



Harmonising European Intermediary Liability in Copyright: An Academic Symposium

Institute for Information Law (IViR), Amsterdam

Date: 14 January 2017
Time: 9:30-17:00
Location: Agnietenkapel
Oudezijds Voorburgwal 229-231
1012 EZ Amsterdam

Short Summary:

With the adoption of the E-Commerce Directive in 2000, the liability of internet intermediaries for the copyright infringements of their users has been partly harmonised in the EU – at least to the extent that the immunities that this introduced apply. But the job remains incomplete: where the immunities do not apply, national rules continue to govern the area. As a result, intermediaries not protected by the E-Commerce Directive face a fragmented European legal landscape.

After a long halt, the EU now seems to be gearing up for further harmonisation. This is aimed at creating a ‘fit for purpose’ regulatory environment to govern intermediary liability. In its recent proposal for a Directive on Copyright in the Digital Single Market, the European Commission has included new obligations for certain platforms to foster revenue-sharing schemes and to prevent the availability of infringing material on their services. In a series of Communications, additional action has also been signalled. A ‘duty of care’ for internet intermediaries, liability where an intermediary ‘is aware’ that its services are used by a third party to infringe but fails to act, pan-EU injunctions against intermediaries, self-regulatory and co-regulatory initiatives, as well as a harmonised ‘notice and action’ framework are all ideas on the table.

In this mutable policy environment, a re-evaluation of the legal basics is appropriate. What were the initial rationales behind the current legal framework, particularly the immunities? Do these still apply? What are the solutions adopted on the national level and what degree of EU-level legislative action is necessary? What are the technological and human rights-based limitations? What duties and what remedies are appropriate to impose on intermediaries and what conditions should govern these? What would the appropriate regulatory model be?

This one-day symposium at IViR will seek to address these questions. The objective shall be to explore the possibilities for a truly substantive European intermediary liability system in copyright now that this idea does not seem so distant. For this purpose, the symposium will bring together an interdisciplinary combination of academics to discuss the issue. Representatives of copyright holders, internet intermediaries and civil society are invited to attend and contribute.

Draft Programme

10:15-11:30: PANEL 1: The need for reform

The EU's safe harbours were adopted over 15 years ago. Given the increased maturation of information society since then, the question arises whether they still serve their initial objectives. Do the justifications for their introduction still apply in the more settled modern technological landscape? Is a horizontal solution to intermediary liability still appropriate for fields as disparate as e.g. copyright and child pornography or should a more vertical approach now be considered? How the immunities interact with the exclusive rights of reproduction and communication to the public is also worth considering. Can these rights be applied directly to internet intermediaries or has the lack of positively-stated rules on intermediary liability led to over-expansive interpretations? When is an intermediary reproducing a work and when is it communicating it to the public? Finally, this panel will also critically assess the Commission's current proposals in the area of intermediary liability, as well as the most recent case law coming out of the CJEU.

11:30-11:45: Coffee break

11:45-13:00: PANEL 2: The conditions of liability

The safe harbours only determine when liability cannot be imposed on intermediaries – they say nothing about when it should. Should further European harmonisation address that question? In other words, should a positively stated EU rule on intermediary liability be introduced? If so, what form that should take is worth considering: a European duty of care for internet intermediaries, a European doctrine of accessory liability in copyright or a (newly-crafted or old-and-repurposed) exclusive right for copyright owners? What conditions for intermediary liability such a rule would dictate should also be examined. What should the relevance of the intermediary's conduct be – should facilitation be sufficient? Is a mental element necessary and if so what should that be? Do different internet intermediaries deserve different legal treatment? Could a European notice-and-action scheme play a useful role? In approaching these questions, inspiration will be sought in this panel from national and historical examples, existing European rules, as well as the law of fundamental rights.

13:00-13:45: Lunch

13:45-15:15: PANEL 3: Remedies: damages and injunctions

If liability is to be imposed on intermediaries, its consequences should also be considered. In Panel 3 the issue of remedies will be discussed. Are damages an appropriate remedy or should only injunctive orders be allowed against intermediaries? Do different internet intermediaries deserve different legal treatment? What criteria can be used to make distinctions? What are the technological constraints and what the constraints set by the EU law of fundamental rights? What room is there for injunctive orders of pan-EU reach? Particular regard will be had in this context for the case law of the CJEU and – to the extent that it also impacts copyright – the ECHR.

15:15-15:30: Coffee break

15:30-16:45: PANEL 4: Choosing a regulatory method

The final question for debate concerns the method of regulation: is traditional state regulation appropriate or may self- or co-regulation deliver better results? Would different parts of a European framework for intermediary liability in copyright require different approaches? What is the interaction between State-imposed rules and industry-adopted codes of conduct? Do human rights bind industry and do they allow State authorities to side-step traditional regulation? What requirements of transparency can be imposed on intermediaries?