



Online intermediaries on the rack?
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The pressure is mounting in Europe to re-evaluate and likely increase the responsibilities of digital commercial enterprises such as online intermediaries (Youtube, Facebook et co) for the purposes of tackling illegal content that goes through the copper wires. In this respect the European Commission launched a consultation on the role of platforms, online intermediaries, data and cloud computing.¹ On the matter of copyright enforcement, the Consultation asks about the introduction of new categories of intermediaries, the suitability of the safe harbour provisions of the e-Commerce Directive¹, the establishment of a duty of care for intermediaries and the introduction of a notice and stay down procedure (as opposed to the current notice and action).¹ Some of these themes are continued in the Blueprint for Copyright Reform launched by the European Commission in December 2015 which calls for a review of the involvement of intermediaries in copyright enforcement.¹ Stricter responsibilities for online intermediaries seem supported also by the the judiciary, as the ECtHR in *Delfi v Estonia*¹ allows national laws that hold an internet news portal liable for the illegal content generated by its users. In practical terms, increased involvement of online intermediaries in the eradication of illegal content means that the 'hot potato' of online copyright enforcement may be passed onto online intermediates. Certainly, enforcement of copyright by private third party actors is nothing new. Collecting societies have successfully collected royalties of behalf for right holders for hundreds of years.¹ Yet the type of enforcement by the market players now advocated involves complex issues, relating to legality, legitimacy, due process, accountability, efficacy, possible distortions of the market place and the stifling of innovation. For example, the notice and stay down proposal may be illegal as it counters the e-Commerce Directive no monitoring provision, moreover, this type of monitoring may increase the costs of doing business, which might deter market entry by innovative start-ups. This paper will explore the justifications for allowing enforcement by third party market players, and discuss some implications. It will be argued that any revisions of the responsibilities of online intermediaries should not be advanced unless there is convincing argument, which may not currently be the case.

¹ European Commission, 'Evaluation and review of the regulatory framework for electronic communications networks & services' <https://ec.europa.eu/eusurvey/runner/Platforms/>

² 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

³ *ibid*

⁴ European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Towards a modern, more European copyright framework' (Brussels 9/12/2015) COM(2015) 626 final , 10-11

⁵ Case of *Delfi As v Estonia* (application no. 64569/09)

⁶ Sylvie Nerisson, 'Has collective management of copyright run its course? Not so fast' [2015] IIC, 1