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LEGAL SPACE FOR INNOVATIVE ORDERING: ON THE NEED TO UPDATE SELECTION INTERMEDIARY LIABILITY IN THE EU

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TABLE OF CONTENTS

I. INTRODUCTION 50
II. ORDERING THE WEB 52
III. INTERMEDIARY LIABILITY REGULATION 53
A. Selection intermediaries and the Directive on Electronic Commerce. *55*
B. Selection intermediary regulation in the Member States *56*
C. Review of the Directive on Electronic Commerce and its legislative future *60*
D. Intermediary liability regulation in the United States *61*
IV. CONSIDERATIONS ABOUT THE PROPER LEGAL RESPONSIBILITY OF SELECTION INTERMEDIARIES 63
A. The nature and context of the conduct of search engines *63*
B. Nature, size and foreseeability of damage *64*
C. The possibility and cost of preventive measures *65*
D. Social utility, free flow of information, freedom of expression and information *66*
E. Legal certainty *68*
V. CONCLUSIONS 69

LEGAL SPACE FOR INNOVATIVE ORDERING: ON THE NEED TO UPDATE SELECTION INTERMEDIARY LIABILITY IN THE EU

Joris van Hoboken[*]

The Web needs ordering to be useful. Hyperlinks and search engines are in the centre of the dynamic virtual layer that orders the Web, but many new tools and services have been introduced and are being developed. They provide additional and critical value to the information that is available on the Web and have made the Web the increasingly dynamic and mature environment it is today. These selection intermediaries face one problematic legal uncertainty that has not been fully addressed in the European Union, namely the liability for linking to unlawful third party content, which is a frequent occurrence as a result of their open editorial models. EU law only contains 'safe harbours' for the providers of strictly delineated 'mere conduit', 'caching', and 'hosting' services and selection intermediaries generally do not profit from the provided legal certainty. The result is a patchwork of degrees of liability across the EU. This paper will discuss the liability of selection intermediaries from the perspectives of legal certainty, their social utility and the free flow of information. This paper argues that currently EU law takes insufficiently into account the added value selection intermediaries provide to the online environment and their contribution to the free flow of information. The innovation in the field of selection intermediaries has only just begun. Legitimate limitations on the free flow of information notwithstanding, the EU needs clearer policy choices regarding the proper freedom of selection intermediaries to increase innovation, transparency and the social value of the Web.

I. INTRODUCTION

The Web needs ordering to be useful for Web users and information providers. A range of intermediary service providers and technologies - in the remainder of this paper to be denoted by the term selection intermediaries - map, order, select, validate and valuate online information.[1] Search engines, reputation and tagging systems, folksonomies, suggestion services; they facilitate the access to information and make the abundance of information on the Web more easily navigable. Their accomplishment is that information providers and Web users are more effective in finding each other. Search engines and directories have been in the centre of this ordering of the Web, but in the last five years many new types of tools and services have

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[1] The term 'ordering' denotes the mapping and organizing functionality of selection intermediaries. The term 'selection intermediary' is introduced in Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 37 HOFSTRA L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1021344 (last visited Jan. 26, 2009). I use the term more restrictively, not including filters, for search engines or information location tools in the broad sense. For a discussion of the similarities and differences between search engines and Internet filters, see also GROUP OF SPECIALISTS ON HUMAN RIGHTS IN THE INFORMATION SOCIETY (MC-S-IS), REPORT ON THE USE AND IMPACT OF TECHNICAL FILTERING MEASURES FOR VARIOUS TYPES OF CONTENT IN THE ONLINE ENVIRONMENT §§11-15 (2008), *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2008)37&Ver=add (last visited Jan. 26, 2009).

become successful, often put under the umbrella of Web 2.0.[2] These tools and services and their use provide additional value to the information that is available on the Web and have helped to make the Web the dynamic and rich information environment it is today.

Selection intermediaries face a problematic legal uncertainty that has not been fully addressed at the European level, namely the liability for showing unlawful third party information. The *acquis communautaire* only contains 'safe harbours' for the providers of strictly delineated 'mere conduit', 'caching', and 'hosting' services and selection intermediaries generally do not profit from the provided legal certainty. The result is a patchwork of different degrees of liability across the European Union, which also forms a barrier to entry. This patchwork is currently being evaluated in the context of the European Commission review of the Directive on Electronic Commerce. The United States legislature has done much more to give legal space for new intermediaries to act and provide value to the Internet. In its first major round of Internet legislation at the end of the Nineties, a range of safe harbours has been introduced to indemnify intermediaries against unlawful information from third parties. Most dominant selection intermediaries are based in the United States and have adapted to the U.S. legal regime.

This paper will discuss the liability of selection intermediaries from the perspective of legal certainty, the social utility of selection intermediaries, and the free flow of information. The legal uncertainty in the EU regarding the liability for unlawful acts of third parties could well be an obstacle for innovation in this key field of online intermediaries. At the same time, the European Union regards the creation of a Single European Information Space and an innovation-friendly business environment as top priorities of its i2010 framework.[3] This paper will therefore argue that it is time to evaluate the existing liability for selection intermediaries on the European level. Such an evaluation has to take into account, both the added value of selection intermediaries for the online economy and their contribution to the free flow of information. Innovation in the field of selection intermediaries has only just begun. Legitimate limitations on the free flow of information notwithstanding, the future of the Web needs clearer policy choices regarding the proper freedom of selection intermediaries to increase investment, innovation, transparency, and the social value of the Web for European citizens.

In section II, the function of selection intermediaries will be discussed as well as selection intermediaries' open editorial model with its consequences for the availability of unlawful references by selection intermediaries. This renders liability for unlawful references one of the key legal issues for selection intermediaries. In section III, the European intermediary liability legislation will be discussed, more specifically the lack of safe harbours for information location tools and hyperlinks in the Directive on Electronic Commerce and the resulting patchwork of national laws governing the references provided by selection intermediaries. In this context, the reviews of the Directive on Electronic Commerce by the European Commission are of special significance, as are the legislative choices made by the U.S. Congress. In the final section of this paper, I will systematically present the possible arguments with regard to the

[2] The term Web 2.0 was coined by O'Reilly. Tim O' Reilly, *What Is Web 2.0. Design Patterns and Business Models for the Next Generation of Software*, COMMUNICATIONS & STRATEGIES, no. 65, First Quarter 2007, at 17, *available at* (last visited Jan. 26, 2009). Web 2.0 has been used as an umbrella and marketing term for many of the things happening on the Web since then, with a special role for the phenomenon of online social networking, user created content, peer produced ordering through tagging and folksonomies. I will avoid the term in the remainder of the Article.

[3] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, *i2010 - A European Information Society for growth and employment*, Brussels, at 5, COM (2005) 229 final (June 1, 2005).

proper duty of care with regard to unlawful references by selection intermediaries. Special attention will be paid to the nature and context of the conduct of selection intermediaries, their social utility, the free flow of information and freedom of expression and information, the need for competition between selection intermediaries and the need for legal certainty. The paper finishes with a conclusion and recommendation in section V.

II. ORDERING THE WEB

One of the complexities of information flows online is that they take place with the help of a range of intermediary service providers. Between information providers and Web users stand Internet access providers, hosting providers, webmasters, search engines, and a range of new services and technologies, each shaping to a bigger or lesser extent if and how communication unfolds. Many intermediary services assist information providers that want their information to be publicly accessible online. Hosting providers provide publishing space to online publishers. Internet forums and user generated content services allow users to publish information on their platforms. Finally, access to the Internet suffices to publish content on the Internet on one's own computer.

The result of all this publishing space is an abundance of online information that does not have a simple centralized organisation.[4] Fortunately, a range of intermediary service providers and technologies - in the remainder of this paper to be denoted by the term selection intermediaries - help to order, select, validate and valuate the available online information. Hyperlink technology is, of course, of crucial importance. Hyperlinks are the basic navigational technology of the Web. New technologies, such as the successful RSS-technology, help individuals to personalize their daily intake of online information. The most important selection intermediaries have been directories and Web search engines. They solely perform ordering functions, as do newer types of recommendation services, such as del.icio.us and StumbleUpon, to name a few. Online publishers such as newspapers and blogs, besides publishing their own content, refer to other content and thereby help to order online information.

Some of these services are still performed by human-powered organisations with clear editorial centres. Some directories and most blogs are still published non-automatically.[5] However, the abundance of online information makes it impossible for individuals and human-powered editorial entities to cover even a fraction of the total online information ecology.[6] New editorial models have emerged, giving order to the Web and helping information providers and Web searchers find each other. This development has opened spectacular new paths for the processing and ordering of information online. Crawler based search engines have become the norm. In 2002 Yahoo replaced its primary offering, the once successful directory "Yet Another Hierarchical Officious Oracle", with a crawler-based search engine.

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[4] Domain names and IP addresses are important but are of limited use in the context of information retrieval. The discussion about a semantic Web will be left aside.

[5] Although, it is increasingly popular to also publish a set of automatically generated references next to normally edited content.

[6] For an overview of the discussion of the problems posed by information overload, see Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J.L. & TECH. 43 (1998). It explains both the significance of search engines as a tool to overcome information overload and the powerful position search engines find themselves in as a result of 'infoglut'. For a more recent argument, see Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 133 (2007).

The outstanding characteristic of new models for ordering information online is that their algorithms distribute editorial power among information providers and Web users. They are allowed to edit and rank references in these selection intermediaries to various extents. As a result we see selection intermediaries that govern their platforms through systems of distributed editorial control. The enforcement of editorial guidelines by the platform takes place *ex post* with the help of third parties.[7] In practice, every information provider or third party is able to make the content of its choice available through the selection intermediaries' platform and has the possibility and incentive to promote itself. The end-user of the selection intermediary is no longer passive. Many are themselves information providers and collectively decide which content is preferred by the platform.

The open editorial model means that selection intermediaries may contain references that are unlawful from the perspective of the laws of a relevant jurisdiction. Questions about jurisdiction will be avoided.[8] For the sake of argument, it is enough that European states have jurisdiction over the references by selection intermediaries in certain cases. If there is jurisdiction, there is a range of laws that could make the publication of references unlawful: copyright law, trademark law, the law of trade secrets, data protection law, defamation, general tort law, criminal law. The question is to what extent selection intermediaries can be held legally accountable for references containing or referring to unlawful information. When are selection intermediaries liable for such "*unlawful references*"? Can there be a legal obligation to remove unlawful references, and if so, under what circumstances?

In the next two sections the issue of liability of selection intermediaries for third party information will be further discussed from a European public policy perspective. The related and broader issue of hyperlink liability will not be discussed.[9] The focus will lie on selection intermediaries and more specifically search engines. The specific questions relating to sponsored references by selection intermediaries will be left aside.[10] The analysis in this paper is by no means a comprehensive overview of the legal issues involved. It is instead an argument against the current problematic state of intermediary liability of search engines and other selection intermediaries in the EU.

III. INTERMEDIARY LIABILITY REGULATION

The liability of online intermediaries has been on the European legislative agenda since the end of the Nineties.[11] However, search engines have hardly been addressed in this debate,[12]

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[7] The enforcement of editorial guidelines is an opaque and continuous battle between information providers, other third parties and the specific selection intermediary.

[8] As well as a discussion of the (debate about the) country of origin principle, included in the Directive on Electronic Commerce, applicable to information society services, which include selection intermediaries like search engines, *infra* section III.A.

[9] The issue of the permissibility of deep linking is of critical importance for search engines and other selection intermediaries. Deep linking by search engines has generally been found to be legitimate.

[10] The editorial model of selection intermediaries with regard to advertisements is usually much more restricted, plus there is a direct profit relationship of the selection intermediary. Sponsored references therefore deserve a separate treatment.

[11] For a discussion of online intermediary liability see K.J. KOELMAN, IMPRIMATUR, LIABILITY FOR ON-LINE INTERMEDIARIES (1997); Rosa Julia-Barceló, *On-Line Intermediary Liability Issues: Comparing EU and US Legal Frameworks*, 22 EUROPEAN INTELLECTUAL PROPERTY REVIEW [E.I.P.R.] 106 (2000); K.J. Koelman, *Online Intermediary Liability*, *in* COPYRIGHT AND ELECTRONIC COMMERCE 7 (P.B. Hugenholtz ed., Kluwer Law International 2000).

and other selection intermediaries were not as developed as they are now. The core result of European legislative efforts is the Directive on Electronic Commerce (2000/31/EC).[13] Additionally, the Information Society Directive contains a provision in Article 5 (1) that is meant to allow the lawful processing of 'transient copies' by online intermediaries.[14] Of note is that the EU Data Protection Directive (95/46/EC) does not contain provisions relating to online intermediaries, resulting in a rather unclear situation regarding the obligations of selection intermediaries with respect to personal data in their ordered indexes.[15]

The objective of the Directive on Electronic Commerce (shortly: Directive) is "to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States."[16] In recital 40, it is noted that "both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of

[12] Two noteworthy exceptions are Rosa Julia-Barceló, *supra* note 11 and Th. Verbiest, *The Liability, in French and Belgian Laws, of Search Tools on the Internet*, 7 INT. J. LAW. INFO. TECH. 238 (1999). For an extensive list of resources on hyperlink liability see the online collection by Stephan Ott at Links & Law, *available at* http://www.linksandlaw.com/legalresources-publicationsenglish.htm (last visited Jan. 26, 2009).

[13] Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC).

[14] Council Directive 2001/29, art. 5(1), 2001 O.J. (L 167) 10–19 (EC). For a discussion of Article 5(1) of the Information Society Directive and its relation to the safe harbours of the Directive on Electronic Commerce, see L. GUIBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES' LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 30 (February 2007), *available at* http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf (last visited Jan. 26, 2009).

[15] Council Directive 95/46/EC, 1995 O.J. (L 281) 31–50 (EC). The issue is of special significance in view of increasingly sophisticated person search engines and search engines using facial recognition software. For the implications of EU data protection laws for personal data in the index and the results of search engines see ARTICLE 29 WORKING PARTY, OPINION ON DATA PROTECTION ISSUES RELATED TO SEARCH ENGINES (April 4, 2008), *available at* http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2008/wp148_en.pdf (last visited Jan. 26, 2009). The Working Party concludes that search engines should generally not be considered to be the controller of personal data they process in their results and index, with the exception of search engines specialized in retrieving personal data, such as people search engines. In addition recent guidelines of the Dutch Data Protection Authority touch on the subject. *See* DUTCH DATA PROTECTION AUTHORITY, DPA GUIDELINES. PUBLICATION OF PERSONAL DATA ON THE INTERNET 7-8 (December 2007), *available at* http://www.dutchdpa.nl/downloads_overig/en_20071108_richtsnoeren_internet.pdf (last visited Jan. 26, 2009) The Spanish Data Protection Authority, the AEPD, seems to have taken the view that search engines should be considered to be the controller of personal data in their index. *See* AEPD, STATEMENT ON INTERNET SEARCH ENGINES 12 (December 1, 2007), *available at* https://www.agpd.es/upload/Canal_Documentacion/Recomendaciones/declaracion_aepd_buscadores_en.pdf (last visited Jan. 26, 2009) ("[t]he AEPD has been defining, via a number of decisions, criteria for protecting the right of cancellation of the information available on the Internet and, specifically, the appropriateness of the right of opposition in respect of search engine services"). Don X.X.X. v. Google Spain, S.L., AEPD Res. no. R/01046/2007, Proc. no. TD/00463/2007 (Nov. 20, 2007), http://www.lapaginadefinitiva.com/aboix/wp-content/uploads/resolucion-aepd-sobre-borrado-de-datos-google.pdf (last visited Jan. 26, 2009) (Spain) dealing with a request of removal from Google's search results by a natural person results in the following administrative order: "calling on Google to adopt the necessary measures to withdraw the data from its index and block future access to it." (*id.*, at 10). This is not only noteworthy because the obligation of removal is based on data protection legislation, but also because the source of the information, a publication of personal data by local Spanish authorities, is considered to be lawful.

[16] Directive 2000/31, *supra* note 13, art. 1(1).

competition."[17] The Directive aims to solve these internal market problems by introducing safe harbours for certain types of intermediaries. To be precise, the section in the Directive on the liability of information society services[18] acting as intermediaries does four things. First, it defines three categories of intermediaries, namely 'mere conduit' (Article 12), 'caching' (Article 13), and 'hosting' (Article 14). Second, for each of these categories it contains a conditional liability exemption. For instance in the case of caching services, one condition is that the provider removes or blocks access to cached information upon notice that the source has been removed or blocked, or there is a legal order for such removal or blockage. Third, it explicitly leaves open the possibility for a court or administrative authority to require the provider to terminate or prevent an infringement. The exemptions do not affect the lawfulness of the processing of information by providers of any of these types of intermediary services. The lawfulness has to be determined by applying the relevant laws of the Member States. An important result is that the exemptions do not protect the providers of exempted services against litigation. Finally, the Directive proscribes general obligations on the providers of these services to monitor the information that they transmit or store, or to seek facts or circumstances indicating illegal activity (Article 15).

A. Selection intermediaries and the Directive on Electronic Commerce.

A full discussion of intermediary liability goes far beyond the scope of this Article. Instead, the focus lies fully on the liability of selection intermediaries. The question is how selection intermediaries in general and search engines more specifically fit into the existing intermediary liability regulation? The Directive does cover search engines as information society services, as can be seen in recital 18:

> [I]nformation society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data . . . .[19]

An important provision for search engines in the Directive is Article 6, which contains an obligation for information society services which contain commercial communications to ensure they are clearly identifiable as such. One has to look at the provisions in Article 21 on the Re-examination by the European Commission to find that search engines (information location tools) and hyperlinks are not covered by the intermediary liability regime in Articles 12 -15 of the Directive on Electronic Commerce. Article 21.2 provides that "in examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services . . . ."[20] This provision was added to the European Commission's proposal for the Directive as a result of an

[17] *Id.,* pmbl. § 40.

[18] Directive 2000/31, *supra* note 13, art. 2(a) refers to Directive 98/34, 1998 O.J. (L 204) 37 (EC), *amended by* Directive 98/48, 1998 O.J. (L 320) 54 (EC) for a definition of 'information society service': "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". *See also infra* sect. III.A.

[19] Directive 2000/31, *supra* note 14, pmbl. § 18.

[20] *Id.*, art. 21(2).

amendment by the European Parliament.[21] The reason why search engines were not included in the intermediary liability regime does not become clear when reading the legislative history. Apparently, it was not an important point of debate. Surely, the regime of Articles 12 - 15 is a compromise between the major stakeholders involved in the preparatory stages of the legislative proposal.[22] Since search engines were less dominant players at the time of drafting and were predominantly U.S.-based, it is conceivable that they have not been involved in the preparatory stages.[23] The compromise is probably best understood as a balancing act between the interests of rights holders and the interests of Internet Service Providers. Although they have horizontal effect, the exemptions are clearly written from the perspective of copyright infringement.[24]

B. Selection intermediary regulation in the Member States

The exclusion of selection intermediaries from the intermediary liability regulation on the European level has led to divergent treatment of selection intermediaries by legislatures and the judiciary in the various Member States. Importantly, the Directive on Electronic Commerce does not provide for full harmonization of intermediary liability exemptions. There were amendments in this direction by the European Parliament, but they did not make it into the final proposal.[25] Therefore, the Directive left room for the Member States to regulate the liability of search engine providers and other intermediaries. According to the European Commission's first report on the application of the Directive on Electronic Commerce, this room has been used by a few Member States, including Spain, Portugal, Austria and EEA-member Liechtenstein.[26] The new EU Member States Hungary and Poland also extended the limitation on liability for providers of hosting services to information location tools.[27] In the remainder of this section, I will highlight

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[21] *See Amended Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market*, at 5, COM (99) 427 final (August 17, 1999).

[22] *See, e.g., id.*, at 7 ("as regards amendments concerning the liability of intermediaries (45 to 49, 53 and 54) which is a very important and sensitive area . . . a particular effort was made in the original proposal, in close consultation with the interested parties, to achieve a reasonable compromise solution that takes due account of all interests at stake.") for the European Commission's reaction on a few of the amendments by the European Parliament to the proposed liability regime of the Commission.

[23] At least there is no sign of it in the preparations for and the legislative history of the Directive.

[24] The European safe harbours closely resemble the safe harbours from the DMCA, *infra* section III.C.

[25] *See* Committee on Legal Affairs and Citizens' Rights, *Report on the proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market*, at 26, COM (98) 0586 (April 23, 1999) ("The limitations on liability established by Articles 12, 13 and 14 are exhaustive"), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A4-1999-0248+0+DOC+PDF+V0//EN&language=EN (last visited Jan. 26, 2009) and *id.* at 58, 82 (Amendments 22 and 16 by the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media respectively).

[26] *See First Report on the Application of 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*, at 13, COM (03) 0702, (November 21, 2003), *available at* http://www.inst-informatica.pt/servicos/informacao-e-documentacao/biblioteca-digital/areas-aplicacionais/erp-scm/com2003_0702en01.pdf/at_download/file (last visited Jan. 27, 2009) [hereinafter *First Report*].

[27] *See* 2001. évi CVIII Törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről [Act CVIII of 2001 on Electronic Commercial Services and Certain Legal Aspects of Information Society Services] (promulgated 24 Dec., 2001), MAGYAR KÖZLÖNY [HUNGARIAN GAZETTE] 2001/153, *translated in* http://www.nhh.hu/dokumentum.php?cid=11961 (last visited Jan. 26, 2009) (Hung.); Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną [Law of July 28, 2002 Concerning the Provision of Electronic Services] (entered into force Mar. 10, 2003), DZIENNIK USTAW [OFFICIAL JOURNAL] 2002, no. 144, item 1204, *available at*

some legal developments in different European countries with regard to selection intermediaries, with a focus on search engines. The overview is far from comprehensive.[28] Instead it focuses on some typical cases and national points of discussion, showing the lack of a clear European legal framework. This overview is followed by a short discussion of the review process of intermediary liability regulation in the EU and relevant legislation in the United States.

Austria has a search engine liability exemption modelled on the mere conduit exemption of Article 12 of the Directive. [29] Interestingly, in the Austrian government's initial proposal the exemption was modelled on the hosting exemption of Article 14. Various stakeholders responded to the initial choice of the Austrian government with a range of arguments against treating search engines like hosting providers. It was argued that search engines generally do not edit the content they show in the results, are not the source of the information they link to, and are not in the position to remove it from the Web.[30] The Austrian legislature changed the proposal into the mere conduit regime of Article 12 of the Directive, which was finally adopted by the Austrian parliament.[31] The international nature of most selection intermediaries reduces the practical significance of the Austrian legislative choices for a liberal liability regime.

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http://www.nowemedia.home.pl/nuke/modules.php?name=Sections&op=viewarticle&artid=6 (last visited Jan. 26, 2009) (Poland).

[28] It does not discuss for instance the (complicated) situation in France. For a discussion see Bradley L. Joslove & Andréi V. Krylov, *Dangerous Liaisons. Liability in the European Union for Hypertext and search engine services*, 2005 COMPUTER LAW REVIEW INTERNATIONAL 33. Recently, a French court has concluded that Digg-like selection intermediaries can be hold liable for third party references to unlawful third party publications. T.G.I. Paris, Mar. 26, 2008 (Fr.), *available at* http://www.foruminternet.org/specialistes/veille-juridique/jurisprudence/IMG/pdf/tgi-par20080326.pdf (last visited Jan. 26, 2009).

[29] Bundesgesetz: Regelung bestimmter rechtlicher Aspekte des elektronischen Geschäfts- und Rechtsverkehrs [E-Commerce Gesetz - ECG] [Law on Electronic Commerce] Bundesgesetzblatt [BGBl] I No. 152/2001 (Austria).

[30] It is useful to consider the various reactions to the proposal by the Austrian government for the Austrian Law on Electronic Commerce. *See, e.g.,* INDUSTRIELLENVEREINIGUNG, STELLUNGNAHME DER IV ZUM E-COMMERCE-GESETZ [REACTION OF THE INDUSTRIELLEVEREINIGUNG ON THE E-COMMERCE LAW] (Stellungnahme no. 18/SN-232/ME, Aug. 30, 2001), *available at* http://www.parlament.gv.at/PG/DE/XXI/ME/ME_00232_18/fname_000000.pdf (last visited Jan. 26, 2009) (arguing for similar treatment as access providers), VERBAND FÜR INFORMATIONSWIRTSCHAFT, STELLUNGNAHME DES VIW ZUM ENTWURF EINES E-COMMERCE GESETZES [REACTION OF THE VERBAND FÜR INFORMATIONSWIRTSCHAFT TO THE ENACTMENT OF AN E-COMMERCE LAW] (Stellungnahme no. 33/SN-232/ME, Sept. 3, 2001), *available at* http://www.parlament.gv.at/PG/DE/XXI/ME/ME_00232_33/fname_000000.pdf (last visited Jan. 26, 2009) (arguing that search engines should be treated similarly as caching intermediaries), WIRTSCHAFTSKAMMER ÖSTERREICH, E-COMMERCE GESETZ; STELLUNGNAHME [E-COMMERCE LAW; REACTION] (Stellungnahme 30/SN-232/ME, Aug. 30, 2001), *available at* http://www.parlament.gv.at/PG/DE/XXI/ME/ME_00232_30/imfname_000000.pdf (last visited Jan. 26, 2009) (arguing that search engines should be treated similarly as access providers). *See also* WOLFGANG ZANKL, E-COMMERCE- UND INTERNETRECHT (2001), *available at* http://www.e-xam.at/pdf/ecominternet.pdf (last visited Jan. 26, 2009). Zankl contends that the similar treatment in the proposal of hosting, hyperlinking and Web search is questionable, because there are some significant differences in how they are related to third party material. He argues for a treatment of search engines similar as access providers(*id.*, at 32-34).

[31] *See* 817 DER BEILAGEN ZU DEN STENOGRAPHISCHEN PROTOKOLLEN DES NATIONALRATES XXI. GP [ITEM 817 OF THE SUPPLEMENTS TO THE STENOGRAPHIC PROTOCOLS OF THE NATIONAL COUNCIL FOR THE 21ST LEGISLATIVE SESSION] 34-35 (Nov. 19, 2001), *available at* www.hdesign.at/e_commerce_gesetz.doc (last visited Jan. 26, 2009) (on the amendment to § 15 of the draft e-commerce law, arguing that search engines work automatically and normally do not edit or effectively control the information they process).

The Spanish legislature chose to adopt the hosting regime of Article 14 for unlawful results of search engine providers.[32] The Spanish Law contains one provision for providers of hosting and search engine services. A hosting or search engine provider is not held liable for resulting damages if they do not have knowledge of the illegal nature of the information. The exemption requires that they act expeditiously in case they obtain such knowledge. Although the Spanish implementation has been praised for providing legal certainty for search engines,[33] such certainty is relative. Spain is only one country for global selection intermediaries. Second, one could ask whether the exemption does not put too much burden on the search engine provider, resulting in the wrong type of incentives. Major search engines have billions of results, varying over time. Being treated the same as hosting providers could easily result in the obstruction of legitimate information flows.

The United Kingdom transposed the Directive on Electronic Commerce into national law in 2002 with the Electronic Commerce Regulations 2002 and did not insert additional exemptions for providers of hyperlinks and information location tools.[34] In the end of 2006, the U.K. government's Department of Trade and Industry (DTI), now called the Department of Business Enterprise and Regulatory Reform, conducted a review of the intermediary liability regime specifically addressing the question whether the existing safe harbours should be extended to providers of hyperlinks, location tools and content aggregation services.[35] The DTI received a predictable mixed response to its questionnaire and concluded that there was at that point insufficient evidence to justify an extension of the limitations on liability at the national level.[36] More specifically the U.K. government concluded that the issue should be dealt with at EU level by the European Commission in its second review of the Directive.

In Germany, limitations on liability of selection intermediaries are regulated by the federal Telemediengesetz (TMG) of 2007. Articles 8-10 of the TMG do not contain limitations on liability for hyperlink and location tool providers, similar to the initial law implementing the Directive on Electronic Commerce, the Teledienstegesetz of 2002. Consequently, the liability of search engines and other selection intermediaries is governed by general laws, applied by German courts in an increasingly complex series of rulings.[37]

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[32] *See* art. 17 of Law 34/2002 on Information Society Services and Electronic Commerce (Ley 34/2002 de Servicios de la Sociedad de la Información y de Comercio Electronicó) of Jul. 12, 2002 (B.O.E. 2002, 166) (Spain). For a short overview of the Spanish implementation of the Directive on Electronic Commerce, see Rosa Julia-Barceló, *Spanish Implementation of the E-Commerce Directive. Main features of the Implementation of the E-Commerce directive in Spain*, 2002 COMPUTER UND RECHT INTERNATIONAL 112.

[33] *See id.*, at 112.

[34] Electronic Commerce Regulations, 2002, S.I. 2002/2013. For a critical discussion of the UK legislative choices with regard to intermediary liability, see M. Turner, Mary Traynort and Herbert Smith, *UK E-commerce liability, Ignorance is bliss*, 19 COMPUTER LAW & SECURITY REPORT 112 (2003).

[35] DTI, DTI CONSULTATION DOCUMENT ON THE ELECTRONIC COMMERCE DIRECTIVE: THE LIABILITY OF HYPERLINKERS, LOCATION TOOL SERVICES AND CONTENT AGGREGATORS (June 2005), *available at* at http://www.berr.gov.uk/files/file13986.pdf (last visited Jan. 26, 2009).

[36] *See* DTI, DTI CONSULTATION DOCUMENT ON THE ELECTRONIC COMMERCE DIRECTIVE: THE LIABILITY OF HYPERLINKERS, LOCATION TOOL SERVICES AND CONTENT AGGREGATORS - GOVERNMENT RESPONSE AND SUMMARY OF RESPONSES 6 (December 2006), *available at* http://www.berr.gov.uk/files/file35905.pdf (last visited Jan. 26, 2009).

[37] For a lengthy discussion of search engine liability in Germany, see U. Sieber & M. Liesching, *Die Verantwortlichkeit der Suchmaschinenbetreiber nach dem Telemediengesetz* [The Liability of Search Engine Operators after the Telemedia Act], MULTIMEDIA UND RECHT [MMR], Issue 8/2007, at 1. *See also* Peter Ruess, *'Just Google it?' – Neuigkeiten und Gedanken zur Haftung der Suchmaschinenanbieter für Markenverletzungen in Deutschland und den USA* [*'Just Google it?' – Novelties and Thoughts on the Liability of Search Engine Operators*

An important set of German court rulings relating to search engines and hyperlinks is the Paperboy ruling of the German Bundesgerichtshof and the rulings building on it. The Paperboy judgment affirmed the permissibility of the use of hyperlink technologies by crawler-based search engines with a decision referring both to the social utility of selection intermediaries and the fundamental right of freedom of expression and information.[38] In a more recent ruling, the *Oberlandesgericht* (OLG) Hamburg builds on this reasoning in Paperboy, concluding that the normal liability standard for publications is too strict in the case of the publication of references by search engines.[39] The OLG Hamburg concludes that the normal liability standard requires an exception in the case of search engines.

> This follows from the required balancing between the general personality right and the freedom to impart and receive information, which is called for by a search engine decisively. That is to say, without the operation of search engines the practical application of the informational abundance on the World Wide Web would not be possible. In light of the tremendous amount of websites to be gathered, an automatic process is the only option for the gathering, extraction and presentation.[40]

In other words, the court argues in this case that the liability of search engines for possibly unlawful content of their references which is the result of the automatic reproduction of unlawful information from the billions of websites on the Web, should be lowered because of the significance of search engines for the freedom of expression and information.

In the absence of legislation and in view of the different outcomes of legal proceedings, the liability of selection intermediaries for third party information is a complex issue in Dutch law.[41] The Dutch legislature transposed Articles 12-15 almost literally into the Dutch Civil Code.[42] Until today, the Dutch government or parliament has not discussed the issue of hyperlink or search engine liability. Case law with regard to search engine liability has primarily dealt with rules of general tort law and the proper duty of care of search engines with regard to unlawful results, with varying consequences. In the *Zoekmp3* case, a dispute between rights holders and a provider of a crawler-based search engine specialized in links to mp3 files on the Web, the lower court in Haarlem imposed a duty of care on Zoekmp3 similar to that for hosting providers. However, the Dutch Court of Appeals in Amsterdam ruled that the service Zoekmp3 was unlawful. The Court of Appeals based the unlawfulness on Dutch tort law and the specific circumstances of the case. The court came to the conclusion that the search engine was making its money by structurally exploiting the availability of unauthorized mp3-files on the World Wide Web, finding Zoekmp3 had not taken sufficiently into account the interests of rights holders. Acting as such, the search engine breached its general duty of care towards them.

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for Trademark Infringement in Germany and the USA], 2007 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 198; Stephan Ott, *supra* note 12.

[38] Bundesgerichtshof [BGH][Federal Court of Justice] Jul 17, 2003, I ZR 259/00.

[39] Oberlandesgericht [OLG] Hamburg [Court of Appeals Hamburg], February 20, 2007, AZ. 7 U 126/06.

[40] *Id.*(translation provided by the author).

[41] For a discussion (in Dutch) see Joris van Hoboken, *De aansprakelijkheid van zoekmachines. Uitzondering zonder regels of regels zonder uitzondering?* [The Liability of Search Engines: An Exception Without Rules or Rules Without an Exception?], 2008 COMPUTERRECHT 15.

[42] Aanpassingswet richtlijn inzake elektronische handel [Implementation Law Directive on Electronic Commerce], Stb. 2004, 210 (Neth.). The limitations on liability can be in Burgerlijk Wetboek [BW] [Civil Code] art. 6:196c (Neth.).

Another interesting case in the Netherlands involves a TV hostess, who complained to Google about the search results for her name. A reference, titled *Urmia Jensen naakt* (Urmia Jensen naked), suggested the availability of nude material on the Web. Apparently, the results had been manipulated by a website, using the popularity of natural persons to manipulate search results, a practice commonly referred to as spamdexing.[43] Surprisingly, the court concluded that Google had not been in the position to determine the unlawfulness of the reference and its duty of care did not require it to block the results in question after being notified. Interestingly, in Germany there is a very similar case with a very different result. In the German case the court ordered the search engine to block the results and to install a filter that would prevent any future references with the combination of plaintiff's name and the word *nackt* (naked).[44]

C. Review of the Directive on Electronic Commerce and its legislative future

Article 21 of the Directive instructs the European Commission to conduct a biannual report on the application of the Directive, the first of which to be concluded before 17 July 2003. Importantly, the report needs to contain an analysis of the need for proposals concerning the liability of providers of hyperlinks and location tool services.[45] In the first report the Commission concludes there was no reason to amend the existing intermediary liability rules with regard to search engines.[46] The Commission did note diverging legislative choices and wrote the following about legal developments with regard to search engine liability:

> It is encouraging that recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the internet and e-commerce. Consequently, this case-law does not appear to give rise to any Internal Market concerns.[47]

Of course the Directive was rather new and some Member States still needed to implement it at the time of the review. The Commission subsequently placed the issue in the agenda of the next review, which is currently taking place. In the second report special attention will be paid to the question of intermediary liability.[48] However, it seems to be pending for a while now - it should have been published in 2005 - and intermediary liability is one of the most controversial issues in the review. Importantly the DG Internal Market is responsible for the Directive on Electronic Commerce. The DG Information Society might be better situated to deal with intermediary liability. It has recently issued a consultation on Content Online, which has considerable overlap with the issues of intermediary liability.[49]

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[43] For an early discussion of the practices and legal problems of spamdexing, see Nathenson, *supra* note 6.

[44] Landesgericht [LG] Berlin [Trial Court Berlin], February 22, 2005, AZ 27 O 45/05, *available at* http://www.aufrecht.de/index.php?id=3867 (last visited Jan. 27, 2009).

[45] *Supra* note 20 and accompanying text.

[46] *First Report*, *supra* note 26, at 22.

[47] *Id.*, at 13.

[48] *See* European Commission Internal Market & Services DG, *Third Meeting of the Expert Group on Electronic Commerce*, at 2 (February 2007), *available at* http://ec.europa.eu/internal_market/e-commerce/docs/expert/20070220-commission_en.pdf (last visited Jan. 28, 2009). *See also* DTI, *supra* note 36.

[49] *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*, COM (2007) 836 final (January 1, 2008), *available at* http://ec.europa.eu/avpolicy/docs/other_actions/col_en.pdf (last visited Jan. 27, 2009). The

The existing intermediary liability regulation is already under continuous pressure. Introducing proposals for amendment of, or new exemptions will require considerable courage and leadership. Unlike what is being suggested by rights holders, the necessary discussion at the EU level about the need for an extension of intermediary liability regulation to hyperlinks and selection intermediaries should not start from the assumption that the current status quo is the result of a full discussion of the subject. Search engine liability was for the most part ignored in the process leading to the Directive on Electronic Commerce and ultimately stalled in Article 21.[50] The current reluctance of the European Commission to meet its obligations under Article 21 of the Directive does not serve the debate on this important issue.

D. Intermediary liability regulation in the United States

The United States Congress introduced a patchwork of intermediary liability regulation in the first major round of Internet legislation in the end of the last century.[51] Unlike the European safe harbours discussed above, the American safe harbours are not horizontal, resulting in a complicated set of different liability exemptions for different types laws. The safe harbours extend to selection intermediaries and hyperlinks. They are not systematically excluded from intermediary liability regulation as in the EU Directive on Electronic Commerce.[52]

The most well-known safe harbours were introduced by the Digital Millennium Copyright Act (DMCA) of 1998 and can be found in 17 U.S.C. § 512.[53] The respective safe harbours protect against monetary liability for copyright infringements by third parties and not against injunctive relief. Search engines are covered in section 512 (d):

> (d) Information location tools.
>
> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j),[[54]] for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to

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Communication identifies the challenge of "updating/clarifying possible legal provisions that unnecessarily hinder online distribution of creative content in the EU, while acknowledging the importance of copyright for creation" (*id.*, at 4) and it asks for comments on the way in which ISPs could help to prevent copyright infringements, such as by filtering the traffic on their networks. There is no mention of the Directive on Electronic Commerce, or the liability of intermediaries.

[50] Therefore, the remark of the European Commission in the first report on the application of the Directive, stating that the legislative choices enshrined in Articles 12-14 "were based on careful analysis of existing rules and emerging case law, including a study on 'Existing rules in Member States governing liability for information society services' commissioned by the Commission from Deloitte & Touche in 1998" (*First report*, *supra* note 26, at 13 note 66) cannot refer to the issue of search engine liability. The report by Deloitte & Touche and the legislative history did not address the liability of search engines.

[51] For a recent discussion of safe harbours in the United States, see Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 5 J. TELECOMM. & HIGH TECH L. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979836 (last visited Jan. 27, 2009). Lemley argues for an integration of existing safe harbours into one safe harbour with horizontal effect. With regard to the European safe harbours he concludes that they have been a failure: "While the EC's 2000 Electronic Commerce Directive provides for some safe harbors, they do not appear to have been working, at least as implemented in national legislation and the courts." (*id.*, at 22-23).

[52] To be honest, the current legal regime for intermediary liability in the U.S. is also the subject of intense debate and litigation.

[53] For a discussion of the application of the DMCA safe harbours to search engines see Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J. L. & TECH. 1 (2004).

[54] Subsection (j) restricts the availability of injunctive relief.

an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.[55]

Stronger than section 512 DMCA is the liability exemption resulting from the Communications Decency Act (CDA) from 1996, to be found in 47 U.S.C. § 230. Strangely enough, the respective intermediary liability regulation aimed to chill certain information flows (adult speech), instead of providing a safe harbour to online intermediaries. Notwithstanding, section 230 of the CDA, titled "Protection for private blocking and screening of offensive material," turned out to be an effective safe harbour for a range of internet intermediaries because of the following language:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[56]

Finally, the Lanham Act contains an even less well-known safe harbour in section 1114(2) for the undefined category of "innocent infringers", which could include search engines.[57]

[55] 17 U.S.C. § 512 (d).

[56] 47 U.S.C. § 230 (c) (1). The scope of the provision can be found in § 230 (e): no effect on criminal law, intellectual property law, and communications privacy law and the superiority of the provision to State law.

[57] *See* Lemley, *supra* note 51, at 6-8. *See also* Recent Developments, *Making Your Mark on Google*, 18 HARV. J. L. & TECH. 486 (2005).

IV. CONSIDERATIONS ABOUT THE PROPER LEGAL RESPONSIBILITY OF SELECTION INTERMEDIARIES

Should a search engine or other selection intermediary remove certain unlawful references and if so, in which cases? In the following I will present the possible arguments with regard to the proper duty of care in a systematic form. These arguments can be used to reflect on current selection intermediary liability. First, the arguments relating to the nature and the context of the conduct of selection intermediaries and search engines (sect. A), the arguments relating to the probability and magnitude of harm when realized and the foreseeability of it (sect. B) and the possibility and costs of preventive measures (sect. C) are discussed. After this, the social utility of search engines will be discussed, as well as the relevance of the fundamental right to freedom of expression and information (sect. D). Finally, legal certainty will be addressed as an important public policy consideration (sect. E).

A. The nature and context of the conduct of search engines

Search engines and other selection intermediaries provide references to third party information and the content of the references is usually third party information as well. As a result, the only editing option they have with regard to unlawful references, without significantly changing their editorial model is to remove them. Since they have no effective control over the information itself they are not in the position to remove or block access to the information. If Exalead or del.icio.us does not contain a reference to a certain website, the information is not prevented from being directly accessible or accessible through other selection intermediaries. From the perspective of the communication process, selection intermediaries are merely facilitating communication between information providers and listeners.[58] The result of removal is a possibly less harmful, yet less complete picture of the online information environment through a particular intermediary. Therefore, if possible the source of the illegal information should be addressed first. This is an argument against the adoption of a hosting regime and in favour of a caching regime.[59]

There is a difference between references by selection intermediaries which contain unlawful or illegal information themselves - for instance in the title or description of the hyperlink - and references to unlawful material. In case of defamation, trademark infringement or unlawful publications of personal data, the former can be the case. In case of copyright infringement, the latter is usually the case, since the length of references has to respect the limitation copyright law poses on the possible reuse of third party information in references. To the extent that the unlawfulness and harm is strongly connected with the virtual infrastructure of a search engine or other selection intermediary, there could be more reason to argue for an obligation to block or remove information. For instance, defamation or trademark infringement in search engine results through metadata manipulation primarily manifests itself in the search engine results. It remains hidden for visitors to the source of the information.

The statements of a selection intermediary about the functions, use and purposes of its platform can be another factor in deciding to what extent the search engine should be held liable

[58] Notwithstanding the economic profit the selection intermediary might draw from facilitating this communication.

[59] A caching service provider, as defined in Directive 2000/31, *supra* note 13, art. 13, has to remove unlawful information after obtaining actual knowledge, but only if the source of the information has been removed or there is an legal order to do so.

for unlawful references and its obligation to remove them. If a search engines encourages the unlawful distribution of information, it is reasonable to hold it accountable for resulting damage.

If a selection intermediary profits directly or indirectly from unlawful references the duty of care with regard to these unlawful references can be stronger. In some cases of conscious and direct profit, selection intermediaries have been considered to be engaged in illegal activity altogether.[60] Generally, an argument building on the profits of selection intermediaries from facilitating the distribution of unlawful information should not be used too easily. Although some third party references will be unlawful, in general selection intermediaries provide legitimate services. The sale of references and advertisements by selection intermediaries, for example the Adwords advertisement programme of Google, deserves a separate treatment, which goes beyond the scope of this Article. The access to selection intermediaries for advertisers is usually much more restricted than for information providers, special rules for commercial communications apply, such as Article 6 of the Directive on Electronic Commerce, and the monetary profits made through advertising lie at the core of the business models of the majority of selection intermediaries.

To conclude this subsection, it is important to recognize the complexity of selection intermediaries and their editorial control. On the one hand, it is exactly their purpose to discriminate on the grounds of content and relevance. It might seem reasonable to require them to do so in view of the prevention of doing or facilitating harm to others. However, at least to some extent, their discrimination on the grounds of content and relevance is limited and also serves the interests of end-users and information providers. The values of comprehensiveness and the possible serving character of editorial choices should play important roles when considering the duty of care of search engines with regard to unlawful results.

B. Nature, size and foreseeability of damage

The nature or type and the size of damage can be factors when deciding whether a search engine has to remove a reference. Liability for damage as a result of intellectual copyright infringement has been predominant in case law. Interestingly, Google seems to treat all international takedown notices claiming copyright infringement equally, in effect exporting selection intermediary liability regulation from the U.S.[61] Damage can be limited to someone needing to block and change his or her credit card, because the details can be found on the Web through selection intermediaries. Damage can also be lasting, for instance with regard to the disclosure of secrets. Also the size of damage can play a role. More specifically, the popularity of the intermediary could enhance its duty of care. Similarly, the prominence or ranking of the reference can influence the damage done. Because of market share, a libellous remark coming first in Google, does more damage than this reference on place fifty in Microsoft's Live.

With regard to the foreseeability of damage, one has to discern between the foreseeability of damage in general and the foreseeability of damage in specific cases. Generally, selection intermediaries with distributed editorial control do not check references before making them

[60] As in Stichtung BREIN/TechnoDesign (Zoekmp3), Hof [Gerechtshof] [Ordinary Court of Appeal] Amsterdam, Jun. 15, 2006, 2006 COMPUTERRECHT 138 (Neth.), *translated in* http://www.book9.nl/getobject.aspx?id=2778 (last visited Jan. 27, 2009) [hereinafter Zoekmp3]

[61] *See* Google – DMCA Policy, http://www.google.com/dmca.html ("It is our policy to respond to clear notices of alleged copyright infringement. . . . . The form of notice specified below is consistent with the form suggested by the United States Digital Millennium Copyright Act . . . but we will respond to notices of this form from other jurisdictions as well.").

available. They act as passive intermediaries. Therefore, until they obtain knowledge of the possible unlawfulness of certain references, they can only foresee damage in general. The question whether selection intermediaries should take preventive measures will be discussed below.

The foreseeability of damage in general directly relates to the question about the permissibility of distributed editorial control. As end-users are allowed to edit the references, to some extent the selection intermediary will carry unlawful references edited by third parties, assuming that some end-users post illegal information on the Web.

Furthermore, general foreseeability of damage through unlawful references can be seen to depend on the type of search engine or selection intermediary. Arguably, a selection intermediary that facilitates access to a certain type of information of which it is clear that there will be a relatively large amount of unlawful references should be held accountable for the risks it poses to interested third parties. This type of reasoning can be found in some important judgments with regard to selection intermediaries for mp3 files and torrent files.[62] However, it leads to the contradictory result that certain specialized selection intermediaries are considered unlawful, while the content can be found through general-purpose platforms acting lawfully.

When a selection intermediary obtains knowledge of alleged unlawful references, they are in a better position to estimate the foreseeability of damage. The relative frequency of the user action (such as a particular search query) that is required for the reference to be shown might play a role here too. In case this frequency lies close to zero, one might conclude that there is no pressing reason to remove the reference. If the specificity of the required user action increases to the point where it is the user that deliberately searches for unlawful references, this is a possible defence in favour of the intermediary.

C. The possibility and cost of preventive measures

There are a number of examples and theoretical possibilities of preventive measures by selection intermediaries. One could think of automated filtering and editorial oversight at different levels and moments: before and after indexing, before and after obtaining notices, or during the user interaction.[63] In the case of crawler-based search engines, preventive measures can also be integrated into the crawling strategy. An example is that search engines usually respect the robots.txt protocol and related crawling instructions of webmasters. A clear editorial policy for information providers might be seen as a preventive measure as well. Most selection intermediaries have such policies for webmasters and users submitting references.

Currently, editorial oversight by humans under the supervision of a particular selection intermediary takes place after obtaining notices. Human-powered preventive measures would normally be too costly, although major search engines such as Google probably have enough resources to do so. A notice and takedown regime, which allows third parties to notify the intermediary of unlawful references, gives the intermediary an opportunity to react. An effective notice and takedown policy presupposes the devotion of resources and knowledge by the

[62] As for instance in the case Zoekmp3, *supra* note 60.

[63] A filter required by the German ruling discussed above, *supra* note 44, is an example of a measure aimed at the user interaction. *See also Web Search for Bomb Recipes Should Be Blocked*: *EU*, REUTERS, Sept. 10, 2007, *available at* http://www.reuters.com/article/internetNews/idUSL1055133420070910 (last visited Jan. 27, 2009) (reporting the proposals of EU commissioner Frattini to block certain searches)(" 'I do intend to carry out a clear exploring exercise with the private sector . . . on how it is possible to use technology to prevent people from using or searching dangerous words like bomb, kill, genocide or terrorism,' Frattini told Reuters.").

intermediary. It can weigh significantly in favour of the intermediary on its duty of care with regard to unlawful references.[64] Finally, one should note that a notice and takedown regime for selection intermediaries, in addition to the problems that arguably exist in the case of hosting providers,[65] suffers from the fact that there is no contractual relationship between information providers and a selection intermediary like a search engine. The information provider cannot influence procedures through negotiation and a selection intermediary will often not be able to issue a counter notice to an information provider if it removes a reference to it.

The most fundamental argument against automated preventive filtering is that filtering technology is imperfect.[66] Filters will always have false positives and negatives, because the required judgment with regard to the unlawfulness of information in references and websites cannot be computerized. The unlawfulness of information depends not only on the content of the information but also on the context in which it is being published. The same problem arises in cases of copyright infringement, with its complicated system of rights and exceptions. Therefore, automated filters will usually filter too much, thereby preventing legitimate speech, or not enough, thereby being ineffective. A preventive filtering obligation for selection intermediaries would fundamentally change the distinction between lawful and unlawful information. It will cause this distinction to change from one ultimately requiring a judgment by a court to a distinction governed by technology.[67]

D. Social utility, free flow of information, freedom of expression and information

Selection intermediaries are performing a critically important task in the digital information environment, by ordering, categorizing and valuing the abundant information on the Web.[68] A central policy argument in this paper is that selection intermediaries with distributed editorial control help society deal with the present information overload and may even be necessary to do so. The open editorial models are an innovative way of dealing with information overload. There is more than enough evidence that the problem of information overload in the

[64] As for instance in Stokke/Marktplaats, Rechtbank [Rb.] [Ordinary Court of First Instance] Zwolle-Lelystad, May 3, 2006, 2006 Informatierecht/AMI [AMI] 179 (Neth.), *translated in* http://www.book9.nl/getobject.aspx?id=2955 (last visited Jan. 27, 2009).

[65] *See* D. TAMBINI, D. LEONARDI & C. MARSDEN, CODIFYING CYBERSPACE. COMMUNICATIONS SELF–REGULATION IN THE AGE OF INTERNET CONVERGENCE 121-22, (Routledge 2008).

[66] For a study on filtering see MARJORIE HEINS, CHRISTINA CHO & ARIEL FELDMAN, INTERNET FILTERS –A PUBLIC POLICY REPORT (Brennan Center for Justice at New York University School of Law 2nd ed. 2006), *available* at http://www.fepproject.org/policyreports/filters2.pdf (last visited Jan. 27, 2009). For a comprehensive overview and discussion of global Internet filtering see RONALD DEIBERT ET AL., ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (The MIT Press 2008). As noted above, Internet content filters are themselves a type of selection intermediaries, *supra* note 1.

[67] *See generally* L. LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999) ("code as code" discussion) and J.R. Reidenberg, *Lex informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 568-76 (1998) (notion of 'lex informatica'). For a more recent evaluation of this debate see J. Grimmelmann, Note, *Regulation by Software*, 114 YALE L. J. 1719 (2005), and the selected essays in CODING REGULATION: ESSAYS ON THE NORMATIVE ROLE OF INFORMATION TECHNOLOGY, (E. J. Dommering & L. F. Asscher ed., The T.M.C. Asser Press 2006).

[68] *See* Pasquale, *supra* note 6, at 185 ff. (arguing, in the context of copyright law, in favour of a more liberal regime for *categorizers* which solve the problem of information overload.).

online digital environment will persist.[69] Therefore, the technologies and services that help our societies to overcome it deserve credit and room to perform their services and innovate further.

Additionally, competition between selection intermediaries is critically important for a healthy, diverse information environment. References are being ranked, valued and presented to users according to various models, each with their own socio-technological biases.[70] Ultimately, the dominance of one specific selection intermediary would result in a distorted view of the online information environment. The need for competition between selection intermediaries implies that there is a public interest to prevent further consolidation of user share and keep the barriers to entry in the selection intermediary market as low as possible. Legal obligations on selection intermediaries that require the devotion of extensive financial resources, which are not available to new entrants, should be avoided or the obligations and procedures to remove unlawful references should be made transparent so they are easily accessible for new entrants.

A short discussion of search engines and the popularity of Google can illustrate the problem. Because of its popularity, in most European countries Google would probably be the first search engine to be addressed in case of spam and illegal or harmful content. Google has shown to have sufficient staff and resources to deal with these notices and possible court cases and consequently shows a relatively nice and clean index in return to user queries. It can use these notices to improve the quality of its search engine. If spam, illegal or harmful material is not removed from the Web, search engines that did not receive a notice because they are harmlessly unpopular would usually still contain the references. Newcomers have to start from scratch. Thus, Google and other major search engines would be able to profit from obligations and requests to remove unlawful references.

The interest of the free flow of information implies a freedom to invent new information technologies and services, including selection intermediaries. It follows that, from this perspective, restrictions on new ways of collectively ordering and categorizing information should remain the strict exception. Freedom of expression, as enshrined in Article 10 of the European Charter of Human Rights and Fundamental Freedom, should weigh heavily when deciding on the liability of selection intermediaries.[71] It goes without saying that extensive duties of care for online intermediaries will result in a chilling effect on legitimate speech,[72] the possible extensive monitoring of users, and perhaps the absence of such services altogether.

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[69] It is rather difficult to measure the growth of the Web. For the growth Websites across all domains, see Netcraft's Web Server Survey Archives, http://news.netcraft.com/archives/web_server_survey.html.

[70] For a discussion of search engine bias, see L. D. Introna & H. Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 THE INFORMATION SOCIETY 169 (2000). Less pessimistic is Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188 (2006) (arguing that further personalization will solve the problem of bias in search services).

[71] For a discussion in the context of online intermediaries, see, e.g., Koelman, *supra* note 12, at 40-44. The Council of Europe recently issued a recommendation on freedom of expression and Internet filters, *Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with regard to Internet Filters*, CM/Rec(2008)6 (March 2008), *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2008)6 (last visited Jan. 27, 2009). The underlying report notes the possibility that some of the guidelines for Internet filters could form the basis for similar recommendations with regard to search engines, *supra* note 1.

[72] *See* Chilling Effects Clearinghouse, http://www.chillingeffects.org (a collaboration among law school clinics including the Berkman Center for Internet & Society at Harvard Law School and the Electronic Frontier Foundation).

Therefore, legislatures and courts have to take account of the freedom of expression and information, when considering search engine and intermediary liability regulation.[73]

To conclude, selection intermediaries might be in a suitable position to restrict information flows, but the introduction of incentives that would curtail legitimate speech has to be evaluated in view of the freedom of expression and information.[74] Search engines and other selection intermediaries serve the freedom of expression and information by their effort for comprehensiveness: every (willing) information provider, possibly within the specific domain of a specialised search engine, is included in the index and made accessible to its users. The ultimate promise of a search engine would be to be the comprehensive index of all the available information. A search engine that does not have a reference to a piece of information is imperfect, even if that information is useless.[75]

E. Legal certainty

The analysis in section 3 exposed the lack of harmonisation at the European level and the subsequent diverging legislative choices and court rulings in the Member States. On top of that, the number of different factors and arguments, each to be weighed in individual cases of an allegedly unlawful reference, is a strong argument in favour of safe harbour legislation for selection intermediaries. The amount of references selection intermediaries are processing, problems of jurisdiction and the wide variety of legal provisions with regard to the lawfulness of information, puts selection intermediaries under continuous legal pressure.

Other selection intermediaries, such as access and hosting services, can profit from the safe harbours discussed above. As shown, the United States Congress did not systematically exclude selection intermediaries from its intermediary liability regulation.[76] The exclusion of selection intermediaries in most of the European Union has turned the liability of selection intermediaries for unlawful references into an enormously complex issue. In practice, some major multinational selection intermediaries have adapted their takedown practices to United States law.[77]

Besides, the lack of legal certainty for search engines and other selection intermediaries could easily be hampering innovation and new entry in this field. Thus, the ordering of information on the Web, conducted by search engines and other selection intermediaries, would actually be obstructed. From the perspective of selection intermediary liability, the European legal environment is hardly the place to launch a new, innovative selection intermediary. Successful American selection intermediaries such as provided by Google and Microsoft have

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[73] The Paperboy judgement (BGH, *supra* note 38) and the judgment of the OLG Hamburg (OLG Hamburg, *supra* note 39) above are examples of this.

[74] A more empirical analysis of the possible incentives to remove legitimate speech, resulting from the current state of selection intermediary liability in the various Member States, goes beyond the scope of this Article. But several factors, including the lack of legal certainty and the complexity of the law warrant further investigation. See also TAMBINI ET AL., supra note 65, at 269-89.

[75] The value of comprehensive selection intermediaries is a fundamental argument against any obligation to remove references. *Compare* J. Grimmelmann, *Information Policy for the Library of Babel*, 3 J. BUS. & TECH. L. 201 (2008), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=james_grimmelmann (last visited Jan. 27, 2009).

[76] *Supra* section III.D. *See also* J. Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007); U. Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J. L. & TECH. 124 (2006).

[77] See *supra* note 61.

the necessary resources to deal with the existing uncertainty and might even profit from it compared to less well off selection intermediaries.

V. CONCLUSIONS

By selecting, ordering and valuing online information, selection intermediaries perform critical tasks in the online information environment. New open models of distributed editorial control, allowing information providers, users and third parties to include references and influence the functioning of selection intermediaries, help our society deal with the problem of information overload. Competition between different selection intermediaries is necessary to prevent socio-technological biases of specific selection intermediaries from becoming prevalent. The current dominance of search engines like Google is an additional argument why the sector of selection intermediaries needs to be further stimulated, if possible. Selection intermediary liability law and regulation should not encourage further consolidation.

By opening up the editorial models of their platforms, the providers of selection intermediaries expose themselves to the risks of liability for unlawful third party information. The EU legal environment is highly fragmented in its treatment of liability of selection intermediaries for unlawful third party information. Until now, and unlike in the United States, the issue of hyperlink and search engine liability has not been addressed by the EU legislature. At the European level, intermediary liability regulation has been restricted to mere conduit, hosting and caching services. Some Member States have extended (in different ways) the resulting safe harbours to search engines and or hyperlinks. Other Member States have seen an expanding and increasingly complex set of case law. Surely, the current situation is not favourable for the functioning of the Internal Market.

The second review by the European Commission is an excellent opportunity to discuss the liability of selection intermediaries and possible safe harbour proposals. The current European status quo is based on an imperfect compromise that did not take into account the fundamental value of selection intermediaries for the free flow of information and the right of freedom of expression and information. Besides, the legal uncertainty for selection intermediaries has resulted in opaque take down practices and possibly has a chilling effect on references to legitimate speech. Therefore, the legal grey-area selection intermediaries find themselves in must be addressed, in a manner that satisfies both the sometimes conflicting demands of preventing unlawful references and of promoting freedom of expression and information and the social utility of the Web.