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Intermediary classic decided in favor of intermediary

Joris van Hoboken (Institute for Information Law (IViR)) · Tuesday, May 29th, 2012

The Dutch Court of Appeal in Leeuwarden has ruled in favor of an online market platform with regard to its liability for intellectual property infringements and the burden of policing for unlawful use of its platform. The case between Stokke, the producer of the Tripp Trapp highchair, and Marktplaats, an eBay subsidiary and the most popular Dutch online market, is a long-running intermediary liability classic in the Netherlands, with earlier District Court rulings in 2006 and 2007.

Using recent judgments about intermediary liability of the ECJ, the Court rejects a long variety of arguments why the intermediary should not be considered passive enough to be considered a hosting provider (Article 14 Electronic Commerce Directive (ECD)) as well as why the Court should impose injunctions to pro-actively police the platform, notice and stay down, or register identifying data of its users. In addition, the Court concludes that the intermediary in question is not a direct infringer of copyright or trademark law. Considering the length and detail of the ruling as well as its comprehensiveness in terms of the possible arguments against intermediaries that it deals with, the case could set a favorable standard for intermediary liability questions in the Netherlands for the coming years.

Hosting or not?

The core question the Court was asked to answer, was whether Marktplaats should pro-actively remove infringing advertisements from its platform. Stokke was of the opinion that Marktplaats could not be considered a hosting provider on the basis of a range of arguments that were crafted in view of the ECJ's widely debated ruling between eBay and L'Oréal.

More specifically, the ECJ had ruled that the intermediary would not be able to invoke the hosting safe harbor if it:

113. […], instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data […].

116. Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have 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.

Much has been said already about the question how to interpret these considerations and the criterion of an active role. The Leeuwarden Court of Appeal interprets them as meaning that Marktplaats can invoke the hosting safe harbor if it has taken a neutral position between the user-seller and the potential buyers and that it cannot if it has played an 'active role' which it interprets as meaning an active role between the user-seller and the potential buyers.

Hosting and optimization activity: equal treatment implies neutrality

Notably, when dealing with the question whether Marktplaats loses its neutrality due to the various ways of shaping and optimizing the interaction between advertisers and buyers on its platform, the Court looks at two criteria. First, whether Marktplaats had involvements with the actual contents of infringing advertisements. And second, whether Marktplaats had treated the different seller-potential-buyer relations equally. In consideration 5.7 for instance, the Court states:

"Since all its user-sellers profit equally from these efforts of Marktplaats, its neutral position with regard to particular offers remains unaffected" [translation JvH].

Concluding that this remained the case for all the different ways in which Marktplaats had played an active role, in the view of Stokke, the Court concludes that Marktplaats can invoke the hosting safe harbor for the infringements on its service.

The interpretation of the neutrality condition by the Court as condition of equal treatment of interactions on the platform is interesting. Its considerations show it to be an effective criterion for dealing with the fact that most hosting providers have started to more actively shape the interactions on their platform, but remain intermediary services regardless. At the same time, it must be noted that the Dutch Court has added yet another criterion (of equal treatment) to the criterion of remaining neutral, or passive, technical an automatic in nature, for determining the scope of the hosting safe harbor.

Like the neutrality criterion or the criterion of being passive, automatic and technical, this criterion does not clearly follow from the text of the Directive on Electronic Commerce itself. In addition, the ruling shows clearly that the use of these criteria by the Court involve a range of factual considerations about the specific behavior of hosting intermediaries. This is a state of affairs that can hardly be considered favorable for legal certainty, one of the primary grounds of having safe harbors at the EU level in the first place. The fact that Stokke was ordered to pay a large parts of Marktplaats' legal costs after losing the case could be considered somewhat of a deterrent in this regard.

(No) room for injunctions consisting of pro-active monitoring.

The Court also had to look into the proportionality of a range of injunctions which Stokke had asked to be placed on Marktplaats, ranging from pro-active filtering obligations and a notice and stay-down requirement for infringing advertisements to the registration of personal data for all user-sellers.

The Court first observes that the hosting safe harbor is directed at immunity for damages and explicitly leaves room for injunctions, which it notes to be in line with Article 8 and 11 of the

Enforcement Directive (IPRED). It further concludes that Article 15 ECD does not stand in the way of imposing obligations to monitor for infringements in specific advertisements, for instance a monitoring obligation for the specific selection of advertisements that contain the text STOKKE or TRIPP TRAPP, a selection that can be easily made with the use of a filter. On the other hand, the Court clarifies that it follows from Article 3 IPRED that injunctions have to remain reasonable and proportionate and are not allowed to become unreasonably expensive or result in obstructions of legitimate trade.

The Court concludes that none of the injunctions it was asked to impose on Marktplaats would be proportionate. It relies mostly on the argument that the costs of imposing such obligations on Marktplaats would be disproportionately high, compared to the situation in which Stokke would continue to use a service (SNB REACT) for notifying Marktplaats of specific infringing advertisements as in the current situation.

For example, with regard to the proportionality of a monitoring obligation for an ex ante check on advertisements containing the text STOKKE or TRIPP TRAPP, the Court observes that the cost reduction on the side of Stokke would be minimal, but that the necessary visual assessment of possible infringing pictures by Marktplaats would be very costly and would probably result in a reduction of the effectiveness of the platform for trade (waiting time), since other rights holders could be expected to demand the same mechanism to be imposed.

(No) notice and stay down obligation

The Court also considers a notice and stay-down obligation disproportional. The idea of notice and stay down is that the intermediary prevents the same infringing advertisements from reappearing on the platform. The Court observes that the ECJ had referred to the possible proportionality and effectiveness of imposing such obligations in consideration 141 of the eBay ruling.

It notes, however, that the wording of the ECJ implies that it is not always a suitable measure. It then notes that the infringements in this case are mostly (95%) the result of natural persons acting in a non-commercial capacity, which reduces the risks for intellectual property laws. On this basis, the Court concludes there is room for a more detailed interpretation of the ECJ's proportionality criterion for notice and stay down. The Court concludes that Stokke would continue to send notices to prevent infringements and that notice and stay down would only result in a reduction of the amount of such notices. It then adds that the benefits for Stokke (besides the cost reduction) would be quite minimal, whereas Marktplaats would have to develop a costly new systems to implement a notice and stay down policy.

(No) obligation to register and hand over user data.

Stokke had also asked the Court for an injunction of a different kind, namely the registration of the identification data of user-sellers of the platform and the handing over of such data to Stokke for infringing users. Marktplaats currently only registers email addresses and stated in Court that the Privacy Directive (95/46) prevents it from processing more personal data than necessary to run its service. The Court argues that the identification requirement in Article 6 ECD does not apply to the natural persons trading on Marktplaats, which is by far the majority in this case. It also argues that the registration obligation for (mostly legitimate) trading activity on Marktplaats would result in the registration of personal data of innocent users. It then concludes that the requested injunction must be considered disproportional considering the weight that should be attached to the protection

of personal data of users that do not fall under a legal identification requirement.

Conclusion

As a result of the ruling, Marktplaats can simply continue to use its programme that results in takedown of infringing advertisements after receiving specific notice thereof. This is probably the most favorable state of affairs possible from the perspective of intermediaries. And the careful, dry and cost-oriented consideration of the disproportionality of injunctions on intermediaries is even more helpful, considering the room for injunctions that is left wide-open in the ECD safe harbors. At the same time, the ruling shows that intermediaries may have to engage in quite costly litigation to defend themselves against claims of 'non-neutral' or 'active' behavior that would result in losing their hosting safe harbor. This is a situation that can only be resolved at the EU level.

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