

**EUROPEAN INTERMEDIARY
LIABILITY IN COPYRIGHT:
A TORT-BASED ANALYSIS**

Christina Angelopoulos



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European Intermediary Liability in Copyright

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Objective & Readership

Publications in the Information Law Series focus on current legal issues of information law and are aimed at scholars, practitioners, and policy makers who are active in the rapidly expanding area of information law and policy.

Introduction & Contents

The advent of the information society has put the field of information law squarely on the map. Information law is the law relating to the production, marketing, distribution, and use of information goods and services. The field of information law therefore cuts across traditional legal boundaries, and encompasses a wide set of legal issues at the crossroads of intellectual property, media law, telecommunications law, freedom of expression, and right to privacy. Recent volumes in the Information Law Series deal with copyright enforcement on the Internet, interoperability among computer programs, harmonization of copyright at the European level, intellectual property and human rights, public broadcasting in Europe, the future of the public domain, conditional access in digital broadcasting, and the 'three-step test' in copyright.

The titles published in this series are listed at the end of this volume.

List of Abbreviations

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
BGB	<i>Bürgerliches Gesetzbuch</i> (the German Civil Code)
BGH	<i>Bundesgerichtshof</i> (the German Federal Court of Justice)
BVerfG	<i>Bundesverfassungsgericht</i> (the German Federal Constitutional Court)
C.civ.	<i>Code civil</i> (the French Civil Code)
CA	<i>Cour d'appel</i> (a French Court of Appeal)
CDPA	(The UK's) Copyright, Designs and Patents Act 1988
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (former European Court of Justice)
COM	European Commission Document Number
CPI	<i>Code de la propriété intellectuelle</i> (the French copyright act)
DMCA	Digital Millennium Copyright Act 1998
DCFR	Draft Common Frame of Reference
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EGTL	European Group on Tort Law
EU	European Union

List of Abbreviations

GEMA	<i>Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte</i> (German society for musical performing and mechanical reproduction rights)
GDP	Gross Domestic Product
HADOPI	France's <i>Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet</i> . Also refers to the law that set up this authority, the <i>loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet</i>
HADOPI 2	<i>Loi n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique, Journal officiel du 29 octobre 2009</i>
J	Abbreviated title of a judge of the High Court of Justice of England and Wales
LCEN	<i>Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique</i>
LG	<i>Landgericht</i> (a German regional court)
LJ	Lord Justice of Appeal, an ordinary judge of the Court of Appeal of England and Wales
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OLG	<i>Oberlandesgericht</i> (a German higher regional court)
PETL	Principles of European Tort Law
SCPL	(in France) <i>service de communication au public en ligne</i> , i.e., an online service of communication to the public
TEU	Treaty on European Union
TGI	<i>Tribunal de grande instance</i> (a French regional court)
TMG	<i>Telemediengesetz</i> (the German Telecommunications Law)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TPB	The Pirate Bay
UCC	Universal Copyright Convention
UK	United Kingdom of Great Britain and Northern Ireland

List of Abbreviations

UrhG	<i>Gesetz über Urheberrecht und verwandte Schutzrechte</i> (the German copyright act)
US	United States (of America)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation

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*Christina Angelopoulos
London, 11 January 2016*

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Chapter 1

Introduction^{*}

The internet is by far the most efficient means of information exchange humanity has invented to date. As a result, it has rapidly progressed to the centre of modern social, political and economic life. With this development, internet intermediaries, the providers of all internet-related infrastructure and services, have been catapulted to prominence: they are the conduits of our communications, our gateways to knowledge, the guardians of our data and, increasingly, the backbone of our economy.

Because of its great efficiency, the internet has also proven a convenient vehicle for the commission of unprecedented levels of copyright infringement.¹ For the most part, these infringements are executed by numerous, anonymous and impecunious infringers, often hidden in inaccessible jurisdictions far from right-holders' reach. As such, they make unappealing defendants for copyright owners trying to enforce their rights: chasing individual infringers is, as has been said many times, 'a teaspoon solution to an ocean problem'.² In their search for deeper pockets, easier targets and long-term fixes, right-holders have instead turned against the internet's middlemen, attempting to hold these parties accountable for the wrongdoings of the small-scale offenders using their services to commit their infringements.³

^{*} The research for this book was completed on 31 December 2015. Subsequent developments in the relevant law are therefore not reflected in this book.

1. I Iglezakis, 'The Legal Struggle in the EU against Online Piracy' in T-E Synodinou (ed.), *Codification of European Law* (Kluwer Law International 2012) 283.
2. The oft-quoted expression originates with R C Picker, 'Copyright as Entry Policy: the Case of Digital Distribution' (2002) 47 (2-3) *Antitrust Bulletin* 423.
3. OECD, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives' (OECD Publishing 2011) 144; J Ginsburg, 'Separating the Sony Sheep from the Grokster