

Carsten Ullrich

Unlawful Content Online

Towards a New Regulatory Framework
for Online Platforms



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Preface

*“...Proactively overseeing
Day-to-day operations
Services and deliverables
With cross-platform innovation
Networking, soon will bring, seamless integration
Robust and scalable, bleeding-edge and next-generation...”*

Being a foreword to a scientific research work, source and background to this quote will obviously be explained, but I will do so at the end of my introductory words besides mentioning now already that it originates from a song. But the quote is very fitting to set the scene against which the Ph.D. thesis presented here was developed.

Platforms have completely changed, have shaped and are dominating the online environment. An environment that in 2000, when the regulatory approach towards platforms was defined for the area of the European Union with the E-Commerce Directive, was entirely different from what we experience today. In the words of above: through innovations brought by the emerging platforms, but even more, by not only allowing networking, but continuously expanding by benefitting from network effects, platforms have integrated all different kinds of services in a seamless manner – sometimes it is invisible to the users which services all belong to the same provider or are currently being used by them – and have become robust or, at least for the very large platforms, are in an entrenched market position. Which leaves us with the “next-generation” question from the above quote: after 20 years of watching this growth and fundamental change, it has become obvious and undisputed that platforms play a decisive role in the online user experience and, what’s more, have become a key factor also in what can be regarded as a new public sphere for content dissemination and communication. And connected to that is the need for a new approach in regulating these actors, thereby giving up the longtime prevailing mantra of not “opening Pandora’s box”, meaning that any change to the E-Commerce Directive would lead to unexpected difficulties and fundamental discussions about readjusting regulation for the online environment overall. Indeed, we are now witnessing the beginning of a “next-generation platform regulation”.

It is a lucky coincidence if an academic research project that starts out with the aim to analyse a status quo and derive conclusions about an improved future path, takes place exactly in alignment with the period when this is also debated in real. It is challenging because the project has to consider a steep increase in contributions to the debate, but rewarding because it offers potential for impact in the actual process. This is exactly what happened with *Carsten Ullrich's* project on “**Unlawful Content Online – Towards a New Regulatory Framework for Online Platforms**”, the result of which we are happy to bring to a wider public attention by publication in the „**Luxemburger Juristische Studien – Luxembourg Legal Studies**“ as volume 21 with Nomos as a publisher. When he started end of 2016 it had become evident that the light touch regulation of platforms was being challenged, but that on short notice no new legislative framework would be proposed by the European Commission. And nearly on the day of the defence of his Ph.D. thesis mid-December 2020 the Commission put on the table two Proposals for Regulations, a Digital Services Act and a Digital Markets Act attempting at exactly creating a “new regulatory framework for online platforms”. Obviously, this did not happen by coincidence but the research project was born out of the observation of the actual situation, the framing of a new doctoral training unit at the Department of Law of the University of Luxembourg (DTU REMS on regulatory enforcement in multi-level systems) and the background that *Carsten Ullrich* could bring to the project: having worked as manager for compliance and the notice-and-takedown operations of a large online platform he had the insights that allowed to shape the research in a way that promised practically applicable results. Nonetheless, the perfect timing at the end could not have been planned in advance, but offered and continues to offer the possibility of impacting the currently ongoing debate about how to best impose obligations on online platforms that increase their responsibility. Besides providing a thorough legal analysis based on some initial technical observations, this publication is finalized by developing a risk-based approach for due diligence obligations and is accompanied by concrete proposals for a standard concerning the removing and prevention of counterfeit on e-commerce platforms, which could serve as blueprint for application as a workable solution in practice.

More specifically, of this publication starts out in chapter 1 with explaining the background, the methodological approach and clarifying the key notions, while chapter 2 gives a summary overview of the socio-technical and economic role of platforms which are referred to as internet intermediaries. Chapter 3 details the emergence of rules about liability or – more

precisely – exclusion of liability for intermediaries under specific situations and does so by presenting legislation and interpretation by courts in the United States of America, several EU Member States and further national approaches to internet regulation. In order to illustrate the difficulties in answering the question of liability in specific contexts, chapter 4 introduces several sectoral frameworks that each deal with the question in a different manner. Besides looking at responses to defamation that violates personality rights or hate speech and terrorist content that endangers public order, the analysis covers the protection of economic rights in the intellectual property setting. More importantly, the publication also draws attention to sectoral solutions which are not discussed a lot in the literature due to their highly specialized character but allow for insightful conclusions: the area of product and food safety regulation. This is then applied to case studies in those two areas to demonstrate the structures of enforcement and challenges in market surveillance in these sectors. Finally, the publication moves to discussing proposals on how to reform the issue of intermediary liability before presenting a well-argued and profound proposal for a co-regulation system relying on duty of care expectations to be fulfilled by the intermediaries based on harmonised technical standards. The conclusion allows for a first evaluation of the Commission proposal for a Digital Services Act (DSA), which *Carsten Ullrich* could add after his defence in order to offer an updated version of the thesis for publication.

Besides working on his Ph.D. thesis, his research also contributed to two studies on the need for reform of the E-Commerce Directive and platform regulation in the EU as well as a more detailed evaluation of the mentioned DSA proposal, which both are also available as open access publications with *Nomos*.¹ In the best possible way the research of the thesis that the reader will find after this foreword, contributed to those studies and in turn the work on those studies could then be used for the further development of the thesis. This is the type of exchange between academic research work and practical application that a Ph.D. supervisor – certainly I can say that for myself, but I think many will share this perception – can be happy

1 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive, *Schriftenreihe Medienforschung der Landesanstalt für Medien NRW* (Band 81), *Nomos* 2020, <https://doi.org/10.5771/9783748906438>; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination – Legislative Options of the European Union and the Digital Services Act Proposal, *Schriftenreihe Medienforschung der Landesanstalt für Medien NRW* (Band 83), *Nomos* 2021, <https://doi.org/10.5771/9783748925934>.

to witness as it proves the added value of fundamental research. Its quality is also underlined by having been awarded the prestigious "Prix Rolf Tarach" of the Amis de l'Université du Luxembourg for the best Ph.D. thesis of 2020.

This leaves us with the open answer to the background of the musical quote at the beginning. Typically, for nearly every topic one can find a song that offers suitable titles or quotes that one can use as a reference in any type of publication. And in the case of introducing this publication of a thesis it was an obligation considering that *Carsten Ullrich* also has a passion and talent for music. One would think that "platform" is a common expression in lyrics and that it would be easy to find the appropriate quote. However, most platform-references concern either platform soles (of those types of boots that were especially popular in the 1970s) such as in *Dire Straits'* "Sultans of Swing" or they refer to platforms in train stations such as in numerous Bob Dylan songs or *Cream's* "White Room". It took a more detailed research to find this one song "Mission statement", which by the way is in itself a fitting title in connection with a Ph.D. thesis as the research question could be regarded as the mission statement of a Ph.D. candidate, by "*Weird Al*" *Yankovic*. For those readers that are not very familiar with this artist (admittedly, I also only knew the artist, but not this specific song before I started the research), he is best known for his parodies of famous pop, folk and rock songs, for example on the same album of 2014 ("Mandatory fun", also a good motto for Ph.D. research which spans over several years and is easier to handle if it gives joy) a parody of *Robin Thicke's* "Blurred Lines" entitled "Word Crimes" (something that you will not find in this publication here). Thinking about it, it turned out to be a perfect match for a quote, even though the song may not have the same wide spread as the platforms you will be reading about in the following: the question of parody as an exception to exclusive rights of authors played an important role in the discussions on the introduction of a new form of platform responsibility with the Copyright in the Digital Single Market-Directive of the EU in 2019. And this is where Carsten Ullrich's thesis nicely ties together with the publications of previous Ph.D. students of mine in the „Luxemburger Juristische Studien – Luxembourg Legal Studies“ series: on "The Struggle in Online Copyright Enforcement – Problems and Prospects" (Sandra Schmitz, vol. 8, 2015), on freedom of expression standards in the "Regulation of Sexualized Speech in Europe and the United States" (Lawrence Siry, vol. 6, 2016), "Reconstructing European Copyright Law for the Digital Single Market – Between Old Paradigms and Digital Challenges" (Bernd Justin Jütte, vol. 10, 2017) and "Implementing the EU

Audiovisual Media Services Directive – Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK” (Jenny Weinand, vol. 13, 2018) analysing a first important approach of the EU towards regulating a specific type of platforms, namely video-sharing platforms.

I am sure Carsten Ullrich’s work will be a valuable read for you and hope it will receive the deserved attention, be an inspiration for future Ph.D. students as well as contribute to the further debate of a “next generation-regulatory framework for platforms”. And I am happy that the author will himself continue to follow the discussions about implementing such new regulatory steps, but now again from the inside perspective of a platform that in the years to come will likely have to adapt to these new rules!

Dr. Mark D. Cole

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Institute of European Media Law (EMR)

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Abbreviations and Acronyms

AdCo	Administrative Cooperation Group (on market surveillance)
AG	Advocate General (of the Court of Justice of the European Union)
AML	Anti-Money Laundering
API	Application Programming Interface
AVMSD	Audiovisual Media Services Directive (2018/1808)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (Germany)
CDA	Communications Decency Act (US)
CDPA	Copyright, Designs and Patents Act (UK)
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CSA	<i>Conseil Supérieur de l'Audiovisuel</i> (Electronic Media Regulator) (France)
CSR	Corporate Social Responsibility
CTIRU	Counter-Terrorism Internet Referral Unit (UK)
DMA	Digital Markets Act COM(2020) 842 final (EU Proposal)
DMCA	Digital Millennium Copyright Act (US)
DSA	Digital Services Act COM(2020) 825 final (EU Proposal)
DSM	Digital Single Market
DSMD	Copyright in the Digital Single Market Directive (2019/790)
EEA	European Economic Area
ECD	E-Commerce Directive (2000/31)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EDD	Enhanced Due Diligence
EFSA	European Food Safety Authority
EMCD	Electromagnetic Compatibility Directive (2014/30)
ERGA	European Regulators Group for Audiovisual Media Services
EUTMD	Directive relating to trade marks (2015/2436)
EUTMR	EU Trade Mark Regulation (2017/1001)
FBA	<i>Fulfillment by Amazon</i>

Abbreviations and Acronyms

FSA	Food Safety Authority
FSP	Fulfilment Service Provider
GAFAM	Google, Apple, Facebook, Amazon, Microsoft
GDPR	General Data Protection Regulation (2016/679)
GEMA	<i>Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte</i> (Society for musical performing and mechanical reproduction rights) (Germany)
GiFTC	Global Internet Forum for Terrorist Content
GPSD	General Product Safety Directive (2001/95)
GRC	Governance, Risk and Compliance
HTML	Hypertext Mark-up Language
HTTP	Hypertext Transfer Protocol
IAP	Internet Access Provider
ICANN	Internet Corporation for Assigned Names and Numbers
ICSMS	Information and Communication System on Market Surveillance (EU)
Infosoc Directive	Directive on harmonisation of certain aspects of copyright and related rights in the information society (2001/29)
IoT	Internet of Things
IP	Intellectual Property
IPRED	Intellectual Property Enforcement Directive (2004/48)
IRU	Internet Referral Unit (Europol)
ISP	Intermediary Service Provider
ISSP	Information Society Service Provider
TCP/IP	Transmission Control Protocol/Internet Protocol
KPI	Key Performance Indicator
KYC	Know-Your-Customer
LCEN	<i>Loi pour la confiance dans l'économie numérique</i> (France)
MSA	Market Surveillance Authority
MSM	Multi-Sided Markets
MSR	Market Surveillance Regulation (2019/1020)
NetzDG	<i>Netzwerkdurchsetzungsgesetz</i> (Network Enforcement Act) (Germany)
NLF	New Legislative Framework
OTT	Over-The-Top (communication service)
P2B	Platform-to-Business Regulation (2019/1150)
P2P	Peer-to-Peer

SNEP	<i>Syndicat national de l'édition phonographique</i> (National Association of Phonographic Publishers) (France)
RAPEX	Rapid Alert System for Dangerous Non-Food Products
RED	Radio Equipment Directive (2014/53)
SIHD	Shared Industry Hash Database
TERREG	Proposal for a Regulation for preventing terrorist content online (EU)
TMG	<i>Telemediengesetz</i> (Germany)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCPD	Unfair Commercial Practices Directive (2005/29)
UGC	User Generated Content
URL	Uniform Resource Locator
WIPO	World Intellectual Property Organisation

