

A world of copyright confusion on the Web

Internet service providers must contend with laws that are not uniform — or not interpreted consistently.

BY CRAIG R. SMITH

"Only one thing is impossible for God: to find any sense in any copyright law on the planet."

— Mark Twain's Notebook, 1902-1903

Mark Twain's contemporary, Charles Dickens, visited America for the first time in 1842 and received a hero's welcome. Americans loved his books. Although the books sold well in the New World, Dickens received very little in return because of a lack of enforceable copyright laws. To remedy this situation, he lobbied for international copyright protection in the United States, which came to fruition in the International Copyright Act of 1891.

Since then, many more copyright laws have been passed here and abroad. Keeping track of and complying with those laws can be difficult, especially for Internet service providers (ISPs) and social-media companies that provide their services to a global market. Many countries have developed specific legislation to help protect such entities from liability relating to the activities of their users. Unfortunately, the laws are not uniform — or are not interpreted consistently — and therefore compliance requires knowledge of the nuances among them.

Service providers face a

particularly treacherous landscape. Information posted by users online instantly reaches audiences all over the world and, as a result, may subject companies that host the information to the laws in each country where people can access it. Copyright owners have targeted service providers in lawsuits because the sheer scale of individual online infringement makes it nearly impossible to go after each direct infringer. In order to avoid liability for what users post, service providers must develop plans to quickly address claims of infringement.

In the United States, the Digital Millennium Copyright Act (DMCA) protects service providers from liability for copyright infringement. The DMCA created safe harbors for the common activities performed by service providers. See 17 U.S.C. 512(a-d). Section 512(c) of the DMCA is particularly relevant to social-media companies because it provides immunity for copyright infringement relating to information posted by users. Senate Report No. 105-190 at 43 (1998).

To qualify for the DMCA safe harbor for hosting third-party information, a service provider must not have actual knowledge of the infringing activity or be aware of facts that make the infringing activity apparent. If the service provider becomes aware of infringement, it must act "expeditiously to remove, or disable access to, the material." In addition,

the service provider cannot receive a financial benefit directly attributable to the infringing activity. Finally, service providers must designate an agent to receive infringement notifications and have a policy for terminating the service of repeat infringers.

U.S. courts have applied the DMCA safe harbors to a broad group of service providers, but have not consistently defined what activities will give rise to liability. For example, in *Columbia Pictures v. Fung*, No. CV 06-5578, 2009 U.S. Dist. Lexis 122661, at *60 (C.D. Calif. Dec. 21, 2009), a California district court held a Web site operator liable for copyright infringement because it induced users to download copyrighted movies. Gary Fung had promoted infringing uses of his service and therefore was liable for inducing infringement. The DMCA safe harbors did not apply to Fung, according to the court, because Columbia's claims "were premised on active inducement of infringement, not passive transmission or storage of infringing material."

In contrast, in *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), a New York district court applied the DMCA safe harbors more broadly. It held that "awareness of pervasive copyright-infringing, however flagrant and blatant, does not impose liability on the service provider" unless the

service provider has “knowledge of specific and identifiable infringements of particular individual items” and does not remove them. YouTube was immune from copyright liability because it removed content when notified of specific infringement, even though it was generally aware of pervasive infringement.

Although European countries have a similar set of copyright laws, they have striking differences in interpretation — both from the United States and each other. A majority of member states in the European Union has adopted laws that are nearly identical to the European Union Electronic Commerce Directive, which provides immunity to service providers for copyright infringement based on user content hosted on their sites. This immunity applies only if the service provider does not have “actual knowledge or awareness of facts or circumstances” of the copyright infringement and “expeditiously removes” the infringing content or disables access to the content upon becoming aware of the infringement. Service providers are not required to monitor their services for infringing content.

RULINGS IN EUROPE

European courts have generally applied the e-commerce directive to find service providers not liable for copyright infringement relating to content posted by their users. For example, in Spain, a federal court dismissed a case against Google Inc. for copyright infringement because “YouTube is not a supplier of content.” *Gestelevision Telecinco sa, Telecinco Cinema sau vs. Youtube LLC*, Commercial Ct. No. 7 Madrid c/ gran v??a., 53, 55700, general id. No. 28079 1 0000904 /2008.

Other countries have interpreted the e-commerce directive much more narrowly. In Italy, a judge sentenced three Google executives

to a suspended prison term for a privacy violation based on a user uploading a video relating to an autistic boy, even though Google had removed the video within two hours of being notified by the police of the privacy violation. *Repubblica Italiana v Drummond, De Los Reyes and Fleischer* (Sentenza n. 1972/2010. Tribunale Ordinario di Milano in composizione monocratica. Sezione 4 Penale.) Italian courts also have held an ISP liable for copyright infringement based on users posting unauthorized copies of TV shows. The Court of Milan refused to apply the immunity provided in the e-commerce directive because the ISP was not a passive hosting provider — it actively indexed and categorized content uploaded by users and provided search features. *R.T.I. SpA v. Italia On Line SRL* (June 16, 2011). This decision is problematic for social-media companies because organizing content to make it more useful and available to users is a common feature.

Similarly, in France, Myspace Inc. was held liable for infringement when a user posted skits of a comedian online. Myspace did not qualify for immunity under the e-commerce directive as a hosting service because Myspace allowed users to create their own Web pages and upload videos. This common functionality distinguished Myspace as a publisher, and not merely a hosting service. TGI Paris, 13 juillet 2007, *Christian C, Nord-Ouest Production c/ SA DailyMotion, SA UGC Images*.

Moreover, although the e-commerce directive does not require active monitoring of content, several countries have required its equivalent. For example, in France, Google was held liable for copyright infringement when users continued to post unauthorized copies of movies after Google had been notified of the infringing content. The court held that Google not only had to remove infringing

videos when notified, but had an obligation to prevent future access to the infringing videos. See *Google Inc. / Compagnie des phares et balises; Google Inc./ Bac Films, the Factory; Google Inc./ Bac Films, the Factory, Canal and Google Inc./Les Films de la Croisade, Goatworks Films, Jan. 14, 2011*.

These cases, and others like them, highlight that there is no governing set of rules on how service providers should behave internationally. Nevertheless, service providers can institute policies to help limit liability. First, there must be a clear mechanism for third parties to provide notice of potential infringement to the service provider. Once notified, service providers need a procedure for quickly removing the content or preventing access to it. Users also must be informed through user agreements that they are responsible for the content they post and that the service provider has the right to remove it and discontinue service for any reason. Finally, service providers should have a plan for dealing with repeat offenders. Technical mechanisms may be required in some countries to not only deny access to infringing content, but to prevent the content from being posted again in the future.

As content providers, Mark Twain and Charles Dickens likely would have supported the broad protections now offered to copyright holders around the world. Whether they would have found any more clarity in the laws is another matter entirely.

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