

Intermediary liability, copyright and freedom of expression



Harmonizing European Intermediary Liability in Copyright

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A panoramic view

- **Various fundamental rights at stake :**
 - **Intellectual property (copyright)**
 - **Freedom of expression**
 - Of the content provider (« right to impart information »)
 - And of the Internet users (« right to receive information »)
 - **Freedom to conduct a business**
 - **Privacy and data protection of the Internet users**

Intellectual property and freedom of expression

- No formal hierarchy between the two rights
- Both intellectual property and freedom of expression are *relative* rights
- They have to tolerate mutual concessions and to be limited *externally*
- Illustrations :
 - ECtHR, *Ashby Donald v France* ; ECtHR, *Neij and Sunde Kolmisoppi v Sweden* (« *The Pirate Bay* »)
 - ECJ, *Scarlet* (§ 43) ; *Netlog* (§ 41) ; *UPC Wien Telekabel* (§ 61)
 - So far, points of departure have been FoE before the ECtHR, and IP before the ECJ

Necessity of a « fair balance »

- Two approaches are possible:
 - *Ad hoc* balancing
 - Categorical balancing
- The two approaches are reflected in the way the two European supreme courts deal with intermediary liability:
 - ECtHR
 - ECJ

The ECHR

- So far only one case has concerned intermediary liability and intellectual property as such
- Tendency for the Court to rely on other relevant sources of « law » (not only of the Council of Europe institutions! – hence, possibility of an « importation » of developments from other international bodies)
- Intellectual property as a restriction of freedom of expression (freedom of expression as a restriction of intellectual property)

The ECHR

- **Three cumulative conditions for an interference to be admissible:**
 - **Provided for by law (legality and foreseeability)**
 - **To pursue a legitimate aim (from the list)**
 - **Necessary in a democratic society (appropriateness*, necessity and proportionality)**
- **A prerequisite to submit an application before the Court : the status of « victim » (art. 34, ECHR)**
 - **Illustration: *Akdeniz v Turkey* (inadmissibly decision) but comp. *Cengiz and others v Turkey***

Appropriateness threshold

- « (...) *futile measures cannot be necessary* » (Judge Pinto de Albuquerque in his dissent in *Mouvement raëlien suisse v. Switzerland*)
- « (...) *the measures which are taken by the addressee of an injunction, such as that at issue in the main proceedings, when implementing that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right* » (ECJ in the *UPC Wien Telekabel* judgment)

The ECHR

- The relevancy of case dealing with intermediary liability in other domains:
 - The *Delfi* and *MTE* cases
 - Notice-and-take-down system is « *in many cases* », « *an appropriate tool for balancing the rights and interests of all those involved* »
 - Excluded in the case of hate speech and incitement to violence in *Delfi*

The EU Law

- The ECD : art. 12-15 and other directives in the field of intellectual property
 - A categorical (but imprecise) balance
 - Interpretation of the directive must respect Art. 10 of the ECHR and national rules protecting freedom of expression (cf. recital 9 of the ECD)
- The Charter of fundamental rights of the EU
 - As an extra tool to balance the human rights at stake
 - To reinforce the reasoning (cf. the *Scarlet* and *Netlog* cases)
 - Or as a foundation to find a « fair » balance in the silence of the directive

The EU Law

- Only specific kinds of intermediaries (« mere conduit », « caching », « hosting »)
- Prohibition of a general monitoring obligation (art. 15, ECD)
- Three different kinds of conditional immunities (art. 12-14, ECD)
 - Horizontal immunities (in the field of civil, administrative or criminal law and independently of the kind of infringement at stake)
 - Possibility for a court (or adm. body) to issue injunctions to terminate or prevent infringements

The EU Law

- **The current EU system has various flaws (focus on the situation of the hosting provider):**
 - **In terms of legal certainty**
 - **In terms of necessity**

The EU Law

- In terms of legal certainty: no foreseeability
 - No European guidance on *notice-and-take-down* (only a reference in art. 21 of the ECD)
 - Different concepts are not sufficiently precise (e.g. the « *actual knowledge* » of illegality, the « *appearance* » of illegality, the *rapidity* of his intervention)
 - Even the *scope* of the immunity has been subject to much discussion (cf. the *Delfi* case) : who is an intermediary ?
 - There are a lot of uncertainties and the system doesn't guarantee foreseeability (in particular, when we look at the divergent solutions between the laws of Member States and between the two European supreme courts!)

The EU Law

- In terms of necessity: important risks of collateral damage and of excessive restrictions of FoE
 - The appreciation of the lawfulness is delegated to the intermediary:
 - The ECD provides for a notice-and-take-down system in which the host is in the front line to appreciate the lawfulness of the content
 - Under the threat of being held liable
 - And under the threat of payment of the costs of giving formal notice and court costs in a injunctive procedure in case of violation (cf. *Mc Fadden* case)!
 - Important risks of private censorship!

The EU Law

- Very difficult for the intermediary to appreciate the lawfulness of a content:
 - Various exceptions to copyright depend on the context and the intentions of the user
 - The territorial aspect of the licences granted for the copyrighted work...
 - Differences between the laws of the Member States in what regards the protection of copyright: « (...) *it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. Moreover, in some Member States certain works fall within the public domain or can be posted online free of charge by the authors concerned* » (Scarlet, § 52 ; Netlog, § 50)

What would be a perfect system for balancing FoE and IP ?

- The States (and the EU) have in principle the duty to find a fair balance between the fundamental rights at stake
 - In principle, wide margin of appreciation of the States to find a balance between two human rights (the « Chassagnou » doctrine, cf. *Ashby Donald v France* and *Neij and Sunde Kolmisoppi v Sweden* cases)
 - Importance of positive obligations, notably in the ECtHR case-law
 - Rules governing intermediary liability must be foreseeable. Hence, preference for categorical balancing rather than *ad hoc* balancing!
 - As often when it comes to balancing human rights, the solution is a procedural one

What would be a perfect system for balancing FoE and IP ?

- The perfect system in five points:
 - 1) Foreseeability of the whole system!
 - 2) No general obligation to monitor (even in the case of hate speech and incitement to violence? *Delfi* case?)
 - 3) *In principle*, immunity for intermediaries, as long as they don't intervene in the content, but see 5)
 - 4) No delegation to the intermediary of the task of balancing the rights at stake and/or of appreciating the lawfulness of a content
 - 5) *As far as possible*, no action of the intermediary on the content before the intervention of a judge (at least a possibility to contest the measure before a judge or an independent and impartial body)

What would be a perfect system for balancing FoE and IP ?

- The **intermediaries** are maybe the best placed to intervene from a technical point of view... but not to appreciate the lawfulness of a content
 - Natural tendency to err on the side of caution and to remove/disable also legal content
 - Terms and conditions of the intermediaries generally exclude responsibility towards their clients in case of undue censorship
 - No incentive to make freedom of expression prevail!
- The best placed is a **judicial or another independant and impartial body** (in order to duly take into consideration the right of the users to receive information as the possibility laid down in the *UPC Wien Telekom judgment*, § 57, of a right for the public to contest *ex post* a blocking measure or a removal of content is difficult to set up!)
 - Can be quick with summary procedures
 - But it remains costly and burdensome!
- Then, the **parties** involved remain better placed than the intermediary (with a possible access to the judge)
 - Notice-and-notice procedure
 - No decision of the intermediary about the lawfulness (at least not in the first place)
 - A good compromise solution

In conclusion

- The prohibition to impose a obligation of general filtering of the communications (as a result of both art. 15 of the ECD and of a fair balancing between human rights, and amongst others, freedom of the Internet users to receive information) should be maintained;
- The actions expected from the intermediaries should be more precisely laid down in the law and harmonized in the European legislation;
- As far as possible, Internet intermediaries shouldn't be put in position where they have to appreciate the legality of a content or to determine by themselves the measure to take in order to terminate or prevent an infringement (cf. the *UPC Wien Telekabel* case);
- In what regards copyright, a notice-to-notice system should be preferred to other notice-and-action systems, and especially to the notice-and-take-down system currently provided for in the ECD.

Some references

- C. Angelopoulos & S. Smet, «Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability », *Journal of Media Law*, 2016, vol. 8, n° 2, pp. 266-301.
- Article 19, « Internet Intermediaries: Dilemma of Liability », 2013.
- E. Montero & Q. Van Enis, « Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle? », *Computer Law & Security Review*, 2011, vol. 27, n° 1, pp. 21-35.

Thank you for your attention!

