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

Kluwer Copyright Blog
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On behalf of Moritz, Kluwer Copyright Blog welcomes Jan Bernd Nordemann, liability of online service providers for copyright protected content - regulatory action needed

In an in-depth analysis for the European Parliament, the author has looked at liability of online service providers, with regard to infringement of copyright protected content. In particular, the paper focuses on the CJEU’s recent case law on liability of online service providers and related regulatory action. The full paper may be downloaded here.

Summary

- The liability privileges in Articles 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.
- The privilege to not bear responsibility can remain available.
- With regard to operation claims, Article 8(3) of the E-Commerce Directive provides for a satisfactory legal framework.
- For cases establishing liability beyond injunctions (e.g. damages) should be harmonised to incorporate the requirements of (sufficient) interventions by the internet provider, and 10 branches of an adequate duty of care by the internet provider.
- The main conclusion in the following conclusions:

1. Articles 12 to 15 E-Commerce Directive

The first part of the analysis is dedicated to the assessment of the adequacy of a reform of the liability privilege in 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 collaborating hosting providers, running a dangerous business model which fosters infringement, the case law of the CJEU has to date answered to the extent, 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.


Concerning access providers, there seems to be no need to change the liability privilege of Article 12 E-Commerce Directive.上游 providers, which operate at the borderline between access and hosting privileges.


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

4. Listing Providers

Listing providers, and more particularly search engines, are important players on the internet, and in principle deserve regulatory attention. So far, it has only been clarified by the CJEU that search engines may escape the liability privilege of Article 8(3) E-Commerce Directive in so far as they provide links against remuneration for advertising purposes. It can be expected that the CJEU will clarify in the near future whether Article 15 E-Commerce Directive applies on editorial links provided by search engines. As the Court has developed a flexible system of adequate duties of care to establish liability of hosting providers in case of loss of legal content, there seems to be no reason, however, to further alter the liability privileges of the E-Commerce Directive to this extent. As long as such systems seem to be sufficiently flexible to provider for just results in all different linking scenarios.

5. Promotion on improving general monitoring duties (Article 15 E-Commerce Directive)

On the position on improving general monitoring duties (Article 15 E-Commerce Directive) which can remain unchanged; they seem to be sufficiently flexible to adopt to new business models, which also makes them, in general, future-proof.

6. False Hosting Providers (Article 14 E-Commerce Directive)

Let us first consider the CJEU’s case law on liability of false hosting providers, which pose special challenges when the CJEU case law yet to be sufficiently developed.

7. Unnecessary Collaborative Hosting Providers (Article 14 E-Commerce Directive)

Concerning collaborative hosting providers, it can be expected that the CJEU will clarify in the near future whether Article 15 E-Commerce Directive applies on collaborative hosting providers. But the concept and wording of Article 14 E-Commerce Directive seems to be no need to change it.

8. Non-Compliance Claims (Article 10 E-Commerce Directive)

With regard to non-compliance claims, Article 10 E-Commerce Directive provides for a flexible and flexibility-adjustable solution with regard to internet providers.

9. Damages Claims - New CJEU Case law

With regard to other claims, in particular damages claims, it can be expected that the CJEU case law on liability of false hosting providers, which pose special challenges when article 15 E-Commerce Directive applies, which may lead to different results from member state to member state. This is unsatisfactory against the background of European harmonisation, in particular, this does not create a level playing field, e.g. for damages claims in right holder claims.

10. Proposal for partial 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 as a form of secondary liability. Nevertheless, the CJEU’s recent case law on the liability of online service providers, with regard to infringement of copyright protected content demands a new approach. By adopting a partial liability rule for internet providers, the CJEU could establish a new level of protection and liability, with a particular permission for damages, should criteria

The study comes to the following conclusions:

- The liability privilege in Article 12 to 15 E-Commerce Directive can remain unchanged.
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