

Mere Conduit

Is a network operator liable for the content offered by users / service providers?



- Network operator mostly not responsible for content ('mere conduit')
- New OTT-services like Twitter, WhatsApp, Skype and Zoom make distinction unclear
- Networks and social media platforms can be used for the dissemination of illegal, harmful or damaging content (e.g. trolls, DDoS-attacks or Ponzi-schemes)
- The network operators has a gatekeeper function and a possible insight in the traffic \Rightarrow possible role in enforcement
- General regulatory approach re. network operators and service providers:
 - Obligation to take (proportionate) measures in case of illegal content
 - Permission to take action in case of serious indications of potentially harmful content
- Balancing act:
 - Protection of privacy and freedom of expression \Rightarrow no content monitoring
 - Protection of intellectual property rights \Rightarrow limited content monitoring
 - Protection of society against fake news, fraudulent financial transactions and harmful content \Rightarrow content monitoring

Examples of Mere Conduit approaches in Regulation

- EU (*E-Commerce Directive of 2000*)
 - Service provider is not liable for the information transmitted, provided the provider
 - Does not initiate the transmission
 - Does not select the receiver of the transmission, and:
 - Does not select or modify the information contained in the transmission
 - No obligation to monitor the information transmitted
 - European Commission is working on the Digital Services Act with new rules for the removal of illegal and (possibly) harmful content
- Early attempts of IPR-protection in France and New Zealand: three strikes rules
 1. ISP should notify users downloading illegal or harmful content
 2. After three notifications, the ISP/operator may be imposed a penalty
 3. Impacts on copyright infringements are unclear. Technological developments reduce usefulness (VPN, blockchain)
- Until 2018 Germany had slower Wi-Fi roll-out because providers of free Wi-Fi services were held liable for copyright infringements by users. As a result the services were hardly offered.
- United States of America
 - Protection for “Good Samaritan” blocking: service providers are entitled to block material considered obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable
 - Federal law prohibits broadcasting obscene, indecent and profane content on radio or TV. Broadcaster is liable ⇒ deliberate delays in broadcasting of live shows. Obscenity is prohibited on all media. Indecency only applies to services that are not subscriber-based.