

## Gestevisión Telecinco SA v YouTube LLC

Judgment no.289/2010, Madrid Commercial Court no.7, 20 September 2010

A Spanish court dismissed copyright infringement claims brought against YouTube by Gestevisión Telecinco, a Spanish TV broadcaster, ruling that YouTube was merely providing 'intermediary services' and was thus not a content provider.

A Madrid court has dismissed copyright infringement claims brought against YouTube by Gestevisión Telecinco, a Spanish television content owner. If YouTube had been found to provide more than 'intermediary services', they might have been forced to pre-screen videos for infringement before they are uploaded. YouTube, Gestevisión Telecinco contended, acted as a content provider but adopted the artificial appearance of being an intermediary to avoid liability for the use of the infringing content on its site. Gestevisión Telecinco's first claim was that YouTube's 'Terms of Use' proved that YouTube commercially exploited the videos for its own benefit. This was because under the Terms of Use, YouTube requested a licence from its users for its own use. Therefore, it was claimed YouTube was showing the videos for its own benefit, not as an intermediary. The problem with this theory is that an entity such as YouTube might require such a licence even if it were 'an intermediary' merely providing a forum for users to upload their own videos to share. It was also claimed that another feature that proved the Claimant's theory was YouTube's editing of the videos uploaded onto the site. These videos are shown on a 'featured' video page on the homepage of the YouTube site. However, witnesses in support of YouTube's case provided evidence that such videos were not chosen so much as automatically picked after pre-defined parameters were been met. YouTube's witnesses claimed that it would be

impossible to edit the enormous number of videos uploaded onto the YouTube site. The Court also agreed with YouTube that a website showing potentially infringing videos on a web-page designed by an intermediary and distinguished by its trade mark in any way contradicted the nature of providing intermediary services. The fact that YouTube received compensation from providing this intermediary service did also not prevent it being an intermediary service. The Court referred to a recent judgment of the European Court of Justice which said that 'the mere fact that the referencing services remunerated, that Google establishes the forms of remuneration...cannot mean that Google is excluded from the exemption from liability provided by Directive 2000/31'. Whilst it appears that the Court has somewhat confused YouTube's standard copyright notice and take-down procedure with their VideoID procedure<sup>2</sup>, it is clear that the Court is aware that YouTube has a series of mechanisms in place that represent a 'system of detection, notification and verification' installed, and the Court notes that that system has been 'effective on each occasion on which Telecinco has requested the removal of contents from YouTube's website'. The Court concluded that Google's methods were not 'excuses or systems of camouflage', but systems that do what they set out to do. Article 14 of the E-Commerce Directive (ECD) provides the exemption for hosting services providers from liability provided that '(a) they had

no actual knowledge that the activity or the information...is illegal or it violates a third party right liable for indemnity and (b) if they do so, they act diligently to remove the data or prevent access to it'. The words 'actual knowledge' present a difficulty for Gestevisión Telecinco, as that knowledge would have to be derived from somewhere. Gestevisión Telecinco suggests that actual knowledge might be derived from a non-judicial 'competent body', but the Court held that mere suspicion would not be sufficient and that the co-operation of the injured party would be required. It follows that Gestevisión Telecinco must have informed YouTube of the rights that it owned and that such rights had been infringed. This precludes most monitoring or advanced supervision of the videos by YouTube. Therefore - because YouTube had established an effective means of removing infringing videos when a content owner had provided them actual knowledge - the Court concluded that YouTube did meet the requirements of the ECD. The Court concluded that, whilst YouTube's reliance on freedom of expression should have raised serious doubts, it had no hesitation in dismissing all of the claims.

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1. Cases C-236, 237 and 238/08, Google v Louis Vuitton Malletier SA.
2. Two different systems: the former deals with specific requests and the other is an automated system taking down pre-notified files automatically.

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