Exclusive rights and liability: Dead end or key to a fair balance?
The setting

- Automatized business models – technological answers lies within the machine
- Control of content in conflict with various fundamental rights
- Anonymity
- Global
- Balance between socially desired business models and enforcement against infringements

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Legal Framework

- However:
- Liability etc. does not concern only copyright!!!!
- Hyperlinks as example: Tort law and criminal law discussions with same results as GS Media 15 years ago
- Search engines as well
Some economic thoughts

- Economic analysis of tort law
  - Intermediaries as cheapest cost avoider?
  - Host Provider – Search Engines – Access Providers
  - Role of automated enforcement – incentives to develop
  - Is there a market failure? Adaptation of business models – new technologies
  - Problem of pure Welfare Approach
    - Definition of values
    - Requiring a lot of resources – case-to-case approach (Antitrust Law)
- Multipolar relationships
- Enforcement costs – „collateral damages“
Some thoughts II

- System of communicating tubes:
  - Range of rights
  - Limitations on rights
  - Subsidiarity of liability of intermediaries
  - Role of Anonymity
- Levies as second best solution?
  - avoiding collateral damages
  - Allowing anonymity
  - However generating spill over effects
  - Wrong incentives for authors etc. – difficult calculation

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Duties (injunctions)

- Probability to enforce actions against infringers – role of anonymity
- Automated enforcement – shifting burden of enforcement to rightholders (BGH Urt. v. 22.7.2010 – I ZR 139/08 – Kinderhochstühle )
- Procedural solutions (defamation cases ) BGH Urt. v. 25.10.2011 – VI ZR 93/10
Exclusive Rights and Liability: Problems and Pitfalls

- One size does not fit all – not only copyright infringements
- Return to specific liability rules according to specific legal areas (defamation, copyright etc.)
- Incentives for monitoring
  - good samaritan privilege needed
  - No total exemption of liability – gross negligence combined with standards
- Procedural rules necessary (granting fundamental rights, avoiding collateral damages)
- Access Providers: conflict between anonymity (WiFi) and enforcement which would need constant monitoring of user’s behaviour
Incentives and Technology

- Underlying philosophy ECRL: automated models, neutral
- Change: artificial intelligence! Hybrid models like platforms emerging; streaming business models
- New protection models
- Right clearance could be affected / enhanced
- Enforcement tools: VERISIGN (ebay), ContentID etc.
- Evolving markets for tools? Also for identification?

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The Role of Co-Regulation

- Problem – definition of standards of care – legal uncertainty what is expected
- Standards for monitoring activities – finely tuned for different business models
- Prima-facie proof of fulfilling legal requirements
- However: Antitrust law blocks self-regulation – opening clauses needed
Limitations and Levies as an alternative

- After youtube-deal: no need any more for exclusivity rights? Problem: rights (and liability) are a fleet-in-being influencing deals
- Limitations for user generated content on platforms (concerning right to make available to the public/copying)
- Combined with levies for platforms
Levies as an alternative?

- Some lessons of the discussion on general levies
  - Legal perspective: „damage“ not the right approach for levies (not CJEU approach)
  - Levies based on data traffic?
  - Who should benefit? Mixed models of levies and Content-ID-mechanisms – opt-in/opt-out models for rightholders
  - Only platforms? Search engines? Link collections/link setters? – P2P traffic would not be covered by levies on platforms!
Licensing Platforms

- 3rd alternative:
  - automated licences (micro licenses) combined with content-ID mechanisms (like streaming movies etc.)
  - Flanked by FRAND licenses
- Problem:
  - Only platforms could be covered, not P2P
  - Territoriality issues still there