

**CLC Lecture and Webinar
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**Comment on
T. Rodríguez de las Heras Ballell,
‘Digital Intermediaries in a Quandary: Intermediary Liability
Paradigm under consideration’**

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The argument in the presentation

- **Intermediary service providers benefit from safe harbour provisions**
 - See, for example, Articles 12-15 Directive 2000/31/EC
 - Especially: no (general) duty to monitor (content), ‘notice and take down’ regime
- **The current regime faces challenges**
 - Rise of platforms: are platforms just *intermediary* service providers (no ‘active role’)?
 - Platforms increasingly monitor actively (→ content recognition technology, automatic filtering)
 - Platforms increasingly used by states as ‘law enforcement agents’
 - » See, for example, the “*Netzwerkdurchsetzungsgesetz*” in Germany
- **The policy road ahead**
 - Intermediary liability → intermediary responsibility?
 - Content of monitoring obligation and consequences of breach?
 - Negligence → strict liability?



Teresa open to all kinds of ‘solutions’ (no liability ... strict liability)

Testing our intuitions on platform operator liability

- **Case 1: A throws a party in her house for 10 guests. B, one of the guests, kills C, another guest, with a punch in C's face. Liability of A?**
- **Case 2: A throws a party in her house for 10 guests. The house sits on land over a tunnel's ventilation system. B, one of the guests, brings a deadly chemical and puts it into one of the pipes of the system. A could have blocked access to the system and averted the catastrophe. 1000 people are killed. Liability of A?**
- **Case 3: Same as Case 2. In addition, A has novel technical means to screen guests for all kinds of weapons, including chemical weapons. Liability of A?**

Cases 2 and 3: Magnitude of expected harm as a relevant factor? Access to and costs of preventive measures as relevant factors?

- **Case 4: Same as Case 2 and 3 but A could not have blocked access to the system nor could she have screened her guests.**

Case 4: Does mere hosting of guests – and having the pleasure of it – suffice for liability, given the magnitude of the expected harm?

Platform operator liability – regulatory approaches

- **No liability (maybe only ‘responsibility’)**
 - **Not a sensible approach: platform users may inflict massive individual and social costs, and platform operators may be best positioned to avert these**
- **Strict liability**
 - **Strict liability sensible regime if level of precautions and activity level wrt an inherently hazardous activity must be controlled**
 - **Operating a platform is crucially different from operating a nuclear power plant**
 - » **The plant but not the platform is inherently hazardous**
 - » **Operator strict liability would be a form of vicarious liability for users’ actions**
 - » **True, the operator gets the benefit of many users and the expected harm may be high – but the operator cannot necessarily control their actions easily and completely**
- **Negligence**
 - **Platform operator may be best positioned to identify/eliminate wrongs (cheapest cost avoider)**
 - **Negligence liability would not reduce the ‘activity level’ of platforms**
 - **Efficient standard of care may go beyond ‘notice and take down’ (see new German law *supra*)**