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**STUDY ON THE LIABILITY OF
INTERNET INTERMEDIARIES**

COUNTRY REPORT – Ireland

Executive summary

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By Giovanni Maria Riccio, University of Salerno (Italy)

Part 1: Legislation

The primary instrument implementing the ECD is the European Communities (Directive 2000/31/EC) Regulations 2003 (Statutory Instrument No. 68 of 2003), which was signed on the 24th February 2003. Although this is not the only Irish law giving effect to the ECD¹, it is the only Irish legislation in relation to Articles 12 to 15 ECD on the liability of intermediary service providers.

Regulation 16, paragraphs 1 and 2 implement Article 12, paragraphs 1 and 2 ECD essentially verbatim. Regulation 16, paragraph 3 implements the possibility mentioned by Article 12 paragraph 3 ECD by providing that the Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights. This exception is however limited to courts: it does not allow Irish administrative authorities to use any enforcement powers which they have.

Regulation 17 similarly implements Article 13 in an almost verbatim fashion. As with Regulation 16, while it provides that it shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights, it does not extend this exception to administrative authorities.

Regulation 18 similarly implements Article 14 in an almost verbatim fashion. Again, while it provides that it shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights, it does not extend this exception to administrative authorities.

Part 2: National Case Law

There has been very little Irish case-law in this area, and in many situations we must rely on outdated cases which pre-date the Internet.

There is no Irish case law dealing specifically with caching, search engine liability, hyperlinking, auction platform, content aggregators or blogs. Hosting liability has been addressed only tangentially.

¹ For example, Article 9 ECD (treatment of contracts concluded by electronic means) is given effect in part by Part 2 of the [Electronic Commerce Act 2000](#), while Article 7.2 ECD (the right of consumers to opt-out of receiving unsolicited commercial emails) was already provided for by section 2(7) of the [Data Protection Act 1988](#) (as now amended by the [Data Protection \(Amendment\) Act 2003](#)).

In *Maguire v. Gill*² an order was made requiring a user to remove defamatory material from a website, and a copy of that order was served on the host (which was based in the United States). However, in that *ex tempore* decision the court did not consider when the host would be liable nor whether the order could be enforced against a host based outside the jurisdiction.³

The only area where the Irish courts have been active is in respect of identifying anonymous internet users. However, the cases to date are not consistent. In *EMI v. Eircom*⁴ a *Norwich Pharmacal* action was brought by record companies in order to compel ISPs to identify users accused of file-sharing. The court accepted that the ISPs acted properly in not volunteering this information and that they owed duties of confidentiality and data privacy to their users. It went on to hold that the court should act sparingly in ordering identification but that in this case there was a *prima facie* case against the user and the balance lay in favour of disclosure. However, the court also imposed safeguards, directing that the information disclosed could only be used to seek redress for the users' alleged copyright infringement activities, and the identities of the alleged infringers could only be made public after the plaintiffs had started proceedings.

A similar approach was taken in *Ryanair v. Johnston*.⁵ Here the defendants operated a bulletin board for Ryanair pilots. Ryanair brought a *Norwich Pharmacal* action for discovery, seeking to compel them to identify the users behind comments which were alleged to have been threatening and abusive. At an interlocutory stage an order was granted requiring the information to be preserved.⁶ However, at trial the High Court found that the comments were not wrongful or actionable, and the court also looked to the motive behind the action, finding that the real purpose was to “break the resolve” of pilots who were in dispute with the plaintiff.

² Unreported, *ex tempore*, High Court, Hannah J., 13 September 2006. Outlined in “Libel action may shut 'rate your solicitor' website”, *Irish Independent* 14 September 2006.

³ In another *ex tempore* decision, *USA Rugby Football Union Limited v. Ivan Calhoun* (unreported, White J., 19 July 2002), the High Court had to consider when it would be appropriate to allow a United States based website to be sued for defamation before the Irish courts. The court held that it was not enough to show that a particular website was accessible in Ireland – *accessibility in Ireland* could not be equated with *publication in Ireland* which was the basis for a claim that the plaintiff had been defamed. Instead it seems it will have to be shown that a particular website was in fact visited by Irish users before such a claim could be brought.

⁴ [2005] IEHC 233.

⁵ Unreported, Smyth J., 12 July 2006. Outlined in “High Court rejects Ryanair bullying claim” *The Irish Times* 13 July 2006.

⁶ Outlined in “Ryanair draws first blood in battle over pilots' web attack”, *The Guardian* 30 March 2005.

However, a very different approach was taken in *Maguire v. Gill*⁷ where an order for third party discovery was made against an ISP requiring them to identify a user but without giving the ISP an opportunity to be heard, without considering whether or not the balance lay in favour of disclosure, and without explicitly ordering safeguards in respect of the use of this information.

Part 3: Notice and take down procedures

A. Regulation

Copyright

Irish law provides for a notice and take down procedure in respect of certain copyright infringements. Section 40 of the Copyright and Related Rights Act 2000 deals with the making available right. It provides an exemption from liability for hosts, stating that “the provision of facilities for enabling the making available to the public of copies of a work [*which would include hosting*] shall not of itself constitute an act of making available to the public of copies of the work”.

However, this exemption will be lost: “where a person is notified by the owner of the copyright in the work concerned that those facilities are being used to infringe the copyright in that work and that person fails to remove that infringing material as soon as practicable thereafter that person shall also be liable for the infringement”.

Under section 40 the Minister for Enterprise, Trade and Employment may prescribe the form of the notice to be given under that subsection and that form shall specify:

- the name and address of the person claiming to be the owner of the copyright;
- the grounds that the person requesting the removal of material has for such removal; and
- a list of the material which is to be removed.

At the time of writing, however, the Minister has not used this power and there is, therefore, no prescribed form which the notice must follow.

Other situations

In other situations, however, Irish law does not provide any notice and takedown procedures, nor is any such legislation pending.

⁷ Unreported, *ex tempore*, High Court, Hannah J., 5 October 2006.

B. Self-regulation

C. Co-regulation

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