

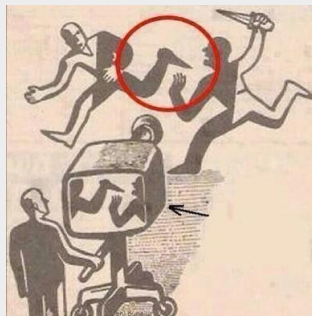
Regulating intermediaries: the challenges of chasing chameleons while dodging sinkholes and ignoring Pokémons

Harmonizing European Intermediary Liability in Copyright
IViR, Amsterdam

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14 January 2017

The importance – and dangers – of framing



Source: via @therealbanksy

A 3-D puzzle



Source: http://www.123rf.com/photo_7708360_jigsaw-puzzle-sphere-dynamic-explosion.html

Chameleons

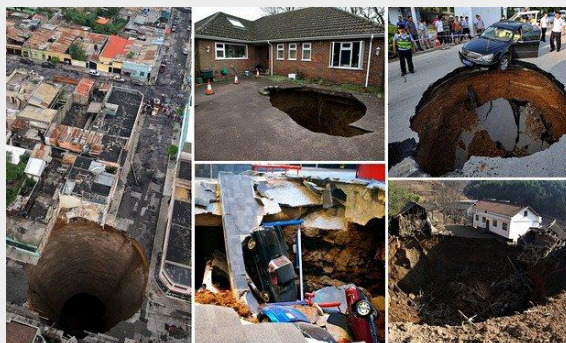


Source: <http://kids.nationalgeographic.com/animals/chameleon/#chameleon-on-branch.jpg>

Chameleons' different colours

- Information intermediaries
- Passive or active (or how active?)?
- Private actors and information
- Private actors and public communication
- Private actors and power
- Differentiated and graduated regulation?

Sinkholes



Source: <https://www.theguardian.com/environment/2014/feb/20/are-humans-causing-more-sinkholes>

Hate speech as sinkholes: why?

- Unpredictability of size/scope
- Unpredictability of occurrence
- Wide ramifications of problem
- Complexity of underlying (regulatory) levels
- Natural and/or man-made phenomenon
- Need for range of preventive and remedial measures

Hate speech: an approximation of a definition

For the purposes of the Council of Europe's Committee of Ministers' Recommendation (97) 20 to Member States on "Hate Speech":

"[...] the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

What is 'hate speech' really?

Hate speech is any type of expression via any medium that intentionally targets someone on the basis of certain fundamental characteristics shared with other members of a specific group, which is hateful in essence and/or incites to hatred, discrimination or violence, or amounts to a grave assault on human dignity and is therefore devoid of any redeeming social value and constitutes an abuse of the rights and freedoms safeguarded by the European Convention on Human Rights.

ECRI GPR No. 15 on Combating Hate Speech

“the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status”

Pokémons



The evolution of (inter-)mediation (I)

MEDIA

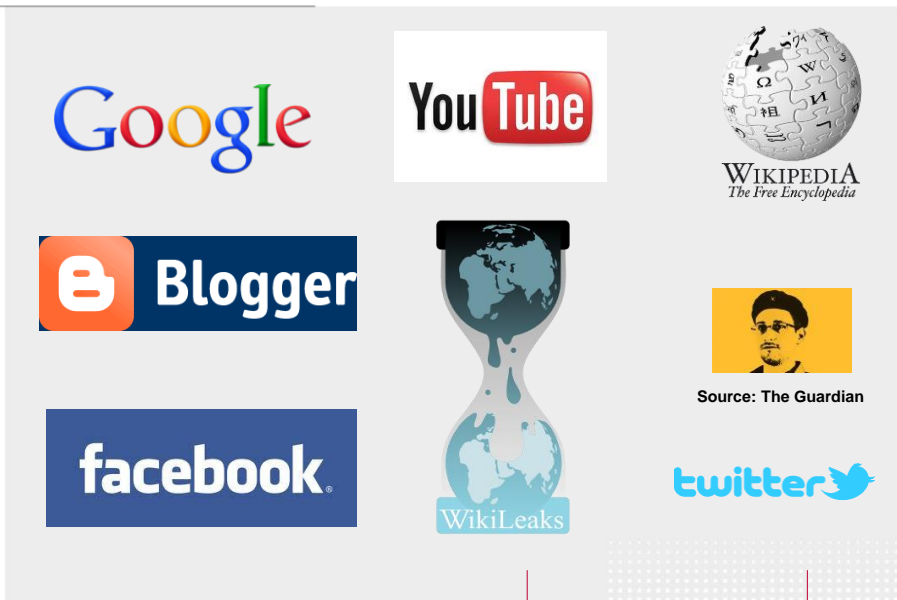
The evolution of (inter-)mediation (II)

InterMEDIARY

The power of the media

“It’s all about power, of course. In the end. The power the media have to set an agenda. The power they have to destroy one. The power they have to influence and change the political process. The power to enable, to inform. The power to deceive. The power to shift the balance of power: between state and citizen; between country and country; between producer and consumer. And the power that they are denied: by the state, by the market, by the resistant or resisting audience, citizen, consumer. It is all about ownership and control: the who and the what and the how of it. And it is about the drip, drip, drip of ideology as well as the shock of the luminous event. It is about the media’s power to create and sustain meanings; to persuade, endorse and reinforce. The power to undermine and reassure. It is about reach. And it is about representation: the ability to present, reveal, explain; and also the ability to grant access and participation. It is about the power to listen and the power to speak and be heard. The power to prompt and guide reflection and reflexivity. The power to tell tales and articulate memories.”

- R. Silverstone, *Why Study the Media?*, p. 143



New types of civic power

1. The power to command attention
2. The power to communicate news
3. The power to enable collective action
4. The power to give people a voice
5. The power to influence people's vote
6. The power to hold power to account

M. Moore, *Tech Giants and Civic Power*

A human rights navigational guide

- Intermediation
- Public interest & public debate (substance & structure)
- Effective rights & remedies
- State obligations – negative & positive
- Rights, duties and responsibilities
- Regulatory values & purposes
- Regulatory design (State, self- and/or co-regulation)

Revisiting the ECtHR's assessment criteria

- Context and content of impugned comments
- Liability of authors of comments
- Measures by applicants and conduct of injured party
- Consequences of comments for injured party
- Consequences for applicants

Future regulatory naming and framing

If democracy is to survive, citizens of industrial societies must discover, recover, or reclaim the emancipatory vocabulary necessary to articulate and enforce effective strategies for controlling the controllers. We must sharpen the critical edges of terms like liberty, democracy, enlightenment, public opinion, and censorship.

S. Curry Jansen, *Censorship: The Knot that Binds Power and Knowledge*, p. 20

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