

Intermediary Liability



Ruslan Nurullaev

Senior Lecturer, National Research University Higher School of Economics.
Address: 20 Myasnitskaya Str., Moscow 101000, Russian Federation. E-mail:
rusnur@gmail.com



Abstract

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The influence of online service providers (OSPs) on our lives is ever increasing. Their services are used by billions of human persons.¹ Among ten largest companies in the world by market capitalisation, seven focus their business on providing online services.² OSPs affect the outcome of elections³ and even become a subject of international politics themselves⁴. If anything, the COVID-19 pandemic has further boosted an expansion of online services.⁵

Despite the rising importance of OSPs, we are still far from reaching a consensus on how OSPs should be regulated and when they should be held liable for infringements committed with the use of their services. In different parts of the world actions are taken to increase responsibility of OSPs

¹ Global social media Stats. Available at: <https://datareportal.com/social-media-users> (accessed: 01.03.2021)

² The 100 largest companies in the world by market capitalization in 2020. Available at: <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/> (accessed: 01.03.2021)

³ Social Media Could Determine The Outcome of the 2020 Election. Available at: <https://www.forbes.com/sites/petersuciu/2020/10/26/social-media-could-determine-the-outcome-of-the-2020-election/?sh=f3b7a0c26f60> (accessed: 01.03.2021)

⁴ After Trump's TikTok Ban, China Readies Blacklist of Foreign Companies. Available at: <https://www.nytimes.com/2020/09/19/technology/china-tiktok-wechat-blacklist.html> (accessed: 01.03.2021)

⁵ E-commerce in the time of COVID-19. Available at: <http://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/> (accessed: 01.03.2021)

for the content disseminated with the use of their services.⁶ Yet even OSPs recognise that this may be a dangerous path.⁷

Oxford Handbook of Online Intermediary Liability edited by Giancarlo Frosio⁸ is written by an international team of authors from different universities and research centres and presents an extensive and multifaceted analysis of the main topics of OSPs' liability. The Handbook promises to "provide a comprehensive, authoritative, and 'state-of-the-art' discussion of intermediary liability by bringing together multiple scholarly perspectives and promoting a global discourse through cross-jurisdictional parallels". It fully delivers on this promise and is essential reading for anyone interested in regulation of online intermediaries.

The Handbook contains 39 chapters collected into 7 logical parts.

Part I features an introductory chapter by Giancarlo Frosio. The chapter provides helpful guidance for the whole Handbook. It explains the Handbook's structure and sets out the most important findings of the chapters coalescing them into a consistent narrative.

Part II (Chapters 2 to 7) lays down a theoretical basis for the rest of the Handbook.

In Chapter 2, Graeme Dinwoodie⁹ investigates the definition of "internet intermediaries", its relationship with alternative terms and the taxonomy of internet intermediaries. Dinwoodie suggests that the term "internet intermediaries" should be given a broad interpretation but this should not stop us from attempting "to classify and differentiate among the different actors who are encompassed by the term".

A theoretical framework for OSP liability focusing on monetary and non-monetary liability, as well as primary and secondary liability is pro-

⁶ For example, in the EU, the DSM Directive (Directive (EU) 2019/790) adopted 17 April 2019 requires online content-sharing service providers to take additional steps ensuring unavailability of copyright-infringing content. In the US, on 28 May 2020 the President signed Executive Order 13925 which purports to limit immunity of OSPs for the content disseminated on their platforms.

⁷ Twitter boss: Trump ban is 'right' but 'dangerous'. Available at: <https://www.bbc.com/news/technology-55657417> (accessed: 01.03.2021)

⁸ An Associate Professor at the Center for International Intellectual Property Studies at Strasbourg University, a Fellow at Stanford Law School Center for Internet and Society, and Faculty Associate of the NEXA Center in Turin.

⁹ Graeme Dinwoodie is the Global Professor of Intellectual Property Law at Chicago-Kent College of Law.

posed by Jaani Riordan¹⁰ in the next chapter. Riordan also looks into theoretical justifications for intermediary liability observing that even in the absence of liability the conduct of OSPs may be important because of its self-regulatory nature.

Martin Husovec¹¹ in Chapter 4 focuses on the consequences of imposing different species of liability upon internet intermediaries and examines: (1) the scope of damages; (2) their aggregation; (3) the scope and goal of injunctions against OSPs and (4) their associated costs. Husovec persuasively argues in favour of employing a consequences-based approach towards intermediary liability.

Kristofer Erickson¹² and Martin Kretschmer¹³ review empirical studies on copyright intermediary liability published during the period from 1998 to 2018 identifying the gaps and limitations of the available empirical research (Chapter 5). They conclude that the flaws of the current safe harbour regime of OSP liability are significant but can be overcome ‘through tweaking, rather than overhauling’.

Mariarosaria Taddeo¹⁴ in Chapter 6 expands the analysis of OSP liability by discussing the moral responsibilities of OSPs in relation to managing access to information and human rights, as well as the role and the nature of OSPs’ responsibilities in mature information societies.

In the next chapter, Christophe Geiger, Giancarlo Frosio, and Elena Izyumenko¹⁵ look at intermediary liability through the lens of human rights and analyse the impact of intermediary liability on users’ rights, OSPs’ rights and rights of IP owners. The chapter authors conclude that courts have often used case-by-case analysis to find a balance between competing fundamental rights and that this flexibility should be preserved.

In Part III (Chapters 8 to 15), the authors present an overview of intermediary liability and safe harbours across multiple jurisdictions, focusing on inconsistencies and fragmentation of regulation in each jurisdiction.

¹⁰ A barrister at 8 New Square, London.

¹¹ Assistant Professor of Law at The London School of Economics and Political Science (LSE) and Affiliate Scholar at Stanford Law School Center for Internet and Society.

¹² Associate Professor in Media and Communication at the University of Leeds.

¹³ Professor of Intellectual Property Law at the School of Law, University of Glasgow and Director of CREATE, the UK Copyright and Creative Economy Centre.

¹⁴ A Researcher Fellow at the Oxford Internet Institute and Deputy Director of the Digital Ethics Lab.

¹⁵ Lawyer at European Court of Human Rights.

In Chapter 8, Eric Goldman¹⁶ turns to regulation of intermediary liability under US law and reviews 47 USC § 230, a long-standing section regulating immunity of online services under US law, and compares it to some of its foreign counterparts.

In the following chapter, Juan Carlos Lara Gálvez¹⁷ and Alan M. Sears¹⁸ continue with the analysis of intermediary liability rules in Latin America, where development of OSP liability was affected by free trade agreements with the United States.

Luiz Fernando Marrey Moncau¹⁹ and Diego Werneck Arguelhes²⁰ review the Marco Civil da Internet (Law 12.965/2014), the landmark legislation on OSP liability in Brazil, including the history its adoption and the practice of its application revealing the contrast of the formal legal provisions and the 'law in action' (Chapter 10).

Nicolo Zingales²¹ follows up, in Chapter 11, with the overview of intermediary liability in African countries revealing a trend of progressive erosion of intermediary liability protections and increasing pressure on intermediaries to fulfil broad and open-ended public policy mandates.

After that, in Chapter 12, Kylie Pappalardo²² and Nicolas Suzor²³ explore the principles of intermediary liability in Australia in defamation, vilification, copyright, and content regulation. Pappalardo and Suzor conclude that rules governing intermediary liability in Australia lack coherency and at times do not allow to predict when, exactly an online intermediary will be liable for the actions of third parties.

¹⁶ A Professor of Law at Santa Clara University School of Law, where he is also Director of the school's High Tech Law Institute.

¹⁷ The Research and Public Policy Director at Derechos Digitales - América Latina, based in Santiago de Chile.

¹⁸ A Researcher and Lecturer at Leiden University's eLaw Centre for Law and Digital Technologies.

¹⁹ A Non-Residential Fellow at the Stanford Center for Internet and Society and a PhD from Pontifícia Universidade Católica of Rio de Janeiro.

²⁰ Associate Professor of Law at Insper Institute for Education and Research, São Paulo, Brazil.

²¹ Professor of Information Law and Regulation at Fundação Getulio Vargas (FGV) Law School, an Affiliate Scholar at Stanford Center for Internet and Society, and a Research Associate at the Tilburg Institute for Law, Technology and Society and the Tilburg Law and Economics Centre.

²² A Senior Lecturer in the Law School at the Queensland University of Technology (QUT) in Brisbane.

²³ A Professor in the Law School at Queensland University of Technology in Brisbane.

Turning now to Asian countries, in Chapter 13, Kyung-Sin Park²⁴ reviews intermediary liability in China, India, Japan, South Korea, Indonesia, and Malaysia. Park compares the regulation in these countries with the ‘safe harbour’ approach used in the EU and US.

In Chapter 14, Danny Friedmann²⁵ discusses intermediary liability for trade mark and copyright infringement in China. Friedmann argues that due to the advancement of artificial intelligence, the filtering standard for OSPs in China will continue to intensify and OSPs will have to proactively monitor and remove infringing content.

Maria Lilla Montagnani,²⁶ in Chapter 15, analyses the Digital Single Market Strategy²⁷ and argues that it introduces an ‘enhanced liability regime’, a new set of obligations and duties of care changing the ‘conditional’ nature of intermediary liability in the EU into ‘organisational’.

Part IV (Chapters 16 to 26) provides an overview of intermediary liability in specific legal areas, including copyright, trade mark, unfair competition, and privacy infringement. Christina Angelopoulos²⁸ highlights the lack of harmonisation in EU rules governing intermediary liability and proposes a negligence-based system to fill in this lacuna (Chapter 16).

In the next chapter, Eleonora Rosati²⁹ analyses direct liability of intermediaries and the right of communication to the public. Rosati discusses case law of the CJEU, focusing on its judgment in *Stichting Brein*³⁰, a seminal case in which the CJEU considered when an operator of an online platform communicates a work to the public.

Jack Lerner³¹ provides detailed overview of secondary copyright infringement liability in the US taking into account the case law and legislative proposals in this area (Chapter 18). Lerner anticipates changes to

²⁴ A Professor at Korea University Law School.

²⁵ Assistant Professor of Law, Peking University School of Transnational Law in Shenzhen.

²⁶ An Associate Professor of Commercial Law at Bocconi University in Milan.

²⁷ European Commission Communication. A Digital Single Market Strategy for Europe (2015) COM (2015) 192 final.

²⁸ Lecturer in Intellectual Property Law at the University of Cambridge and a member of the Centre for Intellectual Property and Information Law (CIPIL).

²⁹ An Associate Professor in Intellectual Property Law at Stockholm University and an Counsel at Bird & Bird.

³⁰ *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] ECLI:EU:C:2017:456.

³¹ A Clinical Professor of Law at the University of California, Irvine School of Law and Director of the UCI Intellectual Property, Arts, and Technology Clinic.

the regulation of intermediary liability in the US after the EU's approval of Article 17 of the DSM Directive³².

Moving on to trade marks, Frederick Mostert³³ highlights the lack of uniform international guidelines for tackling counterfeits problem on the internet and suggests three common principles that can be used as a basis for transnational approach to intermediary trade mark liability (Chapter 19).

In the following chapter, Martin Senftleben³⁴ discusses development of intermediary trade mark liability in the EU. Senftleben contrasts the approach to trade mark liability with liability for copyright infringement and argues that the increased reliance on algorithmic content identification and filtering systems in trade mark cases may bring undesirable results.

Richard Arnold³⁵ reviews UK case law on intermediary trade mark liability with a particular focus on injunctions against OSPs whose services are used to infringe rights in trade marks (Chapter 21).

Proceeding to liability outside of intellectual property rights, in the next chapter, Reto M. Hilty³⁶ and Valentina Moscon³⁷ discuss intermediary liability in the areas of unfair commercial practices and trade secrets.

In Chapter 23, Emily Laidlaw³⁸ presents a new 'notice-and-notice-plus' model of intermediary liability for defamation. Laidlaw also explores the possibility of application of this model to other types of harmful speech. The proposed 'notice-and-notice-plus' model can provide more nuanced and well-balanced approach to OSP liability in certain areas, without requiring intermediaries to make legal judgment on user content.

In the next chapter, Tarlach McGonagle³⁹ reviews the case law of the European Court of Human Rights (including the judgment in *Delfi*⁴⁰) and EU legislation in the area of freedom of expression and intermediary liability.

³² Directive (EU) 2019/790.

³³ Professor of Intellectual Property at the Dickson Poon School of Law, King's College and Research Fellow at the Oxford Intellectual Property Research Centre.

³⁴ A Professor of Intellectual Property Law, Institute for Information Law, University of Amsterdam.

³⁵ Judge of the Court of Appeal of England and Wales.

³⁶ Managing Director at the Max Planck Institute for Innovation and Competition in Munich and Full Professor (ad personam) at the University of Zurich.

³⁷ Senior Research Fellow in Intellectual Property and Competition Law at the Max Planck Institute for Innovation and Competition.

³⁸ Associate Professor, Faculty of Law, University of Calgary.

³⁹ A Senior Lecturer/Researcher at IViR, University of Amsterdam and Professor of Media Law & Information Society at Leiden Law School.

⁴⁰ *Delfi AS v Estonia* [GC] App. no. 64569/09 (ECtHR, 16 June 2015).

Two manifestations of the right to be forgotten in the EU are analysed by Miquel Peguera⁴¹ in Chapter 25: (1) the right to be delisted from search results provided by internet search engines and (2) the right to request removal or anonymisation of personal information by primary publishers.

Eduardo Bertoni⁴² continues the discussion of the right to be forgotten in Latin America and concludes that in the absence of judicial decision it may be difficult to require OSPs to delist content (Chapter 26).

Part V (Chapters 27 to 30) discusses online enforcement of intermediary liability and focuses on monitoring and filtering obligations, website blocking, and enforcement by administrative bodies.

In Chapter 27, Aleksandra Kuczerawy identifies and discusses different mechanisms aimed at removal of infringing content from the internet upon request of right holders. Kuczerawy examines ‘notice and takedown’ (NTD), ‘notice and notice’ (NN), and ‘notice and stay down’ (NSD) and assesses the impact of each mechanism on the freedom of expression.

In the next chapter, Giancarlo Frosio and Sunimal Mendis⁴³ explore the gradual shift from the intermediary liability system based on the principles of negligence and prohibition of monitoring obligation to a system in which some OSPs are required to undertake proactive monitoring and filtering of content. Frosio and Mendis argue that this development may limit the effect of copyright exceptions and limitations and even curtail the use of certain public domain content.

Christophe Geiger and Elena Izyumenko discuss website blocking in Chapter 29. Geiger and Izyumenko review the jurisprudence of the European Court of Human Rights and the CJEU and suggest several criteria that can help to ensure compliance of website blocking orders with fundamental human rights.

In many countries administrative bodies play an important role in policing infringing content online. The practice of intermediary liability enforcement by administrative bodies across several European jurisdictions is investigated in Chapter 30. Alessandro Cogo⁴⁴ and Marco

⁴¹ An Associate Professor of Law at the Universitat Oberta de Catalunya (UOC) in Barcelona and Affiliate Scholar, Stanford Center for Internet and Society.

⁴² Representative of the Regional Office for South America of the Inter American Institute of Human Rights, Director of the Post-graduated Program on Data Protection at Buenos Aires University School of Law, and Global Clinical Professor at New York University School of Law.

⁴³ Assistant Professor in Intellectual Property Law at Tilburg University.

⁴⁴ Associate Professor at the University of Turin Law School and Director of the Master of Laws in Intellectual Property jointly organized by the World Intellectual Property Organization and the Turin University.

Ricolfi⁴⁵ pay special attention to the activities of the Italian Authority for Communication Guarantees (AGCOM), which is authorised to order removal and blocking of infringing content.

Part VI (Chapters 31 to 35) is focused on voluntary measures taken by online intermediaries to police infringing content. This emerging trend transforms the discussion of ‘intermediary liability’ into that of ‘intermediary responsibility’ and ‘intermediary accountability’.

Chapter 31 identifies and reviews different forms of ‘responsible’ behaviour beyond the law, such as graduated response, demotion of search results, payment blockades, private DNS content regulation, standardisation of OSPs’ obligations, codes of conduct, filtering, and website-blocking. Giancarlo Frozio and Martin Husovec also consider the risks and challenges associated with the increased use of such voluntary measures and private ordering.

In the following chapter, Annemarie Bridy⁴⁶ focuses on intellectual property enforcement in the DNS and domain blocking. Bridy pays particular attention to ‘trusted notifier’ agreements between intellectual property right holders and TLD registry operators, such agreements facilitate online enforcement of copyright by suspending, terminating, or locking domains.

Sergei Hoviyadinov⁴⁷ in Chapter 32 presents detailed overview of the evolution of intermediary liability in Russia since 2011-12. Hoviyadinov focuses on two areas: ‘content’ – the types of information the government seeks to restrict online, and ‘surveillance’ – state collection of user data and information about online activities.

Chapter 33 discusses content moderation by online intermediaries and the challenges it presents to the rule of law. Niva Elkin-Koren⁴⁸ and Maayan Perel⁴⁹ also describe barriers to accountability of online intermediaries and propose a strategy that can overcome such barriers – a reverse-engineering methodology which the authors named ‘black box tinkering’.

⁴⁵ Professor of Intellectual Property at the Turin Law School, Partner at the law firm Tosetto, Weigmann e Associati, and Co-director of the Nexa Center on Internet and Society of the Turin Polytechnic.

⁴⁶ An Affiliate Scholar at the Stanford Law School Center for Internet and Society (CIS), and an Affiliated Fellow at the Yale Law School Information Society Project (ISP).

⁴⁷ A JSD candidate at Stanford Law School.

⁴⁸ A Professor of Law at the University of Haifa, Faculty of Law and a Faculty Associate at the Berkman Klein Center at Harvard University, the Founding Director of the Haifa Center for Law & Technology (HCLT), and a Co-director of the Center for Cyber, Law and Policy.

⁴⁹ An Assistant Professor in Intellectual Property Law at the Netanya Academic College in Israel and a Senior Research Fellow at the Cyber Center for Law & Policy, University of Haifa.

Online intermediaries often employ algorithms to police infringing content. In Chapter 34, Ben Wagner⁵⁰ examines the meaning of algorithmic accountability, ‘the process in which both information systems themselves, their developers, and the organizations behind them are held accountable for the decisions made by those information systems’⁵¹, and the challenges that must be overcome to implement algorithmic accountability.

Part VII (Chapters 36 to 38) discusses international private law issues and extraterritorial enforcement against OSPs. In Chapter 36, Dan Jerker B. Svanteson⁵² discusses three examples in which the issue of jurisdiction becomes a major concern for online intermediaries: (1) law applicable to the terms of service used by online intermediaries; (2) requests of law enforcement agencies for provision of user data; and (3) geographical scope of the OSPs’ obligations to remove, block, take down, delist, de-index, or de-reference content.

In the next chapter, Michael Geist⁵³ examines *Equustek Solutions v Google*⁵⁴, a recent case in which the Supreme Court of Canada had to decide whether Google can be required to remove search results on a global basis where infringement of intellectual property rights is concerned. Geist comes to a logical conclusion that ‘extraterritorial application of court decisions such as those involving Google is that it encourages disregard for the rule of law online, placing internet companies in the unenviable position of choosing the laws and court orders they wish to follow’.

In Chapter 38, Bertrand De La Chapelle⁵⁵ and Paul Fehlinger⁵⁶ discuss how to move on from the current ‘legal arms race’ to transnational co-operation of all stakeholders when determining jurisdiction applicable to online intermediaries.

⁵⁰ An Assistant Professor at the Faculty of Technology, Policy and Management at TU Delft.

⁵¹ See Richard Mason and Ian Mitroff. A Program for Research on Management Information Systems. *Management Science*, 1973, no 19, p. 475 cited on p. 679 of the Handbook.

⁵² A Professor at the Faculty of Law at Bond University, a Visiting Professor at the Faculty of Law, Masaryk University, and a Researcher at the Swedish Law & Informatics Research Institute, Stockholm University.

⁵³ A Professor of Law at the University of Ottawa where he holds the Canada Research Chair in Internet and E-commerce Law and is a member of the Centre for Law, Technology and Society.

⁵⁴ [2015] BCCA 265 (Can.).

⁵⁵ The Executive Director and Co-founder of the global multistakeholder organization Internet & Jurisdiction Policy Network.

⁵⁶ The Deputy Executive Director and Co-founder of the multistakeholder organization Internet & Jurisdiction Policy Network.

The Handbook presents the results of research of a diverse international team of experts. It addresses all major themes of intermediary liability and investigates law and practice of a large number of jurisdictions revealing the current trends in development of OSP liability. Perhaps the greatest achievement of the Handbook is that it brings together different aspects of intermediary liability into a holistic and logical narrative.