



Harmonising European Intermediary Liability in Copyright: An Academic Symposium

Institute for Information Law (IViR), Amsterdam

Date: 14 January 2017
Time: 9:30-17:30
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, diverse national rules continue to govern the area in the individual EU Member States. 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. In its recent proposal for a Directive on Copyright in the Digital Single Market, the European Commission has included new obligations for certain online platforms to foster revenue-sharing schemes and to prevent the availability of infringing material on their services. In a series of earlier 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 rationales still apply? What are the solutions adopted on the national level? What are the technological and human rights-based limitations? What duties are appropriate to impose on intermediaries, what conditions should govern these duties and what remedies should result from their violation? What would the appropriate regulatory model on the EU level 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. For this purpose, the symposium will bring together a combination of academics with different areas of expertise. Representatives of copyright holders, internet intermediaries and civil society have been invited to attend and contribute to the discussion.

Programme

09:30-10:00: **Registration and coffee**

10:00-10:05: **Introduction and welcome**

10:05-11:20: **PANEL 1: The need for reform**

Moderator: Bernt Hugenholtz (IViR, University of Amsterdam)

Panelists: Martin Husovec (TILT, Tilburg University)
Martin Senftleben (Free University Amsterdam (VU))
Matthias Leistner (LMU Munich)

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? How do the immunities interact with the exclusive economic rights of authors over the reproduction of their works and their communication to the public? 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? This panel will also critically assess the most recent case law coming out of the CJEU, as well as the Commission's current proposals in the area of intermediary liability.

11:20-11:45: Coffee break

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

Moderator: Stef van Gompel (IViR, University of Amsterdam)

Panelists: Christina Angelopoulos (CIPIL, University of Cambridge)
Remy Chavannes (Brinkhof)
Quentin van Enis (University of Namur)

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? 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.

13:00-14:00: Lunch

14:00-15:15: **PANEL 3: Remedies: damages and injunctions**

Moderator: Daniel Gervais (Vanderbilt University)

Panelists: Dirk Visser (Leiden University)

Christiaan Alberdingk Thijm (Brandeis/IViR, University of Amsterdam)

Sophie Stalla-Bourdillon (University of Southampton)

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 are the constraints set by the EU law of fundamental rights? What room is there for injunctive orders of pan-EU reach? Could a European notice-and-action scheme play a useful role? 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.

15:15-15:45: Coffee break

15:45-17:00: **PANEL 4: The future of European intermediary liability**

Moderator: Bernt Hugenholtz (IViR, University of Amsterdam)

Panelists: Thomas Hoeren (ITM, University of Münster)

Alain Strowel (Université Saint-Louis - Bruxelles)

Tarlach McGonagle (IViR, University of Amsterdam)

The final panel will turn to the future: what could a future European framework for intermediary liability look like? Is a horizontal solution to intermediary liability still appropriate for fields as disparate as e.g. copyright and child pornography or should a vertical approach now be considered? Is traditional state regulation appropriate or may self- or co-regulation deliver better results? 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?

17:00-17:30: **General discussion**