Position Statement of the International Center for Law & Economics

Case Id: 87923cf7-6b3d-487c-b945-0a1fc4004811

In the Matter of:

The European Union Consultation Regarding the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

International Center for Law and Economics
Geoffrey A. Manne, Executive Director
R. Ben Sperry, Associate Director
Kristian Stout, Associate Director for Innovation Policy[1]

January 6, 2015

The Digital Single Market Strategy ("DSMS") initiative represents a unique opportunity to unify regulation across the EU's member states around policies that promote transparency, stability, free trade, innovation and global economic growth. As the Commission undertakes to integrate the digital economy into the EU's single market strategy, however, care should be taken to assure that the principles driving the explosive growth of the Internet are encouraged and not suppressed.

As companies contemplate new business models, new content distribution services, new uses for data and new opportunities for valuable data exchange, it is important that regulation not create a legal environment in which valuable products are inefficiently delayed, degraded or abandoned. Effective and efficient policies flow

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[1] Geoffrey A. Manne is the founder and Executive Director of the nonprofit, nonpartisan International Center for Law and Economics (ICLE), based in Portland, Oregon. He can be reached at gmanne@laweconcenter.org. Ben Sperry can be reached at bsperry@laweconcenter.org and Kristian Stout can be reached at kstout@laweconcenter.org.

from basic, well-established economic and legal principles that maximize welfare by, among other things, minimizing error costs, promoting innovation, encouraging voluntary and self-help remedies, prioritizing self-regulation, minimizing institutional and bureaucratic costs, and capitalizing on the incentives and informational advantages of market participants.

By "tuning" the cross-border regulations that can impede efficient markets, for example by examining where specific legislation doesn't work (e.g. data localization) and where it can (e.g. geo-blocking), the DSMS can function as a sort of "digital free trade agreement" among the EU member states. In this regard the DSMS offers the possibility of important welfare-enhancing regulation; free trade has consistently been found to be beneficial for consumers around the globe.[2]

It is critical, however, that the DSMS is not used to enforce a "lowest common denominator" regulatory scheme, employed to shoehorn innovative and valuable business models into a framework that curtails experimentation and competitive differentiation. The platform portion of the inquiry, in particular, would rely upon such a broad definition that many entities not previously subject to certain regulations may struggle under the weight of compliance. This could be particularly costly for new entrants without the resources to interpret and adapt to confusing issues of liability and perceptions of harm.

Similarly, by potentially imposing higher costs for maintaining networks with, among other things, user-generated content, the contemplated intermediary liability rules could have the undesirable effect of favoring only the largest and most established companies that can afford to comply with the liability provisions.

The Commission has noted the importance of flexibility in the digital economy:

> New business models are emerging: scaling up or down, digital solutions have never been easier with marginal costs close to zero.[3]

But it is crucial to remember that there are costs other than those purely endogenous to a particular firm: The costs of regulation, even when

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[2] *See, e.g.*, N. Gregory Mankiw, *Economists Actually Agree on This: The Wisdom of Free Trade*, New York Times (Apr. 24, 2015), *available at* http://www.nytimes.com/2015/04/26/upshot/economists-actually-agree-on-this-point-the-wisdom-of-free-trade.html.

[3] Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A *Digital Single Market Strategy for Europe - Analysis and Evidence [hereinafter* Commission Staff Analysis] *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015SC0100#footnoteref5.

well-intentioned, can impose a set of constraints on businesses that force less than optimal decisions. To wit, the Commission has also observed that:

> [A] Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can ***seamlessly*** access and exercise online activities under conditions of ***fair competition***, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.[4] (emphasis added).

The ambiguity of this passage – however well intentioned – could signal an environment in which innovation is chilled by uncertainty, as entrepreneurs become overly cautious of running afoul of poorly defined or overly ambitious *ex ante* rules. Whether "fair competition" has any useful meaning or not, "seamless" and "fair" may be interpreted to foreclose activities that differ between jurisdictions, even where those differences are driven by differing economic conditions, demand, demographics, or levels of innovation. Foreclosing these (among other things) for the sake of a reflexive adherence to cross-border "equality" will sacrifice consumer welfare with little countervailing benefit.

And, on the opposite side of this coin, there are certainly cases where pure adherence to uniform laws across all member countries do not make sense. For instance, the geo-blocking practices of rightsholders – though perhaps hard for individual consumers to appreciate – enable a wide range of IPR-based business models to flourish.[5] Thus, the examination of a platform necessarily must be empirically driven.

Any rules that result from this Consultation must be grounded in cost-benefit analysis and concrete and identifiable harms. As constructed, the questionnaire used to request input seems better-suited for collecting competitor complaints than for obtaining the evidence required for rigorous economic analysis. Under an error cost framework, socially optimal rules are those that minimize the expected social costs of false acquittals, false convictions, and administration.[6] Typically this means competition authorities engage in case-by-case analysis of potentially

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[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Single Market Strategy for Europe [*hereinafter* DSM Communication] *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192.

[5] For instance, a start-up distributor operating in a geo-blocking regime can purchase only the content relevant to her distribution area. This allows for more tailored content packages, and avoids the costs associated with purchasing much larger bundles of content.

[6] *See, e.g.*, Thomas A. Lambert & Joshua D. Wright, *Antitrust (Over-?) Confidence*, 20 Loy. Consumer L. Rev. 219, 225 (2008).

anticompetitive conduct — comparing the expected costs to consumer welfare with prospective efficiencies. Conduct is condemned on a *per se* basis – *ex ante* – only if there is long-standing experience and economic evidence that the conduct is always or almost always harmful.

The Commission has no such basis to assume that the issues presented by platforms, intermediary liability, geo-blocking, and the like are really best served by new *ex ante* rules without evidence about perspective harms and potential benefits from concrete conduct.

Importantly, the decision with respect to a new regulatory regime for online platforms is not made in a vacuum; rather, it is a choice between *existing* rules and the proposed alternatives. Justifying new rules demands a comparison to existing rules, meaning rigorous evidence not only that there is a problem, but also that any problems will be better addressed by new rules than current rules. No regulatory regime is perfect. Even if there are some identifiable problems with the current rules, that alone does not mean that any particular proposed new rules are preferable. The Commission should carefully consider existing law (like competition and consumer protection laws at both the EU and member-state levels) and whether new rules will bring the overall regulatory scheme closer to the optimal level.

Platforms

The Commission has endeavored to create a fixed legal definition for "online platforms":

> "Online platform" refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.[7]

This definition may be technically accurate, but it is both under- and over-inclusive in deeply problematic ways.

There is nothing truly exceptional about businesses that operate over the Internet that warrants special scrutiny. The Commission is correct that a platform or multi-sided market is a business model characterized by a firm facilitating connections between two or more distinct types of users. But regardless of whether a platform operates online or offline, the essential function is to connect

[7] European Commission Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy [*hereinafter* Consultation or DSM Consultation] *available at* https://ec.europa.eu/eusurvey/runner/Platforms.

its different groups of users (for instance, buyers with sellers); there is nothing fundamentally distinct about the "platform" business model operating online, and thus nothing fundamentally distinct about the regulation appropriate for online as opposed to offline entities.

Of course, while there is nothing unique about an online platform, there are unique characteristics of firms that operate online – where the focus is on the locus of activity, not the nature of the firm. But there is existing regulation that targets the online activities of firms under the E-Commerce Directive ("ECD"), the InterSoc Directive, and the Data Protection Directive, among others. The proper question then, is not whether there needs to be a redefinition of the nature of a particular business because of a particular medium that it uses (the Internet), but whether existing regulation is not serving the ends for which it was designed. This is an entirely different question, and one that is properly addressed by reviewing the relevant legislation – not by introducing widespread uncertainty through the introduction of an arbitrary distinction between businesses that do or do not use the Internet to facilitate a multi-sided market.

Such a redefinition could lead to expansive regulatory power over a wide range of businesses, an effective mandate to micromanage, and an impulse to simplify rulemaking by overgeneralizing. The actual regulations affecting individual companies or whole industries could be completely inappropriate and require further tailoring that, in turn, would lead to further ambiguity regarding compliance and liability risk.[8]

"Platform" and "multi-sided market" are such broad terms, applicable to such an enormous and varied array of businesses, that the effort to unify their regulation in any coherent fashion must be futile – or else woefully inefficient. While platforms, like any businesses, can be regulated by *ex post* rules of general applicability rooted in findings of actual harm (like TFEU articles 101 and 102), establishing appropriate, workable and efficient *ex ante* rules to govern the organization and business models of such varied firms is likely impossible.[9]

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[8] The German Monopolkommission recently recognized the complex nature of regulating online platforms: "[P]latforms generally display a number of characteristics which have important implications for the actions of companies, competition and, hence, for competition policy. Effective and adequate economic analysis is complex. Conventional methods, considerations and correlations do not suffice in the analysis of online platforms[.]" *Competition policy: The challenge of digital markets*, *Special Report* No 68, Monopolkommission 3 (2015) [*hereinafter* Monopolkommission Report] available at http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.

[9] Of course, some *ex ante* rules, particularly applied to limit the allowable regulations imposed by member states, are feasible. *Per se* antitrust liability for cartel activity and rules limiting the imposition of data localization requirements, for example, are appropriate and feasible – although in no way necessarily limited to the digital economy or to online "platforms."

While we don't subscribe to the view that the EU's DSMS is *intended* to be protectionist, it is difficult to escape the conclusion that what unifies the businesses categorized as "platforms" in the Consultation is that they are predominantly US firms (and certain EU challengers to dominant US competitors). The Commission has proffered the following examples of platforms:

> Typical examples include general internet search engines (e.g. **Google**, **Bing**), specialised search tools (e.g. **Google Shopping**, Kelkoo, Twenga, **Google Local**, **TripAdvisor**, **Yelp**), location-based business directories or some maps (e.g. **Google** or **Bing Maps**), news aggregators (e.g. **Google News**), online market places (e.g. **Amazon**, **eBay**, Allegro, **Booking.com**), audio-visual and music platforms (e.g. Deezer, Spotify, **Netflix**, Canal play, **Apple TV**), video sharing platforms (e.g. **YouTube**, Dailymotion), payment systems (e.g. **PayPal**, **Apple Pay**), social networks (e.g. **Facebook**, **Linkedin**, **Twitter**, Tuenti), app stores (e.g. **Apple App Store**, **Google Play**) or collaborative economy platforms (e.g. **AirBnB**, **Uber**, **Taskrabbit**, Bla-bla car). (Emphasis added to identify US firms).[10]

The similarities between, say, Google Shopping, Netflix, PayPal, and AirBnB are largely superficial, and limited to the fact that each is a multi-sided market operating online. But these similarities are far less relevant to appropriate regulatory treatment than are the differences between them. Google Shopping, for example, is largely an advertising platform, subject (among other things) to member-state advertising regulations which are driven in significant part by each member's particular cultural priorities and demographics. Netflix, on the other hand, offers no advertising. While Netflix sells subscriptions to users, Google Shopping does not. Each stands in a decidedly different position with respect to its end-users and input suppliers, and each operates in a distinct economic sphere, characterized by enormously different competitive dynamics.

The use of data in each firm presents another inflection point in this analysis. Data are obviously crucial to nearly every firm.[11] While all the firms surely have extensive uses for data, the manner in which they employ data varies widely. For instance, firms like Google use data and analytics to improve their search algorithm and maximize the value of targeted advertising, while Netflix uses data and analytics to suggest content users may enjoy. At the same time, health monitoring companies and other online healthcare industry platforms use aggregated, anonymized data to evaluate medical devices and to dramatically improve healthcare outcomes; learning platforms use data to improve pedagogy and bring high-quality

[10] DSM Consultation, *supra*, note 6.

[11] Monopolkommission Report, supra note 7, at 27.

educational opportunities to underserved populations. Soon, connected car technologies will use data to offer consumers a wealth of benefits, from optimizing safety and efficiency, managing performance and navigation, lowering costs on fuel and insurance, providing instant upgrades, to enabling environmentally-friendly advancements.

How companies use data, whether such uses are harmful or helpful to consumers, whether constraining data collection and use will merely make it harder to find good movies online or will prevent life-saving medical advances, and whether data creates a barrier to entry for competitors are all important questions, relevant to both competition and consumer protection analysis.[12] But the implications and effects of data regulation vary so considerably and in such important ways that treating all online platforms as though their data uses are essentially equivalent will have markedly deleterious consequences.

At the same time, offline firms have been collecting and using data for decades. Large retailers undoubtedly possess more consumer data than the vast majority of online platforms; banks and hospitals collect and use more sensitive data that almost every online platform. While these facts surely support continued consideration of the EU's broadly applicable data security and privacy laws, they also undermine the notion that online platforms present exceptional circumstances meriting exceptional regulation.

Furthermore, in § 4.5 of the Commission Staff's Analysis Working Document ("Staff Analysis"),[13] potential platforms are also "operating systems," "e-commerce platforms," and "content platforms, which may include… software/hardware solutions." Although, in terms of academic economics, a platform is a multi-sided market that "enable[s] interactions between two or more distinct but interdependent groups of users," the Staff Analysis reveals a certain malleability in that term when "online" is used as a modifier. While perhaps it may be logically correct to call an operating system like iOS a "multi-sided market" in certain circumstances, it would *not* be reasonable to expand the definition so broadly that Apple (iOS) and Google (Android) are caught up in the same regulatory net as eBay because they all happen to have something to do with the Internet. Again – the differences between an operating system and an online retailer like eBay are far more significant than the similarities.

[12] On the other hand, one of the ways in which the firms use of data *is* consistent has to do with the widely distributed nature of the use. Thus, one of the rules of general applicability that would be well-applied here would remove data localization rules to the extent that they inhibit the ability of firms to operate efficiently throughout Europe.

[13] Staff Analysis, *supra* note 2 at n. 5.

At the same time, when discussing "e-commerce platforms" and "content platforms" the self-referential use of the term "platform" essentially nullifies any meaningful definition of the term. Certainly, there can be companies offering e-commerce and content services online that qualify as multi-sided markets: Amazon's Marketplace, for example. But just as surely there are companies that would not so qualify: for instance, Wordpress.com which allows a user to install an e-commerce plugin into her own blog, or even Netflix when it is engaged in the distribution of its own content.

A single approach to the regulation of platforms is also doomed to failure for practical reasons. For instance, a newspaper, by virtue of its classifieds section and advertisements, is a platform. Certain legal principles attach to printed newspapers that are unique to that business model. When a newspaper operates online nothing principally changes about its activity. Yet under a single "platform" regime as suggested by this Consultation, it would be theoretically appropriate to regulate newspapers *qua* platform in the same way that eBay, Google's search engine, Amazon's Marketplace, and Apple's iOS are regulated. Either the regulations so directed would have to be enormously insignificant – and thus of little concern to companies – or else enormously broad and thus able to provide regulators with extreme and problematic discretion to tailor rules to particular instances.

There are, of course, times when regulators should examine particular companies or industries when there is harm to consumers. However, such scrutiny is warranted only when there are demonstrated harms, and when those harms would evade existing regulation and law. And, as noted above, the proper lens through which to correct these failures is antitrust law (and consumer protection law) – not a vague, general "law of platforms."

For any such regulatory endeavor to avoid the pitfall of excessive error costs due to over-breadth and over-enforcement it must be grounded in more concrete, identifiable and discrete harms, and it must be based on valid evidence. Thus it is imperative that the Commission first outline precisely what harms it sees or expects that are uniquely linked to the full range of Internet-connected platforms and that are not adequately addressed by existing law. The EU is well-known for its sensitivity to consumer privacy, including the collection and protection of individual data by businesses online or offline. There exists already a well developed body of antitrust law as well as contract/commercial law that governs the behavior of businesses, offline and online. And the ECD governs significant aspects of the commercial, online behavior of many of these "platforms." Before implementing a vague, broad, new law, the Commission should identify the shortcomings of these

(and other) laws and identify precisely how a new regulatory regime will correct those failings.

Therefore, until the Commission can describe how these existing legal frameworks have failed, it is nearly impossible to describe an appropriately tailored definition of "platform" for new regulation. Certainly, existing law can (always) be improved. But without more evidence from the Commission regarding actual problems, it is hard to see how redefining regulations for "platforms" as distinct from other online (or offline) businesses would make these rules more effective.

Intermediary Liability

Currently, the EU has a sound legal framework for managing the liability of online service providers – one that matches, more or less, that of many other developed countries. In the absence of notable failures, the rules governing the liability of intermediaries should be revised only with the greatest care.

In the Consultation, the Commission asks:

> Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers... is sufficiently clear to be interpreted and applied in a homogeneous way, having in mind the growing involvement in content distribution by some online intermediaries, e.g.: video sharing websites?[14]

The Commission embeds two distinct ideas in this question. First, has the nature of online intermediaries changed sufficiently to justify an extension of regulation or liability; and, second, can the laws, as they exist, be applied uniformly across member states.

New Liability for Online Intermediaries

The definition of "mere technical, automatic and passive nature" contained in the ECD has come to have a fairly consistent meaning in EU law. Generally, the obligation is that a provider remain "neutral" and adhere to a well-defined set of limitations in order to qualify for exemption from liability:

> The exemptions from liability established in [the ECD] cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by

[14] DSM Consultation, *supra*, note 4.

> third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.[15]

Actual legal definitions notwithstanding, however, nothing of fundamental technical significance has changed that would warrant questioning this definition in the context of intermediaries – even those that are increasingly involved in content distribution. The scale of distribution is not really the issue; the question is whether or not an intermediary has actual "knowledge [or] control over the information which is transmitted or stored." Certainly this standard is open to interpretation and can (and will) be massaged into shape by courts and member legislatures as they deal with new forms of intermediaries. Yet there is nothing fundamentally different about the way in which information is stored and served today.

Take Care With a General Duty of Care

Subtext in the Commission's questions – for example, in the discussion of "stay down" principles and § (d) of the Consultation in which the Commission asks of intermediaries whether they have "put in place voluntary or proactive measures to remove certain categories of illegal content from your system" – suggest that there is interest in extending a general duty of care to online intermediaries.[16]

Online piracy (as well as distribution of other illegal content) is a tremendous concern. There are many intermediaries that build their businesses on the use of illegal content, and must therefore be subject to more particularized legal attention. Similarly, there are many otherwise law-abiding intermediaries that could stand to improve their operations, mitigate the proliferation of illegal content, and must therefore have a stronger role in dealing with content.

Generally speaking, however, the Commission should avoid imposing a new proactive duty to monitor. As in the U.S., Japan, Canada, Australia, and other technologically advanced nations, the "mere technical" rule has worked very well in the European Union. Where there are issues – for instance where a a "stay down" provision is necessary to control illegal content distribution – the Commission should instead strengthen existing (and largely effective) current law.

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[15] Google France and Google v. LVHM, E.C.J. C-236/08 and C-238/08 (2010).

[16] Although the Commission does acknowledge that Article 15 of the ECD had hitherto prohibited imposition of a "general duty to monitor."

The intention behind enhanced intermediary liability is, of course, increasing the amount of welfare enhancing behavior by firms operating on the Internet. But it is generally preferable to seek every means of encouraging independent pro-social behavior of these large platforms before resorting to intrusive and distortionary regulation, oversight and expensive legal processes.[17] The definition of what constitutes an activity of an intermediary such that it would subject it to a legal obligation with respect to illegal content must remain clear, and the threshold for what conduct will subject it to liability must remain high.

Imposing more extensive intermediary liability can have a number of negative effects on both the regulated companies as well as the broader ecosystem.

First, these rules can chill innovation by imposing relatively large compliance costs. This is not bad only for established companies but would disproportionately hurt smaller competitors. By and large, well established companies suffer least under regimes with high compliance costs as they have the available capital to comply. New entrants, however – assuming they are not deterred entirely – can suffer from anemic growth owing to the non-mission focused resources that need to be dedicated to compliance. Surely YouTube and other large intermediaries would survive costly compliance – but it would be far from certain that new startups could efficiently function in such an environment.

Moreover, imposing a general duty to monitor or a general duty of care on intermediaries without an attendant good-faith exception makes a number of heroic assumptions. First, computer code is only as perfect as the foresight of its authors. This is to say it is not perfect at all; a computer can do only what it is told to do. Second, not only are computers imperfect, but humans are even less so, and are frequently willful in their imperfection. Pirates will pirate, and almost any rule imposed on intermediaries will be routed around by criminals in ways that intermediaries are unlikely to be able to predict or, at least for a time, prevent. Platform operators (and content owners) understand this, and regulators would do well to understand it as well.

If faced with increased liability and a duty to proactively monitor, platform operators – understanding that computers are capable of only so much precision in ambiguous situations – will to some extent opt to limit their services. Thus, to avoid the undesirable negative effects on consumer welfare that this would

[17] This was, for instance, the goal of intermediary *immunity* in the United States. *See* 47 U.S.C. § 230 (titled "Protection for private blocking and screening of offensive material" and arguing that the goal was to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" by making sure no intermediary "shall be treated as the publisher or speaker of any information provided by another information content provider").

generate, any legislation that imposed such duties would need to contain a provision that, so long as operators make a good faith effort to put, say, scanning algorithms in place, even when illegal content is found on the platform, they would be exempt from liability – a measure which itself should call into question the wisdom of requiring preemptive scanning.[18]

Thus, in practical effect, imposing a general, proactive obligation on an intermediary that handles massive amounts of data is tantamount to setting that entity up for protracted and costly litigation that will ultimately boil down to an unsatisfyingly indeterminate battle of experts. Far from creating any sort of certainty around the activity of intermediaries and their platform members, general obligations can potentially generate enormous legal uncertainty – both in terms of litigation and compliance costs.

Enforce Existing Law More Effectively

While extended liability may not be necessary, there are important ways in which existing law can and should be made more effective. Thus, the crux of the question – are the existing rules "sufficiently clear to be interpreted and applied in a homogenous way" – is the proper focus here.

There is a useful lesson to be learned by comparing the US's and the EU's approach in the area of intermediary liability. Currently, there is a rough parity between the law of the US and the EU. When IP infringement is at issue, § 512 of the Digital Millennium Copyright Act governs liability. In most ways, § 512 is a fair mirror of the EU's ECD, similarly limiting liability for OSPs that are engaged in "mere caching," "caching" or "hosting."[19]

The real difference between the two regimes – and where the Commission would be better served in directing its attention – is in the enforceability of the respective liability provisions. The US provisions relating to online intermediaries prescribe particular remedies (for instance injunctions under certain conditions), and are directly applicable across the country (as they are uniformly enforceable law). The

[18] Here it should be apparent that the presence of a good-faith provision creates something of an exception that can swallow the rule – further demonstrating that a duty to monitor is not generally workable. If a platform operator merely has to put some reasonable effort into scanning its content in order to avoid liability – and we know that a wide variety of technical approaches will be necessarily imperfect – the marginal gains of deterrence of illegal content become fairly modest despite potentially large costs.

[19] Béatrice Martinet Farano, *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches*, TTLF Working Paper No. 14, 20-25. *available at* http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/300252/doc/slspublic/farano_wp14-4.pdf.

EU rules, by contrast, as implemented through a directive, do not have the same degree of uniformity in either remedies or application.[20] Thus, instead of investigating whether the nature of online intermediaries has somehow changed such that an increased regulatory scope is warranted, the Commission should continue with the general theme of the Consultation, and seek to harmonize the enforcement of existing liability provisions of the ECD across member states.

Perhaps most significantly – and in particular with widely circulated infringing content that can be efficiently identified – a significantly more robust "stay down" obligation would be a valuable addition to the existing regime. Although this is already a possibility within the existing directives that advocate for use of notice and action provisions, the law should be clarified and strengthened.

In Council Directive 2000/31/EC ¶ 40, the "notice and action" regimes are rather generally outlined: while the "service providers have a duty to act… with a view to preventing or stopping illegal activities," the mechanisms "for the development of rapid and reliable procedures for removing and disabling access to illegal information… could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States."[21]

And in ¶ 49, the Commission warns that "the drawing-up of codes of conduct… is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes."[22] Although the Commission has made some effort toward harmonizing the "notice and action" requirements in EU law, the state of the law remains essentially fragmented.[23]

Overall, the notice and action procedures should be efficient and fair to all parties involved. Certainly, this means that the involvement of content providers is important, so long as the overall proceeding is quickly able to target illegal content and remove it from the Internet. But care should be taken to ensure that the notice and action (and provider response) process is not abused in such a way that the quick and effective removal of illegal content is not frustrated.

This can of course be an issue on both sides. At times, content owners may seek action beyond what might be legally required, just as it is also plainly the case that

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[20] *Id.* at 26.

[21] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[22] *Id.*

[23] Saskia Walzel, *European Commission Consults on Notice and Takedown*, The London School of economics and Political Science Media Policy Project Blog (Aug. 24, 2012) *available at* http://blogs.lse.ac.uk/mediapolicyproject/2012/08/24/european-commission-consults-on-notice-and-takedown/.

providers seek to maintain illegal content on their sites where it benefits them economically to do so. Although it may be challenging to find, a balance should be struck. It should neither be assumed that intermediaries bear no cost in the process, nor that inadvertent removal of any legal content is more problematic than the non-removal of illegal content.

Careful study is warranted regarding the best set of notice and action practices that will optimize costs and benefits by facilitating removal of as much illegal content as possible at reasonable cost and without also causing significant amounts of legal content to be removed in the process.

Thus, the Commission would better serve its citizens by offering an interpretative communication that outlines the set of cases where a "stay down" provision is sought and the proper remedies for violation. It would also make sense to encourage member states to more uniformly implement such principles in their local laws.

The Seen and the Unseen

> In the economic sphere ... a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate... *it is seen*. The other effects emerge only subsequently; they are not seen.[24]

The Staff Analysis acknowledges a crucial point: humility is necessary when crafting legislation that will have unknown effects on dynamic, and constantly evolving businesses:

> Given the dynamics of the markets created and served by platforms, and the relatively short time that they have been in existence, more work is needed to gather comprehensive and reliable evidence on how different types of platforms work and their effects on their customers and the economy as a whole. On the basis of such an evidence base, an assessment can be made of the nature of the problems that may arise from their pivotal role in the digital economy and whether existing regulatory tools are sufficient to tackle them, or whether new tools need to be developed.[25]

In other contexts, the Commission has stated that some platforms "have evolved to become players competing in many sectors of the economy and the way they use their market power raises a number of issues that warrant further analysis beyond

[24] Frédéric Bastiat, *Selected Essays on Political Economy*, Seymour Cain, trans., Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc. (1995).

[25] *Id.*

the application of competition law in specific cases."[26] Yet the Commission does not offer any of the detailed study that the Staff Analysis rightly identifies as necessary and that would demonstrate exactly how "some platforms'" behavior justifies new legal categories and regulations.

Before special rules are crafted to attempt to address feared and unarticulated market failures, existing and effective rules of general applicability can and should be employed to address actual harms: most significantly, the well-developed principles of European antitrust law, the ECD, InfoSoc Directive, Data Protection Directive (and, potentially, the General Data Protection Regulation).

Importantly, where there are perceived harms to consumers or competition among intermediaries and platforms, consistent with antitrust and consumer protection principles they should be addressed on a case-by-case basis unless and until a clear and articulable pattern of harm emerges that is amenable to an *ex ante* proscription. The error costs of over-enforcement where feared harms are poorly defined likely threaten more harm than do the risks of allowing the already mature legal regime to continue to function.[27]

The DSMS presents the EU with a great opportunity. A harmonized electronic Europe will yield economic, social and cultural benefits not just to Europe, but to the entire world. But to achieve those benefits, the Commission would do well to remember the proper role of humility in regulation.[28] The unseen costs of deterring new entrants and chilling innovation can very likely outweigh the more limited gains that may or may not be achieved by exerting tighter control over online actors. There is nothing new or unique about internet companies that justifies breaking from the EU's existing, mature, and stable legal regime.

[26] DSM Communication, *supra*, note 3

[27] *See*, *e.g.*, Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Competition L. & Econ. 153, 158-63 (2010).

[28] *Id.*