



European Intermediary Liability in Copyright: A Tort-Based Analysis

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Current EU Legal Framework = Fragmented

Safe Harbours (E-Commerce Directive
(Directive 2000/31/EC)):

- Article 12: “Mere Conduit”
 - Article 13: “Caching”
 - Article 14: “Hosting”
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Copyright

Article 8(3) Copyright Directive (Directive 2001/29/EC):

“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.”

Article 15(1), ECD

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

Intermediary Liability = Conflict between Fundamental Rights

“The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’). There is, however, nothing whatsoever in the wording of that provision or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected.”

(Scarlet Extended (Case C-70/10))

Fair Balance

Promusicae (Case C-275/06):

“the Member States must, when transposing [directives], take care to rely on an interpretation of the directives which allows a **fair balance** to be struck between the various fundamental rights protected by the Community legal order.”

COPYRIGHT

(Article 17(2) v.
of the Charter)

Freedom to CONDUCT A BUSINESS (Article 16)

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Right to PRIVACY
(Article 7)

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Protection of PERSONAL DATA (Article 8)

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FREEDOM OF EXPRESSION (Article 11)

*“The concept of the ‘fair balance’
is, without further elucidation,
vacuous and unhelpful.”*
(Jonathan Griffiths)

Way forward:

- Bring intermediary liability back down to earth, by means of a →
 - Comparative analysis of national tort law rules, so as to →
 - Investigate similarities and differences and ultimately →
 - Find a rule that makes sense across the board.
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What would a reasonable intermediary do?



Conduct element: Broad interpretation. Any participation in the copyright infringement of another → No confusion between the conduct and mental element

“It is one thing to distribute technology that could be used to infringe in the hope that others will use it legitimately. It is something else to distribute the same technology in the hope that others will use it to infringe.”

(Alfred Yen)

Knowledge + Duties of Care = Negligence

There is “negligence” if a person does not meet the standard of care which could reasonably be expected in the circumstances.

– Draft Common Frame of Reference, Annex on “Definitions”



Return to Balancing

Criteria of Care

- A.** Risk of infringement
- (a) probability of infringement
 - (b) seriousness of infringement
- B.** Benefit of the conduct
- (a) interests of the intermediary
 - (b) interests of the users
 - (c) the general interest
- C.** Burden of care
- (a) interests of the intermediary
 - (b) interests of the users
 - (c) the general interest
- D.** Responsibility to take measures
- (a) foreseeability of the risk
 - (b) avoidability of the risk
 - (c) creation and control of source of danger
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Duties of Care

1. Warning systems;
 - ~~2. Notification to the authorities;~~
 3. The blocking and removal of infringing content, including notice-and-take-down;
 4. The suspension of the perpetrator of the infringement;
 - ~~5. Measures for the identification of the perpetrator;~~
 - ~~6. The monitoring of content, including filtering.~~
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Proportionate Liability

Intentional
participation



Full liability

Negligent
participation



Only injunctive
relief

Thank you for your attention!

