The Future of European Intermediary Liability

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Or shall we speak of *platform liability*?

- [https://vimeo.com/132076290](https://vimeo.com/132076290)
The wrong word?

- “Platform regulation is not a useful phrase”
- “In the end, we are all platforms in some form or another.”

Theo Bertram, Google’s European public policy manager
Outline: about shifting!

• From intermediary liability to platform regulation?
• From liability exemption to content responsibility?
• From a horizontal approach to vertical policies?
• From State law to self- & co-regulation?
• From black boxes to transparency?
• Concluding words
From intermediary liability to platform regulation?
You said ‘platform’ in the 2015 DSM Strategy (COM(2015) 192 final)

• Platforms enable:
  – consumers to find information/works
  – businesses to exploit e-commerce

• Platforms include:
  – Search engines
  – Social media
  – E-commerce platforms
  – App stores
  – Price comparison websites
  – Mobility, accommodation, tourism, recruitment, etc.= sharing economy services
‘Platform’ in the *DSM Strategy*

- **Platforms (in general):**
  - Accumulate/control an enormous amount of personal data
  - Use algorithms to transform this into usable information
  - Have a multiplier effect in fostering new SMEs
  - Improve efficiency and consumer choice

- **‘Some platforms’:**
  - Need ‘further analysis’ (regulation?) ‘beyond the application of competition law in specific cases’
DO YOU WANT REGULATION BY COMPETITION LAW?
DO YOU WANT EX ANTE REGULATION?

What Do You Really Want?
DSM Strategy

• Platforms:
  – Need ‘further analysis’ (regulation?) ‘beyond the application of competition law’
    • Transparency
    • Platform usage of the information collected
    • Relations between platforms and suppliers
    • Obstacles to platform portability

• Intermediaries:
  – Further analysis too: « the Commission will analyze (...) whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care »

• Distinction between platforms and intermediaries?
May 2016 Communication
Online Platforms and the DSM

• Shift: Ensuring that online platforms act responsibly
  – “greater transparency on platform content policy”
  – “proliferation on online video sharing platforms of content that is harmful to minors and of hate speech”
  – “sector-specific regulation in the area of copyright”: value gap
  – “engage with platforms in setting up and applying voluntary cooperation mechanisms”

• Beyond liability? Appeal to corporate social responsibility (CSR)?
From liability exemption to content responsibility?
Content (editorial) responsibility in the US debate

• Faked News/Facebook effect?
  « Facebook can no longer credibly describe itself as merely a platform for others’ content, especially when it is profiting from micro-targeted ads. It has to take editorial responsibility. »
  – Prof. Frank Pascale, Jan. 2017
Content responsibility in the law (EU)

• Hate speech and protection of minors
  – Draft AVMS dir. on video-sharing platforms: art. 28 a = measures towards
    • “content which may impair the physical, mental or moral development of children”
    • >< content with incitement to violence or hatred

• Anti-terrorism
  – Draft directive on combating terrorism: offence of “public provocation to commit a terrorist offence”
Content responsibility in self- or co-regulation

• June 2016 Code of conduct on illegal hate speech online agreed with Facebook, YouTube, Microsoft, Twitter
  – Trap still there: more active, more liable (e-Com Dir.)

• Same trend in increasing copyright responsibility (> < liability)?
  – Sept. 2016 Copyright package
Draft Copyright in DSM dir. on online uses of content

• Art. 13(1): refers to « information society providers that store and provide large amounts of works or other subject-matter »
  – Is it about platforms?
• Art. 13(2): platforms should « put in place complaints and redress mechanisms that are available to users »
• Art. 13(3): Member States should facilitate cooperation through « stakeholder dialogues to define best practices »
From a horizontal approach to vertical policies?
From horizontal approach to vertical implementing schemes

- Horizontality of e-Com dir.
- Differentiated schemes depending on the type of right and infringement?
  - Defamation, hate speech, copyright...
- Pro: the assessment is specific and the balance of interests varies
- Contra:
  - automated process used
  - convergence in the implementing process
From State law to self- and co-regulation?
State law: blocking injunctions

<table>
<thead>
<tr>
<th>Users</th>
<th>Intermediaries</th>
<th>(IP) Right Holders</th>
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</table>
| **Directive 2009/140/EC**  
(art. 1(3)a)  
= Telecom package |
| **Directive 2000/31/EC**  
= eCommerce Dir.  
(art. 12 and 15) |
| **Directive 2001/29/EC**  
= Infosoc Dir.  
(art. 8(3))  
**Directive 2004/48/EC**  
(art. 11)  
= Enforcement Dir. |

- **Internet freedom**  
Privacy
- **No monitoring**  
Reactive
- **Protection of rights**  
Enforcement
Laws define the framework, courts find the “fair balance”

Intermediaries

Fairness in balancing

(IP) Rights Holders

Users

Vacuous and unhelpful?
J. Griffith
Adequate for defining scope?
J. Cabay
The judicial sequence according to **UPC Telekabel**

- **Targeted injunction**
  - By court

- **Implementing measure**
  - By intermediary

- **Right to oppose**
  - By user

Still room for the implemention by national judges
Regulatory mix including self-regulation: RTBF

• Regulation by the fundamental rights and by the (common law) judge:
  – CJEU, 13 May 2014, Google Spain (C-131/12)
    • CJEU wording: « inadequate, irrelevant or no longer relevant, or excessive » with regard to purpose/time

• Vague Guidelines by regulators (DPAs)

• Implementation: self-regulation by Google
  – Online form to fill: countries to tick, name used to search + name of requester (+ ID), URL for results to be removed + why URL is « irrelevant, outdated, or otherwise objectionable »

• Criticism: Google = ‘censor-in-chief’. 
‘Supreme court’ for oblivion and newsworthiness!

• Google: « When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there’s a public interest in the information — for ex., we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials »

• Lawfulness, public interest and adequacy left to platform
From black boxes to transparency?
Black box to transparency?

• Self-provided information: *Transparency Report* of Google:
  – Numbers on 13 Jan. 2017: 673,155 requests about 1,859,417 URLs
    • Per country: FR, D, UK, etc.
    • Per type of sites with the top ten sites: Facebook, Profileengine, annuaire.118712.fr, YouTube,...
      – Not press publishers
  – No motivation or reasoning (but examples)

• Insufficient transparency!

• Advocacy for ADR system (at EU level)
  – Learning from success: domain name (UDRP)
    • How to bring the parties to the ADR system?
Online adjudication for small scale disputes

- Offers a ‘judge’, more transparency & fairness
  - Escalated process: mediation before arbitration
  - Effective and independent online provider of adjudication service
  - Fairness: possibility of hearing, appeal
- Should be cheap and fast
- Could complement RTBF, notice-and-action procedures, etc.
Concluding or opening words

• Online *platforms*: just a cosmetic change? Or the sign of a shifting policy?
• Sector-specific regulation in shaping content responsibility (>= liability exemption)?
• Clarification to solve the ‘double bind’ (conflicting imperatives) ‘more action=more liability’
• Need of online adjudication system for massive online micro-cases (not only RTBF) to complement measures taken by parties and court-made law
Thanks for your attention

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