



Internet intermediary liability is an attack on fundamental rights

Presentation to ALDE hearing on ACTA

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Is ACTA a threat?

- International copyright interests are lobbying hard on ACTA; other stakeholders are excluded
- Leaked drafts show proposals to limit protection of Internet intermediaries
- Secrecy of negotiations leaves disposition of parties unclear, but leaked text places question marks over public assurances given

Position of ISPs in society

- Service providers
- Commercial entities
- Innocent intermediaries
- Social responsibilities
 - Comply with legal requirements
 - Cooperate with law enforcement
 - Respect customers legal rights and fundamental freedoms

Problematic copyright enforcement measures contemplated in some countries and regions

- “Three strikes” graduated responses leading to suspension of Internet access capability
- Internet network monitoring
- Internet address blocking
- Internet bandwidth throttling
- Network traffic filtering

Such measures engage fundamental rights

- Article 6 – Fair trial
- Article 8 – Privacy
- Article 10 – Freedom of expression
- Article 11 – Freedom of association

- These rights are not absolute, but impact on them must be considered

Intermediary liability places fundamental rights at risk

- ISPs have little capacity to mount substantive factual or legal defences on behalf of their customers
- ISPs have limited procedural recourse compared with citizens mounting a defence in their own name
- ISPs have weakened commercial incentive to mount any defence on behalf of their customers
- ISPs have rights too!

ISPs are unable to mount relevant factual and legal defences

- Accused Internet users can argue that
 - They didn't copy the material in question
 - The material is actually their own copyright
 - Common in cases of disputes between academics, and in cases between photographers
 - The material is mis-identified as the complainant's work
 - E.g. not a copy of a book, but a book review
 - They had legal rights / exceptions applied / copyright expired
- ISPs have very little capability either to judge such claims, or to defend them in the face of a complaint

Procedural fairness demands the defendant is not replaced by an intermediary

- The customer, not the ISP, needs to mount any defence that their fundamental rights are being infringed
- If action is to be taken against a citizen, the relevant Article 6 rights (right to be heard, independent tribunal, presumption of innocence etc) are with respect to the citizen in question
- Legal costs subsidy is only available to citizens
- Fairness to the intermediary is required, but is not sufficient to ensure fairness to the citizen/customer

Commercial conflicts make it bad policy to rely on ISPs as sole guarantor of fundamental rights

- Individual broadband accounts have a low commercial value that cannot cover expensive legal fees
- ISPs may have or be seeking commercial relationships with copyright complainants

Many proposals treat ISPs unfairly too

- “Gatekeeper” perspective is a transfer of costs from complainants to ISPs
 - Easier for complainants to target ISPs than infringers, especially because costs land with ISPs that would otherwise land with complainant
- Account suspension unfairly burdens ISPs, despite no fault on their part
- Many technical measures are a strategic threat to ISPs’ core business

European *acquis* on Internet intermediaries

- “Mere conduits” (Article 12 E-Commerce Directive 2003/31/EC)
 - Networks protected from liability for traffic simply carried
- Hosting providers (Article 14 E-Commerce Directive 2003/31/EC)
 - Protected from liability until they have “actual knowledge”
- Cache services (Article 13 E-Commerce Directive 2003/31/EC)
 - Protected, provided functioning solely as a cache
- No duty to monitor (Article 15 E-Commerce Directive 2003/31/EC)

European *acquis* on Internet access rights for citizens¹

- Any limit on must
 - Be necessary, appropriate and proportionate
 - Respect presumption of innocence
 - Respect right to privacy
- Rights guaranteed include
 - A prior, fair and impartial procedure
 - Right to be heard
 - Right to effective and timely judicial review

¹ Article 1(3a) Framework Directive 2002/21/EC as amended by 2009/140/EC

Conclusion

- Fundamental rights long guaranteed to citizens and businesses can easily become unenforceable and without effect in the digital environment.
- To avoid this problem it is essential to ensure Internet intermediaries receive strong legal protection from liability and enforcement duties.

Concerns about ACTA

- Will ACTA *directly impose* enforcement requirements on intermediaries?
- Will ACTA *condition protection* of intermediaries on “voluntary” adoption of enforcement measures?

Procedural goals for Treaty negotiations

- Transparency
- Full stakeholder consultation
 - Not just one stakeholder community
- Adherence to the Community *acquis*
 - Treaty making should not supplant democracy

Substantive goals for ACTA negotiations

- Limit ACTA to combating counterfeit goods
- *Failing this,*
 - Fully respect the rights of Internet intermediaries in the digital environment; and
 - Avoid making ISPs become online copyright police