eco Association and i2Coalition – Transatlantic Dialogue on Intermediary Liability

Regardless of where we are on the Internet, a third party is almost always involved as a technological enabler. But what liability does that third party have in circumstances of perceived or actual wrongdoing? Right now, intermediary laws which widely originated in the late 90's and early 2000's are being reconsidered in both the United States and the European Union, specifically with plans to overhaul Section 230 of the Communications Decency Act in the U.S., and to contribute to the process of building the Digital Services Act in the EU.

On 15 October 2020, a transatlantic dialogue was held to discuss these plans with relevant officials and experts. The dialogue was jointly hosted by the European-based eco – Association of the Internet Industry (eco Association) and the U.S.-based Internet Infrastructure Coalition (i2Coalition), and brought together representatives of the Internet industry from both sides of the Atlantic.[1] The dialogue was co-chaired by Christian Dawson, Executive Director of the i2Coalition, and Lars Steffen, Director International at the eco Association. The dialogue's four guest speakers were: Melinda Clem, Chair of the Board of i2Coalition, Vice-President Strategy, Afilias PLC; Oliver Süme, eco Chair of the Board and Partner at the European law firm Fieldfisher; David Snead, Co-Founder of the i2Coalition, General Counsel for cPanel; and Adam Candeub, Acting Assistant Secretary of Commerce for Communications and Information, U.S. Department of Commerce NTIA.[2]

The webinar took place as the first of two dialogues, with a second dialogue to subsequently take place with a focus on intermediary liability in the European Union. The objective of this first dialogue was two-fold: to learn from the NTIA about the current discussion on intermediary liability in the U.S., and to consider insights from both sides of the Atlantic concerning how changes in how intermediary liability is handled could impact on the Internet as a tool that keeps us all connected.

NTIA Input on Intermediary Liability in the U.S.

To set the context for the discussion, the webinar commenced with a detailed contribution from the NTIA's **Adam Candeub**. Looking back to the 1990's, Candeub recounted how, in that time, as more and more Americans connected to the Internet, there was a widespread recognition of how empowering the medium could be, with mass communications no longer limited to a few media companies. However, early on, if user-generated content like posts or comments on platforms were somehow unlawful, obscene, libellous, or threatening, and if material was attributed to the platforms themselves, the U.S. courts ruled that platforms held legal liability. The conundrum here was presented by the famous Stratton Oakmont v. Prodigy case. Here the question was: Do platforms become publishers when they decide to edit or curate user-generated content in order to make them remove obscene content or to remove threatening content? The Stratton Oakmont court ruled that they do indeed become publishers.

To resolve this conundrum, in 1996, Congress passed Section 230 as part of the Telecommunications Act. Section 230 reversed part of the Stratton Oakmont case ruling, but did so in a very limited way – in other words, platforms were released from legal liability when they edited, but only for very specific content. The vision of Section 230 was straightforward: to allow for the development of open forums, Internet platforms needed to be protected from liability for user-generated content. At the same time, Section 230 granted platforms the ability to moderate user posts without assuming the liability that traditional publishers would face.

[1] The eco Association/i2Coalition transatlantic dialogue took place as one of a series of roundtable discussions hosted by both associations. Due to COVID-19, on this occasion the dialogue was held virtually as a webinar.
[2] NTIA is the U.S. Executive Branch agency that is principally responsible for advising the President on telecommunications and information policy issues.

In Candeub's view, the original vision of Section 230 has been changed significantly. The emergence and consolidation of social media companies has made a handful of platforms now dominate a huge amount of discourse, not only in the U.S., but across the world. According to Candeub, with the backing of well-funded legal teams, these platforms have leaned on ambiguities of Section 230 to argue that they have immunity for any decisions they make about content. Candeub described it as a "sad irony" that a law meant to promote openness on the Internet instead has delivered online speech into the care of private censors, leaving some silenced. This was part of the stated rationale behind an executive order issued by President Donald Trump in May 2020, aimed at preventing online censorship.

Candeub described the goal of the U.S. administration as being to protect and preserve the integrity of American public discussion. The May 2020 executive order called for the NTIA to petition the Federal Communications Commission (FCC) to clarify Section 230's ambiguities and return it towards its original purpose: that is, to encourage openness and create a welcoming and open environment for all voices. In the NTIA's petition, the FCC is asked to make three things clear with regard to Section 230 and intermediate liability.

1. Section 230 requires social media companies to abide by their own moderation policies and contractual obligations.
2. Section 230 has deemed social media firms to be publishers when they remove, promote, comment upon, or edit user content.
3. Section 230 does not protect a social media platform that shapes and controls its overall content according to a discernible viewpoint. If the content is a form of expression, then the platform is the speaker; if the platform is the speaker, then it falls outside of Section 230 protection.

The NTIA petition has also asked the FCC to impose disclosure requirements similar to those that broadband service providers like AT&T and Verizon now face. This disclosure provides the oversight mechanisms for other proposed regulations.

Taken as a whole, if the FCC acts on the NTIA's petition, Candeub believes that Section 230 will once again protect freedom of expression while holding dominant platforms accountable for their editorial decisions.

Before moving on, Candeub also indicated that there were two critiques of the NTIA petition that have emerged since its being forwarded to the FCC: The first is the claim that the FCC doesn't have authority to promulgate these rules to resolve ambiguities in Section 230. This argument has been presented twice to the Supreme Court. However, both times the Supreme Court has ruled that the FCC does have this authority. Secondly, it has been argued that the First Amendment offers an entitlement to Section 230 protections. However, according to Candeub, no one has a First Amendment right to such protections. They are a gift to the individuals and the government has the authority to shape this liability relief in any way that it deems appropriate.

Intermediary Liability: Perspective of Two U.S. Companies

Melinda Clem from Afilias, the world's second largest domain registry, drew on the experiences of her own Internet infrastructure company in order to provide examples that illustrate the boundaries of intermediary liability. As Clem described, companies such as hers operate within an ecosystem of other companies and have obligations to uphold for their users. While companies such as Afilias are not content creators – and do not, as part of their business models, manipulate, edit, or prioritize content in any way – they are nonetheless often steps away from content generation. For objectionable content, companies such as Afilias have terms of services, AUPs (Acceptable Usage Policies), and benefit and appreciate the protection that they have under Section 230 today to

remove damaging and offensive material. Those are the protections that such companies are eager to have stay in place and to protect the business and operating model that they have today.

In discussing Section 230, **David Snead**, General Counsel for cPanel, used the analogy of developers finding an error in code. When developers at cPanel, for instance, find a bug in their code, they fix it rather than unplugging the entire network to deal with that bug. Snead argued that the proposals to change Section 230 are akin to unplugging a network to fix a bug. He also does not regard Section 230 as a gift to the industry and contended that the changes that have been proposed would impact SME businesses in ways that will not impact large platforms that have more resources. As such, Snead expressed the hope that discussion about the difference between platform regulation and network regulation would be advanced with a view to leading to positive policy developments.

Intermediary Liability: An EU Perspective

As pointed out by **Oliver Süme**, eco Chair of the Board, liability has been one of the cornerstones of the European Internet industry for two decades now. In the EU, intermediary liability has its roots in the e-Commerce Directive, established in 2000. As Süme reported, a very vibrant discussion is currently taking place in Europe concerning a revision of the Directive's intermediary liability system. This is due to the increasing social and economic importance of online and social media platforms which, in particular, is giving rise to the need for a much more specific legal framework. The primary reason for this is that, under the e-Commerce Directive, the liability regime does not specifically address platforms. This has led to a multitude of rulings having to be made, not just by national high courts, but also in particular by the European High Court. Such rulings deal with the question of intermediary liability and, in particular, the extent to which providers have to be liable for content of third parties. This situation has caused huge legal uncertainty for many players in the past 20 years. More and more European directives as well as national laws have emerged, leading to a fragmented situation.

In Süme's opinion, the e-Commerce Directive itself essentially has a very good horizontal approach which does not refer to a special infringement of a right but rather has the liability system apply to hate speech, as well as to trademark and competition infringements. Süme views this horizontal approach as a very innovation-friendly way of setting out the liability framework. However, the special verdicts and further legislative approaches have attempted to tackle the question of liability more on a vertical basis – for example, in terms of copyright, as was recently seen from the revision of the European copyright legal framework.

The European Commission is working on a Digital Services Act (DSA) and, among many other aspects, the DSA will also revise the intermediary liability system in Europe. From an Internet industry perspective, Süme sees a need for the DSA to deal explicitly with online platforms. He believes it would make sense to introduce a new category of services and define their role in terms of liability. However, Süme also finds it very important to stick to the categories that Europe already has in the e-Commerce Directive for hosting provider services, such as the "no monitoring" principle.

The co-chairs, Christian Dawson and Lars Steffen, proceeded by posing two questions to the panel.

Question 1: Section 230 reform efforts seem to focus on the role of social media platforms. How does reform stand to affect the Internet infrastructure providers specifically?

Candeub clarified that Section 230 only applies to interactive computer services, a defined term referring essentially to platforms who take content from other Internet content providers. However, Candeub also acknowledged that the Internet is playing a role in our lives that is far more pervasive and powerful than was conceived of in 1996 when Section 230 was passed. The call for liability in

both the U.S. and the EU recognizes that there is a vacuum which needs to be filled. Candeub said we all have to work together to make that happen.

Clem reiterated her view that one of the protections that companies such as Afilias feel they have is the ability to enforce terms of services for objectionable content. Taking Afilias again as a sample company, she emphasised that there is a realisation that business models only thrive when there is trust in the Internet. With SMEs serving as the backbone of the economy, the priority in use of resources is to make the Internet secure, to provide more trust, and naturally, to promote innovation – and not on pursuing endless lawsuits.

For the purposes of the dialogue, **Snead** provided an example from cPanel's experience of how the ecosystem works for a business starting out on the Internet. If someone doesn't like a site because, for example, it's selling merchandise that is controversial, some of the proposed changes in Section 230 would then create liability through the entire chain – for the ISP, for the hosting provider, for the bandwidth providers, for payment processors, and then, for the likes of cPanel, who licensed the software. What Section 230 currently does is to allow all of these players to investigate a claim, and if they determine it is valid, to take action or otherwise. Changes to Section 230 would simply require the entire chain to take a claim. Snead said that cPanel would rather be in a position where they have the opportunity to do some investigation; that is, to look into the claim without having to worry about their company having liability for failing to take down a website in circumstances where just a vague notion exists that the business is doing something illegal.

Candeub pointed out that, when it comes to vague allegations of illegality, current Section 230 interpretations have taken things to the other extreme. Here he cited the example of the Byrd v. Hassel case where a court had judged content to be unlawful and illegal and issued an order to the platform, instructing it to take down the content. Here the Supreme Court of California countered this, stating that Section 230 provided immunity to that ruling. In this regard, Candeub indicated his wish for having the development of more concrete communication which would create far better clarity.

Candeub also indicated that one of the things the current petition does is to limit the term of objectionable content to the Congress's initial intent, which was to regulate traditional forms of objectionable media content: e.g. nudity, harassing telephone calls, etc. While it might make sense for businesses to be able to refuse content, or refuse or stop a service, that is not necessarily the intent of Section 230. Candeub believes it is central for democracy to have platforms where people feel able to interact as equals. As such, giving power to certain gatekeepers must be viewed as troubling, and society needs to work through the ramifications of what that power means and what is a proper legal reaction to it.

Süme regarded the dialogue as a good opportunity to speak about additional requirements for any kind of intermediary liability in the future. One example that he regards as an essential issue for any future legislation concerns the increasing shift of decisions from courts or law enforcement authorities to the private sector. In the EU, many national laws and even European-level directives have put service providers and online platforms in the position where they have to reach decisions about what people will (or will not) see or hear on the Internet. According to Süme, this is giving rise to a conflict of fundamental rights. One matter of contention here is that, in a number of European countries, including Germany, law enforcement agencies are not in the position to investigate criminal acts on the Internet in terms of cybersecurity, because they have neither the manpower nor the technology to do so. With more and more private companies having to make these very fundamental decisions, this is leading to a very unbalanced situation, a fact that Süme believes should be kept in mind in discussing a new liability regime for the future. A further factor to be borne in mind is the fact that the current e-Commerce Directive has a "no monitoring principle" that explicitly states that Internet service providers do not have the obligation to actively monitor content that they

host for third parties in order to assess if there is illegal or illicit content on their network. This principle has also been weakened on the basis of a number of new laws over recent years. Süme believes it is very important that this principle be adhered to and that a regime is not entered into where continuous and active monitoring by hosting companies of all kinds would be a legal obligation.

Question 2: Europe is also looking at reform of its intermediary liability frameworks. What can be done to ensure that reform efforts end up facilitating transatlantic trade?

Candeub stated that, in going forward, harmonising systems between national approaches would be a very positive development. As an operator, **Clem** also concurred that her company would desire that level of consistency, and that the more companies can come together and solidify definitions and standards, the easier it will be for new companies to start up, and for existing companies to operate and understand the rules with which they operate. **Süme** echoed Clem's view, emphasising the importance of gaining insight from all sides and of taking these into consideration in improving the liability system. Taking the experiences of the GDPR as an example, Süme considers it to be very advisable to have the same understanding of the fundamental principles of safe harbours and of secondary liability for certain service providers and platforms. **Snead** went on to say that, in pursuing a harmonised approach when it comes to intermediary liability, it would be useful to employ the Privacy Shield as an example. While the situation regarding the Privacy Shield is currently difficult, the Shield has shown how the U.S., the EU, and Switzerland can work together to meet the needs of different constituencies and systems. Snead also stated that the Privacy Shield demonstrated that we need to stop seeing different approaches to the same problem as being necessarily flawed. Here, the Shield showed that the U.S. and the EU can work together on frameworks that will accommodate different cultural approaches to problems and standards.

In closing, **Lars Steffen** indicated that his key takeaways from the dialogue were: that we have to take a closer look at the Internet industry as a vital ecosystem; that we have to create frameworks that are always adaptive for a constantly evolving and developing industry; and that we always have to keep an eye on the threat of a shift of responsibility from law enforcement to the private sector. Ultimately, moving into the future, common ground needs to be created in the development of legal frameworks in the U.S. and in the European Union.

Christian Dawson's main takeaway from the dialogue was that the path forward is through continued open dialogue. Dawson expressed his hope that additional points can be extracted from the ongoing dialogue in illustrating the complexity of the overall ecosystem and the intermediary protections that are vital to ensuring the continued thriving of the Internet as a whole. Dawson indicated his commitment to making sure that, alongside the eco Association, i2Coalition is a facilitator in that process.

To bring the discussion to the next level, a second Transatlantic Dialogue webinar is planned to take place later this year.