

## **What is an intermediary? When is an intermediary liable?**

‘Harmonizing European Intermediary Liability in Copyright’  
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# What is an intermediary?

- Why does it matter?
- Why is it hard?



# It depends on whom you ask

- Engineer: online intermediaries offering physical-layer, network-layer and application-layer services?

Network layer	Application layer
Access providers	Platforms
Mobile network operators	Social networks
Hosting service providers	Cloud storage services
IP and domain name registries	Search engines
	Gaming platforms
	Online marketplaces
	Transaction networks

- Plus offline intermediaries such as postal services, carriers, banks, utilities, physical marketplaces etc.?

# It depends on whom you ask

- Economics student: anyone or anything that helps connect the original provider of any product or service to its ultimate recipient?
- IvIR student: Any service provider between the origin and the destination of information, so everyone in the content chain except the creator and the consumer?
- OECD: “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.”

# Ask a lawyer

- Providers of mere conduit, caching and hosting services, i.e. those information society service providers covered by ECD safe harbour?
- It depends...
  - where you look
  - why you're asking
  - who's asking.



# It depends on where you look

- E-commerce directive (2000/31/EC)
- InfoSoc directive (2001/29/EC)
- IP Enforcement directive (2006/48/EC)
- EC consultation on platforms & intermediaries
- EC proposal for copyright in DSM (COM(2016) 593)



# It depends on why you're asking

- Political debate
- Economic analysis
- Competition law assessment
- Defining scope of safe harbours
- Defining scope of injunctions





# It depends on who's asking

- Courts: providers offering access good content are intermediaries deserving protection, those offering access to bad content deserve an injunction.
- Rightholder: an intermediary is anyone that can potentially help me to prevent or prosecute IP infringement.





When is an intermediary  
liable?



# Different types of objectionable behaviour

- Defamation
- IP infringement
- Political criticism
- Adult content
- Privacy infringement
- Discrimination, incitement
- Hate speech & threats of violence
- Fake news

# Breaking down liability

To what extent can online intermediaries be forced to:

1. Assume *financial liability* for their users' objectionable behaviour, e.g. for content created, hosted, transmitted, paid for etc. using their service?
2. *Remove or block* objectionable content (providers)?
3. *Prevent* re-publication of removed content?
4. *Identify users* who have posted objectionable content?
5. *Disrupt* the business model of bad actors?
6. *Protect* existing business models from economic disruption and changing consumption patterns?

# Why are intermediaries targeted?

- They 'cause the problem'
- They 'profit from the problem'
- They are 'best placed to act'
- They 'have a social responsibility'
- They are often visible and competent targets



# Why do intermediaries push back?

- Their own and their customers' rights come first
- They are not the police
- They are not the court
- They are not the legislature
- They are not your handyman



# When should an intermediary be liable?

- When they do too much?
  - Active role?
  - *Zu eigen machen*?
- When they do too little?
  - General obligation to be helpful?
  - General obligation to prevent harm?
  - Failure to carry out a court order?
- In EU law, especially in copyright cases, focus has been on injunctions rather than liability. For defamation, see ECHR Delfi & MTE cases.

# The three laws of intermediaries



**Graham Smith**  
@cyberleagle



Following

First law of internet intermediaries: Anything you agree to do will never be enough.



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Second law of internet intermediaries: Whatever you agree to do, you will be taken to task over transparency and accountability.



**Graham Smith** @cyberleagle · 5 Dec 2016

Third law of internet intermediaries: However many you placate, there will be another one along tomorrow.





# What would a reasonable intermediary do?

- Reasonableness and proportionality are important, but rule of thumb that intermediaries should take “all reasonable measures” is unusably and illegally vague
- Too little attention to foreseeability of obligations and their effect on intermediaries’ and users’ freedoms
- Article 52 Charter requires sufficiently specific and predictable rules, with clear conditions, limitations and safeguards against abuse.
- This should not be delegated to intermediaries as in Telekabel Wien. If Brussels cannot produce clear rules, national legislators and courts must step up.

# Horses for courses?

- Angelopoulos/Smet in JML: replace ECD's horizontal approach with vertical scheme, with different standards for different types of questionable content:
  - Notice-and-notice for copyright infringement
  - Notice-wait-and-takedown for defamation
  - Notice-and-takedown & notice-and-suspension for hate
  - Notice-and-judicial-takedown as horizontal last resort
- Intermediaries need to manage technical and commercial risk, preferably at scale. Legal complexity, over-calibration & uncertainty lead to over-blocking. Predictable, equitable outcomes is key test.

# Some final questions

- Does switching from fundamental-rights (fair balance) to tort (duty of care) principles make for more equitable and predictable outcomes in specific cases?
- Does focus on injunctions not come at the expense of the horizontal safe harbours & their vital fundamental-rights and policy objectives?
- Do intermediaries' liability and obligations in relation to copyright infringement differ fundamentally from other types of objectionable content?

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