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Liability of Intermediary Service Providers

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Programme for seminar

• Main issues
• Types of intermediary liability
  – EU, US
• Notion of information society service provider
• ECD liability exception regime
• Difficulties raised by ECD, its interpretation and implementation
Main issues

• Internet is designed to carry, host and transmit information (content)
• This information is distributed, hosted and located by online intermediaries.
• Difficulties arise re dubious content: civil or criminal liability
• How far, if at all, should online intermediaries be responsible for this content? How far should responsibility stay with the original content author or content provider?
• Questions more crucial in light of:
  – Rise in unauthorised downloading of digital music, film & video
  – Web 2.0
Introduction

• Earliest cases in the US:
  – Cubby v. CompuServ (1991)

• Different national regimes regulating different types of content

• Calls from industry for clarity and specific regulation
Types of intermediary liability

- Hosting and transmission of criminal content
  - Child pornography
- Material that infringes IP rights, especially copyright, but also trade marks & patents
- Libellous or defamatory material
- Content that is in violation of data protection
  - Privacy, right to one’s own image/picture
Legal regimes: US

- **US**: two separate regimes of immunities for ISPs
  - (1) re material infringing IP rights, especially copyright
    - US Digital Millenium Copyright Act (DMCA), Title 512
      - Exempts ISPs from liability for hosting copyright-infringing material in a set of ‘safe harbours’ but only on certain terms such as the disclosure of the identity of infringers on request, subscription to a detailed code of practice relating to notice, ‘take-down’ and ‘put-back’, and the banning of identified repeat infringers from access
  - (2) re all other types of liability
    - Communications Decency Act (CDA), section 230(C)
      - Total immunity re all kinds of liability bar that relating to IP, so long as the content was provided by a party other than the ISP.
Legal regimes: Europe

- ECD section 4 (articles 12-15): “Liability of intermediary service providers”
  - One harmonised regime (minimum harmonisation directive) which applies in a horizontal manner, i.e. covering criminal, administrative and civil liability for all types of illegal activities initiated by third parties online
  - Immunity in 3 cases, provided certain conditions observed:
    - Conduit
    - Caching
    - Hosting services
ISSP

• Who is an ISSP in terms of the ECD?
  – Also referred to as an “intermediary service provider” (title of sec 4 ECD)
  – “service provider” defined as “any natural or legal person providing an information society service”
  – An information society service is “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service” (see art 2(a) ECD and cross-references it makes; see also recitals 17 and 18)
  – Thus the ECD provisions cover not only the traditional ISP sector, but also a much wider range of actors who are involved in selling goods or services online; offering online information or search tools for revenue or not; and “pure” telecoms, cable and mobile communications companies offering network access services.
ECD liability exemption regime (1)

• Mere conduit of information (art. 12 ECD):
  – ISP is not liable for the information transmitted in a network OR access to the network, as long as the ISP:
    • Does not initiate the transmission
    • Does not select the receiver of the transmission and
    • Does not select or modify the information contained in the transmission
  – Intermediate and transient storage is included provided:
    • it takes place for the sole purpose of carrying out the transmission in the communication network, and
    • the information is not stored for any period longer than is reasonably necessary for the transmission.
ECD liability exemption regime (2)

- Caching (art. 13 ECD):
  - the automatic, intermediate and temporary storage of information for the purposes of making the onward transmission to other recipients of the service more efficient
  - No liability when the ISP:
    - Does not modify the information;
    - Complies with conditions on access to the information;
    - Complies with any conditions regarding the updating of the information, specified in a manner widely recognised and used by industry;
    - Does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; AND
    - Acts expeditiously to remove or bar access to the information upon obtaining actual knowledge of any of the following:
      - The information at the initial source of the transmission has been removed from the network
      - Access to it has been disabled
      - The Court or other administrative authority has ordered such removal or disablement
ECD liability exemption regime (3)

- Hosting (art.14 ECD):
  - Storage of information provided by the recipient of the service
  - An ISP is not liable for damages for the information stored provided the ISP:
    - Does not have actual knowledge of illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent; OR
    - Upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
  - This exemption does not apply where the recipient of the service is acting under the authority or control of the ISP
ECD liability exemption regime (4)

• No general obligation on ISP (art 15, ECD):
  – to monitor the information which it transmits or stores
  – to actively seek facts or circumstances indicating illegal activity in connection with activities of mere conduit, caching & hosting
  – Member States may impose obligations on ISP:
    • to promptly inform the public authorities of any alleged illegal activity undertaken or information provided by recipients of their service
    • To grant to such authorities information enabling the identification of recipients of their service with whom they have storage agreements
Difficulties with ECD implementation

• Difficulties re the practical application of section 14 ECD
  – Obligation to remove or disable access to information, upon knowledge or awareness of illegality
  – The definition of actual knowledge
  – Who determines the illegality of the information?
  – Once the information is removed/disabled, what happens if the person who had originally put that information shows that such information is not illegal/infringing?
    • What about mechanism for “put back”? 
Actual knowledge

• National implementation and court practices differ between EU Member States when assessing this:
  – From requiring a formal procedure and an official notification by authorities; to leaving it to the courts to determine; others provide mechanisms like notice and take down procedures.

• ISPs caught in a conflict of interest:
  – Providers do not want to be entangled in the legal problems of their clients – sometimes complex legal matters that may be exacerbated by complex conflict of laws issues. Risk of potential abuse by fictitious ”victims” bent on impeding competitor.
  – It is in the interest of rightholders and public interest that ISPs act fast to block or remove illegal content.
Notice and take-down procedures

• At the time the ECD was adopted, it was felt that notice and take down procedures should not be regulated in ECD – choice for self-regulation (art. 16, Recital 40)

• In their transposition of ECD, some EU states did, however, include additional measures not covered by the ECD such as statutory notice and take down procedures for illegal content
  – E.g, Finland but only re copyright and related rights infringement
  – Formal notice and take-down procedures in UK under Terrorism Act 2006 (re criminal offences)
Self-regulation & co-regulation

• Self-regulation:
  – e.g. UK - Internet Watch Foundation: works with industry and supported by intermediaries to restrict access to child abuse images hosted anywhere in the world, & criminally obscene content or content inciting to racial hatred hosted in the UK;
  – operates hotline to enable public to report such cases;
  – Members Code of Practice on how to respond to IWF notices on potentially illegal conduct and the procedures when a member fails to comply with a notice.

• Co-regulation:
  – Cooperation between private companies or institutions and public authorities in developing a regulation, e.g. France’s various co-regulation codes of conduct, e.g. re online auction platforms (2006) to which inter alia Amazon & eBay have acceded.
Study on the Liability of Internet Intermediaries (11.2007) (1)

• http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf

• Recommendations re:
  – Notice and take down
  – Information location tools:
    • Hyperlinks
    • Search engines

• Notice and take down:
  – Combined with counter-notice and put-back procedure
  – To avoid civil or criminal liability, these procedures should be supported by legal mechanisms ensuring ISP does not incur liability by sending notification to its customers
  – Backed by rapid preliminary review proceedings re IP infringement or unfair competition

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Study on the Liability of Internet Intermediaries (11.2007) (2)

• Information location tools:
  – General remarks:
    • Generally serve a social need as they facilitate Internet use
    • Liability exemptions should take into account the different levels of control and of awareness that a provider of information location tools has concerning the content to which the tool directs the user.
  – Hyperlinks:
    • The placing of a hyperlink is the deliberate action by the person setting the hyperlink.
    • However, the setter of the hyperlink should not be held liable for changes in the linked website after he has set the link since he is not in a position to obtain knowledge of such changes, unless notified thereof.
Study on the Liability of Internet Intermediaries (11.2007) (3)

- Information location tools (cont.):
  - Search engines: distinction between:
    - Natural results (automatically generated links to websites)
      - Social benefits of such search engines should outweigh disadvantages resulting from listing of unlawful content
    - Adwords (commercial links, used by search engine operators to generate revenues via a personalised advertisement system)
      - Difficult for study experts to conceive of liability exemptions in such a system which is controlled by search engine operator, and designed to generate revenues. Providers do not act as mere technical intermediaries.
What about P2P downloading?

• Content industries sued P2P software providers as “evil intermediaries” (*Napster case*)
  – Sites which did not host infringing files but clearly pointed to such files held by others

• Modern decentralised protocols make it impossible to find a critical central intermediary to sue (Edwards, 2009)

• However, modern P2P networks still depend on intermediary sites, e.g. Pirate Bay, which host files known as “torrents”.

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Pirate Bay

• Defendants argued similarity of functionality to Google
• However, Pirate Bay were aware of the illegality and their acts were different to Google:
  – Aware that a large number of website’s users were engaged in the unlawful disposal of copyright-protected material
  – Provided a website with advanced search functions and easy uploading and downloading facilities, and put individual file-sharers in touch with each other through the tracker linked to the site
  – Operators were making serious money from advertising on the site
  – The majority of the files that Pirate Bay linked to were protected by copyright
• Illegal in Sweden … but not blocked in Norway
Google Adwords

• ECJ ruling (joined cases C-236-238/08) (23 March 2010)
  – Test to determine liability of an ISP: “whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores”.
  – What if the ISP takes money for the display? What if the ISP determines the order of entries returned on a search?
  – What about involvement in drafting the display material that is included in the search return?
  – While a service provider cannot be held liable for the data which it has stored at the request of an advertiser, it would be liable if, having obtained knowledge of the unlawful nature of the data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

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