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Liability For On-line Intermediaries: A European Perspective*

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The dramatic development of the Internet has spawned a number of difficult legal issues. Among them, defining the potential scope of liability of on-line intermediaries for actions initiated by others is a key issue for the development of the information society.[1]

In open networks such as the Internet, on-line intermediaries should be understood as being those actors who do not take part in the creation or selection of information to be disseminated. Instead, on-line intermediaries play various roles in the on-line dissemination of information provided by so-called "content providers". Without these on-line intermediaries, the Internet could not provide the same "any-to-any" channel of communication it does today.

The material that is carried, stored, forwarded or delivered by on-line intermediaries can infringe another's rights. For instance, a copyright holder may see his rights infringed when someone posts copyright material on a web site from which it is then downloaded all over the world. Equally, the Internet can be used by unscrupulous people as a carrier of harmful or illegal material, such as pornography.

In this context, the question is the extent to which on-line intermediaries should be held liable for illegal actions initiated by others. In other words, should Internet intermediaries bear the risk for wrongful acts by Internet users?

In their ongoing process of providing a legal answer to this question legislators, including the European Commission ("the Commission"), must address difficult issues. In particular, legislators need to consider whether concerns about freedom of expression and the maintenance of open networks should counsel in favour of a liability regime that does not encourage on-line intermediaries to monitor the content flowing through their systems. Alternatively, legislators might decide that compensation to the persons whose rights have been violated should prevail even if, as a result, freedom of expression would be inhibited and the Internet would no longer provide an open network for the public. If possible, of course, legislators will seek to find a balanced solution from which on-line intermediaries, users and other stakeholders can benefit.

In formulating an on-line liability regime, an important question is whether liability should be addressed as a horizontal or a vertical problem. Should a uniform liability regime be applied for infraction of any type of substantive law (such as copyright, defamation, privacy), or should separate on-line liability regimes be established for different bodies of law?

This article is designed to provide an overview of the legal situation of on-line intermediaries in Europe. Furthermore, the article seeks to bring some guidance to the discussion on this topic. To do so, it is divided into three sections. The first section provides a general description of the players and their roles, followed by a list of those areas of law from which liability could derive and an outline of the types of liability that could be imposed on on-line intermediaries for illegal actions initiated by others. This section also describes the roles of contracts and codes of conduct in relation to the scope of liability of on-line intermediaries.

The second section contains a summary of the legal situation with respect to the scope of liability of on-line intermediaries in various E.U. Member States. In particular, it contains a survey of those countries where specific legislation regulating on-line intermediaries' activities has been adopted, as well as a summary of the legal situation of on-line intermediaries in some countries where no specific legislation exists. Finally, it addresses E.U. developments on this issue, particularly the Commission's forthcoming Proposal for a Directive that apparently will deal with liability in a horizontal manner.

The third section will analyse several factors that legislators should consider when deciding the scope of liability of on-line intermediaries, for example, whether the "technical ability to monitor" criterion is an appropriate condition for the imposition of liability. In addition, the role of technologies, such as filters for the purposes of monitoring information, will be assessed. Finally, this section addresses the social and economic impact of the application of different standards of liability.

Framing the Issue: Technical and Legal Considerations

On-line intermediaries and their roles

In order to understand the liability issues related to on-line intermediaries, it is necessary to differentiate as distinctly as possible the roles of such intermediaries. An actor could, of course, take on several functional roles, and indeed this seems to be a distinct trend in the

* This paper is a product of the author's involvement in the E-CLIP project; however, it represents the author's opinion and is her sole responsibility. It does not bind the other partners nor the European Commission. It does not preclude any of the final conclusions and recommendations the E-CLIP project will eventually reach.

1 Both the Ministerial Conference on Global Information Networks, held in Bonn from July 6 to 8, 1997 and the Commission's communication entitled "A European Initiative in Electronic Commerce" (COM (97) 157 final, April 16, 1997) highlighted the relevance for electronic commerce of the scope of liability of on-line service providers.

In the United States, discussions about the scope of liability of on-line service providers started as early as 1992. See D. Loundy, "E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability" (1993) 12/2 *Computer Law Journal* 102–173.

on-line business.[2] The division of intermediaries according to their roles is especially important since the scope of liability that might be imposed may differ depending on the specific role the on-line intermediary plays.

The different functional roles that can be carried out by on-line intermediaries are basically the following:

- *Network operator*—providing the facilities for the transmission of data such as cables, routers and switches.
- *Access provider*—providing access to the Internet. Users connect to the Internet through their access provider's server. Commonly, an access provider also provides an e-mail account.
- *Host service provider*—providing a server on which it rents space to users to host content, for instance a web page, which can incorporate all kinds of material (such as software, text, graphics, sound).
- *Bulletin board operators, news groups and chat room operators*—services providing space for uses to read information sent by other users and to post their own messages. Usually they are devoted to specific topics. There are two types of newsgroups: moderated and unmoderated. The chat room allows direct communication in real time.
- *Information location tool providers*—providing tools to Internet users for finding web sites where information they seek is located (such as Yahoo!). There are two types of search engines, namely automated search engines and search engines that rely on human beings to review and catalogue web sites.

Each of these actors has a role to play when an Internet user wishes to use the Internet in the most common way, *i.e.* by surfing the Net and by downloading and uploading material. In order to do so the Internet user first needs to connect to the network via an access provider. Then, assisted by browser software and often by an information location tool, the Internet user will identify and contact the server operated by the host service provider where the web page he wishes to contact is located. Depending on the type of web page, in addition to browsing the page, the Internet user may be able to request information, upload material and download files to his personal computer. The Internet user will also be able to connect to a newsgroup hosted by a server. In order to participate in the newsgroup, the user will send a message that will be posted in the newsgroup. In addition, he will be able to read the posted messages sent by other Internet users.[3]

The above list of actors does not include content providers because, as noted in the introduction, the subject of this article is limited to the scope of liability of on-line intermediaries. These actors do not provide content but only participate in its dissemination in order to make it available to on-line users. Content providers are those actors who actually select and place material in a digital environment. The types of content providers will vary from an individual end-user who may, for example, have rented space from a host service provider and have created his own web page where he places material, to a large corporate information provider such as, for example, a company that provides stock market information. In so far as the content provider is the person who selects the material, decides whether to place it in the digital environment, and thus has control over this material, it seems beyond doubt that such a provider should be primarily responsible for the dissemination of illegal or infringing content.

To the extent that, for obvious reasons, content providers are fully responsible for the material they place in the digital environment, it has been argued that the discussion on the scope of liability of on-line intermediaries is misplaced. Also, it has been maintained that by diverting attention from the content providers to on-line intermediaries, most copyright holders are looking for deep pockets.[4] Furthermore, claimants will often wish to bring an action against a person in his home jurisdiction, and in many cases, the only candidate will be an intermediary.[4a] On the other hand, copyright owners argue that when on-line intermediaries make copyright material available to the public through the facilities they run, it is technically possible for their customers to make millions of copies. Therefore, in the view of some copyright holders, on-line intermediaries should be equally responsible for direct copyright infringement. Furthermore, since existing techniques allow anonymous use of the Internet[5] and data protection laws make difficult the identification and tracking down of the actual perpetrator and, to the extent that on-line intermediaries are easier to identify, it has been argued that liability should be placed on them.

Areas of potential liability

On-line actors might use on-line facilities provided by on-line intermediaries to engage in various forms of illegal activities. This is not a new problem; whenever a new communication medium is developed, it can be used for transmitting illegal material. However, Internet technology is different in several key respects from previous technologies, in particular in so far as the Internet provides any-to-any communication. Through the

2 For example, companies such as America On-Line offer all types of services (including content provision).

3 For further details of Internet technology, see P. Gralla, *How the Internet Works* (1997).

4 In this context, some authors maintain that in so far as the number of host service providers and access providers increases and to the extent that these actors in most cases are not well resourced, copyright plaintiffs will prefer to sue the easily identifiable and larger communication carriers (network operators). For further comments, see F. MacMillan, and F. Blakeney, "The Internet and Communication Carrier's Copyright Liability" [1998] E.I.P.R. 52–58.

4a It should be noted that suing in one's home country is less expensive and more convenient in terms of time and effort. In addition, a home court will be able to award mandatory remedies such as injunctions; it is very difficult to enforce mandatory orders made in one jurisdiction against a person in another jurisdiction.

5 This is especially true in relation to newsgroups or chats because, concerning web pages, at least the host service provider renting the space for a particular web page knows or has the means to know the content provider.

Internet, anyone anywhere in the world can communicate rapidly and openly with anyone else.

The types of substantive law more likely to be infringed by using on-line facilities include the following[6]:

- *Copyright material*—The infringing act may occur when certain files containing copyright material such as text, pictures, or sounds are posted on a web page from which they may be downloaded all over the world.
- *Illegal and harmful content*—The infringing act may occur when material such as pornographic, racist or terrorist materials are disseminated via Internet facilities.
- *Private and defamatory material*—Private material such as pictures taken in intimate situations could be posted on web pages, bulletin boards, chat rooms, etc., and made available to users, infringing therefore rights of privacy, including those contained in European data protection laws. The same may occur with defamatory material.
- *Trade secrets*—Employees may disclose confidential information which may be used in a trade or business and which is not known in that trade or business.
- *Misrepresentation*—This may occur when false or incorrect information provided by someone and disseminated using on-line facilities causes damage to a third party.
- *Others*—An intermediary could also be held liable for the infringement of other substantive laws such as patents, trade marks, and unfair trade practices.[7]

Types of liability

One can distinguish two basic types of liability standards that may apply to on-line intermediaries. The standard imposed on intermediaries may differ according to the functional role they play. At the same time, these liability standards may be different according to whether the party whose rights have been violated seeks damages or an injunction.

(1) *Strict liability.* According to this standard, on-line intermediaries will be held liable whenever a right is violated, *i.e.* whenever infringing or illegal material is disseminated using their facilities, whether they know (or have reason to know) about it and can control it or not. Effectively, imposing upon on-line intermediaries the obligation to monitor the material passing through their system would be equivalent to imposing strict liability on them. Indeed, in so far as monitoring is technically very difficult and economically prohibitive, on-line intermediaries (and especially smaller ones) will not be able to fulfil this obligation. A monitoring obligation therefore would inevitably render them liable.

(2) *With-fault liability.* According to the with-fault standard, on-line intermediaries will be held liable whenever they intentionally or negligently violate the rights of others. This standard can be divided into two levels. The first is *actual knowledge.* If the on-line intermediary knows that the infringing material is on the Internet facility it operates and that this material infringes someone's rights, the on-line intermediary will be held liable. The second level is *constructive knowledge.* This standard of liability can be formulated in different ways. For example, the law may provide a vague "reason to know" standard. Alternatively, a more precise formulation could be employed. For example, the law may provide that if the on-line intermediary is aware of facts and circumstances from which infringement is apparent, then it will be deemed to have the requisite constructive knowledge and will be held liable.

Role of contracts and codes of conduct

As noted earlier, an Internet user who wishes to have access to the Internet and to have his or her own web page must enter into several contracts: with the network operator, with the access provider and finally, with the host service provider. At first glance, one might assume that the liability of on-line intermediaries could be governed by these contractual arrangements, and that there is no need to apply general liability principles. However, this assumption is incorrect. Indeed, the person with whom the on-line intermediary is likely to have a contractual relationship is not likely to be the rightholder whose rights have been violated. The person whose rights have been violated probably will not have any relationship with the particular access provider and host service provider used by the Internet user to disseminate the illegal or infringing material. Moreover, it is beyond doubt that the contract between the Internet user who disseminated the illegal material and the on-line intermediary will not bind the person whose rights have been violated. Thus, in the absence of any contractual relationship, tort principles regulating on-line intermediaries' liability will apply.

Other measures such as self-regulation and codes of conduct among access providers are also envisaged.[8] Sometimes the self-regulation objective is to reinforce the law and not replace it.[9] On-line intermediaries

6 There seems to be consensus among legal commentators in the identification of these areas of law as being those more likely to be infringed. See Loundy, n. 1 above; I. Lloyd, "Liabilities for The Contents of On-Line Services" (1996) 3/3 *International Journal of Information Technology* 273–299; J. Angel, "Legal risks of providing services on the Internet" (1995) 11/6 *Computer Law and Practice* 150–157. Among the identified areas of law, copyright is likely to be the one most affected.

7 For a description of the problem of trade marks, domain names and unfair competition on the Internet, see C. Bromberg, "Trademarks, Domain Names and Unfair Competition: Traffic Hazards on the Internet" (1988) 13/2 *Bulletin of the Association of Computer Law* 61–66.

8 In September 1996, the U.K. Internet industry established the Internet Watch Foundation, which provides a hotline for reporting and subsequent swift removal of obscene material found on the Internet.

9 For Belgium see http//www.a-l.be/en/ispa.html.

sometimes decide, for example, to block access to certain newsgroups or to take down certain sites as a result of self-regulation.[10]

Existing Law

Within the European Union, two states (Germany and Sweden) have specific legislation on the scope of liability of Internet intermediaries. In some other European countries such as France and the Netherlands, while there is no specific legislation, case law has addressed the issue, therefore providing some basis for predicting the applicable liability criteria. Finally, in other countries such as Spain, where neither specific legislation nor case law exits, only interpretation of existing statutes may be used as a basis for predicting how the law may apply.

Specific legislation on this issue

Germany is the European country with the greatest number of Internet commercial sites. Furthermore, from 1995 German Internet access providers have faced claims for allowing access to, *inter alia*, sexual and child pornography forums.[11] Therefore, not surprisingly, on June 13, 1997, the German Parliament approved the Federal Law to Regulate the Conditions for Information and Communications Services ("Multimedia Law"), which, *inter alia*, addresses the scope of liability of on-line service providers.

Article 1 of the Multimedia Law deals with the "Use of Teleservices", which include "electronic information and communication services which are intended for the individual use of combinable data such as characters, pictures, or sounds, and which are based on a telecommunications transmission". Responsibility of on-line intermediaries is addressed in section 5 according to a functional role approach. In particular, the law distinguishes between the following two types of "service providers": those who merely provide access to third-party content (commonly called "access providers") and those who make available third-party content for use (commonly called "host service providers").

According to section 5 (3), those who provide access to the Internet are exempted from any liability. However, section 5 (4) appears to moderate the above provision by stating that "any duties to block the use of illegal content according to the general laws remain unaffected, in so far as the service provider gains knowledge of such content . . . ". Therefore, from the combination of the two paragraphs, it would appear that injunctions will remain available against access providers where they are given notice of illegal content and it is possible for them to block access to it; however, there is no liability for damages.

Article 5 (2) of the Multimedia Law foresees that liability will be imposed on "host service providers" if two conditions are met. The first condition is if knowledge of the illegal content by the host service provider is shown and, secondly, if blocking the use of the illegal content is both technically possible and can be reasonably expected.

It appears that Article 5 (2) of the Multimedia Law foresees a with-fault liability standard based on knowledge. Thus, if the host service provider *knows* that the illegal or infringing material is on the server it operates and it is technically able and can be reasonably expected to block the use but does not do so, the host service provider will be held liable.

By imposing this standard of liability, both for injunctions and damages, it seems, in principle, that a balance of interest is achieved. On the one hand, host service providers cannot just remain inactive with regard to the material residing on their servers. On the other hand, smaller on-line intermediaries will be able to play a role in the on-line world to the extent they can cope with the financial risk of damage claims with which they could not have coped if a higher level of liability for damages had been foreseen. Furthermore, if a higher standard of liability had been imposed, such as strict liability or a duty of monitoring (which is effectively the same as strict liability in so far as monitoring is infeasible), smaller players would not have been able to continue in the business, thus inhibiting competition and cultural diversity.

However, the wording of Article 5 (2) of the Multimedia Law seems to lack clarity in the following aspects. First, the definition of the standard does not specify what should be understood by *knowledge*. Indeed, according to the language, it is not clear how the host service provider will gain knowledge of the illegal material; for example, will a notice from the person whose rights allegedly are being violated establish such knowledge? Will awareness of facts and circumstances revealing an infringement be enough, or is actual knowledge required?[12] In so far as Article 5 (2) speaks only of "knowledge", it seems that *actual* knowledge is required for liability to arise. Secondly, what is technically possible in order to block the use of the illegal content will depend on the available technology at the moment the episode occurs.

In Sweden, a law regarding responsibility for electronic bulletin boards entered into force on May 1, 1998. This law applies, in principle, only to bulletin board operators. However, Article 1 indicates that "by electronic bulletin boards, in this Act, is meant a service for electronic transmission of messages". Thus the concept of bulletin board operators is so broad that it appears to be applicable to other on-line intermediaries.

With regard to the standard of liability, it seems that according to § 4 an obligation to monitor content is imposed on electronic bulletin boards. This is defined

10 See, *e.g.*, http://www.lemonde.fr/multimedia/sem0796/textes/enquo07965.html.

11 M. Ferry-Fall, "Adoption d'un projet de loi sur les services en ligne", *Expertises*, avril, 1997, p. 146–147.

12 F. W. Bulst, "Hear No Evil, See No Evil, Answer for No Evil: Internet Service Providers and Intellectual Property—The New German Teleservices Act", E.I.P.R. Special Report 1997, pp. 32–37 shares the view that Art. 5 (2) lacks clarity in the definition of knowledge. Based on the fact CompuServe Germany apparently lobbied for an amendment to this section, limiting "knowledge" to the knowledge acquired by notices issued by special bodies, and in so far as the attempt failed, Bulst assumes, not without criticising it, that the requisite knowledge can be brought about by virtually anybody in virtually any form.

as an obligation to "supervise the service to the extent that can reasonably be required, considering the scope and direction of the operation".

This obligation is imposed in order to fulfil the obligation, laid down in § 5, of taking down certain messages that contain copyright-infringing material, child pornography, instigation, inflammatory comments against a population group or illegal descriptions of violence. It should be noted that certain areas of law such as privacy are not included.

As the government committee established to examine the need for changes in existing Swedish law explicitly recognises, "the volume of information distributed via electronic mediation services, independent of time and space, is so large that it cannot be read or otherwise controlled by the service supplier". However, it nonetheless recommended establishing an obligation of supervision.[13] Perhaps the reason for having this high standard of liability, which does not seem to go along the lines of the current trend, may be found in a reaction against a previous High Supreme Court decision concerning bulletin board operators which did not attribute them liability under rather egregious circumstances.

As noted above, bulletin boards and chats take place in real time like a telephone conversation. The obligation to supervise bulletin boards requires having not one but several persons monitoring what may be said at any particular moment. Moreover, it would often be virtually impossible for the monitoring personnel to evaluate whether particular material infringed any law. This activity would render bulletin boards economically impossible to run, at least for smaller players, especially given the very small profits from such operations. Therefore, the likely consequence of a provision such as the one adopted by the Swedish law, if applied to its apparent limits, would be the closure of bulletin boards.

Legal situation of on-line intermediaries in those countries where there is no specific legislation

Countries where there is case law: France and the Netherlands

In France, a few cases dealing with liability of on-line intermediaries should be underlined.[14] In the first case, the plaintiff, an association of Jewish students, sued nine access providers, demanding that they monitor sites and block those connections having an unlawful content. The Tribunal de Grande Instance de Paris, in June 1996, denied the claim on the grounds that such control was technically impossible for access providers.[15]

A second case involving liability of host service providers was brought against Atern.org., a host service provider which supplied space for a site containing pictures of the plaintiff in a private situation (*i.e.* nude pictures), thus violating her privacy. The defendant was charged with privacy infringement for making available the pictures to its subscribers. The plaintiff demanded both damages and an injunction (*i.e.* the cessation of making available the pictures). In July 1998, the court, in interlocutory proceedings, accepted the demand for the host service provider to eliminate the pictures from the site; the court denied awarding damages on the grounds that damages are not available in such interlocutory proceedings requiring a fast decision based on urgent reasons.

Nonetheless, the decision contains some statements concerning the obligations of host service providers and the scope of their liability: the court found that the host service provider had the obligation to monitor the morals of the content providers to whom it rents space. In addition, the court found that in so far as the web site has a public address it is feasible for the host service provider to monitor the sites and thus to delete the illegal content.[16] Therefore, for the host service provider to exclude its liability, it had to demonstrate that it had fulfilled the obligations of monitoring and had done what was technically possible to stop the illegal activity. In reading this conclusion, the court demonstrated a rather surprising technological ignorance. The fact that a web site residing in a server operated by a host service provider has a public address is irrelevant to the service providers' ability to identify a site residing on its server, irrespective of the existence of a "public address". This does not mean, however, that a host service provider has the ability to monitor all the information residing on its servers. Despite the pronouncement of this particular French court, host service providers do not have this ability.

In the Netherlands there are a few cases involving liability of on-line intermediaries for infraction of copyright laws and defamation.[17] The first case occurred when a BBS operator was charged with direct copyright infringement because it allowed its subscribers to upload and download pirated software. Furthermore, the BBS itself made some changes in the software in order to make possible the illegal activity. The court accepted the claim and also found that, in addition to direct copyright infringement, the BBS had acted negligently because it should have been aware that copyright could have been infringed.

Another case is that involving the Church of Scientology as a plaintiff against several Internet service providers on whose servers copyrighted works owned by the plaintiff resided. The court denied the claim on the

13 Summary of the Report by the I.T. Committee, Stockholm, March 1996.

14 In France, Telecommunications Law approved in July 1996 set out the conditions under which access providers were exempted from criminal liability for content to which they gave access. The Constitutional Council annulled part of this law on the grounds that individual freedom concerns were involved. See E. Wery, "Internet Hors La Loi? Description et Introduction à la Responsabilité des Acteurs du Reseau" (1997) 5846 *Journal des tribunaux* 417–428.

15 S. Dussolier, *Liability for on-line intermediaries* (report concerning French situation) (1997), pp. 32–37; M. Nami (1997) 2 *Computer and Telecoms Law Review* 36–41; B. Edelman, "Le droit d'auteur face au réseau Internet" (1996) 4 *Computer and Telecoms Law Review* 36–41.

16 The decision is available at: http://www.legalis.net/legalnet/judiciaire/decisions/ord_0698.htm. http://www.legalis.net/jnet/.

17 K. Koelman, *Liability for on-line intermediaries* (report concerning the Netherlands situation) (1997), pp. 26–31.

grounds that service providers "do no more than give the opportunity of communication to the public, and that, in principle, they can exert no influence over, nor even have knowledge of, what those having access to the Internet through them, will supply".[18]

Countries where there is no case law: Spain[19]

The situation in Spain, as in the other countries where there is neither specific legal regulation for on-line intermediaries nor case law addressing this issue, remains unclear. For these European countries, one can only make hypotheses about the liability of on-line intermediaries by applying general laws governing tort liability and specific laws for copyright, defamation and the like.

With regard to copyright, according to both the Spanish copyright law[20] and the general tort liability rule, *i.e.* Article 1903 of the Civil Code,[21] for damages to be granted, a with-fault liability standard applies. In addition, if a criminal offence is established, Article 120 of the Criminal Code applies. This Article imposes civil liability on certain actors based on a crime committed by another person in the following way: "actors will incur civil liability regardless of their criminal liability, where they are . . . the natural persons or legal entities who are owners of publishing houses, periodicals, reviews, radio stations, television stations, or owners of any other method of communication of written, spoken or visual material for criminal offences carried out through such methods, without prejudice to the application of Article 212 of the Criminal Code . . . "

So far, there is not yet any case law dealing with Article 120. However, for the majority of legal commentators, this Article has introduced a case of strict liability. To the extent that Internet intermediaries could be regarded as "owners of any other method of communication of written, spoken or visual material", this Article would apply to them. Thus, an on-line intermediary may be held strictly liable for damages caused by a user of its facilities who criminally infringes copyright.

With regard to the liability of on-line intermediaries for violation of defamation laws, the legal basis for intermediaries' liability might be found in two different laws. First, Article 65 (2) of the Spanish Press Act[22] deals with civil liability deriving from illegal civil acts (and the Press Law Exposition of Motives specifically mentions defamation). This Article states that civil liability derived from an action or failure to act will be incurred jointly by authors, directors, publishers, editors, as well as importers and distributors of foreign press. It is not clear whether an on-line intermediary might fall within one of these categories. Secondly, the general rule for vicarious liability, Article 1903 SCC, which establishes a with fault liability standard, might apply.

Forthcoming E.U. Directive

The European Commission, specifically Directorate General XV (Internal Market), is currently about to formulate a Proposal for a Directive which, *inter alia*, will deal with the scope of liability of on-line intermediaries.

Legal grounds for the proposal

As noted above, some European countries have passed or are about to pass legislation regulating on-line intermediaries' liability. Probably the legal basis for Community action in this field is found in the threat divergent national legislation represents to the functioning of the internal market. Indeed, diverging approaches among legislative initiatives of Member States could lead to discrepancies that would result in an unharmonised legal framework within the European Union. This could create barriers to the growth of European electronic commerce, endangering the functioning of the internal market. Furthermore, as the Green Paper on Copyright and Related Rights in the Information Society notes, "it could also have a substantial adverse effect on the development of new services"[23]

The horizontal approach versus the vertical approach

It is likely that the Proposal will deal with liability of on-line intermediaries in a horizontal manner, *i.e.* by applying a single liability standard for violation of any type of substantive law. Indeed, this idea is confirmed by Recital 12 of the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. This reads as follows: "Whereas liability for activities in the network environment concerns not only copyright and related rights but also other areas, it will be addressed *horizontally* in the context of a forthcoming directive clarifying and harmonising various legal issues relating to Information Society services . . . ".[24]

Among the stakeholders, copyright holders have expressed concern that by imposing a uniform liability regime on on-line intermediaries for infringement of any type of substantive law by Internet users, the threshold will be set too low. They argue that copyright

18 Decision N 96/160, March 12, 1996. For the English version of the decision, see (1996) 10 C.R. 596–599.

19 R. Juliá-Barcelò and P. Grimalt, *Liability for on-line intermediaries* (report concerning Spanish situation) (1997), pp. 38–44.

20 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad intelectual.

21 Art. 1903 of the Civil Code includes a with-fault liability criterion. However, in some cases which probably would not apply to Internet intermediaries, the Supreme Court has interpreted Art. 1903 CC towards a strict liability regime. *e.g.* STS (Supreme Court) 5–04–1960 (R.A. Aranzadi Indez, no. 1640).

22 Ley 14/1966, de 18 de marzo, de Prensa e imprenta.

23 Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final, Brussels, February 19, 1995. This is also highlighted in the Communication on illegal and harmful content on the Internet, COM (96) 487, Brussels, October 14, 1996.

24 Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights, COM (97) 628, December 10, 1997.

law has certain unique characteristics that require a different legal and technological treatment.[25]

On the other side of the argument, on-line intermediaries claim that, for them, the information that travels through their facilities such as cables, satellites, servers, etc. is just a sequence of bits, a succession of 0s and 1s which is not linked to the real meaning of the information itself. Moreover, on-line intermediaries deal with thousands of clients and with billions of bits, which makes monitoring this information impossible. Therefore, because on-line intermediaries will not be in the position of inspecting the circumstances surrounding each piece of information they carry, the real issue is only if they are liable or not. Thus, a horizontal approach provides legal certainty, which a vertical approach would not.

In this context it is also very difficult to separate the discussion concerning the liability of on-line intermediaries for copyright infringement from the ongoing discussion concerning the harmonisation of certain aspects of copyright in the Information Society. Indeed, the standard of liability for on-line intermediaries is directly linked to the scope of authors' rights. For example, if the reproduction right were defined to include all temporary copies, then the temporary copies made using technology for enabling or making a communication would fall inside the concept of reproduction, thus potentially rendering on-line intermediaries liable for direct copyright infringement.[26]

In the United States, liability of on-line intermediaries is to some extent regulated in a vertical manner. The Communications Decency Act of 1996, which is part of the Telecommunications Act,[27] provides a broad exemption from liability of on-line intermediaries for infringement of any type of law other than copyright. Copyright is dealt with in the Digital Millennium Copyright Act of 1998 which incorporates an industry agreement regarding on-line service provider copyright infringement liability. The Act provides that intermediaries (basically, network operators and access providers) are exempt, as mere conduits, from monetary damages and subject only to injunctive remedies if the infringement occurs on their network. In addition, the Act contains exemptions from liability for caching and for host service providers and location tool providers under certain circumstances.

Different Interests at Stake: Who Should Bear the Risk?

When deciding the standard of liability to be placed on on-line intermediaries, legislators are allocating risks accordingly. For example, if host service providers were strictly liable and an Internet user illegally distributed copyright material through server space rented to him by the host service provider, the host service provider would bear the financial consequences deriving from the illegal activity carried out by the user. On the contrary, if host service providers were exonerated from liability, the copyright holder would bear the consequences.[28]

In deciding which standard of liability should be placed on on-line intermediaries for the illegal or infringing material disseminated through Internet facilities by Internet users, legislators should take into account, *inter alia*, a number of aspects. First, is the "ability to control the information" an appropriate criterion on which to base the standard of liability? And, in this connection, do technical mechanisms, intended to prevent infringing and illegal material from being disseminated through on-line facilities, provide on-line intermediaries with an effective tool to control the dissemination of illegal or infringing material? Apart from their technical feasibility, is it possible for technical mechanisms to accommodate all the nuances of the law and social values? And can technical mechanisms take into account the differences in laws and values from place to place, even within the European Union? Moreover, even if technical mechanisms are effective, does one wish private actors (on-line intermediaries) to employ them essentially to act as censors and controllers of the information available to the public?

Secondly, provided a knowledge-based standard of liability is imposed on on-line intermediaries, would it be appropriate to deem notices received by intermediaries directly from allegedly injured parties as giving rise to the requisite knowledge, thus requiring intermediaries themselves to make the decision whether or not material should be taken down? Or should complaining parties be required to give notices to a court or specially constituted body, which would then decide whether material should be taken down?

Finally, what would be the economic and social impact of the attribution of risks embodied in any particular notice and take-down regime?

Pros and cons of employing the "technical ability to control" criterion

The technical ability to control the information is an aspect taken into account by important commentators

25 Legal Special Interest Group workshop on liability for on-line intermediaries held on September 27, 1997, at the Institute for Information Law in Amsterdam. The minutes of the meeting are included in K. Koelman, *Liability for on-line intermediaries*, (1997). See as well the "On-line Service Provider Liability: Motion Picture Association Concepts and Principles Paper" dated March 26, 1998.

26 It should be noticed that according to Art. 5 of the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society not all temporary copies will fall within the scope of the reproduction right. Art. 5 provides that "[t]emporary acts of reproduction referred to in Article 2 which are an integral part of a technological process for the sole purpose of enabling use to be made of a work or other subject matter, and having no independent economic significance, shall be exempted from the right set out in Article 2". In addition, Recital 23 explicitly recognises that, provided the conditions of Art. 5 are met, caching and browsing should be included within the exception to the exclusive right of reproduction.

27 For further details on the Telecommunications Decency Act, see R. Golden, "Telecommunications Decency Act of 1996 and the Internet", April 1997. Available on: http://www.fenwick.com/pub/april/html.

28 E. Montero, "Les resposibilitiés liées à la diffusion d'informations illicites ou inexactes sur Internet, Internet face au droit" (1997) 12 *Cahiers du Centre de Recherches Informatique et Droit* 111–137.

in order to determine whether liability should be imposed on on-line intermediaries.[29] In other words, whether from a technical point of view it is feasible for on-line intermediaries to control the information passing through the facilities they run is regarded as a key issue in imposing liability on on-line intermediaries. Accordingly, if a duty of care or obligation to monitor were imposed, those actors who did not monitor the information flowing through the Internet but had the technical ability to do so would be held liable. Conversely, if this ability did not exist, such actors would not be held liable.

In this light, copyright holders maintain that the future Proposal for a Directive should encourage on-line intermediaries to implement effective technological measures to detect infringement.[30] For example, this might be achieved if a standard of liability were imposed on on-line intermediaries that made them liable depending on the use of available technology.

So far, as regards network operators, access providers and host service providers, the view of technicians is that the sheer volume of material involved would make it a physical impossibility for them to check all the data flowing through or residing on their systems.[31] Indeed, as noted below, the volume of material involved is huge, and the number of sites increases daily; furthermore, they are in a constant process of change and updating, thus making it impossible for access providers to monitor those sites containing infringing or illegal information and take down or block access to them. This is particularly difficult for newsgroups and chats.

However, technical mechanisms are being developed that are intended to prevent infringing and illegal information from being disseminated through on-line facilities. The most popular mechanism is filtering technology that uses an electronic filter through which all messages or fragments of messages must pass. This filter is supposed to allow access to information that is regarded as illegal or harmful to be blocked and to allow monitoring of each transmission automatically, without human intervention. Filtering software follows different models[32]: "black listing", where access to the specified sites is blocked; "white listing", where access is only possible to listed sites; and "neutral labelling", where sites are labelled but the user is entitled to decide how to use the material.

At first glance, these systems might appear to have solved the technical feasibility of controlling information. Accordingly, imposing the obligation to use this technology on on-line intermediaries might appear to be a positive measure against the dissemination of illegal or infringing material. This type of provision would appear to act as an incentive to develop and use technical solutions for blocking illegal content which, in principle, will benefit copyright holders and others. However, it should be taken into account that such a provision could lead to negative consequences. Indeed, the obligation to use technical means effectively would oblige on-line intermediaries to behave as censors of such content by blocking its storage or access to it.

Imposing an obligation on on-line intermediaries to employ certain technology may give rise to several problems. First, by automatically denying access to some sites and storage of certain material (*i.e.* certain messages posted in newsgroups), a threat might arise to privacy rights and freedom of speech recognised by Article 10 of the European Convention of Human Rights.[33]

Secondly, serious doubts exist about the ability of technology adequately to solve the difficult issues involved in copyright infringement and violations of laws against obscenity and the like. For example, determining whether material residing on a web site infringes copyright can be extraordinarily difficult, even for experienced copyright lawyers. Many issues can arise in this context: is the material sufficiently original to be copyrightable? Has the material been copied pursuant to a copyright exception, such as the right to make quotations or for purposes of research or criticism? Who owns the copyright to the material, the actual author or someone who has acquired the rights from the author? Has the person who placed the material on to a server obtained a licence to do so? And which country's law is to be applied to answer all these questions? Similar difficult issues can arise outside the copyright context, for example in determining whether particular material is defamatory or obscene. Can technology really accommodate all these complexities?

Thirdly, employing filtering technology can be especially challenging when the laws and values of different countries are involved. Given the international dimension of the Internet, filters cannot always take into account the differences in standards of what is regarded as obscene or infringing. For example, material that

29 See, for example Montero, *ibid.*

30 Indeed, one of the fears of copyright holders is that if Internet access providers are immunised from copyright liability, they will refuse to install the monitoring devices on the theory that if they don't detect any illegal transmission they can't be held liable. See R. Oman, "From Scourge To Savior: How Digital Technology Will Save Authorship in the Age of the Internet", World Intellectual Property Organization International Forum, Seville, Spain, 1997. Some have expressed the suitability of filtering technology by on-line intermediaries to prevent the dissemination of illegal material, see S. Picard, "Livre Vert sur la protection des mineurs et de la dignité humaine dans les services audiovisuels et d'information" (1997) 1 *Computer and Telcoms Law Review* 44–46.

31 See N. Gibbs, "The view of intermediaries" LAB Meeting held on March 25, 1997; P. Leonard, and P. Waters, "Censoring the net in Australia: Brave New World or 1984 revisited", paper presented to the Multimedia and the Internet Global Challenges for Law Conference held at Management Centre Europe, Brussels, Belgium, on June 27 and 28, 1996.

32 For a description of these models, see Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final, Brussels, February 19, 1995. This is also highlighted in the Communication on illegal and harmful content on the Internet, COM (96) 487, Brussels, October 14, 1996.

33 This Convention has been signed by all Member States and is part of the general principles of the Community law. In the United States the use of these types of filtering mechanisms will violate First Amendment rights. For further comments in this particular issue see D. Johnson, "It's 1996: Do you Know Where you Cyberkids Are? Captive Audiences and Content Regulation on the Internet" (1996) 15 *Journal of Computer & Information Law* 51–97.

might be deemed obscene in one country might be subject to constitutional protections in others.[34] And material that infringes copyright in one country might be subject to an exception in another.

Fourthly, experiments in this area have indicated that labelling sites may be an almost impossible task: for example, on January 29, 1998, the electronic database Lycos counted 18,923,479 sites. Two days later, 178, 648 had been added.[35]

All in all, using the criterion of "ability to control" and imposing available technology such as filtering systems in order to carry out such control (provided that it really works) brings one face to face with at least three different interests: (1) the interest of those whose rights allegedly have been infringed; (2) the rights and interest of those who allegedly have infringed the rights of others; and (3) society's interest in freedom of speech and privacy. Which one should prevail? It is not clear to this author that the former should prevail over the others.[36] Of course, the interests of both the complaining and complained-of party should be regarded as having certain limits as established by Article 12 of the European Convention of Human Rights; however, should it be up to the on-line intermediaries to decide where to draw the line?

The above conclusion does not mean that the role of technology should be disregarded. On the contrary, for example, the filtering model could be a positive one when used at the end-level.[37] Indeed, users should be largely free to decide what is acceptable and what is not, and filtering mechanisms (as well as other systems which may later be discovered), may be useful tools to achieve this. For example, families could make use of these systems to protect children from harmful information. Furthermore, because copyright holders and on-line intermediaries both clearly have an interest in a piracy-free digital environment, it can be expected that they will join efforts in developing watermarking and other standardised identification systems regardless of what the E.U. Directive says on this issue.

34 For example, when in Germany CompuServe was brought before court accused of having disseminated pornographic content CompuServe blocked access to almost 300 newsgroups for the entire world. As a reaction, in the United States people complained about the measure, asserting that, among other things, Bavarian morality was imposed on the entire world. For further comments on this case, see U. Sieber, "Criminal Liability for the Transfer of Data in International Networks—New Challenges for the Internet (part I)" (1997) 13/3 *Computer Law and Security Report* 151–157.

35 See: http://www.lemonde.fr/multimedia/sem0796/textes/enqu0762.html.

36 The same conclusion seems to be included in the document issued as a result of the Ministerial Conference on Global Information Networks, held in Bonn, July 6 to 8, 1998. In particular § 43 says: "Ministers consider that rules on responsibility should give effect to the principle of freedom of speech, respect public and private interests and not impose disproportionate burdens on actors". Furthermore, § 55 reads as follows: "Ministers stress the importance of the availability of filtering mechanisms and rating systems which allow users to decide on categories of content which they wish themselves or minors for whom they are responsible, to access".

37 This opinion seems to be shared by most of the industry, civil liberties groups and academics.

Notice and take-down regimes

Provided that a standard of liability is adopted such as "actual knowledge" or "constructive knowledge", it is important to know when this knowledge will be acquired by on-line intermediaries. For example, would it be sufficient for an end-user to notify the on-line intermediary by e-mail of the fact that the server it runs contains some particular infringing material? Would it be appropriate to require notice and sufficient documentation of the claim from the person who says that his or her rights have been infringed? Would it be appropriate to create a special body to which complaints would be addressed?

One issue that policy-makers should address is whether a notice and take-down regime should involve the establishment of a special body to whom complaints concerning dissemination of illegal or infringing material through Internet facilities should be addressed. Such a body, whose composition should be carefully designed, would have to obtain and verify certain information concerning allegedly illegal or infringing material. For example, if the allegedly infringing material is a multimedia work, it will have to decide whether it is copyrightable and, if so, whether licences have been obtained from the copyright holder, taking into account that some works may be in the public domain or that there could be some fair use involved. After considering this information, the special body may decide to require the on-line intermediary to take down the information. The requisite knowledge will be achieved *only* when this notice has been received from the special body. Therefore, if the on-line intermediary fails to take down the material identified by the notice, it will be held liable, but not before.

Such a notice and take-down regime would have positive consequences for all stakeholders, and for society in general. First, copyright owners and others whose rights have been violated would have an effective means to obtain redress. Secondly, on-line intermediaries would not be put in the position of judges of the legality of Internet content and would be relieved of the burden of exercising prior control over the acts of their customers. Thirdly, society would be assured that those deciding whether material should be taken down are competent to decide such matters and that they will seek to ensure that rights such as freedom of expression, privacy, and freedom of competition will be respected. Finally, on-line intermediaries would have security about when the requisite knowledge requirement will have been met.

Although such a regime might provide an effective means for rightholders to obtain redress, in some ways a notice which is not limited to one issued by a special body may be a more appealing solution. Indeed, rightholders might wish to retain the ability to give notices directly to on-line intermediaries and for such direct notices to give rise to the requisite knowledge on the part of intermediaries for imposition of liability if they fail to take down the allegedly illegal or infringing material.

In the author's opinion, provided that the composition of the special body is carefully designed and in so far as its decisions are taken fast enough, it would be

more appropriate to have a notice and take-down regime whereby notices are given (or forwarded) only to such a body and such a body decides whether Internet users should be denied access to material about which a complaint has been made. If such a regime is not to be adopted, and on-line intermediaries must accept notices directly from complaining parties and decide themselves whether to take material down, it will be vital to require such notices to provide sufficient information for on-line intermediaries to make such evaluations.[38]

Economic and social consequences

Another important aspect European legislators should take into account when placing the risks on on-line intermediaries or on rightholders is the economic and social impact derived from the adopted option. For example, how will European industry and the development of electronic commerce within Europe be affected by the distribution of risks?

Concerning copyright, it is clear that if the Internet does not provide a reasonably secure environment for copyright works, copyright holders will withhold their works from the Internet. As a result, not only would electronic commerce in immaterial objects be damaged, but so would the information society in general. In addition, some stakeholders in general are concerned that if on-line intermediaries do not exercise strict control on Internet content, this might have a prejudicial effect not only on minors but on morality in general.[39]

From the on-line intermediaries' point of view, the imposition of strict liability or an obligation of monitoring would lead to a radical change in the nature of the Internet. As a result of imposing such a standard of liability, on-line intermediaries anticipate, *inter alia*, the following consequences: (1) access to the Internet would be restricted to those actors who are regarded as sufficiently trustworthy. Therefore, certain actors would be excluded from the Internet; (2) if monitoring were imposed, inevitably freedom of speech and privacy would be threatened; (3) the costs of monitoring of information and costs from liability would be diverted to customers by increasing the prices to access and use the Internet. Furthermore, Internet intermediaries foresee the possibility that if high standards of liability are imposed in Europe, the industry will simply move outside Europe, and European employment, *inter alia*, would suffer—without any accompanying benefits.

In evaluating the best course for Europe, it is perhaps useful to consider Europe's interests *vis-à-vis* the rest of the world, and in particular *vis-à-vis* the United States. In this regard, it is worth noting that Europe imports more copyright materials (mostly from the United States) than it exports (and it is perhaps not surprising that mainly American companies[40] are lobbying at the European and national levels in order to ensure that copyright holders do not bear the risk of the wrongful use of copyright works by Internet users). Among on-line intermediaries, the industry is essentially dominated by European players (such as the European telecom operators), although this does not mean that companies such as American On-Line are not also present in Europe. Moreover, at the moment, European access providers and host service providers are mainly small or medium-sized enterprises.[41] Such smaller players would not be able to afford to have employees monitoring sites, much less to cope with the financial risk of damage claims. As a result, probably only larger access providers and host service providers would survive, excluding weaker competitors. The resulting market concentration is likely to favour large American companies.

Finally, it should be noted that the main actors affected by the liability standards will be Internet users, and finally, the community itself. Indeed, while the Internet user will suffer if copyright works are not available in the Internet, they will also suffer if the Internet becomes a closed network or if freedom of speech and privacy is diminished. They would also be disadvantaged by concentration in the on-line industry.

Conclusion

Although clearly an appropriate balance should be sought in establishing an on-line liability regime, the various interests at stake are difficult to reconcile. Whatever regime is adopted is likely to favour certain stakeholders, and certain society interests, over others. In the end, legislators will simply have to decide who will bear the various risks and to accept the economic and social outcome derived from its choice. One can only hope that the decision is taken with appropriate knowledge of the technical, economic and societal factors involved, and with full consideration of the consequences likely to flow from particular choices.

Postscript

After this article was submitted for publication, Directorate General XV of the European Commission issued a draft proposal for a Directive. This draft proposal, entitled "Proposal for a Directive on certain legal

38 This issue is raised by C. Millard, and R. Carolina "Commercial Transactions on the Global Information Infrastructure: A European Perspective" [1997] *Journal of Computer Information Law* 39–71, in relation to the scope of liability of network operators for secondary infringement of the U.K. Copyright, Designs and Patents Act of 1988. The authors are of the opinion that network operators should not be held to have the requisite knowledge unless and until they receive very specific and detailed information concerning the activities of a specific customer. And they add: "Even at this point, there are probably valid policy reasons for not holding network operators liable."

39 See N. Risacher, *La régulation des contenus illégaux et préjudiciables sur Internet* (1997), pp. 9–13.

40 Such as Motion Picture Association, Business Software Alliance, Microsoft, Time Warner.

41 The average size of ISPs is much smaller than that of traditional telecoms operators. It has been found that the majority of ISPs had less than 10 employees (about 38 per cent) and about 235 between 10 and 20 employees; another group had between 20 and 100 employees, and only a small minority over 100 employees. Report entitled "Evolution of the Internet and the WWW in Europe", carried out by Databank Consulting for the European Commission DG XIII.A3-Telecommunication Infrastructure.

aspects related to electronic commerce", has been circulated among the other Directorates General. Adoption of the draft as a formal Commission proposal is expected by the end of November. Section 4 of the Proposal deals with liability of intermediaries, which *inter alia* includes the following:

> *Article 12* establishes an exemption of liability for activities of transmission of information and access to a communication network. This exception applies if the provider: (1) is not the originator of the information, (2) does not select the addressee of the transmission, and (3) does not select the information that is transmitted. It should be noted that the second paragraph specifies that the automatic, intermediate and transitory storage of transmitted information, to the extent that it serves exclusively to execute the transmission, will be covered by the exemption.
>
> *Article 13* concerns the activity of storage (which is carried out by the so-called host service providers). It contains an exemption of liability for those who provide storage of information if they do not have actual knowledge of the illegal activity undertaken by their users and they do not have knowledge of the facts and circumstances from which the illegal activity is apparent. The exemption will not apply if, having such knowledge, the service provider does not act promptly to remove the information.
>
> Finally, *Article 14* establishes that service providers should not be under any obligation to monitor the information that they disseminate or store.