04_Legal Regime of the Liability of Information Society Service Providers_LT[english]

Technological advances continuously pose new challenges to the intellectual property protection. The most recent developments to this effect relate to information technologies and the broader access to the internet. Works protected by copyright or neighbouring rights become increasingly accessible and, more often than not, this access constitutes an infringement of these rights.

However the impact of information technologies is not confined to the facilitated access to literary, scientific, musical and other works. A parallel process is the sharing of a huge quantity of information, in which ever more people turn into authors or performers as each photo or video, each written line is intellectual property. The use of these works is possible only with the consent of the rightholder. At the same time, the sharing of such information involves a number of intermediaries who also process information relating to objects of intellectual property rights, such as hosting service providers, social networks, search engines and many others.

The processing of information relating to objects of intellectual property rights is always fraught with the risk of damaging the rightholder, e.g. the server maintained by the service provider might contain books, audio records and videos which are used without the consent of the author. Search engines might be used to ensure access to such servers. Thus the issue is whether the service provider is liable for infringements of intellectual property rights committed through that service.

The answer seems rather simple at first glance: the service provider should be liable for such infringements because he is a trader providing services within the framework of his occupation. However, the sheer volume of these services makes the actual review of all the information to which the service provider grants access extremely difficult. The application of the principle of liability for each infringement in this case would entail prior identification of the actual author of each photograph or each text and of the person entitled to use it. As a result, the information search and sharing would be extremely limited. Therefore the providers of such services are assumed to be exempted from liability for infringements of the user of the relevant service. The exemption is not full because the service provider has the

obligation to establish any content of which the provider has knowledge or awareness that it infringes an intellectual property right. The knowledge or awareness is not presumed only on the basis of the service provision as the service provider should have reviewed and processed the content or should have been informed of it.

Generally, the providers of such services work on a cross-border basis and this raises the issue of which national law should be applicable to the assessment whether a person is entitled to use certain content or not. Intellectual property rights are largely uniform with the framework of international conventions which introduce the standards for their protection. Yet, each state is free to decide when the intellectual property right can be used freely. A pertinent example is the difference in the legal regimes regulating the right to take photographs of buildings which are architectural works, where the EU alone has five different legal regimes allowing such photographing. The question is which national law is applicable to each individual case and there is no straightforward answer yet. The national laws provide that in the case of copyright infringements the applicable law is the law of the state in which the infringement was committed. This is a clear enforceable rule when, for instance, a book was published and distributed. But when the same book is shared on the internet the issue of where the infringement was committed becomes much more complicated. Is it the place where the perpetrator is located physically, or is it the place where the device containing the book is installed, or is it the place of registration of the service provider?

For the time being, the answer to these questions is given only in the practice of service providers. The applicable legislation consists basically of the U.S. Digital Millennium Copyright Act (DMCA) and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Both regimes build on the principle that the service provider is liable only for infringements he is aware of but there are a number of differences between them.

In many cases, the choice of regime will depend entirely on the judgment of the service provider and, as a result, DMCA might apply to a dispute concerning the copyright of a holder in the EU even when the infringement was committed within the EU territory. Then the whole dispute can be heard by a U.S. court which will enforce its national legislation. This solution,

however, violates the principle of the EU law that the user of a service may not be deprived of the right to seek remedy in the state of residence of the user in which the service is provided. The European Commission has undertaken some action since the beginning of 2017 and the result is yet to be seen.

Another difference between the two regimes is the opportunity for the Directive on electronic commerce to apply to all objects of intellectual property and not just works protected by copyright and its neighbouring rights, whereas the scope of the U.S. regime is limited to copyright. An example to this effect is Case C-324/09 of the Court of Justice of the European Union (L'Oréal SA and Others v eBay International AG and Others). In that case, a reference for a preliminary ruling was made on the applicability of the Directive on electronic commerce to an infringement of a trade mark right. The specific infringement was parallel import in which an eBay electronic marketplace offered products of L'Oréal which were not put on the EU market. It was undoubtedly an infringement of the exclusive rights of the trade mark proprietor and the main issue was whether eBay could be held liable for the damage. The Court held that the information society service provider (an organiser of an electronic marketplace for products) could rely on the exemption from liability provided that the provider was not aware of the infringement of the intellectual property right. Knowledge or awareness is there when the service provider has reviewed, optimised or promoted the content of the relevant offer for sale. The service provider would be liable also when he could become aware of the infringement acting as a diligent economic operator. Therefore the defence of the service provider against claims to pay damages would be to prevent the processing in any way of the information shared by the users of the relevant electronic marketplace and to act expeditiously to any notice of a possible infringement.