

Intermediary Responsibility: Duties, Regulation and Liability

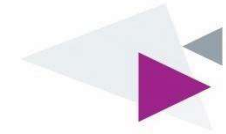
Rachel Alexander – Partner, Wiggin LLP

27 February 2020



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A Changing Climate?

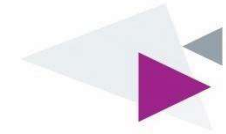


“... it is essential that the rules applicable to digital services across the EU are strengthened and modernised, clarifying the roles and responsibilities of online platforms. The sale of illicit, dangerous or counterfeit goods, and dissemination of illegal content must be tackled as effectively online as it is offline.”

**Commission Communication:
“Shaping Europe’s digital future”
(19 February 2020)**

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Legal obligations & redefining the rules



Intermediary injunctions

- where we are now
- an eye to the future



“Legal innocence” & liability

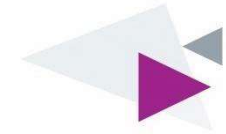
- questioning the immunities
- platform liability – *YouTube/Uploaded*



Digital Services Act

- updating the regulatory framework for digital services/platforms
- some key issues

Intermediary Injunctions



Art. 8(3) Information Society Directive

*“Member States shall ensure that rightholders are in a position to apply for an injunction **against intermediaries whose services are used by a third party to infringe a copyright or related right.**”*



TM

Art. 11 Enforcement Directive (third sentence)

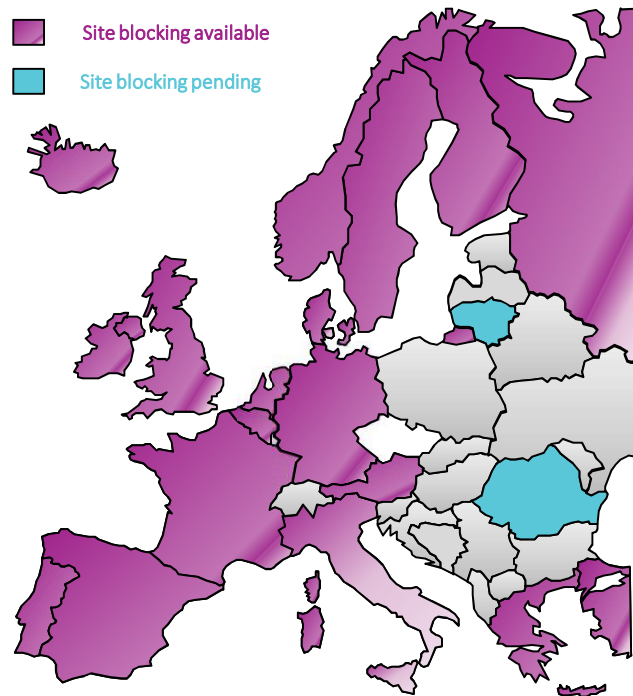
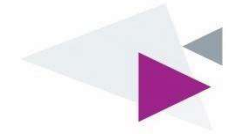
*“Member States shall also ensure that rightholders are in a position to apply for an injunction **against intermediaries whose services are used by a third party to infringe an intellectual property right....**”*

E-Commerce Directive “safe harbours”

“This Article shall not affect the possibility for a court or administrative authority ... of requiring the service provider to terminate or prevent an infringement.”

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Site Blocking – copyright context



- © *LSG v Tele2* - access providers subject to Art. 8(3)
- © *L'Oréal v eBay* - to prevent further infringements
- © *SABAM v Scarlet / Netlog* - outer limits
- © *UPC* - site blocking is compatible with EU law / nature of measures
- © *Facebook* - from identical content to equivalent content / worldwide

- © Orders requiring ISPs to block access to target websites/servers
- © UK threshold criteria:
 - ISPs are service providers (intermediaries)
 - users/operators of the target websites/servers infringe CR
 - users and/or operators use the ISPs' services to do so
 - ISPs have actual knowledge of this
- © Subject to proportionality/balancing of fundamental rights

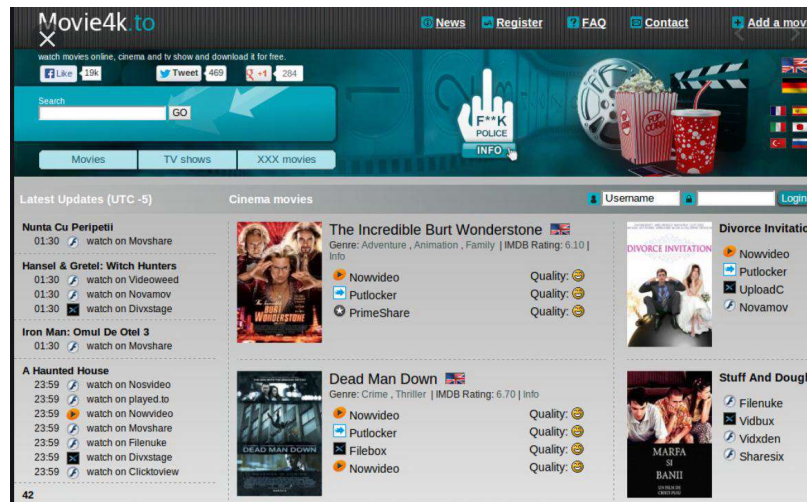
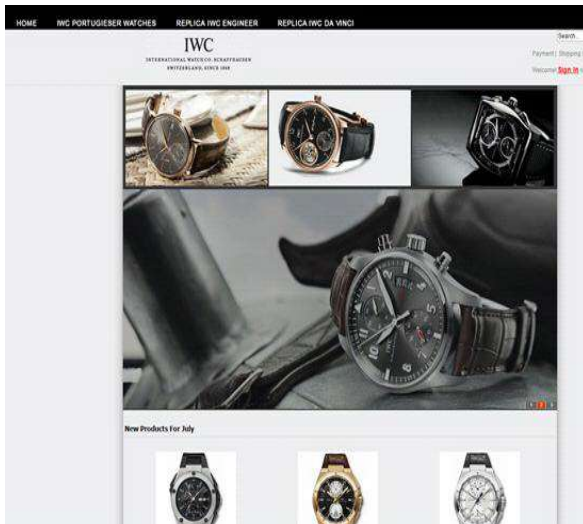
Targets

Sci-Hub

the first pirate website in the world to provide mass and public access to tens of millions of research papers

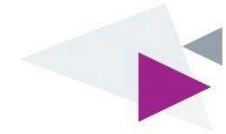
A research paper is a special publication written by scientists to be read by other researchers. Papers are *primary sources* necessary for research – for example, they contain detailed description of new results and experiments.

papers in Sci-Hub library:
more than **80,843,493**



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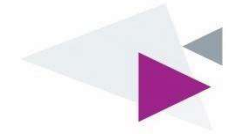
Observations



- A **mature remedy** but currently a **solidly national tool**
- Differing ISP positions
- Varying standards, customs and procedural rules e.g.,
 - **court vs administrative** procedures
 - **evidential burdens**
 - **subsidiarity** requirements
- Variations in orders granted
 - **technical measures** to be implemented
 - **dynamic vs static**
 - **costs**
- **Efficacy**



Expanding the scope of intermediary injunctions



Court of Appeal Briggs LJ (dissenting)

“In my view, the courts could and probably would have developed the jurisdiction regardless of the requirement in the two Directives that it be made available as specified.”

Supreme Court Lord Sumption

“the website blocking order[s] made in this case could have been made quite apart from the power derived from European law, on ordinary principles of equity.”



Broader Scope?

Reliance on other rights:

- see e.g., *Nintendo*

Ex-UK precedents:

- e.g., hate speech

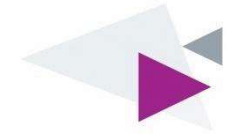
Other intermediaries:

- search
- social media
- marketplaces
- payment providers

... and beyond?

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“Legal Innocence” & Liability



“.... the starting point is the intermediary’s legal innocence.”

“It is critical to these conclusions that the intermediary in question is legally innocent.”

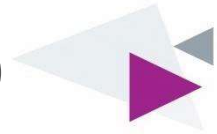
Lord Sumption, *Cartier*

Stream of CJEU cases focusing on the role of digital platforms:

- *BREIN v Ziggo*
- *Uber France*
- *Eva Glawisching-Piesczek v Facebook Ireland Limited*
- *AirBnB Ireland*
- *Coty Germany v Amazon* (judgment pending)
- *YouTube/Uploaded* (AG Opinion/judgment pending)

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YouTube (C-682/18) / Uploaded (C-683/18)



Issues raised

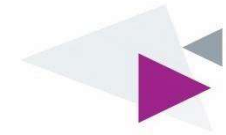
- scope and interpretation of “communication to the public”
- scope and applicability of the “hosting safe harbour” (Art. 14 ECD)
- conditions required to secure Art. 8(3) injunctions
- level of knowledge required to seek damages under Art. 13 Enforcement Directive

Oral arguments

- heard on 26 November 2019
- parties asked to address Art. 17, DSM Copyright Directive

AG Opinion due on 26 March 2020; judgment expected before 18 July 2020 **wiggin**

Digital Services Act



- Intended to update the horizontal regulatory framework for digital services/platforms in the internal market → **strengthen internal market/improve EU competitiveness**
- Update the ECD or a separate instrument tackling new issues (or both)
- Some key issues for IP owners:

- **Art. 14 ECD (hosting privilege)**
- **Art. 15 ECD (no general monitoring)**

- **New liability privileges?**
- **Notice and takedown**

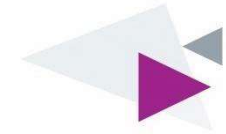
“upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market”

Ursula von der Leyen,
President of the EU Commission

- Other issues include e.g., algorithm transparency
- Enormous range of services potentially in scope

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Other Approaches



France

- DSA not currently a priority on the French legislative agenda
- **New Audiovisual Law** being discussed – new provisions to facilitate enforcement against piracy
- ‘Mission’ proposing new system to **regulate social networks (hate speech)**
- View that **self-regulation** by the largest social media platforms is **inadequate/lacks credibility**

Germany

- German government seems to favour a revision to the ECD
- **NetzDG law** enacted in 2017 to tackle “**fake news**” and “**hate speech**” on social networks
- Subject to criticism but **proposed draft bill intended to introduce stronger provisions**

UK

- **Online Harms White paper** published in April 2019
- Framework for tackling online content which is harmful to users
- **Proposed new statutory duty of care**
- Bill introduced last month to **assign certain functions to Ofcom**



Thank you for listening



Rachel Alexander, Partner

rachel.alexander@wiggin.co.uk

+44 (0)20 7927 9689



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