

Limited liability for the net?

The Future of Europe's E-Commerce Directive

William Echikson

It has been one of the most successful pieces of European regulation. Back in 2000, just as the internet was going mainstream, Europe enacted the E-Commerce Directive, setting clear limits on liability for digital platforms. Platforms weren't held responsible for illegal material uploaded to their sites. Instead, they were responsible only for bringing down illegal material when informed.

Without this legal safe harbour, many of the internet's success stories would never have gotten off the ground. Imagine if YouTube was held responsible for every upload, Blogger for every blogpost and TripAdvisor for each restaurant or hotel review? Such user-generated content would have been too dangerous to publish.

This protection is key for service platforms, too. Should EBay, for example, be held responsible for preventing counterfeits among the billions of products its merchants sell? What if Airbnb became responsible for the conduct of its hosts and its guests, or Uber for its drivers and riders? Instead of taking off, once they encountered an escalating amount of potential liability, these upstarts would have faced a crash landing.

Today, however, the cherished E-Commerce free ride is under attack. Governments, courts and public opinion are demanding that internet firms police and prevent illegal material from being posted on their platforms. Copyright owners believe the internet feeds piracy. Police and intelligence services think the net feeds extremist terrorism and want access to data from suspects. Politicians fear that false news could tarnish elections, even force them from power.

It's easy to understand the crackdown. The internet has grown up. YouTube, Facebook and other digital content platforms are big and powerful, not just hosting content, but shaping how

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we perceive it in their ‘preferred channels’ and ‘news feed’. Airbnb offers more rooms than any hotel chain. Uber works with more drivers than any single taxi company. These economic powerhouses no longer are like a post office, delivering a letter. In many cases, they also are shaping the content of the letter – and accordingly must take on additional responsibilities.

The technology is advancing. Google developed intricate algorithms to proactively block child porn. Although the internet search giant argues that child porn represents an exception – it is recognised as illegal everywhere – there’s no reason why Google cannot write algorithms to police other types of bad behaviour. Another Google invention called Content ID allows rights holders to tag their content and Google’s YouTube then blocks uploads of such copyrighted video. Artificial Intelligence will increase the possibilities of proactive platform monitoring.

Although pressure is mounting on the American version of the E-Commerce Directive – section 230 of the 1996 Communications Decency Act – the real push for change is coming from Europe, which has no First Amendment and bans certain types of speech. In 2014, the Court of Justice of the European Union ruled in favour of a “right to be forgotten”, allowing Europeans to force Google to stop linking to information about themselves that is “inadequate, irrelevant or excessive”.

Since then, European officials have been chipping away at the E-Commerce Directive’s foundations. On March 15th, Germany proposed a bill requiring platforms to block hate speech and fake news from getting online – or face big fines. The European Commission’s recent copyright proposal calls for platforms to take preventive measures against pirated materials. European officials similarly demanded that YouTube and other platforms rid themselves of extremist propaganda and fake news.

So far, most action still consists of self-regulation. The European Commission has pushed platforms into signing up to a ‘voluntary’ codes of conduct which commits them to actively and swiftly remove counterfeit products and illegal hate speech such as racial abuse. These codes, at least in principle, respect the E-Commerce Directive, only reinforcing the second section which requires quick takedowns.

Pressure looks set to mount in the coming months – with the Commission forcing platforms to be more “transparent” about their rankings and actions and to institute redress mechanisms for online merchants or restaurant owners who dislike self-posted customer reviews. New legislation to speed up notice and takedown is probable.

All these actions will attempt to force today’s internet giants to take additional responsibility for what takes place on their platforms. This is reasonable. E-Commerce sites want to reassure customers that they do not sell counterfeit products. Google and Facebook are empowering readers to flag hate speech and working with fact-checking sites to verify news.

A grown-up internet no longer deserves a liability free pass. The unanswered question remains just how far to compel such proactive action. Many of the justifications for the original safe harbour remain valid: to promote free speech and to foster innovation. Kill the E-Commerce Directive and you may kill the magical power of all of us to reach a global audience with a few keystrokes. Kill the E-Commerce Directive and today's internet giants have the resources to cope. But what about tomorrow's giants? They would never escape the liability threat. If for this reason only, regulators should proceed with care