

Pablo A. Palazzi (ed.), *La Responsabilidad Civil de los Intermediarios en Internet*

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Book Review

by **Miquel Peguera**, Barcelona

Ph.D., Associate Professor of Law at the Universitat Oberta de Catalunya, Barcelona, Spain.

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- 1 While a lot has been written about ISP liability in the last decade, it still proves to be a hot topic and one worth of ever more reflection and debate. If this is the case in jurisdictions where special statutes have been enacted, it is all the more so in countries lacking such rules. Hence scholarly initiatives such as the workshop held on this subject at the Universidad de San Andrés (Argentina) in May 2010 are certainly welcome. A result of that workshop is this book, published in March 2012. It contains 18 chapters from a total of 19 authors and has been compiled by one of the authors, the Argentinean legal scholar and lawyer Pablo A. Palazzi.
- 2 The book is structured in to parts. The first one, which accounts for roughly two thirds of the book, deals with the liability related to violations of personal rights – particularly privacy, the right to honor, and the right to one’s own image. The second part is devoted to liability arising from infringements of intellectual property rights. The book discusses not only the Argentinean legal framework and case law, but also takes into account, in a comparative approach, the situation in the U.S. and in the EU. It considers, in particular, the framework resulting from both Section 230 of the CDA and Section 512 of the DMCA in the U.S., and the liability limitations set forth in the European Directive on Electronic Commerce (ECD). Its more general title notwithstanding, the book focuses predominantly on search engines.
- 3 From the perspective of a foreigner, this book is a good opportunity to learn about the state of the debate on this topic in Argentina and how its case law has developed so far. While, as noted, specific rules covering the liability of Internet intermediaries have not yet been passed in that country, a fair amount of lawsuits concerning search engine liability have been brought in the last years. In this regard, the case of Argentina provides an interesting perspective on whether, and to what extent, a particular set of rules is needed to deal with these issues. In fact, most of the contributors of this book favor the adoption of such rules for the sake of legal certainty.
- 4 The eighteen chapters in which the book is divided are of different degrees of analysis. In this respect, the book is not homogeneous. Some contributions explore the issues more deeply than others. In particular, the illustration of the foreign laws turns out to be too vague in some occasions. In other cases, however, an in-depth examination of the foreign legislation and case law is provided. Furthermore, being independent contributions, the reader finds obvious overlap in some areas. In this regard, a future edition of the book would benefit from avoiding some repe-

titions. In particular, rather lengthy explanations about well-known aspects of how the internet functions, which can be found in some chapters, do not appear to add much to the comprehension of the issues presented. Moreover, also on the somehow negative side, the contents of the book, as frequently it occurs in printed books with several contributors, is not as up to date as the reader would expect – the latest case law developments considered do not seem to go beyond the last months of 2010 or the beginning of 2011. It must be said, though, that this certainly does not diminish the value of most of the analysis, albeit the inclusion of some of the latest developments – such as the case involving the linking website Taringa.net – would have enriched the text.

- 5 A general issue the book deals with is that of the rules governing intermediaries' liability. In the absence of a system of safe harbors such as that established by the ECD, the liability of intermediaries, particularly in the field of the violation of personal rights, hinges on the general tort law rules found in the Argentinean Civil Code. One of the questions arising here is whether or not intermediaries' activities could be regarded as "risky" in and of themselves, as this would trigger the regime of strict liability for the resulting harms. Such an approach was taken into account in the well-known case *Jujuy.com*, where the owners of the website were held liable for defamatory third-party postings. While the court actually found the defendants failed to react diligently upon notification of the unlawful contents, it seemed to support as well the theory of the risk inherent to the activity carried out by the defendants as a source of liability.
- 6 Contributors to the book generally deny the characterization of internet services as *per se* risky, and hold that intermediaries' liability must instead be judged according to the standards of fault-based liability. Therefore, some kind of fault in the part of the intermediary must be found for liability to arise, which I think is consistent with the European approach. Indeed, while the ECD has not harmonized the underlying rules of tort liability, intermediaries can only be held liable when they fail to comply with the requirements established to benefit from the safe harbors. It is worth noting, though, that the frequent references made in the book to the ECD safe harbors scheme do not always grasp the fundamental idea that the safe harbor provisions do not in themselves impose liability on those who fail to comply with their requirements; rather, they only provide liability limitations. The actual attribution of liability will depend on the material law governing the particular field considered, be it general tort law, defamation, privacy, copyright or any other area of the law.
- 7 Among the authors who consider the issue of fault-based liability, there are different opinions regarding what can be deemed fault or negligence, or

what is the reach of intermediaries' duties of care, particularly those of search engines. Some authors advance the position that a search engine provider must exercise some type of *ex ante* control so as to avoid certain unlawful results to show up in the first place, and that failing to do so would amount to negligence. Others take the stance that search engines can only be obliged to remove the links to the unlawful websites after being notified of the illicit character of the linked content. Within this group of authors, many consider that a sound notice provided by the aggrieved person would be enough to trigger the obligation to disable the link, while some others think that in order to enhance legal certainty and to protect freedom of expression, only a judge could impose such an obligation. Moreover, it is hotly discussed whether a search engine can be put under the obligation of preventing future instances of search results pointing to unlawful content, as this would entail a general duty of monitoring and an almost impossible task of assessing the legality of the linked content.

- 8 The bulk of cases dealing with search engines' liability in Argentina are the so-called "celebrities' cases". Most of them follow a similar pattern: famous persons, in many cases top models or actresses, find that when typing their name in Google or Yahoo, the search results include links to pages with sexual content that use their names or images without their authorization. In addition, the search engines use unauthorized images of these persons as thumbnails in their image search feature. The complaints against the search engines include claims for both moral and material damages. They also seek injunctions so that the search engines are ordered to remove the links and thumbnails, and to ensure that the plaintiff's name is not linked to any webpage of that kind in the future.
- 9 In most of these cases, the courts have ordered injunctions as precautionary measures against the search engines. However, the injunctions imposed are extremely broad, and thus rightly criticized by many of the contributors to this book. Interestingly, in at least two of the cases a final decision has already been handed down in the lower courts. The cases are *Da Cunha v. Yahoo de Argentina SRL et al.*¹ and *Rodríguez v. Google Inc. et al.*² In both cases the search engines were held liable and enjoined in very broad and vague terms. Nonetheless, the *Da Cunha* ruling was later reversed on appeal.³ Overbroad injunctions and heavy burdens of control imposed on search engines are problematic indeed. It is stressed by many authors in the book that search engine operators should not be forced to act as judges determining the legality of the content they index as this would amount to some sort of private censorship.
- 10 Thinking of our legal framework in Europe, it could be submitted that while in some other intermedi-

ary activities European law can be seen as better suited in terms of legal certainty thanks to the ECD safe harbors, this is certainly not the case regarding search engines. The Directive does not set forth a liability limitation for the provision of links and the operation of information location tools – albeit a few Member States have chosen to do so. In fact, even the most cited Art. 15 of the ECD, which prevents Member States from imposing general obligations to monitor, does not directly apply to search engines as it explicitly relates only to the mere conduit, proxy caching and hosting activities. The lack of safe harbor for search engines has led some courts to apply an arguably flawed overreaching interpretation of the hosting safe harbor, as in the appeal court ruling in the French case *SAIF v. Google*⁴. All this begs the question of whether the ECD should be amended to include a specific safe harbor for links and information location tools, which could also address the uncertainties regarding the search engines' use of thumbnails, the initial copying for indexing purposes, or the making available of cached copies.

- 11 The last third of the book is devoted to intellectual property. This part includes some contributions by non-Argentinean authors. One of them is an article by the Spanish professor Juan José Marín López, who comments on two French rulings as regards to the liability of online auction platforms for trademark infringement. This part also includes two articles written by the German lawyer Stephan Ott, who is well known for his research site linksandlaw.com, a rich source of resources about legal aspects of search engines, linking and framing. He provides a comparison of search engines' liability in Germany and the United States, and an analysis of German case law on the issue of search engines' thumbnails.
- 12 The rest of this part covers several issues regarding copyright and trademark infringements. In particular, the question of the unauthorized use of trademarked words as keywords for triggering sponsored links is analyzed, and a good overview of the U.S. and EU cases in this field is presented. With regard to this particular topic, maybe the book could have taken a more open view in order to find some room for acceptable instances of such uses by advertisers. Not every user who types a trademarked word into a search engine can be presumed to be actually looking for products or services of that brand. As it has been soundly argued, there is – at least to some extent – an objective opaqueness of the searcher's goals when she uses a trademark as a search query.⁵ Moreover, taking advantage of some positive externalities of trademarks should not immediately be characterized as unfair competition.

- 13 There are many other questions raised by this book which cannot be covered in this brief review. All in all it is indeed an interesting and stimulating read, digging into a complex field, which is still far from settled and deserves careful attention. ■

- 1 Da Cunha, Virginia c. Yahoo de Argentina SRL et al., Juzgado Nacional de Primera Instancia en lo Civil N° 75, 29 July, 2009.
- 2 Rodríguez, María Belén c. Google Inc. et al., Juzgado Nacional de Primera Instancia en lo Civil No 95, 4 March, 2010.
- 3 Cámara Nacional de la Apelaciones en lo Civil, Sala "D", 10 de Agosto de 2010 (Expte. N° 99.620/2006 "Da Cunha Virginia c/ Yahoo de Argentina SRL y otro s/ Daños y Perjuicios" Recurso N°541.482. Juzgado N° 75).
- 4 Cour d'Appel de Paris, Pôle 5 – Chambre 1, Judgment of 26 January 2011. Available at <http://www.juriscom.net/documents/caparis20110126.pdf>. Accessed 26 August 2012.
- 5 See E. Goldman (2005), *Deregulating Relevancy in Internet Trademark Law*, 54 *Emory L.J.* 507.

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