

Intermediary responsibility: Four emerging themes

Jaani Riordan

Barrister, 8 New Square

Lincoln's Inn, London

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Overview

- 1 Injunctions are growing real teeth
- 2 From secondary to primary liability
(or, platforms beware)
- 3 From liability to accountability
- 4 The Regulators are coming

(1) Injunctions



“Member States shall not impose a **general obligation** on providers, **when providing the services covered by Articles 12, 13 and 14** [mere conduit, caching or hosting], to **monitor the information which they transmit or store**, nor a **general obligation actively to seek** facts or circumstances indicating **illegal activity.**”

Directive 2000/31/EC art 15(1)

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Gegen blau-schwarze Pläne: "Wir werden alles daran setzen, das auch rechtlich zu bekämpfen".



Grüne: Mindesicherung für Flüchtlinge soll bleiben

OE24.AT

Source: Facebook

Glawischnig-Piesczek v Facebook

- 1 Ms Glawischnig-Piesczek is an Austrian politician and chair of the Green Party
- 2 A defamatory statement was made about her by a Facebook user, which was then shared: [\[12\]](#)
- 3 She made a takedown request in July 2016 which Facebook ignored, so in December 2016 she obtained an interim order against Facebook for the removal of the original post, any identical posts, and any “equivalent posts” (ie “with an equivalent meaning”) that harmed her reputation
- 4 Facebook disabled access to the original post in Austria but took no further steps to comply

Glawischnig-Piesczek: reasoning

- 1 It was common ground that Facebook could rely on the Article 14 (hosting) safe harbour
- 2 Article 14(3) preserves the possibility of injunctive relief so Facebook may be the subject of an injunction even if it is not liable for damages: [24]
- 3 Facebook did have knowledge of the post but not act expeditiously to remove it: [27]
- 4 Intermediaries can be required to terminate “any” further infringement; Member States have a broad discretion to determine the measures: [29]–[30]

“[34] although Article 15(1) prohibits Member States from imposing on host providers a general obligation to monitor information which they transmit or store, ... such a prohibition does not concern the monitoring obligations ‘in a specific case’.

[35] Such a specific case may, in particular, be ... a particular piece of information stored by the ... social network, the content of which was examined and assessed by a court having jurisdiction in the Member State, which ... declared it to be illegal.

[36] Given that a social network facilitates the swift flow of information ... between its different users, there is a genuine risk that information which was held to be illegal is subsequently reproduced and shared by another user ...”

Glawischnig-Piesczek v Facebook Ireland Ltd, C-18/18, EU:C:2019:821, [34]–[36]

Glawischnig-Piesczek: reasoning

5. A national court may order a social network (or other host) to block/remove information:
 - (a) Identical to the content declared to be illegal;
 - (b) Irrespective of whether it was uploaded by the same user or another user.

5. A national court may also order the blocking or removal of information which is “equivalent” if it is “essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality” even if “worded slightly differently”: [39], [41]

“[45] it is important that the equivalent information ... contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement ... Differences in the wording of that equivalent content ... must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content. ...

[46] ... the monitoring of and search for information [by the host] are limited to information containing the elements specified in the injunction, and ... does not require the host provider to carry out an independent assessment, since the latter has recourse to automated search tools and technologies.”

Glawischnig-Piesczek v Facebook Ireland Ltd, C-18/18, EU:C:2019:821, [45]–[46]

“In English law, the starting point is the intermediary’s legal innocence. An ISP would not incur liability for trade mark infringement under English law, even in the absence of the safe harbour provisions ... **There is no legal basis for requiring a party to shoulder the burden of remedying an injustice if he has no legal responsibility for the infringement** and is not a volunteer but is acting under the compulsion of an order of the court.”

British Telecommunications plc v Cartier International AG
[2018] UKSC 28, [33] (Lord Sumption JSC)

(2) Platforms



“**[102]** If a sign identical with, or similar to, the proprietor’s trade mark is to be ‘used’ ... by a third party, that implies, at the very least, that that third party uses the sign in its own commercial communication. In so far as that third party provides a service consisting in enabling its customers to display on its website, in the course of their commercial activities such as their offers for sale, signs corresponding to trade marks, it does not itself use those signs within the meaning of [EU trade mark law].”

C-324/09, *L’Oréal SA v eBay International AG*, EU:C:2011:474, [102]

“this right of the public to access technological development does not go so far as to allow a trader such as Amazon to ride rough shod over intellectual property rights, to treat trade marks such as Lush as no more than a generic indication of a class of goods in which the consumer might have an interest.”

Cosmetic Warriors Ltd v Amazon.co.uk Ltd [2014] FSR 31, [53]

Coty Germany v Amazon Services

- 1 C is the licensee of DAVIDOFF trade marks in Germany
- 2 C had previously (C-230/16, EU:C:2017:941) opposed the sale of *genuine* perfumes on websites outside its 'selective distribution system'
- 3 C now contended that Amazon was liable for the sale of DAVIDOFF-branded perfumes by third party sellers
- 4 Sellers could use the 'Amazon Logistics' programme whereby Amazon stored the goods, collected payment, packaged and despatched goods, and handled returns
- 5 The German courts concluded that this was not 'use' of the sign – mere storage/transport was insufficient



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- 110ml Bottle

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Perfumery – Did you know?
Eau de Toilette or Eau de Parfum? While Eau de Toilette contains 5-9% of perfume oil, Eau de Parfum usually contains 8-14%. Eau de Parfums therefore last longer and smell more intense. **Natural or synthetic fragrances?** Perfumes with natural ingredients often smell different in batches based on the source of the ingredients, while synthetic ingredients usually have consistency in their smell and lasts longer. **Notes and different smell after application?** Perfumes are often designed with top, middle and base notes, and designed to smell different based on the time after application. For example, some top note citrus scents smell

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prime

Sold by: Direct Beautique

Coty Germany: AG's opinion

- 1 AG Sanchez-Bordona took a wider view of the facts: Amazon operated an “integrated business model” and took an “active” role in the sales process which gave it “total control” over the use of the sign
- 2 Buyers would treat “Shipped by Amazon” as an indication that Amazon markets and sells the goods
- 3 EUTMR art 9(3)(b) defined “use” of a sign to include “offering the goods, putting them on the market, or stocking them for those purposes”
- 4 Amazon’s conduct could fall within this concept of “use” on the wider view of the facts

“**[AG57]** This **active and coordinated involvement of Amazon companies in the marketing of goods** involves taking care of a good part of the seller's specific tasks, of which Amazon does ‘the heavy lifting’, as its web page points out. ... In such conditions, **Amazon companies adopt ‘active behaviour and control, direct or indirect, of the act constituting the use [of the mark]’.**”









[AG58] ... [The Amazon companies] assume tasks **going beyond the simple creation of the technical conditions necessary for the use of the mark** ... Consequently, in the presence of a product that infringes the rights of the trademark owner, the latter could legitimately react by prohibiting these companies from using the trade mark.”

Coty Germany GmbH v Amazon Services Europe Sarl, C-567/18, EU:C:2019:1031
(Opinion of Advocate General Sanchez-Bordona), [AG18] (trans)

Warner v Tuneln: facts

1. Warner and Sony are music labels who own copyright in numerous sound recordings
2. Tuneln is a platform that provides a directory of ~100,000 radio stations around the world, including:
 - (a) Stations licensed in the **UK** (eg BBC Radio 1)
 - (b) Stations licensed **elsewhere** (eg NPR, ABC, Radio Tokyo)
 - (c) Stations not licensed **anywhere**
 - (d) Premium Stations (for paid subscribers only – no ads)
3. Accessible via web, mobile app, TV apps, Sony PlayStation, Sonos integration – easy to search/browse
4. Tuneln acted on all takedown notices, normally <24 hours

EDIT Recordings

-  **ESPN New York 98.7**
5/12/14, 12:00:42 PM 45 sec (369 KB)
-  **SomaFM: Underground 80s**
5/12/14, 3:55:01 PM 37 sec (295 KB)
-  **ABC Gold FM 93.0**
5/13/14, 2:31:46 PM 44 sec (297 KB)
-  **ABC Gold FM 93.0**
5/13/14, 2:31:51 PM 41 sec (273 KB)
-  **Freedom Stream Radio**
5/13/14, 3:26:51 PM 14 sec (127 KB)
-  **WFAN Sports Radio 660**
5/13/14, 3:34:19 PM 11 sec (158 KB)
-  **Hot 97**
9/23/15, 11:11:11 AM 47 sec (221 KB)
-  **Los Angeles Dodgers**
9/23/15, 1:16:32 PM 40 sec (659 KB)

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Associated Press
AP News Updates

BBC WORLD SERVICE
UK

NHL

College Football

NFL

RADIO DISNEY
COUNTRY

HARD
WELL

COUNTRY
ROADS

0:00 / 0:00

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Source: TuneIn

Warner v Tuneln: reasoning

1. Tuneln is more than a 'conventional search engine service': [127]–[129]
 - (a) It aggregates links to streams so is highly specialised;
 - (b) It collects metadata and allows searches by artist;
 - (c) The stream link is embedded into Tuneln's interface;
 - (d) Tuneln inserts audio ads before streams begin playing.
2. Tuneln 'intervenes directly in the provision of the links' and is therefore not the same as links in *Svensson* and *GS Media* and so is an act of CTP: at [130]–[131]
3. Stations licensed abroad may be lawful but Tuneln is re-targeting that content to the UK by linking: [141]

Warner v Tuneln: reasoning

4. Linking to an unlicensed station is an infringement since Tuneln is presumed (under *GS Media*) to know that the works were placed online without permission: [146]
 - (a) Tuneln is operating for profit (ads): [148]
 - (b) Not unreasonable to expect Tuneln to check whether all the stations are licensed: [148]
 - (c) Tuneln cannot rely on the warranty given by stations in terms and conditions that they are licensed: [149]
 - (d) Therefore Tuneln cannot rebut the *GS Media* presumption
5. Premium Stations were ad-free versions of stations created for Tuneln pursuant to contracts; therefore any link to them is an infringement if unlicensed: [161]

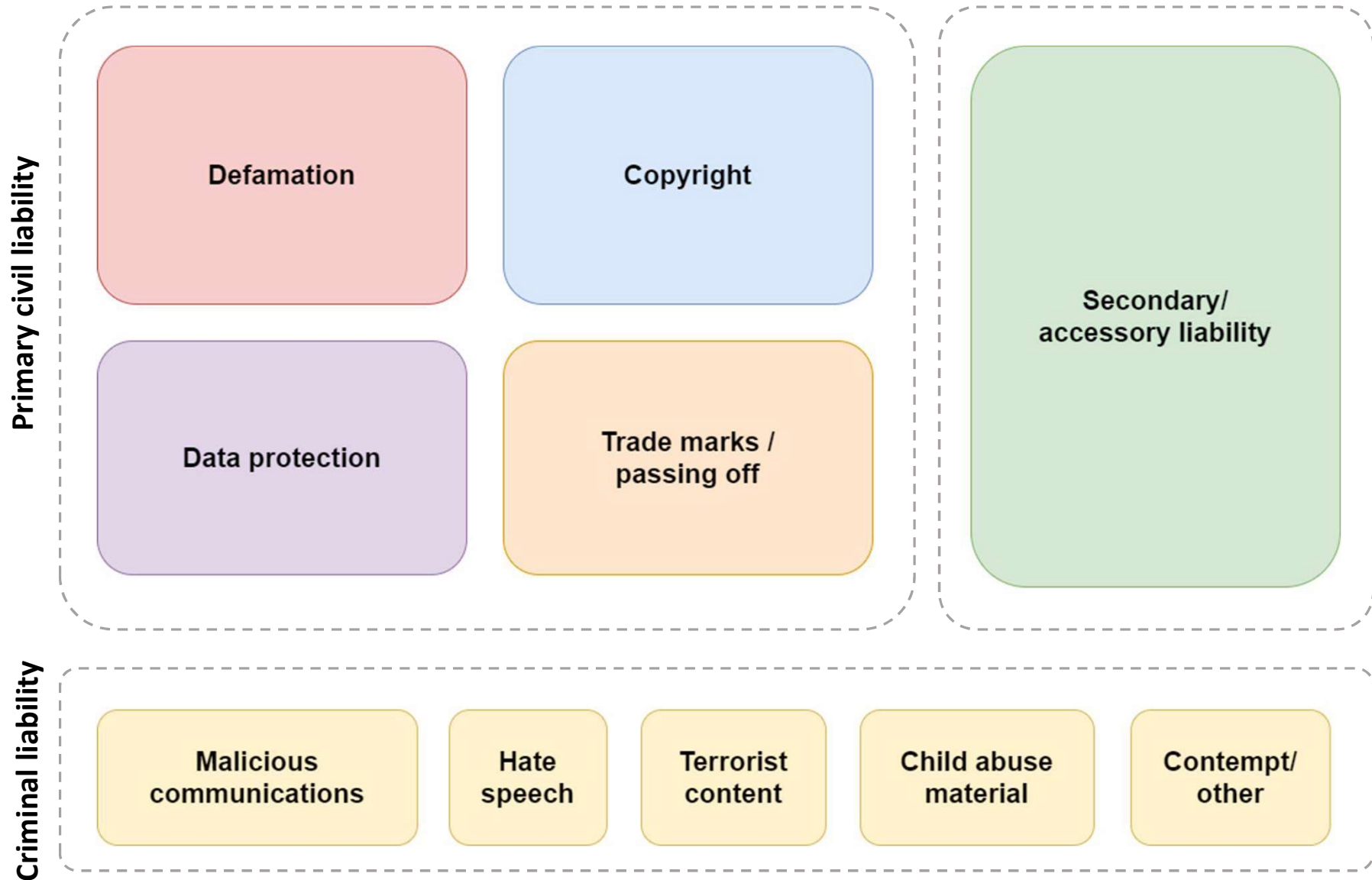
“**[142]** This conclusion does not “break the internet” because it depends on the combined effect of territory and the particular act of communication carried out by TuneIn.”

Warner v TuneIn [2019] EWHC 2923 (Ch), [142] (Birss J)

(3) From liability to accountability



The traditional view



Early exceptionalism

“electronic, at a distance” etc

Mere conduit
(ECD Art 12)

Caching
(ECD Art 13)

Hosting
(ECD Art 13)

“Passive, neutral, technical activities” =
intermediary

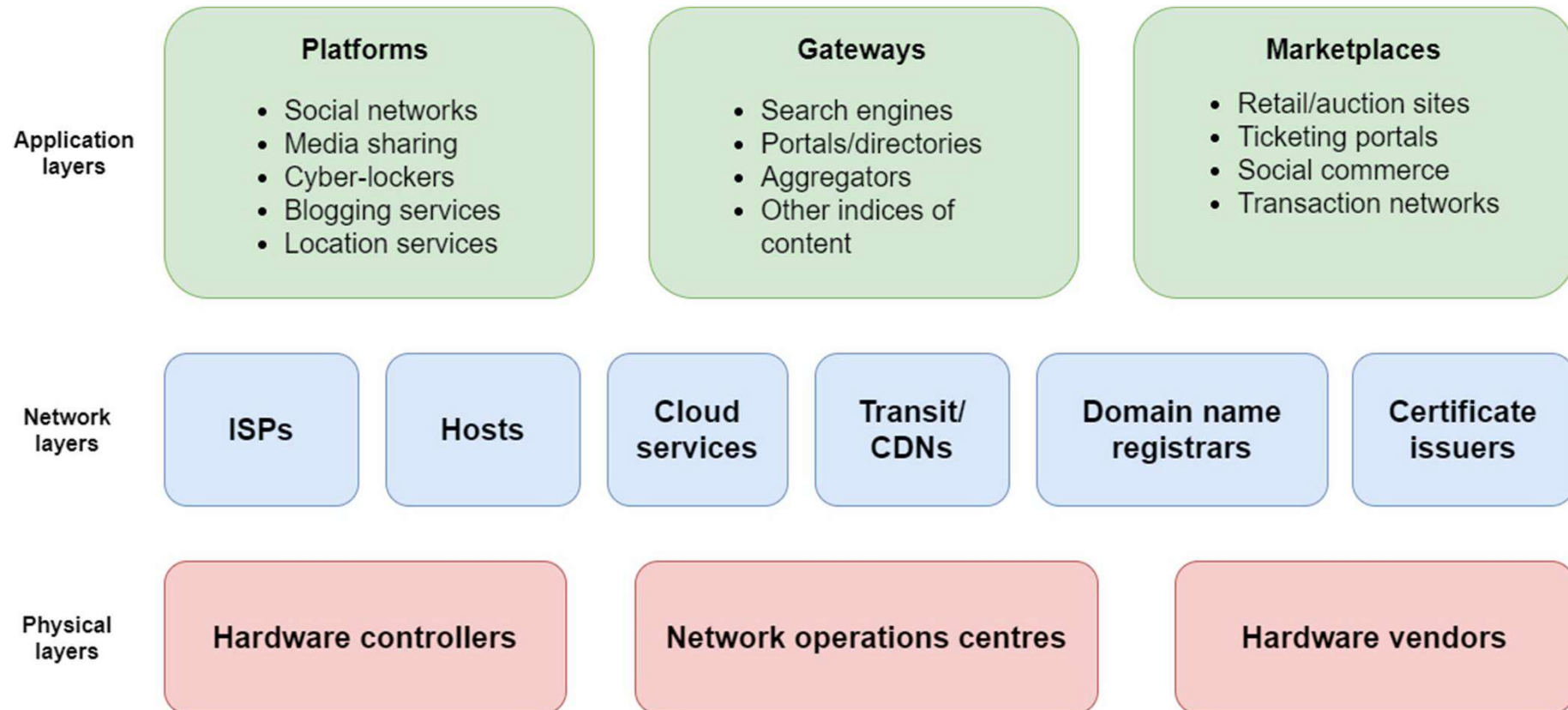
(All other activities
of service providers)

(Offline/in person trade and commerce + exceptions)

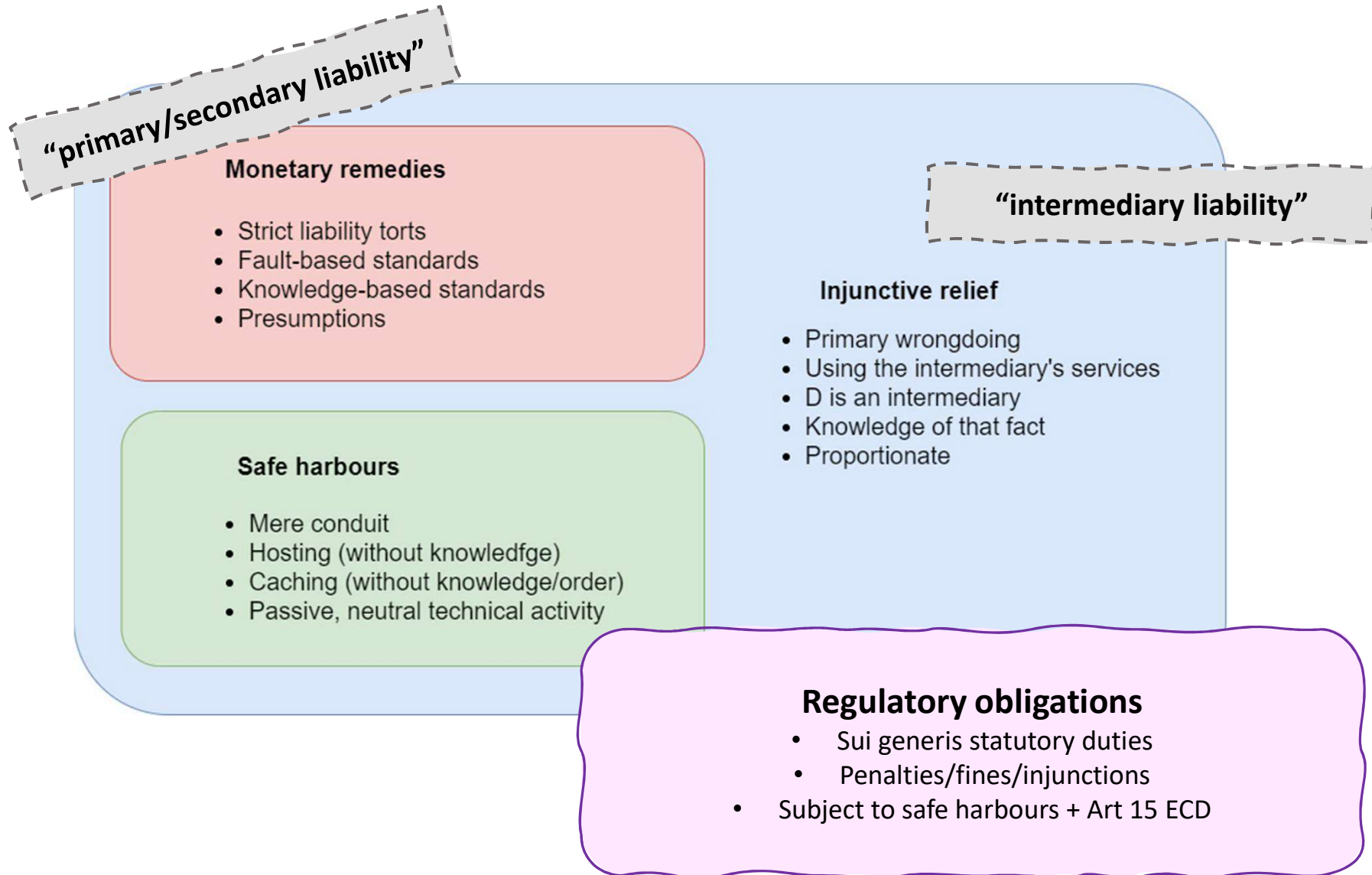
EU concept of 'intermediary'

- 1 An intermediary is “any person who carries a third party’s infringement of a protected work” in a network: *UPC Telekabel*, C-314/12, [30]
- 2 Covers potentially any facilitator of wrongdoing (offline or online): *Tommy Hilfiger*, C-494/15, [29]
- 3 Injunctions do not require any formal (eg contractual) relationship with the wrongdoer: *UPC Telekabel*, C-314/12, [32]

A layers-based approach




A remedies-based view



(4) Regulation



Online Harms

- 1 Proposed scope: “companies that **provide services** or **use functionality** on their **websites** which **facilitate the sharing of user generated content or user interactions**, for example through comments, forums or video sharing”.
 - 2 Proposed regulator: Ofcom.
 - 3 Proposed duties: “to use a proportionate range of tools including age assurance, and age verification technologies to prevent children from accessing age-inappropriate content and to protect them from other harms.”
- 


Online Harms

- 1 What 'harms'? “content or activity that **harms individual users**, particularly children, or **threatens our way of life in the UK**, either by undermining national security, or by undermining our shared rights, responsibilities and opportunities to foster integration.”
- 2 Exclusions: companies, competition law, “most cases of intellectual property violation”, fraud, data protection, cybersecurity, hacking, dark web, journalistic and editorial content.

The Consultation Response

- 1 Content removal: operators to “ensure that illegal content is removed expeditiously and that the risk of it appearing is minimised by effective systems. ... particularly robust action to tackle terrorist content and online child sexual exploitation and abuse.”
- 2 User redress: “effective and proportionate user redress mechanisms which will enable users to report harmful content and to challenge content takedown where necessary”.

Conclusions

- 1 Injunctions are powerful remedies for requiring intermediaries to act (but be prepared to pay)
 - 2 Secondary liability standards are being bundled into primary liability norms – platforms face much more onerous standards of care, and *de facto* strict liability
 - 3 Traditional models of liability are being expanded to hold intermediaries accountable
 - 4 Regulatory activity is increasing – new *sui generis* duties seem likely in a range of areas
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