

BUILDING THE ECONOMIC MODEL OF PLATFORM LIABILITY: TOWARDS THE ASSUMPTIONS

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Abstract: *Platform liability represents a contemporary issue that has been recently tackled also in the EU. However, lawmakers still struggle with the perspective shift in online distribution from one-to-many model towards the many-to-many infrastructure where multitude of parties and interests play key role. Goal of this contribution is to introduce ongoing research into platform liability from the perspective of economic analysis of law. Author shall tackle the difficulties and fundamental issues of platform liability and isolate factors determinant to building an economic model of platform liability.*

1. Introduction

During the past decades, human interaction has increasingly become virtualized. We interact with each other and various conceivable content such as art, forms of entertainment or news of the day. FROSIO captures such shift followingly:

“Online intermediaries mediate human life in a virtual brave new world that reflects and augments our physical realm. (...) Ubiquitous platforms dictate our daily routine: searching for information on Google, getting a taxi on Uber, shopping on Amazon Fresh, making payments via PayPal, collaborating on Google Docs, storing documents on Dropbox, taking up employment through Upwork, discussing trendy topics on Twitter, sharing videos on YouTube, or posting pictures on Instagram.”¹

In changing our way of interaction, our society morphed into “platform society” as noted by FROSIO.² Nonetheless:

“(...) there is more to it. Perhaps unnoticed, our society has transformed into an ‘intermediated society’.”³

Intermediary liability, hence, plays a crucial role as it dictates how we experience the world of cyberspace.⁴ The very legal framework applicable to platforms’ business influence the way business models are conceived and developed.⁵ It is, therefore, crucial to focus legal attention on the legal landscape of platform regulation.⁶ The topic of this short submission aims to introduce problems that need to be tackled when analyzing the newly reformed rules of platform liability for breach of copyright under Art 17 of the DSM Directive from the perspective of economic analysis of law. To this end, the contribution aims to discuss the foundations of platform liability and the basic assumptions that need to be translated into the economic model of platform liability for the purpose of its evaluation.

¹ Editor’s note FROSIO, GIANCARLO. Oxford Handbook of Online Intermediary Liability. Oxford University Press, 2020, s. 1.

² Ibid., p. 2.

³ Ibid.

⁴ PAPPALARDO, SUZOR at Ibid. pp 2–3.

⁵ PAGUERA at Ibid. p. 3.

⁶ As has been done previously by other authors. E.g., see Ibid.

2. Economic models

Economic approach to law is not a brand-new perspective towards legal research. From its humble beginnings in the fields of accident or criminal law, economics found its application across wide array of legal fields.⁷ Moreover, it has been widely popularized in the recent decades. Economy, subsequently, has found its application also in the field of intellectual property, where it has traditionally been used to evaluate the rules of industrial property and their efficiency.⁸ It is only appropriate, hence, to apply the economic approach to law also in the field of copyright and to the contemporary issue of platform liability.

Economic approach towards law can be differentiated into two branches. The economic analysis of law is frequently employed to evaluate legal rules by the use of economic models.⁹ Law and economics, on the other hand, focuses on how law and markets interact as alternative social institutions for coordinating human behavior.¹⁰ As the goal of this short submission is to introduce the model of platform liability under Art 17 of the DSM Directive, the methods employed by the economic analysis of law seem fitting.

Economic models are a methodic tool for finding a simplified version of the real-world phenomenon. Models identify and focus on certain relationships determinant to the phenomenon that they isolate.¹¹ Consequently, employing such method allows to discard factors that are extraneous to the particular problem. Model's assumption, thus, stand in the center as it defines what variables are endogenous and what variables are exogenous.¹² Quality and validity of assumptions, hence, becomes fundamental.

Model building should ideally include six important steps.¹³ First, author should identify an interesting question and good method for answering it. Next, author must limit the scope of inquiry at hand by isolating assumptions. Author should also translate the legal rule into economic terms and explain, how certain legal rule creates incentives for decision-makers. Subsequently, author should start building the economic model and increasingly more tackle the proposed model with existing literature. Finally, publication of the model and author's findings is in order.

2.1. Understanding commercial platforms

For further normative discussion it is crucial to understand what online platforms are. Mainly we shall focus on what connections are intermediated by online platforms and how. The importance of such an attempt can be supported, e.g., by Svantesson:

*“Internet intermediaries are crucial for how most people use the Internet”*¹⁴

To widen the existing knowledge, we shall attempt to isolate the relevant factors that are determinant to platform liability while later analyzing existing quantitative data to build an economic model of platform liability. The resulting model shall thus describe the business of online platforms in the area of copyright. The economic model of platform liability is necessary as it helps us understand how online platforms operate while providing insight into interdependencies between relevant factors.

⁷ THOMAS J MICELI, ‘Economic Models of Law’, *The Oxford Handbook of Law and Economics, Volume 1: Methodology and Concepts* (1st edn, Oxford University Press 2017) 13 et seq.

⁸ For details see: NIVA ELKIN-KOREN and ELI SALZBERGER, *The Law and Economics of Intellectual Property in the Digital Age* (Taylor & Francis Ltd 2015).

⁹ MICELI (n 7) 13.

¹⁰ Ibid 18–19.

¹¹ Ibid 10.

¹² Ibid 10–11.

¹³ For further details see ibid 23–25.

¹⁴ As stated by SVANTESSON. See Editor's note FROSIO, GIANCARLO. *Oxford Handbook of Online Intermediary Liability*. Oxford University Press, 2020, s. 1.

2.2. Assumptions

Traditional intermediaries are professionals occupied with identifying the most commercially promising works of copyright, obtaining necessary rights and distributing copies.¹⁵ Modern intermediaries, on the other hand, are not rightsholders and their core business does not fall under the category of copyright.¹⁶ Instead, modern intermediaries operate in the business of connecting individuals with content.¹⁷ Content, thus, serves as a tool to generate more connections.

Consequently, modern content distribution shifts away from the traditional model of one-to-many distribution towards the many-to-many infrastructure.¹⁸ Everybody can be an author, distributor or user and intermediaries serve to connect these individuals with content. Nonetheless, that does not mean that copyright rules can be discredited altogether. Instead, lawmakers attempt to address the raising issues in content distribution and the multilateral relationships between authors, distributors, users, intermediaries, and other involved parties. Recent attempt has been also made in the European Union as the new Art 17 of the DSM Directive rules come into effect.¹⁹

Subsequently, IRI§ 22 conference contribution shall attempt to isolate factors that are relevant for analysis of online platforms based on the following assumptions:

- There are three predominant actors (decision-makers) interacting at online platforms, the users, the platform and the rightsholders.²⁰
- Creators, while present at online platforms, also fall under the category of users and do not constitute a separate category of decision-makers.²¹
- All groups of actors interact with copyright-protected content.²²
- Users interact with content for profit or entertainment.²³
- Platform interacts with content for profit (content attracts users).²⁴
- Platforms monetize the interaction of users with content not the content itself.²⁵
- Rightsholders enforce their copyright rights for violation of copyright on the platforms via available tools such as ADR, injunctive framework or court action.²⁶
- We shall assume that other factors such as user-friendliness, popularity or operability do not influence the economic model (these factors are constant).²⁷
- We shall assume that all content is of the same category.²⁸

These assumptions shall, nonetheless, be further tested while developing the model of platform liability.

¹⁵ DANIEL J GERVAIS, *(Re)Structuring Copyright* (Edward Elgar Publishing) 158.

¹⁶ Ibid 159.

¹⁷ Ibid 158–159.

¹⁸ Ibid 121.

¹⁹ For general discussion see: MARTIN SENTLEBEN, ‘Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market’ (2020) <<https://papers.ssrn.com/abstract=3367219>> accessed 10 November 2021.

²⁰ GERVAIS, DANIEL J. *(Re)structuring Copyright* [online]. Edward Elgar Publishing, chap. 5–7. accessed 12 December 2021.

²¹ Ibid, chap. 5 and 6.

²² Ibid., chap. 5–7.

²³ Ibid. chap. 7.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid. chap 5–7. Also see HUSOVEC, MARTIN. Accountable, Not Liable: Injunctions Against Intermediaries [online]. 2016 [vid. 28. listopad 2018]; WORLD INTELLECTUAL PROPERTY ORGANIZATION. *Alternative Dispute Resolution Mechanisms for Business-to-Business Digital Copyright and Content-Related Disputes: A report on the results of the WIPO-MCST Survey*. 2021.

²⁷ THE CORE. *The Economy* [online]. kap. 2.2 and 2.3. accessed 12 December 2021.

²⁸ When translated into the real world, nonetheless, the economic model can adjust according to specific industry practices, such as specific policies of movie industry. See KELLER, PAUL. Article 17 stakeholder dialogue (day 2): Filters, not licenses! *International Communia Association* [online]. 2019 [vid. 28. květen 2020]. Ziskáno z: <https://www.communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>.

3. Conclusion

Currently, the research and subject of this short contribution falls under the development of the economic model of platform liability phase. Nonetheless, as platform liability presents an issue with multitude of factors and involved parties, it is necessary to test standing assumptions that frame the future economic model at international forum. The upcoming IRI § 22 international conference, thus, presents a perfect platform to share the ongoing research and gain insight from other involved academics.