

Update

Software

The ECJ ruled in favour of software developers, finding the functionality of a computer program does not constitute a form of expression (and so falls on the wrong side of the ideas/expression dichotomy) and does not enjoy copyright protection. A person who uses a computer program in accordance with a licence is entitled, without the authorization of the copyright owner, to observe, study or test the program functions to determine the underlying ideas and principles of that program. Computer manuals (or parts of them) may be protected by copyright to the extent that they are the expression of the intellectual creation of the author (which may require originality). *SAS Institute Inc v World Programming Limited* (C-406/10).

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=122362&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=154228>

Online Libel

McGrath v Dawkins [2012] EWHC B3 (QB), is a fascinating libel claim (although a summary judgment and strike out application) about defamatory statements published on Amazon and the website of the Richard Dawkins Foundation for Reason and Science. One of the issues was whether it is defamatory to call a person a “*creationist*.”

The case is most interesting on Amazon’s intermediary liability and its pre and post publication actions. Its moderation processes comprised an automatic filter for forbidden words and blacklisted users. Reviews, but not comments, containing the forbidden words were then submitted for human analysis. None of the postings complained of failed either of these tests, and so were displayed without any human intervention. Amazon’s post publication Takedown Procedure required a pro forma document (in the form of a witness statement) to be completed and posted to Amazon’s legal department in Slough (we note that a similar policy was criticized in the Newbinz cases). Mr. McGrath did not use the procedure but emailed Amazon’s Technical Support (who could not help or forward) so he sent his email to the CEO of Amazon in the USA and to other departments—and interestingly-- this worked and the posts were taken down. A later Take Down notice in relation to different posts was ignored by Amazon but those posts were not sued on. The claim against Amazon related to further posts removed only on the issue of the Claim Form.

Amazon relied on intermediary defences, both as a host under the Ecommerce Regs and also the defence of secondary responsibility under §1 of the Defamation Act. The different contours of these have proved problematic in the past. The Judge held that the Ecommerce defence was bound to succeed and here Mr. McGrath suffered from his failure to give the precise URLs and words complained of in his Takedown emails. Amazon narrowly escaped liability as a primary publisher (author, editor or publisher) for the Defamation Act, as by adopting a policy of limited pre-publication control it could have become an editor. The Judge noted this was the notorious "Catch-22" under which an ISP seeking to attract the statutory defence by taking reasonable care may find instead it has become an editor. Amazon was saved as it took no steps in relation to the content of any of the posts in issue and no part in any decision to publish, except by way of the automatic processes. As the Judge said, if there had been a manual review (human eyes) the position might have been very different. That section also requires a showing of reasonable care and the act specifies that the conduct or character of the primary publisher can be relevant to the analysis but found nothing here to suggest that Amazon should have put the defamer on their black list. This is a generous view in our opinion and it is arguable that from the date of the first Takedown Notice, a Red Flag had been raised over the author and never lowered. It cost Amazon £70,000 to defend the application—and this may inform its policy in future.

The first defendant was Professor Richard Dawkins himself, the well-known scientist and scientific atheist. Professor Dawkins had structured matters so that his UK company had no responsibility for the Foundation's website at richarddawkins.net (which hosted the user generated content (UGC)) which was run by a US company --with the servers and the ICANN registration all in the US. The UK company had a separate website, richarddawkinsfoundation.org, which had no UGC/forum. While the US site had a hyperlink to the UK website --there was no link from the UK site to the US site. This was all organized to protect the assets of the UK company from liability for defamatory UGC. The US company was potentially liable in the UK for its publications which were actually read in the UK, but UK libel judgments are in effect unenforceable against assets in the US by virtue of the SPEECH Act. However, the defendants had not been clever enough and by simply clicking the "home" button on the UK .org site, visitors were taken to the .net site and the UGC. Mr. McGrath therefore claimed the English company was also liable for the content on the US site. Despite some authority that a mere hyperlink does not render the operator of the linking website liable for the content of the linked site, the Judge thought this point was arguable.

Filtering

Following the publication of Claire Perry's report into Online Child Protection which called for default blocking and an opt-in system to access 'adult material', a policy to force ISPs to provide an 'adult material filter' option is likely to be included in the Communications Green Paper. See <http://www.claireperry.org.uk/downloads/independent-parliamentary-inquiry-into-online-child-protection.pdf> . We understand however that paper is proceeding slowly so concrete proposals may be some way off.

A German Court in Hamburg ruled against YouTube in its case with GEMA, the German performing rights organization, over copyrighted music in 12 uploaded videos for which no licensing fees had been paid. The court ordered YouTube to install the filtering software and filter uploaded videos for infringements according to key words, such as the name of the artist or the song title. This contradicts a recent ruling by the ECJ which rejected efforts to impose blanket obligations on internet service providers and social networks to filter in Case C 360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*. It also raises similar issues to the pending *Viacom v. YouTube* case in the US under the Digital Millennium Copyright Act.

Disclosure of user data

The ECJ in *Bonnier Audio* Case C-461/10 found neither the Data Retention Directive (2006/24) or the ePrivacy Directive (2004/48) prevent national laws allowing courts to make *orders* for disclosure of personal data of users of IP addresses in civil intellectual property cases –provided they weigh the conflicting interests involved, consider the facts of each case and take account of the principle of proportionality. This accords with Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU* (same).

The important point is that court orders remain required and many participants to the debates will welcome this reminder of the need for due process.

See

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1441103>.

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