

**A comparison of the legitimacy of recent legislative and non-legislative pressures exerted
on the EU intermediary liability framework.**

Roosa Tarkiainen¹

¹ LLB University of Southampton, LLM King's College London.

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INTRODUCTION

As the arena for unlimited dissemination of content, the internet has since its formation been subject to controversy over how the content should be controlled. Beginning with calls for anarchy in this new space,² the multitudes of behaviours and information disseminated online have since developed into subjects of complex regulation. The convoluted path towards regulating content on the internet has in recent times has been approaching yet another crossroad.

Given the volume of information available, and the velocity at which it is disseminated and often subsequently taken down online, holding individual actors liable for illegal content is almost impossible. As such, legislation has focused on the “gatekeepers”³ of the content as subjects of liability. These gatekeepers can be divided into intermediary actors such as access providers, mere conduits, and hosting providers⁴ that are necessary for individual users to gain access to content online. This structure is followed in the EU framework of intermediary liability established in the Directive on Electronic Commerce (E-commerce Directive).⁵ The EU framework of safe harbours, and the similar (although vertical) DCMA regime in the US,⁶ have remained the status quo for liabilities of information service providers over illegal activities carried out using their services. In the case of the E-commerce Directive, the intermediary would only become liable where the information society service provider has neither knowledge of nor control over the information which is transmitted or stored⁷ and is not involved in modifying the information transmitted in the case of mere conduit or caching.⁸ In addition, the information service providers cannot be subjected to general obligations to monitor the information which they transmit or store, or to actively seek facts or circumstances indicating illegal activity.⁹

However, the safe harbour status quo is arguably being undermined through various legislative as well as voluntary measures targeting intermediaries in recent years. At the EU

² Barlow (1996)

³ Lessig (2006) 6

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), OJ L 178 , 17/07/2000 P. 0001 – 0016, Articles 12-14

⁵ E-Commerce Directive

⁶ Digital Millennium Copyright Act (DMCA) Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)

⁷ E-Commerce Directive, Recital 42

⁸ Ibid. Recital 43

⁹ Ibid. Article 15

level, these are composed of the law reform in the new EU Copyright Directive,¹⁰ and the voluntary measures introduced by the EU Commission, as well as national agreements between the relevant stakeholders.

The focus of this paper is to analyse the two trends in intermediary liability from an intellectual property enforcement angle, and to question whether the resulting pressures exerted on the E-commerce Directive are justified and necessary. The developments and their potential justifications will be analysed through the EU intermediary liability framework, primarily focusing on hosting providers that host user generated content. The comparison between EU law reform and voluntary measures will conclude that changes to the liability regime of platforms are inevitable. However, in many instances the changes envisaged by the EU law reform are already in line with the existing *acquis*, whereas the voluntary measures in their many forms exacerbate fragmentation of liability across the EU. Thus, changes achieved through privatized norm setting should be avoided, and the scrutiny and transparency involved in the EU law reform process should be encouraged instead.

¹⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593

CHAPTER 1: LIABILITY FRAMEWORK IN EUROPE

The European liability framework for intermediaries was enacted as part of a broader harmonisation of rules governing electronic commerce in the E-commerce Directive. The original proposal by the European Commission had the aim of forming a “coherent framework to bring about the free circulation of online services”¹¹ and to create a “favourable regulatory framework for electronic commerce in the EU”.¹²

One of the ambitious¹³ aims of the Directive was to form “*the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information*”, given the “*existing and emerging disparities in Member States’ legislation and case-law concerning liability of service providers acting as intermediaries*”.¹⁴ Notably, the Directive recognised that it should constitute “the basis for the development of rapid and reliable procedures for removing and disabling access to illegal information”.¹⁵ Such mechanisms could be developed on the basis of voluntary agreements between all parties concerned.¹⁶ The Directive was in effect explicitly recognizing the need for further voluntary measures to combat illegal activity online. In another recital, the Directive encourages Member States and the Commission to draw up codes of conduct, the nature of which should remain voluntary to interested parties.¹⁷

In terms of intermediary liability, the E-commerce Directive established a horizontal “with fault system with a constructive knowledge requirement”.¹⁸ In other words, the intermediary is held liable where it intentionally breaches the rights of others, and only where it has awareness of the illegality of material where that awareness may be presumed by law.¹⁹ The framework in the Directive provides a series of specific liability exemptions for caching, mere conduit and hosting providers²⁰ where the (exemption from) liability remains the same independent of the type of harmful content disseminated via the intermediary. This type of horizontal regime is arguably preferable, in contrast for example with the US framework,

¹¹ COM (1998) 586 final, p. 4

¹² European Commission, ‘*Electronic Commerce: Commission presents framework for future action*’ 1997

¹³ Lodder, A. (2017)

¹⁴ E-Commerce Directive, Recital 40

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid. Recital 49

¹⁸ Baistrocchi, B. (2003)

¹⁹ Ibid.

²⁰ E-Commerce Directive, Articles 12-14

because the intermediaries do not have to monitor and analyse the content disseminated by their users – a potentially onerous obligation that could result in extensive filtering and censoring of online content.²¹ Indeed the Directive explicitly provides in its own article that Member States shall not impose a general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.²² The prohibition in Article 15 makes sense commercially since such an obligation could render the provision of services by intermediaries onerous if they were obliged to scrutinize all the content going through their networks.²³ It should be noted, however, that such a prohibition is only with respect to obligations of a general nature, and monitoring obligations in a specific case are permitted, according to Recital 47.²⁴

The other relevant provision for the purposes of this paper is Article 14²⁵ governing the safe harbour requirements for hosting providers, defined as information society services that consist of the “storage of information provided by a recipient of the service”.²⁶ This covers storage that is not temporal.²⁷ Under the provision, hosting providers are exempt from liability for information that is stored at the request of a recipient of the service, provided that a). the provider does not have actual knowledge of illegal activity or information, and b). upon obtaining such knowledge the provider acts expeditiously to remove access to the information.²⁸ While the Directive does not establish a notice and takedown regime similar to that of the US regime under the Digital Millennium Copyright Act,²⁹ the practical effect of 14(1)(b) is that providers remove information after having been notified of its illegality in order to avoid liability.³⁰ Nonetheless, Article 14(3) explicitly delegates the discretion to establish a notice and takedown regime to Member States.³¹

The scope of the Directive and its safe harbours depends on the construction by the CJEU of, inter alia, ‘information society services’ and the breadth of the categories of activities such as

²¹ Baistrocchi, B. (2003)

²² E-Commerce Directive, Article 15

²³ Baistrocchi, B. (2003)

²⁴ E-Commerce Directive, Recital 47

²⁵ Ibid. Article 14

²⁶ Ibid.

²⁷ Lodder.A (2017)

²⁸ E-Commerce Directive, Article 14 1(a)-(b)

²⁹ DMCA (1998)

³⁰ Baistrocchi, B. (2003)

³¹ E-Commerce Directive, Article 14(3)

hosting.³² While the articles in the E-commerce Directive were drafted as technology neutral, most of the platforms hosting user generated content that dominate today did not exist at the time of drafting.³³ Therefore the CJEU has had to assess the applicability of hosting safe harbours to modern, non-traditional, hosting providers such as Google³⁴ and eBay³⁵ - the so-called Web 2.0

³² Husovec, M. (2017)

³³ Lodder, A (2017)

³⁴ *Google France, Google Inc. v Louis Vuitton Malletier* (C-236/08) EU:C:2010:159

³⁵ *L'Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474

CHAPTER 2: LAW REFORM

Due to the development of Web 2.0 services since the enactment of the Directive, some have argued that the current liability regime is untenable in its current form. It, apparently, leads to counterintuitive results where a passive provider is rewarded with a liability exemption, whereas dedicated providers that moderate the content might be held liable due to their active role.³⁶ Due to the liability exemptions, lack of monitoring obligations and the notice and takedown regime, rightholders claim they would not be able to recoup the true value of their content as platforms would not enter into licensing agreements.³⁷ Recognizing these concerns, the European Commission in its Digital Single Market Strategy stated that it would consider whether intermediaries should “exercise greater responsibility and due diligence” in managing their networks.³⁸ A public consultation on platforms and intermediaries followed, concluding that the existing liability principles in the E-Commerce Directive are fit for purpose.³⁹ However, certain problematic elements of the regime were raised as requiring clarification, including the concept of a mere “technical, automatic and passive nature” of the providers, the categories of intermediaries, and specific duties of care for specific illegal content.⁴⁰

In 2015, the Commission echoed the concerns of certain industry groups⁴¹ in that the unclear liability framework and unclear scope of the communication to the public right had resulted in a gap in the amount of value transferred to right holders and in an abuse of the safe harbours by platforms.⁴² The concerns over the value gap were formalised in 2016 in the Commission Proposal for a Copyright Directive in the Digital Single Market, notably in Article 13.⁴³ In sum, the Commission proposal created an obligation on “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” to “*take measures to ensure the functioning of agreements concluded with right holders for the use of their works*”.⁴⁴ Along with the

³⁶ Lodder, A. (2017)

³⁷ Giancarlo Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’ (2017) *JIPLP* 12(7) 565 – 575

³⁸ COM(2015) 192 final, §3.3.2.

³⁹ European Commission, ‘*Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy*’, (May 2016)

⁴⁰ *Ibid.*

⁴¹ International Federation of the Phonographic Industry, 2016

⁴² COM(2015) 626 final, §4

⁴³ COM(2016)593, Article 13

⁴⁴ *Ibid.*

licensing obligation, the hosting provider would have to “*prevent the availability on their services of works or other subject-matter identified by right holders*”, through measures “*such as the use of effective content recognition technologies*”.⁴⁵ Recital 38 adds that by storing and providing access to these works, the providers go “*beyond the mere provision of physical facilities*”, thereby “*performing an act of communication to the public*”.⁴⁶ The provider is in this case obliged to conclude licensing agreements, unless the provider does not play an active role “*including by optimising the presentation of the uploaded works or subject matter or promoting them, irrespective of the nature of the means*”,⁴⁷ thus falling under the liability exemption under Article 14 of the E-Commerce Directive.

The Commission proposal raises a number of issues. First, the re-qualification of an ‘active role’ makes it more difficult for a hosting provider to fall under the safe harbour: previously the CJEU held that an ‘active role’, such as to render the host ineligible for the safe harbour, involved optimisation or promotion that has allowed it to have “*knowledge or control of the data stored*”.⁴⁸ Recital 38, however, appears to suggest that mere optimisation of the works is enough, including by automatic means, without any requirement for knowledge by the provider. At first reading, this lowers the threshold for when a provider falls outside the safe harbour provisions. This makes it difficult especially for many of the modern platforms that control the content through automated means to be protected from claims of liability for third party content. Some have argued that left as such, the Commission proposal fails to accurately reflect the status quo of the contours of the safe harbour for hosting as interpreted by the CJEU.⁴⁹ The definition of ‘active role’ remains the same in the later Council and JURI Committee texts.⁵⁰

⁴⁵ Ibid.

⁴⁶ Ibid. Recital 38

⁴⁷ Ibid.

⁴⁸ *L'Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474

⁴⁹ Senftleben, Angeloupoulos, Frosio et al., ‘*The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*’ (2018) EIPR 40(3) 149-163

⁵⁰ Council of the European Union, ‘Proposal for a Directive of the European Parliament and the Council on copyright in the Digital Single Market – agreed negotiating mandate’ 2016/0280 (COD) 25 May 2018; and European Parliament Committee on Legal Affairs, ‘Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market’ (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))

Secondly, the original Commission draft arguably reduces the rich jurisprudence of the CJEU on the communication to the public right under Article 3(1) of the InfoSoc Directive⁵¹ to the mere storing and provision of access to the works. The Council text is stronger on this point in that it explicitly references the relevant InfoSoc provisions,⁵² stating that the services engage in an act of communication to the public “*within the meaning of Article 3(1) and (2) of Directive 2001/729/EC*” and without changing the concept of communication to the public or of making to the public under Union law.⁵³ All three drafts have the effect of making the hosting provider directly liable for acts of communication to the public. At the time of the Commission draft, the criticism was that the existing CJEU jurisprudence on the criteria of Article 3 would not permit a finding of direct liability.⁵⁴ This was because the criteria required a communication to a ‘new public’, where the role of the user would be ‘indispensable’ in that without that intervention the viewers would be unable to enjoy the works.⁵⁵ It follows that the ‘indispensable’ intervention would be the one of the user/uploader, and thus it would not be possible to hold the hosting provider primarily liable for the infringement.⁵⁶ Furthermore, it was argued that intermediaries have indeed been held traditionally secondary liable, as derived from miscellaneous doctrines of tort law such as authorization and vicarious liability at EU member state level.⁵⁷ Such a strict (primary) liability system would offset the balance between copyright and users’ fundamental rights, giving right holders broad rights to control use of their works online, rather than having to refer to specific instances through notice and takedown procedures.⁵⁸

Finally, and perhaps most controversially especially in light of the very vocal opposition,⁵⁹ has been the introduction of an obligation on the service providers to implement “measures to

⁵¹ - Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (‘InfoSoc Directive’) Article 3(1)

⁵² 2016/0280 (COD) 25 May 2018, Recital 38

⁵³ Ibid.

⁵⁴ Rosati, E. (August 2016)

⁵⁵ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05), EU:C:2006:764; and *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) EU:C:2011:631

⁵⁶ Rosati E. (August 2016)

⁵⁷ Giancarlo Frosio, ‘From horizontal to vertical: an intermediary liability earthquake in Europe’ (2017) *JiPLP* 12(7) 565 – 575

⁵⁸ *Google France, Google Inc. v Louis Vuitton Malletier* (C-236/08) EU:C:2009:569, Opinion of Advocate General Poiares Maduro, 22 September 2009

⁵⁹ Julia Reda, ‘*Censorship machines (Article 13)*’ (Juliareda.eu) <<https://juliareda.eu/eu-copyright-reform/censorship-machines/>> ; Index on Censorship, 12 June 2018

prevent the availability on their services of works or other subject matter identified by rightholders”, through measures such as “the use of effective content recognition technologies”.⁶⁰

The wording of the obligation has remained the same throughout the three proposed drafts. The criticism of this obligation has been in light of the aforementioned prohibition in Article 15 of the E-Commerce Directive on imposing a general obligation to monitor for illegal content on the platform.⁶¹ The alleged incompatibility between the proposals and the E-commerce Directive originate from the CJEU’s interpretations of article 15. In *L’Oréal v eBay*, the Court held that, following article 15, “*the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider’s website*”.⁶² In the cases of *Scarlet v SABAM* and *SABAM v Netlog*⁶³, the CJEU repeated its ruling that obligations to filter information uploaded to a server would be incompatible with Article 15, and in *McFadden* the Court concluded that article 15 excludes the “*imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit*”.⁶⁴ Concerns have also been raised that the monitoring technologies would fail to balance rightholders rights with users’ fundamental rights, such as freedom of expression, right to privacy, as well as the providers’ rights to conduct business.⁶⁵

2.2 ARE THE CRITICISMS OF THE LAW REFORM JUSTIFIED?

At the time of writing, the draft Copyright Directive has not yet entered trilogue negotiations. The EU Parliament’s Legal Affairs Committee (JURI) voted in favour of the Directive, however shortly after the plenary session of the European Parliament rejected the proposal and the draft is now open to further discussion and amendments. It should be noted, however, that the result of the vote is not clear as to whether it was the content of the proposal that was rejected, or simply the process by which the Directive was to be pushed forward. Article 1(2)

⁶⁰ COM(2016)593 Article 13

⁶¹ E-Commerce Directive, Article 15

⁶² *L’Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474

⁶³ *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, EU:C:2011:771; and *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v Netlog*, C-360/10, EU:C:2012:85

⁶⁴ *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, EU:C:2016:689

⁶⁵ Giancarlo Frosio, ‘From horizontal to vertical: an intermediary liability earthquake in Europe’ (2017) *JiPLP* 12(7) 565 – 575

of the Commission draft states that the draft preserves “*existing rules laid down in the Directives currently in force in this area*”⁶⁶ and goes on to list a number of Directives. There is no explicit reference to the E-Commerce Directive, however one could argue that “existing rules...in this area” could cover it. Regarding the major criticisms identified above, this paper submits that the majority of them are no longer justified, primarily because of changes made to the latest JURI draft (assuming that the draft or a version of it is adopted), and because of recent CJEU rulings that have arguably pushed the EU jurisprudence over intermediary liability closer to the policy agenda.

2.2.1 Active role

From a literal reading, the drafts of the Copyright Directive do not replicate some of the wording of the CJEU per verbatim. However, the arguments highlighted above presume that the terms “knowledge” and “control” used by the Court, and the terms “optimising” and “control” are independent of one another. The arguments do not recognize that the terms may overlap and that reducing the acquis to two terms employed by the Court is superficial. Indeed the Court in *L’Oreal v eBay*⁶⁷ elaborates on this point, stating that where “*the operator had provided assistance which entails, in particular optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position*” but “*to have played an active role of such a kind as to give it knowledge of, or control over, the data*”.

In other words, the Court identifies that the optimising or promotion of offers results in a non-neutral, active role. The result is subsequent knowledge or control over the data. Knowledge and control could thus be viewed as integral in that optimisation and promotion, in which case repeating the former in Recital 38 of the drafts of the Directive could be unnecessary. Either way, the controversy is surrounding a recital that has not been finalized. The purpose of recitals is to clarify the articles of directives, and they do not themselves change the law. The operative part of the Directives remains untouched by the recitals. The arguments that the wording of a recital can change existing jurisprudence of the CJEU appear exaggerated and theoretical for now.

2.2.2 Direct Liability of Online Content Sharing Service Providers

⁶⁶ COM(2016)593 Article 1(2)

⁶⁷ *L’Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474

The original criticisms regarding the imposition of direct liability on online content sharing service providers are now outdated. Between the publication of the Commission proposal for the Directive and the latest vote, the CJEU has in its rulings arguably already achieved the same result. The two relevant rulings are ‘*Filmspeler*’ (April 2017)⁶⁸ and ‘*The Pirate Bay*’ (June 2017).⁶⁹

The case of *Filmspeler* was a reference from a preliminary ruling by the District Court of Central Netherlands, regarding a dispute between the anti-piracy organization Stichting Brein and the vendor of a multimedia player that contained pre-installed add-ons with hyperlinks to illegal streaming sites. The referring court asked whether the concept of communication to the public under Article 3(1) should be interpreted to cover such sales of multimedia players.⁷⁰ Having gone through the relevant jurisprudence of Article 3(1), the Court answered in the affirmative.⁷¹

While in previous decisions, and notably in *GS Media*,⁷² the CJEU has interpreted communication to the public to include the “indispensable intervention” of the user/defendant to give access to protected works,⁷³ in *Filmspeler* this requirement was relaxed. Instead, the Court here held that it suffices to have an “intervention enabling a direct link to be established” between the unlawful works and the purchasers of the multimedia players.⁷⁴ In other words, the element of ‘indispensability’ in that intervention was removed (in fact the judgement never mentions that word). This means that it becomes easier for a service that merely facilitates access to unlawful content to fall under Article 3(1).⁷⁵ Consequently, a broader range of services can be considered primarily liable for communicating to the public.⁷⁶ Thus, the notion of online content service providers being included in that list becomes increasingly conceivable.

⁶⁸ *Stichting Brein v Jack Frederik Wullems, acting under the name of Filmspeler*, C-527/15, EU:C:2017:300

⁶⁹ *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456

⁷⁰ *Stichting Brein v Jack Frederik Wullems, acting under the name of Filmspeler*, C-527/15, EU:C:2017:300, Par 22

⁷¹ *Ibid.*

⁷² *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644

⁷³ *Ibid.* at 35

⁷⁴ *Above*, 74, at 41

⁷⁵ Rosati, Eleonora ‘*Filmspeler, the right of communication to the public, and unlawful streams: a landmark decision*’ (IPKat, 27 April 2017)

⁷⁶ *Ibid.*

Three months later, the CJEU consolidated primary liability for these services in its ruling in *'The Pirate Bay'*.⁷⁷ That case arose from a dispute between Stichting Brein and two internet access providers regarding an application for an order for the access providers to block access to the peer-to-peer site Pirate Bay. The Supreme Court sought guidance from the CJEU as to whether the operators of the Pirate Bay, which does not host content itself, would be making unauthorised acts of communication to the public under Article 3(1).

The CJEU held that, while the content has been placed online on the platform not by the platform operators but by its users, the operators still intervene to provide access to the works by indexing torrent files which allow the users to then locate those works and share them.⁷⁸ In other words, without making such a platform available and managing it, sharing the works would be “more complex”.⁷⁹ The Court noted that the operators “could not be unaware” that the Pirate Bay provides access to unlawfully published works, and that a very large number of the torrent files on the platform relate these works.⁸⁰ Thus, the Court arguably broadened liability based on actual knowledge, to constructive knowledge as well (“could not be unaware”).⁸¹ Some have argued that the liability is therefore limited to situations where the platform has actual or constructive knowledge.⁸²

However, Rosati⁸³ puts forward a persuasive argument that, on the contrary, the CJEU follows *GS Media* and *Filmspeler* where a presumption of knowledge is established through the profit making intention of the defendant. This is because it was clear to the Court that the platform was operating for a profit given that it generated considerable advertising revenues,⁸⁴ and because the Court followed the relevant reasoning of *Filmspeler*, which in turn confirmed the application of *GS Media*.⁸⁵ The Court finally concluded that Article 3(1) covers “*the making available and management, on the internet, of a sharing platform which, by means of*

⁷⁷ Above, 73.

⁷⁸ Ibid. at 36

⁷⁹ Ibid.

⁸⁰ Ibid. at 45

⁸¹ Rosati, Eleonora, ‘*The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms*’ E.I.P.R. 2017, 39(12), 737-748

⁸² Angelopoulos, ‘*CJEU Decision on Ziggo: The Pirate Bay communicates works to the public*’ (30 June 2017), Kluwer Copyright Blog

⁸³ Above, 85.

⁸⁴ Above 73, at 46

⁸⁵ Above, 85, at 10

*indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network”.*⁸⁶

While persuasive, Rosati’s argument is flawed in that the CJEU has not explicitly ruled that the presumption of knowledge arising from a profit making intention would apply more generally than to the service-specific hyperlinking and multimedia player scenarios. However, assuming that the Court did in fact intend to introduce such presumption of liability to online operators that host content uploaded by users, the implication would be a final stitching of the gap between legislative developments and the status quo. This means that online content sharing service providers, such as YouTube, that operate for a profit would be held jointly liable for the infringements of the rights of the users. An issue still remains as to the exemptions from liability in the E-commerce Directive, and whether platforms who are held liable would be protected from liability. Rosati however argues that the safe harbour protections would not apply. Firstly, this is due to the fact that the safe harbour regime does not apply to hosting providers that are more than passive,⁸⁷ and secondly due to the fact that the CJEU did not mention the E-Commerce Directive.⁸⁸ The argument is that Recital 44 excludes safe harbour for direct infringements for mere conduit and caching providers, but the same would apply in relation to hosting providers.⁸⁹

If this is correct, then the previous criticisms over policy developments introducing new concepts are no longer justified. At a basic level, the aforementioned CJEU rulings confirm the liability of online content sharing service providers, the inapplicability of the safe harbour in certain circumstances, resulting consequently in an obligation to conclude licenses with certain rightholders – mirroring what has been proposed in the Copyright Directive. Indeed, increased liability of such platforms is not unforeseen and is gaining ground in some Member States.⁹⁰

2.2.3 Monitoring obligations

⁸⁶ Ibid. at 50

⁸⁷ InfoSoc Directive, Recital 42.

⁸⁸ Above, 85.

⁸⁹ E-Commerce Directive, recital 44. See also recital 46 and article 14(2)

⁹⁰ Scott Roxborough, ‘YouTube Liable for Copyright Infringement, Austrian Court Finds in Preliminary Ruling’, (The Hollywood Reporter, 6 June 2018)

The next vocal criticism raised over the proposed Directive is its relationship with Article 15 of the E-Commerce Directive. Opponents have argued that the obligation to implement content recognition technologies, where licensing agreements have not been concluded with rightholders and/or where the service provider is eligible for the liability exemption, would amount to a general monitoring obligation.⁹¹ Indeed the CJEU has explicitly stated that “*measures required of the online service provider concerned cannot consist in active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider’s website*”.⁹² In *SABAM/Netlog*,⁹³ the CJEU ruled that specifically a monitoring obligation to prevent “*any future infringement*”⁹⁴ would be incompatible with Article 15, leaving open the possibility of monitoring present traffic on the platform. However, in *McFadden*⁹⁵ the CJEU ruled that Article 15 also “*excludes the imposition of a general monitoring obligation on, inter alia, communication network access providers to monitor the information they transmit*”.⁹⁶

The concern is that a general monitoring obligation would undermine internet users’ fundamental rights and legal certainty.⁹⁷ The risk is that the obligation may lead to accidental blocking of legal content (especially with less developed technologies), or intentional overblocking to avoid liability for non-compliance. Further, an obligation to implement such technologies could hinder the providers’ freedom to conduct business.⁹⁸ This is a criticism raised especially with regards to small and medium sized providers: existing small providers will lack the requisite resources to implement the technologies in an appropriate manner, and those looking to enter the market may be prevented from doing so.⁹⁹

Whether the aforementioned concerns over monitoring obligations are justified depends on the draft considered. Of the three published so far, the Commission proposal imposes the

⁹¹ Above, 53.

⁹² *L’Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474

⁹³ *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, EU:C:2011:771; see also - *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v Netlog*, C-360/10, EU:C:2012:85

⁹⁴ *Ibid.*

⁹⁵ *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, EU:C:2016:689

⁹⁶ *Ibid.*

⁹⁷ Rosati, Stalla-Bourdillon et al. ‘*Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society*’ 19 October 2016

⁹⁸ Frosio, Giancarlo ‘The Death of ‘No Monitoring Obligations’: A Story of Untameable Monsters’ JIPITEC 212 (2017) 8(3)

⁹⁹ Above, 101.

obligation, subject to a thin qualification that the technologies shall be “appropriate and proportionate”.¹⁰⁰ The text fails to define the latter terms, or to include reference to the concerns underlined above. The Council text is arguably a clear improvement. The text also refers to “effective and proportionate” measures, but includes also factors that must be taken into account to fulfil these criteria, including the nature and size of the service (especially where provided by a microenterprise/small-sized enterprise)¹⁰¹, and the availability and costs of the measures.¹⁰² The text explicitly addresses the concerns over technical measures hindering the functioning of smaller businesses, both in terms of technological complexity and the costs of compliance. While the provision does not create an exclusion of liability for smaller enterprises, it certainly introduces flexibility. This means that while larger providers such as Youtube will have higher expectations to maintain accurate services like ContentID, for smaller providers the obligation will be proportionate to their size and expertise.

The Parliament JURI Committee text diverges from the Council one in that it removes specific references to small/medium sized enterprises. Instead it states that the use of effective content recognition technologies “shall be appropriate, proportionate and compliant with the relevant industry standards”.¹⁰³ In contrast to the other texts, the JURI proposal also explicitly mandates that member states shall ensure that the implementation of the measures “shall in accordance with Article 15 [of the E-Commerce Directive] not impose a general obligation on online content sharing service providers”.¹⁰⁴ Furthermore, the same provision obliges Member States to ensure that the “implementation of such measures shall be proportionate and strike a balance between the fundamental rights of users and rightholders”.¹⁰⁵

Furthermore, the drafts are clear in that the relevant rightholders will be providing the necessary data for the content recognition technologies.¹⁰⁶ This limits the scope of the content covered by the obligations in Article 13 to what is explicitly provided by the rightholders. Article 15 of the E-Commerce Directive concedes that only general monitoring is prohibited, and specific monitoring is allowed.¹⁰⁷ It could thus be argued, in the alternative, that the

¹⁰⁰ COM(2016)593

¹⁰¹ 2016/0280 (COD) 25 May 2018 ,Article 13(5)(a). See also recital 38

¹⁰² Ibid. Article 13(5)(c)

¹⁰³ (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), Article 13(1)

¹⁰⁴ Ibid. 13(1)(b)

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. Recital 39 – XCHECK

¹⁰⁷ E-Commerce Directive, Article 15.

monitoring envisaged by Article 13 would be specific enough to be permitted under the E-Commerce Directive.

In light of these added provisions, arguably the JURI and Council texts go much further in addressing the concerns raised over non-compliance with Article 15. In terms of the fundamental rights issues, notably freedom of information and business, the JURI text delegates the relevant balancing to member states. In theory therefore, and assuming the provision would be enforced satisfactorily in the member states, the text overcomes some of the aforementioned problems. It is submitted that the Council text is stronger on the issue of SMEs. It includes the size of the business and the costs of implementation as factors to consider while assessing the effectiveness and proportionality of the measures. This makes the provision more flexible, and less onerous as a barrier to entry into the market. Arguably therefore many of the initial criticisms raised in relation to the Commission text are outdated, and given the Council and JURI texts, the final Directive is likely to include some provision for the shortcomings of the Commission paper.

CHAPTER 3: VOLUNTARY MEASURES

The introduction of legislative changes at both member state and EU level has been accompanied by, and often preceded by, a number of voluntary initiatives. These have included voluntary guidelines at national level, codes of conduct, as well as voluntary agreements between rightholders and the relevant online service providers. These voluntary measures have aimed at improving the enforcement of intellectual property rights online,

especially where it has been felt that the legal framework has fallen short.¹⁰⁸ The online enforcement of IP rights has become increasingly challenging given the speed of infringements online, and the failure of legal rules to catch up with this speed of change.¹⁰⁹ The underlying rationale of imposing (voluntary) obligations often mirrors those of the previously discussed legislative changes, in that intermediaries are best placed to combat the dissemination of unlawful content online, and should in fact be doing more to further enforcement.¹¹⁰

Depending on the country and type of voluntary measure, the stakeholders involved range from rightholders, representative groups, to public authorities and law enforcement pushing intermediaries to engage in agreements to voluntarily combat infringing activity occurring on their services. However, despite these measures being voluntary on the part of the intermediaries, they pose certain problems. Firstly, a compatibility issue with Article 14 of the E-Commerce arises given the intermediaries' involvement into, and a subsequent awareness of, unlawful activity. Secondly, many of the agreements and codes, whether between private parties or in recommendations by public bodies, often involve the use of filtering technologies, implicating the prohibition in Article 15 of the E-Commerce Directive. This leads finally to a more general discussion over the legitimacy of self-regulatory measures over legislation, and the desirability of delegating legal judgments and power over which content appears online to algorithmic technologies. The conclusion flowing from this is that any subversion of the existing liability regime in the E-Commerce Directive would in most cases be more legitimate through controlled and transparent law reform and/court mandated injunctive relief.

3.1 Examples of voluntary measures: Commission

Perhaps the most comprehensive attempt at introducing non-legislative obligations on intermediaries in the IP sphere is the recent EU Commission communication on “Tackling

¹⁰⁸ Giancarlo Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’ (2017) *JIPLP* 12(7) 565 – 575

¹⁰⁹ European Union Intellectual Property Office, ‘*Study on voluntary collaboration practices in addressing online infringements of trade mark rights, design rights, copyright and rights related to copyright*’ September 2016

¹¹⁰ *Ibid.*

Illegal Content Online”.¹¹¹ The communication complements the general actions targeted at intermediaries at EU level in the Digital Single Market Strategy.¹¹² It emphasizes that online platforms that mediate access to content carry a responsibility, flowing from their “central role in society”, to prevent infringing activities on their services.¹¹³ This is especially so because, according to the Commission, these platforms are “typically in possession of technical means to identify and remove such content”.¹¹⁴ Any removal of illegal content should be fast, and decisions regarding illegal content should be possible without a court order or administrative decision.¹¹⁵ This “enhanced responsibility” would involve the introduction of a system of ‘trusted flaggers’ for notice providers with “particular expertise” in notifying illegal content to get their notices processed faster.¹¹⁶ Hosting providers would also adopt proactive measures to actively remove materials, instead of reacting to notices,¹¹⁷ and do so by implementing technologies, such as automatic content recognition, to “detect illegal content”.¹¹⁸ Unsubstantiated concepts like “society’s interest” and the “central role” and responsibility of intermediaries are used by the Commission to justify bypassing well-established liability regimes of intermediaries. While the communication explicitly states that “it does not as such change the applicable legal framework or contain legally binding rules”,¹¹⁹ its indirect effect is just that.

While the E-Commerce Directive envisages some form of voluntary activity to curb access to illegal information, it also specifies that such procedures should be based on the Directive.¹²⁰ The Commission communication suggests at first that its insistence on proactive measures does not “automatically lead to the online platform losing the benefit of the liability exemption in Article 14”.¹²¹ A contradiction is found later on in the paper as it states that “proactive measures...may result in that platform obtaining knowledge or awareness...which could thus lead to the loss of the liability”.¹²² However, as the communication continues, the

¹¹¹ COM (2017) 555 final.

¹¹² Ibid.

¹¹³ Ibid. at 2

¹¹⁴ Ibid. at 6

¹¹⁵ Ibid. at 7

¹¹⁶ Ibid.

¹¹⁷ Giancarlo F Frosio, ‘*Why keep a dog and bark yourself? From intermediary liability to responsibility*’ (2017). 26(1), IJLIT, 27

¹¹⁸ COM (2017) 555 final. At 6

¹¹⁹ Ibid.

¹²⁰ E-Commerce Directive, Recital 40

¹²¹ COM (2017) 555 final. At 6

¹²² Ibid.

platform can continue to benefit from the liability exemption pursuant to point (b) of Article 14(1) if it acts expeditiously to remove or to disable access to the information.¹²³

The practical effect of this is that the exemption in article 14(1)(a) is effectively rendered redundant. Since the objective of the communication is to impose obligations on platforms to proactively monitor and filter content, they will almost always be considered to have some awareness of the illegal content, and as a result be forced to take it down. The communication attempts to reframe Article 14 as a positive obligation to remove content, however this is not the impact of the E-Commerce Directive regime.¹²⁴ The Directive instead provides that the host will lose the safe harbour protection if it does not take the content down after becoming aware of its illegality. The platform can then choose not to take the content down, in which case it may or may not become liable for the unlawful content, depending also on Member States' national law.¹²⁵ There is no direct obligation to take the content down, contrary to what the Commission attempts to achieve in its communication, and justifying it by labelling it “voluntary”.

The more direct circumvention of the E-Commerce Directive is found in the number of ways the communication “encourages” automated removal and proactive measures. Notably, the communication directs platforms to remove content in certain circumstances using fully automated means,¹²⁶ to adopt proactive measures to detect illegal content,¹²⁷ and to use fingerprinting technologies to filter out content that has already been flagged as illegal.¹²⁸ In terms of compatibility with Article 15, the communication only recalls the existence of the general prohibition and of Recital 47 in that the prohibition does not apply to monitoring in special cases.¹²⁹ In this regard, the Commission committed to achieving a “balanced and predictable liability regime”.¹³⁰

Albeit voluntary, the practical impact of the automated and proactive measures would be a direct conflict with article 15. The exception in recital 47 would also unlikely be satisfied, because such specific monitoring obligations should (a) be interpreted narrowly, (b) apply to a

¹²³ Ibid.

¹²⁴ Smith, Graham (October 2017)

¹²⁵ Ibid.

¹²⁶ Above 125, para 4.1

¹²⁷ Ibid. para 3.3.1

¹²⁸ Ibid. para 5.2

¹²⁹ Ibid. p 5

¹³⁰ Ibid.

narrow range of identifiable infringements, and (c) apply to content which is obviously infringing.¹³¹ General calls for proactive detection, identification and removal of “illegal content online”,¹³² and the prevention of re-uploading “known illegal material”,¹³³ without their further definition, is hardly specific. Vague criteria requiring the provider to investigate all content uploaded by users would, where imposed by a court, normally amount to a general monitoring obligation.¹³⁴ The non-specific actions pushed for by the Commission appear to fit this bill. While it is beyond the scope of this paper, the communication can be further questioned over its blind reliance on automated technologies, and “fully automated deletion” of content.¹³⁵ It is not clear how algorithms could be expected to correctly identify something as illegal, or recognize “context-related exceptions”.¹³⁶ Furthermore, unlike for the monitoring in the drafts of the new Copyright Directive, the communication contains no safeguards for small and medium platforms.

From the outset, it thus appears that the Commission is choosing to base their action points on the recitals of the Directive that encourage voluntary measures, while ignoring the limits expressed in the substantive provisions. Labelling obligations as voluntary allows the Commission to circumvent both pre-existing liability regimes, and the transparency and scrutiny mandated by a democratic legislative process.

3.2 Examples of voluntary measures: Voluntary agreements

In conjunction with the Commission paper, several voluntary agreements between rightsholders and intermediaries have emerged. Many of them involve undertakings by intermediaries to implement proactive measures to identify illegal content, especially intellectual property infringements online.¹³⁷ In certain circumstances, public authorities have also become involved.¹³⁸

¹³¹ Frosio, above at 102.

¹³² COM (2017) 555 final.

¹³³ Ibid.

¹³⁴ Van Eecke (2011)

¹³⁵ COM (2017) 555 final.

¹³⁶ Keller, Daphne. (2017)

¹³⁷ Above at 113.

¹³⁸ Ibid.

An example is a French voluntary collaboration practice between non-specified categories of stakeholders.¹³⁹ In practice, mainly platforms and rightholders have signed up this “charter” with the aim of fighting against the online sale of counterfeit goods.¹⁴⁰ For the purposes of this paper, the relevant provision of the charter is Article 3 ‘Measures to detect counterfeiting’. In that article, platforms agree to employ technologies to detect offers for sale of counterfeit products, by analysing the content of listings and the selling behaviour of vendors.¹⁴¹

A study by the European Union Intellectual Property Office (EUIPO) identified certain issues with the coexistence of Article 3 and existing EU law. Firstly, the monitoring obligations envisaged by Article 3 of the charter could give the platforms knowledge of illegality¹⁴² and thus expose it to liability given that Article 14(1)(a) of the E-commerce directive would not apply.¹⁴³ However, as recognized by the study, it is likely that the platforms would upon obtaining such knowledge proceed to remove the unlawful content as this is a requirement that they sign up to under Article 5 of the same Charter.¹⁴⁴ In that case, the exemption in Article 14(1)(b) of the E-Commerce Directive would apply to these platforms. Further, the EUIPO study recognizes that the general duty in Article 3 for platforms to monitor sales activities could be regarded as incompatible with Article 15(1) of the E-Commerce Directive.¹⁴⁵ However, the study quickly dismisses this concern because the monitoring duties constitute a recommendation or a best practice, as opposed to a general monitoring obligation under the Directive.¹⁴⁶ The view of the EUIPO is therefore that the provisions of the French voluntary collaboration practice cannot be regarded as contradicting the provisions of the E-Commerce Directive.

While this may superficially be true, much of the EUIPO study is phrased in hypotheticals. It is not certain how platforms would operate in practice, and how quickly they would remove content identified as illegal, for example. It is also not guaranteed that a national court would find a platform to be in compliance with the relevant national implementation of Article

¹³⁹ Ibid. see also https://www.economie.gouv.fr/files/Charte_lutte_contrefacon_internet_petitesannonces.pdf

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² *L'Oréal SA and Others v eBay International AG and Others* (C-324/09) EU:C:2011:474 at 122

¹⁴³ Above, at 113 p77

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

14(1)(b), simply because the agreement which it has signed contains a provision like Article 5 of the French Charter. In general, the nature of the voluntary agreement framework is that stakeholders can choose to enter into different agreements with varying provisions on monitoring and removal of content, many of which may lack the transparency of the public French code. Furthermore, the exact provisions of a voluntary collaboration will often depend on the bargaining power of the stakeholders, which may not be equal. For example, in some cases the rightholder may be able to impose greater obligations, bypassing safe harbour protections of the platform, and possibly operating as a barrier to entry for other platforms into the market. On the other hand, a stronger bargaining power on the side of the platform could potentially hinder the effective removal and prevention of illegal content/goods.

CHAPTER 4: LEGISLATION VS VOLUNTARY MEASURES

The preceding chapters have identified the multiple ways in which the liability framework of intermediaries in the E-Commerce Directive is currently challenged. Both ongoing law reform and a number of voluntary measures are criticised for their incompatibility with Articles 14 and 15 of the Directive. What is evident, however, is that the trend of imposing increased responsibilities on intermediaries is not slowing down.¹⁴⁷ The active nature of modern platforms, combined with their huge popularity, mandates a discussion of their duties regarding the content that they make available. Decreasing the amount of illegal and harmful

¹⁴⁷ Frosio, above at 121.

content is a laudable goal, and it is not disputed that these intermediaries are indeed best placed to fight it.¹⁴⁸ What is disputed, however, is the validity of the means to that end, especially in the intellectual property enforcement context. The respective advantages and disadvantages of pursuing legislative changes over private measures will be analysed in the following. Both developments pursue the same general goal, however it is argued that also from a theoretical viewpoint, only the former is a legitimate vehicle for achieving their mutual purpose.

As a form of regulating online communications, voluntary measures and so-called ‘self-regulation’ are viewed as flexible alternatives to legislation. This was recognized by Lessig in his influential “Code and other laws of cyberspace”,¹⁴⁹ in which he argued that it is possible to regulate cyberspace through multiple modalities. One of these is code, i.e. technologies that can transform the architecture of the internet more efficiently than traditional ex-post facto legislation-based enforcement methods.¹⁵⁰ Voluntary measures, whether endorsed by government codes of conduct or established through private agreements, are usually a cheaper means of regulation, in contrast with the lengthy lobbying often involved in the legislative procedure.¹⁵¹

The EU Commission in its communication (discussed above) recognized the efficiency of voluntary practices. The aim of the communication was thus to “lay down a set of guidelines and principles for online platforms” to “facilitate and intensify the implementation of good practices”, and to “provide clarifications to platforms on their liability”.¹⁵² In this way, the recommendations in that communication can complement existing legislation, clarify the relevant law for the intermediaries subject to it, often in broad terms to leave its implementation subject to interpretation by relevant stakeholders. Similar rationales have underscored the voluntary agreements between stakeholders discussed above. The aforementioned EUIPO study on voluntary collaboration practices highlighted that many of the measures have come about because of a “very difficult enforcement environment in which the legal rules that exist have sometimes failed to catch up with the speed of change of

¹⁴⁸ InfoSoc Directive, Recital 59.

¹⁴⁹ Lessig (2006).

¹⁵⁰ Ibid.

¹⁵¹ Koops, B.J. (2006)

¹⁵² Ibid. at p3

technologies and practice”.¹⁵³ Many of the agreements and codes of conduct can be more flexible, and technology specific to maximise enforcement efforts.

Voluntary and self-regulation in the form described in the previous chapter are envisaged by the E-Commerce Directive and follow the global trends in intermediary involvement in this area.¹⁵⁴ Indeed it is not disputed that even with a liability exemption framework, intermediaries will make autonomous decisions over what content to take down.¹⁵⁵ While in certain circumstances the legal framework will exist in parallel with autonomous decision making, it is only through a clarified legal framework that the form and extent of these decisions can be controlled. The advantages of doing that through voluntary measures are predominantly outweighed by their disadvantages.

Lessig advances the notion of regulation by code, but he identifies early on the fear that code-based regulation is much less transparent, and thus weakens the “democratic resolve”.¹⁵⁶ This is true in that delegating law enforcement to private intermediaries lacks the legal accountability that otherwise would apply to legislation-backed enforcement.¹⁵⁷ Included in the regular process are concepts such as due process and open justice that have to be complied with. Private agreements and broad codes of conduct are likely to result in a lack of legal certainty to both rightsholders and the intermediaries themselves, due to the plethora of different obligations that the intermediaries are as a result subjected to. Indeed one of the findings of the EUIPO study is that there now exists a “complex legal and cultural landscape” with “many differences in approach” to the voluntary codes of practice examined.¹⁵⁸

Transparency is an increasing concern especially where the voluntary measures encourage the use of technologies. Combined with the increasing number of different bases for intermediaries to control the content online, the reasons behind any content taken down from these platforms is further obscured. The Commission Communication is especially direct in its imposition of technologies, as discussed above.¹⁵⁹ With its numerous calls for proactive detection and “fully automated deletion or suspension of content”, it delegates full faith to

¹⁵³ Above at 113, p.8

¹⁵⁴ The Office of the Intellectual Property Enforcement Coordinator, ‘US Joint Strategic Plan on IP enforcement’ FY2017-2019

¹⁵⁵ Thompson M. (2016)

¹⁵⁶ Lessig (2006)

¹⁵⁷ Rowland (2017) at 87

¹⁵⁸ Above at 113.

¹⁵⁹ COM (2017) 555 final

algorithmic technologies policing online expression. The viability of many of the technological methods suggested are strongly doubted by technical experts.¹⁶⁰ Further, the increased use of technologies to carry out online enforcement exacerbates concerns over the accuracy and substantive fairness of the decisions.¹⁶¹ It is difficult envisage a technology at this stage that can identify, for example, complex legal exceptions in the same way as a legal expert. Indeed, empirical evidence shows that automated takedown processes do not come without significant errors.¹⁶²

Furthermore, there are relevant concerns over the respect for fundamental rights in self-regulation and voluntary measures. As identified by Frosio,¹⁶³ the interests of the intermediaries do not always align with the interests of their users, or public internet users as a whole. The extent to which intermediaries employ methods to protect freedom of expression and the freedom of information of users when filtering and taking down content is unclear. While certain counter-notice procedures exist for erroneous takedowns, there are fears that the increased responsibility imposed on intermediaries will result in overblocking of content. This is especially so where automated technologies are used and result in a greater margin of error in taking down content. Overblocking is a risk relevant to both self-regulation and legislation.¹⁶⁴ It occurs where content that is taken down includes both unlawful and lawful content, implicating, again, freedom of information and internet.¹⁶⁵ Some intermediaries may become “overzealous police officers” because of the fear of sanctions for missing out on content, prompting a higher risk of private censorship.¹⁶⁶

The UN Special Rapporteur for Free Expression has echoed the issues with judicial tasks undertaken by private intermediaries.¹⁶⁷ In the 2016 Report, it stated that “*states must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies or extralegal means*”.¹⁶⁸ It is questionable whether the multiple voluntary activities discussed

¹⁶⁰ Keller, Daphne. (2017)

¹⁶¹ Rowland (2017) at 87

¹⁶² Urban and Karaganis (2017)

¹⁶³ Frosio, above at 121.

¹⁶⁴ McIntyre, TJ. (2013)

¹⁶⁵ Kohl, U. (2012)

¹⁶⁶ M Schellekens (2011)

¹⁶⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/32/38, November 5, 2016, at § 85.

¹⁶⁸ Ibid.

above would comply with this. Furthermore, the report clarified that “*any demands, requests and other measures to take down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and Political Rights.*”¹⁶⁹ This to a large extent supports the argument that the current law reform is in many ways more legitimate in comparison to the voluntary measures.

In a similar fashion, Lord Sumption raised the distinction between moral and legal responsibilities in the recent Supreme Court judgement in *Cartier*.¹⁷⁰ While the judgment concerned the question of whom should pay for the costs of blocking injunctions, rightsholders or the ISPs, the judgment resonates with what has been stated in this paper previously. Lord Sumption noted first that there is “*no legal basis for requiring a party to shoulder the burden of remedying an injustice if he has no legal responsibility for the infringement*”.¹⁷¹ On the whole, attributing that degree of responsibility to the intermediary because they benefit from the volume of the content assumes a moral standard.¹⁷² For Lord Sumption, the relevant law is “*not generally concerned with moral or commercial responsibilities except as an arguable basis for legal ones*”.¹⁷³ It is difficult to find a moral responsibility or a public interest in intellectual property enforcement that is wider than the private interests of the rightholders to justify intermediaries’ contribution to the costs of website-blocking injunctions.¹⁷⁴ Following Lord Sumption’s thesis, the voluntary measures identified would fall into the category of moral standards. By analogy, the burdens of remedying the injustices on their platforms without a legal basis, especially in intellectual property enforcement, would assume a higher moral rule.

It would however be superficial to conclude that the shortcomings of voluntary measures are overcome by regulation in all circumstances. In theory, the legislative process is intended to, through the assessment and scrutiny involved, take into account all stakeholders. However, in reality the process and the resulting legislation is often skewed by powerful lobbying groups.

¹⁶⁹ Ibid.

¹⁷⁰ [2018] UKSC 28

¹⁷¹ Ibid. at [33]

¹⁷² Ibid. at [34]

¹⁷³ Ibid.

¹⁷⁴ Ibid. at [35]

The transparency and neutrality may not in practice be as effective. A pertinent example of the effects of lobbying was in the US during two bills introduced in Congress, the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA).¹⁷⁵ SOPA and PIPA would have introduced tougher means of online IP enforcement, however opponents claimed it would damage freedoms on the internet. Online activism and protest, including an online ‘blackout’ ultimately resulted in the bills being thrown out.¹⁷⁶ Similar public outcry has been heard in Europe with the draft Copyright Directive, however with large companies such as Google criticized for abusing its relationship with the publishing industry to “lobby on behalf of Google’s own interests and confuse the market”.¹⁷⁷ This goes to show that the ideals of a transparent and democratic legislative process may not be achieved when the voices of certain stakeholders are more powerful than others.

On the other hand, it would also be simplistic to claim that the shortcomings of voluntary measures cannot be overcome. Where codes of conduct and voluntary agreements between rightholders and ISPs are criticized for their complexity, a solution could be to promote standards that are international and involve more rightholders and governments.¹⁷⁸ While neither approach is perfect, arguably legislative measures are the lesser of two evils. Norm setting through self-regulation is opaque, inconsistent and may result in legal uncertainty for stakeholders. Delegating enforcement to private parties and contracts has a worrying impact on fundamental rights and freedoms and transparency online. The increased use of algorithmic technologies by these private actors to expedite the (legal) decision making over taking down content raises further alarms. While voluntary measures can be fast, flexible, and are to some extent envisaged by the E-Commerce Directive, they cannot be used to justify an erosion of the law

¹⁷⁵ Electronic Frontier Foundation, ‘SOPA/PIPA: Internet Blacklist Legislation’ at <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill>

¹⁷⁶ Powell (2012)

¹⁷⁷ Garrahan (2018)

¹⁷⁸ Mostert (2017)

CONCLUSION

The presence of illegal and harmful content online is one of the greatest challenges of the development of information society services. The way content is disseminated on the internet today diverges fundamentally from the period during which the E-Commerce Directive was enacted. The influx of platforms and services hosting user generated content has rekindled the discussion over the appropriate control over that content.

The general consensus in recent years appears to be that the intermediaries and platforms have not undertaken sufficient responsibility over this content. Especially in the intellectual property enforcement sphere, the result has been the push for a law reform in the form of a new EU Copyright Directive, as well as a number of voluntary measures, both in the form of

a Communication from the EU commission, and a number of private agreements between stakeholders. At a broad level, the objectives of both waves of enforcement have been the same – to combat illegal content available online. However, this paper has argued that during this process, the existing liability framework in the E-Commerce Directive has been neglected. The question posed was thus whether these diverging means to a common end were justified, and to what extent.

An assessment of the existing EU acquis, also in the form of CJEU jurisprudence, revealed that the criticisms of the draft Copyright Directive were not wholly accurate. Many of the criticisms will depend on the draft considered, and ultimately on what is passed as the new law. Nonetheless, the direct liability of online content sharing service providers, and a subsequent ineligibility for the safe harbour, is likely to be the current state of the law regardless, in light of recent CJEU decisions. The discussion of the active role of platforms, and their monitoring obligations imposed in Article 13 may also be permitted under the E-Commerce Directive at a closer reading of the draft. On the other hand, the voluntary measures covered attempt to bypass the safe harbour and monitoring prohibitions more blatantly. Both the Commission Communication and agreements between rightholders and intermediaries impose duties explicitly prohibited by the E-Commerce Directive, and justify them by labelling their respective measures as voluntary.

The discussion then turned to a more theoretical overview of the advantages and disadvantages of legislation compared to self-regulation. In the abstract, changes to the responsibilities of intermediaries through legislation is more transparent and seeks to balance the interests of different stakeholders. Self-regulation and other voluntary measures on the other hand perpetuate fragmentation of responsibilities across the EU. This paper submitted that while neither method is perfect, the aim should be to avoid privatized norm-setting, and instead to promote transparency in the lobbying process and negotiation leading up to law reform.

The next step is to transcend beyond the discussion of gateway liability, and into endorsing methods to fight the source of illegal content – the unlawful actors themselves – such as follow the money and blacklisting.¹⁷⁹ In the meantime, the trajectory of the law is inevitably towards increased responsibility of platforms. Intermediary neutrality is no longer appropriate

¹⁷⁹ Ibid.

in all circumstances – their roles have changed and the line between the role of the user and the role of the platform in the generation of content has been blurred. The intermediary neutralities provided by the E-Commerce Directive can, and need to, be re-examined, but only through controlled change in the law itself. A complex regime of opaque obligations in voluntary agreements cannot justify an erosion of the legal liability framework.

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