

# The Limited Liability of Internet Intermediaries In the EU



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Within the online environment, start-ups often fulfil an intermediary role. Many 'intermediary' start-ups offer their users a platform: they act as a mediator and facilitate the access to goods and/or services provided by their end-users. An important question on start-ups' minds is whether they can be subject to liability claims as a result of the conduct of their end-users. For instance, what would happen if the user of an online video platform would upload copyrighted content without consent of the copyright owner? Start-ups may not always be aware of illegal end-user activity, why then, should they be held responsible? The European legislator has introduced several limitations to the liability of intermediary service providers. These limitations were considered essential to guarantee both the provision of basic services, enabling the free flow of information within the network society and the provision of a legally certain framework stimulating the Internet and E-commerce economy. However, over the years, intermediary service provision has become more and more intricate, which makes it increasingly difficult to categorize services and pinpoint the exact applicable legal regime. This document aims to provide start-ups with a concise overview of the limited liability regime concerning internet intermediaries as set out by the 2001 EU E-commerce Directive. This brief also includes case reports with relation to hyperlinking services, video platforms and file-sharing services.

## I. The European Legal Framework

The European regulatory framework concerning the liability of internet intermediaries is laid down by the 2000 E-Commerce Directive.<sup>1</sup> Start-ups who wish to operate as an online intermediary better familiarise themselves with the basic ruleset laid out within this Directive.

### Information Society Services

The E-Commerce directive applies to "information society services". An information society service has been defined as **any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.**<sup>1</sup> Information society services cover a wide range of economic activities online: online contracting, hosting services, services providing tools in the search, access and retrieval of data, etc.

The question whether a start-up service can be qualified as an information society service is determined by the following key elements.<sup>2</sup> If all elements are present, the start-up's service will be qualified as an information society service. The service a start-up offers must be:

- **Provided for remuneration:** this refers to the existence of an economic activity, which includes financial contributions through advertisements.
- **Provided from a distance**
- **Provided by electronic means**
- **Provided at the individual request of a recipient:** if an individual visits a website this will also be considered as an 'individual request'.

### The Limited Liability Regime

As mentioned above, the E-Commerce Directive has implemented a **limited liability regime for information society service providers that also act as an intermediary.** It is important to note that the liability exemptions provided by the Directive apply in a horizontal manner. This means that they cover all types of liability, including civil, administrative and criminal liability. The exemption regime also covers a wide variety of activities initiated by third parties: defamation, unfair commercial practices, piracy, etc.

Not all intermediary services can benefit from an exemption regime though. The E-commerce Directive has introduced specific liability exemptions for three distinct types of intermediary services: **i) mere conduit, ii) caching and iii) hosting.**

**Unfortunately, the E-Commerce Directive has been criticised for its lack of clarity.**<sup>3</sup> For start-ups developing new, Web 2.0 and 3.0 services (e.g. video-sharing, peer-2-peer platforms and social networks), it may be difficult to determine whether or not these liability exemptions are applicable.<sup>2</sup> Indeed, these services may not necessarily fall under one of the abovementioned categories. In addition, a start-up offering host services may perform other activities as well.

Nevertheless, the current exemption regime has been applied to new types of services by both national legislators and in case law.<sup>3</sup> Therefore, start-ups should be aware of the existence of exemption regimes and the requirements to be fulfilled for them to apply. Even though not all ambiguities of the current regime can be clarified, an understanding of the liability regime accompanying mere conduit, caching and hosting service, could provide start-ups additional guidance in their ventures.

#### A. Mere Conduit – Art. 12 E-Commerce Directive

Mere conduit refers to information society services that consists of:

- The **transmission** in a communication network of information provided by a recipient of the service or the provision of **access** to a communication network.

**The service provider is not liable for the information transmitted on condition that the provider:**

- Does not initiate the transmission;
- Does not select the receiver of the transmission;
- And does not select or modify the information contained in the transmission.

**B. Caching – Art. 13 E-Commerce Directive**

Caching refers to information society services that consist of:

- The **transmission** in a communication network of information provided by a recipient of the service.

**The service provider will not be held liable for the:**

- Automatic, intermediate and temporary storage if that information is performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.

**Moreover, the caching liability exemption will only apply if the service provider:**

- Does not modify the information;
- Complies with the conditions on access to the information;
- Complies with rules regarding the updating of the information;
- Does not interfere with the lawful use of technology;
- And acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled or that a court or an administrative authority has ordered such removal or disablement.

**C. Hosting – Art. 14 E-Commerce Directive**

The most relevant provision for start-ups is undoubtedly the exemption regime for hosting.

Hosting refers to information society services that consist of:

- The provision of an information society service that consists of **the storage** of information provided by a recipient of the service.

**The host shall not be liable for the information stored at the request of the recipient of the service on condition that:**

- He does **not have actual knowledge of illegal activity or information and**, as regards claims for damages, is **not aware of facts or circumstances from which the illegal activity or information is apparent**.
- The host upon obtaining knowledge of or awareness of illegal activities, **acts expeditiously to remove or to disable access to the information**.

Most start-ups that act as an 'intermediary' in the digital economy provide services that are closely related to the 'hosting' activity. The hosting provision has been subject to great discussion.

It is often hard to determine whether the hosting exemption regime should be applied to Web 2.0 or cloud computing services, e.g. platforms providing space for user generated content and e-mail services: **although start-ups may provide storage or web space to their users, this is often just one aspect of the entire service package and perhaps not their core business.**<sup>4</sup> **In other words, providing services that go beyond the storage of information may open start-ups up to liability!** Therefore, some Member States consider these services not to fall under the host regime, or at least not for those activities that do not relate to the mere storage.

**II. Jurisdictional Differences**

In general, Member States have transposed the Directive literally. Unfortunately the literal transposition of the Directive has not resulted in a uniform interpretation of the liability exemption regime: national legislation and case law diverges. Start-ups may thus face regulatory uncertainty, especially if they operate in multiple countries. Due to this divergence, it is impossible to provide a clear and accurate, country by country representation of the current regulatory framework. The following list of national cases - according to service type - may nonetheless give start-ups an indication concerning the applicable exemption regime, if any.

**Information Location and Hyperlinking Services**

Due to the overload of information available online, ordering services are becoming

increasingly important. Information location, e.g. search engines and hyperlinking services facilitate our navigation on the web.

**Some Member States have implemented specific liability exemptions for information location and hyperlinking services in their legislation**, such as Austria, Portugal and Spain. These Member States have adopted a specific liability regime for search engines and hyperlinking services. The limited liability regime has been based on the Directive's hosting exemption and similar requirements have to be fulfilled by these types of service providers in order for to benefit from the liability exemption. Conversely, Austria's law was modelled after the mere conduit provision. A similar exemption regime was implemented in Hungary legislation, although its scope has been limited to search engines.<sup>3</sup>

In Member States that did not implement specific exemptions, case law has qualified these services as either mere conduit (e.g. United Kingdom), caching or hosting (e.g. Germany). There have also been instances where these services were excluded from the exemption regime, and could thus be considered liable for misconduct of their users (e.g. Belgium).

#### **Video Sharing Websites**

Similar disparity can be found concerning video-sharing-websites such as YouTube and Daily Motion. Although generally considered to be in part hosting services, the point of contention has been whether these platforms should benefit from the exemption regime because often they provide additional services on top of their activity as a host of storage capacity.

**For creative content platforms, the architecture of the website or service may be of particular importance.** In France, Daily Motion was considered a host.<sup>3</sup> Even though the Daily Motion architecture allowed for the formatting and encoding of content, this was considered an essential and integral part of the hosting activity. In Germany, the courts took a different approach however. They deemed that YouTube could not benefit from the liability exemption.<sup>4</sup> Key element in the court's reasoning was the look and feel of the website: YouTube had a very specific layout and the YouTube logo was always present. Following their argumentation, content platforms cannot claim to be a host if third party content appears to be the provider's own content.<sup>4</sup> Moreover, suggestions based on viewer behaviour indicated that YouTube exercised editorial control.<sup>3</sup> In Italy, YouTube was considered to be a digital broadcaster and thus fully responsible for the published content.<sup>3</sup>

#### **File sharing services**

File sharing services and peer-2-peer networks have become increasingly popular. However, torrent websites have become subject to increased scrutiny. In a Swedish decision, the Pirate Bay was held criminally liable for the infringement of the Swedish Copyright Act. The Court concluded that the Pirate Bay could not benefit from the hosting liability exemption because they considered that the owners of the Pirate Bay were very well aware of the fact that copyrighted works were being illegally shared among their users.<sup>7</sup>

Services that are prone to stimulate illegal behaviour could also be affected indirectly. For instance, in Belgium, two internet service providers were ordered to block the Pirate Bay from their users.<sup>5</sup> In this case the internet service provider – an actor likely to fall under the 'mere conduit' liability regime – was required to prevent others from accessing the content of a peer-to-peer network – a host.

#### **III. A Safe Harbour with Limits**

The fact that in some instances the liability of intermediary service providers will be limited, does not mean that they cannot be subject to certain obligations in order to prevent abuse. **Member States still have the possibility of imposing injunctions of different kinds** (as was illustrated in the abovementioned ISP versus Pirate Bay example). **These injunctions can consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement.** In particular, this includes the removal of illegal information or the disabling of access to it. Imposing injunctions can affect service providers both direct and indirect.

#### **IV. Future Actions**

In its digital market strategy, the European Commission acknowledged that it can be difficult to define the limits on what intermediaries can do with the content they transmit, store or host before losing the possibility to benefit from the liability exemptions provided by the e-Commerce directive.<sup>6</sup>

Although no concrete regulatory steps have been taken, the Commission has committed itself to launch a comprehensive assessment of the role of intermediary platforms. The assessment is primarily connected to the combatting of illegal content on the market. **One of the main questions that will be tackled is whether online intermediaries should exercise greater responsibility and due diligence in the management of their networks and systems. A public consultation round will likely follow and considering the importance of this topic for start-**

**ups, this should be considered an excellent opportunity to raise important issues!**

## V. Conclusion

The question whether or not a start-up can benefit from the limited liability regime, should be assessed on a case-by-case basis. Until lawmakers update the current legal regime, legal uncertainty will continue to exist. **Therefore, it is recommended for 'intermediary' start-ups to get professional legal counselling with regard to their liability. Start-ups must also take into account that the legal qualification of their services may differ depending on the Member State they are active in. Thus it is advised that start-ups seek legal guidance for each country in which they wish to operate.**

## References

1. Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (E-commerce Directive) [2000] OJ L 178/1.
2. Aleksandra Kuczerawy and Jef Ausloos, 'NoC Online Intermediaries Case Studies Series: European Union and Google Spain' in Urs Gasser and Wolfgang Schulz (eds), *Governance of Online Intermediaries: Observations From a Series of National Case Studies* (Berkman Center for Internet & Society, Research Publication N. 2015-5, 18 February 2015)
3. Commission, 'Online services, including e-commerce, in the single market' (Staff Working Document) SEC (2011) 1641 final
4. DLA Piper, *EU Study on the Legal Analysis of a Single Market for the Information Society: New rules for a new age?* (2009)
5. Belgium: Pirate Bay, Supreme Court confirms lawfulness of generic IP blocking injunctions (25 November 2013)  
<http://blogs.dlapiper.com/mediaandsport/belgium-pirate-bay-supreme-court-confirms-lawfulness-of-generic-ip-blocking-injunctions/>
6. Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 Final  
[http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf)
7.  
<http://www.lexology.com/library/detail.aspx?g=8e8f7e-df-9e6a-42a9-aa08-d01479b8d925>

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