

European Intermediary Liability in Historical Perspective

Limited Liability for the Net?

The future of Europe's E-Commerce Directive

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Overview

Regulatory Subject Matter

The European Framework

Key Issues

Intermediary Liability – Notice and Takedown/Action

Key ingredient in the design of the regulatory frameworks for addressing illegal/infringing/unlawful conduct information/conduct communications;

Examples of intermediaries: broadband providers, hosting providers, cloud providers (IaaS, PaaS, SaaS), online market platforms (eBay), social media platforms (Twitter), search engines (Google), live streaming (Periscope)

Relevant illegal and harmful conduct: copyright (123movies), trademark violations (eBay), privacy/reputation (Google search), hate speech (Twitter);

Rationales underlying intermediary liability regimes: Legal certainty / stimulation of eCommerce / EU internal market / incentivizing private ordering / Freedom of Expression and balance with other fundamental interests / cyber-exceptionalism;

Outcome: safe harbors, horizontal/vertical with conditions depending on intermediary activity plus promotion of self-regulation by intermediaries within established legal boundaries; Limitation of injunctive relief; Notice and Takedown;

Legal Sources: WIPO 1996; 1998 US DMCA; 1996 US CDA; 2000 EU Ecommerce Directive;

European Response

- ECOMDIR 2000: Access and hosting activities of online service providers get horizontal conditional safe harbors;
- Safe Harbors provide a harmonized liability shield, they do not create liability, they only limit it;
- Horizontal: applicable across types of illegal/unlawful concern, including criminal;
- Conditional: knowledge/ awareness / no initiative;
- Roughly modeled along lines of US DMCA Safe Harbors adopted in 1998, but less detailed
 - no safe harbor for search engines at EU level (information location tools in US DMCA);
 - Limiting liability (without reference to monetary relief);
 - leaving space for all types of possible injunctions, including prohibitory;

Article 14 - Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15 No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

Key Issues

- Notice and takedown requirements at national & EU level;
- Uncertain status information location tools;
- Uncertainty about the scope of hosting provision
- Passivity paradox;
- Interaction with flanking legal frameworks on copyright enforcement, telecommunications, data protection;
- Right to be Forgotten;
- Space for different types of injunctions;
- Interpretation Article 15 ECD ban on obligation to general monitoring;
- Environment has matured, diversified and become more complex;
- Interpretation in light of EU Charter (balancing acts!);
- Privatized enforcement due process & effective enjoyment fundamental rights.