

E-Commerce Regulations

Part 1 of 2

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Google made the headlines when it acquired YouTube, the video sharing website. Google is now making the headlines again as YouTube is being sued for \$1 Billion in the USA, for copyright infringement in relation to the videos which are posted on YouTube's website.

YouTube was established as a way for sharing video clips amongst users, where such sharing was intended in respect of materials which were not restricted by copyright preventing such use. However, as with publicly accessible websites such as this, it was just a question of time before more and more commercially copyright restricted materials started to be posted.

In the USA, YouTube is likely to be looking to the 'safe harbor' protection pursuant to the Digital Millennium Copyright Act (DCMA) of 1998, which is aimed at providing a degree of protection for web hosting companies, ISPs and search engines, to guard against liability for materials posted by third parties on to its website.

It therefore seems an opportune time to consider the E-Commerce Regulations 2002 to consider the protection which is afforded in England for claims arising from third party materials being posted by users on to certain websites.

E-Commerce Regulations 2002

With the global nature of the internet, and the fact that it is available on a 24/7 basis, it meant that practically it would be extremely difficult

for certain legitimate businesses to safeguard themselves from liability, from the multitude of third party materials which may be uploaded to their websites, where the materials may or may not have been posted lawfully.

Relief was provided to some extent for this issue, following the adoption of the European Directive, 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). This Directive resulted in the implementation of The Electronic Commerce (EC Directive) Regulations 2002 (or E-Commerce Regulations as they are commonly referred to).

Although a majority of the provisions in the E-Commerce Regulations were aimed at consumer protection through transparency brought about by mandatory information requirements, there are certain provisions contained in it which are squarely aimed at providing safeguards for certain internet service providers.

Regulations 17 – 22 are the main provisions which are of interest to YouTube types of situations arising in England, and it would be useful to consider these provisions in more detail, so that businesses falling within the scope of the Regulations can understand what safeguards are available to them, as well as the caveats that such safeguards are subject to. For the purposes of this Technology Column, we

will focus on Regulations 17-19 and 22, to deal with the scenarios of a service provider acting as a mere conduit, or caching information, or acting as a web hoster.

Regulation 17: Mere Conduit

Regulation 17 is aimed at providing protection to organisations such as ISPs, who are acting as a mere conduit in transmitting information provided by third parties, at a user's request.

Regulation 17(1) sets this out as follows:

“Where an information society service is provided which 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, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider –

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

Just for the purposes of clarity, ‘information society service’ is defined as consisting of “any service normally provided for remuneration at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service.” In essence, for our purposes, this translates into any internet service normally provided for payment, at the request of a user.

The key requirements for an ISP seeking to rely upon the safeguards pursuant to this Regulation, are that the transmission needs to be initiated following a request by a user, and the information which is provided must neither have been selected nor modified by the ISP. This is to reinforce the fact that the ISP is acting as a mere conduit or vehicle for transmitting information, rather than one which is actively exercising editorial control over the information which has been transmitted.

Regulation 18: Caching

With the internet, it is sometimes appropriate to cache information on servers to make that information more readily accessible to users. Regulation 18 provides safeguards for the service provider in such situations for any unlawful information which is posted on its server by third parties, subject to the following conditions in Regulations 18(a) and 18(b) being fulfilled:

- “(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and*
- (b) the service provider -*
 - (i) does not modify the information;*
 - (ii) complies with conditions on access to the information;*
 - (iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;*
 - (iv) 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*
 - (v) acts expeditiously to remove or to disable access to the information he 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.”*

The above provisions are quite self-explanatory, and we will consider the knowledge requirements referred to in Regulation 18(b)(v), below.

Regulation 19: Hosting

It is Regulation 19 which is of particular interest to a 'YouTube' type of situation or certain other 'hosting' arrangements where information has been posted by users of a service.

This Regulation seeks to allow a service provider to avoid liability where it can come within the scope of Regulations 19(a) and 19(b), namely:

“(a) the service provider -

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.”

With regard to what constitutes 'actual' knowledge for the purposes of Regulation 19(a)(i) (and for that matter for the purposes of Regulation 18(b)(v) referred to above), this is addressed by Regulation 22, which states that:

“...a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to -

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes –

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question.”

From the above, it is clear that once the 'unlawfulness' is brought to the attention of a service provider by way of notice, the service provider must immediately take steps to remove or disable access to the information, otherwise it will not have the protection of the safeguards which the Regulations afford (as after all, the Regulations are aimed at providing a defence to unknowingly making unlawful information available). However, from the underlined section shown in the extract from Regulation 22, it is clear that the Courts still have a discretion to determine what is 'actual knowledge,' and in a YouTube type of situation where an organisation has previously been served with notice to remove large amounts of material which have been posted unlawfully, it is always open to a Court to consider whether from the type of postings which have occurred to date, together with the number of complaints, whether the circumstances suggest that the organisation had actual knowledge generally, or whether the knowledge requirements should be limited to actual knowledge of the specific material in respect of which a claim has occurred.

Conclusion

There is a difficult balance with illegally posted information to websites by users. On the one hand, there is an organisation which has set out to provide a forum for the sharing of information in a legitimate manner, but which of course, as we have seen, is always open to abuse. Should an organisation in such circumstances be liable for a vast quantity of material which it can not actively police to see whether it is posted lawfully or not?

On the other hand, there are the legitimate owners of information, who are finding that their materials are being posted unlawfully, and it is up to such owners to be actively checking and complaining to sites that make such materials available. Not only is this time consuming and cost intensive for such legitimate owners, but such owners are then frustrated that their rights against such sites are

curtailed, despite the fact that such sites are profiting from such illegal information.

Such lawful owners then have to resort to considering whether to sue the individuals who have posted the information, which is not only time consuming and costly, but usually will mean that such owners will fail to recover their damages and costs due to the pecuniary shortcomings of the individual infringer.

For the moment though, it is clear that service providers need to be taking some pro-active steps, if they wish to seek to rely upon the safeguards provided by legislation such as the E-commerce Regulations, and some suggestions include the following:

- Making it clear not only in the small print terms and conditions, but also clearly visible on the website that unlawful information may not be posted;
- Making it clear to users that if unlawful information is posted, or a complaint to such effect is made, that the service provider reserves the right to not only remove the information, but to also provide the contact details of the user to the relevant authorities and complainant/owner of the material which has been unlawfully posted, for legal action to be taken against such users;
- Disable accounts of users who are found to be posting unlawful information, or in respect of whom complaints are being raised;

- Put in place practical measures to confirm the identity of users, to guard against 'false identities,' and also to prevent users having their accounts disabled only to allow them to re-open them easily under an alias;
- Making it clear that there is a quick and effective process shown on the service provider's website, for allowing complaints about unlawful information posting to be registered;
- Removing any information which is purported to be posted unlawfully, in a prompt manner, and communicate this to the complainant.

Otherwise, it is clear that service providers who simply cast a blind eye and attempt to seek safeguards under the legislation, are likely to find that the defences which they are seeking to rely upon, are unlikely to be available.

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