

CLIENT ALERT

Recent EU Court Ruling on Limitations of Civil Liability for ISPs

Sep.18.2014

On September 11, 2014, the EU Court of Justice ruled that the limitations of civil liability for ISPs specified in the EU E-Commerce Directive do not apply to the case of a newspaper publisher which operates a website on which the online version of a newspaper is posted.

The EU Court of Justice has issued a decision that could have wide ramifications for ISPs and other online publishers. In a case¹ brought before the EU Court of Justice by a Cypriot court, an individual had sought damages against a newspaper publisher as a result of harm allegedly caused by defamatory articles published online. The Court of Justice was asked whether the limitations of civil liability specified in the EU E-Commerce Directive² are applicable to a newspaper publisher which operates a website on which the online version of a newspaper drafted by staff or freelance journalists is posted.

Articles 12 to 14 of the E-Commerce Directive concern situations in which an information society service provider (ISP) exercises, respectively, a 'mere conduit' activity, a 'caching' activity or a 'hosting' activity. In these situations, the ISPs may not be held liable for the information transmitted or stored where the conditions referred to in those articles are satisfied.³ This is similar to the exemption from liability for ISPs created by Section 230 of the United States Communications Decency Act (CDA).

The EU Court of Justice confirmed that the limitations of civil liability specified in Articles 12 to 14 of the E-Commerce Directive are capable of applying in the context of proceedings between individuals relating to civil liability for defamation.

In order to establish whether the liability of the newspaper publishing company could be limited under Article 14 of the E-Commerce Directive, the Court considered that it was necessary to examine whether the role it plays 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.

The Court hereby referred to its previous case law in *Google France and Google*⁴ and *L'Oréal and Others*,⁵ in which it had held that the mere fact that a referencing service is subject to payment, that the ISP sets the payment terms or that it provides

Recent Happenings in APRM September 2014

- ["Made in America" Claims: the Landscape, FTC Guidance, and Tips for Manufacturers and Marketers](#)
- [FTC Warns Retailers to Police Their Products' Deceptive Concussion Prevention Claims](#)
- [What's Happening at CPSC This Fall](#)
- [EU Court Affirms Harmonization Laws Governing Price Reductions Offered to Consumers](#)
- [Next Round of Prop 65 'Reforms' To Address Industry Concerns](#)
- [Belgium Introduces A Collective Redress Mechanism For Product Safety and Product Liability Claims](#)
- [Asia-Pacific Economies Endorse the Growth of Self-Regulation in the Region](#)
- [Recent EU Court Ruling on Limitations of Civil Liability for ISPs](#)
- [FDA Issues New Guidance On the Unique Device Identification System](#)

general information to its clients cannot have the effect of depriving that provider of the exemptions from liability provided for in the E-Commerce Directive.

By contrast, the role played by the provider when drafting the commercial messages which accompany an advertising link or when establishing or selecting keywords is relevant. Likewise, where the provider provides assistance with respect to the optimization of the presentation of the products offered for sale or promoting these products, it does not take a neutral position between the customer-seller and potential buyers but plays an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.

Consequently, in the case at hand, since a newspaper publisher which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an 'intermediary service provider' within the meaning of Articles 12 to 14 of the E-Commerce Directive, whether or not access to that website is free of charge. The EU Court therefore concluded that the limitations of civil liability do not apply.

* * *

¹Judgment of the Court (Seventh Chamber) of 11 September 2014, *Papasavvas and Others*, Case C-291/13.

²Directive 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.

³Article 12, entitled 'Mere conduit', provides:

'(1) Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.'

Article 13, entitled 'Caching', states:

'(1) Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.'

Under Article 14, entitled 'Hosting':

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

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

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

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

⁴ Judgment of the Court (Grand Chamber) of 23 March 2010, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), Joined Cases C-236/08 to C-238/08.

⁵ Judgment of the Court (Grand Chamber) of 12 July 2011, *L'Oréal SA and Others v eBay International AG and Others*, Case C-324/09.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com