Liability of intermediaries: an intermediate liability?

*The CJEU case-law and beyond*

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Online Platforms and Intermediaries in Copyright Law
Munich– 23/24 March 2017

LMU – GRUR conference
Or shall we speak of *platform liability*?

- [https://vimeo.com/132076290](https://vimeo.com/132076290)
The wrong word?

• “Platform regulation is not a useful phrase”

• “In the end, we are all platforms in some form or another.”

Theo Bertram, Google’s European public policy manager
 Platforms enable:

- consumers to find content, goods or services
- businesses to exploit e-commerce

 Platforms include:

- Search engines
- Social media
- E-commerce platforms
- App stores
- Price comparison websites
- Mobility, accommodation, tourism, recruitment, etc.= sharing economy services
Outline: from the liability of intermediaries to an intermediate liability

• Introduction
• I. The EU legal framework: *how to balance the interests of rightholders, ISPs and users*
• II. The CJEU (and European Court of HR) case-law: *how to balance fundamental rights*
  – The targeting requirement
  – The foreseeability and proportionality of the law
• III. Towards an intermediate liability made by CJEU?
  – Erosion of distinction between direct and indirect liability
• Conclusions:
  – Between intermediaries and platforms, liability and responsibility, liability and self-/co-regulation
I. THE EU LEGAL FRAMEWORK: HOW TO BALANCE THE INTERESTS OF RIGHTHOLDERS, ISPS AND USERS?
Balancing between the stakeholders

Intermediaries/ISPs

Fairness in balancing

(IP) Rights Holders

Users
The EU legal framework

Users

Directive 2009/140/EC (art. 1(3)a) = Telecom package

Directive 95/46/EC = Privacy Dir.

Internet freedom
Privacy

ISPs

Directive 2000/31/EC = eCommerce Dir. (art. 12 ff)

No monitoring
Reactive

(IP) Right Holders

Directive 2001/29/EC = Infosoc Dir. (art. 8(3))


Protection of rights
Enforcement
User freedom to access Internet: Art. 1(3)a Telecom Package

The end-user Internet access may be subject to measures if:

- Respect the fundamental rights and freedoms of natural persons
- Are appropriate, proportionate and necessary within a democratic society
- Procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms
- Right to effective judicial protection and due process
- Respect for the principle of the presumption of innocence and the right to privacy
- A prior, fair and impartial procedure shall be guaranteed
- The right to effective and timely judicial review shall be guaranteed
Copyright injunctions against intermediaries

• Art. 8(3) of 2001/29 Directive:
  « Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. »

• Injunctive liability (J. Riordan)? Rather: independent from liability
  – Compatible with liability exemptions of eCommerce Dir.: as the exemptions/safe harbours do not cover actions for injunctions

• Based on a broad « duty to care »
Recital (59):

- “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities.

- In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, (...), rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network.

- This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. (= exceptions to copyright; thus independent from direct liability)

- The conditions and modalities relating to such injunctions should be left to the national law of the Member States.”
Four conditions for injunctions

• Art. 8(3) of the 2001/29 Dir.:
  « Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. »

– Intermediaries with services used by others
  • Covers access providers + providers of payment services + search engines (not covered by articles 12 to 14 e-Comm dir.)
  • It also covers off-line intermediaries: see CJEU Tommy Hilfinger, C-494/15 about landlord of market place
  • Defined by what they can: help to put an end to the infringement

– Whose services are used: covers future infringements
  • Thus allows to prevent infringements

– By a third party
  • Whether it is a direct or indirect infringer

– To infringe: with P2P sharing or illegal downloading…
Two ways?

Risk of blocking a site

Risk of disconnecting a user

- User
- ISP
- Infringing site
  - Blocking
  - Filters
- Infringing user
  - Blocking
  - Suspension
- ISP
- Internet
II. THE CJEU AND ECtHR CASE LAW ON INTERMEDIARIES: HOW TO BALANCE FUNDAMENTAL RIGHTS
Outer limit and conditions for injunctions against intermediaries by the CJEU

• Definition of the “outer limit”: beyond no possibility to get injunction
  – Access provider: CJEU, 24 Nov. 2011, C-70/10 (Scarlet v. SABAM)
    • Hosting provider: CJEU, 16 Febr. 2012, C-560/10 (Netlog v. SABAM)
• Clarification of the conditions for ordering injunctions:
  – Access provider: CJEU, 27 March 2014, C-314/12 (UPC Telekabel Wien)
Preliminary question in Scarlet

• “Do Directives (...) in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms,

• permit Member States to authorise a national court, (...) to order an Internet Service Provider (ISP) to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files …,

• and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?“
No broad filtering obligation for access providers (*Scarlet*)

- The question for the CJEU related to:
  - a system for filtering all electronic communications
    - both incoming and outgoing
  - for all its customers
  - *in abstracto*
  - as a preventive measure
  - exclusively at the cost of that ISP
  - for an unlimited period
  - to block the transfer of such files
- CJEU decision: no broad filtering obligations
Scarlet: limit = proportionality principle

- Proportionality principle of general EU law
- Also incorporated in secondary law:
  - The CJEU relies on the argument that civil remedies according Enforcement Directive should be “fair and proportionate” and “must not be excessively costly” (§ 36)
- The CJEU refers to the need to balance the protection of property (art. 17 Charter) against other fundamental rights
  - E.g. privacy (Art. 7 & 8 EU Charter of Fundamental Rights)
    - Incidentally, the CJEU states: “IP addresses (...) are protected as personal data” (§ 51)
- The CJEU refers to the need to protect the freedom to conduct a business (art. 16 of the Charter)
- A broad injunction could undermine freedom of information (part of freedom of expression, art. 11 Charter)
UPC Telekabel: facts

• Austrian anti-piracy group (VAP) requests the grant of an injunction ordering UPC to block access (DNS and IP blocking) to kino.to (Urheberrechtsgesetz, §87b)

• Injunction granted (= general prohibition of outcome without details about implementation) and confirmed in appeal

• Supreme Court asks Qs to the CJEU:
  – Is kino.to using the services of the access providers of persons seeking access to the content of such site in the sense of Article 8(3)?
  – Is the injunction (based on Art. 8(3)) compatible with EU law and fundamental rights?
Who uses the services of the access provider?

- “the person who makes protected subject-matter available to the public on a website without the agreement of the rightholder … is using the services of the internet service provider of the persons accessing” (§40) the protected item
  - But similarly the subscriber of the access service is also using

Fair balance between fundamental rights

- When (i) the injunction does not specify the measures to be taken by the access provider and (ii) the access provider can escape liability by proving it has taken reasonable measures
- Right of property (Art. 17(2)) v. freedom to conduct a business (art. 16) and freedom to receive information (art. 11)
- No absolute protection of property. But the measures “must be sufficiently effective to ensure genuine protection of the fundamental right” (§62)
UPC Telekabel

• Preventive aspect:
  – No need “to prove that the customers of an internet service provider actually access the protected subject-matter … without their agreement” (§38)

• Choice of the intermediary but must take into account the freedom to access information:
  – Thus the measures must be “strictly targeted”
  – New procedural requirement: “the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known” (§57)
  – Three ways to interpret? Austrian Supreme Court:
    • Special mechanism to add in the law
    • Subscriber contract → possibility to sue the ISP
    • General tort law
Sequence

1. Targeted injunction
   - By court
2. Implementing measure
   - By ISP
3. Right to oppose
   - By user
Proportionality of filtering measures

• Filtering tools for implementing the injunctions against intermediaries:
  – DNS (domain name system) blocking
  – IP (Internet Protocol address) blocking
  – Protocol/Port blocking
  – Content identification
  – Bandwidth shaping (Deep Packet Inspection)
    • Possible $\geq$ net neutrality requirements
• But: circumvention measures:
  – Proxy servers, VPN (virtual private networks), Tor, etc.
    • Look on YouTube…
The foreseeability of the law and the proportionality requirement by ECrHR

- ECrHR, *Ahmet Yildirim*, 18 Dec. 2012:
  - possible to block access to an insulting site, but no wholesale blocking to Google Sites (= free way to create webpages) which hosted Yildirim’s webpage
  - need for “*strict legal framework*”
  - must be “*foreseeable in its application if it is formulated with sufficient precision to enable individuals (...) to regulate their conduct*”
    - “*must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise*” (ECrHR, *Sanoma*, 14.9.2010, §82)
  - must be the “*less far-reaching measure*”
Liability of news portal (ECrHR)

• ECrHR (Gr. Ch.), *Delfi v. Estonia*, 16 June 2015:
  - Portal publishing about 330 news article a day with “add your comment” box (with notice and take down system + automatic deletion of message with obscene words). Threats and offensive language about owner of ferry company (claim to have destroyed ice roads).
  
  • ‘*User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression (…) However, alongside those benefits, certain dangers may also arise*’ (§110)

  - ECrHR: “*differentiated and graduated approach*” (§128)
    • >> Internet discussion forum or bulletin board, social media…

  - Internet portal operator = publishers/disclosers (but its duties and responsibilities ‘*may differ to some degree to those of a traditional publisher*’ §113)
Liability of Internet news portal

- ECrHR (Gr. Ch.), *Delfi v. Estonia*, 16 June 2015:
  - Quality of the law: foreseeability (some level of certainty)
  - Legitimate aim of protecting the reputation + right of others
  - Proportionality:
    - Here: hate speech or incitement to violence (not protected)
    - Context of the comments: invitation to comment, economic interest (ads: revenues depends on number of visits). Beyond a passive, purely technical service provider
    - Liability of the authors of the comments: interest of Internet users in not disclosing their identity (value of anonymity: § 147 ff)
    - Measures by Delfi: disclaimer, automatic deletion, Notice & Take Down procedure, manual review by administrators
      - Obligations to take measures is not “private censorship” (§157)
      - Potential impact of medium
    - The professional operator did not take the necessary measures
Balancing fundamental freedoms

- Balancing the protection of copyright as property and other freedoms: the CJEU approach
  - Since *Promusicae* (2008), the CJEU is more directive in the parameters of the balancing
    - *UPC Telekabel* (2014): procedural requirement for the freedom of information to be effective = “more practical fit” between fundamental rights
  - Wide margin of appreciation (>< narrow margin by the ECrHR in *The Pirate Bay and other cases*)
- Convergence with a tort-based approach of the liability of intermediaries
Targeted injunctions against ISPs in UK

- Regarding copyright:
  - *Twentieth Century Fox Film v. BT* of 2011 (*Newsbin2*)
  - *Dramatico Entertainment & others v Sky & others* of 2012 (*The Pirate Bay*)
  - *EMI v. Sky* of 2013
  - *Football Association Premier League v. Sky and others* of 2013
  - *Paramount v Sky* of 2014
  - *Paramount v Sky 2* of 2014…

- Regarding trademark:
  - *Cartier, Montblanc, Richemont v Sky* of 2014
    (§3: List of previous copyright cases with blocking injunctions)
Targeted injunctions against ISPs in EU

• France:
  • Court of appeal Paris, APC, FNDF, etc. (film trade associations) v. Orange, Google, Bing, etc. (15 March 2016) (Allostreaming)
  • TGI Paris, SCPP v. Orange, Free and others (4 Dec. 2014) (The Pirate Bay)

• Belgium:
  • Court of appeal, Antwerp, BAF v. Telenet & Belgacom (26 Sept. 2011) (The Pirate Bay)

• Germany:
  – BGH, 26 Nov. 2015 (cases against Deutsche Telekom (3dl.am) and Telefonica (goldesel.to))

• Netherlands:
  – …
Summary online blocking case

• Focus on the structurally infringing operators:
  – Direct and massive infringers
  – Making profits (through ads)
  – Inducing others to infringe
  – Just contributing to third parties’ infringements
  – Trying to systematically escape the reach of the law, and not only copyright law (e.g. creation of Newsbin2, The Pirate Bay moving to North Korea, etc.)

• When “notice and take down” (N&TD) procedure appears inapplicable, inadequate and inefficient
  – Question: Could the blocking injunctions replace N&TD?

• Risk of over-blocks
III. TOWARDS AN INTERMEDIATE LIABILITY IN THE CJEU CASE LAW?
Scope of copyright is commonly defined by three separate blocks:

- Direct infringement
- TPM protection
- Indirect liability
## Scope of copyright: direct liability + indirect liability + TPM protection

<table>
<thead>
<tr>
<th>Direct liability</th>
<th>Indirect liability</th>
<th>TPM protection</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU harmonization</strong></td>
<td><strong>Not harmonized at EU level</strong></td>
<td><strong>EU harmonization</strong></td>
</tr>
<tr>
<td>• Right of reproduction</td>
<td>• Relationship of the third party with the user (‘control’)</td>
<td>• Against circumventing acts</td>
</tr>
<tr>
<td>• Right of distribution</td>
<td>• Extent of the third party’s involvement (‘promotion’)</td>
<td>• Against preparatory acts (manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of circumventing devices)</td>
</tr>
<tr>
<td>• Right of communication to the public</td>
<td>• Knowledge of infringement</td>
<td></td>
</tr>
<tr>
<td>But right of adaptation: not harmonized (exists at national level)</td>
<td>• Intention of third party</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Ability to prevent or deter infringement</td>
<td></td>
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<tr>
<td></td>
<td>• General due care obligation</td>
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</tbody>
</table>
Hyperlinking: Svensson + BestWater

• No communication to the public in case of hyperlinking (because np new public), but additional conditions for CJEU:
  – Svensson: if no TPM circumvention
    • « where a clickable link makes it possible for users … to circumvent restrictions put in place by the site on which the protected work appears » then « new public » (§31 Svensson)
    • Thus direct liability (>< TPM circumvention)
  – BestWater: if authorization of the linked-to content
    • “in so far the copyright owners have authorized this (i. e. the first) communication” (§18 BestWater) on the linked-to site
    • Thus, in the absence of a first authorization, there is direct liability by communicating to the public

• Effect: hyperlinking could constitute direct infringement (>< violation of TPM or indirect liability)
Convergence under CJEU case law

- Direct infringement
- TPM protection
- Indirect liability
Hyperlinking: GS Media

- Communication to the public in case of hyperlinking to content put online without authorization:
  - If the person posting the hyperlink “knew or ought to have known” that link towards unauthorized content
    - «the same applies » if the link allows users « to circumvent the restrictions taken by» the linked-to website
  - If the posting is made “for profit”, then presumption of knowledge of protection and absence of authorization

- Effect: this blurs the distinction between direct and indirect liability

- Towards an intermediate liability?
  - Risk of adding the knowledge requirement for direct infringement
The GS Media effect

Towards the erosion of the distinction and the full ‘Europeanisation’ of indirect liability because of the need to harmonize?

AG Szpunar in Ziggo C-610/15:

The approach of the Commission and of the UK regarding The Pirate Bay “would, however, mean that liability, and ultimately the scope of () copyright (), would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation”
Intermediate liability: Ziggo and Filmspeler pending before CJEU

- **Ziggo and XS4ALL (C-610/15):**
  - Access providers opposing a blocking request to the website of the The Pirate Bay (TPB)
  - Question: 1) Is there a communication to the public by TPB? And 2) If not, possibility of injunction ✓ Ziggo?
  - AG Szpunar: Yes to 1) if knowledge and, if CJEU says no, then Yes to 2)

- **Filmspeler (C-527/15):**
  - Sells a media player (hardware) comprising add-ons with hyperlinks to sites allowing the streaming of images and sounds without the authorization of copyright holder
  - Here various acts constituting a direct infringement and/or contributing to infringement (not only hyperlinks)
Conclusion 1: platforms v. intermediaries

- Distinction in the Commission DSM Strategy?
- Platforms:
  - Need ‘further analysis’ (regulation?) ‘beyond the application of competition law’
    - Transparency
    - Relations between platforms and suppliers
    - Obstacles to platform portability
- Intermediaries:
  - Further analysis too: « the Commission will analyze (...) whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care »
Conclusion 2: liability v. responsibility

- May 2016 Communication *Online Platforms and the DSM: Shift: Ensuring that online platforms act responsibly*
  - “greater transparency on platform content policy”
  - “proliferation on online video sharing platforms of content that is harmful to minors and of hate speech”
  - “sector-specific regulation in the area of copyright”: value gap
  - “engage with platforms in setting up and applying voluntary cooperation mechanisms”

- Beyond liability? Appeal to corporate social responsibility (CSR)?
Content (editorial) responsibility in the US and EU debate

• Faked News on Facebook:
  « *Facebook can no longer credibly describe itself as merely a platform for others’ content, especially when it is profiting from micro-targeted ads. It has to take editorial responsibility.* » (Prof. Frank Pascale, Jan. 2017)
  – F.T., 21/3/2017: « Facebook said (...) it would have more than 700 content reviewers in Berlin » by the end of 2017 + filtering tools

• Extremist videos associated with ads on YouTube:
  « *We don’t want it to happen and we take responsibility for it* » (M. Brittin, pres. Google Europe in the F.T., 21/3/2017)
Content responsibility (and liability) in draft law (EU)

• Hate speech and protection of minors
  – Draft AVMS dir. on video-sharing platforms: art. 28 a = measures towards
    • “content which may impair the physical, mental or moral development of children”
    • >/< content with incitement to violence or hatred

• Anti-terrorism
  – Draft directive on combating terrorism: offence of “public provocation to commit a terrorist offence”
Conclusion 3: liability v. self- or co-regulation

- June 2016 Code of conduct on illegal hate speech online agreed with Facebook, YouTube, Microsoft, Twitter
  - Trap still there: *more active, more liable* (e-Com Dir.)

- Same trend in increasing *copyright responsibility* (or copyright liability)?
  - Sept. 2016 Copyright package of the European Commission
Draft dir. on copyright in DSM (14/9/2016)

- Art. 13(1): refers to
  - « information society providers that store and provide large amounts of works »: is it about platforms?
    - Leaked draft report at EP: scope limited to platforms that are « actively and directly involved in the making available of user upload »
  - platforms should: « take measures to ensure the functioning of the agreements concluded with rightholders for the use of their works » or « prevent the availability on their services of works (...) identified by rightholders »

- Art. 13(3): Member States should facilitate cooperation through « stakeholder dialogues to define best practices »: responsibility and co-regulation?
Thank you for your attention!

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