

Online Intermediary Liability and Privatised Enforcement: the Content ID Case

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Abstract—Over the last two decades, the use of technologies to promulgate information at the click of a mouse has given rise to unprecedented access to information but has also facilitated the infringement of rights. There have been a number of responses by legislative bodies attempting to recover ground lost by rightsholders in this new environment. Some are reviewed in this paper. The problem facing legislators is that they wish to protect rightsholders without stifling the benefits of easy access to knowledge, information and data, hopefully maximising the advantages and societal benefits of improved accessibility. Content hosts, such as YouTube, suffer under a similar dichotomy but also face the prospect of litigation. Tools such as “Content ID” provide rightsholders with a means of combating potential infringements without litigation. However, as with legislation, it is not a panacea for reaching the balance between facilitating access and protecting rights. This paper illustrates these issues and underlines the importance of an approach that safeguards fundamental rights and freedoms and strikes a fair balance among the different rights involved. Technology can play a crucial role in this attempt.

Keywords—web hosting services; rightsholders; safe harbour; comparative legislation; online intermediary liability.

I. INTRODUCTION

In the Internet ecosystem, hosting providers play a pivotal role: they supply the services and servers that users need to upload and hold the content that they have generated (User Generated Content, or UGC). There are many other kinds of hosting services, for example data warehousing, but herein we consider information sharing sites. UGC can take disparate forms, such as video, image, text, audio, and animation. Platforms that offer to store and make UGC available to the public have become the backbone of what is nowadays known as Web 2.0. Web 2.0 describes websites which employ technologies that “allow users to interact and collaborate with each other in a social media dialogue as creators of user-generated content in a virtual community, in contrast to Web sites where people are limited to the passive viewing of content. Examples of Web 2.0 include social networking sites, blogs, wikis, folksonomies, video sharing sites, hosted services, Web applications, and mashups [1]. Usually, hosting providers offer a comprehensive package of services to users. In addition to the possibility of uploading content to their servers, they may offer assistance in making content more accessible, appealing, and easier to consult and search. They may also help users develop better interfaces, in

terms of look and feel, and content that complies with the web-site’s technical requirements, for instance those regarding usability, file formats and meta-tags. In particular, hosting providers often offer services that allow the host and users to generate revenue from advertising. This is a very important aspect, as advertising is one of the main sources of income for hosting providers.

An issue arises with services that exceed the mere offer of hosting capacity. In particular, advertising services can be seen by Courts as non-neutral activities that have the potential to disqualify hosting providers from the “safe harbour” provisions created to exempt them from secondary liability. In this paper, the term secondary liability is used to refer to the possible liability of intermediaries, such as online service providers, for infringements committed by users of the service. This kind of liability is not harmonised at the international or European Union level. The result is a complex and often confusing landscape of different terminologies and rules [2].

This paper begins by exploring legislation that provides a limited “safe harbour” for service providers. It then examines the problems facing hosting services such as YouTube, and the Content ID system YouTube implemented in response to problems of potential liability.

II. LEGISLATIVE BACKGROUND

Hosting providers create the technical systems for users to upload content on the Internet. When a user uploads content that does not infringe another person’s copyright, nor defames anyone, nor violates privacy or any other third party right, they perform a perfectly legitimate activity and should not, generally speaking, fear an injunction or claim for restitution. The same holds true for the intermediary, the hosting provider, which created the conditions for the upload of content. However, when a user uploads content that does infringe the copyright of a third party, or defames someone, or violates their privacy or another legal right, liability claims may not necessarily be limited to the person or entity that directly performed the uploading action. In many cases, under doctrines that vary significantly from jurisdiction to jurisdiction [3], the person or entity that has helped make the illegitimate act possible may be jointly liable for the wrongdoing.

Many countries have introduced specific safe harbour laws to exempt hosting providers from this secondary liability. The declared policy objective of this type of

legislative provision is to favour the technological, economic and social function of digital intermediaries as long as they fulfil certain conditions. Early examples of these types of provision are in the EU E-Commerce Directive [8], US Digital Millennium Copyright Act [9], and Canadian Copyright Act [10].

A. *The European approach*

In Europe, Article 14 of Directive 2000/31/EC provides [emphasis added] [8]:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 **shall not apply when the recipient of the service is acting under the authority or the control** of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Similar provisions are present in 17 USC 512 (created by the Digital Millennium Copyright Act Pub. L. 105-304 in 1998) and Sec. 31.1 of the Canadian Copyright Act 1985, as amended. It is important to note that while the E-Commerce Directive applies to all illegal content, the North American provisions are limited to copyright cases.

Unlike the aforementioned jurisdictions, Australia's legal framework has trended towards more control of Internet Service Providers (ISPs) (the legislation in Australia refers to "Carriage Service Providers") on many fronts [21]. However, rather than a direct set of provisions comparable to the "safe harbour" approach, there has been a blended legislative approach that allows ISPs to intervene when they wish.

B. *The Australian approach*

The Australian Copyright Act [20], which has been much amended to comply with the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property, United States–Australia Free Trade Agreement and subsequent international agreements, follows most copyright legislation worldwide. Nevertheless, much of the current legal and policy debate is a result of the findings of the High Court of Australia in *Roadshow Films PTY Ltd & others v iiNet Ltd* (2012) [22]. The action was brought with the assistance of the Australian Federation Against Copyright Theft (AFACT), along with a number of major studios and rights holders, including Roadshow Films. AFACT alleged that a large amount of copyright material had been downloaded by users of iiNet, and that iiNet authorised these infringements. AFACT employed an anti-piracy company,

DtecNet Software (DtecNet software company was bought by MarkMonitor in 2010, and MarkMonitor itself was bought by Thompson Reuters in 2012). iiNet is a major player in the Australian internet provision market, with annual revenue exceeding one billion Australian dollars [25].

Upon appeal to the High Court of Australia, the question addressed was whether the term "authorise" could be applied to the activities of iiNet. That is, did iiNet's inaction with regard to putting users on notice of possible infringement amount to authorisation of infringement [23], that would then make the company liable. The court held that it did not, saying: "[An] ISP is not to be taken to have authorised primary infringement of a cinematograph film "merely because" it has provided facilities for making it available online to a user who is the primary infringer", and that an ISP is under no duty to continually monitor the activities of users. However, this case has been diluted by the current trends in Australian courts and legislation.

Recent amendments to the Copyright Act in Australia bring into light again the competing interests of users, hosts, rightsholders and policy makers. The new Section 115A is interesting in that it allows rightsholders, "on application by the owner of a copyright", [25] to seek an injunction to have a foreign website blocked from access, but allows the service provider, the intermediary, to not take part in the proceedings if they do not wish to (and in that case avoid costs). The injunction, if granted, requires the ISP (carriage service provider) to take reasonable steps to disable access to the online location [25]. This kind of legislation, and perhaps the whittling away of safe harbour protection, makes it more attractive for content hosts and service providers to make use of voluntary technologies to protect themselves. Whether this approach is respectful of users' fundamental rights, i.e. of their right to freely express themselves, is yet to be confirmed.

C. *Evaluation of the current legislative trends*

It is vital for hosting providers to meet the conditions required within their jurisdiction in order to enjoy the liability exemptions provided under so-called "safe harbour" provisions (or similar). In all cases, liability exemptions do not apply when the host provider partakes in activities that give them actual knowledge and control of the infringement [11]. Other conditions vary. For example, national courts in the EU have shown a tendency to exclude the applicability of Art. 14 E-Commerce Directive and apply their own traditional liability categories [3]. Therefore, it is of paramount importance for hosting providers to take the necessary steps to clearly remain within the boundaries established by the safe harbour or equivalent legislation to enjoy the relative immunity. At the same time, however, they have to maintain the services which, by making the hosting site more appealing, will attract more users and consequently more advertisement related revenue. All this needs to be done without displeasing rightsholders, which may, and usually do, threaten hosting providers and users with legal actions based on the infringement of their rights, most notably copyright [14].

For intermediaries, an option to ensure that their activity will not conduce to liability claims is to voluntarily enter in private agreements with rightsholders and users. Such agreements are a form of private enforcement that do not suffer the common problems of traditional, State-dominated regulatory interventions: slow, rigid, and lacking insights or participation by key stakeholders [11]. Accordingly, privatised enforcement measures can become particularly appealing to those operators that seek quick, flexible and reliable forms of enforcement. When these privatised measures prove of particular success and become employed by an entire sector they are usually referred to as forms of self-regulation [11]. However, privatised enforcement is not always quick, flexible, reliable or especially balanced towards all the subjects involved. From the below discussion it emerges that of the three categories of players involved in the typical scenario – rightsholders, intermediaries and consumers – the latter is the weakest party and often left in an even weaker position after negotiations.

III. CASE SCENARIO: YOUTUBE

YouTube, the video sharing website created in 2005 by three PayPal employees and owned by Google since 2006, provides a good illustration of the issues involved. Almost all the videos uploaded on YouTube are provided by users, even though some content is provided directly by rightsholders, such as CBS and the BBC. Any Internet user can watch the videos without authentication but only registered users can upload them. The maximum length of videos is 15 minutes. However, users with a good track record of compliance with the web-site rules and with an account verified by a mobile phone number may be allowed to upload longer videos. This limitation is not related to technical issues and at the beginning of YouTube's operations there was no time limit. It was noted, though, that most videos exceeding 15 minutes were infringements of copyright specific to TV shows and movies [13].

Videos can be watched on the YouTube website or embedded in different websites in such a way that users of an embedding website can watch the video without having to be redirected to the YouTube website. The video, nonetheless, is physically stored on YouTube servers and not on those of the embedding website. Downloads of videos are not usually offered as an option by YouTube but there are exceptions. There are also a number of third party applications that allow users to download videos from YouTube. It has been reported that in the past YouTube sent “cease and desist” letters to websites offering the possibility to download and separate the audio or video components, as this was in violation of YouTube's Terms of Service [13]. YouTube also implements a number of localised websites, that is to say websites that are exactly the same as the main one but translated into the local language and, frequently, adapted to meet the requirements of the local legal framework. YouTube usually redirects users to the localised version of the website on the basis of the IP address: this explains why, for instance, users from a given country trying to watch a video sometimes see the message “Video not available in

your country” while users from a different country can still watch that same video.

IV. VOLUNTARY MEASURES: THE CONTENT ID TOOL

In spite of all the described efforts to limit the upload of videos infringing third parties' copyright, YouTube, together with its parent company Google, has increasingly been the object of rightsholders' claims. Rightsholders tend to perceive YouTube's business model as not completely fair, since most of the content, they claim, is uploaded by users without the authorisation of copyright owners. On different occasions, rightsholders have reported that the number of infringing videos available is in the order of hundreds of thousands, which have led to claims for billions of dollars in damages [14]. In addition to the delicate liability issue, Google's 'deep pockets' constitute a strong incentive for this type of litigation, an aspect that increases both the number of cases filed and the amount of damages sought [15]. Individual prosecutions take a lot of time and resources and, particularly in copyright infringement cases, the amount of damages that courts award does not always justify the investment. This is also true in countries where courts can award statutory damages, such as the United States, which in cases of wilful acts can reach the sum of US\$150000 per infringement [16]. In Australia, the annual economic cost of piracy is around AUD\$551 million [17]. While the punitive nature intrinsic in the award of particularly high damages is certainly perceived by convicted infringers, it does not represent a real restoration for rightsholders when compared to industry claims that attribute 'piracy' losses at billions of US dollars [14]. Additionally, many content and media corporations have gained awareness of the counterproductive consequences that a strategy of suing your own customers (actual or potential) triggers in public opinion. Whereas, on the other hand, to prosecute a big corporation allows copyright holders to try to recover damages in the claimed amounts of billions and to have a realistic expectation that the defendant, if convicted, is solvent for the entire amount. Furthermore, the public perception of lawsuits against and between corporations is much more neutral, compared to the case of a corporation suing an individual user.

In 2007, in order to further limit the amount of uploaded infringing content and consequently reduce its exposure to copyright infringement lawsuits, YouTube implemented the Content ID tool, a voluntary system that in the intention of the promoters could seriously limit – or even eliminate – the possibility to upload content previously identified as infringing.

At this point, a brief description of the tool is necessary. Rightsholders that meet certain criteria are eligible to take advantage of the tool and can file a request to YouTube to be admitted to the program. Once accepted into the program, rightsholders can submit their copyrighted material (any sort of audio visual material) to YouTube, which in turn will “scan” it and store the resulting ID into a database. YouTube quantifies over 25 million IDs stored in its database [19]. When a user uploads a new video on YouTube, the video is automatically checked against the ID content in the database and if a match is found, YouTube contacts the rightsholder.

At this point, YouTube (more properly Google) shows its deep understanding of Web 2.0 social and economic dynamics by offering rightsholders the possibility to take any of the following actions:

- Mute the audio that matches their music;
- Block a whole video from being viewed;
- Monetise the video by running ads against it;
- Track the video viewership statistics.

Interestingly, any of these actions can be country-specific, in light of the IP address identification mentioned before. Accordingly, rightsholders are able to determine in which countries they want the content to be blocked, or monetised, and in which the statistics of the video need to be analysed. The actions can also be device-specific, meaning that rightsholders can determine which action should apply depending on the type of device used (desktop, mobile, e-reader, embedding system) [11].

Nevertheless, not every rightsholder can participate in this scheme. To be approved, users “must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community”, a status currently recognised for about five thousand ‘partners’. Under this condition, it seems clear that the Content ID scheme’s main function is to accommodate the needs of big audio visual and media groups, and not those of small or individual rightsholders. The latter can – except in very special cases – rarely demonstrate ownership of rights “to a substantial body of original material that is frequently uploaded”. After all, the Content ID tool has been in action since 2007, which is the year Viacom filed its multibillion dollar lawsuit [14].

V. ENFORCEMENT

Another critical element that emerged in the aftermath of the new tool is connected with the accuracy of the ID matching system. As Fred von Lohmann – at the time an attorney with the Electronic Frontier Foundation (EFF) – noted, the tool has been used by some of the groups admitted to the program to remove extremely large amounts of audio-visual content. Many of these removals were clear fair use cases, which led von Lohmann to describe the practice as “wholesale censorship” [27]. Other observers called this a “fair use massacre” and substantiated the accusation with a number of real cases [28]. The problem is recognized by a large cross-section of civil and academic society, and projects aimed to monitor the evolution of removal claims have blossomed. Indeed, fair use claims, together with other uses related to freedom of expression, cannot be properly evaluated by an automated process that merely identifies similarities in the object uploaded on the basis of a fingerprinting mechanism.

As a matter of fact, the hardship of determining when a use is legitimate is recognised by the law, which has created systems intended to balance conflicting claims and to give the party whose content was removed for alleged copyright infringement the possibility to reply. One such legal mechanism is the United States *Digital Millennium*

Copyright Act notice and take-down procedure (‘DMCA procedure’). Other jurisdictions offer similar solutions in their provisions regarding the removal and replacement of content, although often they do not reach the level of detail present in the US case [4]. The DMCA procedure is based on a highly regulated enumeration of the steps that a take-down procedure should follow offering alleged infringers the possibility to respond and establishing specific sanctions for rightsholders who file illicit claims [5]. On the contrary, YouTube’s Content ID system automatically scans in real time all content that is uploaded by users against the database of works owned by qualifying rightsholders. No evaluation of possible fair use cases is at this point present or possible. If a match is found, the rightsholder is informed and can decide what to do with the content: block it in a variety of ways, monetize it or analyse viewership. Only at this point, the rightsholder has the possibility of determining whether the identified material could constitute a case of fair use. However, it seems quite apparent that a rightsholder is not the most neutral judge when he has to determine whether the unauthorised use of his own material by a third party (use that often criticise or mock the original work, such as in the case of parodies) constitutes fair use.

The user who uploaded the blocked content is left with two choices. The first is to take no action, in which case the content remains under the condition chosen by the rightsholder. Alternatively, the uploader of the blocked content can decide to take action and dispute the claim, alleging the reasons why he or she believes that the content was uploaded lawfully. If this happens, the rightsholder can release the claim or confirm it. In the latter case, the uploader can “appeal” a Content ID claim but only if they possess a pristine and verified account. At this point, the rightsholder may release the claim or take down the audio or video. The latter option, also known as a “copyright strike”, leads to an immediate halt to the audio-visual content and causes the account of the uploading user to enter a state of “bad standing”, with limited features. If three copyright strikes are received, the user’s account is terminated. On the basis of the information available on the YouTube website, and of the data required to submit (or counter-notify) a copyright strike, it seems that the latter integrates a DMCA notification to all legal effects.

A last critical element is related to “contractual agreements” concluded by YouTube and rightsholders. These agreements eliminate the possibility for users to oppose a claim of copyright infringement filed through the Content ID scheme, or even through a formal notification scheme such as the DMCA notice and take-down procedure. YouTube informs users about “Videos removed or blocked due to YouTube’s contractual obligations” and explains that:

“YouTube enters into agreements with certain music copyright owners to allow use of their sound recordings and musical compositions.

In exchange for this, some of these music copyright owners require us to handle videos containing their sound recordings and/or musical works in ways that differ from the usual processes on YouTube. Under these contracts, we may be required to remove specific videos from the site, block specific videos in certain territories, or **prevent specific videos from being reinstated after a counter notification. In some instances, this may mean the Content ID appeals and/or counter notification processes will not be available.** Your account will not be penalized at this time” [29].

In other words, users will be denied the possibility to have their content reinstated on YouTube if they file a Content ID claim or a DMCA counter-notification under the conditions established by 17 USC Sec. 512(g) [16].

The consequence of failing to comply with Sec. 512(g) is that the intermediary is not eligible for the liability exemption granted under the first part of the same provision. Therefore, YouTube, at least under US law, by refusing to reinstate the content under the aforementioned conditions, exposes itself to potential liability claims from all those users that have properly filed a counter-notification which did not cause the rightsholder to start a court action. This is the type of balance that the DMCA puts, at least apparently, in place. Intermediaries can be exempted from liability for the actions of their subscribers, however they need to follow certain procedures. One of these, meant to counter-balance the power attributed to rightsholders to take-down content, is the obligation to replace such content when certain conditions are met under the penalty of becoming liable towards users.

Nevertheless, YouTube limits the ability of its users to file such claims by establishing that the reinstatement of content is at the sole discretion of YouTube. In fact, the US version of YouTube's Terms of Service states:

“If a counter-notice is received by the Copyright Agent, YouTube may send a copy of the counter-notice to the original complaining party informing that person that it may replace the removed Content or cease disabling it in 10 business days. Unless the copyright owner files an action seeking a court order against the Content provider, member or user, the removed Content **may be replaced**, or access to it restored, in 10 to 14 business days or more after receipt of the counter-notice, **at YouTube's sole discretion**” [29].

From this brief analysis it is possible to conclude that if the DMCA notice and take-down procedure is intended to

balance the position of rightsholders and users in the quest for either fast removal or fast reinstatement, then YouTube's agreements with rightsholders clearly removes only one arm of this important balance, namely the one leading to the protection of users. This voluntary and contractual based approach allows YouTube and rightsholders to circumvent the legislative safeguards created to rebalance the positions of the parties involved in UGC activities and to help users – the traditionally weaker party – to express themselves freely through the content they upload.

Concluding, the voluntarily implemented Content ID scheme is clearly a way to meet the needs of the content industry which is interested in faster and automated procedures for the removal of copyright infringing content on YouTube. However, YouTube also hosts extremely large amounts of perfectly legitimate content, including items that copy or reproduce parts of protected works but which are nonetheless lawful (e.g. fair use). In all these cases, the Content ID scheme not only fails to improve an already critical situation but worsens the position of users who upload legitimate content.

VI. CONCLUSIONS

In the various dimensions of the intellectual property spectrum there has been a ‘normalisation’ of intellectual property rights through the adoption of international agreements that establish ever growing protections for rightsholders. There are also a growing number of instances that point away from this harmonisation of intellectual property rights. Indeed, there is a great number of changes facing technology mediated information sharing [26].

The hosts of information sharing servers around the world are coming under pressure to take greater control of their content, or at least responsibility for it. This trend is driven by rightsholders. Despite some international and jurisdictional efforts to mitigate liability through safe harbour provisions, it seems likely that the coming years will see the greater adoption of ‘voluntary’ controls, such as those seen in Content ID.

Future legislative interventions in this field should aim to strike a fair balance between fundamental rights, such as freedom of expression, the proprietary rights of rightsholders and the economic and technology interests of intermediaries. In order to reach this delicate balance, basic consumer protections cannot be contractually overridden.

Additionally, the application of better technologies for rights management, such as notices regarding where and how information can be used, would allow users to be better informed as to the provenance and uses to which they can put such materials.

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