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ROUND TABLE REPORT

INTERMEDIARY LIABILITY THROUGH THE BACK DOOR: Consequences of extending digital copyright for the Open internet

16th of March 2016, Brussels

Report

Round Table

Intermediary liability through the back door: Consequences of extending digital copyright for the open internet

Brussels, 16th of March, 2016

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Speakers

Emilian Pavel
Member of the European Parliament, EMPL and LIBE Committees, S&D shadow rapporteur for the report: "Towards a Digital Single Market Act"

Christina Angelopoulos
Researcher - Information Law and Policy Centre, University of London

Jens-Henrik Jeppesen
Director, Center for Democracy & Technology

Complete recordings of the various speakers' introductory speeches are available online, on OpenForum Europe's Youtube channel.

Moderator Tony Ford, Legal Consultant, OpenForum Europe

Rapporteur Diana Cocoru, Head of Policy, OpenForum Europe

Other details of the event, and the speakers' presentations, are available here.

Credits

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Executive summary

The current European regime for intermediary liability is contained in the E-Commerce Directive (Directive 2000/31/EC) - and specifically in articles 12-15. Over the years, the Commission has also consulted on copyright policy, on substantive copyright and on the enforcement Directive. Currently, a new consultation on enforcement is in progress, and recently published Commission documents such as the DSM Strategy and its recent Copyright Communication hint at intentions to undermine or limit the current regime which provides for restricted intermediary liability.

This paper first explains the "safe harbours" that are enshrined in the E-Commerce Directive, while touching upon the different criteria for the knowledge threshold, depending on whether criminal or civil liability is involved. Next, it justifies why the topic is now under scrutiny and outlines the current challenges perceived by online platforms, as well as the concerns expressed by content providers. It also touches upon the human moderation aspect of content provision, which risks shifting the balance between active and passive hosting providers. Finally, before moving on to a number of recommendations for possible ways forward, this paper addresses the guidance provided by both the CJEU and the ECHR with regard to the limitation of liability, as well as the clashes between different fundamental human rights, and visits the need to approach different types of content in different ways, depending on the type of the content, as well as the role of the platform in the dissemination of that content.

What are we talking about?

The current European regime for intermediary liability is contained in the E-Commerce Directive (Directive 2000/31/EC). Section 4, entitled "The liability of intermediary service providers", contains a set of so-called safe harbour provisions, which are essentially defences. In other words, they constitute immunities granted to intermediaries to protect them from such liability as might otherwise arise through the provision of internet-related services. In the E-Commerce Directive we find a set of three safe harbours: one for the protection of mere conduit services, one for the protection of the provision of caching services and one for the protection of the provision of hosting services. Most would agree that the most important of these three safe harbours is the hosting safe harbour, which is contained in Article 14 of the e-Commerce Directive.

> ***The knowledge threshold changes depending on the type of liability.***

In order to enjoy the protection of the hosting safe harbour, an intermediary must not have had knowledge of the fact that it is hosting illegal information, and if it did have such knowledge, then it must have acted expeditiously to take down or block that information. It is important to underline that **the knowledge threshold changes depending on the type of liability** (criminal vs civil) from which the intermediary is seeking protection: if the intermediary is seeking protection from criminal liability, then the knowledge threshold is one of **actual knowledge** that the provider is hosting illegal information or content. If, on the other hand, the intermediary is seeking protection from civil liability, the threshold is somewhat lower: in these cases, the intermediary must not have had **awareness** of facts or circumstances from which it becomes **apparent** that it is hosting illegal information. However, in many Member States what defines 'simple awareness of facts' is quite murky. For instance, in some countries, Internet service providers apparently receive faxed notices of copyright infringement which contain no contact details, no specific identification of the relevant content, or no proof that there is any valid right at play. This points to the fact that in the existing Directive, the requirements associated with civil liability are not particularly well-defined, and this is something which could be revisited by the Commission. However, the

CJEU's preliminary ruling in *L'Oreal vs. eBay* did provide rather more information. In that ruling the CJEU held that an intermediary will be considered to be aware of facts or circumstances that indicate illegal activity based on a **dual subjective-objective standard**. There is an element of subjectivity, where the intermediary itself has to be personally aware of these facts or circumstances. However, the way we judge whether these facts or circumstances make it apparent that the relevant activity or information was illegal is determined on the basis of an objective standard. In that case, the CJEU introduced the concept of a **diligent economic operator.** In truth however, this remains a rather vague standard and if the Commission were at some future date to introduce details of a specific notice and take-down regime, that aspect is definitely something which the Court would be likely to need to determine.

Article 14 of the E-Commerce Directive hints at a so-called **"notice and take-down regime"**. However, some attention is necessary, because the article 14 'notice and take-down' regime is not as detailed and elaborate as equivalent regimes that we can find in national jurisdictions, either in Europe or elsewhere in the world. Most notably for example it has to be contrasted with the 'notice and take-down' regime that exists in the USA under the rules of the Digital Millennium Copyright Act (DMCA), which provide a detailed procedure for notice and take-down.

Another important aspect which should be taken into account is that the intermediary's knowledge **need not necessarily arise from notice**. Intermediaries may also acquire knowledge through other means, and in particular through their own ***proactive investigations***. Any intermediary stumbling across information that indicates illegal activities through such an investigation will as a result be deprived of the protection of the hosting safe harbour.

In this context, it is important to understand that the safe harbour regime of the E-Commerce Directive only protects intermediaries from **liability, in the strictest sense of the word**. That is to say, liability to pay monetary compensation. The final paragraphs of the text setting out each of the safe harbours includes a provision which makes it clear that the safe harbour is not available to protect intermediaries from injunctive relief. In particular, in the area of copyright, this possibility of injunctive relief against intermediaries has been been given great effect by the European legislator. Since 2001 (i.e., when the Copyright Directive

was adopted) article 8(3) of that Directive has instructed Member States to offer right-holders the possibility of applying for an injunction – specifically, an injunction against intermediaries whose services are used by third parties for the infringement of their copyrights. And since 2004 that obligation has been expanded to all intellectual property right-holders, through article 11 of the Enforcement Directive. It follows that all intellectual property right-holders must now be given the possibility of applying for injunctive relief before a court, for the protection of their rights.

When analysing the possibility of injunctive relief, it is necessary to stress that certain limitations apply to the obligations which may be imposed on intermediaries. The most important (or at least the most straightforward) of those limitations is found in the article 15, according to which Member States may not impose on intermediaries general obligations either (i) to monitor the information which they transmit or store, or (ii) actively to seek out indications of illegality. So whereas injunctions may be imposed against intermediaries for the enforcement of copyright and other intellectual property rights, the obligations faced by intermediaries under such injunctions should not involve any general monitoring obligation.

That is not the only limitation applicable to injunctions that could potentially be imposed on an intermediary: further limitations have also been introduced by the case law of the CJEU, as addressed below (in the section entitled "What does the case law have to say?").

Why did the regime come under scrutiny now?

It is now just over 14 years since the intermediary liability regime that was set up by the E-Commerce Directive came into being. When the regime was adopted, the notion of hosting seemed to be straightforward: it involved the provision of space on servers for the hosting of web pages and so forth. In the meantime however, the emergence of modern Web 2.0 and other technical evolutions have resulted in the notion of hosting evolving towards intermediaries that could be said to assume a rather more active role. There have been multiple recent hints that consideration is being given in the Commission to revisiting the "safe harbours";

such a review would be understandable now that it is nearly 15 years after the text was agreed, and we have also been witnessing a technological evolution over that interval.

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Most people would agree that one of the main reasons that the internet has developed into this massively useful and enjoyable tool for free expression, education, commerce, entrepreneurship (etc.) is the fact that Internet intermediaries are protected by limited liability, as laid down in the E-Commerce Directive. Also in the US, there are provisions that have very similar effect and impact.

Some have voiced concerns that those intermediaries who do not play only a passive role should perhaps not be permitted to benefit or continue to benefit from the full range of the immunity which the e-Commerce Directive gives them. Others have expressed the concern that if we impose heavy additional burdens on intermediaries, this is likely to cause them to overreach, to overreact, in order to protect themselves. Exposing intermediaries to this potentially heavy burden could have the consequence of adversely affecting certain basic principles, including freedom of speech and maintaining the availability for citizens of multiple sources of information or channels of communication. There is therefore an associated risk, of causing significant and undesirable side effects.

In the last few weeks there have been reports of specific groups writing very straightforward letters to the Commission, pushing for revision of the arrangements on the Copyright front, particularly on behalf of artists and creative persons (of whom some specific to the music industry). It is clear that we could soon be having to debate the possible resetting of the balance which currently exists between copyright and user access. At the same time, it is also the case that some intermediaries have lobbied and have written letters of their own, strongly making the point that without the present arrangement, it would be hard for them to continue as they now are.

Intermediary liability is a policy area where very diverging opinions are expressed. It also is one of the three biggest questions of the Digital Single Market (DSM) Strategy. It is a topic that affects and concerns several committees in the European Parliament; moreover there are different opinions in each of those committees, as well as in the political groups. The same goes for the different Member States. When we consider redefining the liability of intermediaries, we need to be very careful and try to strike a suitable balance between an open Internet and a safe Internet. It is vital to ensure that the Internet is as equitable as possible and we must avoid creating a situation in which the private sector is pushed into voluntary policing efforts. This would be very dangerous, as was reflected in the Opinion published by LIBE (and adopted by a plenary vote of the European Parliament in January 2016) concerning the DSM, which includes the statement that "the role of intermediaries and online platforms must respect the Charter of Fundamental Rights of the European Union". In its Opinion, LIBE insists on maintaining the provisions of article 12 of the E-Commerce Directive, namely that Member States should ensure that service providers are not liable for the information transmitted, on condition that they do not initiate the transmission, do not select the receiver for the transmission and do not select or modify the information contained in the transmission. The Opinion also reiterates that under Article 15 of the E-Commerce Directive, Member States should impose no general obligation on providers of transmission, storage and hosting services either (i) to monitor the information which they transmit or store, nor (ii) actively to seek facts or evidence of circumstances indicating illegal activity. This points to a rejection of measures for the active monitoring of almost all users of the services concerned.

> ***Europe needs a balanced digital policy to ensure that basic values are respected, whilst at the same time fostering a fair and innovation-friendly online environment.***

While aiming to strike the right balance, we need to bear in mind the legitimate interests of all stakeholders: those of citizens, those of creators and other right-holders who should be able to follow and use their work and get fair remuneration for dissemination, as well as those of Internet IT businesses that need a certain freedom to be able to produce and create those new technologies that Europe and

its citizens need. The political groups are currently trying to define the way in which they should tackle this issue and strike the right balance. On the one side, preserving a safe and open Internet is crucial for our society, whilst on the other side we need to make sure that we are able to tackle illegal content as efficiently as possible, we combat online crime, copyright is respected, and creators can fully benefit from their product and from the fruits of their work. Europe needs a balanced digital policy to ensure that basic values are respected, whilst at the same time fostering a fair and innovation-friendly online environment.

What does the case law have to say?

The intermediary liability regime has been interpreted by that the European Court of Justice, which sits in Luxembourg (the CJEU). The most important CJEU cases on intermediary liability continue to remain the *Google France* case and the *L'Oreal vs eBay* cases.

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These cases remain controversial to some extent. In those cases, essentially the CJEU took over the opportunity presented by the raised questions, in order to clarify the current intermediary liability framework or to add an additional condition for the enjoyment of that framework by intermediaries. Essentially, the CJEU relied on the title of section 4 of the E-Commerce Directive (entitled "liability of intermediary service providers"), to declare that in order to enjoy the protection of the safe harbours, a service provider must be an "intermediary". The CJEU then defined the notion of an intermediary by reference to the recital 42 of the E-Commerce Directive, declaring that in order to qualify as an intermediary, a service provider has to be sufficiently neutral. This means that the services that it provides must be of a mere technical and automatic and passive nature, such as not to give rise to knowledge or control over the information which is transmitted or stored.

This has been somewhat controversial, with a number of commentators arguing

that recital 42 of the E-Commerce Directive was never intended by the legislator to be applied to the hosting safe harbour, but only to mere conduit and caching safe harbours. This is particularly important for the hosting safe harbour, giving the evolving nature of the notion of hosting over the decade and a half since the adoption of the E-Commerce Directive.

The questions which emerge more and more are (i) whether the hosting safe harbour protects those intermediaries who play more of an active role, and (ii) how to define that role. The CJEU has not been completely clear in this respect, although it did provide some indications in the *L'Oreal vs eBay* case. What it said is that the mere provision of hosting services or of general information concerning those services, the setting of terms for the enjoyment of those services and the receiving of financial remuneration for its services are not in and of themselves enough to deprive an intermediary of the protection of the safe harbours. However, if the intermediary is involved in drafting the content or in promoting or presenting that content, this means that the intermediary can no longer be considered sufficiently neutral in order to enjoy the protection of the safe harbours. So that's what we know on that front so far.

Besides the limitation provided for in article 15 of the E-Commerce Directive on the obligations which may be imposed on intermediaries, the CJEU brings more clarifications on the interplay between different rights. Of particular importance in this regard are the SABAM cases (*SABAM vs Scarlet* and *SABAM vs Netlog*), as well as the more recent *Telekabel Wien* case from 2014. What the Court did in those cases, in addition to relying on Article 15 of the E-Commerce Directive, was to interpret intermediary liability as a question that involves **clashes between fundamental rights**, so raising the question of intermediary liability to higher constitutional planes. The Court reverted to the very basic principles contained within the Charter of Fundamental Rights. The rights that were identified by the Court were, on the one hand, the rights of copyright holders and the holders of intellectual property rights in general to the protection of their property (which are protected under article 17 of the Charter of Fundamental Rights). On the other hand however, there are the rights of the intermediary itself and of the users. On the side of the intermediary, what has to be protected is its freedom to conduct its business (which is protected through article 16 of the Charter); and turning to the users of the intermediary's services, it is important to focus on the right to privacy and the right to the protection of personal data (which

are protected under articles 7 and 8 of the Charter respectively) and, of course, their right to freedom of expression and information (which is protected under article 10 of the Charter). The court declared that in the case of such clashes of fundamental rights it becomes necessary to find a fair balance between them, so that **the protection of one such right does not disproportionately affect another such right**.

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Now (so far, at least) the Court has not given us much by way of of information regarding how to go about striking this fair balance. However, it reveals **the deeper dimension to the question of intermediary liability**, namely that intermediary liability is not simply a mundane example of a secondary EU law question, but one that affects our basic fundamental rights, human rights, the basic building blocks of our legal system and our society.

It is important in that regard also to consider that this same approach has been taken more recently by the European Court of Human Rights, based in Strasbourg, which has released a number of decisions in cases in the domain of intermediary liability, again taking this 'fairly balanced' approach - for example, in the case of *Delfi AS vs. Estonia*. It should be kept in mind that not only was this case not applying the E-Commerce regime, it was not even applying the Charter of Fundamental Rights of the EU: rather, it was simply applying the European Convention of Human Rights (ECHR). Essentially, the question presented before the Court in the Delfi case was whether the imposition of intermediary liability on Delfi by the Estonian Court breached the intermediary's freedom of expression? While this is a tricky question, and commentators disagree with much of the court's analysis in this particular case, it is important to keep in mind that the court was determining its position on a very specific question - essentially whether it is within the margin of appreciation of the individual contracting state to the ECHR to impose this kind of liability. This is a very different question from whether it should be allowed by the EU, or whether it is in line with the E-Commerce Directive (specifically, by

article 15). It seems that the indications in this case are that it would not be in line with the Directive. Therefore essentially the Delfi case ended up before the wrong European Court. The reason why that happened is essentially because the Estonian Court should have requested a preliminary ruling from the CJEU but failed to do so, and therefore the intermediary's only remaining recourse was to apply the ECHR.

In the Delfi case, the court concluded that the only liability that was imposed on the intermediary was for a monetary compensation of 320€, which ends up being within the margin of appreciation of the individual state. This is quite a moderate position to take. The problem remains that it is not entirely clear from the Delfi case what precisely is expected from the intermediary that it do. It seems that because the Court considered hate speech to be such a terrible crime, the intermediary should have taken greater measures to prevent the illegality. However, given that Delfi had already applied both automatic filtering and a notice and take-down system, it remains debatable whether that would have been possible. The conclusion of the decision puts intermediaries in a very challenging situation, and many commentators have pointed out that the only real solution is either proactive moderation by natural persons (real people) or, if the intermediary cannot afford that, which will often be the case, then simply to shut down discussion forums online, in newspapers and so forth. However, it seems that the Court of Human Rights has reconsidered that position in the recent *MTE vs Hungary* case.

It remains to be seen how this will develop in the future; we should also keep in mind that saying that something does not infringe the ECHR does not necessarily mean that it is sensible policy, nor does it necessarily mean that this is the way that the EU should or will proceed.

Should different types of content be treated or regulated in different ways?

Although most of the discussion is mainly about illegal content in the category of copyright infringement, in the past few years we have seen a huge amount of public debate on radicalisation content, extremist content, terrorism enabling

content, etc. Hate speech has been a big concern for policy makers, and this has also contributed to pushing the boundaries of the legal regime that we just described.

The question arose what the obvious impact would be of any changes in the intermediaries' liability regime for other sectors, such as e-commerce and the creative industries. The panel was invited to reflect on the more potential changes that the intermediary liability regime could mean for different sectors, not just creative industries, but also e-commerce. Also the question whether different types of illegal content should be tackled in different ways was raised.

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Addressing these questions, the point was made that some policy makers have sometimes made reference to the mechanisms that are applied for child pornography and how those could apply to extremism and hate speech. The answer is that those are very different types of situations and of content: there are international databases of unlawful destination URLs and of unlawful content (e.g., child sexual exploitation images) that has been recognised and categorised as such, which is clearly not the case with political speech. The case of hate speech requires real analysis and assessment to understand whether a certain expression is illegal under the applicable laws. The need for such evaluation applies equally to the context or circumstance in which the content is being used, as much as it applies to the content itself. This would seem to indicate that there is a definite need for different approaches for different types of situations.

Another member of the panel also underlined the fact that different areas raise very different questions and that some degree of differentiation and granularity in that regard would be helpful. Moreover, this suggestion has very recently been expressed by the European Court of Human Rights (in *Delfi AS vs Estonia*), which has examined cases of intermediary liability for defamation and hate speech and declared that in hate speech notice and take-down regime would not be sufficient in order to protect the intermediary from liability. It was not entirely clear from that case exactly what would have been sufficient in that case, but what

was interesting however is that the ECHR did say that notice and take-down regime would be sufficient to safeguard the intermediary from liability within the framework of the ECHR **in other areas**. This was confirmed a few weeks ago, in early February, when a new judgement was handed down in *MTE vs Hungary,* which essentially held that notice and take-down procedures would be sufficient in areas such as offensive online materials.

When looking at what sectors would likely be most potentially impacted, the panel underlined that the safe harbours apply horizontally, with the exception of some very small limitations, to a broad range of different areas of laws. That would include protection against liability not just for intellectual property rights infringements, but also for defamation, hate speech, child porn, e-commerce and so forth.

The indications that have recently been emerging from the Commission on this subject are still very opaque. Whilst it seems clear that the Commission is now planning some action, it is also true that the Commission has been talking about actions for 5 or 6 years now, and nothing has yet happened as a result. However, it seems that if there is going to be any action, then it will be limited to copyright. So there seems to be an indication that (for example) the notice and action regime that was mentioned explicitly in the Communication published by the Commission in December 2015 would be limited just to copyright. That would introduce a **certain level of differentiation** between copyright and other areas of law which are affected; if so, this would be consistent with the pattern so far, because while the E-Commerce Directive applies horizontally there is further elaboration specifically for copyright in the Copyright Directive, with regard to injunctive relief (as shown above), which is not touched upon within other areas of law.

In those other areas of copyright, it is also interesting to see that governments, law enforcement authorities and indeed the Commission have taken non-legislative steps and worked on alternative schemes by which to make the private undertakings in question (i.e., the content platforms) take action based on their own terms of service. In the hate speech area, a scheme is in place in Germany (with the support of a number of big social media companies), whereby certain NGOs will help them make determinations about (for example) content that is flagged as hate speech. And the Commission has also held meetings with the big companies

to get their cooperation. Therefore it is interesting to see the Commission and other authorities applying various types of pressure on private undertakings to cooperate in various areas where they do not have immediate legislative authority. The biggest problem is making sure that we avoid transforming the platforms into virtual courts that in practice effectively decide which content is illegal. If we consider only child pornography, it is very easy to see that this is really something that does not have to be online. But if we try to use algorithms or other tools in other areas such as hate speech or extremism, without human intervention it is very hard to find or to block content **without an assessment of the meaning of that content in actual, real life circumstances**.

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Speaking of the impact on other policy areas, the audiovisual media sector was also touched upon. More specifically, a question was asked about the link between the exemptions under the E-Commerce Directive and the AVMS Directive. This link was made because for various reasons video sharing platforms like YouTube, Daily Motion, Vimeo etc. are outside the scope of the AVMS Directive; one of the main reason is the fact that it is considered that they do not have any responsibility for the content. However, the point was made that they are now organising more and more services just like other online services, while not being responsible for the content; in turn this leads to the problem of the lack of a level playing field between those platforms which are regulated and those which are not. Moreover, from the Commission's plans, there would at present appear to be no basis for expecting major imminent changes to address this concern.

Addressing the question above, it was underlined that as regards the difference between a content host and a publisher, there are different platforms where one can access both published content and user-generated content. In this context, it was said to be unfair that any platform that limits its activities only to the distribution of content uploaded by third parties would be subject to the E-Commerce Directive provisions (and thus benefit from the safe harbours), whereas the platform which has an affiliate content-producing entity would not benefit from the liability

limitation under the E-Commerce Directive. This comes down to assessing whether the platform is indeed **acting as a neutral intermediary,** or **whether it is presenting its own content** and has been involved in the presentation and selection and modification of that content. If the platform has commissioned the content itself, then it seems fair to hold it liable as the editor of that content. If however the platform really is only acting as a neutral host of that content, then it makes perfect sense that it would be held liable under an entirely different regime.

What should be the way forward?

There is a real need to identify the gaps in the current intermediary liability framework. Going back a few years, the Commission has consulted on Copyright policy, on substantive copyright and on the enforcement Directive back in 2014, after which it consulted on notice and action procedures. The Commission's consultation on enforcement recently closed, while Commission's documents such as the DSM Strategy or the Copyright Communication following this strategy hint at intentions to undermine or to limit eligibility for, or the scope of, the current regime.

> ***The Commission indicates that it is going to work on preparing a fit-for-purpose regulatory environment for intermediaries.***

At the moment, things remain rather murky. In its DSM Strategy document, the Commission indicates that it is going to work on preparing **a fit-for-purpose regulatory environment for intermediaries** that will also contain rigorous procedures for the take-down of illegal content, whilst avoiding the taking down of legal content. That might suggest the introduction, perhaps, of a more detailed notice and take-down, and notice and action regimes; and indeed, in its December 2015 Communication, on "Copyright - a more European copyright framework", the Commission speaks about the introduction of a notice and action framework and (perhaps rather more worryingly) even the introduction of a 'notice and stay down' framework.

The essence of a 'notice and stay down' framework is that once the provider has

received notification about illicit content that is on the network or website and has taken it down, the provider faces a continuing obligation to make sure that the same content does not appear again in the future on that platform. The *practical* difficulty here is the need to find a way for the intermediary to do that without having to monitor all of the information that appears on its platform. In *L'Oreal vs eBay*, the CJEU did mention that the platform might for example take action to make sure that the same infringement by the same infringer does not reappear (e.g., by deleting the account of the infringer). It is clear that the feasibility of such an approach is likely to vary, according to the type of intermediary: if we consider internet access providers, that becomes very difficult, because providers cannot just delete individual subscribers' accounts (and so disconnect them – and most likely their entire household too – from the Internet) simply because they once infringed specific copyright: that would constitute a disproportionate remedy. On the other hand, if we consider platforms such as YouTube or Facebook, then that option could work – i.e., deleting a specific individual account, and/or making sure that at least the same content is not still being disseminated by the same infringer. However it would be extremely difficult, without relying on a filtering process, to ensure that no further infringement involving the same content is committed by any other user on the same platform. And filtering necessarily involves general monitoring of personal information (including potentially private information) of all users of the intermediary's database, *including* non-infringing users.

Notice and stay down was first introduced in France as a concept a few years ago, and eventually the French courts gave up on the idea after the French Supreme Court struck it down. It seems still to be a rather popular idea in Germany, and it would be interesting to monitor both how that evolves in that country and whether we will ever get any European guidance in that respect.

In addition, the Commission has also signalled the possible introduction of a **duty of care for intermediaries**, which would force them to apply more due diligence, and so to take more responsibility for the information that they transmit or store. The characteristics of this duty of care, including how it would apply, are not yet known since the Commission has not been at all specific about it. Whether this would be a good thing, or a bad thing, will be a direct after-effect of what type of duty and what type of intermediary we are talking about, and the specific conditions under which the duty would arise. In strict terms, we

could even understand this duty in terms of an obligation for the provider to take content down, once the provider has received notification – or else perhaps something more proactive, which goes to the underlying substance of the law, i.e., not simply a defence, but a formal definition of when the intermediary could be liable. That would perhaps help by increasing legal certainty for intermediaries, so that they would know exactly what to avoid; in turn, that clarity would be beneficial for all relevant stakeholders. Further, it may be that the behaviour which this would seek to encourage on the part of private undertakings (companies) is similar to the behaviour envisaged in various 'follow the money' schemes and the associated voluntary agreements. Nevertheless, there remains a major and significant difference between owing a legal duty and choosing to engage in a voluntary activity, alternatives which it would not appear easy to combine. What is more, any such 'duty of care' notion would appear to be likely to succeed only if the intermediary also created the records to show (if needed at a later date) that it has complied with the duty. As well as being particularly unaffordable for providers at the SME level, such an approach is likely both to slow things down materially, as well as to result in additional risks associated with the generation of records which could subsequently be used for unintended purposes. In the end, very much will depend on precisely what the Commission has in mind.

The point made was that **without continuation of the current legally well-protected liability limitation principles, the Internet would not continue to function in its current form (as a permissive and open space for free expression and political debate and cultural diversity)**. This is absolutely something that community organisations wish to safeguard as we move forward: they advocate that the way forward for European policy in this area should be along the lines of improving the fitness for purpose of notice and action procedures, as well as the consistency of their application across Member States. That would seem to be a **sensible way forward** to accommodate right-holders' concerns that some processes do not work well enough in terms of addressing IP infringement, whilst potentially also helping to ensure that the liability limitation concept is not gradually undermined.

The suggestion was made (in order to address these concerns) that it would be useful if some form of **guidance** could be prepared and issued, to ensure that there are standards for making notices, proper processes are in place, there is

transparency in terms of how notices are handled, and there are redress and appeal possibilities. It was pointed out that it could be extremely useful to enshrine such principles in policy, and that doing so would presumably help to eliminate some of the grey areas under discussion.

> ***It would be useful if some form of guidance could be prepared and issued, to ensure that there are standards for making notices, proper processes are in place, there is transparency in terms of how notices are handled, and there are redress and appeal possibilities.***

Speaking of greater European guidance in this area, we were reminded that when the E-Commerce Directive was set up, the expectation was that national legislators would 'pick up the baton' and introduce very complex and detailed notice and action procedures through their own legislation. Whilst that did happen in some cases, it has not happened in a number of countries, and the result is a patchwork quilt of very differentiated regimes that offer greater or lesser protection in greater or lesser detail. This can only create a confusing legal framework for all relevant stakeholders. To address this issue, a good starting point would be the **introduction of a more detailed European procedure for notice and take-down**. A few years ago, the Commission did initially float the possibility of a Directive on notice and take-down, but this was then withdrawn.

It is also worth considering that safe harbours are only defences, which harmonise protections against liability, without providing any information about that liability itself under the applicable national legal regime's liability provisions. In other words, just because an intermediary is not protected by a safe harbour defence does not necessarily mean that the intermediary will be legally liable: the safe harbour only means that the intermediary cannot in fact be held liable even if otherwise it might; so perhaps it would be necessary and helpful first (or in parallel) to apply more focus on achieving greater harmonisation of the underlying legal rules in the liability area, in order to create a more secure environment for all the stakeholders involved.

Speakers' biographies

EMILIAN PAVEL,
Member of the European Parliament

Mr. Emilian Pavel has been involved in politics for over 12 years. As a Member of the European Parliament, he works in the Committee of Employment and Social Affairs, and the Committee of Civil Liberties, Justice and Home Affairs (LIBE). He was the S&D shadow rapporteur in the LIBE Committee for the report "Towards a Digital Single Market Act" adopted in January 2016. His priorities in the European Parliament include youth entrepreneurship and employability, lifelong learning and education, Digital Agenda, and regional development.

CHRISTINA ANGELOPOULOS,
University of London

Ms. Christina Angelopoulos is a researcher in information law at the Institute for Advanced Legal Studies (IALS) of the University of London. She wrote her Ph.D. at the Institute for Information Law (IViR) of the University of Amsterdam on the topic of the European harmonisation of the substantive rules on the civil liability of internet intermediaries for copyright infringements committed by their users. Her thesis is due to be defended in April 2016.

JENS-HENRIK JEPPESEN,
Director, Center for Democracy & Technology

Jens-Henrik Jeppesen is the representative and Director of the Center for Democracy and Technology. For the past 15 years, he has been engaged in European and international public policy, focusing on digital economy and technology policy. His expertise includes data protection, cybersecurity, copyright and digital rights management. He has been an active and longstanding member of leading industry organizations, such as BSA – the Software Alliance, Digital Europe and the American Chamber of Commerce to the EU, where he has chaired committees and working groups.

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Created in 2010, Copyright 4 Creativity (C4C) *is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C represents libraries, scientific and research institutions, consumers, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright embodied by C4C's Declaration and its Copyright Manifesto. Find out more on the C4C website.*

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Registered office: 1 Blunt Road,
South Croydon, Surrey CR2 7PA, UK