Reforming the liability of non-hosting intermediaries

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"Digital Services Act" Leak


Proposal

E-Commerce Directive

Commission: Fit for purpose!

Parliament: Clarification needed!

Inception Impact Assessments & Public consultations

Aged well, but things have changed*...

* Not only for IP/copyright.
1. Introduction

2. Non-hosting internet intermediaries: between transnational private regulation and EU law
   2.1 The regulatory landscape
   2.2 What are “non-hosting” functions?
   2.3 Conditions for liability exemptions in the EU framework

3. Non-hosting functions in the current EU framework
   3.1 Intermediary functions related to the domain name system
   3.2 Wifi hotspots
   3.3 Content delivery networks (CDN)
   3.4 Processing in the cloud
   3.5 Live-streaming
   3.6 Search engines

4. Filling in the missing parts of the liability exemption regime going forward
2. Non-hosting internet intermediaries: between transnational private regulation and EU law

2.1 The regulatory landscape

2.2 What are “non-hosting” functions?

2.3 Conditions for liability exemptions in the EU framework
Mere conduit (Article 12)

Caching (Article 13)

Hosting (Article 14)

Notice-and-action

Copyright carve-out for OCSSPs

Expectation towards service providers

Prohibition of general monitoring obligation, Art. 15 ECD
Articles 12-15 Liability of intermediary service providers

- **Minimum** harmonisation
- Information society service provider
- Horizontal (criminal, civil and administrative liability for all kinds of illegal activities by third parties – not injunctions)
- Recital 42: activity of the service provider is “of a **mere technical, automatic and passive nature**, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.”
3. Non-hosting functions in the current EU framework

3.1 Intermediary functions related to the domain name system

3.2 Wifi hotspots

3.3 Content delivery networks (CDN)

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3.6 Search engines
3.1 Intermediary functions related to DNS

- IP addresses and domain names play crucial roles for the functioning of the internet but the ECD’s intermediary liability provisions do not explicitly cover the addressing and naming functions...

- C-521/17 – *SNB-REACT*: provider of an IP address rental and registration service; does not help!
- → *De lege lata*: unclear

3.3 Content delivery networks (CDN)

- Technological development
- Complex business models which offer a variety of functions that did not exist when ECD was adopted
- Difficult to locate within Art. 12-14 ECD. Not storage but “provision“ of information? Temporal dimension but not „caching“?
Legal uncertainty has been resolved by CJEU (C-484/14 McFadden)?

3.2 WiFi hotspots

3.4 Processing in the cloud

- Cloud processing ≠ storage in Art. 14 ECD
- Modification conditions in Art. 12 and 13 ECD (modification of content as such vis-a-vis modification of content representation); analogy or teleological interpretation?
3.5 Live-streaming

- ...

3.6 Search engines

- ....
Findings: missing pieces

- Current ECD: transmission in, or access to, a communication network as well as storage

- Several non-hosting functions currently not addressed:
  - „Auxiliary network functions“: do not transmit or provide access (DNS, IP addresses, etc.) –facilitation of communication of information!
  - „temporal provision and processing of information“: different from storage!

- Beware spill-over effects from platform/hosting discussion but:
  what if a non-hosting intermediary “moderates” content (notice+action; trusted notifiers; proactive screening etc.)?
Credits

Creative commons attribution
Scale by Amelia (Noun Project)
Stopwatch by Veronika Krpaciarova (Noun Project)
filter By Eucalyp (Noun Project)
Denmark by Chameleon Design (Noun Project)
yoga by Mariia Nisiforova (Noun Project)

Literature:
Schwemer, S.F., ‘On Domain Registries and Website Content: Shift in Intermediaries’ Role in Light of Unlawful Content or Just Another Brick in the Wall?’ [2018] 26 International Journal of Law and Information Technology, 273–293

Mostly on SSRN (or somewhere else)

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