Service provider's liability for user collaboration

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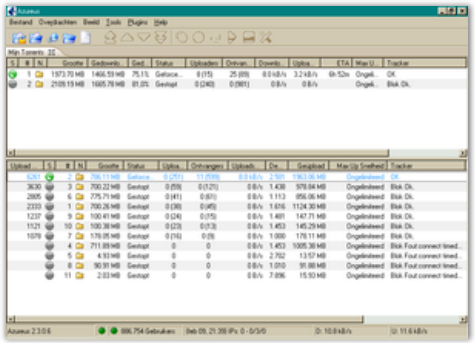
Structure

- Facts
  - Anatomy of popular user collaboration services
- Law
  - Some options for secondary liability
- Policy
  - Alternatives to liability?

Facts

User collaboration before

User collaboration since...



Napster 1999

PirateBay 2003

...not only sharing
but also creating...

YouTube 2005

eBay 1995

MySpace 2003

Technical architecture

- Some alternatives for “gatekeepers”:
  - Service automatically generates links (e.g. Google) or stores links generated by users (e.g. eDonkey)
  - Service stores addresses of active collaborating users (e.g. PirateBay)
  - Service stores actual content files either as such (e.g. MySpace) or through technical filters (e.g. YouTube)

Service provider's role

- Connects collaborating users; may provide social incentives for users to e.g. rise their status
- Makes the system work technically as effective as possible; may take technically broken files down and may ban users who break the rules of the service
- May provide tools to edit, convert or otherwise transform content files
- May try to generate profit
- May collaborate with third party right holders

Law

Question

- If users share, re-use, or re-create content, they may infringe copyright, trademark etc.
- If service is popular, third party infringements are practically unavoidable
- On what conditions is the provider liable? Actual knowledge? Strict liability? No liability?

KaZaA in Europe

- Supreme Court of the Netherlands, December 12, 2003: "Insofar as there are acts that are relevant to copyright such *acts are performed by those who use the computer program and not by KaZaA*. Providing the means for publication or reproduction of copyrighted works is not an act of publication or reproduction in its own right." -> roles separate, *no liability* because there is no secondary liability theory in European copyright law

But: Grokster in the US

- June 27, 2005. US Supreme Court: “Held: One who distributes a device with the object of *promoting its use to infringe copyright*, as shown by clear expression or other *affirmative steps* taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.” -> roles separate but active steps -> *“gross negligence” liability*

Finnish BitTorrent case

- Service provider of a BitTorrent tracker sued because users infringe copyright; technically much like PirateBay

- Turku Court of Appeal on 19 June 2008: "Since the *acts of administrators* [the provision of technical means] have been a *direct and necessary part* of the reproduction and distribution of copies, we hold that the defendants have actively participated in the reproduction of copies as required in the legal precedents." -> *strict liability*

French MySpace case

- A French comedian sues MySpace for copyright infringement since their users post clips featuring him
- A Paris Court 22 June 2007: MySpace *strictly liable* as it would have acted like the user (publisher)
- Provision of technical means relevant, actual knowledge of infringements not

Directive

In Europe E-Commerce Directive 2000/31/EC, Article 14, Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have **actual knowledge** of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; **or**

(b) the provider, upon obtaining such knowledge or awareness, **acts expeditiously to remove or to disable access to the information. [negligence]**

2. Paragraph 1 shall not apply when the **recipient of the service is acting under the authority or the control of the provider. [strict liability]**

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Belgian eBay case

- Lancôme v. Ebay, Le tribunal de commerce de Bruxelles, 31.7.2008 - *no actual knowledge*
  - eBay did not have a duty to monitor what users published in the service
  - eBay had removed infringing products based on actual knowledge (e.g. take-down notices)
  - Since eBay did not have "editorial control" over what users would publish, it did not have "authority or control" over the users

French DailyMotion case

- A film producer sues DailyMotion, a video sharing service much like YouTube, for copyright infringement since users posted their movie
  - High Court of First Instance in Paris, 13 July 2007: DailyMotion liable since it *has actual knowledge* that infringing video clips are on the site in addition to giving its users means to commit infringement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Agregado el 26-9-2008 a las: 12:55 por katius
Como siempre recomendamos visitar todas las secciones, puesto que no todos los elinks salen en el home.
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Todo sobre Emule
eMule fue creado en el año 2002 para el

Spanish case - Sharemula

- Users collaborated providing links to each other much like in the Finnish BitTorrent case
- Madrid appeals court September 18, 2008: service provider had no actual knowledge of infringements that happened at users' end
- Based on directive's *actual knowledge standard,* provider not liable

Immunity standard

Finnish act on the provision of information society services - immunity until written notice received

Section 15: Exemption from liability in hosting services

... the service provider is not liable for the information stored or transmitted at the request of a recipient of the service if he/she acts expeditiously to disable access to the information stored:

1) upon obtaining knowledge of the order concerning it by a court or if it concerns violation of **copyright or neighbouring right** upon obtaining the **notification** referred to in Section 22;
2) upon otherwise obtaining **actual knowledge** of the fact that the stored information is clearly contrary to Section 8 of Chapter 11 or Section 18 of Chapter 17 of the Penal Code (39/1889) [terrorism, child porn]

Some liability options

Option	No liability	Immunity	Actual knowledge	Gross negligence	Strict liability
Liability basis	N/A	Right holder notice and take down procedure	Actual knowledge and passivity towards infringements	Active steps to support infringement	Providing technical means == using the service
Legal source	No secondary liability doctrine in law, e.g. KaZaA case (2003)	E.g. Finnish law based on directive 2000/31/EC	Directive 2000/31/EC and DMCA sec 512, e.g. Sharemula case (2008)	Grokster case (2005)	Copyright law, e.g. Finnish BitTorrent case (2008)

Conclusion: the law is in a mess, service providers not immune

Policy

Arguments

- For liability:
  - Service provider in the best position to monitor infringements, technically filter them out with little cost, and charge extra to compensate for infringements
- Against liability:
  - Liability would undermine legal uses and social benefits of collaboration services -> market failure; users directly liable as well; alternative income possibilities

Some alternative proposals...

- "Infringement tax"
  - Either a flat fee or use-based (requires monitoring of data volumes / content of the data)
- Regulated mandatory filtering, censorship etc. (cf. capital markets regulation)
- Change the right holders' end: either incentives to use open content or direct "copyright bail-out". How much would it cost to nationalize major media companies? Less than the current bail-out?