IS YOUTUBE A COPYRIGHT INFRINGER?
THE LIABILITY OF INTERNET HOSTING PROVIDERS UNDER SPANISH LAW

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Absrtact /*Resumen*

The working paper focuses on the current situation of Spanish legislation on Internet Service Providers liability, particularly dealing with the hosting service. It starts by presenting the Spanish liability system and the more salient peculiarities of the Spanish transposition of the safe harbors laid down in the E-Commerce Directive. These peculiarities relate to the actual knowledge requirement of the hosting safe harbor. The working paper focuses particularly on a judgment handed down by the Supreme Court that hold an open interpretation of actual knowledge, an issue where courts had so far been split. Very few cases have dealt with the actual knowledge and the hosting safe harbors, though the latter was discussed in an interesting scenario involving the worldwide known hosting service YouTube against the private national broadcasting channel Telecinco.

El artículo se centra en el actual sistema de responsabilidad previsto en la legislación española para los proveedores de servicios intermediarios en Internet, y particularmente el dedicado a los proveedores de alojamiento. Se empieza presentando el sistema de responsabilidad y las peculiaridades que en este encontramos en lo relativo a la trasposición al sistema español de lo previsto en la Directiva de Comercio Electrónico. Llama la atención especialmente en lo que respecta a la concepción del llamado conocimiento efectivo de los proveedores de alojamiento. El artículo se centra en este sentido en el pronunciamiento del Tribunal Supremo en uno de los pocos casos que tratan a fondo el concepto de conocimiento efectivo, y repasa también en detalle los pormenores de un interesante caso que tuvo como protagonistas al popular servicio de alojamiento YouTube y a la cadena de televisión privada Telecinco

Keywords/*Palabras clave*: Copyright; Intellectual Property; Internet; ISP liability; E-commerce Directive; Actual knowledge; YouTube.
Propiedad Intelectual; Internet; Responsabilidad ISP's; Directiva de Comercio Electrónico; Conocimiento efectivo; YouTube.

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1. Introduction. Hosting providers

Directive 2000/31, of the European Parliament and the Council, of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal market (hereinafter ECD), defines hosting as the provision of an information society service that consists of the storage of information provided by a recipient of the service[1].

Activities of this kind are typical of website hosting. A server that is permanently connected to the network hosts a website, ensuring that it is accessible on line at all time. The hosting provider is, therefore, the key intermediary in the case of potential infringements of intellectual property rights, because the Internet contains an enormous number of illegal file sharing sites hosted by Internet Service Providers (ISPs).

ISPs of this kind have an immense client base, as practically all private users and SMEs that wish to create their own website approach a hosting service provider to help in setting up the page or website to provide the appropriate equipment, connectivity, technical or maintenance services and other facilities.

Nevertheless, it is often the client that acts as the webmaster[2] for the site, remotely managing and changing content without any intervention on the part of the hosting provider. This is a key point, because it could be inferred from the definition established in the ECD that the client furnishes the provider with the content to be posted electronically, and it is the latter that inputs or stores it on its servers. The truth is that it is the user who is responsible for the remote content management system in the majority of cases, and the activity of the posting provider is therefore neutral and passive with respect to the content hosted and stored.

The storage service provided by the ISP in these cases consists basically of furnishing the user with a space in which to store the content, and offering any other facilities the client may require.

Website that provide discussion forums, chats or space for third parties to express their opinions are a case in point, which may merit a brief initial analysis.

To begin with websites that provide a forum for other users to express their opinions, a format that has proliferated online, we may observe the *webmaster* of the site in question is not equivalent to a hosting provider because the former does not have any servers and does not

[1] In accordance with, Article 14 of the ECD : "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 (…)."

[2] The *webmaster* is typically the owner, designer, developer and programmer of a website, and normally writes, edits and publishes content.

store websites for third parties. However, it seems clear that the service provided by the webmaster with respect to the messages posted by users in the forum is an information society service consisting in the storage of the third-party data provided. Therefore, even though the webmaster may himself use the services of his own hosting provider, this figure could be subsumed under the same category as the hosting provider[3].

Another example is that of chat pages offered by a site to allow users to hold real time conversations online via the site itself. In this case, as in that explained above, the owner of a website unquestionably acts as an intermediary providing a data hosting service, again using the services provided by a third party.

Lastly, we may consider the case of websites set up for electronic commerce which provide a service allowing buyers and sellers to express their opinions about barter products. As in the preceding two examples, the owner of the website once again stores and hosts the comments posted by third parties, acting as a hosting provider. This has given rise to various legal disputes, especially in the American case law and in cases that are analogous to the commercial exchange of sound files online[4].

Finally, we may consider a common feature of the examples mentioned above, which is that the any Internet user can access the content in question. We should not, however, assume that the hosting role is confined to those storing publicly available data on their servers, as such providers may also act as hosts when the content stored is accessible only to the person who provided the data. The commonest case in this regard is perhaps that of e-mail accounts.

The case of e-mail accounts consists of storing messages and attached data on a website until the user decides to delete the files. Storage is electronic, remote and provided upon request by

[3] In its judgment of 18 May 2010, the Spanish Supreme Court confirmed that the exclusion of data storage from liability in accordance with Article 16 of the ISSL (LSSICE in its Spanish acronym) is applicable to forums, on the understanding that the activity consists of allowing users to submit comments to the forum where they are stored and visible, which constitutes a case of data "storage" provided by third parties. Accordingly, the owner of the forum can benefit from the exclusion from liability established in Article 16 (providing the same is unaware of the illegality of the content, or proceeds to eliminate or block the content on becoming aware that it is illegal). It is not immediately obvious that "hosting" of comments can be subsumed under the concept of "hosting" as established in Article 16 of the ISSL , however, as it might be understood that the said precept refers only to hosting providers in the strict sense. Nevertheless, I believe this reading is fully in consonance with the letter of Article 16, and the Supreme Court's interpretation in this regard is positive. Furthermore, it is in line with the case law in France, where it has been found that the owners of sites providing services similar to YouTube (e.g., Dailymotion) and sites aggregating links furnished by users are hosting providers (*hébergeurs*).

[4] In *Schneider v. Amazon Inc.*, 108 wash: App. 454, 31 P.3d 37, (Wash. App., Div. 1, Sep 17, 2001), the buyer of a book on the Amazon portal posted certain accusations against the author in the space provided, and the appeals court found that Amazon had acted as the service provider for these purposes. The cases of *Stoner v. eBay Inc*., 56 U.S.P.Q.2d 1852, (Cal.Super., Nov., 1, 2000) and *Grace v. Neeley*, BC 288836 (Cal. Super., Apr., 24. 2003) are similar.

the individual recipient of the service. There can be no doubt, then, that this is an information society intermediation service consisting specifically of the provision of a data hosting service[5].

2. Liability of parties

The activity of intermediary service providers has caused an acute, and unremitting, jurisprudential headache in connection with the attribution of liability for breaches of intellectual property rights committed by their clients by copying and publishing protected content without the consent of its authors while using the technical resources and services provided by such intermediaries.

Different legislators have addressed this thorny question seeking an appropriate balance between rights holders, users and ISPs. Thus, right holders will not market their works online if they cannot effectively control them, but it is also necessary to avoid penalising the providers of intermediary services as far as possible, as these are the agents who make the Internet accessible to the general public with all of the benefits this implies[6].

The risk exists, then, that an excessive burden of responsibility on the ISPs could significantly slow the development of the Internet, if they fear they may incur unforeseeable costs, but a total exemption from liability would seriously prejudice the position of right holders because it is precisely the intermediaries who are based placed to protect, control and, where appropriate, stop any illegal activity on the part of Internet users[7].

It would initially seem obvious that this is a matter of tort law, and it is not for nothing that the action for compensation provided for in the Spanish Intellectual Property Law is structured as a claim for tortuous damages[8]. In my opinion, then, the provisions of the Intellectual Property Law must act as special rules with regard to the general legislation governing tort. However, it will also be necessary to consider more general conditions in the

[5] *Vid*. I. GARROTE FERNÁNDEZ-DÍEZ, "La responsabilidad civil extracontractual de los prestadores de servicios en línea por infracciones de los derechos de autor y conexos", *pe. i. revista de propiedad intelectual* issue 6 (September-December 2000), p. 41.

[6] *Vid*. J. KOSTYU, "Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers", *Catholic University Law Review*, vol. 48, 1999, p. 1241.

[7] Following I. GARROTE FERNÁNDEZ-DÍEZ, "La responsabilidad civil extracontractual de los prestadores de servicios en línea por infracciones de los derechos de autor y conexos", *pe. i. revista de propiedad intelectual* issue 6 (September-December 2000), p. 13.

[8] As underscored by the Provincial Court of Alava in its judgment of 21 July 2000 (JUR 2000/277208).

case of the liability on the part of intermediary service providers, because the Intellectual Property Law makes no reference to liability for indirect infringements.

Thus, the Intellectual Property Law at no point likens the position of the intermediary services provider to that of tortfeasor. In fact, Article 138 mentions only mentions the possibility of specific interim relief and action to seek the cessation of intermediary services, in line with the provisions established in Articles 139 and 141. The ISP is not, therefore, liable for damages caused in accordance with Article 140 of the Intellectual Property Law. The intermediary is not treated as an offender pursuant to the Intellectual Property Law, but as a party having general civil liability, to which the measures provided in the Law are applicable[9].

Hence, a special regime to govern the liability of these intermediaries has yet to be defined for the purposes of compensation. Moreover, it is not even clear that the holder of intellectual property rights can seek compensation from such parties where a third-party user of their services commits an offence specified in the Intellectual Property Law.

Consequently, the general rules of Spanish Law governing tort, which are established in Articles 1,902 and 1,903 of the Civil Code[10] would apply in the case of possible liability on the part of the ISP. This is an important point, because such liability will depend on the existence or otherwise of any tortuous action or omission, attributable to the service providers, that may have caused effective loss or damages to the holder of the intellectual property rights breached.

The applicability of the ordinary legislation governing liability, without prejudice to the provisions of specific law[11], is specifically referred to in Article 13 of the ISSL , which stands at the top of the second section of Chapter Two of the Law, where the regime applicable to liability is established.

[9] On this point, we follow A. CARRASCO PERERA, "Comentario al artículo 138 del TRLPI", in *Comentarios a la Ley de Propiedad Intelectual*, coordinated by R. BERCOVITZ RODRÍGUEZ-CANO 3ª. Ed., Tecnos, Madrid, 2007, p. 1666.

[10] These articles are as follows:

"Article 1902. Any party that causes damages to another by action or omission as a result of tort or negligence is obliged to redress the damage caused.

Article 1903. The obligation established in the preceding article is enforceable not only in respect of a party's own acts or omissions, but also those of other parties for whom they are accountable."

[11] In accordance with Article 13.1, "The providers of information society services are subject to the civil, criminal and administrative liability established in general in Spanish law, without prejudice to the provisions of this Law."

The scenario in which we find ourselves is, then, clearly what the case law refers to as liability for a third-party act, which is to say a situation in which the party causing damages, whether directly or indirectly, is not the party obliged to redress the same, but some other person. This is the case, for example, of the liability of parents for damages caused by their offspring, or guardians for their wards.

However, this liability for third-party actions also encompasses liability for a party's own offences or actions, as the party held liable is so as a result of negligence determining the damages occasioned[12]. Thus, a party whose negligence allows some other person over whom a special duty of care exists with respect to third parties directly to cause damages will be held liable, even where such liability is only indirect and most often by omission[13].

Thus, a kind of vicarious liability is established in which liability may be sought from the guarantor of a situation regardless of that party's actual actions, even though responsibility for the tortuous act lies with the direct agent of the same. This enshrines a direct and non-subsidiary liability which is perfectly consistent with joint liability together with the actual tortfeasor.

In this light, we need to distinguish between the four components of liability, namely act or omission, tort or negligence, effective damages and causal nexus[14].

The act would appear to be the easiest component to identify, as the service provider furnishes the resources necessary for the client or user to store, access, publish or copy contents protected by intellectual property rights, online.

The most controversial point in the attribution of liability to an ISP unquestionably lies in the second component, that of tort or negligence. The rather feeble legal cover of this matter in Spanish law means the liability of intermediary service providers in large part depends, as we shall explain in detail below, on the existence or otherwise of a duty to control the contents

[12] *Vid*. F. REGLERO CAMPOS (Coord.), *Lecciones de responsabilidad civil*, Aranzadi, Navarra, 2002, pp. 126-130.

[13] Numerous judgments of the Supreme Court take this stance, stressing that liability under Article 1903 of the Civil Code is based on tort (Judgments of 19 June 1998 [RJ 1998\5068], 13 October 1998 [RJ 1998\8068], 4 June 1999 [RJ 1999\4286] and 9 July 2001 (RJ 2001 5001]), and establish liability "in cases of failure to perform the duties imposed by society to care for persons or things that depend on another, and to exercise due caution in choosing agents and overseeing their actions", which is found "when a link exists between the actual wrongdoer and the person responsible for the same such that the law may properly assume that any damages caused should be attributed rather to the negligence or lack of diligence on the part of such other person than to the wrongdoer, and the ground of such liability is therefore the assumption of negligence…" (in this regard, see, inter alia, the Supreme Court judgments of 18 May 1904, 26 October 1981 (RJ 1981\3956] and 6 June 1997 [RJ 1997\4610].

[14] *Vid*. L. DÍEZ-PICAZO and A. GULLÓN, *Sistema de Derecho Civil*, Volumen II, 9ª edición, Tecnos, Madrid, 2001, pp. 543-544.

uploaded to its infrastructure, to implement the tools necessary to verify whether contents published or transmitted over that infrastructure or facilities are supported by the rights required for the purpose, and to ensure that measures are in place to block access to the contents concerned where the lack of the necessary authorisation is established.

The author or operator of the illegal content will be held directly liable for all damages resulting from the dissemination of the content, while the liability of the ISPs will be limited to the extent that they will be considered responsible only for dissemination due their actions after becoming aware that the traffic concerned is illegal[15].

Meanwhile, the Spanish 34/2002 Information Society Services Law (ISSL) does not regulate the quantification of damages or, consequently, the compensation due in respect of the damages caused by intermediary service providers. It is therefore necessary to consider the ordinary rules established by Law for damages and, specifically, the special regulation of the assessment of damages in intellectual property cases[16].

2.1 Direct and indirect liability of the parties

On the assumption that the contents shared are protected by intellectual property rights, the users of P2P file sharing programs perform a range of actions that could invade the exclusive sphere of the holders of such rights.

What the users of P2P platforms do when they participate by offering their files to other users and downloading files offered by others comprises aggregate use of protected works and services ranging from initial instrumental copying to downloading and publication. All of

[15] *Vid*. S. CAVANILLAS MÚGICA, *Deberes y responsabilidades de los servidores de acceso y alojamiento. Un análisis multidisciplinar*, Comares, Granada, 2005, p. 61.

[16] This matter is regulated in the first two points of Article 140 of the Intellectual Property Law, as follows:

"1. "The compensation for damages due to the holder of the rights breached shall comprise not only the amount of the loss sustained, but also the amount of any earnings foregone as a consequence of breach of the right. The amount of the compensation may, where appropriate, include investigation expenses incurred to obtain reasonable proof of the offence committed.

2. Compensation for damages shall be established, at the discretion of the injured party, on the basis any of the following criteria:

The financial losses, including loss of earnings, sustained by the injured party, and the profits obtained by the offender from illegal use. Compensation for moral damages shall be payable even where the existence of financial loss is not proved. The amount shall be assessed on the basis of the circumstances of the offence, the severity of the damages caused and the degree of illegal dissemination of the work.

The amount the injured party would have received by way of remuneration had the offender sought authorisation to use the intellectual property right in question."

these behaviours enter fully into the legal ambit of the rights holders, and where such acts are committed without consent the user becomes an offender, is directly liable and, eventually, may be subject to a civil suit to seek cessation of the offending action and compensation for damages caused to the rights holders[17].

Meanwhile, intermediary service providers will also be liable as direct tortfeasors where they act as content providers, which implies that they act under their own responsibility with full control over the contents published online. As explained above, the commonest types of content providers are those that also provide access and hosting services, the servers of official agencies and to a large extent the Internet users themselves via personal websites or the attachment of content to mailing lists. In fact, many ISPs that in practice provide content to their users camouflage the true nature of the service under that proper to the provision of some other kind of intermediary service in order to benefit form the possible exclusions from liability for the transmission, copying or hosting of possibly illegal content established in the legislation. This is of course the case with the celebrated ISP and world number one in music and audiovisual streaming services, YouTube.

It is clear that the providers of intermediary services do not directly copy the content loaded on their machines. Rather, it is users and content providers who are responsible for copying and preparing content for upload to, storage in or transmission via their servers, and for accessing the contents loaded on the services. To do this, however, they make use of the technical resources provided by the ISP for these purposes.

Nevertheless, it is clear that the providers of intermediary services must be equally liable even if they do not personally and directly perform any actions entailing copying or direct publication of copyright content. This is because, a series of copies take place automatically when the user gives the order, for example, to recover stored content available to the public, and these copies fall within the sphere of the service provider's (in this case, the access provider's) technical control, despite their ephemeral nature.

While the specific legislation considered below does not give this matter all the attention it deserves, let us note that certain actions that do not directly concern a creation covered by legislation protecting rights over intangible assets, or entail their exploitation or direct use, but are nevertheless intended to allow a third party to exploit or immediately use the rights without the authorisation of their exclusive owner must be considered indirect breaches of such exclusive rights.

It appears that the ISP activities described above would fit with this concept of indirect infringement and as such the liability of the parties concerned would have to be taken into

[17] Following R. SÁNCHEZ ARISTI, *El intercambio de obras protegidas a través de las plataformas peer-to-peer*, Instituto de Derecho de Autor, Madrid, 2007, pp. 173-174.

account. In the case of P2P networks, intermediary service providers furnish operators and their clients with the necessary resources to commit offences, which in this case consist of breaches of copyright. On this point, we may imagine various plausible scenarios, such as that of a provider that allows access to a client using a P2P program or assigns a website to a firm running a copyright music sharing program.

It has traditionally been held that parties providing third parties with the neutral technical resources[18] necessary to commit a breach of intellectual property cannot be considered jointly liable for the principal offence. Thus, a person renting an events space in which copyright music is later illegally played cannot be held liable for the breach of copyright. It seems clear, however, that a party who takes an active part in the offence must be liable, and in this light we need to establish the level of cooperation by the intermediary in the offence committed in order to judge the resulting liability.

Indirect infringement is a legal concept that has been imported from American law, and it may be further broken down into two categories, namely *contributory infringement* and *vicarious liability*. There are three conditions for *contributory infringement*: a direct infringement must exist, in this case by a user; the ISP must be aware of that infringement, or reasons must exist why it should be aware; and there must be a material contribution to the infringement. *Vicarious liability*, meanwhile, involves a direct infringement, the right and capacity to control the same and the derivation of a financial benefit.

The exemption of ISPs from liability has clearly been accepted and, indeed, sought[19] in pursuit of a supposed legal certainty, but this has nonetheless left the holders of exclusive intellectual property rights with no defence and in a situation of legal uncertainty.

[18] Understood as resources that are not exclusively used for an illegal activity.

[19] As the European Commission states in its Communication on illegal and harmful content on the Internet of October 1997, "The law may need to be changed or clarified to assist access providers and host service providers whose primary business is to provide a service to customers, to steer a path between accusations of censorship and exposure to liability. Where host service providers themselves provide content on the World Wide Web or on newsgroups, they are of course liable for this in the same way as any author or content provider. Where the content is provided by third parties, host service providers' liability needs to be clear. In a number of Member States (Austria, German, France and the United Kingdom), legislation has been adopted or proposed defining the legal responsibilities of host service providers in such a way that they are only liable for an item of content hosted on their server where they can reasonably be expected to be aware that it is *prima facie* illegal or fail to take reasonable measures to remove such content once the content in question has been clearly drawn to their attention. Some rules go further and appear to require access providers to restrict access to other sites which contain illegal content. Network operators, on the other hand, are not normally exposed to liability in criminal or civil law for the content carried over their networks, although they may be required by the terms of the relevant legislation or licenses to take steps in relation to their customers (access providers) if the latter use facilities to carry illegal content. The European Commission thus believes, in general, that Internet service providers are not liable for content carried on their networks and created by third parties."

All of the above has given rise to an interesting jurisprudential dispute, as we shall see below, which pits a restrictive against an extensive interpretation of the liability system currently established in Spanish law by the ISSL .

2.2 Defining features of ISPs' indirect liability

The liability of intermediary service providers as defined following the implementation of the ISSL contains other features that define the system, which merit a few lines given the legal peculiarities inherent in the same[20].

The first point of note is that ISPs' liability is configured as liability for their own actions. Thus, an intermediary is not liable for the activities of users or content providers, but only for its own actions arising precisely at the moment the host becomes aware that an infringement is being committed, such as a breach of copyright in a P2P network, and fails to react to the same with due diligence. This rather confused concept may perhaps be defined as a liability for third-party content but as a result of the provider's own actions, which is to say as a liability arising from the intermediary's own actions and its level of awareness of the offence committed over its network, although at all times referring to third-party content.

The objective and subjective nature of the intermediary service providers' liability is another matter that has not escaped jurisprudential debate, and the ISSL takes the subjective view, in line with the ECD , therefore basing liability on the wilful action or negligence of the intermediary. However, it is difficult not to ask whether the theory of risk should not be applied, which would have meant holding intermediaries objectively liable for the damages caused.

In this regard, the subjective nature of liability is made clear in the case of hosting providers, because in this case the intermediary's level of awareness of the activity carried out in their environment is expressly mentioned. The subjective nature of access providers' liability is less obvious, although in practice they will only be liable where they are informed of the illegality of contents and fail to react appropriately. They are therefore liable not for the contents to which they provide access, but for negligence in failing to remove or block access to such content.

[20] Following I. GARROTE FERNÁNDEZ-DÍEZ, "Acciones civiles contra los prestadores de servicios de intermediación en relación con la actividad de las plataformas P2P. *Su regulación en la Ley 34/2002 y en la Ley de Propiedad Intelectual", pe. i. revista de propiedad intelectual* issue 16 (January-April 2004), pp. 81-84.

In connection with possible negligent conduct, we may note that ISPs' liability does not arise in any event from any hypothetical general obligation for the intermediary to supervise the content placed on the Internet. The law does not establish any such obligation, largely because of the technical complexity of requiring general filtering and control of contents. While some isolated cases have occurred in which intermediary service providers were found liable for failure to control and oversee the information contained on their services, the majority of European legal systems, and in particular Spanish law, opt to support the rule established in Article 15.1 of the ECD [21], which does not allow a general obligation to be imposed on intermediaries requiring them to supervise the contents managed by the users of their services.

The cover provided to intermediary service providers in the legislation is without doubt their strongest weapon in seeking impunity for copyright infringements because, together with the concept of actual knowledge discussed below, it constitutes a practically unassailable barrier against the holders and defenders of rights, who often find themselves bound hand and foot when they seek to ground their *a priori* logical defence arguments.

Finally, we may note that the Spanish legislator has unfortunately allowed the exclusion of any liability on the part of the intermediary when the same obtains a direct benefit from illegal activities, always providing it complies with the other conditions established by law. In daily practice, this means access providers are able to profit from the high tariffs charged for good broadband conditions, which are contracted *en masse* by users seeking sufficient connectivity to exchange large volumes of music files in P2P traffic[22].

3. The Community and domestic regulatory framework

3.1 The Electronic Commerce Directive

The main aim of the ECD is to remove obstacles to the development of information society services and, in particular, e-commerce in the national market.

[21] In accordance with this article, which concerns the non-existence of any general obligation to supervise content, "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

[22] In this regard, see I. GARROTE FERNÁNDEZ-DÍEZ in "Acciones civiles contra los prestadores de servicios de intermediación en relación con la actividad de las plataformas P2P. *Su regulación en la Ley 34/2002 y en la Ley de Propiedad Intelectual", pe. i. revista de propiedad intelectual* issue 16 (January-April 2004), p.84.

To this end, it seeks to establish a clear, general framework regulating certain legal aspects to the information society and to guarantee the freedom of establishment and free provision of services between member States by harmonising the respective national law of the EU countries.

With regard to the subjective scope of application, the ECD defines intermediary service providers in Article 2b)[23] in line with the definition contained in Article 1.2 of Directive 98/34/EC, of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations, as this definition also comprises activities involving the provision of works online[24]. Meanwhile, services that do not involve data treatment and storage are left outside the scope of "information society services"[25].

[23] Article 2b) defines a service provider as "any natural or legal person providing an information society service".

[24] Whereas 18 of the ECD precisely delimits what is understood by information society services as follows: "Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line. Activities such as the delivery of goods as such or the provision of services off-line are not covered. Information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data. Information society services also include services consisting of the transmission of information via a communication network or in hosting information provided by a recipient of the service. Television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services. The use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service. The contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services."

[25] In accordance with Whereas 17 of the ECD , "The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access. This definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition."

Section IV of the ECD , "Liability of intermediary service providers"[26] dedicates four articles (Articles 12 to 15) to clarifying the civil liability of ISP. It is the laudable aim of the ECD here to define the different roles and responsibilities of Internet operators, seeking a balance between all of the interests at stake in the limitation of illegal activities online without constricting the commercial operations conducted in and around the Net, while establishing the maximum legal certainty for the Internet community.

The first point established by the ECD , as explained above, is that an ISP acting as a content provider and not as a mere intermediary will be subject to the tort rules prevailing in each member State and cannot seek refuge in the exemptions from liability established in the Community legislation. Likewise, an intermediary will be liable in accordance with the provisions of domestic legislation if it does not qualify for any of the exemptions established in the ECD , but it will logically enjoy the benefit of any other exemptions offered by national law. This would be the case for example, where there was no potential breach copyright because the work affected by the behaviour defined in the legislation was already in the public domain.

Before embarking on a specific analysis of the exemption or *safe harbour* established in the ECD for the hosting providers, let us consider certain issues that are common to the legislation we shall be discussing[27]. In the first place, the exemptions from liability provided for in the ECD will come into play only for information society intermediary service providers established in member States of the European Union. We may note here that an ISP is considered to be established in the Community where it meets the conditions set forth in Article 2 c)[28], even though its server may be located in a non-member State. The place where the intermediary conducts its economic activity is taken into account as a criterion of establishment, but mere hosting of a website on a Community server is not relevant for these purposes, nor is the fact that the service can be accessed from a website in a member State. In line with the above, ISPs established in non-member States but using a server in the European Union do not qualify for the benefits of the ECD .

[26] This Section was originally headed "Liability of intermediaries", but the title was amended in the Modified Proposal in order to make clear that the ECD only concerns the exemption from liability of service providers who act as pure intermediaries.

[27] Following the numbering used in I. GARROTE FERNÁNDEZ-DÍEZ, "La responsabilidad civil extracontractual de los prestadores de servicios en línea por infracciones de los derechos de autor y conexos", *pe. i. revista de propiedad intelectual* issue. 6 (September-December 2000), pp. 40-41.

[28] This precept defines an established Community service provider as "a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider."

In the second place, Articles 12 to 14 of the ECD only provide protection against potential actions for damages, while blocking and interim relief actions are always excluded per Articles 12.3, 13.2 and 14.3 of the ECD, despite the omission in this regard by the Spanish legislator.

Thirdly, the exemptions that will be applied regardless whether the ISP may be considered the principal offender or a subsidiary in accordance with the domestic legislation of the member State in which it is established, and of its role as the direct offender or as a mere accessory or accomplice.

In the fourth place, Article 18.1 of the ECD[29] establishes the obligation for the member States to provide in their national legislation for the adoption of measures to prevent or put an end to offences. It is left to the decision of each member State whether such measures will be civil, criminal or administrative.

Finally, the system for ISP liability established in the ECD is closed by a general clause (Article 15.1 mentioned above), which exempts them from the general liability actively to supervise or control the data provided by third parties online. However, the member States may require intermediaries to report any data concerning illegal activity that may come to their attention to the public authorities, and to provide information regarding the identity of their clients[30]. Unfortunately, this obligation operates only in cases where a "storage contract" exists between the intermediary and the offender (i.e., when space has been assigned to host a website, an e-mail account or any other content that the client may wish to provide). However, right holders will soon run up against the major obstacle of personal data protection in dealing with providers offering Internet access services.

3.2 **The Information Society Services Law (ISSL)**

As explained in the introduction, the ISSL (Law 34/2002, of 11 July) governing information society services and electronic commerce was intended to transcribe the principles set forth in the ECD into Spanish law, establishing the legal regime for information society services and electronic contracting, especially with regard to the obligations of the providers of services of

[29] This article refers to court action, establishing that "Member States shall ensure that court actions available under national law concerning information society services activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved."

[30] This possibility arises from Article 15.2 of the ECD : "2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

this kind, intermediary services, electronic commercial communications, prior and subsequent information in the formalisation of electronic contracts, conditions for the validity and enforceability, and the sanctions regime applicable to information society service providers.

In fact, the final wording of the ISSL deviated significantly from the spirit of the ECD [31], and some of the drafts even went so far as openly to contradict the basic principles established by the Community legislator, including ideas such as mandatory prior registration to operate online[32]. The Law diverged by regulating certain matters that are not addressed in the ECD , such as the obligation it imposes on certain providers to retain traffic data and the criteria for provider liability with regard to Internet hyperlinks. Unquestionably, however, the biggest surprise to arise from a holistic reading of the Law is that it does not contain a clause establishing that ISPs are not subject to any requirement to supervise content in general, as provided in Article 15.1 of the ECD .

Contrary to what might be expected, the lack of any such clause is all the more anomalous given that the ISSL is extraordinarily protective of intermediary service providers, granting them facilities of all kinds to benefit from the exemptions from liability established in the text. In this light, it is strange that the circle is not closed in accordance with this spirit by transposing the aforementioned "no requirement" clause.

The Law turns on the concept of "information society service", which is included in the stated purpose[33] as a wide-ranging concept encompassing not only electronic transactions involving goods and services, electronic information services such as those provided by online newspapers and magazines, intermediation activities related with the provision of network access, network transmission over telecommunications networks, temporary copying of Internet pages requested by users, hosting of data, services and applications provided by third

[31] In this regard, see, inter alia, C. SÁNCHEZ ALMEIDA, "La responsabilidad civil en Internet", Address given at the *XIII Congreso de Responsabilidad Civil* organised by the *Comisión de Abogados de Entidades Aseguradoras y Responsabilidad Civil del Ilustre Colegio de Abogados de Barcelona*, March 2005, available at http://www.tercerarepublica.com/node59.html.

[32] This precept was finally dropped in the definitive version of the Law.

[33] The wording employed is as follows: "The Law considers a wide concept of information society services which encompasses not only electronic transactions involving goods and services, electronic information services (such as those provided by online newspapers and magazines), intermediation activities related with the provision of network access, network transmission over telecommunications networks, temporary copying of Internet pages requested by users, hosting on own servers of data, services and applications provided by third parties, and the provision of search engines and links to other websites, as well as any other service provided upon individual request by users (downloads of video and audio files…), providing the service represents an economic activity for the provider. These services are provided by telecommunications operators, Internet access providers, portals, search engines or any other subject owning and operating a website over which the activities referred to are conducted, including e-commerce.

parties on servers, and the provision of search engines and links to other websites, as well as any other service provided upon individual request by users, such as downloads of audiovisual files, providing the service represents an economic activity for the provider even if the service may be used free of charge by recipients.

The services enumerated above may be provided by telecommunications operators, Internet access providers, portals, search engines or any other subject owning and operating a website over which the activities referred to, including of course e-commerce, are conducted.

In light of the above, the concept of "information society service" would have to include any kind of remote service provided electronically at the individual request of the recipient, whether or not for valuable consideration, to the extent that it constitutes an economic activity for the service provider. In any event, the Law enumerates, by way of example but without limitation, some of the activities constituting information society services:

- electronic trading of goods and services;
- organisation and management of electronic auctions or markets, and virtual shopping centres;
- management of online purchases by groups of people;
- sending commercial communications;
- telematic information services; and
- video on demand, being a service in which the user can choose online both the desired program and the moment at which it is supplied and received and, in general, the distribution of content subject to individual requests.

To turn to the subject of this study, we need to move on now to Section Two of the ISSL, where the Law seeks to transpose the exemptions from liability established for intermediary service providers in the ECD into Spanish law under the title "Liability regime". Let me repeat, however, that the ISSL surprisingly omits here any reference to the non-existence of any general obligation to supervise content like that contained in Article 15.1 of the ECD , which provides that the member States shall not impose on ISPs any general obligation to

supervise the data they carry or store, or any general obligation actively to seek out events or circumstances that may indicate illegal activities.

The ISSL enshrines the principle of no responsibility for third-party content, but the principle is fragile and full of exceptions which could jeopardise the immunity initially granted to intermediaries[34].

Article 13 of the ISSL, the first dealing with the liability regime, passes over the responsibility regime for own actions, referring to existing Spanish legislation without prejudice to the measures established therein, which in this regard come to little or nothing.

Article 13.2 of the ISSL explains that the liability of intermediary service providers for their intermediation activities is determined on the basis of the provisions set forth in the following articles, which establish four categories of liability, namely that of network operators and access providers; that of service providers making temporary copies of data requested by users; that of hosting or data maintenance service providers; and that of service providers who facilitate links or offer search engines.

In the following discussion, I shall analyse these categories with reference to the original wording employed in the ECD and the transposition of this content into Spanish law via the ISSL.

4. Exemptions from liability in the Community legislation and transposition into Spanish law

Let me now consider each of the cases of exemption from liability established in the Community legislation for intermediary service providers, and the specific requirements for their application. At the same time, I will discuss the manner in which these exemptions have been transposed into domestic law via the ISSL.

4.1 **Spirit and *ratio essendi* of exemptions from liability**

The rules established by the Community legislator in the ECD with regard to the liability of intermediaries determine, in essence, that ISPs cannot be held liable for content provided by third parties under the conditions and requirements examined below.

[34] *Vid.* P. LLANEZA GONZÁLEZ, *Aplicación práctica de la LSSI-CE*, Editorial Bosch, Barcelona, 2003, pp. 90-95.

The ECD sought to define the scope of "no liability" in such a way that intermediary service providers would be fully guaranteed that they would not be liable if they complied with the requirements established in each case. In contrast, the ECD does not seek in any way to harmonise the substantive rules in accordance with which the criteria for the attribution of liability are set in each legal system, whether in the civil jurisdiction (the subject of this study) or in criminal or administrative law. In practice, these rules will unquestionably differ in each of the member States.

When the exclusions from liability established in the ECD are not applicable, therefore, it will be the legislation of the member State concerned that determines whether the ISP is or is not liable, and the form taken by that liability.

The ECD articles included under the section "Liability of intermediary service providers" should not be interpreted as if the mandate of Community law were to require the member States to make intermediaries who do not meet the requirements for exemption liable. Rather, they are intended to set limits to the cases in which an intermediary should be free of liability without in any case prejudging whether the same is liable if it is not covered by the exemption.

Thus, Article 12 of the ECD mandates the member States to guarantee that an ISP of this kind will not be found liable for data carried or access provided when the service meets the requirements established in the Directive.

Likewise, Article 13 mandates the member States to guarantee that a provider of data transmission services who also conducts a cache storage activity in accordance with the terms provided will not be held liable for storage.

Finally, Article 14 requires the member States to guarantee that the provider of hosting services in compliance with the conditions established in the article will not be found liable for the data stored at the request of the recipient of the service.

Interpretation of the ECD raises an interesting question as to whether the attribution of liability to the ISP when the same fails to comply with the requirements established for exemption is based on the premise that the provide is in any case responsible for the content intermediated, but is freed from liability as an exception to the general rule in certain defined cases, or whether there is no direct cause-effect relationship between non-compliance on the part of the ISP and the attribution of liability in view of the illegality of the content intermediated. Without entering into the this debate, we may observe that Whereas 40[35] of the

[35] According to Whereas 40 of the ECD , "Disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the national market, in

ECD notes the disparities between the solutions adopted in the different European legal systems and case law.

It would seem clear, then, that the ECD does not seek to harmonise national law with regard to the conditions for liability, but rather to create exemptions from liability benefiting intermediaries without offering solutions where an ISP cannot enjoy exemption, referring in such cases to the different legal systems of the member States. Perhaps the most appropriate tack would have been to pursue harmonisation of national laws by establishing "common standards" of liability, but what was sought and has gradually been achieved in practice is only to release intermediary service providers from liability[36].

Another important line of jurisprudential argument[37] holds that the basis for the ECD rules is effectively to establish the cases in which an intermediary is necessarily liable for the content

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particular by impairing the development of cross-border services and producing distortions of competition. Service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities. This Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States. It is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures. The provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC."

[36] On this line of argument, see L. FAJARDO LÓPEZ, "LSSI: Aportaciones desde el Derecho privado", *REDI*, 2001, n. 35 and C. SÁNCHEZ ALMEIDA Y J.A. MAESTRE RODRÍGUEZ, *La Ley de Internet, Régimen jurídico de los servicios de la sociedad de la información y comercio electrónico*, Servidoc, Barcelona, 2002, p. 44, who maintain that "what the Directive establishes on this point, is rather a system of exoneration than of attribution of liability, given a series of requirements."

[37] This is the position taken by M.E. CLEMENTE MEORO, "La responsabilidad civil de los prestadores de servicios de la sociedad de la información", in Mario E. Clemente Meoro and Santiago Cavanillas Múgica, *Responsabilidad civil y contratos en Internet. Su regulación en la Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico*, Comares, Granada, 2003, pp. 87 ff.; J.M. BUSTO LAGO, "La responsabilidad civil de los prestadores de servicios de la sociedad de la información (ISPs)", in L. Fernando Reglero Campos (coord.), *Tratado de Responsabilidad Civil*, 2nd Ed, Aranzadi, Cizur Menor (Navarre), 2003, *passim*; J.P. APARICIO VAQUERO, "El nuevo régimen de prestación de servicios de la sociedad de la información", *RdNT*, 2003, n. 2, p.105; I. CONDE BUESO and I. DÍEZ LÓPEZ, "Comentario a los artículos 13 a 17 de la LSSICE", in Javier Cremades and José Luis González Montes (coords.), *La nueva Ley de Internet*, La Ley-Actualidad, Madrid, 2003, pp. 259-293; J. A. MAESTRE, "Análisis de la Directiva sobre el Comercio Eletrónico y del Anteproyecto de la Ley de Servicios de la Sociedad de la Información (LSSI)", in Javier Cremades, Miguel Ángel Fernández-Ordoñez and Rafael Illescas (coords.), *Régimen jurídico de Internet*, La Ley, Madrid 2002, pp. 1241-1260; R. SÁNCHEZ ARISTI, *La propiedad intelectual sobre las obras musicales*, 2nd Ed. Revised, updated and extended, Comares, Granada, 2005, p. 235; J. VILLAR URÍBARRI, "El régimen jurídico de los prestadores de servicios de la sociedad de la información", in Rafael Mateu de Ros and Mónica López-Monís Gallego (coords.), *Derecho de Internet. La Ley de Servicios de la Sociedad de la Información y de*

mediated. These would comprise all cases in which the activity of the service provider was not in line with the requirements established for exemption from liability, and in accordance with this line of argument these requirements would constitute actual obligations or positive duties imposed on the ISPs rather than merely conditions established for them to obtain the benefit of exemption from liability.

Meanwhile, the ISSL follows the criteria of the ECD , establishing requirements to obtain exemption from liability. When an ISP carries out an activity that is not in accordance with the conditions established to obtain exemption, it may be found liable, in my opinion, only where a provision exists in our legal system that attributes such liability, or obliges the intermediary to answer for any wrongdoing.

Articles 14 to 17 of the ISSL describe various *de facto* cases to which the legal consequence of no liability on the part of the provider for content carried, stored or linked is connected. As could hardly be otherwise, the jurisdiction is undisputed with regard to the effects of this exclusion from liability. Debate centres rather on whether these same articles can be interpreted *sensu contrario*, which would entail the conclusion that these rules, which subject the exemption from liability to certain conditions, would positively establish that the service provider is liable for the third-party content carried, stored or linked when it fails to comply with the requirements imposed for the enjoyment of the exemption.

In the opinion of this author, Articles 14 to 17 of the ISSL are not ideally suited to establish the liability of the intermediary service provider in themselves. When the requirements established for exemption from liability are not met, the ISP must be held liable or not depending on the standards of liability ruling for each type of tort, and this in fact makes it all the more difficult for the holders of the rights breached to mount their defence.

The exemptions from liability established in the ISSL are structured in such a way as to those situations in which the activity of the provider goes beyond the strict limits of a purely passive and automatic function, as conceived and described in the ECD in Whereas 44[38]. When an

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Comercio Electrónico, Aranzadi, Cizur Menor, 2003, pp. 403-404; P. LLANEZA GONZÁLEZ, *Aplicación práctica de la LSSI-CE*, Editorial Bosch, Barcelona, 2003, p. 78; C. SÁNCHEZ ALMEIDA and J.A. MAESTRE RODRÍGUEZ, *La Ley de Internet. Régimen jurídico de los servicios de la sociedad de la información y comercio electrónico*, Servidoc, Barcelona, 2002, pp. 149-183; F. CARBAJO CASCÓN, "La responsabilidad por hiperenlaces e instrumentos de búsqueda en Internet", *Revista Práctica de Derecho de Daños*, Ed. La Ley, October 2004, issue. 20, pp. 7-29 and I. GARROTE FERNÁNDEZ-DÍEZ, "Acciones civiles contra los prestadores de servicios de intermediación en relación con la actividad de las plataformas P2P. *Su regulación en la Ley 34/2002 y en la Ley de Propiedad Intelectual", pe. i. revista de propiedad intelectual* issue 16 (January-April 2004), p.78.

[38] In accordance with Whereas 44 of the ECD , "A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities."

ISP exceeds the limits established in these precepts it will not be possible to conclude that it had no direct and active part in the illegality of the content mediated or, to put this another way, that it acted as a purely neutral intermediary.

According to the Law, intermediaries who go beyond these limits cannot enjoy the exemptions from liability provided, but this does not mean it can be argued that an intermediary who fails to comply with the conditions can be considered responsible for the content. *Lege data*, this is not established in the legislation. Though it could be affirmed that non-compliance with any of the conditions established for exemption from liability might constitute conduct resulting in liability in accordance with the general legislation applicable, the attribution of such liability to the intermediary provider would nevertheless have to be grounded in the general governing that liability.

However, scholars commenting on the ISSL frequently remark that Articles 14 to 17 in themselves determine the cases in which an intermediary service provider will be liable for the illegality of content, though this liability must be fixed by the relevant provisions of Spanish legislation.

I do not agree with this opinion, because we may observe that the general and special rules governing liability in Spanish law also include certain requirements with regard to its origin. A necessary step is therefore missing for it to be possible to affirm a direct relationship between the articles of the ISSL and the attribution of liability. This is the step required by applicable Spanish legislation for liability to be declared, and without it, we find in many cases that it is often not possible to find a non-compliant intermediary liable, despite its failure to comply with the requirements for exemption from liability established in the ISSL.

To explain this more concisely, we might say that Articles 14 to 17 of the ISSL establish the cases in which the provider *may* be liable, but non-compliance with their provisions does not *per se* entail any attribution of liability.

Despite this opinion, the jurisprudential debate exists in practice and it has found its way into the case law, where we may find some rulings in favour of this presumably direct attribution of liability to subjects who do not qualify for the exemptions established in the ISSL[39].

In the end, it is certainly the case that the criteria defined in the ISSL to delimit the cases of exemption from liability will have an influence in the decision on the attribution of liability to ISPs or otherwise, but this will always be made on the basis of the general rules governing such attribution. A reading that seeks to integrate the conditions and requirements provides a view of the specific responsibilities of intermediaries in the provision of their services, and an agent that does not act with due diligence can be considered negligent. As a corollary,

[39] Thus, the Ruling of Barcelona Court of Instruction No. 9 on 7 March 2003 notes the attributive nature of liability in Articles 14 and 17 of the ISSL.

however, civil liability cannot be imposed *ex* Articles 14 to 17 of the ISSL, but must always stem from Article 1,902 of the Civil Code.

4.2 **Requirements for and scope of the exemption from liability for the hosting providers**

In data hosting cases, the exemption from liability will apply wherever:

- the service provider had no actual knowledge that data activity was illegal and, with regard to any action for damages, was not aware of any events or circumstances that would have revealed the illegal nature of the activity or data; and
- the service provider, being aware of the above matters, acted promptly to remove or block access to the offending data.

In light of the above, the content of the provision concerned is sufficiently clearly worded, although we may note that the Community legislator left certain gaps in the EU system by failing to define how the much commented terms "actual knowledge" and "awareness of events and circumstances" should be understood to reveal illegality. Moreover, the ECD also fails to clarify what "prompt" means in relation to the removal or blocking of the data in question, and it does not make clear whether this obligation refers to means or outcomes. This is no minor question, because "acting promptly" to remove or block content is not the same thing as actually achieving the removal of or blocking access to the data[40].

In my opinion, the ECD raises the bar for due diligence on the part of an intermediary service provider by requiring that it cannot ignore evident data revealing the illegal nature of the works hosted on its servers. This seems to me a good approach to the demand for responsibility, as it should not be forgotten that ISPs are professional agents, the majority of whom obtain a market profit from their business activities. Unfortunately, the concept of "actual knowledge" has been irreversibly diluted, as we shall see, to the point where it is in practice unusable as an instrument for the defence of the exclusive rights of copyright holders.

We may also note that the Community legislator is at pains to ensure that the removal of content by hosting providers does not adversely affect freedom of expression, in view of the wording of Whereas 46[41] of the ECD and, more generally, Whereas 9[42]. Thus, the provider

[40] In this regard, see M. PEGUERA POCH, *La exclusión de responsabilidad de los intermediarios en Internet*, Comares, Granada, 2007, p. 281.

[41] According to Whereas 46 of the ECD , "In order to benefit from a limitation of liability, the provider of an

will not be deprived of the exemption from liability even if it has not removed or disabled access to the content, where such failure to remove or block content is due to the imperative of legislation enacted by the member State in question to protect the aforementioned right.

In accordance with Article 14.2 of the ECD , exemption from the liability established in the preceding paragraph will not apply when the recipient of the service acts under the authority or control of the provider, which appears consistent with the line of argument followed thus far that the ISP's action must be purely technical and passive with respect to third-party contents for exemption to apply. Notwithstanding the above, we may remark that from a strictly literal standpoint, Article 14.2 is merely the negation of the exemption of liability for the recipient of the service due to the lack of independence, but it does not assign any liability for the possible illegality of content to the provider exercising "control" or "authority".

4.3 **Transposition of the ECD in the ISSL**

Spanish law provides for the exemption from liability in the case of hosting in article 16 of the ISSL[43]. The requirements for exemption and the scope thereof are similar to those found

information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned. The removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level. This Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information."

[42] Whereas 9 is as follows: "The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty. This Directive is not intended to affect national fundamental rules and principles relating to freedom of expression."

[43] In accordance with Article 16 of the ISSL, "1. The providers of an intermediary service that consists of hosting data provided by the recipient of the service shall not be liable for the information stored at the request of the recipient, providing that:

They have no actual knowledge that the activity or the data stored is illegal or infringes assets or rights of a third party qualifying for compensation; or

Where they have such knowledge, they act with due diligence to remove the data or disable access to the same.

It shall be understood that the service provider has the actual knowledge referred to in paragraph a) above when a competent body has declared the data illegal or ordered that the same be removed or access disabled, or when the existence of damages has been declared and the provider is aware of the pertinent ruling, without prejudice to such procedures as providers may apply to detect and remove content pursuant to voluntary agreements or any other channels of actual knowledge that may be established.

2. The exemption from liability established in paragraph 1 above shall not apply in the case that the recipient of the service may act under the management, authority or control of the provider."

in the ECD , although we would underscore two key points on which the ISSL departs from the Community text.

The first of these points is the specific requirement established in the ECD for the intermediary provider to benefit from the exemption from liability in the event of any claim for the compensation of damages, which is to say in the case of civil liability.

As we have seen above, the ECD requires not only that the provider should have no actual knowledge of the illegality of the information or activity to be free of any liability for damages, but also that the ISP should have no awareness of any events or circumstances that could reveal the illegal nature of the activity or information. The ISSL once again inexplicably omits the second requirement, while transforming the first into a requirement that the provider must not have actual knowledge not only that the activity or the information stored is illegal, but also that it infringes the assets or rights of a third party qualifying for compensation.

This addition or specification might at first sight appear to refer to the matters already established in the Community text, but in my opinion it should be interpreted as an extension of the scope of exemption from liability granted in the Spanish legislation, making it sufficient for the provider to be unaware of the injurious nature of the information to escape any civil liability for the wrongful act in question. Taken together with the elimination of the requirement for evidential or circumstantial knowledge, this means the exemption from liability for hosting providers under the ISSL is structured in a manner that is worryingly more lax than was foreseen by the Community legislator.

The second point on which the ISSL departs excessively from the ECD in my opinion is the concept it employs of “actual knowledge”. As this discussion will be the subject of further detailed analysis below, let it suffice for the present to note the disparities between the two legal texts.

With regard to the inapplicability of the exemption from liability due to lack of independence established in by Article 14.2 of the ECD , the ISSL, true to its expansive nature, further increases the number of cases in which the exclusion from liability will be inapplicable to include those in which the recipient of the service acts under the management of the provider, as well as the cases of authority and control already established in the ECD .

To conclude, we can only lament once again the absence from the ISSL of the clause in the Community text which establishes that exemption from liability shall not affect any possible

order to put an end to the infringement or prevent action on the part of the competent authorities of a member State.

5. The problematic concept of *actual knowledge*

In the case of data hosting the ISP is required subjectively not to have actual knowledge of the illegality of content, so that it will only qualify for exemption if it proceeds to remove or block the content, or to disable the link to the illegal content. Therefore, the consideration of actual knowledge becomes one of the keys to determine whether the provider can benefit from the exemption from liability in these cases.

In accordance with Article 16.1 of the ISSL, it is understood that the service provider has actual knowledge when a competent body declares the illegality of content or blocks access to the same, or when the existence of injury is declared, and the provider is aware of the pertinent ruling, without prejudice to any procedures applied by providers to detect and remove content under voluntary agreements or any other channels of actual knowledge that may be established.

Analysing the conditions established for actual knowledge, the same may be split into three types. The first would include those cases in which ruling may have been issued by a competent authority declaring the data illegal, ordering its removal or disabling, or declaring that the assets or rights of a third party qualifying for compensation have been infringed, and the ISP was aware of that ruling.

The second type would refer to those cases in which a provider has its own procedures in place to detect and remove illegal contents. In this regard, it will be understood that the ISP establishing a procedure of this kind will have actual knowledge of the illegality of the content hosted or linked, or that they are in breach of intellectual property rights, without the need for any ruling from a competent authority. The rules governing the specific procedure for detection and removal will be those that determine the requirements for notification of an infraction to ensure that the provider has actual knowledge of illegality.

Finally, the Spanish legislation refers to “other channels of actual knowledge that may be established”, and in this light it must be understood that the legislator wished to leave a door open to other procedures that may be adopted in the future and adopted as a matter of general practice.

At this point, having revisited Article 16 of the ISSL, we must inevitably ask what would happen if the provider should suspect, or to go further, should know through its own channels

that P2P file sharing programs hosted on its servers were exchanging protected works without taking any action to prevent the situation? While it might seem evident that the ISP necessarily acquires actual knowledge given its activity, the fact is that this may only be held to be the case *lege data* when a specific agreement exists with the holders of intellectual property rights, or an internal procedure for the detection and removal of illegal content. If no agreements of this kind exist, the ISSL allows the intermediary to "turn a blind eye", if I may use the expression, until it receives de notification of the illegality of the content hosted[44].

An integrated view of this discrepancy reveals the need to interpret Spanish law in conformity with the ECD , which leads us to the conclusion that the second paragraph of Article 16.1 of the ISSL and the second paragraph of Article 17.1 should be read in a wide sense.

However, such integration may be too much to ask, as the actual wording of the ISSL diverges, incomprehensibly, from the provision contained in Article 14 of the ECD , as it requires the ISP not to have knowledge of any facts of circumstances revealing the illegal nature of the activity or data to qualify for exemption from liability, thereby establishing an implicit obligation not to ignore evident data showing that the works hosted on its servers are illegal. In consonance with this argument, Article 16 of the ISSL deliberately, and most unfortunately, eliminates this provision, allowing the hosting provider to ignore the illegality of the content hosting, even where it is obvious, unless it is duly notified of or fails to comply with the supervisory procedures it has itself established.

Certain rulings of the courts have, however, recognised the possibility that actual knowledge may exist without verification of the circumstances enumerated in the ISSL, arguing from the evidential or circumstantial knowledge referred to in the ECD [45], which is also to be found in Spanish legislation governing intellectual property, although expressed in other terms[46].

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[44] In this regard, see I. GARROTE FERNÁNDEZ-DÍEZ, "Acciones civiles contra los prestadores de servicios de intermediación en relación con la actividad de las plataformas P2P. *Su regulación en la Ley 34/2002 y en la Ley de Propiedad Intelectual", pe. i. revista de propiedad intelectual* issue. 16 (January-April 2004), p. 95.

[45] In this regard we may note the judgment of 9 December 2009 (RJ 2010\131) issued by the Supreme Court Civil Bench, which turns down the appeal brought by the Spanish Association of Internet Users against the judgment of Section 19 of the Provincial Court of Madrid of 6 February 2006, which in turn ratified the judgment of Madrid Court of First Instance No. 42 of 15 June 2005 and, to a lesser extent, the ruling of Section 2 of the Provincial Court of Cáceres of 30 October 2006 (JUR 2006/277689).

[46] By way of example, but without limitation, we may refer to Article 102 of the Amended Spanish Intellectual Property Law, which reads as follows: "For the purposes of this Chapter, and without prejudice to Article 100, parties performing the actions referred to in Article 99 above without the authorisation of the holder of intellectual property rights shall be considered to be in breach of the same, and in particular:
Any parties bringing one or more copies of a computer program into circulation in the knowledge, or being in a position to assume, that the same is illegal.

The first occasion that the Supreme Court has had to rule on the regime for exemption from liability established in the ISSL and interpret the requirement for the lack of actual knowledge, in this case pursuant to Article 16 of the ISSL, arose in the judgment of 9 December 2009, issued in the case of *SGAE vs. Asociación de Internautas*.

The dispute began when SGAE (*Sociedad General de Autores y Editores*, the principal Spanish copyright collecting society) brought an action in the WIPO mediation and arbitration service to close down the domain www.putasgae.com, a site that had repeatedly and harshly criticised the copyright collective. The WIPO ruling of 18 December 2002 closed down the site and SGAE thereupon registered the domain name. However, criticism of SGAE continued on the website www.putasgae.org, owned by the *Plataforma de Coordinación de Movilizaciones contra la SGAE*, and a *mirror*[47] was hosted by the *Asociación de Internautas* in the sub-domain http://antisgae.internautas.org.

In these circumstances, SGAE and its chairman, Eduardo Bautista, sued the Internet Users Association for libel in view of the defamatory expressions employed in the mirror site hosted on the Association's servers.

The judgment issued by the Madrid Court of First Instance No. 42 on 15 June 2005 ordered the Association to cease libelling the complainants, remove the defamatory expressions against the same, compensate the complainants and publish the judgment, as well as expressly imposing costs. However, it made no mention of the text of the ISSL.

The Association then proceeded to appeal, alleging among other arguments that the judgment was in breach of the Law. In its judgment of 6 February 2006, Section 19 of the Provincial Court of Madrid upheld the judgment of the court of first instance and argued that the Information Society Services Law did not preclude the application of other legislation, such as Organic Law 1/1982, of 5 May, protecting the civil right to honour, personal and family privacy, and personal image.

The appeal judgment reached the conclusion that the defendant had affective knowledge, in a material sense, of the defamatory contents and even took over the same by deciding to host the same on its server[48]. The Association appealed to the Supreme Court on the grounds of recognition of the constitutional right to freedom of expression and exemption from liability in accordance with Article 16 of the ISSL.

Any parties holding one or more copies of a computer program for commercial purposes in the knowledge, or being in a position to assume, that the same is illegal (…)".

[47] This term is used to define websites, or any other resource that is a mirror of another, meaning it contains a copy of the information.

[48] The Ninth Legal Ground of the judgment notes that the defendant "proceeded to collate and take over the content".

As mentioned above, the Supreme Court turned the appeal down, and one of the key points of its judgment was its interpretation of the requirement for lack of actual knowledge established in Article 16 of the ISSL. The Supreme Court clearly opts for the non-restrictive interpretation explained here, expressly underlining that a closed reading of this concept would not be in conformity with the ECD [49].

The Supreme Court therefore based its arguments on the "other channels of actual knowledge" referred to in Article 16 of the ISSL, which are not specified in any secondary legislation. Webmasters have usually waited for court rulings or, to a lesser extent to receive complaints from interested parties, before removing content. Based on this judgment, however, it will be necessary to take into account that knowledge may be considered effective on the basis of events or circumstances allowing effective apprehension of the reality concerned, even if such is mediated or stems from logical inference. The sub-domain was a re-address, and the provider therefore should have checked the content hosted to ascertain its nature.

A further interesting, and in my opinion appropriate, approach to the concept of actual knowledge, in this case drawn from minor case law, was that taken by the courts of Lugo in a matter concerning liability for illegal content hosted on an Internet forum. In this regard, both the Mondoñedo Court of First Instance No. 1 and the Provincial Court of Lugo understood on ratifying the judgment of the *a quo* court, that the cases referred to in the second paragraph of Article 16.1 of the ISSL constitute *iuris tantum* presumptions of actual knowledge, and that it would therefore be possible to extend such cases, which were not held to be limitative[50].

[49] According to the grounds of the judgment, "Interpretation of Article 16.1 of Law 34/2002 as proposed by the appellant is not in conformity with the Directive, the objective of which in this regard is to harmonise the regimes for the exemption of service providers from liability, as it would unjustifiably reduce the possibility of obtaining " *actual knowledge*" of the illegality of the content stored thereby expanding the scope of the exemption with regard to the terms of the harmonising directive, which requires actual knowledge but does not restrict the appropriate instruments to obtain such.
In addition, Article 16 itself permits such an interpretation in favour of the Directive by reserving the possibility of "*other channels of actual knowledge that may be established"*, and it cannot be ignored that it attributes equal value to *" actual knowledge"* and knowledge obtained by the provider of the service on the basis of events or circumstances allowing effective apprehension of the reality concerned, even if such is mediated or stems from logical inference.

[50] I refer to the judgment of 5 November 2008 issue by the Mondoñedo Court of First Instance and the sentence of the Provincial Court of Lugo of 9 July 2009 (JUR 2009/328919), which stated as follows in the second point of law: "This precept [Article 16 of the ISSL] contains a presumption, and the said actual knowledge referred to in point a) must be held proved 'when a competent body has declared the data illegal or ordered that the same be removed…' etc., and the provider is aware of the relevant ruling. In the opinion of this Court, however, this does not prevent knowledge of illegality from being proved in some other way, as this is not a closed list but a presumption (known legal resolution) 'ad exemplum' and, 'sensu contrario', it would prevent actual knowledge from being proved through any other channel."

Until a relevant case law is created, this represents a jurisprudential step forward with regard to the meaning of actual knowledge, establishing an interpretation that is much close to the spirit of the ECD and more favourable to the defence of the interests of copyright holders.

Nevertheless, the structure of Spanish legislation means intermediaries can in fact remain completely inactive until they are notified, even where the content they store is evidently illegal. Meanwhile, it is evident that legal provisions in no way provide an incentive for internal blocking and removal procedures, and such procedures are in practice rather scarce and can be Kafkaesque, acting to the detriment of the providers that implement them.

The opinion expressed here is far from undisputed, however, and various highly regarded authors have argued that the general rules governing liability in cases of omission could fill in the legislative *lacunae* in flagrant cases of illegality[51].

To conclude, it seems clear that the transposition of the ECD into Spanish law departs considerably from the Community text by doing away with the requirement for the lack of any knowledge for providers to be freed of civil liability. It also clearly departs from the terms of the ECD by restricting the interpretation of the concept of actual knowledge, thereby denaturing the intention of the Community legislator and limiting the concept to a merely formal knowledge of the existence of a prior ruling declaring the content mediated illegal.

The most serious point about the transposition effected by the Spanish legislator is that it runs counter to the ECD , allowing exemption form liability in cases where the intermediary provider is actually aware of the illegality of the content hosted on its server. While the Community text establishes that exemption is not applicable in the presence of such actual knowledge, the ISSL does not prevent exemption when a provider has actual knowledge unless it is obtained through any of the channels referred to in the second paragraph of Article 16.1. Therefore, ISPs are granted practically total immunity, and this makes it practically impossible for right holders to defend their exclusive sphere, rendering the chances of obtaining any kind of financial compensation for the damages sustained absolutely illusory.

[51] In this regard, see J. MASSAGUER FUENTES, "La responsabilidad de los prestadores de servicios en línea por las infracciones al derecho de autor y los derechos conexos en el ámbito digital", *pe.i. revista de propiedad intelectual*, issue 13 (January-April 2003), pp. 44-45 and R. SÁNCHEZ ARISTI, *El intercambio de obras protegidas a través de las plataformas peer-to-peer*, Instituto de Derecho de Autor, Madrid, 2007, p. 200.

6. The hybrid legal nature of YouTube. Intermediary or content provider?

The regime governing web 2.0 service providers' liability for infringements of intellectual property arising on their platforms is far from being a model of legal certainty. While the ISSL does contain certain specific provisions, many points remain debatable. Thus, the Law establishes rules for exemption from liability in the case of certain activities, including hosting of content provided by third parties. The provider of these services cannot be found liability for the illegality of the material hosted if it meets the conditions provided. These consist basically of not having actual knowledge of the illegal or harmful nature of the content and, where it is illegal, the provider must act with due diligence to remove it.

The question formally at issue on this point is whether YouTube meets the requirements for exemption under this regime, but the heart of the matter currently under debate is what is the right balance between the interests of the online service providers and the holders of intellectual property rights. Who should assume the cost of overseeing respect for these rights, and to what extent. This debate translates into a question of how the regulation should be interpreted to achieve the desired balance.

6.1 YouTube as a content provider. The precedent of the Tiscali case

To begin with a description of the way YouTube operates[52], the service provides users with access to videos uploaded to the site by other users and certain communications media with which content agreements exist[53].

Certain characteristics of the YouTube website suggest that it does not act merely as an intermediary service but as a content provider, being directly responsible for and benefiting from the exploitation of content online.

[52] YouTube is an Internet site where users can upload and share videos. It was created by three former employees of PayPal in February 2005. In November 2006 Google Inc. acquired YouTube for $1,650 million, and it now operates as one of its affiliates. YouTube uses an online player based on Adobe Flash to deliver its content. The opportunity it provides to host personal videos simply has made the site highly popular. YouTube hosts a wide range of film clips, television programmes and music videos, as well as *amateur* content and *videoblogs* (despite its rules against uploading copyright videos, there is ample content of this nature). Links to YouTube videos can also be established in blogs and personal sites using API or encrusting an HTML code.

[53] The YouTube service present itself as an "online video streaming service that allows anybody to see and share videos uploaded by our members". See the section "What is YouTube" in the website's "Help Center".

Thus, YouTube exploits videos on its own behalf as a the licence holder for users and content providers with which it has collaboration agreements, and the Terms of Use posted on the website include an intellectual property rights licence in the sites favour, permitting it to exploit videos in its own name and on its own account.

It might also be understood, given YouTube's editorial work in selecting and presenting content, that its role is not confined to the merely passive, technical functions of an intermediary service provider. This work is patently clear in relation to the "Favourite Videos" chosen by YouTube personnel for pride of place on the sites home page, and the prohibition of videos that are incompatible with the editorial line taken by YouTube, even if they are perfectly legal[54].

We may also note that YouTube does not provide a space for users to exploit content in whatever manner they think best, but rather their sites are designed by YouTube, and a YouTube brand is distinguished under which the content and videos are operated subject to conditions that are not imposed by technical or legal imperatives but at the discretion of YouTube.

Finally, YouTube conducts its own unquestionably lucrative commercial activity over its website, benefiting economically from advertising and prohibiting the commercial use of their videos by its clients.

In view of this brief description of key features, it seems questionable that YouTube is configured as a mere intermediary service provider and is not rather a provider of content hosted on its website, regardless of the fact that the same may have been provided by its users[55].

The consequences that would stem from the configuration of YouTube as a content provider are enormously important. In accordance with Article 15 of the ECD , national laws may not impose a general obligation to supervise the content carried by the intermediary services referred to in Articles 14, 15 and 16 of the ISSL. However, this prohibition of any obligation to supervise benefits only intermediary service providers and in no way content providers.

[54] *Vid.* the prohibition of "shocking videos" in the "Instructions for the YouTube community".

[55] *Vid* J. MASSAGUER FUENTES, "La responsabilidad de los prestadores de servicios en línea por las infracciones al derecho de autor y los derechos conexos en el ámbito digital", pe.i. revista de propiedad intelectual, issue 13 (January-April 2003), p. 43, who explains in relation to intermediary hosting service providers that "The general exemption from liability of site service providers is conditional upon their activities' being those proper to an intermediary, and this takes the form of an express requirement that the client to whom the service is provided should not act under the provider's direction and control and, in spite of the silence surrounding the matter, the implicit requirement that the provider may not in any other way determine the content stored or alter the circle of people to whom the client may with to make the same available. In either of these cases, the condition of intermediary is lost and the operator becomes a content provider."

As we shall see, content providers are subject to the general liability rules established in Spanish law[56].

In this regard, events occurring in Belgium in 2007 when a court obliged the ISP Tiscali to filter illegal file sharing between its users are highly significant, even though YouTube has so far won all of the legal actions brought to date[57].

In 2004, SABAM, a collecting agency, sought an interim relief against the ISP Tiscali (currently Scarlet) due to infringements of copyright over musical works pertaining to its repertoire via the services provided by Tiscali to its subscribers. The measure in question obliged Tiscali to prevent its clients from sending or receiving music over peer-to-peer without the authorisation of the right holders and a fine of €25,000 was established for each day's delay in implementing the measure.

Tiscali then lodged a counterclaim to seek compensation of €50,000 for the commencement of a humiliating and groundless action. Tiscali further sought to have the court declared not competent, but this petition was rejected *de facto*, and it was further found that SABAM had established the need for interim measures against Tiscali given its capacity as an intermediary to prevent the infringement of intellectual property rights by third parties, and had proved the existence of breaches of copyright on works belonging to the SABAM repertoire via P2P networks and Tiscali's networks.

The court sought the opinion of an expert, who was asked, inter alia:

> • to establish whether the solutions proposed by SABAM would allow only files shared illegally to be filtered, or whether this would imply filtering all and any user of P2P networks;

[56] *Vid* J. MASSAGUER FUENTES, "La responsabilidad de los prestadores de servicios en línea por las infracciones al derecho de autor y los derechos conexos en el ámbito digital", pe.i. revista de propiedad intelectual, issue 13 (January-April 2003), p. 20 , who explains that "The legal position of content providers presents no special features from the standpoint of liability for the infringement of copyright and other intellectual property rights that may exist on the content placed in circulation over the Internet. Thus, in the operating cycle of protected content in a digital environment, content providers store the material in servers connected to the Internet, from which it is made available to users accessing the content when and from where they choose, where appropriate subject to the access conditions imposed. As we have seen, this activity therefore entails copying (storage of a service connected to the Internet) and access or public communication (i.e., holding the content stored under conditions that allow the public to access the same under the terms established)."

[57] *Vid*. "Belgium judge orders ISP to clean up network", *The Register*, available at http://www.theregister.co.uk/2007/07/05/belgium_P2P_isp/,, "IFPI hails court ruling that ISP'2 must stop copyright piracy on their networks", available at http://www.ifpi.org/content/section_news/20070704b.html and "ISPs to Become Copyright Police", available at http://www.slyck.com/news.php?story=1525.

- to verify whether any other measures aside from filtering the shared content could be used to control the use of file sharing applications, and if such measures existed to determine whether they would affect all file sharing taking place over the Internet or only activities considered illegal; and

- to determine the cost of implementing the measures in question and the duration of such implementation.

Scarlet accused SABAM of waiting until March 2006 to begin the expert evaluation (the parties were permitted to ask questions of the expert), which the ISP understood to show that the interim measure could not be presumed to be urgent. This was rejected by the court on the grounds that SABAM had less knowledge of the Internet than the telecommunications operator and in view of the extensive and full report issued by the expert, which explained the time it had taken to prepare the same.

The conclusions reached by the expert in his report are of special interest.. The report affirms that 11 solutions could be found that would be technically viable in the short run to filter the P2P network. Seven of these could be applied to the Tiscali networks, 6 to block P2P applications and 1 to filter the same. The expert stressed the last of these solutions, referring to the technology of Audible Magic[58], Copysense Network Appliance[59], which identifies protected musical content flowing over P2P networks. The other traffic management methods are used in particular, although not exclusively, by recognition and discrimination applications.

The expert therefore considered that the solution proposed by the firm Audible Magic was the only solution to seek a specific response to the problem." The court's confidence in the expert is striking, as is the expert's trust in the fingerprinting solution. Nevertheless, the expert highlighted various problems:

- Filters in P2P networks will cease to be effective in the medium run, given the increase in encrypted networks;

- The Audible Magic solution is designed for educational environments and not for large volumes of traffic like those of an ISP; and

- The solution entails both implementation and maintenance costs.

[58] *Vid.* http://www.audiblemagic.com/index.asp.
[59] *Vid*. http://www.audiblemagic.com/products-services/copysense/.

Tiscali questioned the effectiveness of Audible Magic on two main grounds: the legality of a transmission resides in data that are inaccessible to this system, which is to say it is not possible to know whether an author has authorised the communication of his works; and communications may be encrypted, which would make it impossible to identify musical works.

In an effort to highlight the virtues of Audible Magic and play down the problems noted by the expert, SABAM asserted that the technology was being used successfully by Internet giants like MySpace and Microsoft, and pointed to an Iometrix study which showed that the Copysense Network Appliance was perfectly suited to the large volumes of traffic handled by ISPs. SABAM further affirmed that most P2P network accesses were made over unencrypted networks to allow all participants to read shared files. This point was not disputed by Tiscali.

The cost of this solution, quantified at approximately €0.50 per user/month was not considered a problem by the court.

Tiscali continued its defence by arguing that the court should order suspension on the following grounds:

- the imposition of the technical measures proposed to oversee traffic over P2P networks could become a permanent charge, which would be counter to Directive 2000/31 and its Belgian transposition;
- the adoption of the filtering methods might result in exemption from liability established for ISPs by Article 12 of Directive 2000/31; and
- use of the technical measures sought could "require the permanent and systematically installation of listening devices", which would breach fundamental rights such as the right to privacy, the right to the confidentiality of communications and the right to freedom of expression.

The court considered that Article 15 of the ECD , which prohibits any form of control over or intercepts of communications should be interpreted together with Whereas clause 40 of the Directive[60].

[60] "The provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC."

In addition, the court affirmed that the interim measure does not impose upon Tiscali the obligation to control its networks, as the use of the filtering technology does not constitute an obligation to control but to use measures to prevent an unlawful act from being committed applied on a purely technical and automatic basis, so that the ISP has no active role in the filtering activity.

With regard to the matter of users' privacy and the secrecy of communications, the court held that the filtering technologies in question do not process any kind of personal information, being technical instruments like antivirus or anti-spam software that do not imply identification of Internet users but only block unlawful activities. In addition, in the contract between Tiscali and its users the ISP prohibits the latter from using its networks to breach intellectual property rights, and it would therefore be legitimately entitled to sanction offending users.

On the basis of the above arguments, the court upheld the adoption of interim measures against the ISP consisting, in accordance with the claimant's petition, in the implementation of the Audible Magic system on its systems within a period of between 4 and 6 months. In the event of non-performance, the ISP would be liable to pay a daily sanction of €2,500, significantly less than the €25,000 sought by SABAM. Tiscali argued that it should not be required to pay for the said implementation, to which the court responded that it was not its responsibility to consider this question as the costs of the interim measure were inherent in the same.

The counterclaim brought by the ISP, according to which SABAM's real purpose was to humiliate it Tiscali, as it could not otherwise be understood why the collection agency had taken action against it when larger operators were present in the market and SABAM had not taken action against the developers of P2P software, was turned down in its entirety and declared to be groundless, as the existence of other ISPs did not prevent action being taken against Tiscali.

6.2 **YouTube as a mere intermediary. Telecinco vs. YouTube**

YouTube maintains that its activity consists only of allowing users to upload videos to its servers, from where they can be automatically viewed by third parties, running on the site which constitutes and intermediary hosting service regulated by Article 16 of the ISSL.

Meanwhile, the lists of links to videos hosted on the server and the video search system operating on the YouTube site respectively constitute an intermediary service facilitating

links and other search instruments, both of which are regulated by Article 17 of the ISSL[61].

As neither the ISSL nor the Directive compared establish any restriction, the condition of intermediary is enjoyed merely by making an automated search tool available to users. Neither the search fields offered or the delimitation of the search scope are of any relevance in this regard. In extreme cases, however, these matters could be considered to indicate actual knowledge of the unlawfulness of the data to which the search leads.

Likewise, the law does not require that links be created automatically. Consequently, they include links generated manually at the editorial discretion of the author[62]. Evaluation of the way such links are generated is another matter for investigation of the possible existence of actual knowledge of the illegality of the content to which links lead.

The only requirement established by the ISSL is that the link in question be included in a website that allows the user to access third-party content by a click of the mouse, which would only generate doubts as to the inclusion of "direct links" in this class of services.

7. Conclusion

As this essay has made clear, we may conclude, therefore, that YouTube's activity consists of offering a variety of intermediary services, both as a host and as the provider as lists of links to third-party videos hosted on the site.

However, the recent case law shows that this issue is more complex from both the legal and the conceptual standpoint. This is shown by the fact that the different courts hearing this case

[61] This article is as follows: "1. The providers of information society services providing links to other content or including content directories or search engines among their services shall not be liable for the information to which the recipients of these services are directed, providing that:

- They have no actual knowledge that the activity or the data referred to or recommended is illegal or infringes assets or rights of a third party qualifying for compensation; or
- Where they have such knowledge, they act with due diligence to remove or disable the related link.

It shall be understood that the service provider has the actual knowledge referred to in paragraph a) above when a competent body has declared the data illegal or ordered that the same be removed or access disabled, or when the existence of damages has been declared and the provider is aware of the pertinent ruling, without prejudice to such procedures as providers may apply to detect and remove content pursuant to voluntary agreements or any other channels of actual knowledge that may be established.

2. The exemption from liability established in point 1 above shall not obtain if the content provider to which the link is made or whose localisation is facilitated acts under the management, authority or control of the provider facilitating localisation of the contents."

[62] On this issue, see PEGUERA POCH, *La exclusión de responsabilidad de los intermediarios en Internet*, Comares, Granada, 2007, p. 288.

worldwide have not established a uniform criterion, and though a decision in favour of YouTube was recently reached in the USA[63], the German courts found against the provider[64].

In Spain, the broadcaster Telecinco sued YouTube for an alleged breach of intellectual property rights in the publication of protected content owned by the station. Though the argumentation contained in the judgment of the court of first instance[65] was weak, certain of the points raised are nevertheless worth considering.

The judgment concludes that YouTube is in reality a web 2.0 hosting service, noting that although it is a content platform it remains an intermediary service and is not in any way a final service. This point could perhaps have been further developed by the court, as it ignores various questions that are by no means trivial.

The truth is that neither European nor Spanish legislation distinguishes between services in which contents are made available by the owner of the service or by users, and until such a distinction is made services like YouTube and Spotify will have to be measured against the same legal yardstick, even if this flies in the face of common sense, as YouTube provides hosting services and content offered by its users while Spotify only provides content which it posts on the net itself.

The sentence denies that YouTube exercises editorial control over content and stresses that it cannot be downloaded. With regard to this facet of the ISP, the judgment steers a steady course between the strict, and debatable regime, imposed by the ISSL, which establishes that actual knowledge, and therefore liability, can only exist where a court or administrative ruling has been issued declaring the content to be unlawful. However, the judgment states that such actual knowledge must stem from the claimant, which is required to notify the unlawful content found on the YouTube platform on an individual basis. While recognising that tracking and locating its content on YouTube is not a straightforward or easy procedure for the claimant, the judgment specifies that it is the broadcaster that obliged to carry out this task. In my opinion, this is correct since YouTube could, as the hosting provider, seek refuge in the no prior control regime, and Telecinco would be obliged to report and seek removal of any unlawful content.

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[63] *Vid*. "Judge Throws Out Viacom Case Against YouTube (Court Document)", available in http://techcrunch.com/2010/06/23/youtube-declares-victory-in-viacom-case/ [last visit 28.09.2010].

[64] *Vid*. "German court rules against YouTube in copyright row", available at http://www.dw-world.de/dw/article/0,,5979400,00.html [last visit 28.09.2010].

[65] Judgement available at http://www.elpais.com/elpaismedia/ultimahora/media/201009/23/tecnologia/20100923elpeputec_1_Pes_PDF.pdf [last visit 28.09.2010].

The judgment falters where it embarks on the analysis of the action for removal sought by Telecinco under Article 138, paragraph three of the Intellectual Property Law[66]. The ruling establishes that this and the following article of the Intellectual Property Law are not applicable to the case, because it is established at the end of the aforementioned paragraph that the provisions apply without prejudice to the ISSL, and this eliminates any possibility of applying the action for the cessation to information society services.

However, in the opinion at least of this author, the adverbial wording refers to implies just the reverse. Thus, the regime provided in the ISSL refers to a higher level, and Article 138 of the Intellectual Property Law is therefore applicable in addition to the provisions of the ISSL with regard to the liability of intermediary service providers.

To conclude, this is a common sense judgment insofar as it refers to the development of the information society, although from a strictly legal standpoint, the only one that is truly important, the dual or hybrid nature of YouTube is not well analysed. It would be desirable for the legislator urgently to establish a legal regime governing the no supervision requirement for final providers where their content is furnished by users, as in the case of YouTube, and not by themselves, as in the case, *verbi gratia*, of Spotify. It would clearly be a lamentable step backward for the information society if a service like YouTube, which claims to receive over 24 hours' worth of video every minute[67], were required to carry out prior filtering in order to assure the lawfulness of every video uploaded to its server.

[66] This is as follows: "Both the specific measures for cessation established in Article 139.1.h and the interim measures provided for in Article 141.6 may also be sought, were approved, against intermediaries whose services make use of a third party to breach the intellectual property rights recognised by this Law, even though the acts of such intermediaries do not in themselves constitute an infringement, without prejudice to the provisions of the ISSL. The said measures must be objective, proportionate and non-discriminatory.

[67] *Vid*. "A Big Win for the Internet", available at http://googlepolicyeurope.blogspot.com/2010/09/big-win-for-Internet.html [last visit 28.09.2010].

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