Liability of Online Service Providers for Copyright Protected Content - Regulatory Action Needed?

Klausen Copyright Blog
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In an in-depth analysis for the European Parliament, the author has looked at liability of online service providers with regard to copyright protection and infringement. In particular, the paper highlights the challenges and the need for regulatory action in the field of liability of online service providers.

The full paper may be downloaded here.

Summary

- The liability privilege of Article 12 to 15 E-Commerce Directive can remain unchanged. They seem to be sufficiently flexible to adapt to new business models, which also makes them, in general, future-proof.
- With regard to injunction claims, Article 8(3) Copyright Directive provides for a flexible system of duties of care to establish liability of linking providers in case of links to illegal content, which may be imposed on providers, in particular to prevent infringements notified.
- Damages claims: New CJEU case law
- Articles 12 to 15 E-Commerce-Directive

The first part of the analysis is dedicated to the assessment of the necessity of a reform of the liability privilege of the E-Commerce Directive. Although Articles 12 to 15 E-Commerce Directive are more than 20 years old, there seems to be no pressing need for a reform. The provisions seem to be sufficiently flexible to adapt to new business models, which also makes them, in general, future-proof.

In relation to sufficiently collaborative hosting providers, running a dangerous business model which fosters infringement, the case law of the CJEU has to date not answered its question, and to what extent, such hosting providers should profit from the liability privilege. But the concept and wording of Article 14 E-Commerce Directive seems to be sufficiently flexible to allow an adequate case by case result in such scenarios. No change of Article 14 E-Commerce-Directive is deemed necessary.

- Access providers (Article 10 E-Commerce-Directive)

Concerning access providers, there seems to be no need to change the liability privilege of Article 12 E-Commerce-Directive. Access providers, which operate at the border between access and hosting providers, may have impact on infringement, but they do not bear the main responsibility. No change of Article 10 E-Commerce-Directive is deemed necessary.

- Cache Providers (Article 13 E-Commerce-Directive)

The liability privilege for caching providers (Article 13 E-Commerce-Directive) lacks practical importance. Therefore, there is no pressing need to change it.

- Linking Providers

Linking providers, even particularly search engines, are important players on the internet, and in principle render negligence ineffective. In so, it has only been clarified by the CJEU that search engines may escape the liability privilege of Article 10 E-Commerce-Directive if an active monitoring obligation is applied. But such open legal questions do not in themselves justify a reform, as it can be expected that the CJEU will answer the questions in a way that adequately respects the different rights and interests at stake.

- Prohibition on imposing general monitoring duties (Article 15 E-Commerce-Directive)

On the prohibition on imposing general monitoring duties (Article 15 E-Commerce-Directive) the CJEU case law is abundant. But if it holds a filter with respect to such an important question as the delegation between general monitoring obligations (provided by Article 10 E-Commerce-Directive) and specific monitoring claims, which may be imposed on providers, in particular to prevent infringements notified.

Befit Article 15 E-Commerce-Directive pursuant to the CJEU case law, is strikingly ambivalent to a balancing of fundamental rights, it can be expected that any exclusion provided by case law will respect all essential interests in an appropriate way. No legislative action seems to be necessary concerning Article 15 E-Commerce-Directive.

2. Need for pan-EU Liability rules

The second part of the paper analyzes the usefulness of a need for pan-EU liability rules. The EU legal framework provides for harmonized law concerning liability provisions in Articles 12 to 15 E-Commerce-Directive. The CJEU case law has not evolved significantly and as such, the system does not seem to have been developed yet to cover the liability rules concerning infringements of copyright protected works.

-損害請求 (Article 14 E-Commerce-Directive)

With regard to侵权请求, Article 14 E-Commerce-Directive provides for a flexible and solidarity-studies with regard to internet providers.

- Storage Claims: new CJEU case law

With regard to other claims, in particular damage claims, it has to be seen whether the CJEU case law provides for a harmonized answer in cases of primary infringement, e.g. unauthorized use of the harmonized-expropriation rights in copyright.

The CJEU case law in this regard is consistent, which may be seen to different results from member states to member states. This is unsatisfactory against the background of European harmonization. In particular, the CJEU case law creates a broad playing field, e.g. for damages claims against linking providers. But this is subject to development from CJEU case law which may harmonize secondary liability within the primary liability cases of E-Commerce-Directive provisions.

3. Proposal for pan-EU liability rules

The last part of the paper consists of a proposal for a copyright sector specific regulation of liability. The liability of internet providers for damages would typically be seen in a form of secondary liability. Nevertheless, the CJEU case law so far does not harmonize the harmonized-expropriation rights in copyright. The CJEU case law remains concerning secondary liability rules concerning primary infringement.

In particular, establishing liability beyond exceptions, and in particular establishing liability for damages, should require:

- An independent intervention by the internet provider.
- A breach of an adequate duty of care by the internet provider.

The study comes to the following conclusions:

1. Article 12 to 15 E-Commerce-Directive

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In relation to sufficiently collaborative hosting providers, running a dangerous business model which fosters infringement, the case law of the CJEU has to date not answered its question, and to what extent, such hosting providers should profit from the liability privilege. But the concept and wording of Article 14 E-Commerce Directive seems to be sufficiently flexible to allow an adequate case by case result in such scenarios. No change of Article 14 E-Commerce-Directive is deemed necessary.

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