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Economics v Human Rights: Intermediary Liability for Free Speech, Copyright and Privacy

Nowadays, access to the information as fast as possible is crucial for the individuals of the Internet era.1 As per the most recent report of UK Government, in the UK, 89% of the adults had recently connected to the Internet in the first quarter of 2017.2 From a wider angle, as per the report of the International Telecommunication Union, in 2017, 48% of the world population used the internet with 81% of developed countries to use it whereas this percentage was only 41% of developing counties.3 Although the numbers for the things4 connected to the Internet were beneath notice only few decades ago, in the present day, the current estimates show that there are almost 25 billion things which are connected to the Internet and the numbers are in an incremental growth.5 These statistics basically demonstrate that the Internet is one of the most dynamic and significant media for modern discourse.

To begin with it is necessary to define the term 'Internet'. According to Justice John Paul Stevens, "The Internet is an international network of interconnected computers".6 As for Lawrence Lessig, "Cyber space has an architecture; its code — the software and hardware that defines how cyber space is — is its architecture. That architecture embeds certain principles; its sets the terms on which one uses the space; it defines what's possible in the space. And these terms and possibilities affect innovation in the space".7 To define the Internet from a more technical perspective, Internet Engineering Task Force's (IETF) definition is on point. The main responsibility of the IETF is to handle the architectural design of the Internet, and to develop standards through a series of publications called "Request for Comments" (RFC), hence constitute the "Internet Standards". In one of these publications, the Internet is described as follows:

"In many ways, the Internet is like a church: it has its council of elders, every member has an opinion about how things should work, and you can either take part or not. It's your choice. The Internet has no president, chief operating officer, or Pope. The constituent networks may have presidents and CEO's, but that's a different issue; there's no single authority figure for the Internet as a whole."8

Internet, is in a constant motion which comes along with both social and economic consequences on our daily lives. In the past few years, it was not easy to cope with most of these challenges and yet in the future, there will be a lot more other changes with even less time for us to be prepared.9 Today, many countries are in a process of reforming their laws in order to embrace the digital revolution whereas the citizens are trying to ensure a way of adjustment to adapt the principles of the offline world into the online world.10 Since the Internet is a very unique global phenomenon, regulating it with the existing, or maybe even old-fashioned, laws would be inadequate. As mentioned before, the Internet has a very unique structure and nature which is also explicitly emphasized by John Perry Barlow as:

“We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.

Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.” 11

However, is the cyber space cannot really be regulated as Barlow advocated or any kind of a regulation on cyber space does really restrict the rights of the individuals of that society? On the other hand, can we call a society where people act solely based on their own principles as a “free” society? My point of view is pretty straightforward, law and regulation are essential.

Within this essay, I will be critically assessing the importance of both human rights and economics while creating Internet law with respect to intermediary liability for free speech, copyright and privacy.

The unique characteristics of the Internet which its advantages are rooted, including its speed, its universal nature and the relative anonymity it offers, can also lead to challenges to human rights. Do we therefore need new human rights for the Internet? On the other hand, the vast amount of economic activity that the Internet has generated cannot be underestimated. A recent study shows that the economic impact of the Internet account for 3.4% of GDP in the 13 countries studied but 21% of the economic growth in the five mature economies, with 2.6 jobs created for every job lost.12

Free Speech

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”13

Freedom of speech is one of the fundamental human rights of the information society. Article 10 of the European Convention on Human Rights (ECHR) reads:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and

to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The omnipresence of the Internet, its universal accessibility and the amplifying effect it has on information published online have to be taken into account, as do its empowering potential and technological

characteristics, including its end-to-end orientation and decentralised nature. Nevertheless, according to the principle "what applies offline, applies online"14, the rules for restrictions remain the same. This principle was confirmed in July 2012 by the Human Rights Council in its ground-breaking decision regarding the protection and promotion of human rights on the Internet.15

The Internet did not create a new freedom, the freedom of speech on the Internet is basically an extension of an existing human right to this media. In principle, the ECHR applies its established practice also to the Internet. However, that shall not mean that the Court does not take the nature of the Internet into account.16 In the case Ahmet Y?ld?r?m v. Turkey17, the Court reviewed whether interference with right of the applicant to freedom of speech was given by law, pursued lawful aims and was necessary on a democratic society as required by Article 10 ECHR. In the case the Court took the fact that the Internet is one of the principal means of implementing the right to freedom of speech as an aggravating factor in determining the illegality of the measures taken by the Turkish authorities. It did not question that there had been a legitimate ground for the restriction based on Turkish law regarding the website question but the freedom of expression of a third party as a collateral effect and thus not necessary to achieve the legitimate result.18 Besides the 'right of the users', the 'right of others' is another issue which should be taken into consideration along with freedom of speech. In the case Perrin v. United Kingdom19, the applicant had claimed his freedom of speech to publish obscene material on a website. However, the Court found that the need to protect morals and the rights of others justifies the criminal conviction for the publication of the freely accessible webpage with no age checks, presenting extremely obscene images and likely to be found by under-aged people.

Internet intermediaries such as Information Society Service Providers (ISSPs) and Internet content providers control the spaces in which search individuals access and share information online and express their opinion. An example is the video clip produced in the United States on the Prophet Mohammed, presenting him in a way which offended the religious feelings of Muslims. The issue became a global sensation when the trailer was posted on YouTube and therefore became accessible all over the world.20 However, it can be argued that the film was not conceived as a piece of art but rather as a mere provocation without any of the redeeming social value that characterises actual art. Some states like Pakistan asked YouTube to block users' access to the clip but most took no measures against it. YouTube blocked the trailer in some countries, but not in Pakistan. The Pakistani Prime Minister, in return, ordered YouTube to be blocked altogether until the clip had been removed.21

Apart from the rights conferred on users, some courts have also recognized that website blocking engages the freedom of expression rights of the ISSPs. As noted by the Advocate General Cruz Villalón (AG) in his opinion on UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH22, "Although it is true that, in substance, the expressions of opinion and information in question are those of the ISP's

customers, the ISP can nevertheless rely on that fundamental right by virtue of its function of publishing its customers' expressions of opinion and providing them with information". In other words, an ISSP can "rely on the social importance of its activity" of making Internet access available.23 In support of this contention, AG referred to an established body of the ECHR case law, in accordance with which "Article 10 guarantees freedom of expression to everyone, with no distinction being made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom."24 According to the ECHR, "publishers do not necessarily associate themselves with the opinions expressed in the works they publish. However, by providing authors with a medium they participate in the exercise of the freedom of expression, just as they are vicariously subject to the duties and responsibilities which authors take on when they disseminate their opinions to the public".25 Indeed, the human right to freedom of expression claims of the ISSPs are not as such unusual in the practice of the ECHR. More recently, the Article 10 rights of an ISSP have even made their way to the Grand Chamber in a case of Delfi AS v. Estonia26 that concerned the liability of Estonia's largest Internet portal for hosting infringing content generated by its users, despite the fact that the portal had no actual knowledge of infringing content which it, moreover, removed immediately upon notification by the injured person's lawyers.27 On the facts, however, no violation of Article 10 was established – a finding that has since then been widely criticized for imposing on Internet intermediaries an excessively high standard of liability.

On the other hand, economics is also an important game changer in the equation. Richard Posner expresses his ideas regarding the matter as "Even brilliant conservative judges seem to suspend some of their critical faculties in the presence of claims to freedom of speech. Perhaps the time has come to give the free speech icon an acid bath of economics."28

In the report of Copenhagen Economics and The Global Network Initiative, the basics of intermediary liability is explained as: "Online marketplaces and other intermediaries are in some respects comparable to a traditional city square marketplace. The city mayor makes a square available to merchants, but the city is not held liable for the items traded on that marketplace. However, if the city mayor is made aware of illegal traders on the city square, he/she is obliged to ensure that they are removed and their trading is discontinued."29 Even though it is not as obvious as the link between free speech and human rights, there is also a very important intersection point amongst free speech, economics and intermediary liability.30 For example, we can take Amazon as the intermediary to demonstrate the connection to free speech and economics. In Amazon, the connection to free speech is more than just the product reviews. There may not be a direct link, but it comes through economics. A survey conducted by "Dimensional Research" stated 90% of the respondents say that positive reviews influence the purchase decision, while 86% said that negative reviews affect their buying decisions.31 Considering the survey, it is crystal clear that these reviews have a substantial impact on buyers' decisions and therefore it effects the revenue generated. One of the main problems regarding the relation between these reviews and freedom of speech is 'fake news'. Since 2015, Amazon has sued against more than 1000 people in relation to the fake reviews. Regarding the lawsuits, Amazon spokesperson said, "Our goal is to eliminate the incentives for sellers to engage in review abuse and shut down this ecosystem around fraudulent reviews in exchange for compensation".

Copyright

As a form of intellectual property, copyright is protected as part of the human right to property. In Article 1 of Protocol No. 1 of the European Convention on Human Rights this is enshrined as "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." In the Anheuser-Busch Inc. v. Portugal case, ECHR has furthered its interpretation this right providing that "Article 1 of Protocol No. 1 is applicable to intellectual property as such."32 In brief, in addition to the protection of States' domestic laws, copyright as an essential part of intellectual property which enjoys protection under the umbrella of human rights guaranteed by the Convention.33 As also noted by the ECHR in another case "As to the weight afforded to the interest of protecting the copyright-holders, the Court would stress that intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention."34

Finding a common ground between enforcing copyright law and guaranteeing human rights is not easy. The debate about the implementation of Anti-Counterfeiting Trade Agreement (ACTA) in Europe and of Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA) in the US has shown that striking the balance between rights of authors and the rights of users is challenging, especially when governments are perceived as responding more to pressure from economic entities wishing to safeguard their profits margins.35

The introduction of the World Wide Web (WWW), which can be defined as an information-sharing model that is built on top of the Internet36, initiated the commence of the digital age for various kind of content industries. As mentioned above, these technologies have allowed the Internet users a major number of platforms to access the content other than the authorised distribution channels. Even though copyright is protected by law for many years now, sometimes these protections may remain insufficient with regard to the unique characteristic of the Internet – such as the relative anonymity of file sharers.37 Consequently, and inevitably, the copyright owners have needed to somehow block the infringing distribution higher up the chain. In the US, this problem resulted with the establishment of the online service provider safe harbours which are introduced in the Digital Millennium Copyright Act 1998 (DMCA). The aim was to protect the rights of the copyright owners against the ones who circumvent copy protection technologies while insulating the liability of ISSPs for infringing acts of their subscribers.38 With this regard, the Sony Corp. v. Universal City Studios case can be considered as the initial attempt for balancing the struck between protecting the copyright and the technology. In the case, Court's main question was determining the liability of Sony for producing and also advertising the video tape recorders for home use. The Supreme Court held that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses." Further, it is explained that the law should "strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce".39

Another case, Neij and Sunde Kolmisoppi v. Sweden40, two of the co-founders of "The Pirate Bay", complaint that the verdict of the domestic court, regarding their violation of the Copyright Act, is a breach of their freedom of speech. In the press release, it is stated that "The Court held that sharing, or allowing others to share, files of this kind on the Internet, even copyright-protected material and for profit-making purposes, was covered by the right to receive and impart information under Article 10. However, the Court considered that the domestic courts had rightly balanced the competing interests at stake when

convicting the applicants and therefore rejected their application as manifestly ill-founded."41

From the economics perspective, in order to reach desired the level of the copyright protection, such market conditions as costing, reproducing, distributing and trading play an important role and these conditions are in a rapid change along with the digitalisation and the Internet. On the other hand, while the digitalisation changes the mentioned conditions, it also changes the desired level and the type of the copyright protection.42

At the outset, albeit, the basics of the economics of copyright might seem unchanged despite the Internet, analysing the subject will show the switch in the roles. It is a fact that the basic principles of the economics of the copyright, and therefore the incentive for copyright law and regulation, remains same even in the Internet era. Yet, undoubtedly, the Internet created some important changes regarding

(i) the creation of the work,

(ii) the way of accessing the work, and

(iii) the administration of the copyrights.43

First of all, the Internet has lowered the costs to create the work however it has also lowered the costs to copy and distribute the work on an international scale.44 Lowering the mentioned costs, will ultimately lead to broader and easier distribution of the works. Secondly, since the Internet is the new distribution channel, it has changed the ways of accessing the works as well as how the revenue is generated and shared. By these developments, while the need for offline intermediaries, reduces, the role of online intermediaries seems to be growing. 45

Privacy

"Google knows quite a lot about all of us. No one ever lies to a search engine. I used to say that Google knows more about me than my wife does, but that doesn't go far enough. Google knows me even better, because Google has perfect memory in a way that people don't." Bruce Schneier

Under many international and national laws, privacy is recognized as a fundamental right yet it is still challenging to define exactly what this right entails.46 In the 1890s, the privacy is articulated with the "right to be left alone" of the individual.47 Also, the Preamble to the Australian Privacy Charter emphasizes that, "Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech. Privacy is a basic human right and the reasonable expectation of every person".48 Similarly, according to Alan Westin, privacy can be defined as the "desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others".49

It is now common wisdom that the power, capacity and speed of information technology is accelerating rapidly and the extent of privacy invasion increases correspondingly. Since the information technology has a very high ability to collect, evaluate, store and disseminate individual's information, regulating the privacy on internet is essential with regard to creating internet law.50 According to opinion polls, concern over privacy violations is now greater than at any time in recent history.51 In the very beginning of the Internet era, websites were incapable of recalling the users. The coding was very simple: each time you went to a website, your search history and the actions you have taken would simply be forgotten.52 Lou Montulli described this situation in one of his blog posts as; "This is a bit like talking to someone with Alzheimer disease. Each interaction would result in having to introduce yourself again, and again, and again".53 In order to improve this very basic technology, Montulli and his colleague John Giannandrea came up with the idea of giving some kind of a memory to the website which we nowadays call as the "cookies". The initial intention for the use of these cookies was to determine whether the users had already visited the website before or not, by storing a data on users' hard drive. Even though they were accepted by default and collecting users web history without a prior consent, the invention of it was not publicly known for almost two years. On the 12th February 1996, Financial Times published an article regarding cookies which aroused a massive media attention, especially about the privacy implications.54 In the 21st century, according to the report of the Federal Trade Commission, the business community have an agreement that web tracking is almost crucial due to the fact that it is a very unique way of advertising which provides a considerable income to the market.55 Besides, it should be noted that, even though the majority of people tend to accept it without reading, the tracking policies are actually disclosed within the provided agreements.

According to the Article 8 of the ECHR, States are expected to ensure that the domestic laws provide a sufficient protection against the unfair disclosure of individuals' information. Even though The Data Protection Act 1998 sets forth the implementation of this obligation, it does not nullify the responsibility of States'. The interpretation of the Data Protection Act must be compatible with Article 8 ECHR, and yet the legislation authorising the disclosure of personal data should also cover the scope of that power in addition to circumscribing the borders against its arbitrary use. 56

The issue of Internet privacy and human rights is also a major concern in international debates.57 The case of K.U. v. Finland58, stated the principle that, while:

"users of telecommunications an Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as prevention of disorder or crime or the protection of the rights and freedom of others."

The 'right of others' in this case represented respect for private life, protected by Article 8 of the ECHR. An unknown person had posted an advertisement of a sexual nature on behalf of the applicant, who was 12-years-old, on an Internet dating site without his knowledge. It gave details of him and stated that he was looking for an intimate relationship with a male and a link to his webpage was also attached with his photograph and phone number. When the applicant became aware of this situation, he turned to the police

who tried to establish the identity of the person, which the service provider refused to disclose as they felt bound by the confidentiality rules; the courts refused to order the service provider to disclose identity, for lack of explicit legal provisions. The Court found a violation of the right to private life, in particular because of the potential threat to the physical and mental welfare of the young person at his vulnerable age.

While lawyers, academics and pundits emphasise that users of the Internet have the right of privacy, what is at the core of consumer's objections is the fact that someone is making money off of them. Companies like Google or Facebook make big amounts of money collecting anonymous data because tracking where a machine has been valuable to advertisers.

As mentioned above, in addition to the voluntarily given information of the customers, companies may also store information with regard to the customer's online behaviour using "cookies" and "click-stream analysis". Since the costs of computing technologies are rapidly falling, collecting and storing the data becomes easier correspondingly.59 Even though the cost of obtaining the data about customers is decreasing with the advances in technology, conversely, the value given to that specific data for businesses is increasing. The collected data is being used to sell consumers the products in the form of "personalised marketing". According to the reports of Aljazeera "Companies in the United States made over $42 billions from peddling customer data to online sellers in 2013".60 A balance is needed between business incentives and the need for Internet intermediaries to protect privacy.61 Comparing the attitude of the US and European Union towards internet privacy law, it can be said that European Unions has a stricter approach regarding the matter. That being said, I would like to point out an agreement made between the US Department of Commerce, the European Commission and Swiss Administration "to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce."62 The principles are envisaged for use merely by organisations in the USA which are receiving personal information from the EU for the purpose of qualifying for the Privacy Shield and thus benefitting from the European Commission's adequacy decision. 63

Conclusion

Free speech, copyright and privacy are the best three areas to demonstrate the basic conflicts between human rights and economics, in an offline v. online perspective. The Internet makes the process of creating the copyrightable work easy, yet on the other hand the process of copying and distributing it has become as easy correspondently. For free speech, ECHR's attitude is straightforward and brief, "what applies offline, applies online". However, in practice, the implementation of this theory can be more challenging than it looks on paper. In term of privacy, I believe that 'the Internet is the new 'Big Brother' is not an overstatement. It is both the governments' and intermediaries' duty to protect personal data within the scope of the legislation.

In conclusion, undoubtedly, intermediary liability plays an important role while creating the Internet law. On the other side, as discussed above, both human rights and economics have a direct impact over the determination of the liability of these intermediaries. Even though human rights and economics are two

very distinct areas, while creating law, they equally effect the general principles and the implementations of law.

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