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Hosting liability and social media services

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Outline

- Social media services
- The E-Commerce Directive Art. 14
- Implementation in the Nordic countries
- Case-law
- Unresolved issues
- Conclusion

Social media services

- Also called user-generated content services, communities etc.
- The users generate and upload the content without the service provider's prior control
- The users interact directly with each other
- The service provider provides the service itself, determines the overall conditions for the use of the service, and hosts the user-generated content
- E.g. Facebook, YouTube, Twitter, MySpace, Flickr, certain types of blogs etc.

The E-commerce Directive Art. 14

- The service provider is exempted from liability if the provider
 - *Criminal liability*: has no actual knowledge of illegal activity or information
 - *Damages*: is not aware of facts/circumstances from which the illegal activity or information is apparent
 - Or, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information (*"notice and take down"*)
- "Technical, automatic and passive nature"
- The liability exemption does not preclude injunctions pursuant to national law

Implementation

- Denmark:
 - Lov (2002/237) om elektronisk handel § 16
- Sveden:
 - Lag (2002:562) om elektronisk handel § 18
- Norway:
 - Lov (2003-35) om elektronisk handel § 18
- Finland
 - Lag (2002/458) om tilhandahållende av informationssamhällets tjänster § 15

Case-law

- Applicability – what is "hosting"?
 - Swedish Pirate Bay decision (2009)
 - Storage of torrent files is hosting
 - Google Adwords (ECJ 2010)
 - Adword service constitutes hosting
- Hosting vs. publishing: When should the ISP have known (constructive knowledge)?
 - French MySpace and DailyMotion cases (2007) and Italian Google case (2010): very low threshold!
 - Spanish YouTube and other recent cases: Does the service stimulate infringements? Has the provider taken reasonable and appropriate steps to prevent infringements?

Case-law

- Notice and take down procedure
 - The removal (upon notice) must be effective, cf. Danish Connery case
- Monitoring/filtering obligations
 - General monitoring obligations prohibited, cf. Art. 15 ECD
 - General vs. specific monitoring obligations?
 - Rapidshare case (Germany)

Problems/uncertainties

- Does it matter whether the ISP benefits financially directly or indirectly?
- Lack of notice and take down-procedures
- What about repeated infringements?
- Prohibition regarding general monitoring obligations
- Freedom of expression
- Preliminary question to the ECJ (case C-324/09) is pending, can hopefully provide at least some clarification

Conclusion

- The hosting provision is too vague and too many issues are left open
- Hence, too much is left to the courts
- Lack of harmonisation
- Modernisation needed!
- However, politically difficult because it could imply harmonising fundamental principles on criminal and tort liability
- In the meantime the industry tries to solve the problems by e.g. banner ads revenue sharing agreements