Liability of Online Platforms (host providers) and IP Rights Infringement

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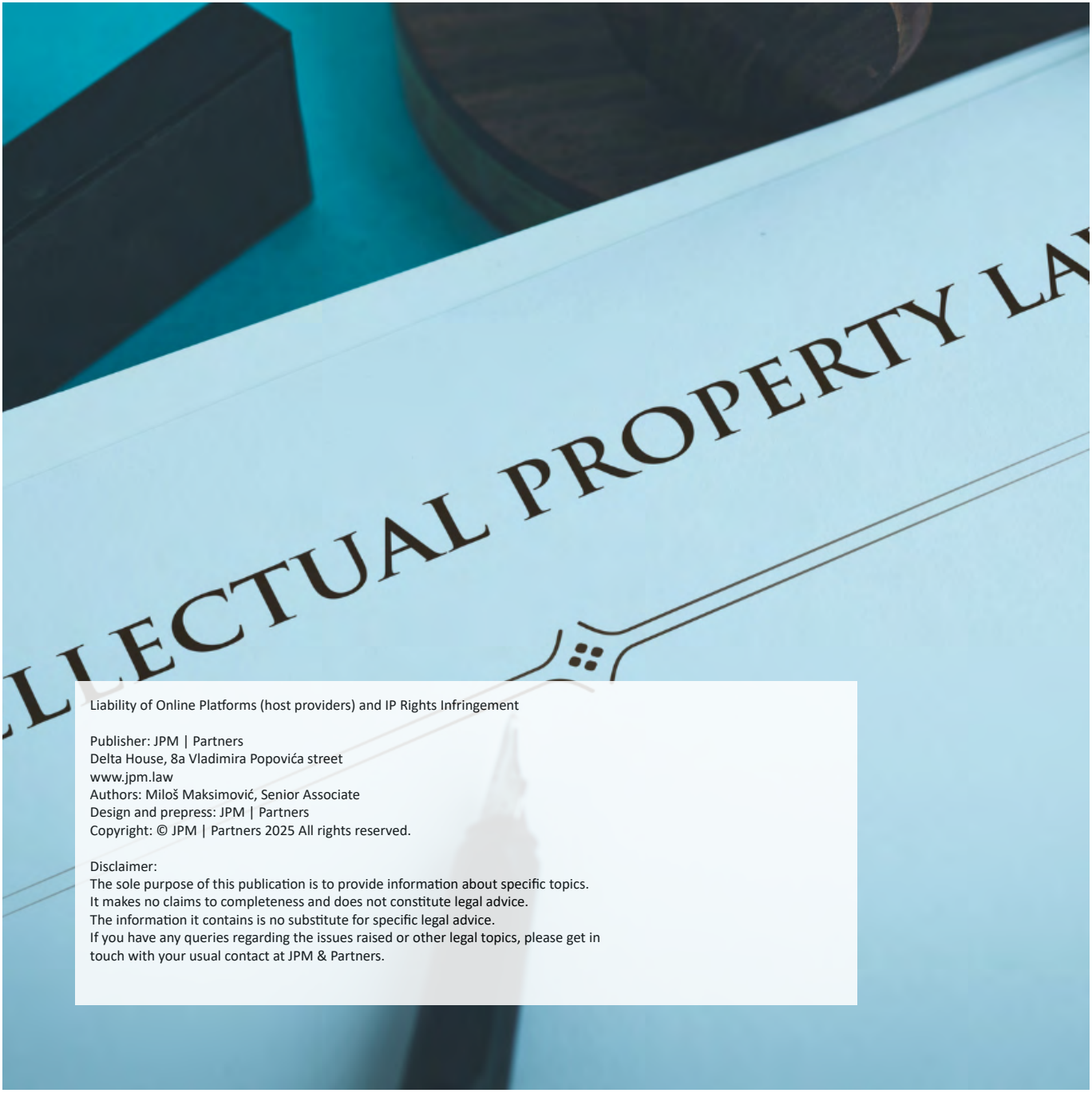

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Authors: Miloš Maksimović, Senior Associate
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Platform liability for third-party intellectual property (IP) infringement is an important legal issue both globally and in Serbia. In the EU, platforms are subject to the Digital Services Act (DSA), which outlines detailed rules regarding platform obligations, responsibilities, and liability. In Serbia, the legal framework is more fragmented, as there is no single regulation that systematically governs the area.

One of the aspects of concern relates to infringements of intellectual property rights, for example, when social media users post photos or other materials that violate copyright, trademarks, or related rights of third parties. Although platforms often assume they are neither responsible nor obliged to monitor such content, Serbian legislation does include provisions that may form a basis for their liability.

Content Provider and Host Provider – Different Approaches and Liabilities

Relevant provisions on liability (in addition to the general liability rules under the Law on Contracts and Torts) are found in the Law on Trademarks, the Law on Copyright and Related Rights, the E-Commerce Law, and the Law on Electronic Media.

In Serbia, the Law on Electronic Media introduces what can be understood as a 'content provider.' This usually refers to media service providers such as TV or radio broadcasters, who have editorial responsibility for selecting and organizing content. Because of this editorial control, they are liable for the published material regardless of whether it was produced by them directly or by a third party.

On the other hand, the role of a so called 'host provider' (though this term is not explicitly used in Serbian legislation), is closest to what the E-Commerce Law defines as an ICT service provider [1].

This category includes e-commerce platforms, online advertising services, search engines, and various online platforms. These operators act as host providers and, unlike media service providers, they do not bear editorial liability for the published content.

1 E-Commerce law defines it as a service provided remotely, for a fee through electronic data processing and storage equipment, at the user's request, and in particular internet trade, offering data and advertising via the internet, electronic search engines, as well as enabling the search for data and services transmitted over the electronic network, enabling network access or storing data of the user.

Host Providers and Limitation of Liability (safe harbour principle)

The distinction between a content provider and a host provider is legally crucial. Host providers (such as social media or video-sharing platforms) are not held to the same standard of liability as entities that create and distribute their own content (e.g., television broadcasters or traditional media). However, they remain subject to specific duties and conditions, and only by complying with these obligations can they limit or, in certain cases, exclude liability (so-called safe harbour principle).

Under the E-Commerce Law, a service provider (host provider) that transmits electronic messages submitted by users is not liable for the content or its delivery, provided it has not:

a) initiated the transmission;
b) selected the data or documents to be transferred;
c) altered or excluded any part of the message or documents;
d) chosen the recipient of the transmission

Temporary data storage

When it comes to temporary storage, the provider is not liable for automatic, intermediate, or short-term storage that merely serves to make the transmission of data more efficient, provided it:

a) does not alter the data;
b) respects the conditions of access to data;
c) follows the rules for data updating;
d) complies with permitted data collection technologies;
e) removes or disables access to data immediately after learning that it has been deleted from the network or access has otherwise been disabled, or upon receiving an order from a competent authority.

Permanent data storage

If the provider stores data at the user's request, it is not liable for the content of that data if it:

a) had no knowledge (and could not reasonably have had knowledge) of the user's illegal activity or the nature of the data;
b) removes or disables access to such data immediately after learning that it is illegal.

Third-party links

A provider that merely offers links to third-party (other service provider) content is not liable for that information if it:

a) had no knowledge (and could not reasonably have had knowledge) of the illegality of the data or activity;
b) removes or disables access to such data immediately after learning that it is illegal.

Monitoring and Other Obligations of Platforms

Host provider is generally not obliged to review or monitor the data it stores, transmits, or makes available. However, the provider must notify the competent authority if it reasonably suspects that:

a) a user is engaging in illegal activities; or
b) illegal information has been provided through its service.

Upon receiving a court or administrative order, the provider is required to hand over all data necessary for detecting or prosecuting criminal acts, or for protecting the rights of third parties, as well as in case of removal of content requested by the authority.

At the request of a third party (e.g. users), the provider will remove the content within the deadline set under the law, unless it reasonably believes that the content does not breach applicable law. In such cases, the provider may refer the matter to the competent authority for determination.

Therefore, their main duty is to act once they have been notified by a competent authority or users, or when unlawfulness becomes evident. To manage this, most platforms introduce internal rules, usually in the form of notice-and-take-down procedures set out in their terms and conditions. This is where legal expertise and business logic intersect so drafting these documents carefully is essential to reduce risks and securing compliance.

IP Rights Infringement

While Serbian IP laws (e.g., the Law on Copyright and Related Rights, the Law on Trademarks) provide the substantive rules for determining whether certain content infringes copyright, trademark, or other IP rights, the content removal mechanisms are primarily regulated by the E-Commerce Law and related regulations.

For example, whether photos posted on social media infringe third-party copyright must be assessed under the Copyright Law (originality of the work, degree of similarity, etc.), whereas the potential liability of the platform (host provider) depends on the E-Commerce Law mechanisms (e.g., whether the provider knew or should have known about the infringement, and whether it acted upon a user's report).

Since most online platforms are not equipped to assess potential IP infringements, this task is generally left to the competent authorities (typically courts). In Serbia, however, a formal notice-and-takedown procedure is not prescribed by law, but is instead left to the platforms' internal policies.

This gap creates uncertainty as to when a host provider may independently determine an infringement, when it must remove content, and when it should await a competent authority's decision.

For example, under the Serbian E-Commerce Law, a host provider is required to remove content within a prescribed deadline, unless it "reasonably believes that the content does not breach applicable law." In such cases, the host provider may refer the matter to the "competent authority for determination."

However, this raises at least a couple of questions:

Can the operator refuse to delete content based on its “reasonable belief,” and how should this standard be interpreted in practice?
Is the provider obliged to refer the matter to the competent authority, and which authority in particular (depending on the type of content), or does it have discretion to simply decide not to remove the content?
Is the platform liable

if it rejects the removal of content and it is afterwards determined to infringe rights?

This creates legal uncertainty, as host providers are not always certain about the exact steps they must take in order to exclude liability (e.g., removing the content without proper cause may unjustifiably restrict users’ freedom of expression, whereas not removing unlawful content may expose the provider to liability for damages or, in severe cases, even criminal liability). Therefore, establishing clear and transparent procedures, and consistently following them, is of particular importance, as it ensures compliance and provides predictability for platform conduct.

As for liability for damages, the general rules of the Serbian Law on Contracts and Torts apply. In practice, a platform’s liability would likely be assessed against the objective standard of care under tort law - whether the provider had sufficient evidence to evaluate a potential infringement, whether the reporting user submitted adequate documentation and information, and the specific circumstances under which the platform decided not to remove the content. Ultimately, however, the determination of liability and damages remain within the competence of the courts in litigation proceedings.

EU Regulations and Relevance for Serbia

Serbian regulations share the same intent as the EU Digital Services Act (DSA), but lack specific mechanisms for addressing third-party IP infringements. Intellectual property laws in Serbia (trademark, copyright, etc.) contain only general provisions on intermediary liability, leaving the scope of platform responsibility largely open to interpretation. In practice, this creates legal uncertainty for both domestic and foreign platforms operating in Serbia.

On the other hand, the DSA introduces a structured system distinguishing between platforms by size and type of service. It obliges platforms to establish effective procedures for handling illegal content, including IP infringements. Very Large Online Platforms (VLOPs) are subject to stricter requirements, such as mandatory risk assessments and systemic risk mitigation measures that extend to IP rights.

Although Serbia, as a non-EU member, is not bound by the DSA, the regulation still indirectly shapes the Serbian market.

Major multinational platforms are already subject to EU rules, and Serbian users are affected through the global policies these platforms adopt to remain compliant in EU. For now, this reduces the pressure on Serbia to legislate in this area. However, the adoption of a uniform domestic framework could provide two key benefits:

i) better legal certainty for platforms and users, and
ii) a more predictable environment that could improve the development of domestic platforms.

Author

Milos Maksimović

Senior Associate

E: milos.maksimovic@jpm.law

JPM | PARTNERS
8a Vladimira Popovića,
Delta House
11070 Belgrade, Serbia
T:+ 381/11/207-6850
E: office@jpm.law

www.jpm.law