



Centre on Regulation in Europe
Improving network and digital industries regulation

LIABILITY OF ONLINE HOSTING PLATFORMS SHOULD EXCEPTIONALISM END?

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1. The Economist - 11 Feb 2017

Eroding exceptionalism: Internet firms' legal immunity is under threat

Platforms have benefited greatly from special legal and regulatory treatment

**The
Economist**

But giving platforms a free pass is increasingly difficult for regulators and courts: they simply have become too important for the economy and society more generally. Successful online platforms, in other words, carry the seeds of their own regulation.



The Economist – 8 Sept 2018

Should the tech giants be liable for content?

- **Free speech comes in many flavours.** The debate over the platforms is a melange of concerns, from online bullying to political misinformation. These worries demand different responses. The case for holding the tech firms directly responsible for what they carry is clear for illegal content. Content that may be deemed political is far harder to deal with – the risk is both that platforms host material that is beyond pale and take down material that should be aired
- **Make platforms accountable for their procedures:** clarify the criteria applied to restrict content; recruit advisory bodies and user representatives to help ensure that these criteria are applied; give users scope to appeal against decisions. They also need to open their algorithms and data to independent scrutiny, under controlled conditions.
- **Small firms should be treated differently from large ones.** The original rationale of the CDA made sense, but the firms that need protection now are those that seek to challenge the big tech platforms. If rules are drawn up to impose liability on online firms, they ought to contain exemptions for those below a certain size and reach.

The
Economist

2. Economic analysis of liability rules

- From an economic perspective, **liability rules** should aim at **minimising the welfare loss** that results from harmful activities or transactions; market failures may lead to such a welfare loss
- In the context of online intermediaries, some **market failures** may be more pervasive than in offline markets, whereas others may be partly mitigated:
 - Negative externalities may be present
 - Market power may be prevalent
 - Some asymmetric information problems may be resolved by online intermediaries, allowing markets to function that could not be sustained in the pre-Internet era
 - New asymmetric information problems and enforcement problems may arise
 - Some users may not act in their best interest



Efficient liability for online intermediaries

- **Precaution costs:** Which instruments are available to online intermediaries to prevent harm, and at what costs?
 - Who can prevent harm at the lowest cost?
 - ⇒ In some cases intermediaries may have the best information to detect harm or identify injurers, and can remove content or block users
- **Type and extent of the harm:** How serious and how dispersed is the harm?
 - How likely is it that victims are able and willing to detect the harm and enforce their rights?
 - ⇒ If harm is dispersed or victims are vulnerable, they may not be able to prevent the harm
- **Benefits to society of online intermediaries' activities**
 - How significant are monitoring costs for smaller platforms?
 - ⇒ Liability rules should not undermine legitimate (small) businesses

Quality of monitoring by online intermediaries

- Online intermediaries could be **encouraged to take proactive, voluntary measures** to monitor and remove illegal material
 - To foster these incentives, online intermediaries should not be sanctioned for learning about illegal material through voluntary efforts, but failing to take it down (Type II error)
 - ⇒ A clear Good Samaritan clause may need to be introduced
- Liability rules should **discourage online intermediaries from taking down too much content or offers**, including legal material (Type I error)
 - A sanction on systematic Type I errors in monitoring may need to be introduced in order to encourage online intermediaries to improve the quality of their notice-and-takedown systems and further develop detection technology.

Differentiation of liability

Type of content	Harm & available instruments		Duty of care		
	Contracting party or third parties	Online intermediaries	Extent of harm	Dispersion of Harm	Need for duty of care online intermediary
<ul style="list-style-type: none"> Incitement to terrorism Child sexual abuse Illegal hate speech 	Victims; Society ↓ Limited measures	Reputation; Fewer customers/less activity ↓ Remove content	Very high, possibly to health and safety of persons	High	Strong
<ul style="list-style-type: none"> Copyright infringement Other IPRS infringements 	Right holder; Buyer/user (if infringement unintended) ↓ Notify online intermediary	Fewer customers/less activity ↓ Remove content; Block seller/user	Varies, primarily monetary	Low	Moderate (if effective notice-and-takedown system is in place)
<ul style="list-style-type: none"> Illegal commercial practice Infringement of other community standards 	Buyer/user (if infringement unintended) ↓ Notification, consumer law instruments	Reputation; Fewer customers/less activity ↓ Remove content; Block seller/user; Notify public authority	Varies, primarily monetary	Varies	Moderate to strong (need for cooperation with public authorities)

3. Dealing with illegal material is shared responsibility

- Ensuring a safer Internet is a problem of many hands and many rules
 - Many hands: providers, hosting platforms, users, government ...
 - Many rules: liability, consumer protection, product safety, data protection, competition law
 - Rules need to be consistent and provide the right incentives
 - Liability framework should efficiently share responsibility for detection and removal of illegal material among the many hands
 - Alleviate two extremes: no liability – strict liability
- Liability rules of hosting platforms need to be principles-based
 - Can be clarified by the Commission, in delegated act or soft-law
 - Can be complemented with effective co- and self-regulation

Liability of hosting platforms: revolution

- **EU harmonisation of liability** with a negligence-based rule
- EU law defines the duty of care based on
 - Prevention: available instruments and the costs
 - Harm: type and extent
 - Benefits of activities provided by hosting platforms
- But politically and legally difficult
- And, at least currently, not necessary

Liability of hosting platforms: evolution

- Limit **EU harmonisation to liability exemption**
- Link with the provision of an organisational and design infrastructure facilitating detection and removal of illegal content
- Platforms have an obligation to create the conditions that allow individual users to comply with their responsibilities
- Many of the features of this infrastructure have already been clarified by the Commission in the Communication of Sept 2017 and the Recommendation of March 2018

Liability of hosting platforms: evolution

Improving detection of illegal content

- By the platforms
 - Appropriate, proportionate, specific pro-active measures should be encouraged
 - Good Samaritan clause should be affirmed
- By third parties
 - Notice-and-take down should be facilitated and based on EU common principles
- Automated tools should be encouraged with safeguards on
 - Errors minimisation and human in the loop
 - Transparency and accountability
 - Sharing with smaller players

Liability of hosting platforms: evolution

Improving removal of illegal content

- Act expeditiously
 - Esp. when harm can be substantial or arise quickly and/or when notification is made by authorities or flaggers
- Inform content provider and possibility of counter-notice
 - Unless special circumstances
- Out-of-court dispute resolution

Liability of hosting platforms: evolution

Differentiation of care

- Depending on the level of harm and dispersion of victims
- With effective co- or self-regulation
 - Determination of the rules: balanced interests
 - Enforcement of the rules: close monitoring

Type of illegal content	Hard-law	Soft-law	Co/self-regulation
BASELINE All types of illegal content online	- Dir. 2000/31 e-commerce	- Communication 2017 Illegal content online - Rec. 2018/334 Illegal content online	
Child sexual abuse	- Dir. 2011/92 Child sexual abuse		- CEO Coalition (2011) - ICT Coalition for Children Online (2012) - Alliance to Better Protect Minors Online (2017)
Terrorist content	- Dir. 2017/541 Terrorism	- Rec. 2018/334 Illegal content online	- EU Internet Forum
Hate speech	- Dir. AVMS in case of video-sharing platforms		- CoC Illegal hate speech online (2016)
IP violation – copyrighted content	- Prop Dir. Copyright DSM		
IP violation – counterfeit goods			- MoU Counterfeit goods online (2011-2016)



Cooperative responsibility

- From contested liability to cooperative responsibility (Helberger et al. 2018)
- *Involves all stakeholders and can take different forms for each:*
 - *organisational and design responsibility for **platforms**;*
 - *active participation, empowerment, and real responsibility for **users**;*
 - *creating frameworks for shared responsibility and shared values for **governments**, considering platforms and users as partners in regulation rather than as subjects.*