

Chapter 20

Liability of Hosting Provider with Regard to Open Libraries

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ABSTRACT

Internet allows free access of information to anyone, without any particular quantitative, temporal or geographical restriction. At the same time, the use of Web 2.0 technologies allows users to offer their personal contributions in order to enrich projects, such as the renowned “open libraries” project. However, the emergence of “open libraries”, which is much related to the concept of the so called “User Generated content”, may give rise to several types of copyright infringement by reason of impairing one or more of the original author’s exclusive rights. In addition, Internet Service Providers may facilitate users’ infringing activities by offering either a mere access to the net or by providing them with hosting services for various actions to take place that may be properly characterized as copyright infringements by the applicable copyright law. In the abovementioned context, this chapter examines the issue of whether an Internet Hosting provider could be held liable for copyright infringement in terms of any content originated by the user, especially in relation to an open library, by offering a deeper understanding on the rules governing ISP’s liability in the USA and the EU. The author attempts to describe the main recent developments taken place in this area of law and conclude on the most important differences between the US and the EU legal order.

INTRODUCTION

Understanding the legal issue of a host provider’s liability in the context of an open library is, by itself, a difficult task. The reason seems to be very

simple: in order for a person to be held liable in any jurisdiction worldwide, an action, omission or a forbearance has to be committed (or just to take place) that may be properly characterized as an “infringement” by the applicable law. Such “infringement” in the digital world of an open library is primarily connected to the laws of Intel-

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lectual Property and especially those governing copyright and its related rights. While the law seems to be clear on whether certain actions or omissions constitute a copyright infringement, an intense dialogue has been developed nowadays among academics, institutions, publishers and – most importantly – users, which demonstrates the user communities’ interest (legitimate or not) to acquire free and open access to works protected by copyright and possibly interfere with them in order to create derivative works for non-commercial purposes. It is therefore argued that such derivative works constitute a common cultural good that the law – especially the IP Laws – should also take into account along with the IPR holders’ legitimate interests.

At any rate, the judgement of whether a user’s conduct constitutes a copyright infringement according to the applicable copyright laws is of significant importance in examining the critical issue of a hosting provider’s liability for such infringement. This is because - in general - no information service provider can be held liable for copyright infringement if there is no such infringement on behalf of another person (e.g. the user), which is the actual infringer in question. As it will be further discussed in a greater detail below, information service providers facilitate the users’ activities and could not be held liable, unless such activities are “infringing” within the meaning of the applicable law. Thus, the analysis of the legal issue discussed in this chapter, will inevitably proceed on the assumption that the user’s activities are “infringing” within the meaning of copyright law.

In order to analyze the liability of a host provider in the context of an open library, we first allocate the notion of an open library in the broader context of the so called “user-generated content” phenomenon” by providing a clear distinction between “open libraries” and “digital libraries”. We then continue the discussion into the technical features of a hosting providers’ function by explaining the reason for which only host providers

may be associated with the operation of an open library. These issues are addressed in Part I. In Part II, we mention the key provisions of the US copyright laws essential for our analysis, while in Part III an analysis on the host providers’ liability takes place in relation to American laws and especially the US case law. In Part IV we attempt to analyze the copyright basics in terms of the European legal order along with a corresponding analysis on the rules governing a host provider’s liability with regard to the European legal framework. In Part V, finally, we conclude on a comparative analysis on our issue between the US and the EU legal order.

PART I

Defining Open Libraries

To understand the term “open library”, one should inevitably resort to the meaning of the term “digital library”. It has been argued that a digital library may be properly characterized as “...a library, in which collections are stored in digital formats (as opposed to print, microform, or other media) and accessible by computers.” (D. Greenstein, S. Thorin, 2002)

As follows, in order for a library to be considered as digital, two main features have to be present: the first is that the relevant content has to be stored in a *digital form*¹ and the second is that such material must be *accessible* to the users of a digital library’s services. Such accessibility becomes feasible through the use of a network service, such as the World Wide Web. Because the use of the WWW is widespread nowadays, the vast majority of the digital libraries are web-based.²

While the terms “digital library” and “open library” are sometimes used interchangeably, they do not actually have the same meaning. Even though both of them store information in a digital form and then make them accessible to their users, digital libraries and open libraries

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