not act expeditiously to remove it
- No general obligation to monitor but possibly an obligation to monitor “in a specific case”
 - A different user
 - A somewhat changed message

Glawischnig-Piesczek v. Facebook

- Identical and equivalent content
- Information in the injunction
- Territorial scope of an injunction under the E-Commerce Directive
- No territorial limitation in the Directive
 - The Directive “does not preclude those injunction measures from producing effects worldwide.”
- It is up to the member states to ensure consistency with international law



4 Ob 36/20b

Der Oberste Gerichtshof hat als Revisionsrekursgericht durch den Senatspräsidenten Dr. Vogel als Vorsitzenden und die Hofräte Dr. Schwarzenbacher, Hon.-Prof. Dr. Brenn, Priv.-Doz. Dr. Rassi und MMag. Matzka als weitere Richter in der Rechtssache der klagenden Partei Österreichischer Rundfunk, *****, vertreten durch Korn Rechtsanwälte OG in Wien, gegen die beklagte Partei Facebook Ireland Ltd, *****, Irland, vertreten durch Wolf Theiss Rechtsanwälte GmbH & Co KG in Wien, wegen Unterlassung, Beseitigung und Urteilsveröffentlichung (Streitwert im Sicherungsverfahren 38.000 EUR), über den Revisionsrekurs der beklagten Partei gegen den Beschluss des Oberlandesgerichts Wien als Rekursgericht vom 28. November 2019, GZ 1 R 22/19s-17, mit dem der Beschluss des Handelsgerichts Wien vom 21. November 2018, GZ 39 Cg 11/18p-7, bestätigt wurde, den

B e s c h l u s s

Glawischnig-Piesczek v. Facebook

- Oberste Gerichtshof (Austria), 4 Ob 36/20b, 30 March 2020

“In cases of intellectual property right claims (e.g., copyright claims), the scope of the injunction is limited by the principle of territoriality to the protection within the country.

In cases of other injunctions, there must be a clear statement by the plaintiff is necessary when the plaintiff wants to require protection extending beyond Austria.”

<https://www.ogh.gv.at/entscheidungen/entscheidungen-ogh/unterlassungsanordnungen-sind-auch-gegen-internet-provider-zulaessig-grundsatzlich-aber-auf-den-schutz-im-inland-beschaenkt/>

- The injunction based on copyright infringement is limited to Austria because of the territoriality principle
- The injunction based on the personality rights violation is also limited to Austria because the plaintiff provided no explanation as to the territorial scope of the requested injunction

EU Digital Services Act Proposal (2020)

Orders to act against illegal content

1. Providers of intermediary services shall, upon the receipt of an order to act against a specific item of illegal content, issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union or national law, in conformity with Union law, inform the authority issuing the order of the effect given to the orders, without undue delay, specifying the action taken and the moment when the action was taken.
2. Member States shall ensure that the orders referred to in paragraph 1 meet the following conditions:
 - (a) the orders contains the following elements:
 - a statement of **reasons explaining why the information is illegal content**, by reference to the specific provision of Union or national law infringed;
 - one or more exact uniform resource locators and, where necessary, additional information enabling the **identification** of the illegal content concerned;
 - information about **redress** available to the provider of the service and to the recipient of the service who provided the content;
 - (b) the **territorial scope of the order**, on the basis of the applicable rules of Union and national law, including the Charter, and, where relevant, general principles of international law, does not exceed what is strictly necessary to achieve its objective;
 - (c) the order is drafted in the **language** declared by the provider and is sent to the point of contact, appointed by the provider, in accordance with Article 10.

“Today’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”

Justice Thomas in his concurring opinion in
 Biden v. Knight First Amendment Institute, 593 U.S. – (2021), 5 April 2021

Internet Law: Class 3

Professor Marketa Trimble