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Legal Regulation & Education: Doing the Right Thing?

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Unraveling Intermediary Liability

Current law in Europe governing the liability of internet intermediaries for third party content is suffering an identity crisis. The rules are often confused and conflicting and provide minimal practical guidance to the businesses operating in this environment. For an intermediary such as a search engine, Social Networking Provider or Internet Service Provider, there is uncertainty whether any given content should be taken down or blocked upon a notice of complaint. This is costly to a business such as Facebook that receives 2 million requests to remove content per week, and it fails to balance the rights of users in accordance with human rights principles.

What has been striking about the changes in recent years is the system has become more challenged rather than less. There are many potential reasons for this, most of which are common to the challenges of internet regulation in general; the environment is rapidly changing as are the businesses and users that use it; case law is piecemeal and tied to particular jurisdictions; a tendency to deploy quick fixes to address unlawful content; and application of varying standards depending on the type of intermediary or offense. However, this does not seem to fully capture why the current system has arguably gone off the rails.

This paper seeks to unpick the current state of intermediary liability by examining the developing case law and the changing legislative and regulatory frameworks at work. It will compare the approaches in Europe, the USA and Canada and contextualize the approaches within the wider internet governance debate. The goal of this paper is to identify the points of challenge and commonality in the current regime, and to examine the implications of the current regulatory settlement to the balance of competing rights. Drawing from this analysis, the paper will outline the principles needed in an intermediary liability framework.