

LEGISLATION, TRENDS AND CASES

Trends

Problems with proactive: a summary of recent legal developments in the field of internet intermediary liability

MICHAEL RUSS*

Edinburgh University

This short work will outline some of the European Commission's proposed changes to internet platform regulation. Specifically, this will involve detailing the Commission's proposed voluntary proactive measures for hosting platforms, the changes to the Audiovisual Media Services Directive (AVMSD) for video-sharing platforms and the implications of the proposed Copyright Directive. The work will identify a significant problem with applying voluntary proactive measures to the eCommerce Directive and suggest how this problem might be overcome.

Recent changes for hosting intermediaries

Over the past three years the European Commission has become increasingly dissatisfied with the liability framework for internet intermediaries, specifically hosting intermediaries (or hosting platforms).¹ A large part of this dissatisfaction stems from the fact that hosting platforms are under no obligation to actively seek out and remove illegal user content from their services. They must only remove this content if they have received explicit notice of its existence. Over the years, the Commission has identified that the mechanism for granting intermediaries notice, namely the notice-and-takedown system, is ineffective because it is slow and complicated, and this has resulted in illegal content remaining online for extended periods of time.²

Since 2017 the Commission has sought to encourage hosts to actively remove illegal content from their services instead of waiting to receive knowledge of it through a notice-and-takedown order.³ This active removal of content is to be achieved through platforms undertaking voluntary 'proactive measures' which involve a combination of automated identification and filtering technologies with a 'human-in-the-loop' for

* PhD Candidate, University of Edinburgh; michael.russ@ed.ac.uk.

1 See Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final; Commission, 'Online Platforms and the Digital Single Market Opportunities' and Challenges for Europe' (Communication) COM (2016) 288 final; Commission, 'A Connected Digital Single Market for All' (Communication) COM (2017) 228 final; Commission, 'Tackling Illegal Content Online' (Communication) COM (2017) 555 final; Commission Recommendation C/2018/1177 of 1 March 2018 on measures to effectively tackle illegal content online [2017] OJ L63/50.

2 'A Digital Single Market Strategy for Europe', s 3.3.2 (n 1).

3 See 'Tackling Illegal Content Online' and Recommendation C/2018/1177 on measures to effectively tackle illegal content online (n 1).

oversight.⁴ These automated technologies should be able to automatically detect and remove illegal content and also prevent *ex ante* any re-uploads of the same content in future.⁵ Importantly, the Commission has been very clear that these voluntary proactive measures are to be consistent with the eCommerce Directive's no monitoring obligations, taken without prejudice to both Articles 14 and 15.⁶

The Commission has similar ideas in mind for intermediaries hosting audiovisual content. In 2016, it put forward a proposal to amend the current AVMSD (2010).⁷ One of the main changes to the Directive is that its terms will be broadened to cover 'video-sharing-platforms'; that is, intermediaries which primarily host user-generated audiovisual content.⁸ Although the Commission states that these platforms do not have editorial control over the user content they host, only having substantial control over the way this content is organised, they will still be expected to prevent adult content, such as pornography or advertisements for alcohol, from being made readily available to children.⁹ They will also be expected to prevent access to content which is hateful to minority ethnic groups, as well as content which seeks to incite violence.¹⁰

The Commission intends to achieve these measures through the introduction of flagging mechanisms which will enable users to report illegal content to the hosting platform.¹¹ The platform must then remove the reported material within a specific timeframe, the length of which is determined by the illegal nature of the content. Age verification and parental control systems are to be introduced to prevent children from accessing unsuitable content and content-rating systems are to be implemented so that unsuitable content is less likely to be viewed.¹² Platforms will also be expected to engage in voluntarily proactive content removal which is to be consistent with Articles 14 and 15 of the eCommerce Directive.¹³ Any removal mechanisms and flagging procedures are to be constructed within frameworks of self-regulation or co-regulation.¹⁴

4 'Tackling Illegal Content Online', s 3.3.2. (n 1)

5 Ibid s 5.

6 Regarding Article 14, '[t]he guidance in this Communication is without prejudice to EU acquis and relates to the activities of online platforms, and in particular hosting services provided by these platforms in the sense of Article 14 of the E-Commerce Directive, and covers all categories of illegal content while duly taking account of the fact that different types of content may require different treatment' in 'Tackling Illegal Content Online' (n 1). Regarding Article 15, specific proactive measures must be 'taken voluntarily by hosting service providers, including by using automated means in certain cases . . . without prejudice to Article 15(1) of Directive 2000/31/EC' in Recommendation C/2018/1177 on measures to effectively tackle illegal content online (n 1).

7 Directive of European Parliament and the Council 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.

8 European Parliament and Council, 'Proposal for amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM(2016) 287 final, recitals 26–8.

9 Ibid Article 28a(1)(a).

10 Ibid Article 28a(1)(b).

11 Ibid Article 28a(2)(b).

12 Ibid Articles 28a(2)(c) and (2)(d).

13 Ibid Recital 30.

14 See this in European Parliament, 'Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities' (COM(2016)0287 – C8-0193/2016 – 2017/0151(COD)) Recital 7a.

In June 2018, an updated draft of the Directive was released by the Commission to incorporate input from the European Parliament and the Council of Europe.¹⁵ The draft clarifies that social media platforms, although not the intended targets of the Directive, may indeed fall under the requirements of the Directive if they meet the definition of video-hosting platforms. This will be the case if they host a sufficient amount of programmes and/or user-generated content to constitute an 'essential functionality' of their service.¹⁶ The draft also adds incitement to terrorism to the content listed under Article 28a, to which platforms must seek to prevent user access, as well as adding terrorist incitement under an amendment to Article 6 of the AVMSD (2010).¹⁷ The Directive was slightly updated and approved by the European Parliament in October 2018 and requires only approval by the Council of European ministers before it can enter into force.¹⁸

Also in 2016, the Commission released a specific proposal for updating the copyright framework in order to account for technological developments in the digital marketplace.¹⁹ The Commission argues that hosting platforms have enabled users to easily access copyrighted content and this has subsequently lead to the loss of revenue for the right-holders of that content. This has come to be known as the 'value gap' (although existence of this gap is contested).²⁰ The proposal states that 'effective technologies' are to be imposed on platforms to ensure that right-holder content hosted on their services is 'protected' and subject to licensing agreements.²¹ This is to be achieved through the requirement of platforms to install 'effective content recognition technologies' as stated in Article 13(1).²²

In July 2018, the European Parliament rejected the adoption of the Copyright Directive (although an amended version of the Directive was accepted by the European Parliament in September 2018, its adoption pending only a final plenary vote to be taken in early 2019).²³ The Directive is highly controversial, with Article 13 in particular attracting a lot of criticism from free speech advocates.²⁴ It has also received criticism from academics and members of the European Parliament on account of its inconsistency with Articles 14 and 15 of the eCommerce Directive, as well as the

15 Ibid.

16 Ibid Recital 3b.

17 Ibid Article 28a(1)(c) and Article 6(b).

18 See European Parliament press release 'Audiovisual media: agreement reached on new media services directive' (26 April 2018) <www.europarl.europa.eu/news/en/press-room/20180423IPR02332/audiovisual-media-agreement-reached-on-new-media-services-directive>.

19 European Parliament and Council, 'Proposal for a Directive on copyright in the Digital Single Market' COM (2016) 593 final.

20 There is very little empirical evidence to confirm the existence of this value gap. See Giancarlo Frosio (2016) 'Digital piracy debunked: a short note on digital threats and intermediary liability', Internet Policy Review (23 March) <<https://policyreview.info/articles/analysis/digital-piracy-debunked-short-note-digital-threats-and-intermediary-liability>>.

21 'Proposal for a Directive on copyright in the Digital Single Market', recital 38 (n 19).

22 Ibid Article 13(1). For existing content recognition technologies, see YouTube's 'Content ID', 'Audible Magic' (used by Facebook, Twitch, Soundcloud and others) and Microsoft's 'PhotoDNA'.

23 See <www.bbc.co.uk/news/technology-44712475> (5 July 18); <www.wired.co.uk/article/article-13-eu-copyright-directive-memes> (5 July 18); <www.independent.co.uk/life-style/gadgets-and-tech/news/european-copyright-laws-memes-link-tax-article-13-11-a8432486.html> (5 July 18).

24 Ibid.

concerns it raises for abuses of free speech under Article 11 of the Charter of Fundamental Freedoms.²⁵

Taken as a whole, it is clear that the Commission wants hosting intermediaries to undertake proactive measures in order to remove illegal content, whether that be for hate speech, incitement to terrorism or copyright, and regardless of whether that content is in the written word or video. It is, however, also clear that the Commission wants these proactive measures to be compatible with the eCommerce Directive. The main problem for the Commission is that Article 14 of the eCommerce Directive as it stands will pose significant difficulties for any platform undertaking proactive measures. These difficulties could fundamentally undermine the purpose of the protection granted to hosting platforms under Article 14. This is a problem which will now be examined.

Proactive measures and the eCommerce Directive

For hosts to avoid liability under the eCommerce Directive they must fulfil two conditions: (1) not play an active role in disseminating illegal content; and (2) quickly remove such content appearing on their services when they have direct knowledge of it.²⁶ These conditions are stated in Article 14 of the Directive and have been further clarified by the Court of Justice of the European Union (CJEU).²⁷ Playing an active role involves the host using its services to promote illegal content, either through the host's knowing participation or through negligence.²⁸ The problem with voluntary proactive measures, as the Commission has outlined them, is that hosts will not be able to claim protection under Article 14 if they try to remove content but *fail*. If they have a voluntary automated system in place for removing illegal content, and this system fails to remove some content, then the platform can be deemed to be playing an active role and be held liable under Article 14.

This is precisely what happened in the case of *Delfi AS v Estonia*.²⁹ Delfi, an online newsportal, was held liable by the European Court of Human Rights (ECtHR) for hosting user content which was defamatory and hateful. Part of the ECtHR's decision hinged on that fact that the newsportal had taken measures to prevent hateful user content appearing on its service, but its automatic filtering system had failed to filter it.³⁰

The Commission is oddly silent on this liability problem with proactive measures; not in any of its many communications is it addressed. All it argues is that, by providing general proactive measures, the hosting platform cannot be deemed to play an active role and is therefore consistent with Article 14.

25 See Christina Angelopoulos, 'On online platforms and the Commission's new Proposal for a Directive on copyright in the Digital Single Market' (6 April 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800> (6 May 2017); and European Parliament Conference, 'Better Regulation for Copyright: Academics Meet Policymakers' (6 September 2017) <https://juliareda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf>.

26 See C-236/08 *Google France SARL, Google Inc v Louis Vuitton Malletier et al* [2010] and C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011].

27 Article 14 only states that intermediaries must not have actual knowledge but the CJEU has interpreted this to mean that playing an active role is sufficient to grant knowledge, see Eleonora Rosati (2016) 'Why a reform of hosting providers safe harbour is unnecessary under EU copyright law' 38(11) European Intellectual Property Review 668–76.

28 *L'Oréal v eBay* (n 26).

29 *Delfi AS v Estonia*, App No 64569/09 (ECtHR, 16 June 2015).

30 *Ibid* [152] [156] and [157].

[T]he mere fact that an online platform takes certain measures relating to the provision of its services in a general manner does not necessarily mean that it plays an active role in respect of the individual content items it stores and that the online platform cannot benefit from the liability exemption for that reason. In the view of the Commission, such measures can; and indeed should, also include proactive measures to detect and remove illegal content online, particularly where those measures are taken as part of the application of the terms of services of the online platform.³¹

The Commission then goes on to invite the liability problem by saying that hosts can only avoid liability if they immediately remove illegal content upon discovering it.

[T]he online platform continues to have the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness. Where it does so, the online platform continues to benefit from the liability exemption pursuant to point (b) of Article 14(1). Therefore, concerns related to losing the benefit of the liability exemption should not deter or preclude the application of the effective proactive voluntary measures that this Communication seeks to encourage.³²

So, the Commission wants hosts to undertake proactive measures voluntarily and it assures them that, if these measures are effective, then they will be able to claim the liability exemption guaranteed under Article 14. But there are good reasons to believe that using proactive removal mechanisms will lead hosts to fail to remove content.

For one, the automated filtering technologies that the Commission has advocated are expensive and time-consuming to develop. This could very well lead platforms to construct poor quality filtering systems which fail to detect content.³³ YouTube's 'Content ID' famously cost the platform around \$60 million to construct.³⁴ Although not every platform would have to deal with the same amount of content as YouTube (which in 2015 was estimated as having over 300 hours of content uploaded every minute),³⁵ it was able to construct such a system because it had the financial backing of investors which many smaller hosts will simply not be able to attract.³⁶

There are also problems with preventing the re-upload of content. Filtering mechanisms have been known to fail to identify duplicates of content which have already been filtered out by the system.³⁷ If duplicates of relatively simple content such as audio files or images are not filtered by these systems, then it is to be expected that more complex and contextually dependent content such as hate speech or incitement to

31 'Tackling Illegal Content Online', s 3.3(3.3.1.) (n 1).

32 *Ibid.*

33 See Evan Engstrom and Nick Feamster, 'The limits of filtering: a look at the functionality and shortcomings of content detection tools' (2017) (March) Engine <www.engine.is/the-limits-of-filtering>.

34 *Ibid.*

35 <www.theguardian.com/technology/2015/feb/13/youtube-10-years-old-evolution-of-online-video?CMP=fb_gu> (13 February 2015).

36 Engstrom and Feamster (n 33).

37 For problems with automated filtering see Daphne Keller, 'Problems with filters in the European Commission's platforms proposal', (Centre for Internet and Society 5 October 2017) <<http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>>.

terrorism will slip through the filters with even greater ease.³⁸ The Commission's desire for voluntary proactive measures is an invitation for platforms to lose Article 14 immunity.

Does this mean that proactive measures and Article 14 are necessarily incompatible? Maybe not. The Commission could follow the approach to hosting liability taken in the USA where hosting platforms are granted protection for 'Good Samaritan' practices under s 230 of the Communications Decency Act (CDA 230).³⁹ This enables hosts to avoid liability with 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable'.⁴⁰ The key phrase here is *in good faith*. Hosts are protected from liability if they try to remove the illegal content even if they are not able to remove it all.

If the Commission were to follow this approach it would, however, have to ensure that hosts did not engage in the over-removal of content. Under CDA 230 hosts in the USA have a tendency to remove legal content as well as illegal content through their Good Samaritan exercises.⁴¹ Content which does not abide by a host's, privately constructed, community standards is removed without the host necessarily considering its speech value. This is especially the case when content is controversial and deemed by the platform to be hateful or offensive. As providers of private services, hosts have the final word on what gets to stay on, and what gets removed from, their platforms. Unlike DMCA (Digital Millennium Copyright Act) notices for copyright, which are able to be challenged through counter-notices and the content reinstated, there is no effective counter-takedown system for content covered by CDA 230.

The problems with CDA 230 and private ordering of content could, however, be mitigated in a variety of approaches consistent with the Commission's implementation of proactive measures. There are an ever-growing number of regulatory frameworks which could curb host enthusiasm for privately enforced content removal, including self-regulation, co-regulation and meta-regulation.⁴² Self-regulation would combat private regulation of speech by requiring hosts to voluntarily draft a code of conduct which details responsible measures for removing illegal content.⁴³ The hosts would also need to construct an independent, third-party ombudsman tasked with ensuring that they abide by the code. Conformity with the code would be encouraged through disciplinary powers

38 Hate speech is something which courts themselves often find difficult to identify, see *LA v Turkey*, App No 42571/98 (ECtHR, 13 September 2005); *Lindon, Ovtchakovsky-Laurens and July v France*, App Nos 21279/02 and 36448/02 (ECtHR, 22 October 2007); *Féret v Belgium and Perincek v Switzerland*, App No 27510/08 (ECtHR, 15 October 2015) in D Voorhoof and E Lievens, 'Offensive online comments, Delfi confirmed but tempered' (*Inform: The International Forum for Responsible Media Blog*, 17 February 2016) <<https://inforrm.org/2016/02/17/offensive-online-comments-delfi-confirmed-but-tempered-dirk-voorhoof-and-eva-lievens>>.

39 Communications Decency Act, 47 USC §230(c) (1996).

40 *Ibid* §230(c)(2)(A).

41 See Daphne Keller (2015) 'Empirical evidence of "over-removal" by internet companies under intermediary liability laws' (Centre for Internet and Society, 12 October) <<https://wilmap.law.stanford.edu/news/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>> (12/10/18).

42 For some different approaches to regulation, see: <<https://inforrm.org/2018/07/15/house-of-lords-communications-committee-inquiry-the-internet-to-regulate-or-not-to-regulate-an-overview-of-the-evidence-part-1-oscar-davies>

43 For more on self-regulation, see D Tambini et al, 'The privatisation of censorship: self regulation and freedom of expression', in D Tambini et al, *Codifying Cyberspace: Communications Self-regulation in the Age of Internet Convergence* (Routledge 2008).

appointed to the ombudsman by the hosts themselves. These could take the form of financial penalties or other proportionate sanctions.⁴⁴

Similar to self-regulation, co-regulation is able to avoid dubious private regulation through the use of an industry-wide code of conduct and an ombudsman. However, in a co-regulatory framework the burden of regulation is shouldered by both stakeholders and government.⁴⁵ The involvement of the government may extend to the implementation of a code of conduct and ombudsman through legislation. Governmental involvement can also ensure that the ombudsman receives funding, as well as that the ombudsman is granted the necessary sanctioning powers to enforce the code.⁴⁶ This grounding in the legislative process ideally prevents the code and/or ombudsman from being overly tailored to the industry's interests.

Meta-regulation also involves governmental involvement, but in a less direct way than co-regulation. In meta-regulation, the government's role is limited to setting targets for hosts to meet by self-regulatory initiatives.⁴⁷ This means that hosting platforms could set up an ombudsman according to their own preferences, but it would have to meet regulatory targets decided by the state. Government could also ensure that users and hosts have established appeal mechanisms which could be enshrined through legislation.⁴⁸

Ultimately, the difficulty for the Commission will be in choosing a solution which is not only broadly consistent with the eCommerce Directive, but is also able to effectively prevent the distribution of illegal content. Whatever approach it ends up implementing, it is crucial that the best balance is struck between the restriction of illegal content and promotion of user free speech. This will not be an easy task and will require the engagement of academics, industry stakeholders and legislators from around the world. There is currently no clear choice; there is, however, plenty of work to be done.

⁴⁴ This is the model of regulation used by many European member states for the regulation of their respective print press. There are a variety of ways of implementing such a system, see D Tambini et al, 'Reforming the PCC: lessons from abroad', (LSE Media Policy Project, *Media Policy Brief 6 – Reforming Journalism Self-Regulation*, June 2012) <www.lse.ac.uk/media@lse/documents/MPP/Policy-Brief-6-Replacing-the-PCC.pdf>.

⁴⁵ Broadcasting is the most established example of a media industry operating under a co-regulatory model in Europe, see Eric Barendt et al, *Broadcasting Law and Fundamental Rights* (Oxford University Press 2013, first published 1997).

⁴⁶ For application to audiovisual media, see 'Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services', recital 7a (n 14).

⁴⁷ There are, however, various ways to interpret a framework of meta-regulation, see Cary Coglianese and Evan Mendelson 'Meta-regulation and self-regulation' in *Oxford Handbook of Regulation* (Oxford University Press 2010).

⁴⁸ For more on meta-regulation, see Jacob Rowbottom (2018) 'If digital intermediaries are to be regulated, how should it be done?' (LSE Media Policy Project Blog, 16 July 2018) <<http://blogs.lse.ac.uk/mediapolicyproject/2018/07/16/if-digital-intermediaries-are-to-be-regulated-how-should-it-be-done>>.

