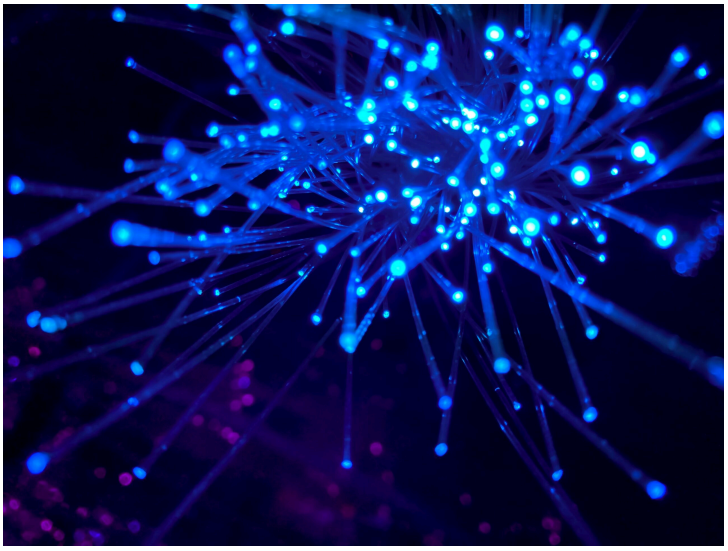
Kluwer Copyright Blog

Internet intermediary liability and copyright infringement: shaping an alternative EU framework?

Zoi Krokida (Stirling University) · Monday, September 12th, 2022



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The thorny issue of internet intermediary liability seems to continue preoccupying EU policymakers. While internet intermediaries act as gatekeepers of content that is transmitted online, their services seem to attract a high number of copyright infringements. Effective and prompt solutions to combat online piracy are more than urgent. This blogpost provides a critical reflection on the current legal framework that revolves around internet intermediary liability and suggests an alternative framework that aims to maintain to a greater extent an equilibrium amongst the rights of the parties involved, namely internet intermediaries, right holders and internet users.

Article 17 of the Digital Copyright Directive

Article 17 of the Digital Copyright Directive governs the liability of a new subtype of host internet service providers, namely online content sharing service providers (OCSSPs) for copyright violations that occur within their services. Crucially, that provision has been controversial and has drawn severe criticism from civil society organizations and academic scholars because it introduces primary liability rules and complex liability exemptions and triggers a dual liability risk. What is more, the national implementations of Article 17 so far have failed to ensure the protection of users' fundamental rights because most of the EU countries have implemented verbatim the problematic features of the provision, while the European Commission's Guidance on the implementation of Article 17 fails to offer solid guidance. As a corollary, the rights of creators seem to be prioritised, while the interests of OCSSPs and internet users might be subordinated.

A. Primary liability rules

In particular, Article 17 imposes primary liability rules on OCSSPs via the exclusive right of communication to the public. The attribution of primary liability rules is in line with a bedrock of case law by the CJEU. Cases such *Svensson*, *GS Media*, *Brein v Ziggo* and *YouTube/ Cyando* confirm that trend. However, it has been argued that primary liability rules might impede innovation in the EU Digital Single Market. This is mainly because primary liability rules go against the rationale of Article 14 (1) of the E-Commerce Directive which states that host internet service providers should be exonerated from liability if they do not have knowledge or are not aware of the infringing content or if they remove expeditiously the infringing content upon being notified. In addition, primary liability rules might lead to over-blocking. Similar to the take-down obligation in Article 14 (1) b of the E-Commerce Directive, OCSSPs might take down material without investigating further the legality of the content in order to avoid liability, thus jeopardizing the right of internet users to freedom of expression and information. What is more, primary liability rules might force new OCSSPs in the market to finance additional resources in order to enter the EU Digital Market or even incentivize existing internet intermediaries to change their business model so that they do not fall within the scope of OCSSPs.

B. Exemptions from liability

In order to escape from liability, OCSSPs must undertake specific acts. More specifically, OCSSPs must demonstrate that they made best efforts to acquire authorization from creators or made best efforts in line with high industry standards of professional diligence to prevent, or act expeditiously to remove, allegedly infringing content upon being notified by right holders and to prevent its reappearance. However, it seems that those requirements might be controversial because they might place additional burden on OCSSPs and therefore increase their transaction costs. For example, it might be tricky for OCSSPs to license all content that is disseminated online given that there is no pan-EU licence. At the same time, where the threshold for diligence that online content sharing service providers must demonstrate is questionable, industry practices might prioritize the interests of right holders. In addition, the prevention of the reappearance of allegedly infringing content might have chilling effects on users' fundamental rights. This is because OCSSPs might resort to automated technological tools and remove lawful content. The difficulty of distinguishing between legitimate and illegitimate content has been reinforced in a number of studies. YouTube's transparency report reveals that in the first half of 2021, while 722,649,569 claims for copyright infringement were filed, 60% were resolved in favour of the uploader by reinstating the content. Crucially, this controversy has been accentuated by the Opinion of the Advocate General Saudmandsgaard ØE on the annulment action of Poland. In paras 63 and 64, the AG pointed out that filtering technology could be a plausible solution for identifying online infringements due to the high volume of content and the inability of human moderators to identify allegedly copyright infringing content, but argued that its implementation must be proportionate.

C. Risk of dual liability

In addition, Article 17 might create the risk of dual liability for OCSSPs and host internet service

providers. A telling example can be found in OCSSPs whose business model attracts both copyright and trade mark violations. Those OCSSPs might be subject to different rules, while at the same time right holders might be uncertain as far as the enforcement of their rights are concerned. Further, while online marketplaces are excluded from the definition of OCSSPs, what would happen if their services fall within the scope of Article 17? For instance, if they sell unauthorized eBooks or digital pictures, would the principle of diligent economic operator apply too? This dual liability risk might also shake the current harmonized enforcement framework in copyright law. So, for example, as per Article 14 of the E-Commerce Directive, it is up to the right holders to prove that an infringement took place, while, as per Article 17 of the Digital Copyright Directive, OCSSPs must demonstrate that they made best efforts to licence the material online or terminate or prevent the availability of infringing content within their services.

Digital Services Act and its intersection with Article 17 of the Digital Copyright Directive

Another attempt to regulate internet intermediary liability is to be found in the Digital Services Act. The Act was voted on by the European Parliament on 5 June 2022, with its formal adoption by the Council due to take place in September 2022, followed by its publication in the Official Journal of the European Union. It reveals a promising approach and would apply as *lex specialis* in cases which are not covered by current legislation, such as the Digital Copyright Directive.

Interestingly, while the Digital Services Act has not been tested by the courts, it has been argued that some provisions require further granularity. For instance, it is important to clarify if Article 8, which addresses the orders for removal of infringing material and Article 9, which addresses orders to provide information are applicable in the context of OCSSPs. Otherwise, two different copyright regimes will appear. This is because Article 17 of the Digital Copyright Directive only requires OCSSPs to demonstrate that they made best efforts to terminate access to, or prevent the availability of the infringing works. In addition, it is questionable whether Article 13 which addresses the issue of transparency reports, Article 14 on notice and action mechanisms and Article 15 concerning the statement of reasons for removing the material cover the activities of OCSSPs.

An alternative EU framework for ISP liability and copyright infringement?

In light of the discrepancies surrounding the current legislative framework on internet intermediary liability, an alternative solution could be envisaged in the creation of an EU co-regulatory framework. This framework would entail a supervisory authority that would operate under the Digital Services Coordinator of the Digital Services Act and supervise the activities of OCSSPs under Article 17 of the Digital Copyright Directive. A co-regulatory framework is already envisaged in the Audiovisual Media Services Directive and the Digital Services Act, while in certain EU member states (Greece and Italy) similar authorities exist in order to deal with the online enforcement of copyright law. The establishment of a regulatory authority might offer an alternative framework for governing internet intermediary liability and maintain a greater balance between the rights of the parties involved. In particular, the authority could prove an efficient means of redress for right holders because it could consider appeals against the decisions of internet intermediaries without depriving right holders of their right to go to court. A better enforcement of copyright law could also be achieved, since its highly skilled and trained staff

would be in the position to identify copyright violations and distinguish between legal and illegal content; taking into consideration the copyright exceptions. Further, in contrast to self-regulation, a supervisory authority would promote the rule of law because it would operate under the principles of independence and accountability. Effective access to justice and due process would be ensured, since the regulatory authority would supervise the correct implementation of its decisions with regard to the removal of the infringing content, while the issue of transparency reports with regard to its operation and decisions would be required. Finally, a supervisory authority would be able to protect the diversity of the content that is transmitted online and limit chilling effects on internet users' fundamental rights. The discrepancies in filtering technology along with the lack of necessary knowledge of human moderators would be addressed, since the authority would monitor the activities and decisions of internet intermediaries.

Crucially, potential flaws within a co-regulatory framework should not be underestimated. For instance, a co-regulatory framework could suffer from the intricacies of state regulation, while the establishment of a supervisory authority could be very expensive. In this light, a careful articulation of duties of the supervisory authority would reduce potential negative implications. At the same time, in order to reduce additional expenses, the proposed supervisory authority would be part of an existing governmental body or financially supported by OCSSPs themselves. A representative example can be found in the operation of the Hellenic Committee for Intellectual Property Infringements which is mainly supported by members' contributions, as well as financial support from EU Institutions and International Organizations.

This post is a summary of my published paper entitled 'Supervising the Gatekeepers? An Alternative EU Framework for the Liability of Internet Intermediaries for Copyright Infringement' (2022) 2 Intellectual Property Quarterly 62-79.

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