

# Abridged Table of Contents

Acknowledgements	25
Abbreviations and Acronyms	27
Chapter 1 - Introduction	31
A. General background	31
B. Structure	38
C. Methodology	46
D. Definitions, assumptions and limitations	49
Chapter 2 - The emergence of intermediaries on the internet – a socio-technical review	59
A. The early internet	59
B. The technical architecture of the internet	61
C. Internet intermediaries within the layered internet	65
D. Intermediary powerhouses	88
E. Summary: socio-technical and economic role of internet intermediaries	95
Chapter 3 - Intermediaries and unlawful content – challenges in internet regulation	98
A. The subject matter of internet governance	98
B. The emergence of internet intermediary liability	103
C. Regulatory Frameworks of internet intermediary liability	125
D. Enforcement challenges in internet intermediary liability	155
Chapter 4 - Sectoral frameworks and the E-Commerce Directive – the enforcement gaps	225
A. Introduction	225

B. Personality rights and public order: defamation, hate speech and terrorist content	228
C. Economic rights: intellectual property	297
D. Product and food safety regulation	380
E. Summary: Sectoral frameworks and intermediary liability	414
Chapter 5 - Enforcement case studies	418
A. Introduction	418
B. Case study 1: Online market surveillance in product regulation	422
C. Case study 2: Online market surveillance in food safety regulation	436
D. Summary of MSA/FSA case studies	448
Chapter 6 - A new framework for online intermediary responsibility	453
A. Intermediary responsibility reform proposals – an overview	454
B. The regulatory choice of a new intermediary responsibility system	466
C. Primary and secondary responsibility and the sanctions regime	500
D. A co-regulatory duty of care based on harmonised technical standards	501
Chapter 7 - Conclusion	540
ANNEX I – Interview Questionnaire (Model)	550
A. Market surveillance and enforcement	552
B. Enforcement activity and the E-Commerce Directive	556
C. Cooperation with information service providers	558
D. Regulatory Cooperation	559
E. Additional data (not part of the interview)	561
ANNEX II – A sectorally adaptable, risk-based duty of care standard (model)	562
ANNEX III– A duty of care standard for E-Commerce platforms	563
A. Introduction	563

B. Duty of care: risk assessment, prevention and removal	565
C. Duty of care: Notice-and-Takedown	573
D. Duty of care: transparency	573
Bibliography	580
A. Books, book sections, journal articles and public reports	580
B. Blog articles, internet news articles and webpages	614
C. Case law	626
D. Statutes & Bills	636
Index	643

# Table of Contents

Acknowledgements	25
Abbreviations and Acronyms	27
Chapter 1 - Introduction	31
A. General background	31
B. Structure	38
C. Methodology	46
D. Definitions, assumptions and limitations	49
1. Definitions	49
I. Internet intermediaries – intermediary service providers	49
II. Online platforms	50
III. Illegal versus unlawful content	51
IV. Material content	52
V. Unlawful activity and unlawful content/information	53
VI. Harmful content	53
VII. Platform users	55
2. Assumptions	55
3. Limitations	55
I. Sanctions	55
II. Substantive law affecting online platforms	56
Chapter 2 - The emergence of intermediaries on the internet – a socio-technical review	59
A. The early internet	59
B. The technical architecture of the internet	61
C. Internet intermediaries within the layered internet	65
1. A typology of intermediaries	66
2. Internet access providers	68
3. Search engines	70
4. E-commerce platforms	73

5. User generated content and social media platforms – the rise of Web 2.0	78
6. Sharing economy platforms	82
7. Messenger services, cloud platforms and other online intermediaries	85
D. Intermediary powerhouses	88
1. Multi-sided platforms	88
2. The leading players	90
I. Google (Alphabet)	90
II. Amazon	91
III. Facebook	92
IV. Apple	92
V. Microsoft	93
3. From content to infrastructure control	94
E. Summary: socio-technical and economic role of internet intermediaries	95
Chapter 3 - Intermediaries and unlawful content – challenges in internet regulation	98
A. The subject matter of internet governance	98
1. Infrastructure	98
2. Content regulation = intermediary regulation?	101
B. The emergence of internet intermediary liability	103
1. Justifications for internet intermediary liability in law	104
I. Moral justifications	104
II. Economic justifications	106
2. Primary and secondary liability	108
I. Primary liability for intermediaries	109
II. Secondary liability	110
a. Common law	111
b. Civil law jurisdictions	112
3. Early case law on internet intermediaries	114
I. Case law in the EU	115
a. United Kingdom	115
b. Germany	117
c. France	118
d. Italy	119
e. Belgium	120

II.	Case in law in the US	121
a.	Cubby, Inc v CompuServe, Inc.	121
b.	Stratton Oakmont v Prodigy Services Co.	122
c.	Playboy Enterprises, Inc. v Frena	123
d.	Sega Enterprises, Ltd. v MAPHIA & Religious Technology Center v Netcom	124
C.	Regulatory Frameworks of internet intermediary liability	125
1.	US	125
I.	Communications Decency Act 1996	126
II.	The Digital Millennium Copyright Act 1998	128
III.	Trademarks – The Lanham Act	130
2.	EU	131
I.	Setting the scene for an intermediary liability framework	131
II.	The E-Commerce Directive	132
a.	General principles and scope	132
b.	The liability (exemptions) of intermediaries	136
3.	Comparing the EU and US intermediary liability frameworks	143
4.	Other jurisdictions	146
I.	Australia	146
II.	Canada	148
III.	China	150
IV.	India	151
D.	Enforcement challenges in internet intermediary liability	155
1.	Emerging challenges - EU reviews of the ECD	155
I.	The 2003 and 2007 ECD evaluations	155
II.	The 2012 public consultation	157
III.	Reviews and initiatives under the Digital Single Market policy	158
IV.	Main legal challenges of the ECD inhibiting enforcement against unlawful content	161
2.	ECD intermediary liability – the main challenges through case law	163
I.	The neutrality of internet intermediaries	164
a.	Search engines	165
b.	E-commerce marketplaces	166
i.	National case law	166
ii.	EU case law	169
iii.	Application of CJEU rulings	170
iv.	US developments	176

c. UGC platforms and social networks	177
i. National case law	178
ii. EU case law	182
II. The intermediary's actual knowledge of illegal acts	184
a. Defining actual knowledge	184
b. Obtaining actual knowledge	185
i. Court or authority orders	186
ii. Notice-and-Takedown	186
iii. Awareness of illegal activity or information	191
III. The preventive obligations of intermediaries	196
a. National case law	199
i. France	199
ii. Italy	200
iii. Germany	202
iv. UK	204
b. CJEU and ECtHR case law	207
i. L'Oréal v eBay (C-324/09)	207
ii. Scarlet Extended (C-70/10) & Netlog (C-360/10)	208
iii. Mc Fadden (C-484/14)	213
iv. The ECtHR rulings in Delfi v Estonia & MTE v Hungary	214
v. Eva Glawischnig-Piesczek v Facebook Ireland (C18/18)	217
3. Summary of legal challenges of the ECD	219
I. Summary: The availability of the ECD protections	219
II. Summary: The knowledge standard	221
III. Summary: Specific versus general monitoring	223
Chapter 4 - Sectoral frameworks and the E-Commerce Directive – the enforcement gaps	225
A. Introduction	225
B. Personality rights and public order: defamation, hate speech and terrorist content	228
1. Defamation	228
I. Defamation online - background	228
II. The legal framework of defamation in the EU	230
III. Defamation, online intermediaries and the ECD in national law	232
a. UK	232

b. France	235
c. Germany	237
d. Differences in assessing the manifestly illegal nature of defamation	239
e. Defamation and the interactive, social web	241
IV. Summary and outlook	242
2. Hate speech	244
I. The phenomenon of hate speech on Web 2.0	244
II. The legal framework of hate speech	246
a. Fundamental rights at stake	246
b. EU regulation	247
i. The EU Code of Conduct on illegal hate speech online	248
ii. The AVMSD and the DSA proposal	252
c. Member States	254
i. England and Wales	255
ii. Germany	257
iii. France	264
III. Private regulation of hate speech	268
IV. Summary and outlook	271
3. Terrorist content	274
I. Background	274
II. Legal framework against terrorism online – EU and Member States	275
III. Private regulation of terrorist content and technological developments	281
IV. EU regulation	286
a. Proposal of a Regulation for preventing terrorist content online	286
b. Regulation 2019/1148 on marketing and use of explosives precursors	290
V. Summary and outlook	295
C. Economic rights: intellectual property	297
4. Copyright	297
I. Copyright and the information society	297
II. International law and EU set-up	301
III. Copyright enforcement and online intermediaries	304
a. Enforcement at Member State level	304
b. Enforcement against IAPs – blocking and filtering injunctions	306



c.	Content hosting, sharing and the road towards primary liability	312
	P2P file sharing and hyperlinking	313
	Search engines, hyperlinking and auto-complete functions	317
	Content sharing platforms	323
IV.	Industry developments: enforcement by private actors	327
a.	Content recognition and identification technologies	328
	Fingerprinting	328
	Hashing	329
	Watermarking	330
	Metadata analysis	331
	Predictive analysis	333
b.	Platform activities addressing copyright infringements – the rise of automated prevention	334
V.	EU legal initiatives – the Digital Single Market Directive (DSMD)	341
VI.	Summary and outlook	347
5.	Trademarks	349
I.	Trademarks, counterfeiting and e-commerce	349
II.	EU Trademark protection, its widening scope and the internet	353
III.	Enforcement: primary infringers or intermediaries with responsibilities?	356
a.	Online intermediaries as primary infringers	356
b.	Secondary liability trends and consumer law	362
IV.	Private enforcement	365
V.	EU policy development	371
a.	Memorandum of Understanding on the Sale of Counterfeit Goods over the Internet	372
b.	Other EU policy initiatives	377
VI.	Summary and outlook	378
D.	Product and food safety regulation	380
6.	Product safety (non-food products)	380
I.	Background – product safety in e-commerce and online platforms	380
II.	EU product safety law and e-commerce	383
a.	The New Approach and the New Legislative Framework	383
b.	Responsibilities and liabilities of economic actors	387

III. Enforcement and e-commerce	388
a. Tackling the challenges of enforcement in e-commerce	388
b. Online intermediaries and product safety law	391
IV. Private enforcement	400
V. EU legislative initiatives	402
VI. Summary and outlook	405
7. Food safety	406
I. Background – food in e-commerce and on online platforms	406
II. Food safety and its enforcement in EU and national law	408
a. EU food safety law – responsible economic actors	408
b. Online intermediaries and food safety	411
III. Summary and outlook	413
E. Summary: Sectoral frameworks and intermediary liability	414
1. The multilevel regulatory picture of EU intermediary liability	414
2. Summary: Common trends in sectoral online intermediary liability	416
Chapter 5 - Enforcement case studies	418
A. Introduction	418
1. Rationale and objectives	418
2. Survey structure	419
3. Confidentiality	421
B. Case study 1: Online market surveillance in product regulation	422
1. Overview	422
2. Survey results – Online market surveillance - RED and EMC Directives	423
I. Section A: Market surveillance and enforcement	423
a. Enforcement scope: sector coverage	423
b. Enforcement vis-à-vis ISPs	424
c. Online market surveillance activity	425
d. Online market surveillance resources	428
II. Section B: Enforcement activity and the ECD	429
a. Use of the ECD by MSAs	429
b. The relation between product safety laws and the ECD	430
III. Section C: Cooperation with ISPs	431
a. Nature of cooperation between MSAs and ISPs	432
b. Obstacles to effective surveillance and enforcement	433
IV. Section D: Regulatory cooperation between MSAs	434

C. Case study 2: Online market surveillance in food safety regulation	436
1. Overview	436
2. Survey results – Online market surveillance in the area of food safety	437
I. Section A: Market surveillance and enforcement	437
a. Enforcement scope: sector coverage	437
b. Enforcement vis-à-vis ISPs	437
c. Online market surveillance activity	438
d. Online market surveillance resources	440
II. Section B: Enforcement activity and the ECD	442
a. Use of the ECD by FSAs	442
b. The relation between food safety laws and the ECD	443
III. Section C: Cooperation with ISPs	444
a. Nature of cooperation between FSAs and ISPs	444
b. Obstacles to effective surveillance and enforcement	446
IV. Section D: Regulatory cooperation between FSAs	446
D. Summary of MSA/FSA case studies	448
1. Enforcement hesitation and unclarity over the relevance of the ECD	449
2. The technical role and legal classification of online platforms	450
3. Product and food safety enforcement expertise as a chance	451
4. Horizontal cooperation	451
Chapter 6 - A new framework for online intermediary responsibility	453
A. Intermediary responsibility reform proposals – an overview	454
1. Systemic approaches	455
2. Procedural approaches	462
3. Common and divisive features of current intermediary liability reform proposals	464
B. The regulatory choice of a new intermediary responsibility system	466
1. The current regulatory choice	466
2. Regulatory approaches for the internet	468
I. Self and co-regulation on the internet	470
a. Self-regulation	472
b. Co-regulation	475
II. Corporate (social) responsibility for online platforms	479
III. Duties of care	481
IV. Risk regulation and compliance	483

V. Standardisation	487
3. Application to a new intermediary responsibility framework	492
I. Risks and pitfalls of flexible regulatory tools	495
C. Primary and secondary responsibility and the sanctions regime	500
D. A co-regulatory duty of care based on harmonised technical standards	501
1. Introduction	501
2. Changes to the ECD's online intermediary liability framework	502
3. Sectoral flexibility – the harms under a horizontal framework	505
4. The duty of care risk management system	508
I. Risk assessment	510
a. Risk identification	510
b. Risk analysis and evaluation	512
II. Risk control measures	515
a. Risk control: prospective responsibility for empowering safe platform use	516
b. Risk control: retrospective responsibility to contain unlawful content	523
III. Example of a duty of care standard for economic harms	524
5. Transparency and accountability obligations	528
I. Transparency	528
II. Accountability	530
III. Complementary regulatory approaches towards online platforms	531
6. The regulatory institution	533
7. Brief of evaluation of the Commission's DSA proposal of December 2020	536
Chapter 7 - Conclusion	540
ANNEX I – Interview Questionnaire (Model)	550
A. Market surveillance and enforcement	552
B. Enforcement activity and the E-Commerce Directive	556
C. Cooperation with information service providers	558
D. Regulatory Cooperation	559
E. Additional data (not part of the interview)	561

ANNEX II – A sectorally adaptable, risk-based duty of care standard (model)	562
ANNEX III– A duty of care standard for E-Commerce platforms	563
A. Introduction	563
1. Principles	564
B. Duty of care: risk assessment, prevention and removal	565
1. Methodology: risk-based approach	565
2. Risk assessment	566
I. Harms definition	566
II. Risk identification & definition	567
III. Risk analysis	567
a. Risk drivers	567
b. Platform capabilities	568
IV. Risk evaluation	570
3. Risk control	570
C. Duty of care: Notice-and-Takedown	573
D. Duty of care: transparency	573
1. Terms & Conditions	573
2. Transparency reporting	574
Bibliography	580
A. Books, book sections, journal articles and public reports	580
B. Blog articles, internet news articles and webpages	614
C. Case law	626
1. National	626
I. France	626
II. Germany	628
III. Italy	630
IV. UK	630
V. US	631
VI. Other jurisdictions	632
2. EU and ECtHR	633
I. EU	633
II. ECtHR	636
D. Statutes & Bills	636
Index	643