



COPYRIGHT AND RELATED RIGHTS IN THE EU: INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT IN THE ONLINE ENVIRONMENT

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LIABILITY REGIME AND OBLIGATIONS



LIABILITY REGIME AND OBLIGATIONS

“(Internet intermediaries) bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties”
(OECD study)



LIABILITY REGIME AND OBLIGATIONS

Technical/economic functions:

- Access
- Hosting
- Communication
- Social networking
- Search
- Organisation of content
- Advertising
- Market place
- Payment



LIABILITY REGIME AND OBLIGATIONS

Rules defined and governed by:

- “Terms and Conditions” (T&C) or Community guidelines
- Legal acts, i.e. E-Commerce Directive 2000/31/EC, Enforcement Directive 2004/48/EC, Information Society Directive 2001/29/EC



LIABILITY REGIME AND OBLIGATIONS

E-Commerce Directive 2000/31/EC

- Information Society Service (ISS)
- Horizontal liability exemption (all types of illegal content)
- A specific liability regime, with liability exemptions for ISS performing technical functions, namely, transmitting information (Art.12), temporarily storing (Art. 13) or hosting it (Art. 14)



LIABILITY REGIME AND OBLIGATIONS

E-Commerce Directive 2000/31/EC

- No general obligation to monitor (Art. 15); Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14
 - This does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation (Recital 47)

Notice-and-take down (NTD) and code of conducts

LIABILITY REGIME AND OBLIGATIONS

Enforcement Directive 2004/48/EC

- Injunctions (Art. 11); Interlocutory injunctions (Art. 9)
 - Prevent or prohibit continuation of infringement
 - Non-compliance is subject to penalty payment
 - Unfair , disproportionate and costly measures to be avoided
- Interplay between Directives considered by the CJEU



THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-324/09, *L'Oréal* case vs. eBay International AG

- „Article 14(1) of Directive 2000/31/EC on electronic commerce (on exemption of hosting providers) must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored
- The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.”



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)

- EU laws was precluding an injunction “requiring it to install a system for filtering all electronic communications passing via its services, which applies indiscriminately to all its customers, as a preventive measure, exclusively at its expense and for an unlimited period, in order to prevent illegal downloads.”



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-314/12, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH

- EU law was not precluding an injunction requiring an internet access provider to block access to a website making copyright protected work available illegally, notably when such an injunction did not specify the measures which that access provider must take



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH

- A right(s) holder may not claim compensation from an access provider on the ground that the connection to that network was used by a third party to infringe its rights; yet, such right(s) holder may claim injunctive relief against the continuation of that infringement
- An injunction ordering the internet connection to be secured by means of a password is apt to ensure a balance between the different interests at stake



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV (“the Pirate Bay” case)

- An online intermediary may be liable when it has set out its service with the full knowledge and functionalities to allow for the IP infringing content to be made available, and is effectively communicating these works to the public



COURT OF JUSTICE OF THE EU PRACTICE

CJEU, C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited

- When a hosting provider stores a piece of content for a user which was declared unlawful by a court, monitoring is justified
- Injunctions covering *identical* content to content declared illegal are therefore legitimate, irrespective of who requested the storage of information; in addition, for the injunction to be effective, it may extend to *equivalent* content; there is no restriction on the geographical scope of the injunction's effects



RECENT DEVELOPMENTS IN INTERMEDIARY AREA



RECENT DEVELOPMENTS

- COM's Communication on "Online platforms and the Digital Single Market – Opportunities and Challenges for Europe" (2016)
- COM's Communication on illegal content online (2017)
- COM's Recommendation on measures to effectively tackle illegal content online (2018)
- **Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (2019)**
- **The Digital Services Act Package (upcoming)**



RECENT DEVELOPMENTS

New obligations in the Directive (EU) 2019/790

- Obligation to ISS to take measures to ensure the functioning of agreements concluded with rightholders for the use of their works [...] or to prevent the availability on their services of works [...] identified by rightholders through the cooperation with the service providers
- Two possibilities: licencing or filtering by technical means
- Users should be able to benefit from exceptions
- ISS providers that store and provide to the public large amounts of works



RECENT DEVELOPMENTS

New obligations in the Directive (EU) 2019/790 (cont.)

- “Online content-sharing service provider” performs an act of communication to the public/making available when it gives public access to content uploaded by users
- Measures to avoid liability for copyright infringement (cumulative):
 - Make best efforts to obtain authorisation
 - Make best efforts to make sure content is not available if rights holders requested
 - Take down content after notice from rights holders, prevent future uploads





THANK YOU



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