

When are website operators liable for user comments?

30/06/2015

IP & IT analysis: Felicity McMahon, a barrister at 5RB, considers the decision of the Grand Chamber in the case of *Delfi AS v Estonia*, which dealt with issues of liability of a news portal for unlawful comments posted on its website.

Original news

Delfi AS v Estonia, Application no 64569/09

What is the background to this case?

Delfi is one of the largest internet news portals in Estonia, publishing articles on which it invites user comments. Comments below one article included comments defamatory of L. They were online for approximately six weeks, and removed when L complained. L brought an action against Delfi. The Estonian court found Delfi liable and ordered it to pay L EUR 320. Delfi, it said, was not exempt from liability under the E-Commerce Directive 2000/31/EC, and under domestic law was liable for either having failed to prevent the comments from being published or failing to remove what were obviously unlawful comments--the comments having included incitement to violence and hate speech. Delfi took the case to the European Court of Human Rights (ECtHR) which found no violation of the European Convention of Human Rights, art 10 (ECHR).

On what basis was this case referred to the Grand Chamber?

Delfi requested a referral of the ECtHR First Division's decision that there had been no breach of art 10. In February 2014 the case was referred to the Grand Chamber.

What did the Grand Chamber decide?

By 15-2, no breach of art 10. The court said that it was deciding the position in relation to manifestly unlawful speech on a large, commercial news portal which invited reader comments--not other types of websites (eg discussion forums or social media). It understood the Estonian court's decision to have been based on Delfi's failure to remove unlawful comments of which it should have been aware. The Grand Chamber took the interpretation of the law from the Estonian court and found the decision foreseeable and therefore prescribed by law. Delfi had a great deal of control over the comments, it had automatic filters and moderators--indeed a poster could not remove his or her own comment, only Delfi could do this. The low damages award was proportionate to the legitimate aim of protecting the reputation of others.

Does this ruling mean that website operators no longer benefit from the exemption under the E-Commerce Directive?

No. It is not the role of the ECtHR to interpret EU law. The court simply did not interfere with the Estonian court's decision that the E-Commerce Directive did not apply because Delfi's activities went beyond activities of a merely technical, automatic and passive nature. Whether a website operator's activities fall within the scope of the exemptions will be a question of fact in each case.

Would a UK court have dealt with liability in the same way as the Grand Chamber did?

There are a number of reasons why a UK court may approach liability of a website operator differently. The ECtHR has said that it is not a breach of ECHR, art 10 to impose liability, not that such liability must be imposed--although the state does have a duty to protect ECHR, art 8 rights.

For the ECtHR the extent of control Delfi had assumed over the comments was important. The Defamation Act 2013, s 5(12) (DA 2013) however makes clear that moderating will not remove the availability of that defence if the website

operator chooses to use it. Similarly the difficulty of ascertaining the identity of the posters of comments was a factor--DA 2013, s 5 seeks to provide a mechanism for doing so.

The leading judgment sought to confine the case to situations where the speech was extreme and obviously unlawful without the need for close analysis or legal advice--in many defamation cases this will not be the position.

Each case is likely to turn on its facts.

What does this ruling mean for website publishers and news organisations seeking to limit liability for third party content published on their websites?

While the decision may be worrying for the reasons set out in the dissenting judgment, the risk of website operators being found liable for user comments is not new. The E-Commerce Directive does not exempt a website from liability where it is aware of facts or circumstances from which it would have been apparent that the activity or information was unlawful. The idea that one might moderate 'too much' and lose the protection of the E-Commerce Directive prompted DA 2013, s 5(12). When deciding how to moderate comments--to not moderate at all, or to use sufficient moderation tools to remove unlawful content promptly--the considerations will remain the same.

Interviewed by Alex Heshmaty.

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