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# Providers' liability: From the eCommerce directive into the future

Giovanni Sartor

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# Summary

- The emergence of Internet intermediaries
- The regulation of intermediaries
  - In the US
  - In the EU
- Current issues
- What's next?



# Who are the Internet Intermediaries

- Internet access and service providers
- Data processing and web hosting providers
- **Internet search engines and portals**
- E-commerce intermediaries (Draft Directive on Online Intermediary Platforms)
- Internet payment systems
- **Participative networking platforms**

(OECD 2010)



## Participative networking platforms

Type of Platform	Examples
Blogs	WordPress
Wikis, other text-based collaborations	Wikipedia
Instant messaging	WhatsApp,
Mobile	Mobile Facebook
Sites allowing feedback on written works	Amazon
Group-based aggregation	Reddit
Photo-sharing sites	Flickr
Podcasting	iTunes,
Social network sites	Facebook
Virtual worlds	Second Life,
Online computer games	World of Warcraft
Video content or file-sharing sites	YouTube



# Market structures

- Network externalities:
  - Network effect + non rivalry + minimal marginal costs => winner takes all markets, a **single winner** in each domain
- Revenue models:
  - content and services for free alongside advertising messages, and collection of personal data (for participative platforms). Two sided market (advertisers and users )!
  - free services with no advertising (no profit)
  - subscription (for access to the Internet)



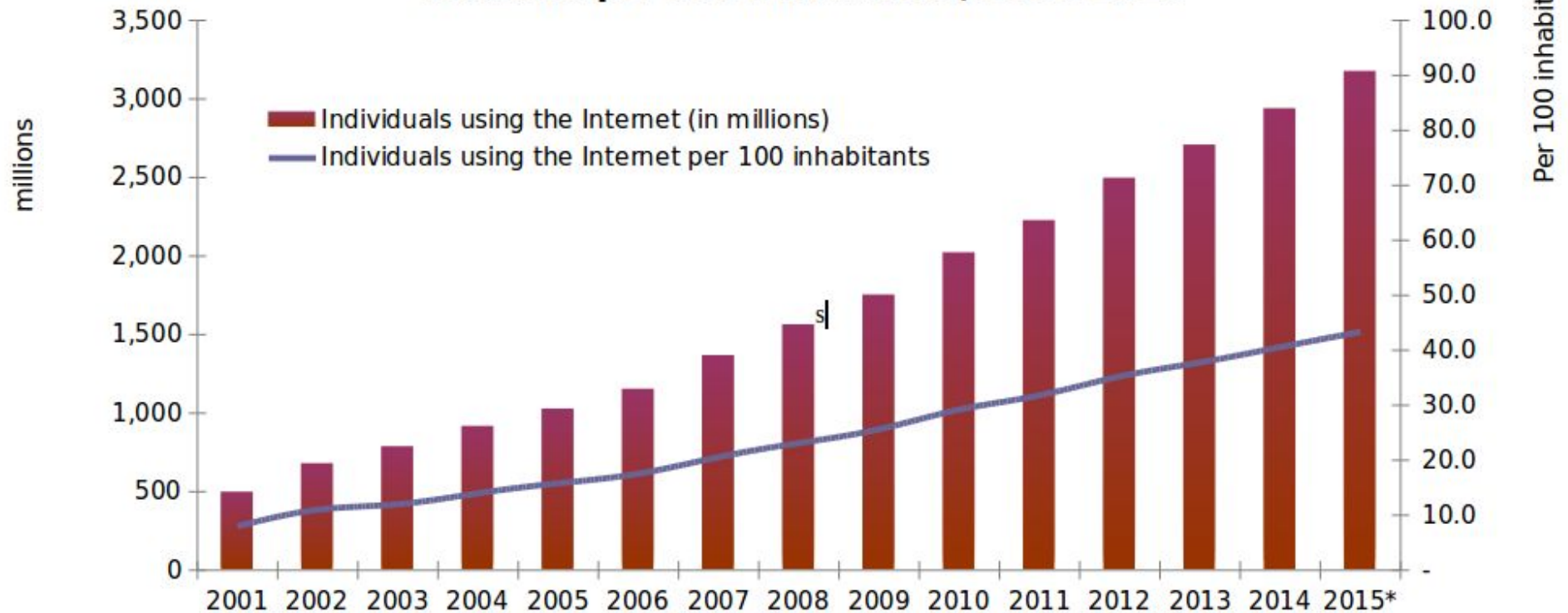
# Providers' liability in the law

- Main legal rules go back to 20 years ago
  - when providers were completely different in kind, size, economic and political power, technologies, etc.
- Law struggles to meet today's challenges
  - Conflict of policies and values
  - Incompatible judicial decisions
  - Legal-political uncertainty



# 2000-2018: Different Internet eras: quantity

**Global numbers of individuals using the Internet,  
total and per 100 inhabitants, 2001-2015**

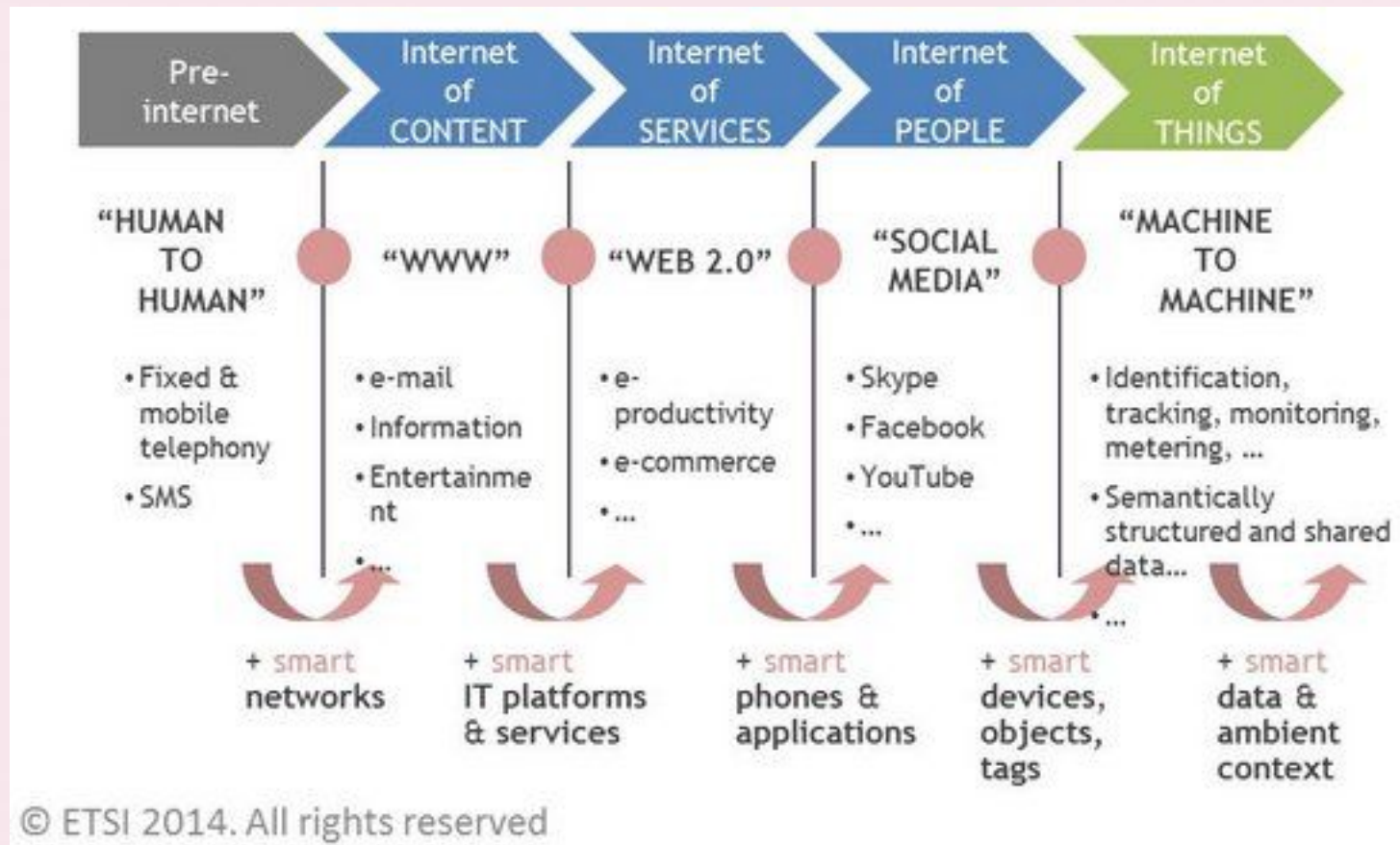


Note: \* Estimate

Source: ITU World Telecommunication /ICT Indicators database



# 2000-2018: Different Internet eras: quality



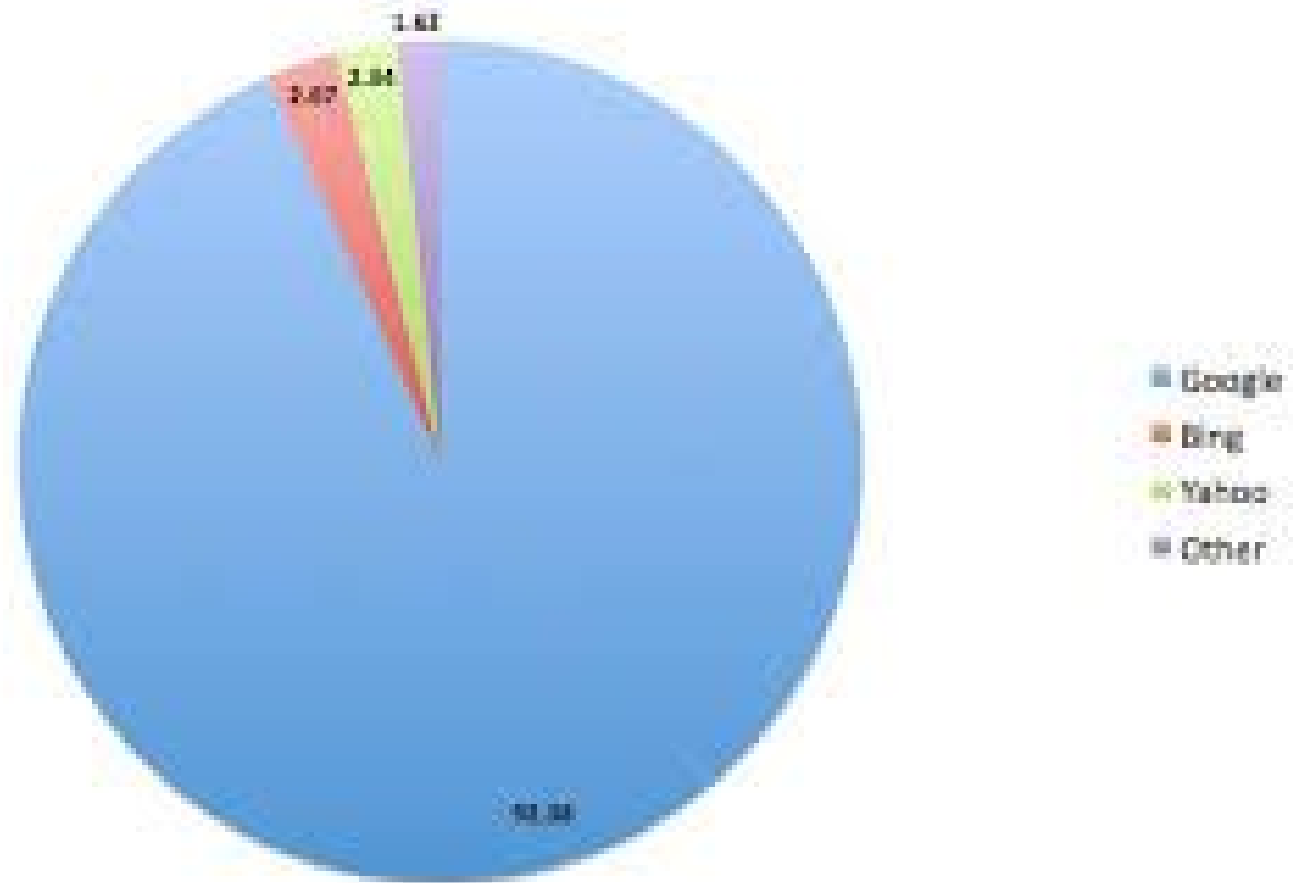




# Market structures

## Search: Google and the others

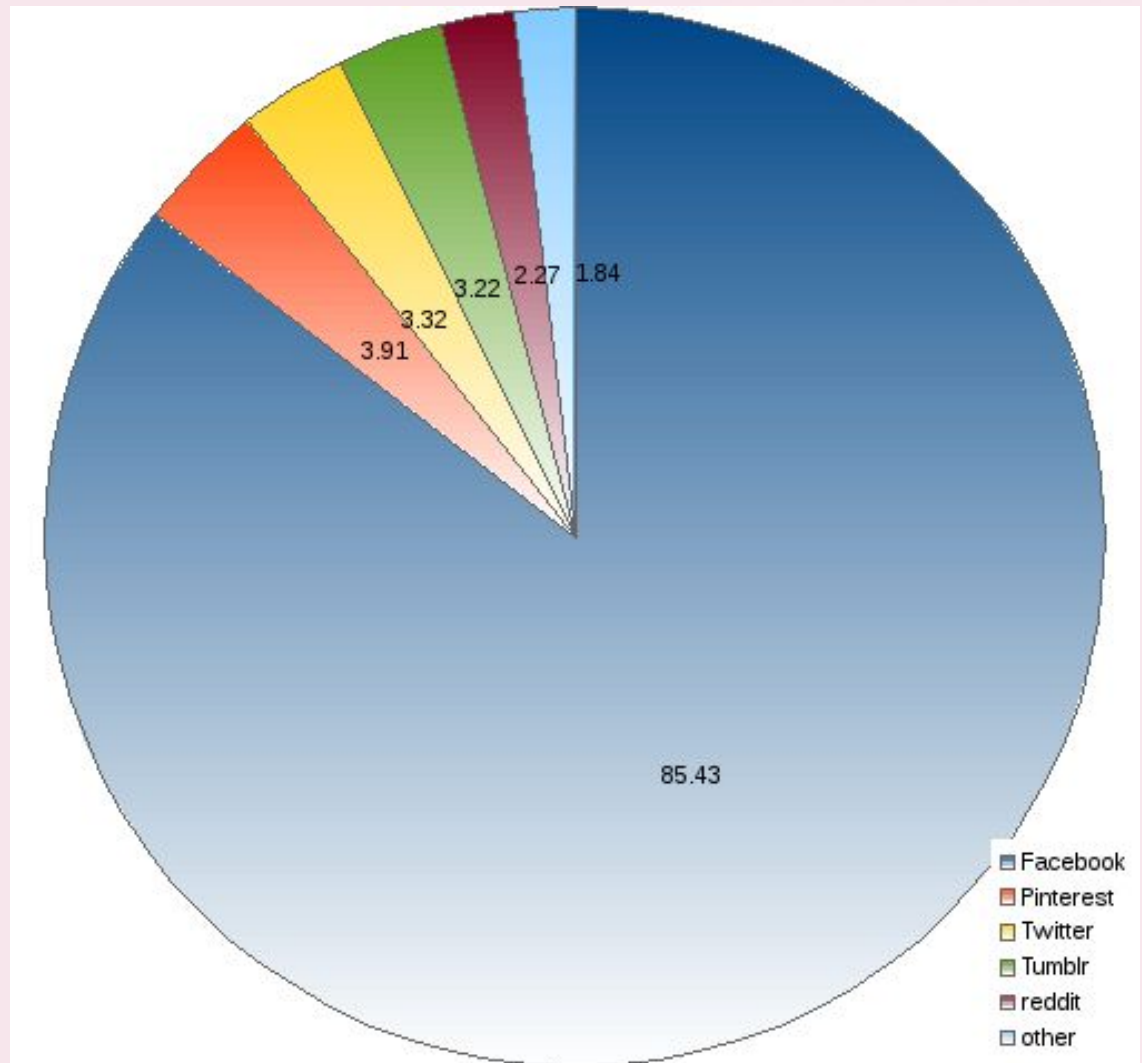
Europe Search Market Share, Oct. 2014





# Market structures

Social:  
Facebook  
and the  
others





Internet and the  
others as % of  
adv. expenses.

## Internet killed the paper star

United States advertising revenue as %\* of total

Internet    Broadcast TV    Mobile  
Newspapers†    Cable TV    Radio



Source: Borrell  
Associates

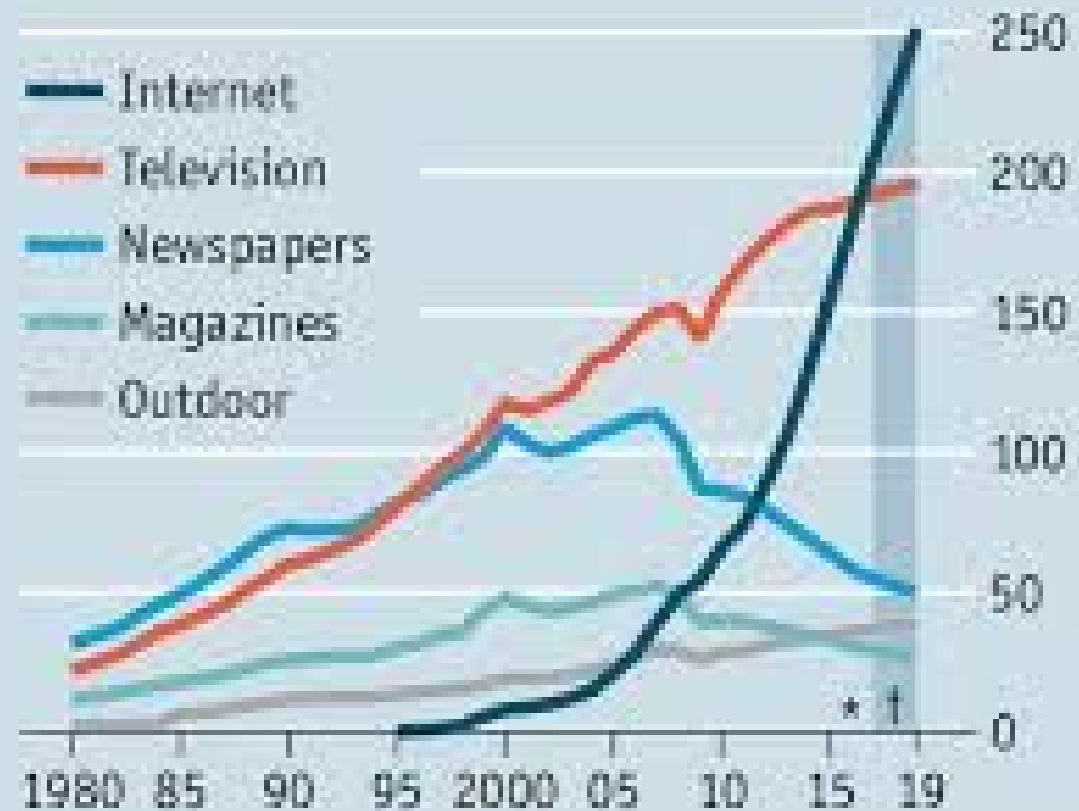
\*Will not total 100% as not all types of  
media included †Print only ‡Forecast



Internet  
and the  
others as  
% adv.  
expense

## Sliced and diced

Advertising spending, worldwide, \$bn



Source: Zenith

\*Estimate †Forecast

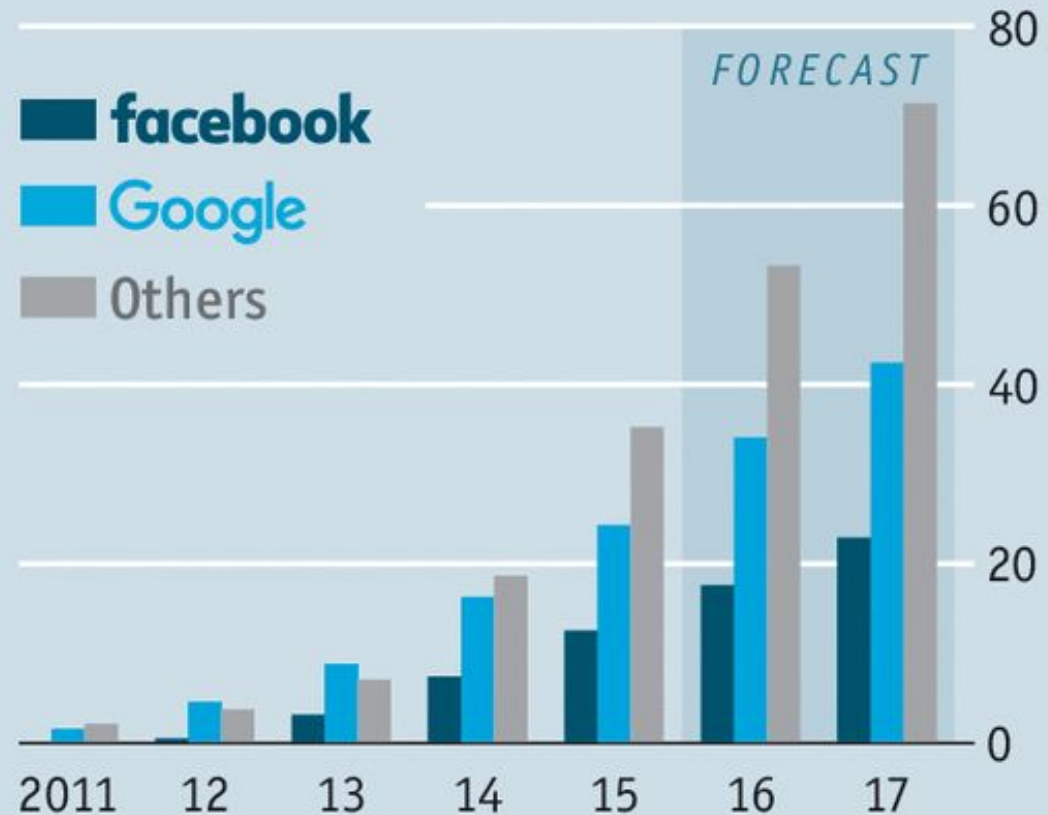


# Adv. Revenue: Google, Facebook, and the others

## Ad a friend

Mobile advertising revenue, \$bn

3



Source: eMarketer

Economist.com

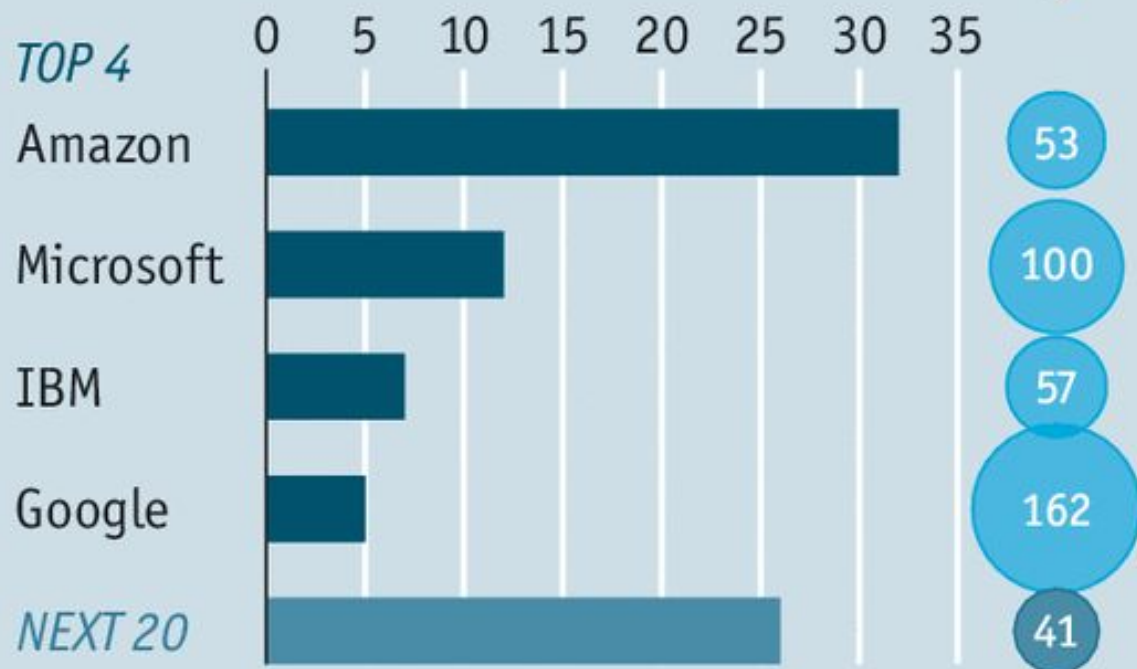


## Market power in cloud services

### Ahead in the clouds

Cloud-services market share  
Worldwide, Q2 2016, %

Revenue,  
% increase on  
a year earlier



Source: Synergy Research Group

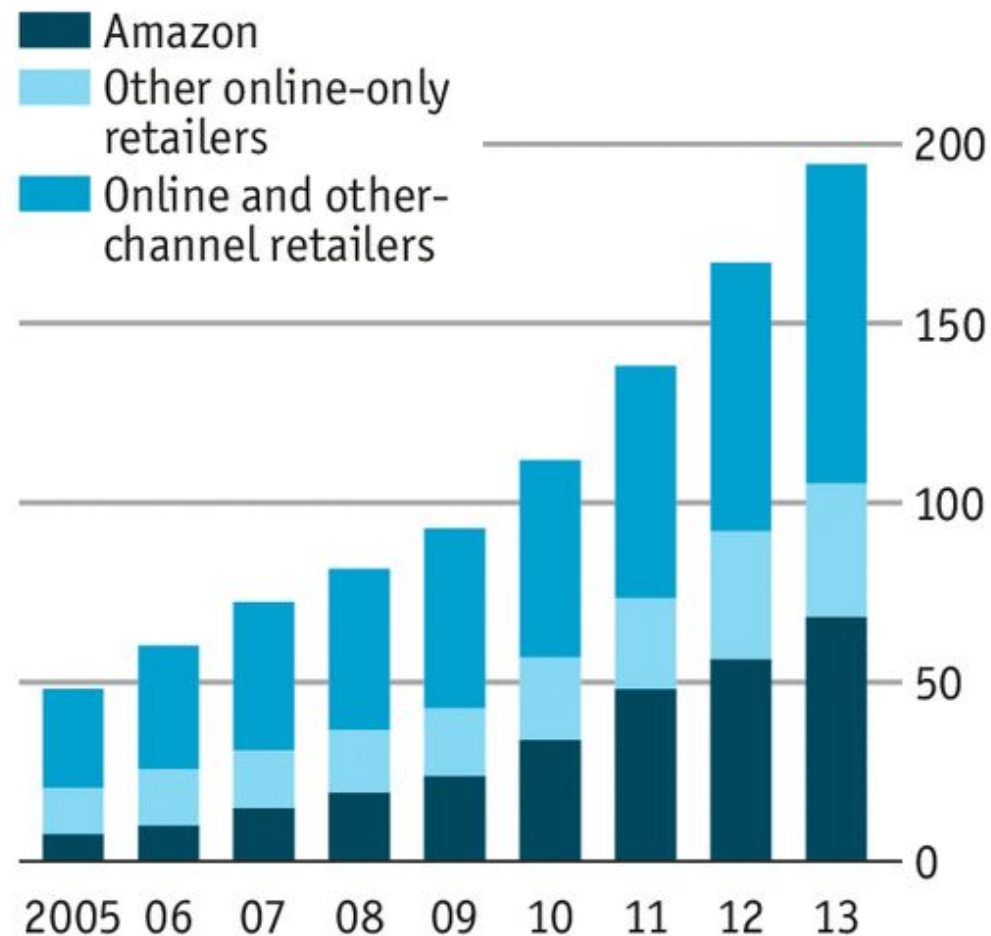


# Amazon and the others.

## The biggest play

1

Online retail sales in America, \$bn



Source: Citi Research



# Providers' immunities / safe harbours

Many legal systems, have exempted providers from liability for illegal content / activities by their users.

Rationales:

- To enable them to survive and grow and support the Internet economy (still valid, for all providers?)
- To preserve current business models and usage patterns (still valid?)
- **To protect fundamental freedoms over the Internet (expression, association, economic initiative, political participation, etc.)**





# Collateral censorship: problem or opportunity?

The regulation of providers induces providers to regulate their users

- To avoid sanctions, or obtain benefits, providers may block, censor, or otherwise control the speech of users. Their control (censorship) may
  - prevent illegal or harmful activity,
  - but also limit legitimate expression, without adversarial and public control.
- E.g: Search engines implementing right to be forgotten; EU Code of Conduct on Illegal Online Hate Speech, etc.



# How to regulate intermediaries' liabilities

Regulatory options for intermediaries enabling third party content / activities:

- Immunity from sanctions and from injunctions
- Immunity from sanctions, subjection to injunctions
- Liability for negligence (general civil liability)
- Strict liability
- Criminal and administrative sanctions

Various shades are possible.

- Key issue: Do we want unrestricted anonymous freedom of speech over the Internet?



# The law on intermediaries in the US. Back to the 90's.

- Communication Decency Act (CDA), 1996, Section 230,
  - for all violations, except Federal crimes and Intellectual property
- Digital Millennium Copyright Act (DMCA / OCILLA) 1998
  - for infringements of copyright



# Communication Decency Act (CDA)

- Interactive computer service providers
  - are not liable for information provided by another content provider (safe harbour)
  - keep their immunity when act in good faith to restrict access to objectionable materials (good Samaritan clause)
- Application:
  - Full immunity from liabilities and injunctions
  - Limited exceptions (e.g. for revenge porn and discrimination)



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# Digital Millennium Copyright Act

- Provider processing infringing content not liable if
  - Has no actual knowledge that the material is infringing
  - Does not receive a financial benefit from infringing activity
  - Upon notification of alleged infringement expeditiously removes content or blocks access to it (**notice and take down procedure**)



# Notice and take down (DMCA)

## Steps of the procedure

1. Alleged right holder notifies infringement to provider's agent
  2. Provider blocks access and transmit notification to user (uploader)
  3. If user send counter-notification, provider informs right holder
  4. If right holder does not start lawsuit, provider enables access again
- Neutral role of the provider, presumption for the alleged rightholder



# The law on intermediaries in the EU. Back to the 90's.

The eCommerce directive (2000/31/EC), Art. 12-16.

- **Scope:**
  - Mere conduit ISPs (transmission in network)
  - Caching ISP (temporary storage of data)
  - Hosting ISP (storage of information provided by a recipient of the service)
- What about search engines? Participative platforms?



# The eCommerce immunities: host providers

- Who is a host provider?
  - An information society service provider who stores information provided by a recipient of the service, at the request of a recipient
- Art. 15. No liability for host provider, who
  - Has no actual knowledge of illegal activity or information (or awareness of facts making illegal activity or information apparent)
  - Upon obtaining knowledge or awareness removes or disables access to information





# Providers and public powers

- Art 13, 14, 15: Provider may be ordered, by competent authorities, to terminate or prevent infringements
- Art. 16: No general obligation shall be imposed on providers
  - to monitor the information which they transmit or store, nor
  - to seek facts or circumstances indicating illegal activity.



# Still the right framework?

Big intermediaries (Google, Facebook, etc.):

- Have huge economical resources
- Enjoy dominant position in monopolistic markets
- Have political influence
- Are gatekeepers for information on the Internet
- Their platforms contribute to public opinion (including through hate speech and fake news)
- Have powerful automated tools to detect and classify materials



# Intermediaries can and regulate on line content

How Google will tackle extremism (Kent Walker, Senior Vice President of Google, Financial Times):

- Use technology to identify (and remove) extremist videos
- Employ experts (from NGOs) to take decisions
- Put warnings and exclude monetisation, comments and endorsement from offensive but not prohibited (e.g. inflammatory religious or supremacist) videos
- Redirect potentially radicalised users to materials that can change their mind



# The big issue

- Should the law regulate providers, as the most effective way regulate the speech of their users? Are immunities still justified?
- Intermediaries are required to play an active role:
  - Defamation (Delfi case, ECHR)
  - Violations of data protection (Google Spain, ECJ)
  - Infringements of copyright (Ziggo, ECJ)
  - Fake news (proposed German Social Networks Enforcement Law)
  - ....



# Proposals for the regulating intermediaries (I)

- Proposed Directive on Audio-Visual Media Services (COM(2016) 287). **Video-sharing platform** providers should put in place appropriate measures to:
  - protect minors from harmful content; and
  - protect all citizens from incitement to violence or hatred.
- Proposed directive on Copyright (COM(2016) 593). **Providers storing and giving access to large amounts of content** uploaded by their users should take adequate measures (including content-recognition) to
  - Implement agreements with rightholders
  - Prevent access to works identified by rightholders



# Proposals for the regulating intermediaries (II)

- Discussion Draft of a Directive on Online Intermediary Platforms. **E-Commerce intermediaries** has duties
  - to inform the customer
  - to remove misleading information by the supplier
  - to protect consumers, on obtaining credible evidence that the supplier's conduct may unjustly harm the consumer





# Open issues. Who is a host provider?

## – Collaborative platforms

- No, since they are not “passive”, since they organise, index content, link ads, remove objectionable content
- Yes, since they store and make accessible content provided by third parties (Google-Luis Vuitton, ECJ)

## – Search engines

- No, since they autonomously index all web-sites (Google-Spain)
- Yes, since they are implicitly authorised by uploaders to index and make accessible content

## – Newspaper hosting reader’s comments

- No, since they provide content, and moderate comments (Delfi, ECHR)
- Yes, since they only enable users to upload their comments





# When is immunity lost?

- Actual knowledge is necessary
  - of the presence of the content
  - Also of the illegality of it? What about legal uncertainty
- What should intermediaries do
  - Remove only illegal material specifically indicated? Or also
  - Find illegal material when given sufficient clues?
  - Preventively block illegal material?



## When does a control obligation become (too) general?

- Should a legitimate injunction identify single recordings to be removed, or may it also address
  - All instances and fragments of an item (e.g. of a movie)?
  - A class of works (all episodes of a TV series)?
  - Also preventively (ECJ Scarlet-Sabam case)?
- New technologies make “general” controls easier
  - e.g., potential infringements of copyright, child pornography, violent or hate speech



# Abilities and moral obligations of intermediaries.

- Abilities
  - They enable access to content and interaction
  - They can and do regulate online content and interaction
- Consequential moral obligations
  - They have social/moral responsibilities: they should contribute to an online environment where human rights are respected, and individuals and societies can flourish-
  - Should moral become legal obligation, or only voluntary non-enforceable commitments?
- Being related to capabilities, moral obligations may differ for different kinds of intermediaries



# A regime for intermediaries Immunities (I)

- A broad personal scope
  - Whoever transmits or stores non-selected third party content or hosts third party activities (no distinction between active and non-active hosting)
- A broad material scope
  - Immunity from criminal, administrative and civil liabilities, for illegal third-party content or activities
- Subjection to impartial authorities
  - Courts
  - Public authorities (e.g. data protection authorities)
  - Public-private bodies



# A regime for intermediaries Immunities (II)

- Good Samaritan clause
  - Immunity is maintained when intermediary in good faith prevents access to objectionable material or activity
- Prohibition of “general” obligations to monitor and search. Excessive generality to be determined by:
  - sustainability,
  - technical means available, and
  - interference on users’ rights (ECJ Scarlet v Sabam)



# A regime for intermediaries

## Exceptions to immunity (I)

Lack of knowledge:

- The intermediary should be responsible when
  1. Has actual knowledge of
    1. the presence of third party content or activity in its systems and
    2. the illegality of such content or activity and
  2. Does not expeditiously removes or block content or activity, when obtaining such knowledge.

Supplements

1. Adversarial “notice and action” procedures
2. Involvement of impartial bodies to decide contested cases



# A regime for intermediaries

## Exceptions to immunity (II)

**Duty of care:** The intermediary should be responsible for damages when

- It fails to exercise reasonable due care to prevent illegal activities and
- Third parties are harmed as a consequence
- Reasonable due care depends on
  - Gravity of the the risks
  - Available technologies
  - Economic sustainability
- Possible specifications for different kinds of providers and illegalities.



# Immunity and automaticity: a questionable correlation

- Immunity should not depend on automaticity
  - “Automated” (passive) management of a service does not mean fair or neutral management
  - Human intervention may be useful to screen out certain objectionable material
- Provider should use, in good faith and with due diligence, automated and non-automated methods
  - to make third party information accessible
  - to prevent harm to users and third parties,
  - while respecting users’ freedoms





# Should intermediaries act as de facto first instance judges?

- Should intermediaries decide conflicts between content providers and alleged victims?
  - Inevitable in the context of notice and take down procedures, unless public body or external NGOs are always involved
- However
  - Diligent intermediaries in good-faith should be shielded from liabilities for excusable legal mistakes (in particular when the law is uncertain)
  - Transparency and right to review by independent bodies should be guaranteed.



## From legal obligation to social/corporate responsibility

- Intermediaries may be encouraged to take voluntary initiatives aimed at improving
  - respect of human/fundament rights, and
  - the quality of online interactions.
- However
  - Remedies should be provided
  - Collaboration with public bodies and NGOs should be ensured
  - Transparency is needed



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Thanks for your attention!

Giovanni.Sartor@eui.eu



# Draft Directive on Online Intermediary Platforms

- It concerns consumer-protection and e-commerce intermediaries
  - No general liability for non-performance if platform operator presents itself as intermediary in prominent way
  - Liability is the customer can reasonably rely in the platform operator having a predominant influence on the supplier
- Duty to protect
  - on obtaining credible evidence that the supplier's conduct may unjustly harm the consumer
- Similarities (active role of providers), but differences