Liability of internet intermediaries for copyright infringement

Stefan Kulk
Utrecht University
Centre for Intellectual Property Law

29 November 2012 – Ius Commune Conference
Overview

• What are internet intermediaries?
• Why would one sue internet intermediaries?
• Liability exemptions
• Copyright exceptions and limitations
• New intermediaries?
What are internet intermediaries?

- All internet service providers that provide services needed to communicate information on the internet.

- Not just internet access providers, but service providers in general.
Internet access providers

• Multiple internet access providers are involved in internet communication
• They are the ‘gatekeepers’ of the internet.

Chinees internet als voorbeeld van rol internetaanbieders
Hosting providers

- Store information provided by others.
Search engines

- Google
- Ilse
- Bing (voorheen Live Search)
- Yahoo!
- Lycos
- Vindenn.nl
- Altavista

*Nationale Search Engine Monitor* by iProspect, 2012
Other internet intermediaries

- Social networks
- Content platforms
- Advertising platforms
- (Financial service providers)

Social networks: Twitter, Facebook
Content-platforms: Youtube
Advertentie-platforms: Google Adwords, Ebay
Financial service provider: iDeal, Paypal.
Why sue internet intermediaries?

• Internet points of control
• Effective
• Deep pockets
Liability exemptions

- Limitations only apply to the payment of damages. Injunctive relief and other measures against intermediaries are not precluded.
- Limitations focus on ‘classical’ intermediary conduct.

The liability exemptions deal with liability in a negative way. The rules define the cases in which there should be no liability.

Establishing liability remains an issue of national law.

The exemptions were written with classical intermediaries in mind: internet access providers and hosting providers. Search engine providers were not taken into account. In 2003, it would be evaluated if the inclusion of search engine providers would be needed. This evaluation came in the late 2000’s. European Commission: No new provisions, but the liability exemptions do need clarification.

Injunctive relief is not precluded: the E-Commerce Directive, but also the Enforcement Directive in a positive way states that injunctive relief is possible.
When do the liability exemptions apply?

• ‘Mere conduit’ activity (internet access providers)
• Caching
• Hosting
‘Mere Conduit’

Article 12(1) E-Commerce Directive
Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;
(b) does not select the receiver of the transmission; and
(c) does not select or modify the information contained in the transmission.
Caching

Article 13(1) E-Commerce Directive
Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;
(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
Hosting

Article 14(1) E-Commerce Directive

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
Copyright: Temporary Reproductions

**Article 5(1) Information Society Directive (Copyright)**
Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
Copyright: Communication to the public

Recital 27 Information Society Directive (Copyright)

The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.
What about new intermediaries?

Hosting service provider?
• Search engine advertising providers (e.g. Google AdWords)?
  – CJEU: Yes (Google/Louis Vuitton, C-236/08 to C-238/08, 2010)
• Electronic market place?
  – CJEU: Yes (L’Oréal/eBay, C-324/09, 2011)
• Social network?
  – CJEU: Yes (Sabam/Netlog, C-360/10, 2012)

• But...“it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.” (Google/Louis Vuitton, para. 114).

A new criterium is introduced: neutrality, which is not included in the provisions of the E-commerce Directive.
Conclusion

• The intermediary’s liability for damages is limited. However, the possibilities of injunctive relief and other measures against intermediaries are endless.

• Liability exemptions and copyright exceptions and limitations were created with classical intermediaries (access and hosting providers) in mind. But what about new, more hybrid, intermediaries?

• Research question: How can the rules on intermediary liability and copyright be made more flexible, in order to respond to new technological developments and their intermediaries?