SPIRIT LEGAL®

Lose *Control*

The end of the platform privilege as we know it

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» It is difficult to make predictions, especially about the future.

Niels Bohr, 1940

» For 25 years, people were under the impression that the E-Commerce Directive and later the Digital Services Act would shield platforms from direct liability for the content they were promoting. “We are just neutral hosts” was seen as a sufficient defense against claims under trademark, copyright, and data protection laws.

We were wrong.

Seven months in Luxembourg

A judicial triptychon

December 2025

Russmedia Digital (C-492/23, Grand Chamber)

Fake sex worker ad posted on an online platform

June 2026

Coyote / WebGroup (C-188/24 & C-190/24, Grand Chamber)

Radar speed control warning App

Unrestricted access to porn websites (xvideos, BangBros, Private, Penthouse)

July 2026

AGCOM v. Google (C-421/24, 2. Chamber)

Illegal gambling ad videos on YouTube

How it's done

Platform privilege edition

Done!

- *Russmedia*
  - Data protection and private life are carved out from the ECD.

Done!

- *Coyote / WebGroup*
  - Control or knowledge kills the neutral role.

Done!

- *AGCOM v. Google*
  - RevShare agreements equal knowledge, killing the neutral role.

Dernière Danse

The least successful lobbying campaign in the history of the EU

Russmedia's core message:

The fundamental right to Data Protection and Private Life cannot be reconciled with an unconditional liability exemption for hosting illegal content.

- Art. 1.5.b ECD: Carve-out for the DP Directive
- Art. 2.4.g DSA & Recital 18: Same carve-out for GDPR
- The sleeping carve-out now awakens

No white flag

Cluj-Napoca wins the hearts of Luxembourg

- The Grand Chamber‘s course on GDPR:
- Joint Controllership:
  - Joint Controllership: A commercial platform that sets its own commercial T&Cs and structures or monetises ads is a joint controller alongside the user.
- The Carve-Out: As a controller, you cannot invoke the hosting safe harbor to escape GDPR obligations
- GDPR requires setting up a risk management system (RMS)
  - Ex-Ante Verification Duty (Art. 5.2, 24, 25 & 32 GDPR):
  - At least for sensitive data (Art. 9 GDPR), platforms must perform prior identity verification and consent checks before publication
  - Platforms must deploy TOMs against the copying and dissemination of sensitive data.

Master of Puppets

Coyote, WebGroup and the Question of who's in control

- What if a claimant sues under general tort, IP, or unfair competition law instead of the GDPR? Does the safe harbor survive there?
- The Grand Chamber's Literal Reading of Recital 42 ECD / Recital 18 DSA: Safe harbor requires "neither knowledge of nor control over" the stored information.
- What Triggers "Control" & Kills Neutrality?
  - Exploiting user content for the platform's own commercial purposes, e.g. via broad T&C licences.
  - Algorithmic sorting, indexing, ranking, recommending, and visual layout designed to maximise engagement and revenue.
- Result: If you pull the algorithmic strings, you are an active provider in control, with no Art. 14 ECD / Art. 6 DSA privilege.

Money, money, money

In for a penny, in for a pound

- Why mainstream social media and video platforms are caught: YouTube isn't just a niche marketplace (Russmedia) or an adult or driver-alert platform (WebGroup / Coyote).
- Ad-revenue sharing + algorithmic curation + commercial T&Cs = the business model of every major Web 2.0 platform
- The New World Order:
  - Option A: Let It Go, become a passive cloud drive (no algorithmic feed, no commercial exploitation) and keep Art. 6 DSA.
  - Option B: Keep the Money, Money, Money (algorithmic engagement + ad monetisation), but lose the safe harbor & assume full ex-ante controller/publisher responsibility.

Everything Counts

In large amounts: Finanzfluss v. Meta

- The Case: Finanzfluss v. Meta (LG Frankfurt, 16 Sept 2026, 2-06 O 234/25):
  - Hundreds of scam ads & fake profiles on Facebook/Instagram hijacked the Finanzfluss brand and founder Thomas Kehl's likeness to funnel users into WhatsApp investment fraud
  - Meta's reporting tool failed (takedowns took up to 62 days while Meta pocketed the ad spend)
- First Application of the CJEU Triptychon:
  - No Art. 6 DSA Privilege: Algorithmic ad-targeting, ranking, and monetisation = active control over content distribution (Coyote / WebGroup applied)
  - Full Direct Liability: Meta was ordered to proactively prevent equivalent fake ads, disclose all scam-ad revenues, and pay damages for trademark and personality rights violations

Somewhere only we know

Oh, simple thing, where have you gone

- The cosy old world of Notice & Takedown is mostly dead
- Takeaways for your practice:
  - Programmatic AdTech (SSPs, DSPs, Exchanges): Real-Time Bidding (RTB) is 100% Coyote control + Russmedia + TCF joint controllership.
  - E-Commerce Marketplaces: Margin/sponsored ranking (Buy Box) = direct liability for unlawful offers
  - 20 Days From Today (9 Dec 2026): Transposition deadline of Product Liability Directive (EU 2024/2853), software & recommender systems are "products"; strict liability for defective design without a safe harbor shield
- *Cuius est commodum, eius est periculum*

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