Kluwer Copyright Blog

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

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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 infringements concerning copyright protected content. In particular, the paper tries to answer the question of whether regulatory action is needed in relation to the liability of online service providers for copyright protected content.

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 adopt to new business models, which also makes them, in general, future-proof.
- These privileges do not, however, establish liability.
    - With regard to injunction claims, Article 8(3) Copyright Directive provides for a satisfactory pan-EU solution.
    - EU rules establishing liability beyond injunctions (e.g. damages) should be harmonised to incorporate the requirements of (1) sufficient intervention by the internet provider; and (2) breach of an adequate duty of care by the internet provider.

The study comes to the following conclusions:

1. **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 privileges in the E-Commerce Directive. Although Articles 12 to 15 E-Commerce Directive are more than 15 years old, there seems to be no pressing need for a reform. The provisions seem to be sufficiently flexible to adopt to new business models, which also makes them, in general, future-proof. Of course, certain legal questions arising with regard to Articles 12 to 15 E-Commerce Directive have not yet been finally answered by the CJEU. But such open legal questions do not in themselves justify a reform, as it can be expected that the case law will answer the questions in a way that adequately respects the different rights and interest at stake.

- **Hosting providers (Article 14 E-Commerce Directive)**

While false hosting providers (Article 14 E-Commerce-Directive) may have emerged as a new

category of hosting providers, not envisaged at the time of the adoption of the E-Commerce Directive in 2000, the E-Commerce Directive has proven fit to treat the issue adequately. The delineation between passive service providers caught by Article 14 and active role providers remains an issue for the Court, without it being necessary to change the article.

In relation to insufficiently collaborative hosting providers, running a dangerous business model which fosters infringements, the case law still has to find final answers as to whether, 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 12 E-Commerce Directive)**

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

- **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, 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 enjoy the liability privilege of Article 14 E-Commerce Directive in as 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 14 also applies to editorial links provided by search engines. As the Court has developed a flexible system of adequate duties of care to establish liability of linking providers in case of links to illegal content, there seems to be no need, however, to further refine the liability privileges of the E-Commerce Directive to linking providers. The system of duties of care seems to be sufficiently flexible to provide for just results in all different linking scenarios.

- **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 it still lacks a final word from the Court with regard to such an important question as the delineation between general monitoring obligations (prohibited by Article 15 E-Commerce Directive) and specific monitoring duties, which may be imposed on providers, in particular to prevent infringements notified.

But as Article 15 E-Commerce Directive, pursuant to the CJEU case law, is strongly dominated by a balancing of fundamental rights, it can be expected that any solution provided by case law will respect all relevant 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 analyses the existence of a need for pan-EU liability rules. The EU legal framework provides for harmonised law concerning liability privileges in Articles 12 to 15 E-Commerce-Directive. They do not, however, establish liability. The EU system does not seem particularly developed yet so far as rules to establish liability are concerned.

- **Injunction claims (Article 8 (3) Copyright Directive)**

With regard to injunction claims, Article 8(3) Copyright Directive provides for a flexible

and satisfactory solution with regard to internet providers.

- **Damages Claims: New CJEU case law**

With regard to other claims, in particular damages claims, EU law only provides for a harmonised answer in cases of primary infringement, i.e. unauthorised use of the harmonised exploitation rights in copyright. For the (secondary) liability of other persons, until now different national secondary liability concepts have applied, 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 for right holders in the EU. But there is a development from CJEU case law which may harmonise secondary liability within the primary liability rules of EU law, in the series of judgments in *GS Media/Sanoma*, *Filmspeler* and *BREIN/Ziggo*.

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 as a form of secondary liability. Nevertheless, the CJEU is already starting to develop such an EU liability rule within the harmonised field of primary liability. Further development in Luxembourg at the CJEU could be awaited. Or the legislator could also take the initiative, but any such legislative initiative should go in the same direction as the CJEU: EU rules establishing liability beyond injunctions, and in particular establishing liability for damages, should require

- (1) a sufficient intervention by the internet provider; and
- (2) a breach of an adequate duty of care by the internet provider.

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