

The future of freedom of expression on-line -
why ISP self-regulation is a bad idea

by Sjoera Nas*

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Governments struggling with the abundance and speed of freedom of expression on-line have long cast flirting looks at service providers as the next best thing to central regulation. But most providers were not very keen on acting as policemen and refused to voluntarily accept liability for the content of their customers. Through the E-Commerce Directive governments have forced liability on ISPs anyway, hidden under a black veil of 'self-regulation'.

But what does such self-regulation entail? Let's take a look at the daily practice of internet service providers. For obvious reasons, most providers don't publish statistics about take-down, but from my personal experience with XS4ALL I can provide some insights. XS4ALL, founded in 1993, was the first provider in the Netherlands catering to the consumer market. Currently, it provides to both the consumer and the business market and serves about a 150.000 customers, most of which have a broadband ADSL-connection.

In the first 6 months of 2003, XS4ALL received a total of 750 serious copyright-related complaints, that is 31 complaints per week, or 4 and half per day. The majority of these complaints are about straightforward infringements of copyright, and can be dealt with pretty easily. The remaining 10% of the complaints however, demand a huge amount of time and attention from highly skilled legal professionals.

The majority of complaints originate from a few international right holders, like the MPAA, IDSA, Mediaforce, Microsoft and BSA, the Business Software Alliance. The Motion Picture Association of America is representing most of the Hollywood film-industry, while the Interactive Digital Software Association is representing the international video and computer games industry. Another very active plaintiff is Mediaforce.

-†From January till July of this year XS4ALL received 265 complaints from the Motion Picture Association, 143 from the Interactive Digital Software Association, 110 from Mediaforce and 47 from the Business Software Alliance. On top of that, 1 specific rightsholder (Visualware) generated 125 complaints. So, out of the total 750 complaints, 681 stem from 4 large rightsholders, that is just about 90%. Most of these complaints are about

FTP-servers, usually on ADSL-nodes, about Usenet postings and sometimes about websites and homepages.

In general, the complaints from the representative bodies of right holders are clear-cut and don't require much research. XS4ALL immediately forwards the complaint to the customer. Usually, the customer voluntarily removes or retracts the illegal content. In those cases, XS4ALL administers a virtual 'yellow card' to the customer, in case of a second wilful copyright violation that can be followed by a 'red card', i.e. disconnection. That seldom happens. Warnings are taken very seriously, since most customers are bandwidth junkies. Besides, the costs of disconnection and provider switch of a broadband subscription are very high.

Sometimes, copyright organisations complain about customers directly exchanging software amongst each other via IRC (chat-networks), or via peer-to-peer networks. Since providers have no way of verifying, tracing or influencing these alleged infringements, these complaints are usually ignored. As far as I know, Dutch providers have not been forced to hand-over personal data about customers to right holders, as was the case in Denmark and the USA, but the central collecting society is currently building up pressure, threatening to sue both providers and individual uploaders.

Back to the practice of dealing with complaints. Since mid 1999 XS4ALL has had a procedure for complaints about illegal content. This involves a questionnaire that has since become the standard model of all Dutch ISPs. The questionnaire enables right holders to describe their complaint clearly and precisely and protects the ISP against liability in case of wrongful take-down.

Most of the major right holders don't bother to fill in the questionnaire. Their complaints are largely generated automatically, and their reply-addresses often don't work, or answers are ignored. Often these complaints refer to North-American legislation, the Digital Millennium Copyright Act, without any reference to the European E-Commerce Directive. Still, if such a complaint is serious and can be verified easily, most providers kindly act as postman, and forward the complaint to the customer. In most of these cases, the customer voluntarily removes the material. Life becomes difficult when the customer either doesn't reply at all, or replies with a sensible answer, creating reasonable doubt about the complaint. That only happens in 10% of the cases, and those make life very difficult for ISP's. In those cases, the right holder is asked to complete the questionnaire. After that, the ISP has to make two difficult judgements. First of all, to determine the seriousness and validity of the complaint, and secondly to judge the quality of the response of the customer, when given.

The questionnaire to deal with complaints came out of a lengthy and very influential court case about the copyrights of the Church of Scientology. In 1995, XS4ALL servers were formally seized by a bailiff, assisted by a representative from Scientology, for hosting the Fishman Affidavit on the

homepage of a customer. This affidavit, a court-testimony from a former member, contained many quotes from documents that the church wanted to keep secret. Another customer of XS4ALL, Karin Spaink, put the document on her homepage. When Scientology threatened to sue her and XS4ALL, many other people put mirrors on their homepages. In interim injunction proceedings in 1996, the court of The Hague declared all Scientology's claims against XS4ALL, Karin Spaink and 20 other defendants to be unfounded. Scientology appealed, but lost once again in 1999. However, this 1999 decision included a separate declaratory judgement stating that providers can be held liable if three conditions are met;

first, the provider is notified;

secondly, the notification leaves no reasonable doubt about the infringement of (copy-)rights;

and thirdly, the provider does not take down or block the material.

The The Hague court also ruled that providers might be held liable for hyperlinks and have to hand over the names and addresses of their customers under certain circumstances.

Again Scientology appealed. Early in September 2003, eight years after the initial complaint, the Appellate Court of The Hague quashed the previous ruling and ruled against Scientology on all points in a surprisingly strong-worded opinion. In this case, the court said, freedom of opinion should prevail over the enforcement of copyright. "The (...) texts show that, in their doctrine and their organisation, Scientology et al. do not hesitate to overthrow democratic values. From the texts it also follows that one of the objects of the non-disclosure of the contents of OT II and OT III ... is to thwart discussion of the doctrine and practices of the Scientology organisation."

The Appellate Court doesn't offer any further help with the liability regime, leaving it up to providers once more to decide about the freedom of expression on-line.

Another landmark case that shapes the debate in Europe about liability and freedom of expression online is the Radikal-case. Last year, XS4ALL was sued by the German national railroad company over Radikal, a German magazine containing a manual to block railroads. The manual had been on-line since 1996. XS4ALL refused to voluntarily comply with both demands; take down of the material and hand-over of the personal data of the customer. In preliminary proceedings instituted by Deutsche Bahn, XS4ALL was nevertheless ordered to do so. XS4ALL appealed but lost. The district court only confirmed the judgement that in this specific case, the illegality was painstakingly clear and the provider should have immediately recognised that. According to this ruling, a provider can only ask for more detailed information (for example with the questionnaire) "(...) in the case of information which is allegedly offensive or allegedly breaches

copyright (...)."

This assumption of obviousness doesn't help providers in distinguishing between legal and illegal content. Nor does the E-Commerce Directive provide any clear guidelines. In Article 14, the provider is exempted from liability in case of hosting if the ISP has no actual knowledge of 'apparent' illegal content, or if so, acts expeditiously to remove the content.

What expeditious is, or how 'apparent' can be construed in a universally understandable and predictable way, is left open to the market. Left to this self-regulation, providers don't see much space to refuse requests to take down offensive, damaging or illegal content.

Based on my personal experience, not just with Scientology and Radikal, but with many other difficult complaints, I am convinced that the only way to protect freedom of expression on-line is to refer these decisions to courts. In case of doubt, let a judge decide. As burdensome for the legal system as that might sound, I'm convinced that in practice it would only lead to a very limited number of cases. In 90% of the cases, the complaint stems from a major right holder, and can easily be verified by the provider. In those case, more than 95% of the customers voluntarily remove or retract the material once they are 'caught in the act'. The remaining complaints from the major right holders are sometimes just wrong, based on a typo or other bad research from the right holders, or unverifiable, for example about peer-to-peer exchanges. It is the 10% of 'other' complaints that deserve close attention. Again, in 90% of those cases customers remove the material voluntarily. What's left, is crucial for the freedom of expression. In my opinion providers should be protected against any liability for keeping those materials on-line while courts decide.

The European Commission recognised the difficulties in dealing with the liability regime and organised a two-year research program called Rightswatch. RightsWatch was an attempt to work out a European self-regulatory framework for copyright infringement on the internet, with representatives from the copyright industry, from providers and from internet-users. Europe was divided in Southern Europe, the UK and Ireland and Northern Europe. I participated in the Northern European discussions, and the conclusion of our group was that it was a good idea to create a permanent intermediary between providers and right holders, a body that could transfer complaints to the right address, provide statistics about the type and number of complaints, and decide whether a complaint was difficult enough to be dealt with by a judge.

The Southern European working-group came up with completely different conclusions, very much resembling the procedure in the US of notice and immediate take-down. This procedure can easily be abused to stifle freedom of speech. During one of the general Rightswatch meetings, Yahoo legal representative Greg Wren referred to it as 'shoot first, ask questions later'. In the English/Irish working-group, no agreement could be reached.

Users and providers insisted on a legal underpinning for any notice and take-down regime, after having had bad experiences with a self-regulatory hotline. Right holders were not keen on the hotline either, because according to them, it caused unnecessary delay in removing infringing materials.

In the Netherlands the call from both users and providers for a national body received a warm welcome. Earlier this year, the Ministry of Justice set up a committee with representatives from all parties involved. Currently, we are working on the construction of a central body for complaints about illegal content, similar to the existing hotlines for child pornography and discrimination. This Central Body should be able to discern straight-forward complaints that deserve immediate action from the ISP and more complex complaints that deserve a correspondence with the ISP customer, and in case of a serious reply, deserve a court ruling.

The biggest issue to be solved remains the handing over of the customer identity. Even after the disappointing ruling in the Radikal-case, Dutch providers do not voluntarily hand over customer details to plaintiffs, in accordance with privacy legislation. Right holders however are insisting on both take-down and handing over of customer details. Again, it is my personal conviction that only a judge can weigh between the customers right to privacy and the right holders wish to know the identity of a person infringing on their copyrights.

In practice, the E-Commerce Directive has not brought much clarity in the responsibility of internet providers. Many civil rights activists and providers have argued for a more formal approach, where only an order from a judge would constitute actual knowledge of infringing material.

Attempts to develop a standardised notice and takedown (NTD) procedure have failed miserably so far. The parties involved, citizens, service providers and copyright holders have been unable to achieve agreement about the exact meaning of terms like 'expeditiously' and 'apparently illegal'. Providers are not equipped with special moral values that make them a good replacement for the judiciary. Quite the opposite, in fact. Guided by marketeers and stock-value, most providers will avoid risk and rapidly take down any material that might offend anybody. Without any right of reply or access to appeal for the customer, without any obligation to the public to justify their acts or publish yearly statistics.

"Any self-regulatory regime within the context of NTD procedures cannot be truly effective without some form of legislative underpinning", was the official conclusion of Rightswatch. However, the European Commission has made it clear that the E-Commerce Directive will not receive a review of its text until, at the earliest, 2006. This leaves it up to national governments to choose the level of protection for the freedom of expression. Hopefully, the Dutch can set a good example.