

Duties of Care for Internet services providers



Institute for Information Law (IViR)

Prof. Dr. Nico van Eijk
Catherine Jasserand, LL.M.

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A Pandora's box



Yogi Berra



*'You've got to be very careful
if you don't know where you're
going, because you might not
get there'*

Duties of Care

- Duties of care primarily concern the direct or indirect interaction between government/public interest and Internet Service Providers (or other players in the value chain).
- Duties of care need to be distinguished from liability (however...).
- Research question: analysis of duties of care on selected topics and in specific national environments

Themes

- Internet security and safety
- Child pornography
- Copyright
- Identity fraud
- Trade in stolen goods

- Four countries (Netherlands, United Kingdom, Germany and France) + EU context

Methodology

- Literature, legislation, jurisprudence (desk research)
- Interviews of national experts:
 - Representatives of Internet service providers,
 - Governements
 - Regulatory and supervisory bodies
 - NGO's
 - Independent experts
- Country reports reviewed by national experts

Internet security

- Privacy Directive article 4:
 - Providers of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services (...).
 - In case of a particular risk of a breach of the security the provider must inform the subscribers
 - In the case of a personal data breach, the provider must notify the competent national authority and the subscriber/individual involved.

Internet security

- Still in a preliminary stage
- Lack of formal embedding. Almost no regulation (except implementation of article 4 Privacy and electronic communications Directive)
- Unclear provisions
- Risk of increased liability

National findings

- Netherlands: Policies for ISPs and protocol between the Dutch Telecom authority and Police
- UK: “ Best practices”
- Germany: Anti-botnet action
- France: Issue of competences (ARCEP v. Ministry of Defence). Proposal of law on right to privacy in the digital environment and Signal Spam

Child Pornography

- Strong social pressure
- Regulation in all countries almost identical
- Hotlines (INHOPE)
- Self-regulation or regulation
- Rejection of filtering system but willingness ‘to do more’

National findings

- Netherlands: Notice and Take Down Code of Conduct
- UK: Internet Watch Foundation generating a blacklist
- Germany: Code of conduct and adoption of a law to impose filtering (inapplicable)
- France: Signaling procedure, Code of Conduct and proposal of law (LOPPSI 2) containing filtering matter

Copyright

- Strong influence E-commerce directive (Notice and Take Down Procedure)
- Three strikes/graduated response in France and UK
- Symbolic regulation (or not?):
 - What is the problem (general interest or commercial)
 - Costs of enforcement
 - Criminalization of ‘socially accepted’ behavior
 - Risk of going underground
 - In short: proportionality issues

National findings

- Netherlands: NTD Procedure and discussions on the private use exception
- UK: new Digital Economy Act and NTD Procedure
- Germany: NTD Procedure for any illegal content
- France: HADOPI law (IAPs) and NTD Procedure (hosting providers) for illegal content

French HADOPI law

- Graduated response connected to the failure of duty of surveillance of Internet access by Internet subscribers: two warnings, gross negligence and sanction
- New duties of care for Internet access providers (information of Internet subscribers about existing security tools, assistance to HADOPI Agency, implementation of Court decision by disconnecting Internet access)
- Reliability of IP addresses? Net neutrality?

British Digital Economy Act

- Graduated Response connected to both copyright infringements and duty of surveillance
- Copyright owners responsible for notifications. Administrative authorities request disconnection. Judicial process only afterwards. Secretary of State may also give provisions on judicial blocking injunctions.
- IAPs have the obligation to cooperate with Notice&Notice procedure, disconnection, blocking injunctions and keep a Copyright Infringement List to be disclosed to the copyright owner at judicial request.

Identity Fraud

- EU-recommendation to regulate
- However no criminalisation of identity fraud yet (but still infringement of i.e. privacy regulations)
- Effects of identity fraud are prime focus
- No ISP issue
- but relevance elsewhere in value chain (banks, providers of information society services, etc)
- No (self)regulation, publicity campaigns
- Liability risk...

National findings

- Netherlands: Government's initiatives against identity fraud and wrongful registration of personal data
- UK: public awareness campaign on the issue
- Germany: only in relation to phishing
- France: Charter to promote authentication on the Internet and proposal to create two offences in relation to identity theft (LOPPSI 2)

Trade in stolen goods

- Issue for auction/'sale' sites (eBay, Craigslist, etc.)
- Selfregulation (i.e. Verified Right Owner Programme, VeRO)
- Notice and take down procedures in place
- But does the E-commerce regime apply?

National findings

- Netherlands: no definition by the courts of the status of the auction websites.
- UK: eBay exempted from liability for material offered
- Germany: direct liability of auction websites
- France: contradictory positions on the status of eBay by national Courts (hosting provider v. broker)

Conclusions

- Towards a value chain approach
- Ex ante examination of effectiveness and enforceability
- Better embedment of notice and take down procedures
- Further guidance on issues such as internet security & safety and privacy
- Elevation of the knowledge level

Yogi Berra says

‘I made a wrong mistake’

Prof.dr. N.A.N.M. van Eijk
Institute for Information Law
(IViR, University of Amsterdam)
www.ivir.nl
vaneijk@ivir.nl