



Intermediary Liability in Europe The Electronic-Commerce Directive

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Legal History

- Intermediary liability system of the E-Commerce Directive (“ECD”) is based on the first German law dealing with Information and Communication Services.
- German law came into force on August 1st 1997.
- Part of German law was a new liability system for Intermediaries with three cornerstones:
 1. **No obligation for monitoring information or data that are conducted or hosted.**
 2. **No liability for the the pure passing or conducting of information (Access Provider).**
 3. **Limited liability for hosting / storage of third party content (Hosting Provider)**

E-Commerce Directive

- ECD (“Directive 2000/31/EC”) came into force on June 8th 2000.
- Intermediary Liability System as a core part:

Art. 12 – “Mere Conduit”

ISP is not liable for the information transmitted.

Art. 13 – “Caching”

ISP is not liable for automatic and temporary storage of information.

Art. 14 – “Hosting”

ISP is not liable for information stored at a request of a recipient.

Art. 15 – “No general obligation to monitor”

Intermediary Liability System

Part A:

Art. 14 – Hosting

1. “Actual Knowledge”
2. “Expediently”
3. “Notice and take down”

Part B:

Filtering Measures and the “Scarlet-Sabam Case” of the European Court of Justice

Part C:

Digital Single Market Strategy of the European Commission

Part A: Art. 14 - Hosting

1. “Actual Knowledge”

- No liability for a Hosting Provider

„(...) 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;(...)*“

- Rational and arising questions.

Part A: Art. 14 - Hosting

2. “Expediently”

- No liability for a Hosting Provider

„(...) on condition that:

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

- Rational and arising questions.

Part A: Art. 14 - Hosting

3. Notice and take-down

- Diverging approaches have been adopted across EU member states, basically three categories:
 - Formal, official notification by a competent authority;
 - Simple notification determining actual knowledge; burden of proving illegality stays with the ISP;
 - Statutory requirements.

Part B

1. Filtering Measures

- Political aspects
- Technical aspects
- General aspects

Part B

2. The “Scarlet-Sabam” Case

- Background
- Technical aspects
- Legal aspects

Part C

“Digital Single Market Strategy” of European Commission

- Three Pillars of the Strategy
- Liability related aspects
- Scenarios for the future of Intermediary Liability in Europe

Thank you for your attention!

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