

# Position of online intermediaries with regard to illegal information



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LOOKING FURTHER

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# <https://alti.amsterdam/nft-wtf/>

## NFT? WTF!

Blockchain, Forum / 24 September 2021 /  Arno R. Lodder

Almost ten years ago, in Spring 2012, I supervised a thesis written by Micha Schimmel simply called Bitcoin. A year later Joeri de Leeuw wrote From cash to virtual currency. Then, in 2014, I was asked by a group of fanatic cryptocurrency people to lecture on “Bitcoin 2.0 and digital contracts”. I told them “I haven’t really fully grasped Bitcoin 1.0 yet, so don’t know if I’m ready for 2.0”. I did accept the invitation, though, and around the same time did another bitcoin lecture for the Dutch IT & Law association. My motivation was the well-known mantra: “If you want to learn something, read about it. If you want to understand something, write about it. If you want to master something, teach it.”

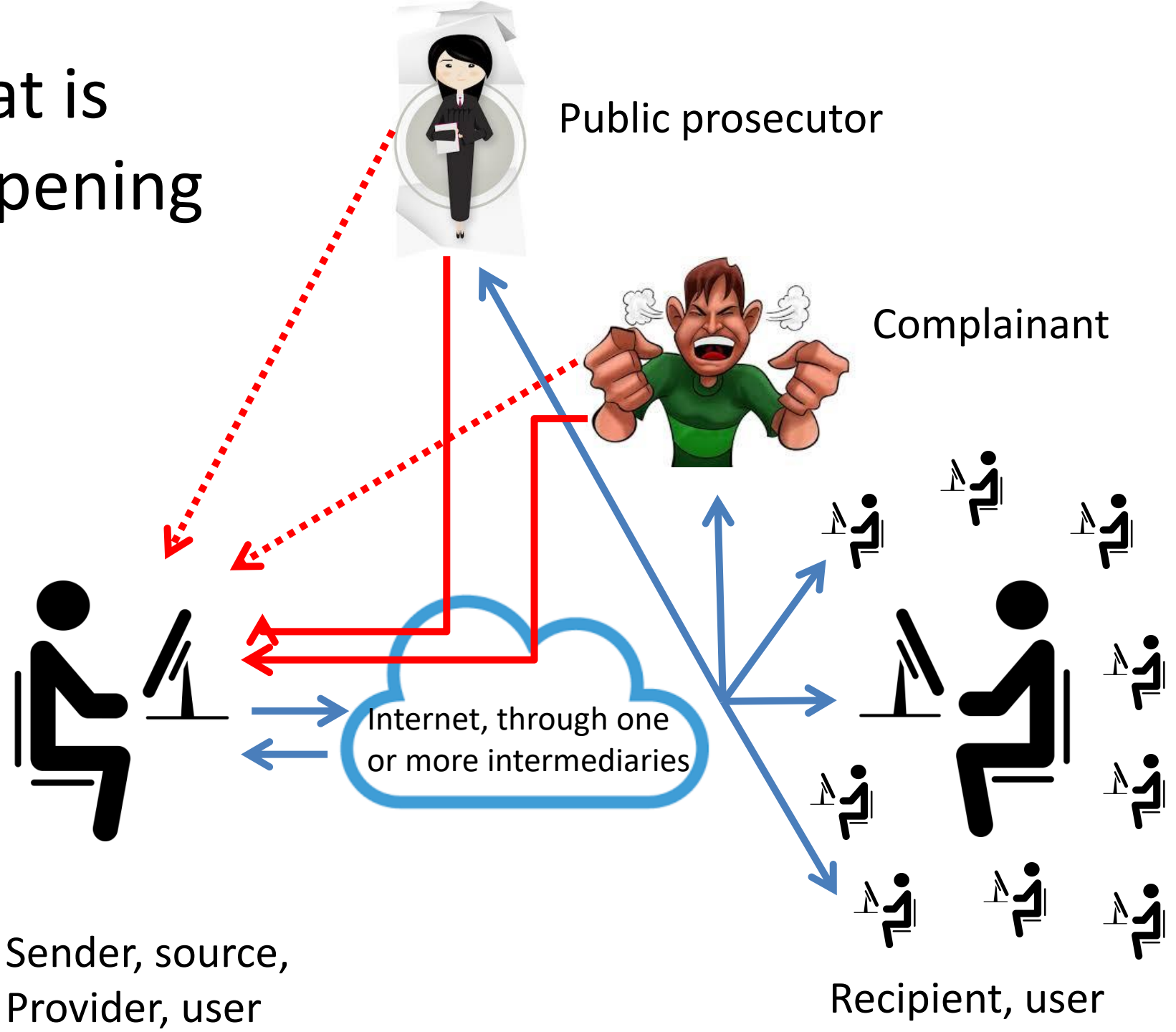
Although since 2014 I did quite some teaching and Ph.D. thesis supervising on bitcoin, blockchain, etc., I am still somewhere in between learn and understand. I am afraid I will never master it. Now it is 2021. And we have this new blockchain offspring: Non-fungible Token, for short NFT.

There is a lot going on with NFTs this year. Some piece of digital art was sold for 69 million dollars. My students told me NFTs are used for money laundering. You create this NFT piece of art and buy it yourself with bitcoins. Whatever you pay yourself is then no longer black money. On 31 August Andres Guadamuz tweeted about a fake Bansky NFT sold for over 250k euro. I wrote him:

# Some of my work on ISP liability

- Lodder, A.R. & Wisman, T.H.A, Computer says no to my upload? Article 17 on filtering and the GDPR prohibition of automated decision making, in Brownsword & Fabri, to appear
- Lodder, A.R. & Polter, P., "ISP blocking and filtering: on the shallow justification in case law regarding effectiveness of measures", in *European Journal of Law and Technology*, Vol 8, No 2, 2017.
- Lodder, A.R. & Sandvliet, K., Measures of Blocking, Filtering and Take-Down of Illegal Internet Content: The Netherlands - Report for the Council of Europe, Lausanne, 2015
- Lodder, A.R. & van der Meulen, N., Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time 4 *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2013

# What is happening



# Drawing up inventories!

Which kinds of intermediaries do we have?

Which kinds of objections do third parties have to a sender's communication? (legal basis of claim)

What exactly should the intermediary do (to help the third party)

Why should the intermediary be obliged to do so? (legal basis of obligation)

# Kinds of intermediaries

- ISP's
  - Internet Service providers
  - Access providers (wifi)
- Search engines
  - Surface web / dark web
  - Bit-torrent
- Cloud storage providers
- Cloud communication providers
  - Email
  - Chat
  - Video-conferencing
- User generated content platforms
  - Usenet
  - Social media
  - Online trading platforms
  - Dating platforms
  - Blogs
  - Video-platforms
- Online Learning Environment
- Sharing platforms
- All kinds of service providers
  - Payment
  - Anonymizer
  - App-store
- Games, virtual worlds
- ..... Did I miss anything?

# Legal basis of claim

- Private Law
  - Infringement of intellectual property right
    - Copyright
    - Portrait right
    - Trademark
    - (Trade secrets)
  - Tort
    - Defamation
    - Fake news
- Criminal law
  - Speech crimes
    - Incitement to hatred etc.
    - Libel
  - Financial crimes
    - Fraud
    - Money laundering
- Anything else?

# Actions required by intermediaries

- Block access to an illegal service
- Block access for a particular user
- Provide identifying details of source
  - To log data and store logs
- Removal of illegal content
  - Notice and take down
  - Notice and stay down, coming down to:
- Surveillance of platform or use of service



# Legal basis of obligation for action by intermediaries

- Every day tort law
- Every day criminal law
- Exception: E-Commerce Directive arts. 12, 13, 14, 15
- Specific obligations (e.g. GDPR, intelligence agencies).

# Current exceptions

E-Commerce directive

# Mere-conduit services

- Art. 12 E-Commerce Directive
- Access providers and nodes
- Obligation to block? TPB
  - Workaround: proxies



- Obligation to block proxies

- Obligation to block search engine for proxies



- No liability for providers of anonymous Wifi access: ECJ 15 september 2016 (Tobias Mc Fadden), case C-484/14.



# Caching

Never any issues under the heading of caching

Nothing

# Hosting: art. 14 e-Comm Directive

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.
2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
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.

# However: art. 15 e-Comm Directive

## No general obligation to monitor!

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

# Hosting

- ISP-hosting
  - Notice-and-take down (NTD)
- Cloud hosting services
  - NTD and cross-border issues
- User-generated content services
  - NTD
  - Notice and Stay down: Obligation to monitor for:
    - Sextortion, revenge pornography
    - Fake news, fake ads
    - Copyright infringements (art. 17 DSM Directive)
    - Content similar to what was already considered unlawful: ECJ 3 October 2019 (Eva Glawischnig-Piesczek v Facebook Ireland Limited), case C-18/18.

Effectively undermining the regime of art. 15 e-Comm directive?

# Hosting

- Possible problem with freedom of expression
  - Whose freedom of expression?
    - Expressing and receiving information?
  - Why should that be relevant in a horizontal relation?
- Balancing exercise, to be executed by intermediary  
=> split position
- Unfair:
  - Balancing exercise may require expert legal knowledge, and even experts may disagree
  - But liable if they take the wrong decision!
- Do we want the weighing up of our fundamental rights to be done by commercial parties located in the US? How about fair trial, transparency, right to appeal? Local norms?





# Hosting

- We have: A few very powerful platforms
- Dilemmas
  - Crucial role in keeping and distributing evidence of, among others, human right's violations (e.g. war crimes in Ukrain)
  - Vehicle of propaganda (terrorism!)
  - Who decides?



# Specifically for search engine

- Right to be forgotten
  - ECJ May 13 2014 (Costeja), case C-131/12
    - Qualification of Google as controller
  - art. 17 GDPR
  - Same problem concerning balancing fundamental rights
  - Safe harbour not for GDPR-matters
- Trade-mark infringement by AdWords
  - Among others: ECJ March 23 2010, cases C-236/08, C-237/08 C-238/08 (Google France v Louis Vuitton)

# Conclusion

- Even after disentangling, the conundrum remains
- Current legal regime seems to be inadequate, inefficient, unfair
  - Based on the internet 25 years ago
- So what would a better regime look like?

# THANK YOU



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