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Panel Session X: The middleman – intermediary liability

Monday, October 16 2017

16:00-17:30

- Agris Bitāns, Eversheds Sutherland Bitāns (Moderator)

- Remy Chavannes, Brinkhof
- Marketa Trimble, University of Nevada
- Justice John Nicholas, Federal Court of Australia
- Martin Hosking, Redbubble

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Introduction

Remy Chavannes

Basic question

How should the responsibilities, risks and costs of preventing and tackling IP infringement be divided, especially between rightholders and intermediaries?

Drilling down

1. **What is an intermediary?**
2. **What kinds of responsibilities should intermediaries assume, and under what circumstances & conditions?**

Broader context

- **Broader debate on tackling objectionable content online: pressure on intermediaries to "do more" about fake news, hate speech, terrorist incitement, child pornography, defamation, breach of privacy, political criticism**
- **Competing public interests and fundamental rights: protection of IP rights, freedom of expression, privacy**

1. What is an intermediary?

It depends on whom you ask

- **Engineer: online intermediaries offering physical-layer, network-layer and application-layer services?**

Network layer	Application layer
Access providers Mobile network operators Hosting service providers IP and domain name registries	Platforms Social networks Cloud storage services Search engines Gaming platforms Online marketplaces Transaction networks

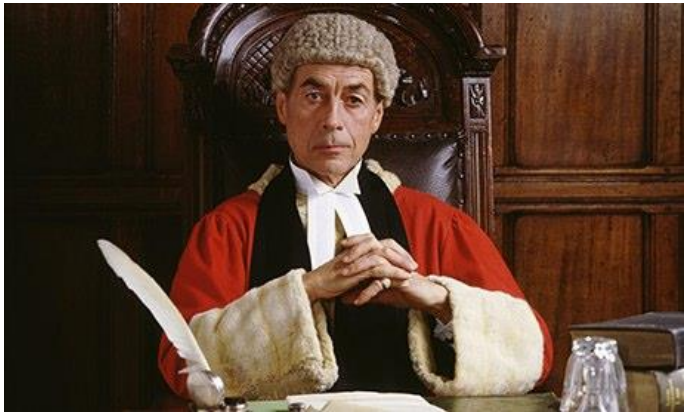
- **Plus offline intermediaries such as postal services, carriers, banks, utilities, physical marketplaces etc.?**

It depends on whom you ask

- **Economist: anyone or anything that helps connect the original provider of any product or service to its ultimate recipient?**
- **Information scientist: Any service provider between the origin and the destination of information, so everyone in the content chain except the creator and the consumer?**
- **OECD: "Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties."**

It depends on why you're asking

- **Courts: providers offering access good content are neutral intermediaries deserving protection, those harboring bad content deserve an injunction.**
- **Rightholder: an intermediary is anyone that can potentially help me to prevent or prosecute IP infringement.**



2. What kinds of responsibility?

To what extent can online intermediaries be forced to:

- **Assume *financial liability* for their users' objectionable behaviour, e.g. for content created, hosted, transmitted, paid for etc. using their service?**
- ***Remove* or *block* objectionable content (providers)?**
- ***Prevent* re-publication of removed content?**
- ***Identify* users who have posted objectionable content?**
- ***Disrupt* the business model of bad actors?**
- ***Protect* existing business models from economic disruption and changing consumption patterns?**

Basic approach

- **Basic approach in many jurisdictions: safe harbour for passive intermediaries + notice & takedown + duties of care**
- **Differences in scope (horizontal or copyright-only), enforcement (damages or injunctions), and specific measures**
- **Basic "grand bargain" is being contested rightholders who believe intermediaries must do more to prevent infringement & help enforce IP rights**
  - **Primary liability for infringing content stored or transmitted?**
  - **Obligation to monitor or filter at point of transmission or storage?**

Further issues

- **Who has the right / the duty to determine that certain content is infringing? Intermediary, rightholder or court?**
- **Which national courts should decide, according to which norms and to what (territorial) extent? Can a national court order global removal of content judged to infringe?**
- **Automation, transparency and redress re. content removal**
- **What is the optimal balance between overblocking and underblocking, and how can internet users exert influence?**

United States

Marketa Trimble

United States

(1) Upcoming 20th Anniversary of the DMCA

(2) Division of Responsibilities

(3) Scope of Remedies

Marketa Trimble

(1) Upcoming 20th Anniversary of the DMCA

Digital Millennium Copyright Act

Online Copyright Infringement Liability Limitation Act

17 U.S.C. §512

- **Regulates ISP liability for copyright infringement**
  - **Both direct and secondary liability**
  - **Both federal and state law on copyright**
- **Provides a safe harbor for ISPs who fulfill §512 requirements**
- **Establishes a notice and takedown procedure**

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(1) Upcoming 20th Anniversary of the DMCA

Impact of the DMCA since 1998

- **E.g., Google has received takedown notices for almost 3 billion URLs**

  Transparency Report, Google, https://transparencyreport.google.com/copyright/overview, Oct. 6, 2017

- **Since Jan. 1, 2000, more than 1,000 cases have been filed in U.S. federal district courts involving §512**

  Based on a search of LexMachina, https://law.lexmachina.com/, Oct. 6, 2017

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(1) Upcoming 20th Anniversary of the DMCA

Information about the Functioning of the DMCA

- Since 2002, "Chilling Effects"/"Lumen" database
- Since 2011, Google's "Transparency Report"
- J. Urban et al., *Notice and Takedown in Everyday Practice*, v. 2, March 2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628
- U.S. Copyright Office's "Section 512 Study" https://www.copyright.gov/policy/section512/

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(1) Upcoming 20th Anniversary of the DMCA

Changing Nature of the Internet since 1998

- 1998: 2.4 million websites; 188 million Internet users
- 2015: 836 million websites; 3 billion Internet users

(Internet Live Stats, http://www.internetlivestats.com/total-number-of-websites/, Oct. 6, 2017)

- E.g., Google launched in 1998, BitTorrent in 2001, Facebook in 2004, YouTube in 2005, Twitter in 2006, Snapchat in 2011, Periscope in 2015

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(1) Upcoming 20th Anniversary of the DMCA

Changing Perceptions of the DMCA since 1998

- **From "Chilling Effects" to "Lumen"**

  "Lumen, the measurement unit for visible light, epitomizes our interest in illuminating the online public sphere and the platforms through which all users of the Internet post, search, speak, and read."

(*Chilling Effects Announces New Name, International Partnerships*, https://www.lumendatabase.org/blog_entries/763, Nov. 2, 2015)

(2) Division of Responsibilities

- **Responsibility for policing (detection of infringements)**
  - **Copyright owner v. ISP**
- **Responsibility for safeguarding free speech (adequate restraint in enforcement)**
  - **User v. copyright owner**

(2) Division of Responsibilities

Responsibility for policing

- **Congress intended for ISPs and copyright owners to share responsibility for detection of infringements**
- **ISPs' development of detection tools v. need to avoid actual or red flag knowledge**
- **The need to create incentives for technological development in detection while maintaining a safe harbor for ISPs**

- **Viacom v. YouTube, 676 F.3d 19 (2d Cir. 2012), UMG Recordings v. Shelter Capital, 718 F.3d 1006 (9th Cir. 2013)** (interpreting "right and ability to control")
- **Capitol Records v. Vimeo, 826 F.3d 78 (2d Cir. 2016), EMI Christian Music Group, Inc. v. MP3Tunes, LLC, 844 F.3d 79 (2d Cir. 2016)** (interpreting "red flag knowledge")

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(2) Division of Responsibilities

Responsibility for safeguarding free speech

- A shifting role for the fair use defense – from a defense to a right
- Lenz v. Universal, 815 F.3d 1145 (9th Cir. 2015, amended 2016)

- §512 requirements v. access to the Internet as a free speech issue
- BMG Rights Management (US) LLC v. Cox Communications, Inc. (4th Cir. 2017)

(3) Scope of Remedies

- **No instrument for ISP liability across national borders**
- **Regular conflict-of-laws rules should apply**

- **Google Inc. *v.* Equustek Solutions Inc., 2017 SCC 34 (Supreme Court of Canada); Google v. Equustek, N.D.CA Case 5:17-cv-04207-NC, complaint filed on July 24, 2017**

(3) Scope of Remedies

- The role of geoblocking
- Data requests and the “location of the server” theory

- The Hague Conference Judgments Project

Australia

Justice John Nicholas
Federal Court of Australia

THE COPYRIGHT ACT 1968 (C'TH)

The communication right under Australian copyright law

- The exclusive right to communicate copyright content to the public within or outside Australia by making such content available online or electronically transmitting it.
- A communication is taken to have been made by the person responsible for determining the content of the communication.
- The communication right is not directly infringed by passive content hosts that are not responsible for determining the content of the communication.
- But a passive content host may be liable if it authorises another person's infringing acts.

Liability for authorisation under Australian copyright law

The concept of authorisation

- Early case law explored the concept in the context of performance rights (eg. live music venues) and reproduction technologies (eg. photocopiers, video recorders).
- Authorisation is not confined to the granting or purported granting of authority or permission to perform a relevant act.
- A person authorises a relevant act if the person "sanctions, approves or countenances" it.
- A person's inaction or indifference may reach a point at which authorisation may be inferred if he or she has power to prevent the relevant act but fails to take reasonable steps to do so.

Partial Codification

- The case law with respect to authorisation has been partially codified so as to require a consideration of various factors when deciding whether a person has authorised a relevant act. (ss 36(1A) and 101(1A))
- These factors include:
  - the extent (if any) of the person's power to prevent the doing of the relevant act;
  - the nature of any relationship existing between that person and the person who did the relevant act;
  - whether the person took any other reasonable steps to prevent or avoid the doing of the relevant act, including whether the person complied with any relevant industry code of practice.
- There are no relevant industry codes of practice.

The "mere" facilitation of a communication

- A person who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright merely because another person uses the facilities to infringe the copyright. (ss 39B and 112E)

- The key word here is *merely* - facilitating the making of a communication that the person knows will constitute an infringement may still amount to authorisation.

Case Law

- *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, (2006) 156 FCR 380 *(*carriage service provider liable for authorisation)

- *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, (2005) 222 FCR 465 (operator of Kazaa peer to peer file sharing service liable for authorisation)

- *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16, (2012) 248 CLR 42 (carriage service provider not liable for authorisation)

Safe harbours for service providers

- Existing statutory provisions limit the remedies available against carriage service providers complying with relevant conditions.
- The definition of carriage service provider:
  - covers telecommunication and internet service providers providing access to their telecommunications infrastructure;
  - does not cover many other service providers (search engines, social media platforms, online market places, etc).
- Other service providers are exposed to full range of remedies in the event they infringe copyright or authorise another person's infringement.
- The Australian Government is considering whether to extend safe harbour protection to other service providers.

Site Blocking

- New statutory provision (s 115A)
  - Provides for standalone injunction which operates as a no fault remedy against a carriage service provider.
  - Allows for “blocking orders” in relation to any “online location” situated outside Australia that has as its primary purpose copyright infringement or the facilitation of copyright infringement.
  - The term “online location” is not defined.
  - Includes non-exhaustive list of discretionary considerations governing exercise of discretion to grant an injunction against a carriage service provider.
  - The injunction requires the carriage service provider to take reasonable steps to disable access to the online location.

Case Law

- Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016] FCA 1503, (2016) 343 ALR 428 (Federal Court of Australia)
- X v Twitter Inc [2017] NSWSC 1300 (Supreme Court of New South Wales)
- Google Inc v Equustek Solutions Inc 2017 SCC 34 (Supreme Court of Canada)

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Europe

Remy Chavannes

High-level overview

- **Ongoing EU legislative process to update copyright directive to address infringing content on internet platforms**
- **Ongoing "dialogue" between CJEU and national courts on the interpretation of existing rules on intermediary liability, copyright, and IP enforcement**
  - **E-commerce directive (2000/31/EC)**
  - **InfoSoc directive (2001/29/EC)**
  - **IPR Enforcement directive (2004/48/EC)**
- **Through extensive interpretation of concept of 'communication to the public', CJEU is engaged in *de facto* harmonisation of secondary liability in copyright law**

CJEU approach to IP enforcement

- **InfoSoc & IPRED prescribe a high level of protection to rightholders, but also a balance between rights of rightholders and users**
- **IP is a fundamental right, but one of many**
- **All fundamental rights deserve equal respect; where they collide, national legislators & courts must achieve "fair balance"**
- **"Fair balance" in IP enforcement can be found at 3 stages: scope of exclusive rights, scope of exceptions & limitations, and extent/method of enforcement (external balancing)**

1. What is an intermediary?

- **CJEU Tommy Hilfiger / Delta Center (C-494/15): for an economic operator to be an 'intermediary' within the meaning of IPRED, it must be established that it provides a service capable of being used by one or more other persons in order to infringe one or more intellectual property rights. It is not necessary that it maintain a specific relationship with that or those persons.**
- **A tenant of market halls who sublets to market-traders selling counterfeit goods is "an intermediary whose services are being used to infringe" within meaning of IPRED**

More than just intermediaries

- **Sanoma / GS Media (C-160/15): knowingly hyperlinking to freely available infringing content is direct infringement**
- **Brein / Wullems (C-527/15): sale of video player boxes preloaded with links to pirated streams is direct infringement**
- **Brein / Ziggo (C-610/15) on website blocking by access providers: Pirate Bay is direct infringer (and viewing of pirated streams is unauthorized reproduction)**

2. What kinds of responsibility?

- **Article 11(3) IPRED: rightholder can apply for injunction against intermediary whose services are being used to infringe IP rights**
- **L'Oréal/eBay (C-324/09)**
  - **Injunctions must be effective and dissuasive, equitable and proportionate. They must not therefore be excessively expensive and must not create barriers to legitimate trade**
  - **Intermediary cannot be required to exercise general and permanent oversight over its customers, but may be forced to take measures which contribute to avoiding new infringements of the same nature by the same market-trader from taking place**

Offline = online?

- **Tommy Hilfiger / Delta Center (C-494/15): 'offline' intermediary subject to the same injunctions as online intermediaries**
- **But in the online context, E-commerce directive also applies, which includes specific rules not applicable in offline context, including prohibition on general monitoring & obligation for commercial communications to identify responsible trader**

Copyright = trademark?

- **Hilfiger case is about trademark infringement. Concept of "intermediary" may be narrower in copyright law: InfoSoc directive appears to relate only to online intermediaries ("who carry a third party's infringement in a network")**
- **Article 8(3) InfoSoc allows rightholder to obtain injunction to cease provision of the service being used to infringe, which is narrower than IPRED**

Blocking and filtering

- **Scarlet / Sabam (C-70/10): an order to filter infringing content is out of the question, because it breaches privacy, freedom of expression and freedom of enterprise rights.**
- **UPC Telekabel Wien (C-314/12): an order to block users' access to infringing services is potentially permissible, even if it isn't 100% effective, but requires safeguards for the interests of users and intermediaries**

Open wifi networks

- **McFadden (C-484/14): provider of open wifi network can invoke safe harbour for mere conduit**
- **Provider cannot be forced to monitor all traffic, or to shut down wifi network to prevent infringing use**
- **But something must be done, so third option must be the right one: password protecting wifi network**
- **For proper dissuasive effect, only give password to identified users.**
- **No clarity on type of password protection, or on storage and provision of customer data**

DSM proposal

- **Pending DSM copyright proposal (COM 2016 593) requires "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" to take appropriate and proportionate measures, including based on content recognition technology, to ensure functioning of agreements with rightholders for use of works & prevention of piracy**
  - **Which intermediaries does this concern?**
  - **Do these intermediaries need agreements with rightholders?**
  - **Are content filters are now permissible, even obligatory?**
  - **How does this relate to E-commerce directive?**

Horses for courses?

- **Angelopoulos/Smet in JML: replace ECD's horizontal approach with vertical scheme, with different standards for different types of questionable content:**
  - **Notice-and-notice for copyright infringement**
  - **Notice-wait-and-takedown for defamation**
  - **Notice-and-takedown & notice-and-suspension for hate**
  - **Notice-and-judicial-takedown as horizontal last resort**
- **Intermediaries need to manage technical and commercial risk, preferably at scale. Legal complexity, over-calibration & uncertainty lead to over-blocking. Predictable, equitable outcomes is key test**

Business Insight

Martin Hosking

UGC AND IPR

ABOUT REDBUBBLE:

- **Three sided marketplace founded in 2006**
- **Artist is the seller**
- **$200M in annual sales**
- **Largest global Australian consumer, internet Company.**
- **11MM+ images and 600,000+ artists**
- **1000s of new images and artists per day**
- **63% of sales in the US, 30% in Europe**
- **Operates under the DMCA and equivalent European provisions**

UGC AND IPR

- **The IP framework in Australia is out-dated and does not deal with the reality of UGC**
- **Thus the Australian Productivity Commission and ALRC have recommended it be update and adoption of Safe Harbours for Service Providers**
- **The consequence is frivolous and expensive litigation is encouraged and Business operations are compromised,**
- **Contributors and consumers are disadvantaged**
- **Government has in principle accepted this but draft laws were not put through last year**

INDUSTRY REQUIRES

- **A stable set of laws that are compatible with best jurisdictions. This to balance the rights of rights holders, UGC platforms, contributors and consumers via:**
  1. **Clear take-down requirements**
  2. **Clear repeat infringer requirements**
  3. **An expectation of continued improvement**
- **Such a system is in the interest of all parties:**
  - **Allows artists and contributors to gain distribution**
  - **Provides them a mechanism for easy redress**
  - **Provides consumers with access to UGC**
  - **Enables innovative companies to remain in Australia**
  - **Encourages the platforms to invest and innovate**

Questions

Conclusions

Thanks for your attention!