Fundamental Rights and European Intermediary Liability in Copyright

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Current EU Intermediary Liability Framework

Safe Harbours (E-Commerce Directive (2000/31/EC)):

- Article 12: “Mere Conduit”
- Article 13: “Caching”
- Article 14: “Hosting”
Copyright


“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”
Intermediary Liability = Conflict between Fundamental Rights

“The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’). There is, however, nothing whatsoever in the wording of that provision or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected.”

(Scarlet Extended (Case C-70/10))
Fair Balance

*Promusicae* (Case C-275/06):

“the Member States must, when transposing [directives], take care to rely on an interpretation of the directives which allows a *fair balance* to be struck between the various fundamental rights protected by the Community legal order.”
COPYRIGHT (Article 17(2) of the Charter) v.

Freedom to CONDUCT A BUSINESS (Article 16) + Protection of PERSONAL DATA (Article 8) + FREEDOM OF EXPRESSION (Article 11)
Balancing: An Empty Slogan?

“The concept of the ‘fair balance’ is, without further elucidation, vacuous and unhelpful.” (Griffiths)

Reality = the CJEU resorts to ‘fair balance’.

Q: How can we make balancing work?
‘Fair Balance’ in the ECtHR

• *Delfi v Estonia*, app. no. 64569/09, Grand Chamber, 16 June 2015

• *MTE & Index.hu Zrt v Hungary*, app. no. 22947/13, 2 February 2016

• *Pihl v Sweden*, app. No. 74742/14, 7 February 2017

**Article 8 ECHR (right to private life) v. Article 10 ECHR (freedom of expression)**
Balancing Criteria

1. the context of the comments;
2. the measures applied by the intermediary in order to prevent or remove the comments;
3. the liability of the actual authors of the comments as an alternative to the intermediary’s liability; and
4. the consequences of liability for the intermediary;
Balancing Criteria

1. the context of the comments; and their content;
2. the measures applied by the intermediary in order to prevent or remove the comments;
3. the liability of the actual authors of the comments as an alternative to the intermediary’s liability; and
4. the consequences of liability for the intermediary;
5. the consequences of the comments for the injured party.
# CJEU Balancing Case Law

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How to Balance?

1. **Freedom to conduct a business**: the intermediary must be able to **choose the technical means** and **avoid penalties** by showing that it has taken **all reasonable measures**

2. **Freedom of expression**: must not unnecessarily restrict end-users’ ability to **lawfully access information**

3. **Copyright**: must **prevent** access to infringing content or make such access **difficult to achieve and seriously discourage it**
Case C-484/14, *McFadden* (15 September 2016):

1. **Termiate** a wi-fi network

2. **Monitoring** all the information transmitted through that network

3. **Password-protecting** the network = ‘fair balance’!

Opinion of AG Szpunar in Case C-610/15, *Stichting Brein v Ziggo* (8 February 2017):

- **Block access to a peer-to-peer network** = ‘fair balance’!
Art. 51(1) Charter

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”
1. Existing EU law?

   Opinion of AG Szpunar in Case C-610/15, Stichting Brein v Ziggo (8 February 2017)

2. New EU law?
1. Existing EU law?

→ Opinion of AG Szpunar in Case C-610/15, *Stichting Brein v Ziggo* (8 February 2017)

2. New EU law?

→ Art. 13 of new proposal for a Directive on Copyright in the Digital Single Market
Thank you for your attention!