



(Non-)Regulation of online platforms and internet intermediaries

The facts: Context and overview on state of play

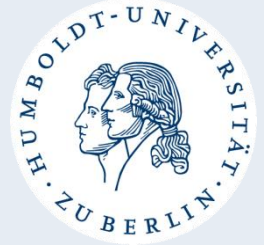
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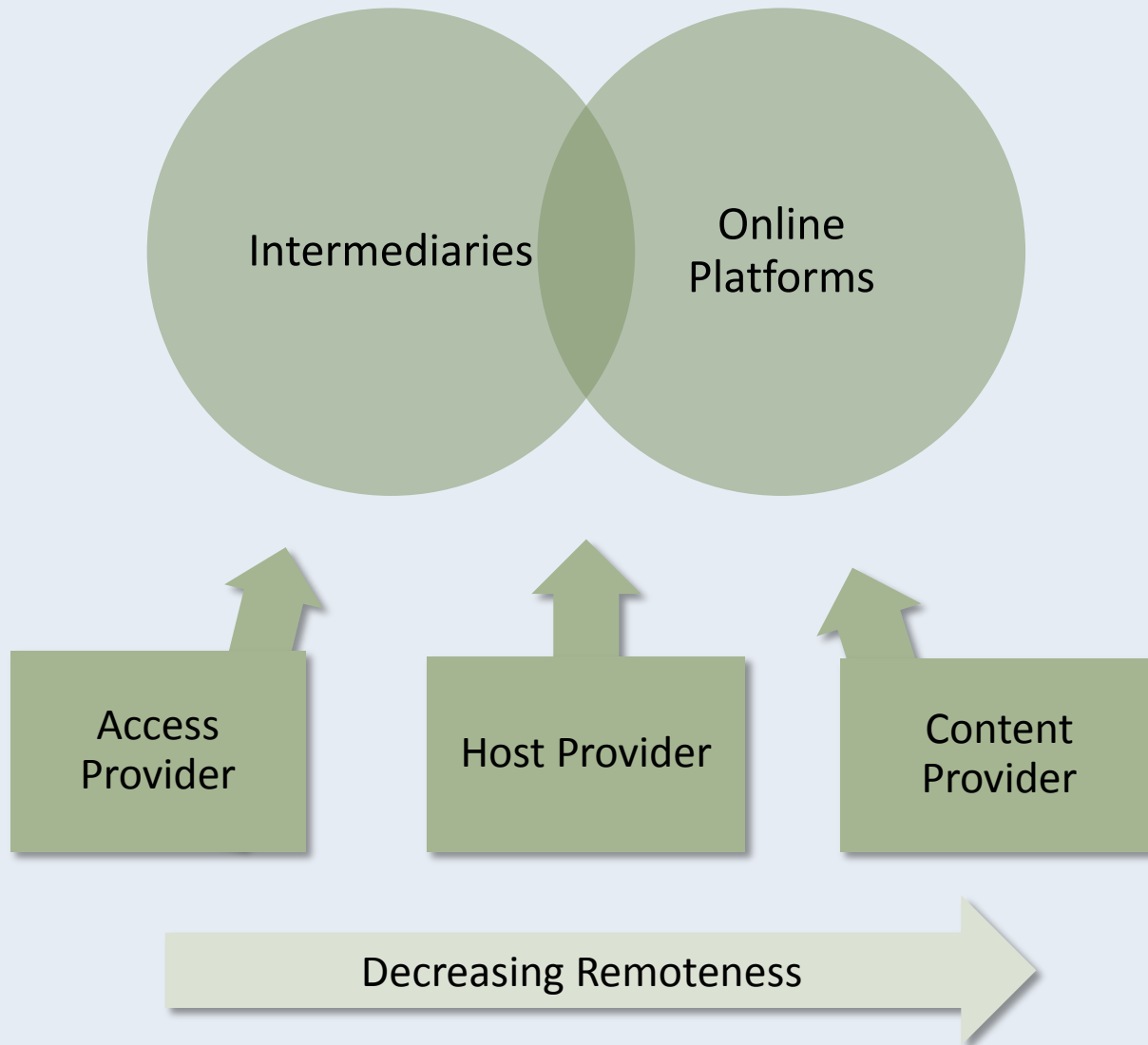
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Outline



- I. Introduction
- II. Terminology
- III. The legislative framework (so far)
- IV. The Practice: Hot Topics and Case Law
- V. Recent EU-Action
- VI. Conclusion

II. Terminology



III. The legislative framework



InfoSoc
Directive

E-Commerce
Directive

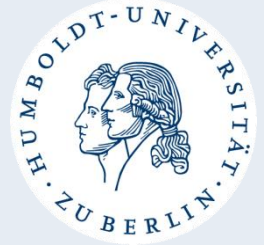
Protection of intellectual
property

Article 8 section 3 :
Injunctions against
intermediaries whose
services are used by a third
party to infringe a copyright

Freedom to conduct a business
and Freedom of information

Articles 12 to 14 :
Liability limitations of
intermediary service
providers

IV. The Practice



1. Access Providers

Article 12 E-Commerce Directive "Mere conduit"

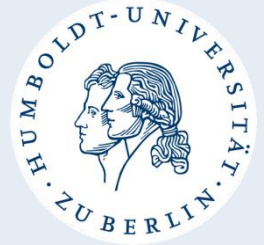
1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

[...]

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

IV. The Practice



1. Access Providers

Case Law

ECJ in
McFadden
(C-484/14)

Scope of
application of Art.
12 E-Commerce

Scope of duties:
Password
Protection

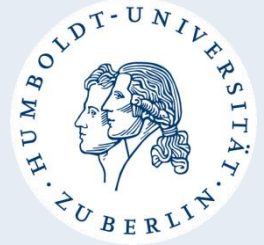
ECJ in
UPC Telekabel
(C-314/12)

Scope of
application of Art.
8 InfoSoc

Scope of duties:
Blocking

IV. The Practice

2. Host Providers



Article 14 E-Commerce Directive Hosting

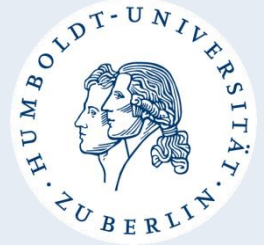
1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider 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; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

IV. The Practice

2. Host Providers



Case Law

BGH in
Alone in the Dark
(I ZR 18/11)

Scope of duties:
Filtering

ECJ in
L'Oréal/eBay
(C-324/09)

Scope of
application:
Active Role

OLG Hamburg in
GEMA vs. Youtube
(5 U 87/12)

Scope of
application :
Active Role of
Video Platforms

Scope of duties:
Filtering

IV. The Practice

2. Host Providers



Exploitation of user-generated content

Commission Impact Assessment on the modernisation of EU copyright rules, SWD(2016) 301 final:

The CJEU has not addressed the specific case of online services giving access to content uploaded by their users. With some exceptions, national case law is not very clear either as to who engages into an act of communication to the public when content is uploaded on a sharing website.

IV. The Practice



3. Search Engines, Aggregators and Hyperlinking

Case Law

Hyperlinking

ECJ in
*Svensson and
BestWater*

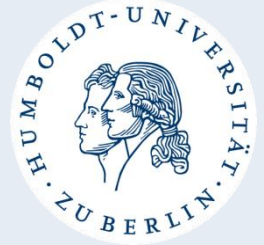
ECJ in
GS Media

Aggregators

BGH in
Vorschaubilder

ECJ in
Infopaq

V. Recent EU-Action



Proposal for Directive on copyright

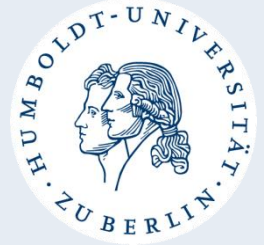
Article 10 Negotiation mechanism

Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial

(38) Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

V. Recent EU-Action



Proposal for Directive on copyright

Article 13

Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

[...]

VI. Conclusion

