

Editorial

Intermediary Liability as a Human Rights Issue

by **Martin Husovec***

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- 1 In early summer 2016, a number of scholars from diverse backgrounds met in Tilburg to discuss issues of intermediary liability and human rights.¹ After a few passionate debates - as well as a round of drinks - a general feeling arose that the social issues at stake require a dedicated forum. To keep the momentum, we decided to set up an informal group - 'Intermediary Liability and Human Rights' - to kick-off periodical meetings and, on the kind invitation of Prof. Spindler, to launch a paper symposium with JIPITEC. This dedicated volume presents the fruits of this intellectual exercise. Its goal is to highlight that design of intermediary liability rules and their real-world effects *can* and also *should* be heavily scrutinized from the human rights law point of view. In this sense, Judge Spano's recent article,² in which he argues that the existing ECtHR case-law is best understood only as a starting point and of limited precedential value, is a perfect invitation for scholars in this area to join us.³

- 2 To borrow from the band the Scorpions, 'wind of change' is in the air. Despite the fact that intermediary liability rules have been around for some time, the related debates seem to be increasing in intensity. The selection of contributions in this issue illustrates this very well. First of all, impatience of policy makers results in different types of

'ultimatums', such as the Code of Conduct, which are meant to incentivize a change without amending the laws. Second, there are a number of new policy proposals across the globe, which usually try to legally impose more proactive measures and not just wait for the firms to improve things on their own. Third, the courts are becoming increasingly involved in shaping how the environment should look like; the case-law surrounding hyperlinks and website-blocking are perhaps the most salient symbols of this trend. And lastly, human rights law and its community is awakening to the new 'intermediated' realities of the online world.

- 3 To name just a few recent initiatives and developments. Within the last few years, the European Court of Human Rights received more than a dozen of new cases in the area.⁴ The Council of Europe recently conducted a large scale

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1 After the Tilburg meeting organized by me and Tilburg Institute for Law, Technology and Society (TILT), the second meeting took place in Amsterdam and was organized by Tarlach McGonagle at the Institute for Information Law (IViR), University of Amsterdam.

2 Robert Spano, 'Intermediary Liability for Online User Comments under the European Convention on Human Rights' (2017) *Human Rights Law Review*, p. 11-12.

3 Feel free to drop me an email.

4 To mention just intermediary liability cases *stricto sensu*: ECtHR, *K.U. v. Finland* (App. no. 2872/02); ECtHR, *Yildirim v. Turkey* (App. Nr 3111/10); ECtHR, *Akdeniz v. Turkey* (App. No 25165/94); ECtHR, *Cengiz and Others v. Turkey* (App. no. 48226/10 and 14027/11); ECtHR, *Delfi AS v. Estonia* (Application no. 64569/09) - two decisions; ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v. Hungary* (Application no. 22947/13); ECtHR, *Rolf Anders Daniel Pihl v. Sweden* (App. Nr. 74742/14); ECtHR, *Payam Tamiz v United Kingdom* (App. no. 3877/14) and pending cases of: *Kharitonov v Russia* (App no. 10795/14); *Grigoriy Nikolayevich Kablis v. Russia* (App. no. 59663/17); *OOO Flavus and others v. Russia* (App. No. 12468/15). The list of the related cases is much broader, see - CoE, 'Internet: case-law of the European Court of Human Rights', available at <http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf>.

study regarding filtering and blocking policies in its Member States and is working on a set of political recommendations.⁵ The civil society globally launched a discussion about the principles regarding the best governmental practices.⁶ Open Society Foundations commissioned a report on the issue of human rights and self-regulation that was masterfully prepared by IViR.⁷ The Internet protocol community has just adopted a new tool to respect human rights in the area of Internet standards.⁸

- 4 A sceptic may wonder, why all this fuss all of a sudden?
- 5 Balkin convincingly argues⁹ that this is due to emerging privatized control of speech by ‘new governors’¹⁰ that challenges our existing human rights safe-guards. As also IViR’s report highlights, because the entities are private and our human rights ‘supervision’ only indirect, we are struggling to approach them in the traditional ways. Unlike the government, these gatekeepers are primarily responding not to a process of political accountability, but to (mostly economic) incentives on the market. But if market outcomes are driven only partly by the legal institutions, then governments can be at best ‘co-architects of the environment’. What is then a right approach for achieving human-rights compliant outcomes? Can existing doctrines be always relied on? The contributions of this dedicated volume all reflect on and demonstrate this challenge.
- 6 To begin with, Belli and Sappa provide a high-level discussion of how intermediary liability rules influence enjoyment of fundamental rights. They argue that when intermediaries are held responsible for their users’ activities, the foreseeable consequence is an increase on the types and the granularity of restrictions these private entities will introduce and implement, in an attempt to

escape any liability. Moreover, they emphasize intermediaries’ regulatory role while contractually regulating the content and applications that their users access and share.

- 7 Frosio argues that we are witnessing the rise of monitoring obligations that are being imposed on online intermediaries around the world. He observes that proactive monitoring and filtering are increasingly finding their way in the legal system as the preferred enforcement strategy through legislation, judicial decisions, as well as private ordering across the entire spectrum of legal areas. He interprets this trend as the death of ‘no monitoring obligations’.
- 8 Kalèda then zooms in at one of such emerging policies that is heavily used in the European Union, namely injunctions against intermediaries. In his contribution, he analyses how the principle of effective judicial protection shapes the enforcement practice of the website blocking. He argues that these novel injunctions are affecting the rights of multiple third parties. As a consequence, we should give more weight to procedural fundamental rights stemming from Article 47 of the Charter. This new perspective has, in his view, several advantages, such as it must be applied by the courts of their own motion and it could lead to the establishment of a minimum procedural standard across the Member States.
- 9 Kuczerawy in her contribution reviews the possibilities of the existing legal framework from the perspective of freedom of expression. She is also interested in harmonization, but of different kind. She examines to what extent the doctrine of positive obligations, under both the ECHR and the EU Charter, may require the EU legislator to take additional legal measures to protect freedom of expression online, such as by introducing effective procedural safe-guards.
- 10 And last but not least, Burke and Molitorisova close by looking at the digital freedoms from the perspective of more encompassing user rights to anonymity. They explore the CJEU’s recent *McFadden* judgment and earlier case-law in order to crystalize the CJEU’s position on the anonymity of users. They criticize the disproportionately narrow scope of the judicial analysis and identify a number of useful patterns.
- 11 The contributions thus represent an excellent mix of doctrinal and comparative approaches to the debate. I hope that the reader will enjoy reading them as much as I and JIPITEC’s excellent anonymous peer-reviewers enjoyed reviewing them.

Martin Husovec, November 2017

5 See <<http://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>>.

6 See <https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf>.

7 Christina Angelopoulos, Annabel Brody, Wouter Hins, Bernt Hugenholtz, Patrick Leerssen, Thomas Margoni, Tarlach McGonagle, Ot van Daalen and Joris van Hoboken, ‘Study of fundamental rights limitations for online enforcement through selfregulation’ <<http://www.ivir.nl/publicaties/download/1796>>.

8 See <<https://www.article19.org/resources.php/resource/38939/en/internet-protocol-community-has-a-new-tool-to-respect-human-rights>>.

9 Jack Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation’ (2017) UC Davis Law Review; Yale Law School, Public Law Research Paper No. 615.

10 Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2017) 131 Harvard Law Review.