

Liability of online service providers for copyrighted content – substantive and procedural aspects

European Parliament - IMCO Working Group on the Digital Single Market - 12th meeting:
“Online Service providers and the limited liability regime of the E-Commerce Directive”

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Starting point

- Liability of online service providers
- Seen from the perspective of intellectual property rights
- **Copyright main focus**
 - Copyrighted content easy to digitize and to upload onto the internet
- **Other IP rights (trademark, design, patents) catching up**, as far as digital business model on the internet
 - Example: GUCCI bags for download from Turbosquid.com

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- 3DS
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The E-Commerce-Directive 2000/31 (“ECD”)

- **Liability privileges** (“safe harbours”) for
 - Access providers (“mere conduits”), Art. 12 ECD
 - Cache providers, Art. 13 ECD
 - Hosting providers, Art. 14 ECD
- Prohibition to impose **general monitoring obligations** on providers, Art. 15 ECD

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 1

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
- **Hosting providers:**
 - 2000: Art. 14 assumes a **neutral** good faith storage provider
 - 2017: A lot of hosting providers play an **active role** (indexing, suggesting, branding etc.)
 - Example: YouTube not caught by Art. 14 ECD any longer due to active role (OLG Hamburg of 2015, 5 U 87/12)



The E-Commerce-Directive 2000/31 (“ECD”):

Problem 1

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
- **Hosting providers:**
 - 2000: Art. 14 assumes a neutral **good faith** storage provider
 - 2017: some hosting providers (e.g. sharehosters) operate a **dangerous business model**, staying passive, but turning a blind eye to repeated infringements
 - Example: UPLOADED (sharehoster) protected by Art 14 ECD, in case after notification different users upload the notified illegal film file again and again (OLG Munich 2017, 29 U 1819/16)



The E-Commerce-Directive 2000/31 (“ECD”):

Problem 1

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
- **Access providers:**
 - 2000: Art. 12 assumes a **neutral “mere conduit”**
 - 2017: Access providers play an important role to **disseminate live streams** for their customers; business model closer to hosting = Provider should leave safe harbour, when actual knowledge etc.
 - Example: Illegal live streams of British Premier league or of German Bundesliga, upstream provided by contractual partner of infringer



The E-Commerce-Directive 2000/31 (“ECD”): Problem 1

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
- **Linking providers:**
 - 2000: **Not caught by Art. 12-14 ECD**
 - 2017: **Role** of link providers **comparable to internet providers**, in particular to hosting providers
 - Example: Providing of links by Google’s search engine



The E-Commerce-Directive 2000/31 (“ECD”): Problem 1

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
- **Solution: Is it a problem that can only be fixed by the legislator?**
 - Courts adapt case law to new business models
 - Difficult to find neutral safe harbour rules even today that are immune to evolving business models
- **No pressing need to reform Art. 12-15 ECD**

The E-Commerce-Directive 2000/31 (“ECD”): Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **Sector specific pan-EU liability rules**
 - Art. 8 (3) Copyright Directive 2001/29
 - Prevention and helping duties by intermediaries
 - Covers i.a. hosting and access providers
 - Only injunction claims
 - Art. 12-14 ECD do not apply, but Art. 15 ECD (no general monitoring obligation)

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **But no pan-EU liability rules for other claims, e.g. damages**
- National concepts apply
- No sound interface with privileges in Art. 12-14 ECD
 - Example: YouTube out of safe harbour due to active role (Art. 14 ECD), but no damage claim under German liability concepts (OLG Hamburg of 2015, 5 U 87/12) = gap



The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **Solution: Do we need pan-EU liability rules in the ECD?**
 - Yes, DSM requires level playing field for providers in Europe
 - BUT: “Horizontal” approach by ECD
 - **IP rights** (copyrights, trademarks, design, patents, etc.)
= in general EU harmonization
 - **Personality rights and other information** (hate speech etc.)
= in general no EU harmonization
 - **Still, pan-EU liability rules for providers are necessary for all illegal information, if DSM should become reality**

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **Smaller solution: Do we need pan-EU liability rules for IP rights?**
- **Yes, DSM requires harmonized liability rules for IP rights**
 - IP rights vastly harmonized
- But take a closer look at the current status!

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **Pan-EU liability rules for IP rights**
 - Secondary liability already partly harmonized for Copyright (Art. 8 (3) Copyright Directive 2001/29), but only for injunctions
 - **No need to legislate on injunction claims**, in particular for prevention and helping duties of providers
 - Same for other IP rights (Art. 11 3rd sentence Enforcement Directive 2004/48)

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
- **Pan-EU liability rules for IP rights**
 - Need to harmonize the rest?
 - Direct liability
 - Accessory liability
 - **Sector specific approach**
 - **Commission: Art. 13 Draft DSM Directive**
 - **Active role** hosting providers included into concept of communication to the public = direct liability
 - Sound with Art. 14 ECD, as active role out of safe harbour

The E-Commerce-Directive 2000/31 (“ECD”):

Problem 2

- **The CJEU is starting to create pan-EU liability** rules beyond Art. 8 (3) Copyright Directive
- Providers communicate to the public (direct liability)
- Requirements
 - **Deliberate “intervention”** = communication
 - **Breach of duty of care:** “knew or ought to have known” that content provided was illegal
 - See (linking and indexing) cases “Filmspeler” (2017, C-527/15) and “The Piratebay” (2017, C- 610/15)

Example: CJEU “The PirateBay” – C-610/15 of June 14, 2017

- “The PirateBay” (www.thepiratebay.org)



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Example: CJEU “The PirateBay” – C-610/15 of June 14, 2017

- “The PirateBay”
- WAS under Swedish national (criminal) law: Aidership



Free Anakata!  Free Brokep!



- IS under EU liability rules by CJEU: Communication to the public (= direct liability)

Proposals

- **Problem 1:** Evolution of providers from 2000 until 2017 not mirrored
 - New business models of access, hosting and linking providers
 - Courts adapt case law to new business models
 - **No pressing need for legislative action concerning Art. 12-15 ECD**
 - But Communication (“Guidelines”) from Commission could be helpful to foster sound EU-wide application

Proposals

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
 - **DSM requires pan-EU horizontal approach to create liability rules for all illegal information, not only for IP rights, but also for national domains like personality rights**

Proposals

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
 - Alternatively, DSM requires pan-EU **sector specific approach** for liability rules, e.g. copyright
 - **Injunctions (Prevention and helping duties)** already harmonized, Art. 8 (3) Copyright Directive
 - **No legislative action necessary**

Proposals

- **Problem 2:** ECD only provides pan-EU liability privilege – but no pan-EU liability rules
 - Alternatively, DSM requires pan-EU **sector specific approach** for liability rules, e.g. copyright
 - **Full liability (damages etc.)**
 - **Need for harmonization**
 - Art. 13 Draft DSM Directive, combined with case law of CJEU points in the right direction for communication to the public

Proposals

- Harmonization of **full liability** sector specific copyright
- **What we need:**
 - Rules that are sound with Art. 12-15 ECD
 - Rules that are flexible enough to take into account the nature of the business model, in particular the benefits and the dangers resulting from it
 - Rules that motivate providers to act with responsibility as to infringements
 - Rules that are open enough to produce “just” results on a case-by-case basis
 - Rules that are future proof to adapt to new emerging business models

Proposals

- Harmonization of **full liability** sector specific copyright
- **Proposal for requirements:**
 - (1) Deliberate intervention by provider, e.g. active role and**
 - (2) breach of (adequate) duty of care**
- **Flexible open future system with weighing of interests, imposing only adequate duties upon providers**
 - Outer limit: Art. 15 ECD (no general monitoring duties)
 - Compare with flexible duties under Art. 8 (3) Copyright Directive
 - Hosting providers CJEU C-324-09 – L'Oréal/Ebay
 - Access providers CJEU C-314/12 – UPC TeleKabel („kino.to“)
 - **Difference to Art. 8 (3): Deliberate intervention by provider**
- **The CJEU may be on the way to this solution anyway**

Thank you for your attention.

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