Passive & Neutral Intermediaries: Concepts Without Policy Goals?

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Origin & status quo
Origin of the neutrality criterion

*Google France C-236/08 to C-238/08*

- AG Maduro originally proposed to reject Art 14 to keyword storage entirely
- “I construe **Article 15** (..) as the very expression of the principle that service providers which seek to benefit from a liability exemption should remain neutral as regards the information they carry or host.” (para 143)
- Active position = “**stems from its relationship with the advertisers** (..) **Google has a direct interest in internet users clicking on the ads’ links**” (para 145)
- BUT, organic search passive!
CJEU accepts ‘neutrality’ criterion

Google France C-236/08 to C-238/08

• “it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions (...) cover only cases in which the activity (...) is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.” (para 113)

• “it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.” (para 114)
CJEU rejects AG’s strict test

• CJEU does not follow AG; it applies Art 14;
• “mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions” (+) “concordance between the keyword selected and the search term entered by an internet user is not sufficient”
• “the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant” = up to the domestic court
Clarification in L’Oreal v eBay

• Criticized as lacking the legal basis (Recital 42 misplaced)
  • AG Jääskinen, eBay C-324/09, para 140 (re: mere conduit & caching)
  • ‘neutrality’ does not appear to be quite the right test
  • split activities (IF covered + beyond = Art 14 for covered)

• CJEU responds: Section 4 (title) is the source
  • mere storage + ToS + remuneration ≠ denial of Art 14
  • NOT OK, to provide “assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers” =
    • “played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.”
CJEU: L’Oreal v eBay

1.

<table>
<thead>
<tr>
<th>Content</th>
<th>Activity</th>
<th>Result</th>
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<tbody>
<tr>
<td>A</td>
<td>PASS.</td>
<td>SH</td>
</tr>
<tr>
<td>B</td>
<td>AC TI.</td>
<td>X</td>
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</tbody>
</table>

2.

A

- eBay scenario
- PASS.
- AC TI.
- X

3.

A

- e.g. storage + prediction
- PASS.
- AC TI.
- separable
- X

- X
- X
Advocate General (arguably)

1. Content
   - A
   - B

   Activity
   - PA SS.
   - AC TI.

   Result
   - SH
   - X

2. eBay scenario
   - A
   - PA SS
   - AC TI.

   Result
   - X

3. e.g. storage + prediction
   - A
   - PA SS
   - AC TI.

   Result
   - SH
   - X

   separable
Consequences
Consequences for SHs

- **Trademark cases**
  - co-drafting of keyword advertising not covered [Google France]
  - co-promotion or ‘optimization’ of third-party ads not covered [eBay]

- **Copyright cases**
  - debate on co-intervention in communication to the public of active providers

- **Defamation cases**
  - Estonian SC (Delfi) side-stepping & applying strict liability
  - Hungarian SC (MTE) side-stepping & applying strict liability

- **ECtHR**: accepts it as a factor for Art 10 permissibility (para 145-6)
Rationale?

• Google France / L’Oreal v eBay
  • In-built implicit limitation of the system
  • Universal condition for all SHs

• But taking care of what?
  • CJEU accepted AG’s criterion, without proposed test [direct financial benefit];
  • Misuse by intentional collaboration is prevented by knowledge/recitals
  • Only intermediary activity under ‘provided by the recipient of the service’
  • Many ‘proactive services’ fall outside of Art 12-14 anyway, e.g. suggestion tool
Common view

Own content?

Active

Passive

Third-party content?

Why am I here?
Common view

Own content?

Third-party content?

Active

Passive

Papassavas [CJEU]

eBay [CJEU]

TPB [CJEU]

Delfi/MTE [ES/HU]

Art 13 DSM
Possible view = still not too late
Possible view = still not too late
Thank you for your attention!

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Blog: www.husovec.eu
http://ssrn.com/author=1912670
twitter.com/hutko
• Permissibility of Delfi-rule under Art 10
  • [Claimed principle] ‘graduated & differentiated approach’ = new situation
  • [Thinking] ‘editorial liability’ = old situation

• [context of comments criterion]: “the Court agrees with the Chamber’s finding that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal” (par 145)

• “In sum, the Court considers that it was sufficiently established by the Supreme Court that the applicant company’s involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider. The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.” (para 146)