

# Striking a fair balance in intermediary liability

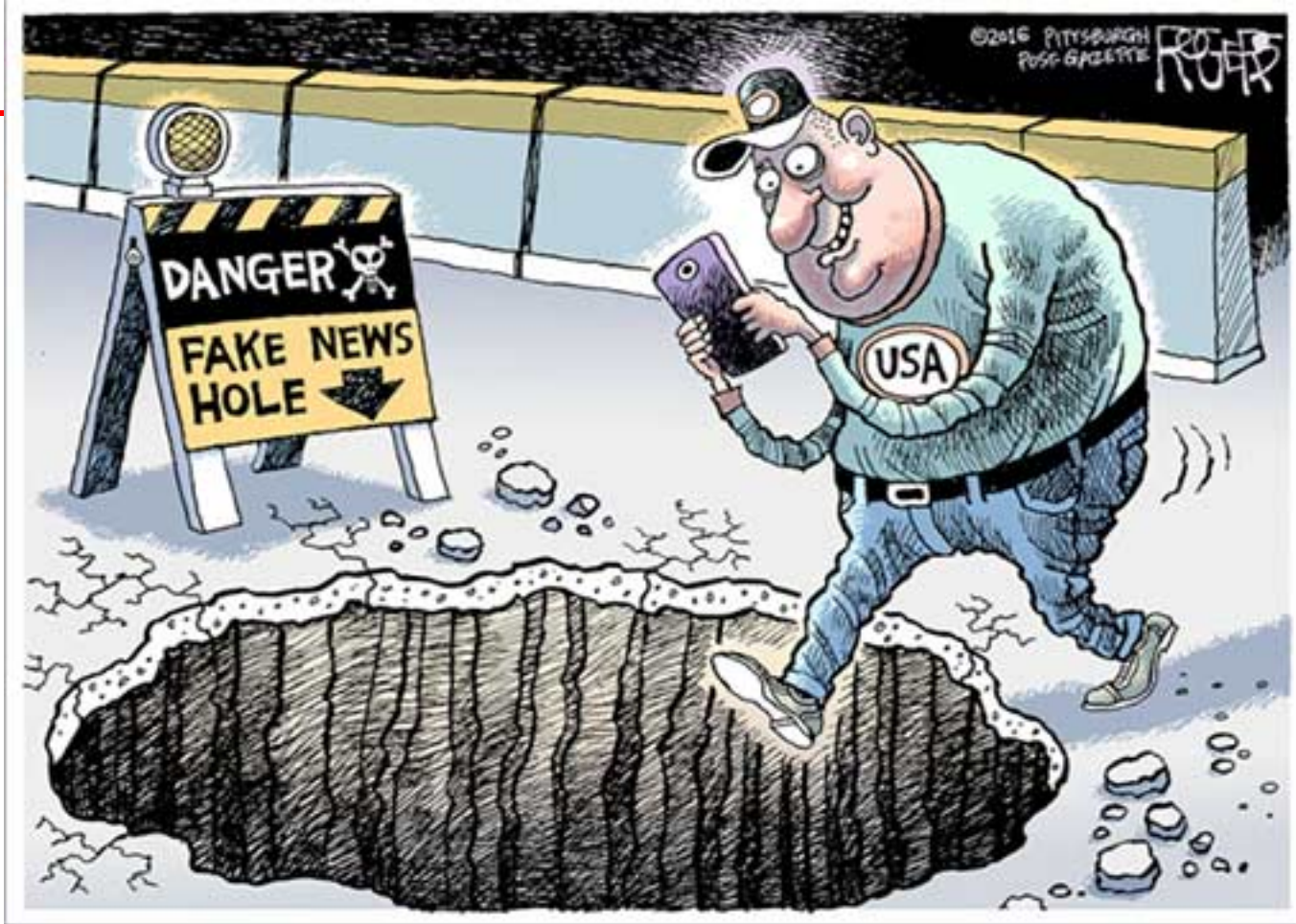
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IViR intermediary liability symposium  
Amsterdam, 14 January 2017  
Christiaan Alberdingk Thijm

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# Information bubble



# Trumps positie hopeloos; Clinton wint nu forse meerderheid Electoral College

Republikein heeft nog wel kleine kans op comeback



# CJEU 29 January 2008

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- Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows **a fair balance** to be struck between the various fundamental rights protected by the Community legal order.
- Promusicae

# CJEU 29 January 2008

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- [Those directives] do not require the Member States to lay down (...) an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.
- Promusicae

# CJEU 24 November 2011

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- [A] systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified.
  - Scarlet / Sabam

# CJEU 8 April 2014



# CJEU 13 May 2014





# CJEU 6 October 2015

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**Max Schrems**

@maxschrems

I want to marry the judge.. ;)   
 #CJEU



RETWEETS

5

FAVORITES

12



# CJEU 21 December 2016

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- No general data retention legislation for the purpose of fighting crime;
- Clear and precise safeguards;
- Measure must be “strictly necessary”;
- Connection between the data retained and the objective pursued;
- A link with serious criminal offences and to contribute to fighting serious crime or to preventing a serious risk to public security, e.g. a geographical criterion.

# CJEU 15 September 2016

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- Store offers free wifi to customers
- Customers can use wifi anonymously
- Wifi is used for copyright infringement



bB

# Password protection

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- Can the store be ordered to stop future infringements, even if only available measure would be to protect the wifi with a password?
- Yes, *“provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain”*
- To *“dissuade”* infringements

# Fair balance?

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CJEU only assesses if the measure strikes a fair balance between

- protection of intellectual property
- freedom to conduct business, and
- freedom of information (para. 100) .

CJEU omits to take into account:

- privacy (Article 7 Charter), and
- protection of personal data (Article 8 Charter)

# Fair balance with privacy?

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- Identifying all users before granting a password
  - Violates data minimization principle as identifying data is not necessary for providing access
  - No safeguards
  - Boils down to general retention obligation which is not even justified for fighting crime (CJEU 21 December 2016, Tele2 Sverige and Watson, C-203/15 and C-698/15)

# How to get out of the bubble?

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