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**The intermediary immunity/liability scheme in the U.S and
in the E.U. Possible impact of the Stop Online Piracy Act
(SOPA)**

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Table of Contents

Abstract.....	3
Introduction.....	4
Overview.....	5
Role of intermediaries.....	5
Types of intermediaries	5
Intermediary Liability Schemes.....	5
Analysis	7
Actual Knowledge	9
No general obligation to monitor.....	10
Rationales and regulatory objectives	10
Appropriate regulation.....	11
Possible impact of SOPA.....	13
Conclusion	15
Bibliography	16
Articles.....	16
Studies.....	17

Abstract

This paper focuses upon the intermediary liability scheme both in the United States and in the European Union. The paper focuses on a comparison among the Digital Millennium Copyright Act (DMCA) & s.230(c) of the Communications Decency Act (“CDA”) and the European’s E-commerce- Directive (“ECD”).It indicates both the similarities and the differences of the above legal regimes. Moreover, it discusses the supportive basis for the above legal frameworks and it comments the regulatory objectives that favour. In addition, it evaluates them as an appropriate regulation of intermediaries. Finally, the paper presents the possible impact of the Stop Online Piracy Act (SOPA), in the regulation of intermediaries.

Introduction

The legal framework of Internet the last decades has changed in many directions and a lot of concern has acquired the liability of intermediaries, a key element for the growth of Internet.¹ A historical overview over the European countries indicates that until 2000 and the adoption of the eCommerce Directive, the liability of intermediaries was regulated by national laws and national case laws.^{2 3} National laws of countries have adopted different legal regimes and there were divergences in case law between the Member States, sometimes even in the same State. European Commission acknowledging the important role of intermediaries agreed to introduce in 2000 a new legal regime, the eCommerce Directive ('ECD').

United States dealt with the liability of intermediaries long before European Union did it. Sony Betamax case in 1984 was a milestone case in the subject of liability regime. However, it presented the various loopholes that the US legal regime had. As a consequence, United States first introduced in 1996 the Communications Decency Act and in 1998 the Digital Millennium Copyright Act, which provided a legal regime for the liability of intermediaries.

¹ Pablo Asbo Baistocchi, 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce', 2002 Vol. 19 *Santa Clara Computer & High Tech.LJ* 111,

² EU Studies on the Legal Analysis of a Single Market for the Information Society, New Rules for a new age? 6. Liability of Online Intermediaries, (November 2009)

³ In Netherlands (Bridgeston v.Lenior), in United Kingdom (Godfren v.Demon Internet)

Overview

Role of intermediaries

The basic element of the Internet is the ability each other to communicate and transact directly without mediation .However, the reality shows that intermediaries are very important for Internet's operating.⁴ Internet's technology needs intermediaries to interact in order to facilitate the parties. Firstly, in case of an interaction over the Internet, it is necessary both the Internet itself and the party which facilitates the communication to be involved⁵. In other cases, especially in commercial transactions, payment intermediaries are necessary. Auction intermediaries give the opportunity future possible parties to change, buy or sell many things.⁶

Types of intermediaries

As it easily demonstrable, there are many types of intermediaries. Internet service providers, payment intermediaries and auction intermediaries are some of the many intermediaries that exist and facilitate the parties for a better use of Internet⁷. It is not in the purpose of this paper to describe all the intermediaries. However, it would be useful to examine the utility of these different types of intermediaries. The divergence of the types of intermediaries shows that different interactions and transactions are happening among the parties over the Internet. The operation of the ISPs is different one from the operation of the payment intermediaries. The last ones facilitate parties to transfer funds among them, but the first ones facilitate the access to the content of the Internet. ⁸Different needs of the ends users create different Internet operations. As a result, intermediaries are diverging and offering to users different services.

Intermediary Liability Schemes

Internet Service Providers (ISPs), due to their role in the Internet interactions and transactions have been one of the main targets in cases of violations.⁹ ISPs are easily

⁴ Mark MacCarthy, 'What Payment Intermediaries are Doing about Online Liability and Why it Matters' [2010] 25(2) *Berkeley Technology Law J* 1037.

⁵ Ronald J.Mann & Seth R. Belzley, ‘‘ The Promise of Internet Liability’’, [2005] 47:239, William and Mary Law Review.

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ Diane Rowland and Elizabeth Macdonald, *Information Technology Law*,(Third Ed., Cavendish Publishing Limited, 2009) 494.

identifiable and locatable. This is the reason why many times ISPs have been the most popular target in cases that someone wishes to gain recompense for violations of his rights when it is impossible to bring to justice the offending party.¹⁰ For that reason, first the USA in 1998 introduced the Digital Millennium Copyright Act (“DMCA”) & s.230 of the Communications Decency Act (“CDA”) and Europe followed in 2001 with the EU E-Commerce Directive (“ECD”), both addressing the intermediary liability.

The eCommerce Directive, in Section 4 (Article 12-15) introduced provisions for certain legal aspects of information society and especially liability rules. It provides a safe haven for ISPs, under which they are exempted from liability under some conditions.¹¹ There are three types of liability regime (mere conduit, caching, hosting).¹²

The Digital Millennium Copyright Act (“DMCA”), which adopted in 1998 was a legal result in order to balance the interests both of the content provider and the service providers.¹³ On one hand, content providers and especially IP owners desired to make works available to Internet and on the other hand, service providers would refused to invest to new technologies.¹⁴ As a result, DMCA introduced a safe harbour for ISPs for copyright infringements; and it provided power to remove infringing material and to avoid injunctions.¹⁵

The Communications Decency Act was adopted in 1996, in order to respond to the rising problem of Internet child pornography.¹⁶ In section 230, it introduces a liability exemption for publisher or speakers and distributors also. Basically, CDA provides protection not only for pornography or sexual assault, but for all types of claims except for intellectual infringements, which are covered by DMCA.¹⁷

¹⁰ *ibid.*

¹¹ EU Studies on the Legal Analysis of a Single Market for the Information Society, New Rules for a new age? 6. Liability of Online Intermediaries, (n 2).

¹² 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, (Articles 12-15).

¹³ EU Studies on the Legal Analysis of a Single Market for the Information Society, New Rules for a new age? 6. Liability of Online Intermediaries, (n 2).

¹⁴ *ibid.*

¹⁵ It is worth to be mentioned that DMCA was complied with the WIPO treaty.

¹⁶ EU Studies on the Legal Analysis of a Single Market, above (n 2).

¹⁷ *ibid.*

Analysis

After an analytical examination of the three above statutes, many similarities and differences are easily identifiable within the above frameworks.

First of all, according to Pablo Asbo Baistocchi, there are two approaches to apply in liability regimes, the vertical approach and the horizontal approach.¹⁸ The vertical approach means that different liability regimes apply to different areas of the law. DMCA deals only with copyright issues and CDA deals with other types of violations of laws.¹⁹ On the contrary, horizontal approach means one liability regime applicable to all areas of law. ECD acquires a horizontal approach because deals with all kinds of content issues (intellectual property, criminal etc).²⁰ This is one of the most important differences between the European Union and the United States frameworks.

Specifically, s.230 CDA provides a total immunity in all kinds of liability in cases of intellectual property and when the content is provided by a party other than the ISP.²¹ However, ECD separates various activities and addresses them in specific manner. ECD instead of establishing a general liability regime, provides a system of exemptions from liability.²² As a result, whether the ISP is a mere conduit or in terms of caching, and hosting then the liability is limited. These three activities are the defences for the ISP in order to avoid liability.²³

In Article 12 of the ECD, it is mentioned that the provider of an information society is not liable where the service consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network., on condition that the provider 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.^{24,25} Analogous provision includes the DMCA in sec 512.²⁶ However, it is applied only to copyright

¹⁸ Pablo Asbo Baistocchi, above (n 1).

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Lilian Edwards, 'the Fall and the Rise of Intermediary Liability Online', in Edwards L. and Waelde C., *Law and the Internet*, (Third Ed., Oxford and Portland Oregon ,2009).

²² Pablo Asbo Baistocchi, above (n 1).

²³ David Bainbridge , *Introduction to Computer Law* ,(Fifth Ed., Pearson Longman, 2004) 351.

²⁴ Directive 2000/31/EC, above (n 12), Article 12.

²⁵ *ibid.*

²⁶ Diane Rowland and Elizabeth Macdonald, above (n 9),496

infringement. ECD does not include the exception for transient reproduction as part of the technical process.²⁷

Secondly, ECD provides that when an ISP *cache* material, it will not be liable for such an activity.²⁸ Even if there is no clear definition of *caching* in Article 13, Recital 42 refers to an automatic, intermediate and temporary storage for the sole purpose of making the transmission more efficient.²⁹ Caching is exempted from liability because the service provider has not control over the information that is transmitted or stored and as a result it cannot be liable.³⁰ The service provider in order to attain the defence should apply some conditions. First, he must not modify the information, to comply with conditions on access and with rules used by the industry, not to interfere to the lawful use of technology and to remove the information when has actual knowledge.³¹ A parallel provision about caching has the DMCA also.³² It requires as the ECD further requirements such as the absence of interference and compliance with the rules. In cases of actual knowledge, the service provider should act expeditiously in both of the statutes.³³ Despite the fact that DMCA provides a clear process about the ‘take down procedure’, ECD does not.³⁴ The ‘take down procedure’ **applies** only to copyright infringement, but ECD applies to a general ‘illegal activity’.³⁵

Thirdly, under Article 14 of ECD, ISPs are not liable for the information stored at the request of a recipient of the service.³⁶ In these cases ISPs either host or store the information originated by third parties. In this point, there is a distinction between the criminal and the civil liability.³⁷ ECD provides that the ISPs should not have ‘actual knowledge’ of the illegal activity in order to be exempted from criminal liability.³⁸ Moreover, in order to be exempted from civil liability they should have no ‘actual knowledge’ and are not aware of the facts or circumstances from which the illegal

²⁷ Specifically, the DMCA contains in sec 512 (4) the exception for transient reproduction, limiting the liability.

²⁸ Directive 2000/31/EC, Article 13.

²⁹ Directive 2000/31/EC, Recital 42.

³⁰ David Bainbridge, (n 23), 352.

³¹ Directive 2000/31/EC, Article 13.

³² Diane Rowland and Elizabeth Macdonald, above (n 9), 497

³³ *ibid.*

³⁴ *ibid.*, 498.

³⁵ *ibid.*

³⁶ Directive 2000/31/EC, Article 14.

³⁷ Lilian Edwards, (n 21), 65

³⁸ *ibid.*

activity or information is apparent.³⁹ The absence of such actual knowledge is required also and in the DMCA in sec 512. But DMCA unlike ECD includes in its provisions the linking liability also⁴⁰. Specifically, DMCA offers a safe harbour for information location tool (search engines also) providers in cases that they provide a hyperlink which infringes material.⁴¹ Sec 512(d) of DMCA states that information location tool provider should not be liable for monetary relief for infringement of copyright.⁴²

Actual Knowledge

But ‘‘actual knowledge’’ is not clearly defined in the e-Directive.⁴³ ECD in Article 15 states that ISPs have no general obligation to monitor the information which they transmit or store. In this perspective, ‘‘actual knowledge means that ISPs acquire knowledge from a third party and not from their own investigation.⁴⁴ But even this does not define the exact meaning of the ‘‘actual knowledge’’. Both ECD and DMCA require that after acquiring the knowledge, ISPs should expeditiously remove the illegal information.⁴⁵ Thus, ISPs are liable only if in case of awareness, they do not remove the information. But ECD does not establish a clear notice and take down regime as DMCA does.⁴⁶ The last one provides that the provider should have an online agent to receive notices and furthermore should notify the Copyright Office.⁴⁷ However, ECD only states that service provider should remove or disable access to the information without requesting more requirements or underlining a process. ECD in Article 21(2) mentions that a future proposal will analyse the need for proposal concerning the ‘‘notices and take down’’ procedures.⁴⁸ Such lacuna poses several problems which are related to the smooth operation of the Internet. One of such a problem is that ISPs would not be able to know whether they are properly informed and whether the information received is founded or not.⁴⁹ As a consequence, European

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Diane Rowland and Elizabeth Macdonald, above (n 9), it is mentioned that DMCA provides that: ‘‘*Linking users to an online location containing infringing material or infringing activity by using information location tools including a directory, index, reference, pointer, or hypertext link*’’.

⁴² Diane Rowland and Elizabeth Macdonald, above (n 9), 498.

⁴³ Pablo Asbo Baistrocchi, above (n 1).

⁴⁴ *ibid.*

⁴⁵ Diane Rowland and Elizabeth Macdonald, above (n 9), 497.

⁴⁶ *ibid.*

⁴⁷ Pablo Asbo Baistrocchi, above (n 1).

⁴⁸ Rosa Julia-Barcelo, ‘On-line intermediary liability issues: comparing EU and US legal frameworks’ [2000] 22(3) European Intellectual Property Review 106.

⁴⁹ Pablo Asbo Baistrocchi, above (n 1).

service providers are likely to take down material even if it is not sure that are illegal in order to avoid liability.⁵⁰ And as a result, freedom of speech will be controlled by the service providers.⁵¹

Moreover, DMCA provides that when an ISP takes down in good faith, it is protected from liability.⁵² Furthermore, DMCA applies liability for the sender an intentional false notification. However, in ECD there is no such a provision.⁵³ All these lacunae of the Directive have as a consequence the application of national liability law and a further result the distortion of a harmonized law regime in Europe.⁵⁴⁵⁵

No general obligation to monitor

As it mentioned before, Article 15 of ECD mentions that member states shall not impose a general obligation on providers to monitor when they are providing activities which are mentioned before(mere conduit, caching and hosting), nor to seek facts or circumstances indicating illegal activity. ECD does not want to pose ISPs as ‘‘privatised censors’’.⁵⁶ This is a very difficult target, because such an obligation is not very realistic to be attained by the providers.⁵⁷ It would be very difficult for providers to control all information over the Internet.⁵⁸ However, in Paragraph 2, ECD provides the opportunity to Member States to establish obligations to ISPs so as to inform the authorities of alleged illegal activities, and to communicate at the request of the authorities.⁵⁹ This duty of communication even today has not been yet adopted by all Member States.⁶⁰

Rationales and regulatory objectives

The aims of the ECD as enshrined in the preamble of the Directive were the development of the information society services which contributes to the electronic

⁵⁰ *ibid.*

⁵¹ Rosa Julia Barcelo, (n 48).

⁵² Lilian Edwards (n 21).

⁵³ Pablo Asbo Baistrocchi, above (n 1).

⁵⁴ *ibid.*

⁵⁵ It is necessary to be mentioned that national liability laws are based o fault and only when the national courts discovers that the sender knew the lack of proper grounds to send the notice leading to the take down og the content will he be held liable.

⁵⁶ Lilian Edwards, (n 21),74

⁵⁷ Pablo Asbo Baistrocchi, above (n 1).

⁵⁸ *ibid.*

⁵⁹ Directive 2000/31/EC, Article 15(2).

⁶⁰ Pablo Asbo Baistrocchi, above (n 1).

commerce for the growth of Internal Market.⁶¹ Moreover, the rationale for regulating ISPs is legal certainty, the consumer confidence and the smooth function of the Internal Market⁶². Such a legal framework develops the ‘‘free movement of services’’ as it was introduced in Art.10 (1) on European Convention on Human Rights and Fundamental Freedoms. Moreover, it aims to enhance cross-borders services and develop fair competition among the countries. ECD offers immunity net to the intermediaries under specific circumstances.

The same regulatory objectives are identified both in CDA and DMCA, but the only difference is that not both of them follow a vertical approach for the liability regime, as we discussed before. The purpose for DMCA is to be a legal framework applied as a liability regime for ISPs in copyright infringement, and on the contrary the CDA to be applied in other laws except from copyright infringement.⁶³ Both EU and USA desire to regulate the important issues of intermediaries in order to protect both consumers and internet providers. Criminal activities, libel, unfair competition, distortion of the Internet market and the confidence of consumer to electronic commerce were some of the objectives of regulating intermediaries.

Appropriate regulation

Policymakers acknowledging the difficulty in regulating the primary misfeasors resulted in providing liability in excepted cases to intermediaries. Both in ECD and in DMCA (DCA gives a blanket immunity to ISPs) is applicable the *with-fault* liability system, which is lighter than the *strict* liability system.⁶⁴ The *strict* liability system defines that ISPs are held liable even if they do not have knowledge or have the control over the Internet.⁶⁵ On the contrary, the *with-fault* liability system needs ISPs intentionally to violate the rights of the others.⁶⁶ In the last system there is a distinction between the actual knowledge and the constructive knowledge.⁶⁷ Under actual knowledge the ISP held liable if he knows that there is illegal material on Internet. But constructive knowledge is determined by law and ISP held liable if he has some clues

⁶¹ Directive 2000/31/EC, Recital 4 &5.

⁶² Directive 2000/31/EC, Recital 7

⁶³ EU Studies on the Legal Analysis of a Single Market for the Information Society, New Rules for a new age? 6. Liability of Online Intermediaries, (n 2).

⁶⁴ Pablo Asbo Baistrocchi, (n 1).

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

or reasonably presume that there is illegal material. Both the European Directive and the DMCA accept the with-fault system with ‘‘constructive knowledge’’⁶⁸.

The above short analysis about the liability system indicates the willingness of the states to regulate the serious matter of intermediaries but in the end a system of exemptions was established. As it mentioned before all the three statutes are based on the logic that intermediaries should be regulated under exceptions and some circumstances. Actually, they establish a net-immunity instead of a liability system.

The question about the evaluation of the regulatory framework especially for ECD and DMCA as an appropriate regulation is more a philosophical question than empirical, because a statute cannot be judged only by its content but also from its implementation through the years by the courts. As regards its content, it is worth repeating the claim that both the ECD and the DMCA have some loopholes in their provisions.⁶⁹ Firstly, as regards the EU Directive the most important loophole is the lack of a ‘‘notice –take down procedure’’⁷⁰. As it mentioned before such a lack creates a lot of problems especially on freedom of speech on Internet and the smooth function over the Internet. ISPs are obliged to become ‘‘privatised censors’’ when they take down a page due to a claim.⁷¹ But who wants to bear the cost of policing the content of the pages? Certainly ISPs do not. But nor the users want private companies like the ISPs to attain the role of a censorship body. As a result, it is doubtful how appropriate is such a framework. But except for the lack of ‘‘notice and take down’’ procedure, ECD accepted criticism also about the power which gave to ISP to block the content of the pages, infringing the freedom of expression.⁷² Unfair competition is promoted due to the fact that many competitors in bad faith will distort the truth and they spread unfounded claims. Lastly, important loophole within ECD is the lack of liability for information tool services.⁷³

As regards the liability system in USA, the most important element that might create scruples is the vertical approach of liability system.⁷⁴ Under this system, different

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Lilian Edwards, (n 21)

⁷¹ *ibid.*

⁷² Pablo Asbo Baistrocchi (n 1).

⁷³ *ibid.*

⁷⁴ EU Studies on the Legal Analysis of a Single Market for the Information Society, New Rules for a new age? 6. Liability of Online Intermediaries, (n 2).

liability regimes apply to different areas of the law and as a result such a system is really confusing and complicated. ISPs should distinct their behaviour according to the different areas of the law. But such a process is not very favourable to the growth of the electronic commerce and it does not contribute to consumer's confidence.

Possible impact of SOPA

Stop Online Piracy Act, known as SOPA is a bill in the House of Representatives in United States, which have as a purpose to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of US property, as it mentioned in the preamble. The cause of this Bill was the problem of foreign-based websites which sell pirated music, videos and other materials.⁷⁵ It is a truism that USA is the country which gains the biggest amounts of money from intellectual property products, and as a result they desire to control pirated materials and the source of these products. Federal law gives the opportunity to shut down U.S websites which sell pirated products but they cannot do it for foreign websites.

As a consequence, the Bill tries to control and shut down foreign websites. The method to accomplish it, is by stopping U.S companies funding or advertising in these ‘‘illegal’’ websites.⁷⁶ And more powerfully, Justice Department prosecutors will attain powers to prevent U.S support of foreign sites. Specifically, the Justice Department could seek court order requesting U.S ISPs to block the access to such foreign sites.⁷⁷ Moreover, it will require from advertising networks to stop cooperating with these sites and many content owners(especially Hollywood studios) will have the opportunity to seek a court order so as to credit-card companies stop paying these sites.⁷⁸ Furthermore, the Attorney General could stop search engines from displaying these sites.⁷⁹ Basically, the bill targets to block the access and simultaneously to stop funding these sites.

⁷⁵ <http://online.wsj.com/article/SB10001424052970203735304577167261853938938.html>, assessed in 20 April 2012.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ <http://www.potpiegirl.com/2012/01/sopa-and-you-and-me-my-thoughts/>

Wikipedia mentioned in its site for SOPA: “censorship without due process”.⁸⁰ Opponents of SOPA support that SOPA will encourage content owners to block US ISPs which may host foreign sites. And in extreme cases they could block or shut down an innocent site. Sites like Facebook, Wikipedia and Twitter are based on the content that users have uploaded and as a consequence they have expressed their concerns.⁸¹ Rights of free speech and freedom of expression are confined and are in hazard.

The general legal framework of USA as it was mentioned before is consisted from two statutes (DMCA and DCA) which clearly give a freedom from liability for ISPs. On the contrary, SOPA tries not to create a liability regime like the previous regimes. It allows the Attorney General to target sites based on a court order. The system might be differential but the philosophy of the legislation is the same. SOPA will encourage ISPs to attain a role as privatised censors. The US sites in fear of be shut down will censor foreign sites. But such an evolution will be catastrophic both for freedom of speech over the Internet and for many companies which are based on the content that users uploaded on Internet.

⁸⁰ (n 22).

⁸¹ *ibid.*

Conclusion

Internet Service providers attain a basic and substantive role for every interaction or transaction over the Internet. United States and Europe have understood their role and they have developed a specific legal regime only for the liability of the intermediaries. Both Europe and United States supported a framework in which ISPs enjoyed freedom of liability. However, as it analysed before, various deficiencies and important legal gaps have emerged creating a legal uncertainty and confusion. The regulatory framework both in EU and USA are dealing with many problems and it contributes to the view that Internet is chaotic.

States should support the development of the technological progress and the growth of e-commerce as the next generation of economic source. There are many legal expertises like Ronald Mann and Seth Belzley who support that the existing fault-based liability scheme is flawed and the better and more effective solution would be liability without fault (Internet Intermediaries as gatekeepers). A proposal like the above might create many concerns. However, there is a reference point: States shall consider the deficiencies and their impact in the global development of e-commerce. The reference point shall be a possible reform both in Europe and United States.

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