# INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION

In the European Union, courts have been expanding the enforcement of intellectual property rights by employing injunctions to compel intermediaries to provide assistance, despite no allegation of wrongdoing against these parties. These prospective injunctions, designed to prevent future harm, thus hold parties accountable where no liability exists. Effectively a new type of regulatory tool, these injunctions are distinct from the conventional secondary liability in tort. At present, they can be observed in orders to compel website blocking, content filtering, or disconnection, but going forward, their use is potentially unlimited. This book outlines the paradigmatic shift this entails for the future of the Internet and analyzes the associated legal and economic opportunities and problems.

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# Injunctions Against Intermediaries in the European Union

## ACCOUNTABLE BUT NOT LIABLE?

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To beings of no flesh but of playful spirit, whose colour was once beige and eternity is their living.

– Anonymous

# Contents

# Foreword

The problem of issuing injunctions against intermediaries has arisen in the case law of European judiciary in the recent years in three instances. Even though it does not stem from the title of the book, it is clear that the real problems of liability of intermediaries emerged with the development of Internet services. Professor Martin Husovec correctly points out in the introduction to his book that his intention is to encapsulate two main stories: the website-blocking story and the password-locking story.

From this point of view, one may say that this volume constitutes a journey into terra incognita. Indeed, several decisions of the Court of Justice and, not substantially more, of national jurisdictions of the Member States do not explain all the problems pertaining to responsibility of Internet intermediaries. I would even dare to assert that the most sensitive aspects of Internet intermediaries are still to be identified and resolved.

It is true that the conditions of liability of Internet intermediaries in Europe are to some extent harmonized on the EU level. On one hand, the possibilities to issue injunctions have their legal base in Article 8(3) of the InfoSoc Directive and Article 11, third sentence, of the Enforcement Directive. On the other hand, the E-Commerce Directive provides for the limitation of intermediary liability – but does not shield from injunctions. Despite this harmonization, many of the cases in which national courts apply these provisions do not reach the Court of Justice. My impression is that national judges are not always aware that the rules on Internet intermediaries' liability they apply constitute the implementation of the relevant EU Directives. It is for this reason that the Court of Justice had so far only a few possibilities to rule on the interpretation of these Directives in the context of the liability of Internet intermediaries.

Another problem at the level of EU law which is closely linked to the liability of Internet intermediaries concerns the uncertainties related to the concept of striking a fair balance between fundamental rights, especially those enshrined into the EU Charter of Fundamental Rights. As the decisions in *UPC Telekabel*, *Scarlet Extended*, and *McFadden* show, the task of balancing conflicting fundamental rights is particularly challenging.

I would not disclose any secret by saying that the cases that have reached the Court of Justice were not easy ones. Indeed, each of them presented a new challenge. They invited the Court to delve into novel technological concepts and, moreover, contributed to controversial societal debates. It is sufficient to recall that in probably the most important decisions on the subject, the Court of Justice did not follow opinions of Advocates General. The judges were not entirely convinced by arguments put forward by my learned colleagues Cruz Villalón and Wathelet in, respectively, the cases of *UPC Telekabel* and *GS Media*. Nor was the Court of Justice wholly persuaded by my humble submissions in the case of *McFadden*. In this context I cannot resist a temptation to express my thanks to the author that despite discrepancies between opinions of Advocates General and the actual rulings of the Court of Justice, he asked one of the former to write the foreword for his book – a book in which he duly presents the issues from the perspective of both the Opinions of Advocates General and the actual rulings of the Court of Justice.

The problems pertaining to liability of Internet intermediaries are not of course limited to EU law. The author lays a particular emphasis on English and German law. The challenges that the he had to face were twofold. First, procedural instruments that could potentially be qualified as "injunctions" vary from one country to another. Second, one has to bear in mind that we are dealing here with a very special type of injunction that can be addressed to intermediaries who are not considered directly or indirectly liable for infringements in question – innocent parties, as described by the author. Moreover, concerning some situations where secondary liability is invoked, it is clear for every comparative private lawyer how complex and divergent rules on secondary liability are.

Professor Husovec's book addresses the most complex, difficult, and innovative aspects of liability of Internet intermediaries. His analyses take into account not only legal aspects but also social and economic considerations. He demonstrates excellent analytical skills as well as an impressive clarity in his study. The final proposals of the book, based essentially on the distinction between "remote" and "proximate" services, are very well argued. They confirm the author's awareness of practical consequences and show his attention to the influence of technological development.

I am deeply convinced that this volume will substantially enrich the doctrinal debate on the liability on Internet intermediaries. It will also constitute a useful tool of argumentation for practicing lawyers. Last, but not least, the book will serve as a source of inspiration for judiciary, including Advocates General.

Maciej Szpunar, Advocate General of the Court of Justice of the European Union

# Preface

The newspaper headlines are full of them. They are hard to avoid, and equally hard to regulate. Internet intermediaries – the symbols of how innovation can improve our well-being while at the same time put it at risk.

Since the 2000s, we have grown accustomed to the basic social contract. They were legally obliged to be reactive and only morally obliged to be proactive. Not anymore. Intellectual property law is just one of the areas where this is changing. The legal obligations to prevent third-party wrongdoing before it takes place are on the rise. In the European Union, injunctions against intermediaries are the symbol of this shift. Based on Article 8(3) of the InfoSoc Directive and the third sentence of Article 11 of the Enforcement Directive, these injunctions do not primarily target bad actors. They address by-standers who often comply with the law. The question asked is not what the intermediary did wrong but how it can help. The measures thus seek accountability where no liability exists. And there are signs that these instruments are going global.

The book that you are reading conceptualizes this shift and looks at novel problems that it creates. It breaks the phenomenon into pieces in order to tell the story of these injunctions, from yesterday to tomorrow. While doing this, the European Union law, its case-law and implementation, remains at the center of the debate. At the same time, in order to offer the view of law in action, the book also explores the developments of two jurisdictions – Germany and the United Kingdom. As the prototypes of different systems, the countries also serve as two case studies of the historical foundations on which the European and domestic concepts of today operate. By contrasting two jurisdictions and their recent practice in the area, the book also highlights how a similar tool can take on itself different goals, if put into a different setting. It also demonstrates how universal, nevertheless, some of the considerations remain.

The book argues that we are witnessing the emergence of a new type of regulatory tool distinct from the conventional secondary liability in tort. It appears next to primary and accessory liability as a third category. Depending on its design, it can complement the two but also compete with them. The tool's goal is to achieve more targeted intervention oriented toward future wrongdoing. Unlike tort law, where the decision about standards of care necessarily triggers an entire avalanche of consequences, injunctions governed by courts allow for tailor-made responses framed as specific forms of enforcement assistance. However, exactly because these injunctions do not use a weight of damages to force private parties to arrive at socially optimal levels of care, they pose new challenges for the cost and benefit analysis.

This is why the economics of enforcement plays a central role in this book and is offered to the reader right after the introduction. Economic analysis helps in suggesting how to rethink and redesign the tool, if we aspire to benefit from it beyond the world of "nice gestures." I offer a simple modeling of the interactions to improve our understanding of how and when we risk wasting the resources for symbolic enforcement that is of no economic value, since such enforcement does not deliver anyone with better justice.

However, economics doesn't capture the full breadth of the social problems. Therefore, even welfare-maximizing injunctions should not be automatically endorsed. Economic gain is not always social bargain. Unsupervised injunctions against intermediaries can strip citizens of their fundamental rights or circumvent political processes where they are inconvenient. To prevent this from happening, we have to pay attention to their limitations, safeguards, and rule of law. The book explains how.

Naturally, I could not address everything. One of the underdeveloped areas is how to optimally regulate voluntary agreements that often result from the enforcement of rights. As a necessary by-product, they deserve much more of our attention. In order to sketch the issues that I see, I offer brief remarks on the subject in the concluding section.

I wish you an enjoyable and informative read and hope that the book will, at the very least, bring more clarity into our collective thinking about these issues.

Maciej Szpunar, Advocate General of the Court of
Justice of the European Union

# Acknowledgments

It is 2007 in Košice, a little picturesque town in eastern Slovakia. A young second-year law student decides to found a start-up and thereby invest his earned scholarship, but not just any start-up! Its name roughly translates into "I do not go to lectures dot sk." Its main purpose is to create an online space for students to share their notes from university lectures. The students should not be forced to attend boring lectures just to be able to study, goes the motto. The website booms. The number of law students attending boring lectures plummets. Selected law professors are outraged, which means that the young entrepreneur has a problem – a legal one. Are such notes protected by teachers' copyright? And if so, is the entrepreneur liable for his users' actions? He needs to find out.

A decade later, in the Netherlands, the young man becomes a full member of the Law Faculty. To his surprise, he finds himself still reading about the same issues. Hopefully his lectures are not boring.

Naturally, founders of start-ups do not turn into law professors overnight. It takes a regiment of excellent teachers to inspire a young mind and a supportive family to nurture it. I am extremely lucky to have all of that.

Radim Polčák's pioneering books were the first I touched. Ivo Telec's advanced lectures propelled me to read more. Annette Kur, a true giant of intellectual property scholarship, accepted to be my doctoral supervisor and then became the best mentor one could wish for. Ansgar Ohly, my lecturing hero, thought that my never-ending comments amounted to something and was always ready to offer his feedback. Jeremy Phillips thought it was a good idea to give a chance to a young Slovak blogger. Jennifer Granick warmly welcomed me at Stanford University and opened doors to many Silicon Valley firms to understand the industry. Graeme Dinwoodie, an endless source of inspiration on many fronts, always had advice for me when I needed it. Arthur van Martels and Fabian Hafenbrädl, two of my closest friends and doctoral peers, always encouraged me to enter academia. Lucia, my beloved wife, had commitment that was not shaken by the prospect of marrying an academic with seven-league boots. And finally, Marianna and Viktor Husovec, the best parents under the sun, always supported me in all my pursuits, regardless of how crazy they were, and taught me never to act without a plan and to easily give up on it.

Over the years, I also became indebted to an ever-increasing number of scholars, who became my colleagues and sometimes close friends. I keep learning from them every day. In particular, I owe gratitude to my "intermediary liability crowd," Christina Angelopolous, Miquel Peguera, Daphne Keller, Eleonora Rosati, and Sophie Stalla-Bourdillon, whose excellent insights keep me convinced that the area of research probably never dries out. Moreover, I certainty couldn't have written this book without formative discussions with Richard Arnold, Annemarie Bridy, Robert Cooter, Henri de Belsunce, Thomas Dreier, Josef Drexl, Niva Elkin-Koren, Giancarlo Frosio, Eric Goldman, Patrick Goold, Dietmar Harhoff, Reto Hilty, Franz Hofmann, Mrinalini Kochupillai, Matthias Leistner, Mark Lemley, Robert Merges, Sylvie Nérisson, Jan Nordemann, Pamela Samuelson, Pekka Savola, Graham Smith, Jennifer Urban, and many other brilliant minds. They all engaged with my ideas and influenced my thinking.

Finally, yet importantly, I would like to thank Advocate General Maciej Szpunar, who, despite his much more important tasks at the Court of Justice of the European Union, generously agreed to write the foreword for this book. I also owe thanks to Matt Gallaway and his colleagues from Cambridge University Press for bringing the book into the reader's hands. Therefore, dear reader, the thinking, I definitely did not do alone, only the writing and mistakes, those are my own.

# Abbreviations

| | |
|---|---|
| AG | Advocate General |
| Art 11(III) Enforcement Directive | Article 11 sentence 3 *Directive 2004/48/EC* |
| Art 8(3) InfoSoc Directive | Article 8 paragraph 3 *Directive 2001/29/EC* |
| BGB | The German Civil Code |
| BGH | The German Federal Supreme Court |
| CJEU | The Court of Justice of the European Union |
| E-Commerce Directive | *Directive 2000/31/EC* |
| Enforcement Directive | *Directive 2004/48/EC* |
| EU Charter | Charter of Fundamental Rights of the European Union |
| InfoSoc Directive | *Directive 2001/29/EC* |
| OGH | The Austrian Supreme Court |
| The Convention | The European Convention on Human Rights |
| TRIPS | The Agreement on Trade-Related Aspects of Intellectual Property Rights |