

# Internet Service Providers' Liability in Spain

## Recent Case Law and Future Perspectives

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**Abstract:** The article focuses on the current situation of Spanish case law on ISP liability. It starts by presenting the more salient peculiarities of the Spanish transposition of the safe harbours laid down in the E-Commerce Directive. These peculiarities relate to the knowledge requirement of the hosting safe harbour, and to the safe harbour for information location tools. The article then provides an overview of the cases decided so far with regard to each of the safe harbours. Very few cases have dealt with the mere conduit and the caching safe harbours, though the latter was discussed in an interesting case involving Google's cache. Most cases relate to hosting and linking safe harbours. With regard

to hosting, the article focuses particularly on the two judgments handed down by the Supreme Court that hold an open interpretation of actual knowledge, an issue where courts had so far been split. Cases involving the linking safe harbour have mainly dealt with websites offering P2P download links. Accordingly, the article explores the legal actions brought against these sites, which for the moment have been unsuccessful. The new legislative initiative to fight against digital piracy – the Sustainable Economy Bill – is also analyzed. After the conclusion, the article provides an Annex listing the cases that have dealt with ISP liability in Spain since the safe harbours scheme was transposed into Spanish law.

**Keywords:** ISP liability; Spain; Case Law Review; Hosting Provider; Link Provider; Sustainable Economy Bill

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### A. Introduction

1 Ten years have passed since the European Directive on Electronic Commerce (ECD) was adopted on 8 June 2000.<sup>1</sup> One of the key aims of the Directive was to address the disparities in Member States' legislation and case law with regard to the liability of information society service providers acting as intermediaries. To this end the ECD set forth a series of exemptions from liability for specific intermediary activities, namely *mere conduit*, *caching* and *hosting*. Under these exemptions – also known as *safe harbours* – established in Articles 12 through 14 ECD, intermediaries providing those services cannot be held liable for the third-party information they transmit, cache or host, as long as they meet the requirements set forth in the relevant provisions.<sup>2</sup> In addition, with

respect to the services covered by the liability exemptions, Article 15.1 ECD prohibits Member States from imposing on intermediaries a general obligation to monitor the information they transmit or store, or a general obligation to actively seek facts or circumstances that may indicate illegal activity.<sup>3</sup>

2 This safe harbour scheme was largely inspired by the provisions set forth in the US Digital Millennium Copyright Act (DMCA), enacted in 1998,<sup>4</sup> which also establishes a number of safe harbours to limit the potential liability of Internet intermediaries – albeit exclusively in the field of copyright.<sup>5</sup> The ECD selects indeed the same intermediary activities as those covered by the DMCA – with the exception of the provision of hyperlinks and information location tools. Moreover, many of the requirements to benefit from the exemptions are the same under both statutes.

However, their basic approaches differ notably as – unlike the DMCA – the European Directive does not focus exclusively on liability arising from copyright infringement. Rather, it covers intermediaries' liability in a horizontal way for any kind of unlawful content provided by their users. In addition – among other differences – the ECD does not provide for a procedure to notify intermediaries of the presence of unlawful material, and to ask them to take it down – the so-called *notice-and-take-down* procedure, which constitutes a key element of the DMCA.<sup>6</sup>

- 3 In general, transpositions of the safe harbours into Member States' national law have closely followed the language of the ECD.<sup>7</sup> In some cases, however, there have been deviations that pose the problem of whether some transposition measures are compatible with the ECD. Moreover, the interpretation of the liability exemptions is proving to be a difficult task. Some of the difficulties consist of determining the scope of the safe harbours, in particular of that related to hosting – especially in view of the new services that have emerged in recent years, generally referred to as Web 2.0. Indeed, the applicability of the hosting safe harbour has already been the subject of some referrals to the European Court of Justice.<sup>8</sup>
- 4 This article will focus on the particular case of Spain. Part B will present the peculiarities of the Spanish transposition. Part C will examine the current trends of Spanish case law, considering the main developments with regard to each of the liability exemptions, particularly that of hosting and that of linking. Next, Part D will briefly consider the provisions of the Sustainable Economy Bill, which intend to be an effective way of preventing copyright infringement by targeting information society service providers that violate copyright. Part E will briefly offer some conclusions on these matters. Finally, the Annex to this article will list the rulings issued in Spain so far dealing with ISP liability.

## B. Some peculiarities of the Spanish transposition

- 5 The ECD was transposed into Spanish national law by means of Law 34/2002 of 11 July 2002, on Information Society Services and Electronic Commerce (hereinafter LSSICE, the Spanish abbreviation).<sup>9</sup> The system of liability limitations is laid down in Articles 13 through 17 of this law.
- 6 The first point worth noting is that – notwithstanding Article 15 ECD – the LSSICE does not contain any reference to the fact that intermediary service providers cannot be subject to general obligations of monitoring or seeking facts or circumstances revealing illegal activity or information. In addition, the LSSICE provisions establishing safe harbours do not explicitly mention the possibility of injunctions, whereas Articles 12.3, 13.2 and 14.3 ECD state that the liability exemptions “shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.”
- 7 The safe harbours for *mere conduit* (Art. 14 LSSICE) and *caching* (Art. 15 LSSICE) reproduce almost verbatim the language of those established by the ECD (Arts. 12 and 13, respectively). On the other hand, the safe harbour for hosting (Art. 16 LSSICE) presents some relevant deviations from that laid down in the ECD, particularly with regard to the lack of knowledge requirement. Finally, the LSSICE adds a new exemption not provided for in the ECD, which deals with hyperlinks and information location tools (Art. 17 LSSICE).

### I. Actual knowledge and awareness of facts or circumstances indicating illegal activity

- 8 The basic requirement for limiting the potential liability of hosting providers is that the provider must not know about the illegality of the third-party material. This is consistent with the rationale behind the safe harbour, which rests upon the assumption that the service provided is of a passive nature. Only when the presence of the illegal material comes to its knowledge is the provider required to take it down in order to benefit from the exemption. This general principle is laid down in the ECD considering two different kinds of knowledge – actual and constructive. Article 14.1(a) ECD sets forth the condition that the provider does not have *actual knowledge*, and that when it comes to claims for damages – i.e. civil liability – it must also lack *awareness* “of facts or circumstances from which the illegal activity or information is apparent.” Thus, a two-tiered standard is set forth: lack of *actual knowledge* for claims other than for damages, and lack of *constructive knowledge* in case of claims for damages. As some commentators have pointed out, this distinction based on the type of claim corresponds to the criminal/civil liability distinction.<sup>10</sup> Indeed, this was already clearly stated in the ECD Proposal.<sup>11</sup>
- 9 Article 16 of LSSICE, however, establishes a single standard consisting of the lack of *actual knowledge*. The provision does not distinguish between different types of claims, and disregards altogether the constructive knowledge standard. As a consequence, a hosting provider would in theory be free from any liability arising from the content hosted – even as regards claims for damages – as long as it does not have *actual knowledge* of illegal activity or informa-

tion. Merely being aware of facts or circumstances indicating illegal content would not disqualify the provider from the safe harbour.

- 10 A second deviation from the ECD concerns the concept of actual knowledge itself. While the ECD does not provide a definition, the LSSICE does offer a legal notion of what should be understood by actual knowledge in Article 16.1.II. It conceptualizes this type of knowledge in an extremely narrow way:

*It will be understood that the service provider has the actual knowledge referred to in [...] when a competent body has declared that the data are unlawful, or has ordered their removal or the disablement of access to them, or the existence of the damage has been declared, and the provider knew of this decision, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established.<sup>12</sup>*

- 11 According to a strict construction of this provision, there are only three ways in which a hosting provider may gain the relevant knowledge. The first one is the existence of a prior decision, issued either by a judicial court or by an administrative body within its field of competence, concerning the hosted content. This decision may be one declaring that content to be illegal – or that it damages someone else’s rights – or simply a decision ordering the content to be removed or access to it to be disabled. The second way of gaining actual knowledge refers to cases where voluntary notice and take-down agreements are in place – something that seldom occurs. The third way, somewhat undefined, concerns the possibility of establishing other means of actual knowledge – which probably relates to future regulatory instruments.
- 12 While this provision – strictly construed – affords a great deal of legal certainty to the provider, it doesn’t appear to be compatible with the notion of actual knowledge laid down in the ECD’s hosting safe harbour, which is obviously wider. Moreover, it grants in practice a nearly blanket immunity for the provider, particularly taking into account that, as noted, neither the ECD nor the LSSICE provides for a procedure of notice and take-down.
- 13 Spanish courts have wrestled over how to construe this provision. Some rulings have taken the strict view that only in the cases contemplated by this article does the provider have the relevant knowledge, while others have chosen a more open reading, admitting other ways of gaining this knowledge. Interestingly – as we will discuss in more detail later – the Spanish Supreme Court issued a judgment in December 2009 that explicitly rejects the strict construction of this article on the grounds that it is not in accordance with the ECD

## II. Safe harbour for information location tools

- 14 The ECD – unlike the DMCA – chose not to establish a safe harbour for information location tools, a choice that was criticized by commentators.<sup>13</sup> The reason for not providing for such a safe harbour remains unclear. In any event, Article 21, which relates to the re-examination of the Directive, establishes that every two years the European Commission shall submit a report concerning the application of the Directive, “accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services.” This report, according to Article 21.2, “shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, ‘notice and take down’ procedures and the attribution of liability following the taking down of content.” The only report submitted so far, however, does not contain any proposal to amend the Directive so as to include a safe harbour for information location tools.<sup>14</sup>
- 15 The Spanish transposition law added a specific liability exemption for information location tools, modelled upon the hosting safe harbour. According to this provision – laid down in Article 17 LSSICE – information society service providers that provide links, directories or information search tools shall not be liable for the information to which they lead their users. This liability limitation is subject to the condition that the provider does not have *actual knowledge* that the activity or the information to which it directs, or which it recommends, is illegal, or that it damages a third party’s goods or rights. In case the provider obtains such knowledge, it must act diligently to remove or to disable the link, in order to benefit from the exemption.
- 16 These conditions are the same as those required in the hosting safe harbour – the only difference being that in the safe harbour for information location tools the illegality relates to the linked content instead of to the hosted content. Moreover, the notion of *actual knowledge* that contemplates this provision is exactly the same as that contemplated under the hosting safe harbour. Indeed, Article 17.1.II LSSICE replicates verbatim the text of Article 16.1.II quoted above. Thus, the same kind of concerns arise, as to whether this is an excessively narrow concept of what amounts to actual knowledge. It is worth noting, however, that in the case of linking there is no possible contradiction with the ECD, as it does not provide for a safe harbour for these activities – and thus does not give any indication as to what should be considered actual knowledge in a liability exemption for linking.

17 The safe harbour for information location tools covers a wide variety of activities, which may range from the operation of a search engine such as *Google* or *Bing* to the inclusion of a hyperlink on a website or on a blog. Whatever the case may be, the requirements would be the same – mirroring those of the safe harbour for hosting. Interestingly, another Member State has established two different safe harbours, one for search engines and another for links. The one for search engines – whose activity is more of a passive and automatic nature – mirrors the conditions set forth in the transmission safe harbour, whereas that for links replicates the requirements of the exemption for hosting.<sup>15</sup>

## C. Case Law

18 So far, Spanish courts have issued rulings in some fifty cases dealing with the liability of Internet intermediaries.<sup>16</sup> Around half of the cases relate to defamatory content – particularly comments submitted by users to blogs, wikis and forums. Roughly the other half of the reported cases relate to the liability of websites that provide links to copyrighted content, whether in the form of P2P download links or in the form of links to files hosted on third-party servers. In addition, there have been a few other cases dealing also with copyright, including a lawsuit brought by a television company against YouTube, and a case that deals with Google’s cache.

19 After the eight years since the LSSICE was passed in July 2000, the Spanish Supreme Court recently handed down its first two decisions on intermediaries’ liability, both dealing with defamatory third-party content and discussing the application of the hosting safe harbour – Article 16 LSSICE. These rulings are certainly important as the decisions from lower courts on this matter have been far from uniform, especially with regard to what amounts to *actual knowledge*. The Supreme Court, as we will see below, has adopted an open interpretation of actual knowledge on the grounds that a strict one would run afoul of the ECD, which contemplates not only actual knowledge but also awareness of facts and circumstances revealing illegal content.

20 The following subparts will highlight some relevant aspects of the case law dealing with each safe harbour – mere conduit, caching, hosting and linking.

### I. Mere conduit and injunctive relief: *Emi v. Bitmailer*

21 *Emi Music Spain v. Bitmailer* is one of the very few cases that have discussed the mere conduit safe harbour – Article 14 LSSICE.<sup>17</sup> The defendant, Bitmailer, was the access provider of *weblisten.com*, a website

engaged in copyright infringement. The plaintiffs, Emi Music Spain and other music companies, requested an injunction against Bitmailer to cease providing the service to the infringing website. The court rejected the measure on the grounds that the mere conduit safe harbour set forth in Article 14 LSSICE shields access providers from injunctions.

22 It must be noted that ECD safe harbours do admit the possibility of injunctive relief against a qualifying service provider. As stated in Recital 45,

*[t]he limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.*<sup>18</sup>

23 This principle is further implemented in the language of each of the safe harbour provisions by stating that the limitation of liability “shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.”<sup>19</sup>

24 The ECD does not oblige Member States to provide for injunctive relief under their national law. Rather, it simply establishes that the safe harbours do not prevent the issuance of injunctions against intermediaries, as long as those injunctions are ordered according to national law. The availability of injunctions thus hinges on the law of each Member State, and will easily differ from one state to another, and from one field – such as copyright – to another – such as defamation. Actually, given the horizontal approach of the ECD, the injunctions envisioned may relate not only to copyright infringement, but to all types of possible unlawful content, as national law may provide.

25 However, the safe harbours set forth in the Spanish LSSICE, unlike those in the ECD, do not explicitly mention that they will not affect the possibility of injunctions against a qualifying provider. Yet this hardly can be considered an obstacle to granting injunction relief. The language of the safe harbours in the LSSICE simply states that a qualifying service provider will not be *liable* – which under Spanish law doesn’t mean it cannot be ordered to stop providing a particular service in order to terminate or prevent an illegal activity carried out by a recipient of the service.<sup>20</sup>

26 In the *Bitmailer* case the court pointed out that the mere conduit safe harbour – unlike the caching and hosting safe harbours – does not impose a duty to stop providing the service once the provider knows about the illegal nature of the information. According to the court, that means that a qualifying access provider cannot be sued for injunctive relief, a

conclusion that certainly seems to run afoul of the ECD. In any event, it must be observed that the case was decided before the transposition of the Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, which explicitly provides for injunction relief against intermediaries.

## II. Caching: Megakinki v. Google

- 27 The *caching* safe harbour (Art. 13 ECD and Art. 15 LSSICE) is a very technical one. It exempts from liability operators that engage in *proxy caching* and subjects that liability limitation to very detailed requirements. Not a single case involving a true situation of *proxy caching* has been brought in Spain – and the situation is probably the same in other Member States. The same can be said of the United States, with regard to the caching safe harbour established in the Digital Millennium Copyright Act, the provision the ECD took as a model to draft this liability exemption.<sup>21</sup> While this safe harbour has been discussed in a few cases in Europe and in the US, they did not really involve the case provided for in that provision. In fact, those cases dealt with the operation of search engines cache, which is a completely different function than that contemplated by the safe harbour, both in the DMCA and in the ECD – and of course in the LSSICE.<sup>22</sup>
- 28 One of these cases was argued before Spanish courts and is currently pending before the Supreme Court. The case is *Megakini v. Google*, also known as the *Google cache* case.<sup>23</sup> As noted, the case does not deal with the *proxy caching* function, but with the search engine's feature of providing so-called *cached* links. However, it does discuss the applicability of the caching safe harbour.
- 29 The owner of the website [www.megakini.com](http://www.megakini.com) sued Google, claiming the search engine had violated his copyright over the website. He alleged that the short excerpt or “snippet” appearing just below the main link to his website in Google's search results page was a copyright violation, as it was a non-authorized copy of part of the website's content. Moreover, he contended that Google's acts of reproducing and making available a *cached* copy of the website by means of a “cached” link constituted a copyright infringement as well. This “cached” link is shown just after the snippet. When it is clicked, the user is led not to the actual web page, but to the copy or “snapshot” of that page that Google took when crawling the web, which is stored by the search engine until the next time its robot visits the page and takes a new “snapshot.”<sup>24</sup> The claimant requested an injunction so that Google would stop performing these activities, and asked for a small monetary compensation for the allegedly suffered harm.
- 30 The court of first instance rejected the plaintiff's claim.<sup>25</sup> It held that the type of use Google was carrying out was protected under a joint interpretation of Article 31 of the Spanish Copyright Act (TRLPI)<sup>26</sup> and Articles 15 and 17 LSSICE – the caching and linking safe harbours. Apparently, the court considered that the caching safe harbour applied to Google's cache. Moreover, it held that the linking safe harbour implicitly exempted from liability the reproductions needed to perform the indexation and the search function activities – which would only be infringing if the provider did not meet the requirements of that safe harbour. Unfortunately, the ruling is not very precise. When it mentions Article 31 TRLPI, it is not even clear whether it means that the exception for transient copies set forth in that article – which transposes the exception for temporary reproductions laid down in Article 5.1 of the Directive 2001/29 – applies,<sup>27</sup> or whether it simply means that Articles 15 and 17 LSSICE are also *limits* to copyright, just like those listed in Articles 31 and following of the TRLPI.
- 31 The judgment was appealed by the plaintiff. The court of appeals confirmed that Google was not liable, but on different grounds.<sup>28</sup> On appeal, the plaintiff identified three types of uses of his work – the Megakini website – in which Google engaged. The first one was the initial – and internal – copies that Google's robots make, for indexation purposes, of every webpage they find. The plaintiff conceded that those copies are necessary for the search engine to perform the searches, and thus he did not question them. Actually, the plaintiff admitted that they fall under the exception of technical copies set forth in Article 31.1 TRLPI (Art. 5.1 of the InfoSoc Directive), and thus they were not infringing. This was also accepted by the defendant, and therefore those copies were not an issue between the parties. The court pointed out that indeed these copies seem to fall under the said exception. However, it did not elaborate much on this, concluding that “at least the parties have so agreed.”<sup>29</sup>
- 32 The second type of Google's use the plaintiff identified was that of showing a snippet from the website just below the main link in the search results page. The plaintiff-appellant insisted that this was a copyright violation, but the court of appeals considered it to be *de minimis*. The third type of use was that involved in the provision of the “cached” link. The plaintiff contended that this was a reproduction that was neither necessary to carry out the search function nor covered by any exception. As the court rightly pointed out, the discussion was actually about the legality of *making available* the cached copy – a copy already made by Google's robots when crawling the web and stored on Google's servers.
- 33 Notwithstanding Google's contention and what was held by the lower court, the storing and making

available of those *cached* copies is not the function contemplated by the caching safe harbour. The language of Article 15 LSSICE – which closely follows that of Article 13 ECD – clearly shows that it is considering exclusively the so-called *proxy caching*. This is an activity that some access providers perform by means of a *proxy server*, consisting of keeping a copy of a webpage that a first user has requested, so that when a subsequent user requests the same page the provider can show to this user the cached copy as a substitute for the original. This way, the ISP avoids having to fetch again the information from the origin source, and thus it saves time and bandwidth. This function is different from that performed by Google's cache. Google is not a transmission service provider that serves web page requests from users. It does not create a cached copy of a webpage while responding to a request from a user; rather it copies all the pages in the first place on its own initiative. By means of *cached* links, Google makes those copies available to users much in the way of an archive – acknowledging that the cached copy may not reflect the current state of the original webpage, as this may have changed since that snapshot was taken by Google's robot.<sup>30</sup>

- 34 Interestingly, the court of appeals distinguished these two different functions, and rightly concluded that the Google cache does not fall under the caching safe harbour of Article 15 LSSICE – against what had been held by the court of first instance. In addition – again in contrast with the lower court – it held that the linking safe harbour of Article 17 LSSICE did not apply either, as it relates to the searching function and not to the making available of the cached copies stored on Google's servers. It also held that the making available of cached copies is not covered by the exception of Article 5.1 of the InfoSoc Directive (Art. 31.1 LSSICE) as it is not necessary to carry out the search function. Moreover, although the ruling did not point it out, this exception, even if it is deemed to be applicable to the making of the cached copies, would never cover the making available of those copies, as the exception concerns only the reproduction right.<sup>31</sup>
- 35 After excluding the applicability of all those protections, the court of appeals concluded nonetheless that, in that particular case, the making available of cached copies was not a copyright infringement. The reasoning of the court is an interesting one, and its analysis goes beyond the purpose of this article. Essentially, the court held that Article 40 bis of the TRLPI – which introduces the three-step test into the text of the Spanish Copyright Law – may be not only an interpretation criterion to construe the scope of the exceptions set forth in the TRLPI, but also a way through which courts may ask themselves about the limits of the concerned rights, beyond the literalness of the exceptions. The court asserted that something similar to the Anglo-Saxon doctrine

of fair use should guide a court's interpretation of the scope of intellectual property rights. It held that, ultimately, courts should apply to the context of intellectual property rights a limit similar to that of *ius usus innocui* in the context of movable and real estate property – the right of using someone else's property in a way that does not harm its owner, with a rationale of preventing an overreaching protection of the owner's right. It further concluded that, in the present case, Google's acts did not harm the plaintiff's rights, and were even implicitly accepted by the plaintiff as he published his website without restricting the access to it in any way. Therefore, the defendant Google was held not liable of copyright infringement. As noted, this ruling was further appealed by the plaintiff before the Supreme Court, which will definitely decide on the case.

### III. Hosting

#### 1. The Spanish Supreme Court's interpretation of *actual knowledge*

- 36 As already pointed out, the Spanish safe harbour for hosting activities departs from that of the ECD as regards the kind of knowledge contemplated therein. In cases involving hosting, courts have split over how to construe the notion of “actual knowledge”. Some courts have held a strict construction, which in practice implies that the provider lacks actual knowledge unless a court has previously issued a decision declaring the hosted content to be illegal. Some others have followed an open, non-limitative interpretation – admitting other means of obtaining actual knowledge. That is why it is worth briefly discussing in the following subparts the two cases already decided by the Spanish Supreme Court involving the hosting safe harbour, where an open interpretation of “actual knowledge” has finally been established.

#### a.) SGAE v. Asociación of Internautas

- 37 *SGAE v. Asociación de Internautas* is the first case dealing with ISP liability that reached the Spanish Supreme Court. It deals with the liability of the *Asociación de Internautas* (AI, an Internet users association) with regard to the hosting of a gripe site with defamatory content.<sup>32</sup>
- 38 It appears that it all started when a group of internet users – the *Plataforma de coordinación de movilizaciones contra la SGAE* – put up a gripe site against SGAE, a Spanish collective rights management society. This group registered the domain name “putasgae.com” – a word combination clearly derogatory with respect to SGAE.<sup>33</sup> In 2002, SGAE filed a complaint be-

fore the WIPO Arbitration and Mediation Center under the Uniform Domain-Name Dispute-Resolution Policy (UDRP). In a decision dated 18 December 2002, the panellist found against the defendant registrant and ordered the cancellation of the domain name.<sup>34</sup> As a consequence, the gripe website went silent, and the *Asociación de Internautas* agreed to shelter it under its own website, located at “internautas.org”. On 21 February 2003, AI posted a note on its website under the title “A space of freedom comes back to the Net”.<sup>35</sup> There AI explained how the registrants of “putasgae.com” had lost their domain name after the UDRP decision. The note stressed that, leaving aside how appropriate the name *putasgae* may be, the group against SGAE was fighting for a good cause – the cause against the system of levies on private copies. AI announced that from that moment on it would offer organisational and legal support to the group, and also a space on its own website, under a third level domain name – “antisgae.internautas.org”. In this space, the content created by the *Plataforma* were hosted. Actually, the *Plataforma* owned a new domain by then, “putasgae.org”, which was redirected to the said third-level domain in the AI servers.<sup>36</sup> Although in choosing “antisgae” as a third-level domain name AI carefully avoided using the derogatory word combination, the website hosted under it did use the term “putaSGAE” as the title of the site, even using a logo resembling that of SGAE, with the addition of the offensive word “puta”.<sup>37</sup>

- 39 In March 2004, SGAE and its President, Eduardo (Teddy) Bautista, filed a civil lawsuit against AI before Madrid’s Court of First Instance, claiming that the web hosted under “antisgae.internautas.org” included numerous defamatory statements against the plaintiffs. The plaintiffs asked the court to order the removal of the offensive statements, including the domain name “putasgae.org”. The complaint asked also for 18,000 Euros in damages for each of the claimants to compensate their moral harm.<sup>38</sup> Once AI learned about the filing of the lawsuit, it required the *Plataforma* to provisionally remove from the site all the materials the complaint cited as defamatory, which the *Plataforma* did.
- 40 Surprisingly, the defendant AI appeared as the registrant of “putasgae.org” in the WHOIS database. AI contended that the *Plataforma* had fraudulently used AI’s name in the registration process. It also alleged that it acted simply as a hosting provider and did not create the allegedly defamatory statements; rather, they were created by the *Plataforma*. The court held that all this, even if it were true, was irrelevant to the case. It simply would mean that not only AI but also the *Plataforma* would be responsible for the libel, but plaintiffs are free to choose whom to sue. The court stressed that the defendant admitted it hosted the content produced by the *Plataforma*. This was enough, according to the court, to hold AI liable, as “the one that provides the service must also con-

trol what is published on its pages, because if it provides its domain for some content to be published it also can, and must, prevent their publication if they are illicit.”<sup>39</sup> It is striking that the ruling made no reference whatsoever to the LSSICE, although the defendant had expressly alleged being shielded by the hosting safe harbour in its opposition to the complaint.<sup>40</sup> The court held AI liable and awarded 18,000 Euros in damages to each plaintiff.

- 41 The defendant appealed the ruling before the Madrid Court of Appeals (*Audiencia Provincial de Madrid*). Among the defenses put forward in the appeal were the neutral report doctrine and the fact that the court of first instance had disregarded altogether the defense based in the application of the hosting safe harbour set forth in Article 16 LSSICE, which had been raised by the defendant in its opposition to the complaint.
- 42 The court of Appeals acknowledged the existence of the LSSICE, but stated that it does not prevent the application of other norms, such as the Organic Law 1/1982 of 5 May on the civil protection of the right to honour, to personal and family privacy and to one’s own image – the law upon which the plaintiffs based their claim. The court stated that liability for illegitimate interferences with the fundamental rights to honour, to personal and family privacy and to one’s own image lies with the author and the publisher of the illicit information, but also with the service provider on the basis of its actual knowledge and technical ability to control the information. Having said this, the court took into account the fact that the domain name “putasgae.org” had been registered under the defendant’s own name, and that it failed to produce any evidence that would destroy the strong presumption of the domain name’s ownership that arises from that fact. In addition, the court weighed the fact that – as stated in the opposition to the complaint – the defendant actively holds opposite views to SGAE as regards the levies on private copies. As a result, the court rested fully convinced of the defendant’s liability as to the term “putasgae” and as to the illicit content.
- 43 The ruling was appealed for cassation before the Supreme Court,<sup>41</sup> which handed down its judgment on 9 December 2009, affirming the challenged ruling and thus the liability of the appellant.<sup>42</sup> In its brief before the Supreme Court, the *Asociación de Internautas* put forward two legal grounds or “cassational motives”. The first one was that the appealed ruling infringed the principles of freedom of expression and information enshrined in Article 20 of the Spanish Constitution. The second one was that the ruling failed to apply the limitation from liability set forth in Article 16 LSSICE. In its first motive, the appellant contended that if a hosting provider can be liable for the third-party content it hosts, this means it must control the content, and this will end up

by limiting the freedom of expression of the recipients of its service – those who want to have their content hosted. The appellate brief recalled that in order to avoid such a risk for free speech, the ECD and the LSSICE established a safe harbour for hosting service providers. The Supreme Court reasoned that precisely the equilibrium between the right to freedom of expression and the right to honour was established through the safe harbours. Therefore, the court focused the discussion on whether or not the appealed ruling failed to correctly apply the LSSICE – and did not further elaborate on the alleged violation of the principle of freedom of expression. Hence the court came to the crucial point of how Article 16 LSSICE – and particularly its notion of actual knowledge – must be construed.

- 44 The AI claimed that it was protected by the safe harbour because it didn't have "actual knowledge" of the illegal content. As discussed above, Article 16 LSSICE – unlike the ECD – contemplates a number of specific ways for the service provider to gain actual knowledge. The appellant admitted that this provision may be construed in two different ways, namely, a strict interpretation and an open one. Under the strict interpretation – the one favoured by the *Asociación* – for a service provider to have actual knowledge, there should have been a prior decision declaring the material to be illegal – absent a voluntary agreement of notice and take-down and other means of actual knowledge established by the law. Because such a prior decision did not exist, the *Asociación* had not obtained the actual knowledge contemplated by Article 16.1 LSSICE and thus it met the requirements to benefit from the liability limitation. The more open interpretation would construe the list of ways to gain actual knowledge as a merely indicative, non-closed list. The appellant contended that even if this interpretation were to be followed, it still lacked actual knowledge, as actual knowledge cannot be presumed but must be demonstrated by the plaintiff, which, according to AI, had not been the case. It argued moreover that actual knowledge must be related not only to the presence of the materials but to its illegal nature, which cannot be determined by a service provider.
- 45 The Supreme Court didn't accept the defendant-appellants' view. According to the court, a construction of Article 16 LSSICE such as that put forward by the appellant is not in accordance with the ECD because it unreasonably limits the possibilities of obtaining actual knowledge of the illegal content hosted, and, in turn, it broadens the scope of the exemption with respect to that envisioned by the ECD. To support this view, the court said that, actually, the language of Article 16 LSSICE allows an interpretation in accordance with the ECD, as it mentions "other means of actual knowledge that may be established". It assumed, thus, that this language refers not necessarily to future legislative measures, but simply

to other ways of assessing whether the provider has the relevant knowledge. Moreover, the court said that, in any event, it cannot be disregarded that the ECD attaches to awareness "of facts or circumstances from which the illegal activity or information is apparent" the same effects as to actual knowledge.<sup>43</sup> According to the Supreme Court, this was precisely the assessment made by the court of appeals, which considered that the domain name "putasgae.org" was a red flag – a circumstance from which the illegality of the hosted content should have been apparent to the provider. Indeed, the court of appeals concluded that *Asociación de Internautas* had had this awareness, and because it failed to meet the duty of care required by Article 16.1(b) LSSICE – acting expeditiously to remove or to disable access to the information upon obtaining such awareness – it could not benefit from the safe harbour. Therefore, the claim that the court of appeals failed to apply the LSSICE was dismissed by the Supreme Court, which affirmed the ruling holding the *Asociación de Internautas* liable.

## b.) The *Quejasonline* case

- 46 Some months after the judgment in *SGAE v. Asociación de Internautas*, the Spanish Supreme Court issued another ruling involving the hosting safe harbour.<sup>44</sup> The case deals with the liability of an Internet forum for third-party comments.
- 47 The defendant was the company Ruboskizo, S.L., which owns the forum [www.quejasonline.com](http://www.quejasonline.com), a site intended for people to complain online about different topics. The plaintiff was a Valencian lawyer whose reputation was harmed by a comment posted to the forum by someone who fraudulently used his name. In the comment, the user impersonating the Valencian lawyer expressed derogatory remarks against the plaintiff's main client. When he heard about the post he immediately notified Ruboskizo, who quickly removed it. However, Ruboskizo refused to reveal the identity of the poster.
- 48 The aggrieved party then filed a lawsuit against Ruboskizo, which was held liable by the court of first instance.<sup>45</sup> The defendant appealed, and the court of appeals (*Audiencia Provincial de Valencia*) affirmed the ruling.<sup>46</sup> Ruboskizo appealed on cassation to the Supreme Court, alleging that the court of appeals failed to apply the safe harbour scheme laid down in the ECD (Arts. 14 and 15) and in the LSSICE. The Supreme Court reversed the ruling, holding that the court of appeals didn't take into account those provisions – and thus didn't consider whether the defendant qualified for the exemption from liability.<sup>47</sup> The Supreme Court found that Ruboskizo had not had actual knowledge or awareness of facts or circumstances revealing the illegal nature of the offensive comment, and that it diligently took down the post when notified of it.



- 49 In spite of reaching opposite results, the Supreme Court rulings on *SGAE v. Asociación de Internautas* and *Quejasonline* do not contradict each other at all. Both opinions were written by the same judge and both held an open construction of “actual knowledge”. What explains the different outcome is that in *SGAE v. Asociación de Internautas* the court considered that the defendant had awareness of facts or circumstances from which the illegal activity or information was apparent, whereas in *Quejasonline* this was not the case, and thus the defendant did qualify for the safe harbour.
- 50 Another interesting point in the *Quejasonline* ruling is that the Supreme Court clearly admits that the hosting safe harbour applies to a forum – in other words, that, for the purposes of the safe harbour, the owner of a web forum must be deemed to be *hosting* the comments sent by users. Arguably, the same should apply to comments sent to blogs and to other Web 2.0 platforms. This is relevant inasmuch as it had been debated by commentators whether the hosting safe harbour should apply only to *true* hosting providers – companies offering space on their servers to host their client’s websites – and actually the definition of hosting in the LSSICE’s definitions annex seemed to favour the latter view.

## 2. Notice of specific infringements in order to get actual knowledge: *Telecinco v. YouTube*

- 51 *Telecinco v. YouTube* is an interesting copyright case that implements the Supreme Court’s open construction of *actual knowledge*, requiring nonetheless that, in order to get that knowledge, notices of infringement must refer to specific instances of copyright violation. The conflict was very similar to that between *Viacom* and *YouTube* in the United States,<sup>48</sup> and so was the outcome, which held *YouTube* not liable.<sup>49</sup> The case is now under appeal.
- 52 On 1 July 2008, *Telecinco*, a TV company, filed a petition for preliminary measures of protection against *YouTube* under Article 141 of the Spanish Copyright Act (TRLPI). It asked the court to grant these measures *inaudita parte*, that is, before the defendant has the opportunity to present its arguments against it. The court accepted *Telecinco*’s views about the urgent need for adopting the requested measures and issued an order granting them on 23 July 2008. The ruling ordered *YouTube* to stop using *Telecinco*’s clips on *YouTube*’s site and to remove them from it. The court further prohibited *YouTube* from using those works in the future without *Telecinco*’s authorization. At the same time, the court ordered the plaintiffs to immediately provide enough identification of the infringing content so that their use

on *YouTube* could be stopped and prevented in the future.

- 53 *YouTube* then filed a brief in opposition to the adopted measures. It argued they were technically unfeasible, essentially because the information provided by *Telecinco* didn’t allow a proper identification of the clips. In a new order issued on 21 November 2008, the court accepted this argument and acknowledged that *YouTube* was already offering a way for copyright owners to identify allegedly infringing clips. The court concluded that, at least for that initial stage of the procedure, this system could be deemed appropriate and thus modified the prior to the effect of requiring *Telecinco* to specifically provide the URLs of the claimed infringing clips.
- 54 Finally, on 20 September 2010, the court rendered its final judgment on the case. As said, it parallels some of the holdings of *Viacom v. YouTube*. However, unlike in *Viacom v. YouTube*, where almost all documents filed are available online,<sup>50</sup> in *Telecinco v. YouTube* – as is normally the case in lawsuits in Spain – the actual text of the complaint and the defendant’s opposition brief are not available. Rather, we must content ourselves with the streamlined references to the parties’ arguments offered in the ruling. Hence, it is not easy to assess to what extent the ruling actually addresses all the arguments put forward by the parties – or to what extent it sidesteps them.
- 55 The ruling addresses three main questions: first, the nature of the service provided by *YouTube*, i.e. whether it acts as a mere intermediary or rather as a content provider; second, in the event that *YouTube* is deemed to merely provide intermediary services, whether or not it qualifies for the hosting safe harbour set forth in the Spanish transposition of the E-Commerce Directive; and third, in the event that it qualifies for the safe harbour, whether or not plaintiffs may be granted injunction relief.

### a.) The nature of the service provided

- 56 As to the first question, the plaintiff contended that, despite the appearances, *YouTube* is in fact a content provider. To support this contention it pointed to the fact that in its Terms of Use, *YouTube* asks users to grant it a license for the content they upload. This would allegedly show that *YouTube* is aware that it is exploiting the copyrighted content sent by users, as otherwise it wouldn’t need to ask for a license. The ruling rejects this argument, asserting that requiring a license from users is not incompatible with carrying out a merely intermediary service. Here the court asserts that different types of intermediary services exist, one of which would be what it labels as “hosting 2.0”, as opposed to strict or pure hosting. This might be pointing to a debated issue between the parties, i.e. whether “hosting” under Article 14

of E-Commerce Directive (and its Spanish transposition) covers not only web hosting (i.e. providing server space for a website), but also the storing of users' materials by a website, like in a video sharing site.

- 57 The plaintiff further contended that YouTube acts as a content provider because it carries out “editorial functions”, such as selecting “featured videos” and preventing some inappropriate but not unlawful clips from appearing on the site. The court holds that in fact it would be impossible for YouTube to control all the videos users upload. Besides, it asserts that selecting “featured videos” doesn’t amount to an editorial function, as it is carried out automatically, following certain objective parameters. Nor, according to the court, would the fact that videos are displayed on a site designed by YouTube and distinguished by its trademark turn YouTube into a content provider. Similarly, the court states that exploiting the site for gain is not a sign that the service is not of an intermediary nature. The court rightly underscores that the E-Commerce Directive presupposes that intermediary services covered by the safe harbours are provided for gain.
- 58 The ruling goes on to describe the notice-and-take-down procedure YouTube has in place. Just like in *Viacom v. YouTube*, the Judge finds that this procedure works smoothly, and highlights that every time Telecinco has followed it to request the taking down of a video, YouTube has promptly reacted by removing the allegedly infringing clip. The court stresses that, being an intermediary service provider, YouTube cannot be subject to a general obligation of monitoring its site nor actively seeking facts or circumstances revealing infringements (Art. 15 E-Comm Directive).

## b.) Qualifying for the safe harbour

- 59 Once it was established that YouTube provides an intermediary service, the second group of issues relate to whether it qualifies for the hosting safe harbour laid down in the Spanish transposition of the E-Commerce Directive.
- 60 Telecinco argued for an open interpretation of the concept of actual knowledge. The court, following the Supreme Court’s doctrine presented above, holds that the concept of actual knowledge must indeed be construed in an open way (thus not limited to the instances where a prior ruling has declared the illegality of the materials), but at the same time in a way that is compatible with the general principle that the provider cannot be subject to a general obligation of monitoring. As a result, according to the court, copyright owners should precisely identify the specific infringing files in order for the provider to gain actual knowledge of the infringement. The court finds that YouTube’s system of notice-and-

take-down is consistent with this approach. While it acknowledges that this may be burdensome for copyright owners, the court stresses that this is nonetheless the order of priorities that both the EU and Spanish legislators have chosen.

## c.) Injunction relief

- 61 Finally, the court tackles the issue of the injunction requested by the plaintiff. According to the ruling, the plaintiff requested an injunction against YouTube under Articles 138 and 139 of the Spanish Copyright Act. These provisions allow right holders to apply for an injunction against intermediaries whose services are used by a third party to infringe, even where the acts of the intermediaries as such are not infringing, “without prejudice to the provisions of [the LSSICE]”. The court rejects the injunction on the grounds of the latter clause of the provision. The court thinks it is “blindingly obvious” that this clause “completely eliminates the possibility of bringing the action” against intermediary service providers.
- 62 Arguably, however, this is not that clear. The E-Commerce Directive clearly states that the hosting safe harbour “shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement” (Art. 14.3 E-Commerce Directive). Therefore, even though the Spanish transposition remains silent about this point, it seems that the liability exemptions of the LSSICE, as such, do not prevent injunctions against the service provider – provided, of course, that the injunction doesn’t imply actively monitoring the site. If the LSSICE doesn’t prevent injunctions, then the “without prejudice to” clause quoted above might have a different meaning – for instance, it might simply mean that the possibility of applying for an injunction against those intermediaries doesn’t undermine their protection under the LSSICE, which shields them from all types of liability but not against injunction relief.

## IV. Linking

### a.) Sites with links to information about getting unauthorised access to pay TV

- 63 The first case applying the LSSICE linking safe harbour was a 2003 case involving the website *ajoderse.com*.<sup>51</sup> The site provided links to other sites and the theme common to most of the linked materials was information about hacking encoded pay-per-view television transmissions, either by disseminating the secret keys or by other means. A group of pay-TV

companies brought a criminal action for revealing confidential information – i.e. the secret keys. While it was clear – at least from appearances – that the owner of the site had precisely selected the linked websites in accordance with the theme, the court considered that he lacked “actual knowledge”, as there had been no prior judicial decision declaring the linked materials to be illegal. The court stated that in order to be held liable:

... there must be actual knowledge on the part of the service provider that the hyperlinked activity or information is illegal. However, even if the service provider knows that the linked pages are illegal, Law 34/2002 [the LSSICE] defines what is understood as actual knowledge in the final paragraph of Art. 17.1.<sup>52</sup>

Following a strict interpretation of “actual knowledge”, the court found that the accused party was protected by the safe harbour and thus dismissed the case.

- 64 A recent case, *Digital+ v. Zackyfiles*,<sup>53</sup> dealt with a similar issue. The website Zackyfiles.com offers information about satellite TV receivers, satellite systems and related software. The site contains links to other pages. In one of the linked pages, keys to get unauthorized access to pay TV were found. The court acquitted the accused party, holding that he was protected by the linking safe harbour laid down in Article 17 LSSICE.

## b.) Google search results linking to defamatory content

- 65 Another case involving linking deals with Google's search results. An aggrieved party brought a civil lawsuit against Google because in its search results it provided links to sites where the plaintiff was being defamed. The lower court held Google not liable,<sup>54</sup> which was affirmed by the court of appeals.<sup>55</sup> The linked sites were deemed to be defamatory indeed. Nonetheless, both courts held that Google was protected by the information location tools safe harbour set forth in Article 17 LSSICE.
- 66 Before initiating the lawsuit, the plaintiff had repeatedly asked Google to remove the links to those sites. In some of the notices, the aggrieved party reported to Google that there was a lawsuit ongoing against the concerned sites. In one of the notices, the plaintiff even informed Google that a court ruling had been issued declaring that the information provided by one of those sites was false.
- 67 The court of appeals, following a strict construction of Article 17 LSSICE, held that those notices were not enough for Google to get actual knowledge of the illegal content. As noted above, the linking safe harbour in Article 17 LSSICE contains the exact same

wording as hosting safe harbour, Article 16 LSSICE, when it comes to the notion of actual knowledge. In order to find that knowledge, it requires not only that “a competent body has declared that the data are unlawful, or has ordered their removal or the disablement of access to them, or the existence of the damage has been declared” but also that “the provider knew of this decision”. The court thus held that even though the plaintiff had informed Google that a ruling holding the content to be illegal existed, that was not enough to deem that Google had actual knowledge, as there was no evidence that Google had been given a copy of that ruling.

- 68 The court of appeals' ruling makes no reference to the Supreme Court judgment in *SGAE v. Asociación de Internautas*, where, as explained above, the notion of “actual knowledge” was construed in an open way. It must be noted, however, that the Supreme Court's ruling dealt with that notion in relation to the hosting safe harbour, not the linking one. This may be a relevant distinction, as the Supreme Court's main argument for the open interpretation was that a strict one would run afoul of the E-Commerce Directive, something that cannot be said in the case of the linking safe harbour as no such provision is established by the Directive.

## c.) Legal actions against websites offering P2P download links

- 69 In addition to the cases mentioned above, the safe harbour for information location tools has been discussed in cases involving websites offering links to files containing music, movies, video games or software programs made available elsewhere on the Internet without authorization, whether in P2P networks or in high speed servers such as *Rapidshare*, to name just one of the best known. Litigation against websites providing this kind of link has been, and continues to be, the most relevant trend in the right holders' judicial enforcement strategy in Spain against digital piracy. However, the intent of holding them liable in court – whether criminally or civilly – has so far been almost a complete failure, not just because of the safe harbour protection, but, more importantly, because courts agree that merely linking to infringing files is not a copyright infringement.
- 70 In the field of criminal law, some thirty cases against websites linking to infringing material have been brought so far by rights holders in recent years. It must be observed that in Spain, as in many other European countries, a private party may file a criminal complaint. The prosecutor (*Ministerio Fiscal*) must take part in the procedure, but it is not necessary for the prosecutor to agree with the claimants for the case to go ahead.

- 71 While many of these cases are still pending, all those already decided have been dismissed – with only two exceptions. The main ground for dismissals is that, according to the courts, the mere provision of links does not constitute an act of communication to the public, and thus does not fall under Article 270 of the Spanish Penal Code. This article sets forth that it is a criminal offense to reproduce, plagiarize, distribute or publicly communicate a copyrighted work, with lucrative intent and without the authorization of the rights holder. To provide a link is obviously not a reproduction of the work; nor it is plagiarism or distribution. Hence, the only remaining possibility for the linking activity to fall under Article 270 of the Penal Code is that it is deemed to be a communication to the public. As courts consider that this is not so, the conduct falls outside the said article and thus cannot create criminal liability.
- 72 The leading case in this field is *Sharemula*, a criminal case dismissed in 2007 – with the dismissal affirmed by the court of appeals in 2008.<sup>56</sup> Columbia Tristar Home Video and other claimants brought a criminal action against the owner of the website [www.sharemula.com](http://www.sharemula.com). The site offered P2P download links to movies and other copyrighted material available in P2P networks. The claimants alleged that this activity constituted a non-authorized act of communication to the public. The owner argued that the website did not communicate the works to the public, as users did not download the works from the website, but from P2P networks. Furthermore, the accused party alleged that the activity was covered by the linking safe harbour laid down in Article 17 LSSICE.
- 73 The examining judge dismissed the case, holding that the owners of [sharemula.com](http://www.sharemula.com) did not directly carry out acts of communication to the public, as *Sharemula* did not host the copyrighted files. They merely facilitated that communication, inasmuch as they selected and provided information about the files, as well as the means to download them. The judge acknowledged the merits of the argument that *Sharemula*'s activity, considered as a whole, and focusing on its final result, may fall under the general definition of communication to the public laid down in Article 20 of the Spanish Copyright Act, which defines an act of communication to the public as any act by which a plurality of persons may access the work without prior distribution of a copy of the work to each of them.<sup>57</sup> Nonetheless, the judge weighed the fact that *Sharemula* neither hosted the files nor directly caused the downloading; rather, the files were transferred by means of a P2P software client – eMule – widely available on the Internet. The judge held that while acts of arranging and providing information about the files available in P2P networks may facilitate the downloading, they cannot be equated to it, and thus they must be deemed mere intermediary activities. Besides, the judge considered the fact that the economic benefit drawn by the owners of the website stemmed from the advertising placed on it and not directly from the downloading.
- 74 The dismissal was appealed and the court of appeals affirmed it. In affirming the dismissal, the court held that the accused party was an information society service provider that qualified for the LSSICE linking safe harbour, as it lacked actual knowledge that the material to which it directed its users was illegal. The court again followed a strict construction of the notion of “actual knowledge” laid down in Article 17.1 LSSICE, holding that, as there was no prior ruling declaring the linked content to be illegal, the provider lacked the “actual knowledge” and thus could not be held liable. In addition, the court held that *Sharemula*'s activity did not constitute an act of communication to the public and that, as a consequence, it was not necessary to analyze whether the provider acted with a lucrative intent, as in any event the conduct would not constitute the criminal offense contemplated in Article 270 of the Penal Code.
- 75 After *Sharemula*, all criminal cases against websites offering links to infringing content where a final decision has been issued have been equally dismissed, with the sole exceptions of the *Infopsp.com* and the *SimonFilms.tv* cases, where the owners of the sites were convicted.<sup>58</sup> These convictions, however, hardly seem relevant as in both cases the accused party accepted a plea of guilty as a result of an agreement with the claimants and with the prosecutor. As a result, these cases did not offer a full discussion of the issues involved.
- 76 In three other cases, the dismissal issued by the examining judge was reversed on appeal. These decisions, however, did not hold that the activity was indeed a criminal offense. Rather, they simply ordered the examining judge to continue with the investigations to fully clear up the facts. One of these cases was *Divxonline*.<sup>59</sup> After the decision handed down by the court of appeals, the examining judge resumed the procedure and eventually issued a definitive dismissal.<sup>60</sup> However, this dismissal was again appealed, and the court of appeals reversed it anew.<sup>61</sup> Another case is *Elitedivx*, which is still pending.<sup>62</sup> The third case is *Todotorrente*.<sup>63</sup> This latter case is particularly relevant, as the court of appeals held that the accused party's activity did amount to a communication to the public.
- 77 To sum up, with regard to criminal liability, and with few exceptions, case law so far agrees that merely linking to infringing files, whether located in P2P networks or in someone else's server, is not a criminal offense. It cannot create criminal liability for contribution either, as the acts to which the activity contributes – those of users sharing files – are not criminal offenses, because they will normally lack lucrative intent on a commercial scale.<sup>64</sup>

- 78 With regard to civil lawsuits, the rulings handed down up to now have held defendants not liable.<sup>65</sup> The main rationale behind these decisions is actually the same one as in criminal cases – merely linking does not constitute an act of communication to the public, and thus it is not a *civil* copyright infringement, either. In their complaints so far, rights holders keep on claiming that these acts constitute acts of communication to the public – which, as noted, is rejected by courts. It remains to be seen what the outcome would be in this type of lawsuits if plaintiffs would claim *contributory* infringement. To be sure, it is not clear whether actions for contributory infringement may be brought under the Spanish Copyright Law, apart from the cases of circumvention of technological protection measures where the TRLPI expressly contemplates acts of contribution. In any event, courts have not yet discussed this possibility with regard to providers of links. In theory, another way of claiming contributory liability would be to resort to the general rules on civil liability, laid down in Article 1902 of the Civil Code, which appears to still be an unexplored argument in rights holders' civil lawsuits. However, qualifying service providers would still be protected by the LSSICE linking safe harbour.
- 79 In view of the lack of success in judicial actions against websites offering links to infringing content, rights holders have been lobbying for a legal reform that may allow them to effectively stop this activity. This resulted in a draft provision included in the Sustainable Economy Bill, which is currently being debated in the Spanish Parliament. As it relates to the liability of information society service providers, it seems appropriate to briefly comment on it.

## D. The Sustainable Economy Bill

- 80 The Sustainable Economy Bill (SEB), a bill addressing a wide range of issues in response to the present scenario of economic recession, includes a new legal mechanism conceived to tackle online copyright infringement.<sup>66</sup> Unlike other legislative measures taken by Member States such as France or the United Kingdom, the Spanish SEB isn't aimed at users that illegally make available copyrighted material. Rather, it focuses exclusively on information society service providers – whether they are acting as intermediaries or not – who may violate copyright. While its provisions cover all kinds of information society service providers, the main purpose behind the bill – as publicly stated by its promoters – is to fight against websites that provide links to copyrighted material located in P2P networks or on public servers, whether for downloading or streaming.
- 81 The bill grants to an administrative body – the newly created Second Section of the Intellectual Property

Commission – the power to assess whether an information society service is violating copyright. It also grants this administrative body the power to order the provider of that service to stop providing it or to remove the infringing material.

- 82 As it deals specifically with the freedom to provide information society services, the new rule is drafted primarily as an amendment to the LSSICE, particularly to its Article 8. Let us start by presenting the content of this provision and its links to the E-Commerce Directive, and then we will see how it would be amended if the bill is finally enacted.
- 83 Article 8 LSSICE establishes the cases in which a Spanish judicial or administrative authority may restrict the provision of information society services. It is directly connected to Article 3 ECD, which deals with the so-called country of origin principle and with the exceptions to it. According to this principle, "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State."<sup>67</sup> There are, however, some exceptions to this principle, which are set forth in Article 3.4 ECD. This article allows Member States, under certain conditions, to take restriction measures in respect of a given information society service when the measures are necessary for some of the following objectives:
- (a) public policy, in particular the prevention, investigation, detection and prosecution of criminal offenses, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons
  - (b) the protection of public health
  - (c) public security, including the safeguarding of national security and defence
  - (d) the protection of consumers, including investors.<sup>68</sup>
- 84 The measures must be proportionate to these objectives and "taken against a given information society service which prejudices [them], or which presents a serious and grave risk of prejudice to those objectives".<sup>69</sup>
- 85 The country of origin principle set forth in Article 3.2 ECD was transposed in Article 7 LSSICE. Next, Article 8 LSSICE – in accordance with Article 3.4 ECD – provides for the possibility of adopting restriction measures with regard to a given information society service when it prejudices or may prejudice some of the objectives listed in it. However, unlike in Article 3.4 ECD, this possibility of restriction measures in Article 8 LSSICE is not established just as an exception to the country of origin principle but in general – that is, regardless of whether the service is originated in another Member State, in Spain, or in any other country. This does not appear to be an improper transposition of the Directive. According to the ECD it is possible for a Member State to adopt restriction measures for the sake of the said objectives with

regard to services originating in another Member State. Thus, it seems that nothing prevents a Member State from subjecting the services originating within its territory to the same kind of restrictions, let alone services originating in non-EU countries.

- 86 The measures envisioned in Article 8 LSSICE may consist of the interruption of the provision of the service or the removal of the illicit material. The objectives that may motivate those measures are similar to those listed in Article 3.4 ECD: (a) the protection of public order, the investigation of criminal offenses, the public safety and the national defence; (b) the protection of public health and of consumers, including investors; (c) the respect of human dignity and the principle of non-discrimination on grounds of race, sex, religion, opinion, nationality, disability or any other personal or social circumstance; and (d) the protection of youth and childhood. The restriction measures should be adopted by the authority that is competent for the protection of the concerned objective, acting within the competencies conferred on it by the law. This “competent authority” does not always need to be a court, as the protection of some of the objectives is also entrusted to administrative bodies – for instance, in the case of public health or consumer protection.
- 87 Here is where the Sustainable Economy Bill comes into play. It introduces an amendment to this Article 8 LSSICE, which consists of adding a new objective to the list: the protection of intellectual property rights.<sup>70</sup> The purpose of the bill, as mentioned above, is to allow an administrative authority to order restriction measures against information society services that may violate copyright. Thus, Article 8 LSSICE – an article that, as noted, already allows not only courts but also administrative bodies to restrict the provision of information society services – was seen by the drafters of the bill as the best place to insert the new rule.
- 88 The next thing is creating the administrative authority that will exert the function of protecting copyright and ordering the said measures. To this end, through an amendment to the TRLPI, the SEB establishes a new section within an already existing body – the Intellectual Property Commission. While the first section of this commission will continue to exert mediation and arbitration functions, the newly created second section will have the mission of protecting intellectual property rights from violation by information society service providers, and will be the authority with the power to adopt the restriction measures provided for in Article 8 LSSICE.
- 89 According to the proposed amendment of Article 158 TRLPI, the second section of the Intellectual Property Commission will be able to order the measures for the interruption of the provision of an information society service or for the infringing materials to

be taken down. The measures may be taken against an information society service provider who acts with *direct* or *indirect* lucrative intent. It appears that the reference to “indirect” lucrative intent is meant to include the situations such as those where the owner of a website offering links to infringing content does not charge a fee for the service, but seeks economic profit through advertising placed on the page. The restriction measures may be taken as well against providers lacking direct or indirect lucrative intent as long as their conduct causes – or is capable of causing – a patrimonial harm. Arguably, this encompasses any situation involving an infringement, and thus – in spite of what was sometimes claimed in the debates – the bill does not just target people who try to profit from copyright infringement but has a potentially broader scope.

- 90 Once the first draft of the bill was made public it prompted a strong opposition from Internet users. In particular it was argued that allowing an administrative authority to order the closing down of a website would violate the principle of freedom of expression. It was contended that websites are media and therefore only a court could order to close them down. Actually, the current text of Article 8 LSSICE already takes this into account, as a measure of closing down a website adopted by an administrative authority might run afoul of Article 20.5 of Spanish Constitution, which establishes that “[t]he seizure of publications, recordings, or other means of information may only be adopted by a judicial decision”. Indeed, Article 8 LSSICE includes a paragraph stating that the competent judicial authority – as the one responsible for ensuring the rights to freedom of expression, to receive information, to academic freedom and to literary, artistic, scientific and technical creation – will be the only one who may adopt the restriction measures contemplated in that provision wherever this competence is attributed exclusively to judicial authorities by the Constitution or other laws governing the concerned rights.
- 91 It could be argued, thus, that this paragraph of Article 8 LSSICE already ensures that the proposed amendment will not allow administrative authorities to take restriction measures that may violate freedom of expression and the other related rights. However, it was contended that the reform would indeed be an assault on free speech, because the one who would decide in the first place whether the restriction measure affects those rights would be the administrative authority itself. Therefore, and in view of the strong opposition against the bill, before introducing it into Parliament the government modified it to include a truly peculiar system of judicial control. It was decided that once the commission orders a restriction measure, it must ask the court to authorize its execution. However, the court will not be able to consider the merits of the case, i.e. whether there is indeed a violation of copyright. Rather,

the court must only take into account whether the concerned measure prejudices the rights and liberties enshrined in Article 20 of the Constitution, quoted above. Moreover, the court's decision must limit itself to either granting or denying the authorization – it cannot modify or amend the measure.

- 92 This peculiar system raises important concerns. Not the least of these is that it appears to craft an administrative procedure in the hope of achieving something that courts have been denying so far – deeming that websites that link to infringing content engage in copyright infringement and closing them down. This is certainly striking, as it is difficult to see how an administrative body could find those websites to be infringing where judges have found them not to be so.

## E. Conclusion

- 93 In the eight years since the E-Commerce Directive was transposed into Spanish law, case law on ISP liability in Spain has been less uniform and predictable than desirable. Courts have issued rulings in around fifty cases so far. Roughly half of them have dealt with defamation in messages posted on websites, blogs, forums, wikis or other platforms. In some of these cases, courts did not really apply the hosting safe harbour, sometimes alleging that the safe harbour does not prevent the application of other norms, particularly the Organic Law 1/1982 of 5 May on the civil protection of the right to honour, to personal and family privacy and to one's own image. On these occasions, some courts have tended to consider that the owner of the platform is subject to a duty to control the content published on it and are thus liable for the third-party defamatory comments. In other rulings, however, the owner of the site or forum where users' comments were posted has been deemed protected by the hosting safe harbour and therefore not liable. A crucial issue regarding this exemption is the notion of actual knowledge, as the Spanish transposition departed from the language of the E-Commerce Directive, crafting an extremely narrow concept of actual knowledge and, moreover, dispensing altogether with the requirement of lack of awareness of facts or circumstances from which the illegal activity or information is apparent. The language of the LSSICE has been construed in different ways by different courts, either in a strict way – which in practice means that, for the provider to have actual knowledge, there must be a prior ruling declaring the third-party material to be illegal – or in a more flexible interpretation, admitting other ways of obtaining the relevant knowledge. The latter view has finally been endorsed by the Supreme Court. On the one hand, the Supreme Court's position increases legal certainty as to whether actual knowledge can be obtained by ways diffe-

rent than those expressly considered by the LSSICE. On the other hand, however, it poses the problem of determining on a case-by-case basis what amounts to actual knowledge, which obviously reduces legal certainty for intermediaries. Nonetheless, this type of uncertainty is the one envisioned by the E-Commerce Directive, as it clearly contemplates not only different ways of gaining actual knowledge but even mere awareness of red flags indicating the illegal nature of the information.

- 94 With regard to the liability for linking to illegal content, the Spanish situation is characterized by the safe harbour set forth in the LSSICE dealing with information location tools, a safe harbour not included in the ECD. While it protects providers of links irrespective of the nature of the linked content, case law has mainly focused on the activity of linking to copyrighted works located in P2P networks or elsewhere on the Internet. Case law generally agrees that in these cases, the safe harbour applies. Actually, however, the safe harbour is not necessary to shield from liability those websites offering links to infringing content, as courts hold that merely providing links does not constitute an act of copyright infringement, and it cannot create criminal copyright liability either. This has frustrated the expectations of rights holders as all cases against those websites that have been decided so far have been dismissed, with only two exceptions. This appears to be the reason behind the proposal included in the Sustainable Economy Bill, which targets information society service providers that violate copyright. The bill, still being debated at the Spanish Parliament, is under much criticism. It opens a dangerous door as it entrusts to an administrative body the task of determining whether a service provider has engaged in copyright infringement, and grants to this authority the power of ordering the service to be interrupted. The judicial intervention in this procedure – before a restriction measure is applied – will be limited to determining whether the restriction measure harms freedom of expression, but it cannot assess whether or not a copyright infringement has occurred in the first place. This is particularly shocking as case law has repeatedly held that the type of services supposedly targeted by the bill are not infringing. This would be enough to predict the failure of the bill, at least with regard to its main goal – closing down websites offering P2P download links.

## F. Annex: List of cases

- 95 This annex aims to provide an overview of the Spanish cases on ISP liability. The list includes all cases that I know of which have been brought to courts in Spain in which at least one ruling has been issued. Surely there must have been some other cases; this is always difficult to know, as lower court's rulings

are normally not reported on case law databases. In any event, these are the cases that in one way or another have been known to lawyers and scholars in Spain. The names of the cases provided here are only for clarification purposes – it must be observed that in Spain, cases do not have an official name; rather they are just identified by the name of the court and the date of the ruling. Within each subpart, cases are presented starting with the newest, taking into account the date of the last ruling issued in each case.<sup>71</sup>

## I. Civil cases dealing with defamation

- *PSOE Mérida*. Defamatory comments were posted on a website devoted to politics. The website owners were held liable: Judgment of the Court of First Instance No 2 of Mérida, 1 July 2009. Ruling affirmed on appeal: Judgment 280/10 of the *Audiencia Provincial* (Court of Appeals) of Badajoz, 3<sup>rd</sup> Section, 17 September 2010.
- *Quejasonline.com*. Defamatory comments posted by an anonymous user on a website devoted to criticism. The court of first instance held the owner of the website liable for the third-party comments: Judgment of the Court of First Instance No 23 of Valencia, 30 November 2006. Ruling affirmed on appeal: Judgment 403/2007 of the *Audiencia Provincial* (Court of Appeals) of Valencia, 6<sup>th</sup> Section, 29 June 2007. The Supreme Court reversed the ruling on cassation and held the defendant not liable because of the hosting safe harbour: Judgment 316/2010 of the Supreme Court (Civil Chamber), 18 May 2010.
- *Rankia.com*. Defamatory comments posted by a user on the website rankia.com. The court of first instance held the website's owner qualified for the hosting safe harbour and thus was held not liable: Judgment 153/2009, Court of First Instance No 42 of Madrid, 23 September 2009. The judgment was affirmed on appeal: Judgment 181/2010, *Audiencia Provincial* (Court of Appeals) of Madrid, 21<sup>st</sup> Section, 13 April 2010.
- *Chaturanga (Yahoo!)*. Defamatory comments posted on a chat-room hosted by Yahoo! The lower court held Yahoo! not liable on account of the hosting safe harbour: Judgment of the Court of First Instance No 3 of Esplugues de Llobregat, 5 March 2009. Affirmed on appeal: Judgment 98/2010, *Audiencia Provincial* (Court of Appeals) of Barcelona, 19<sup>th</sup> Section, 3 March 2010.
- *Google search results*. Lawsuit brought against Google because of links to defamatory sites shown in the search results. The lower court rejected the claim on account of the linking safe harbour: Judgment of Court of First Instance No 19 of Madrid, 13 May 2009. Affirmed on appeal: Judgment 95/2010, *Audiencia Provincial* (Court of Appeals) of Madrid, 9<sup>th</sup> Section, 19 February 2010.
- *SGAE v. Asociación of Internautas*. Hosting of a gripe website with defamatory content. The hosting provider was held liable: Judgment 126/2005, Court of First Instance No 42 of Madrid, 15 June 2005. Ruling affirmed on appeal: Judgment 50/2006, *Audiencia Provincial* (Court of Appeals) of Madrid, 19<sup>th</sup> Section, 6 February 2006. Affirmed also on cassation, holding that the provider did not qualify for the hosting safe harbour: Judgment 773/2009 of the Supreme Court, Civil Chamber, 9 December 2009.
- *Mindoniense.com*. Defamatory comments posted by users on a forum. The owner of the forum was held not liable as he qualified for the hosting safe harbour: Judgment 109/2008, *Juzgado de Primera Instancia e Instrucción* No 1 of Mondoñedo, 5 November 2008. The ruling was affirmed on appeal: Judgment 538/2009, *Audiencia Provincial* (Court of Appeals) of Lugo, 1<sup>st</sup> Section, 9 July 2009.
- *Alasbarricadas.org*. Defamatory remarks against the Spanish singer Ramoncín posted by users on a forum. The owner of the forum was held liable as the court considered that he did not qualify for the hosting safe harbour: Judgment 184/2007, Court of First Instance No 44 Madrid, 13 September 2007. Ruling affirmed on appeal: Judgment 420/2008, *Audiencia Provincial* (Court of Appeals) of Madrid, 13<sup>th</sup> Section, 22 September 2008.
- *Veloxia Network II*. Defamatory comments posted by users on an Internet forum. The forum's owner qualified for the hosting safe harbour and thus was held not liable: Judgment of the Court of First Instance No 10 of Madrid, 28 June 2007. The ruling was affirmed on appeal: Judgment 511/2008, *Audiencia Provincial* (Court of Appeals) of Madrid, 10<sup>th</sup> Section, 16 July 2008.
- *SGAE v. Merodeando.com*. Defamatory comments posted by readers on a blog. The owner of the blog was held liable: Judgment of the Court of First Instance No 55 of Madrid, 24 June 2008.
- *Relevance v. Derecho.com*. Defamatory comments on a website. The website owner was held not liable by the court of first instance, as he was not the author of the comments: Judgment of the Court of First Instance No 46 of Madrid, 22 September 2006. The ruling was partially reversed on appeal, enjoining the website owner from publishing similar comments in the future: Judgment 278/2008, *Audiencia Provincial* (Court of Appeals) of Madrid, 12<sup>th</sup> Section, 17 April 2008.
- *SGAE v. Frikipedia*. Defamatory remarks on the entry about the SGAE in a satirical wiki. The wiki



webmaster was held liable: Judgment 202/2006, Court of First Instance No 52 of Madrid, 19 December 2006. The ruling was confirmed on appeal, holding that the hosting safe harbour did not apply: Judgment 516/2007, *Audiencia Provincial* (Court of Appeals) of Madrid, 18<sup>th</sup> Section, 8 October 2007.

— *Unió Mallorquina*. Defamatory comments posted by users on a forum. The lower court held the owner of the forum not liable: Judgment of the Court of First Instance No 14 of Palma, 16 October 2006. The ruling was reversed on appeal, holding the defendant liable: Judgment 65/2007, *Audiencia Provincial* (Court of Appeals) of the Balearic Islands, 3<sup>rd</sup> Section, 22 February 2007.

— *Aprendizmason.org*. Defamatory statements on a website. The web hosting provider, iEspaña, was held not liable, as it qualified for the hosting safe harbour: Judgment of the Court of First Instance No 3 of Alcobendas, 5 May 2004. The ruling was affirmed on appeal: Judgment 835/2005, *Audiencia Provincial* (Court of Appeals) of Madrid, 14<sup>th</sup> Section, 20 December 2005.

— *Idiada Automotive Technologies*. Defamatory remarks on a website. The website owner was held not liable. The authors of the remarks were held liable: Judgment of the Court of First Instance No 6 of El Vendrell, 17 May 2004. The ruling was affirmed on appeal: Judgment 420/2005, *Audiencia Provincial* (Court of Appeals) of Tarragona, 1<sup>st</sup> Section, 10 October 2005.

## II. Criminal cases dealing with defamation

— *Elcomentario.tv*. Criminal case brought against the owner of an Internet forum on account of defamatory comments posted by an anonymous user. The case was dismissed by the examining judge, as the owner of the forum was not the author of the comments: Decision of *Juzgado de Instrucción* No 1 of Oviedo, 31 March 2009. Affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Oviedo, 18 September 2009.

— *Foro Laboral*. Criminal case brought against two individuals on account of defamatory messages posted on an Internet forum. The accused individuals – one of them the initiator of the forum – were acquitted as they were not proven to be the authors of the illegal content: Judgment of *Juzgado de Instrucción* No 17 of Madrid, 19 November 2007. Affirmed on appeal: Judgment 104/2008, *Audiencia Provincial* (Court of Appeals) of Madrid, 1<sup>st</sup> Section, 11 April 2008.

— *World Networw*. Criminal case brought against the owner of a website on account of defamatory

messages posted by users. The accused was acquitted, as he was not proven to be the author of the messages: Judgment of *Juzgado de Instrucción* No 21 of Madrid, 16 of October 2007. Affirmed on appeal: Judgment 128/2008, *Audiencia Provincial* (Court of Appeals) of Madrid, 2<sup>nd</sup> Section, 9 April 2008.

— *Mafius Blog*. The owner of a blog was convicted on account of defamatory comments sent by unidentified readers. Judgment of *Juzgado de Primera Instancia e Instrucción* No 5 of Arganda del Rey, 30 June 2006. Judgment affirmed on appeal. The court of appeals held that the hosting safe harbour did not apply: Judgment 96/2007, *Audiencia Provincial* (Court of Appeals) of Madrid, 3<sup>rd</sup> Section, 26 February 2007.

— *Veloxia Network I*. Criminal case brought against the owner of an Internet forum. On a ruling dealing with procedural matters, the court of appeals held that the hosting safe harbour applied. Decision of *Juzgado de Instrucción* No 3 of Plasencia, 10 July 2006; Decision 273/06, *Audiencia Provincial* (Court of Appeals) of Cáceres, 2<sup>nd</sup> Section, 30 October 2006.

— *Aporellos.com*. The owners of the website were held liable for damages; the hosting provider and the access provider were held not liable: Judgment of *Juzgado de Instrucción* No 3 of Murcia, 18 April 2005; Judgment 56/2006, *Audiencia Provincial* (Court of Appeals) of Murcia, 4<sup>th</sup> Section, 18 May 2006.

## III. Criminal copyright cases against sites offering download or streaming links

— *Edonkeymanía*. Criminal copyright case against a website linking to P2P downloads. Initially, the examining judge granted preliminary measures: Decision of *Juzgado de Instrucción* No 3 of Madrid, 1 August 2003. Finally the judge dismissed the case: Decision of *Juzgado de Instrucción* No 3 of Madrid, 17 June 2010.

— *Cinegratis.net*. Criminal copyright case against a website linking to P2P downloads. The case was dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 1 of Santander, 4 February 2010. Dismissal affirmed on appeal: Decision 214/10, *Audiencia Provincial* (Court of Appeals) of Cantabria, 3<sup>rd</sup> Section, 8 June 2010.

— *Divxonline*. Criminal copyright case against a website linking to P2P downloads. The case was dismissed by the examining judge, apparently on account of lack of lucrative intent: Decision of *Juzgado de Instrucción* No 3 of Mislata, 9 September 2009. The court of appeals reversed the dismissal and remanded the case to the examining judge, holding that the accused could indeed have had lucrative intent: Decision 18/2010, *Audiencia Provincial* (Court of Appeals)

of Valencia, 3<sup>rd</sup> Section, 8 January 2010. The examining judge dismissed the case again, on account that the provision of links does not constitute a criminal offense: Decision of *Juzgado de Primera Instancia e Instrucción* No 3 of Mislata, 17 May 2010. This dismissal, however, was again reversed on appeal: Decision 630/2010, *Audiencia Provincial* (Court of Appeals) of Valencia, 3<sup>rd</sup> Section, 26 October 2010.

— *CVCDGO*. Criminal copyright case against a website linking to P2P downloads. Case dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 48 of Madrid, 27 May 2009. Dismissal affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Madrid, 23<sup>rd</sup> Section, 11 May, 2010.

— *RojaDirecta.com*. Criminal copyright case against a website offering links to live streaming sporting events and to BitTorrent downloads. The case was dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 37 of Madrid, 15 July 2009. Dismissal affirmed on appeal: Decision No 364/10 of *Audiencia Provincial* (Court of Appeals) of Madrid, 1<sup>st</sup> Section, 27 April 2010.

— *IndiceDonkey.com*. Criminal copyright case against a website linking to P2P downloads. Case dismissed: Decision of *Juzgado de Instrucción* No 1 of Madrid, 19 March 2008. Case reopened to carry out new investigations and dismissed again: Decision of *Juzgado de Instrucción* No 1 of Madrid, 2 March 2010.

— *Naiadadonkey*. Criminal copyright case against a website linking to P2P downloads. Case dismissed: Decision of *Juzgado de Instrucción* No 3 of Alcoy, 17 June 2009. Dismissal affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Alicante, 2<sup>nd</sup> Section, 10 February 2010.

— *SimonFilms.tv*. Criminal copyright case against websites offering streaming films for a fee. It is not clear from the facts of the case whether the sites merely linked to, or actually hosted, the films. The accused was convicted following an agreement with the claimants and the prosecutor: Judgment of *Juzgado de lo Penal* (Criminal Court) No 2 of Vigo, 26 January 2010.

— *Ps2rip.net*. Criminal copyright case against a website linking to P2P downloads. The examining judge declined to dismiss the case and thus decided to go ahead with the procedure: Decision of *Juzgado de Instrucción* No 3 of Cerdanyola del Vallès, 7 March 2009. This decision was affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Barcelona, 3<sup>rd</sup> Section, 11 November 2009.

— *Cinetube.es*. Criminal copyright case against a website linking to P2P downloads. Case dismissed: Decision of *Juzgado de Instrucción* No 2 of Vitoria-Gasteiz, 21 October 2009.

— *Portalvcd/e-mule24horas*. Criminal copyright case against sites linking to P2P downloads. Case dismissed: Decision of *Juzgado de Instrucción* No 3 of Ponferrada, 31 October 2008. Dismissal affirmed on appeal: Decision 463/2009, *Audiencia Provincial* (Court of Appeals) of León, Secc. 3<sup>rd</sup>, 15 October 2009.

— *Infektor*. Criminal copyright case against a website linking to P2P downloads. The examining judge declined to dismiss the case and thus decided to go ahead with the procedure: Decision of *Juzgado de Instrucción* No 1 of Amurrio, 21 July 2009. That decision was affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Álava, 30 September 2009.

— *Elitedivx*. Criminal copyright case against a website linking to P2P downloads. Case dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 4 of Cartagena, 17 April 2008. Dismissal reversed on appeal, remanding the case to the examining judge: Decision of *Audiencia Provincial* (Court of Appeals) of Murcia, 5<sup>th</sup> Section, 16 September 2009.

— *Etmusica/Elitemula*. Criminal copyright case against websites linking to P2P downloads. Case dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 2 of Moguer, 13 July 2009. Dismissal affirmed on appeal: Decision of the *Audiencia Provincial* (Court of Appeals) of Huelva, 1<sup>st</sup> Section, 1 September 2010.

— *Infopsp*. Criminal copyright case against a website linking to P2P downloads. The accused was convicted after pleading guilty following an agreement with the claimants and the prosecutor: Judgment of *Juzgado de lo Penal* (Criminal Court) No 1 of Logroño, 25 November 2008.

— *Spanishshare*. Criminal copyright case against a website linking to P2P downloads. The examining judge dismissed the case: Decision of *Juzgado de Instrucción* No 4 of Madrid, 12 November 2008.

— *Tvmix*. Criminal copyright case against a website offering links to live streaming sporting events. Case dismissed by the examining judge: Decision of *Juzgado de Instrucción* No 13 of Madrid, 5 May 2008. Dismissal affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Madrid, 5<sup>th</sup> Section, 3 November 2008.

— *Todotorrente*. Criminal copyright case against a website linking to P2P downloads. The examining judge dismissed the case: Decision of *Juzgado de Primera Instancia e Instrucción* No 3 of Orihuela, 17 October 2008. Dismissal reversed on appeal: Decision 551/2010, *Audiencia Provincial* (Court of Appeals) of Alicante-Elche, 7<sup>th</sup> Section, 20 September 2010.

— *Sharemula*. Criminal copyright case against a website linking to P2P downloads. This is a seminal

case. The examining judge first denied the solicited preliminary measures: Decision of *Juzgado de Instrucción* No 4 of Madrid, 20 December of 2006. Decision affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Madrid, Section 2<sup>nd</sup> bis, 18 June 2008. After the first ruling, the examining judge dismissed the case: Decision of *Juzgado de Instrucción* No 4 of Madrid, 28 September 2007. Dismissal affirmed on appeal: Decision of *Audiencia Provincial* (Court of Appeals) of Madrid, 2<sup>nd</sup> Section, 11 September 2008.

— *Todocarátulas*. Criminal copyright case against a website linking to P2P downloads. The accused was acquitted: Judgment of *Juzgado de lo Penal* (Criminal Court) No 18 of Barcelona, 8 September 2005. Acquittal affirmed on appeal: Judgment of *Audiencia Provincial* (Court of Appeals) of Barcelona, 7<sup>th</sup> Section, 22 December 2005.

#### IV. Civil copyright cases against sites offering P2P download links

— *Indice-web*. Civil copyright case against a website linking to P2P downloads. The court denied the solicited preliminary measures: Decision 185/2009 of the Commercial Court (*Juzgado de lo Mercantil*) No 6 of Barcelona, 11 May 2009. The defendant was held not liable: Judgment 149/2010 of the Commercial Court (*Juzgado de lo Mercantil*) No 6 of Barcelona, 22 April 2010.

— *Elrincondejesus*. Civil copyright case against a website linking to P2P downloads. The court denied the solicited preliminary measures: Decision 138/2009 of the Commercial Court (*Juzgado de lo Mercantil*) No 7 of Barcelona, 2 July 2009. The defendant was held not liable: Judgment 67/2010 of the Commercial Court (*Juzgado de lo Mercantil*) No 7 of Barcelona, 9 March 2010.

— *Etmusica/Elitemula*. Civil copyright case against websites linking to P2P downloads. Initially, the court granted some preliminary measures, but eventually overruled them in Decision of the Commercial Court (*Juzgado de lo Mercantil*) of Huelva, 11 November 2009, and Decision of the Commercial Court (*Juzgado de lo Mercantil*) of Huelva, 13 November 2009.

— *Agujero.com*. Civil copyright case against a website linking to P2P downloads. Preliminary measures denied: Decision of the Commercial Court (*Juzgado de lo Mercantil*) No 3 of Barcelona, 6 May 2009.

#### V. Other cases

— *Digital+ v. Zackyfiles.com*. The website zackyfiles.com offered information about conditional access systems for pay-TV. One of the linked pages contain-

ed a key for getting unauthorized access. The webmaster was acquitted on the grounds of the information location tools safe harbour. Judgment 334/10 of the Criminal Court No 1 of Zaragoza, 20 October 2010.

— *Telecinco v. YouTube*. Civil copyright case. Telecinco, a TV company, sued YouTube and asked for a preliminary injunction to have its videos taken down from the service. The court granted the injunction *inaudita parte*, ordering the plaintiff to properly identify the infringing videos: Decision 320/2008, Commercial Court (*Juzgado de lo Mercantil*) No 7 of Madrid, 23 July 2008. Once the defendant presented its allegations against that ruling, the court confirmed the injunction, but required the plaintiff to provide the precise URLs or identification codes for the videos to be taken down: Decision 448/2008, Commercial Court (*Juzgado de lo Mercantil*) No 7 of Madrid, 21 November 2008. In its final judgment, the Court held Google not liable, as it was covered by the hosting safe harbour and met its requirements: Judgment 289/2010 of the Commercial Court (*Juzgado de lo Mercantil*) No 7 of Madrid, 20 September 2010.

— *V.D. Sistem v. Tus Profesionales*. Claim for damages and injunction against a hosting provider who hosted two sites which allegedly engaged in unfair competition. The lower court granted the injunction but held the provider not liable for damages. Judgment of the Commercial Court (*Juzgado de lo Mercantil*) No 4 of Madrid, 18 June 2007. This was affirmed on appeal, holding that the provider was protected by the hosting safe harbour as it lacked actual knowledge: Judgment 131/2009 of the *Audiencia Provincial* (Court of Appeals) of Madrid, 28<sup>th</sup> Section, 18 May 2010.

— *Megakini v. Google*. Civil copyright case. The owner of a website sued Google on account of the reproduction of snippets from his site under the main link on the search results page and on account of the making available of a “cached” copy of the site by means of a “cached” link. The lower court held Google not liable: Judgment of the Commercial Court (*Juzgado de lo Mercantil*) No 5 of Barcelona, 30 March 2007. The court of appeals held the defendant not liable but on different grounds, and stated that the caching safe harbour did not apply to Google’s cache: Judgment of the *Audiencia Provincial* (Court of Appeals) of Barcelona, 15<sup>th</sup> Section, 17 September 2008.

— *Emi v. Bitmailer*. Civil copyright case. Claimants requested an injunction against an access provider so that it ceased to provide the service to an infringing website. The court denied the injunction: Decision of the Commercial Court (*Juzgado de lo Mercantil*) No 2 of Madrid, 10 November 2004.

— *Ajoderse.com*. Criminal case against a website providing links to information about hacking encoded pay-per-view television transmissions. The case was dismissed on account of the linking safe

harbour: Decision of *Juzgado de Instrucción* No 9 of Barcelona, 7 March 2003.

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- 1 **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”),** *Official Journal L 178*, 17 July 2000.
- 2 See Arts. 12 through 14 of the **E-Commerce Directive**.
- 3 See Art. 15.1 of the **E-Commerce Directive**.
- 4 See, e.g., R. Julià-Barceló, *On-line Intermediary Liability Issues: Comparing E.U. and U.S. Legal Frameworks*, E.I.P.R., 2000 (3), pp. 105 – 119; see also M. Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 *COLUM. J.L. & ARTS* 481 (2009).
- 5 Title II of the DMCA amended Chapter 5 of Title 17 of the United States Code (U.S.C.), by adding a new Section 512 titled “Limitations on liability relating to material online”. See 17 U.S.C. § 512 (2000).
- 6 See 17 U.S.C. § 512(c)(3) (2000).
- 7 See European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: First Report on the application of 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), Brussels, 21 November 2003, COM(2003) 702 final (hereinafter First Report on the application of Directive 2000/31/EC), p. 6 et seq.
- 8 See the Judgment of the Court (Grand Chamber) of 23 March 2010 in Joined Cases C-236/08 to C-238/08 (*Google France*), which deals with the applicability of the hosting safe harbour of the E-Commerce Directive to an Internet referencing service provider.
- 9 Ley 34/2002, de 11 de Julio, de servicios de la sociedad de la información y de comercio electrónico (BOE 166, 12 July 2002, p. 25388).
- 10 See, e.g., E. Crabit, *La directive sur le commerce électronique. Le projet “Méditerranée”*, 4 *REVUE DU DROIT DE L’UNION EUROPÉENNE* 749 (2000), pp. 811 – 812.
- 11 See Commission Proposal for a Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, Commentary on Individual Articles, COM (1998)586 final (Nov. 18, 1998) (hereinafter Commentary on Proposal for E-Commerce Directive), p. 29: “The exemption from liability (both as regards civil and criminal liability) cannot be granted if a service provider knows that a user of his service is undertaking illegal activity (actual knowledge). The exemption from liability, as regards claims for damages, cannot be granted if the service provider is aware of facts and circumstances from which the illegal activity is apparent.”
- 12 See Art. 16.1.II LSSICE (unofficial translation).
- 13 See, e.g., J. Strachan, *The Internet of Tomorrow: The New-Old Communications Tool of Control* E.I.P.R., 2004, (3), p. 123 – 136.
- 14 The report does relate, though, to the fact that some Member States decided to provide for this limitation of liability, and it states that “[w]hilst it was not considered necessary to cover hyperlinks and search engines in the Directive, the Commission has encouraged Member States to further develop legal security for internet intermediaries. It is encouraging that recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the internet and e-commerce. Consequently, this case-law does not appear to give rise to any Internal Market concerns”. See *First Report on the application of Directive 2000/31/EC*, p. 13.
- 15 This is the case of the Austrian E-Commerce Gesetz that sets forth a safe harbour for search engines in § 14 (*Ausschluss der Verantwortlichkeit bei Suchmaschinen*), and a different one for links in § 17 (*Ausschluss der Verantwortlichkeit bei Links*). An English version of the E-Commerce Gesetz is available at [http://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_2001\\_1\\_152/ERV\\_2001\\_1\\_152.pdf](http://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_152/ERV_2001_1_152.pdf) (last visited 1 November 2010).
- 16 See the Annex to this article.
- 17 Preliminary ruling of the Commercial Court (*Juzgado de lo Mercantil*) No 2 of Madrid, 10 November 2004.
- 18 E-Commerce Directive, Recital 45.
- 19 E-Commerce Directive, Art. 12.3 (“mere conduit”), 13.2 (“caching”), 14.3 (hosting).
- 20 See, e.g., J. Massaguer, *La responsabilidad de los prestadores de servicios en línea por las infracciones al derecho de autor y los derechos conexos en el ámbito digital*, PE. I. *REVISTA DE PROPIEDAD INTELECTUAL*, 13 (2003) pp. 11– 48, (p. 36). See also J.J. Marín López, *La comercialización de la música a través de Internet y los derechos del productor de fonogramas: los casos “Weblisten” y “Bitmailer”*, *REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE GRANADA*, 8 (2005) pp. 363 – 386.
- 21 See 17 U.S.C. § 512(b) (2000).
- 22 See the Belgian case *Copiepresse SCRL v. Google Inc. (Tribunal de Première Instance de Bruxelles*, Feb. 13, 2007, No 06/10.928/C), where the court held that the ECD caching safe harbour does not apply to Google’s cache. As to the US, the DMCA caching safe harbour was applied in *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D.Nev. 2006). On this decision, see M. Peguera: *When the Cached Link is the Weakest Link: Search Engine Caches under the Digital Millennium Copyright Act*, 56 *J. COPYRIGHT SOC’Y U.S.A.* (2009) pp. 589 – 645, available at <http://ssrn.com/abstract=1135274> (arguing the court wrongly applied the DMCA safe harbour).
- 23 Judgment of the Commercial Court No 5 of Barcelona, 30 March 2007; *affirmed* on different grounds by the Judgment of the *Audiencia Provincial* (Court of Appeals) of Barcelona, Section 15<sup>th</sup>, 17 September 2008.
- 24 See Google Help Center, *Google Web Search Features: “Cached” links*, [http://www.google.com/intl/en/help/features\\_list.html#cached](http://www.google.com/intl/en/help/features_list.html#cached) (last visited 1 November 2010). The “Cached” links feature is also present in other main search engines, such as Yahoo! or Bing.
- 25 Judgment of the Commercial Court No 5 of Barcelona, 30 March 2007.
- 26 Royal Legislative Decree 1/1996, of 12 April, which enacts the *Texto Refundido de la Ley de Propiedad Intelectual* (TRLPI).
- 27 See Art. 5.1 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter “InfoSoc Directive”).
- 28 Judgment of the *Audiencia Provincial* (Court of Appeals) of Barcelona, Section 15<sup>th</sup>, 17 September 2008.
- 29 *Id.* F.J. 2.
- 30 For a detailed discussion on this topic, see M. Peguera: *When the Cached Link is the Weakest Link: Search Engine Caches under the Digital Millennium Copyright Act*, 56 *J. COPYRIGHT SOC’Y U.S.A.* (2009) pp. 589 – 645, available at <http://ssrn.com/abstract=1135274> (last visited 1 November 2010) (claiming that search engine caches fall outside the caching safe harbour set forth in the U.S. Digital Millennium Copyright Act).

- 31 On the applicability of Art. 5.1 of the InfoSoc Directive to Google's cache, see S. Klein, Search engines and copyright: An analysis of the Belgian Copiepresse decision in consideration of British and German copyright law, IIC 2008, 39(4), 451 – 483.
- 32 The relevant court documents of the case are available at <http://www.internautas.org/pagweb/11.html> (last visited 1 November 2010).
- 33 Actually, the name of the registrant that appeared in the WHOIS was *Realmente Cabreados con la SGAE* ("Really Upset with SGAE").
- 34 Decision available at <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0953.html> (last visited 28 July 2010).
- 35 Available at <http://www.internautas.org/html/836.html> (last visited 28 July 2010).
- 36 See [http://web.archive.org/web/\\*/http://putasgae.org](http://web.archive.org/web/*/http://putasgae.org) (last visited 28 July 2010).
- 37 See, e.g., <http://web.archive.org/web/20030528203547/antisgae.internautas.org/> (last visited 28 July 2010).
- 38 The full text of the complaint can be accessed at <http://www.internautas.org/archivos/demanda-sgae.pdf> (last visited 28 July 2010).
- 39 See the Decision of the Court of First Instance No 42 of Madrid, June 15, 2005 (Fifth legal ground). Available at [http://www.internautas.org/archivos/sentencia\\_sgae.pdf](http://www.internautas.org/archivos/sentencia_sgae.pdf) (last visited 28 July 2010).
- 40 See the first legal ground of the defendant's opposition to the complaint. The text of the opposition can be found at [http://www.internautas.org/archivos/oposicion\\_demanda.pdf](http://www.internautas.org/archivos/oposicion_demanda.pdf) (last visited 28 July 2010).
- 41 See the appeal at [http://www.internautas.org/archivos/interposicion\\_casacion.pdf](http://www.internautas.org/archivos/interposicion_casacion.pdf) (last visited 28 July 2010).
- 42 Judgment 773/2009 of the Supreme Court, Civil Chamber, 9 December 2009, available at <http://www.internautas.org/archivos/pdf/sentenciasupremoputasgae.pdf> (last visited 28 July 2010).
- 43 See Art. 14(1)(a) of the E-Commerce Directive.
- 44 Judgment number 316/2010, from the Civil Chamber of the Supreme Court, dated 18 May 2010; the text in Spanish is available at [http://responsabilidadinternet.wordpress.com/resol\\_jud/otras\\_materias/sts\\_18\\_05\\_2010\\_quejasonline](http://responsabilidadinternet.wordpress.com/resol_jud/otras_materias/sts_18_05_2010_quejasonline) (last visited 28 July 2010).
- 45 Judgment of the Court of First Instance No 23 of Valencia, 30 November 2006.
- 46 Judgment 403/2007 of the Audiencia Provincial (Court of Appeals) of Valencia, Section 6<sup>th</sup>, 29 June 2007.
- 47 Judgment 316/2010 of the Supreme Court (Civil Chamber), 18 May 2010.
- 48 *Viacom Intern. Inc. v. YouTube, Inc.* 2010 WL 2532404 (S.D.N.Y. June 23, 2010).
- 49 Judgment 289/2010 of the Commercial Court No 7 of Madrid, 20 September 2010.
- 50 See <http://dockets.justia.com/docket/new-york/nysdce/1:2007cv02103/302164/> (last visited 28 July 2010).
- 51 This paragraph is based on a previous article: Peguera, M. (2008): 'I Just Know That I (Actually) Know Nothing': Actual Knowledge and Other Problems in ISP Liability Case Law in Spain, E.I.P.R. 2008, 30(7), pp. 280 - 85
- 52 Decision of *Juzgado de Instrucción* No 9 of Barcelona, 7 March 2003.
- 53 Judgment 334/10 of the Criminal Court No 1 of Zaragoza, 20 October 2010.
- 54 Judgment of Court of First Instance No 19 of Madrid, 13 May 2009.
- 55 Judgment 95/2010, *Audiencia Provincial* (Court of Appeals) of Madrid, 9<sup>th</sup> Section, 19 February 2010.
- 56 Decision of *Audiencia Provincial* (Court of Appeals) of Madrid, Section 2<sup>nd</sup>, 11 September 2008, affirming the dismissal of the case decided by the examining judge (Decision of *Juzgado de Instrucción* No 4 of Madrid, 28 September 2007). The reasoning for the dismissal is to be found in a previous ruling where the examining judge rejected the preliminary measures requested (Decision of *Juzgado de Instrucción* No 4 of Madrid, 20 December of 2006). The rulings are available in Spanish at [http://responsabilidadinternet.wordpress.com/resol\\_jud/webs\\_enlace/](http://responsabilidadinternet.wordpress.com/resol_jud/webs_enlace/) (last visited 1 November 2010).
- 57 See Art. 20.1 TRLPI.
- 58 *Infosp*, Judgment of *Juzgado de lo Penal* (Criminal Court) No 1 of Logroño, 25 November 2008; *SimonFilms.tv*, Judgment of *Juzgado de lo Penal* (Criminal Court) No 2 of Vigo, 26 January 2010.
- 59 Decision 18/2010, *Audiencia Provincial* (Court of Appeals) of Valencia, 3<sup>rd</sup> Section, 8 January 2010.
- 60 Decision of *Juzgado de Primera Instancia e Instrucción* No 3 of Mislata, 17 May 2010.
- 61 Decision 630/2010, *Audiencia Provincial* (Court of Appeals) of Valencia, 3<sup>rd</sup> Section, 26 October 2010.
- 62 Decision of *Audiencia Provincial* (Court of Appeals) of Murcia, 5<sup>th</sup> Section, 16 September 2009.
- 63 Decision 551/2010, *Audiencia Provincial* (Court of Appeals) of Alicante-Elche, 7<sup>th</sup> Section, 20 September 2010.
- 64 While the Penal Code merely requires "lucrative intent", the interpretation favoured by the *Fiscalía General del Estado* is that this lucrative intent must occur on a commercial scale. See *Circular 1/2006 sobre los delitos contra la propiedad intelectual e industrial tras la reforma de la ley orgánica 15/2003*, available at [http://aui.es/IMG/pdf\\_CIRCULAR1-2006-FISCALIA.pdf](http://aui.es/IMG/pdf_CIRCULAR1-2006-FISCALIA.pdf) (last visited 28 July 2010).
- 65 See, e.g., Judgment 67/2010 of the Commercial Court (*Juzgado de lo Mercantil*) No 7 of Barcelona, 9 March 2010.
- 66 The new regulatory scheme is laid down in the Second Final Disposition of the Bill (*Disposición Final Segunda, Proyecto de Ley de Economía Sostenible*, BOCG, No 60, 9 April 2010), available at [http://www.congreso.es/public\\_oficiales/L9/CONG/BOCG/A/A\\_060-01.PDF#page=55](http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_060-01.PDF#page=55) (last visited 28 July 2010).
- 67 Art. 3.2 of the Directive 2000/31/EC. See also Recital (22) of this Directive.
- 68 See Art. 3.4(a)(i) of the E-Commerce Directive.
- 69 See Art. 3.4(a)(ii)-(iii) of the E-Commerce Directive.
- 70 It must be noted in Spanish national law, "intellectual property" means exclusively copyright and neighbouring rights. This expression does not include trademarks and patents, which are normally referred to as "industrial property".
- 71 Most of the rulings are available in Spanish at the author's blog [http://responsabilidadinternet.wordpress.com/resol\\_jud/](http://responsabilidadinternet.wordpress.com/resol_jud/) (last visited 1 November 2010). Many of them are also commented there.