Book Review: The Responsibility of Online Intermediaries for Illegal User Content in the EU and US, by Folkert Wilman. Cheltenham: Edward Elgar, 2020

Tobias Lutzi

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Folkert Wilman, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and US*. Cheltenham: Edward Elgar, 2020. xxxvi + 414 pages. ISBN: 9781839104824. GBP 165

Like Charles Dickens in *A Tale of Two Cities*, Folkert Wilman tells a story of groundbreaking societal change through the lens of its two epicentres. More specifically, he describes how in the late 1990s and early 2000s, the United States and the European Union created legal frameworks that shielded online intermediaries from liability for illegal content stored and disseminated at the request of their users. While these systems have undeniably been pivotal in the internet's success – with Section 230 of the Communications Decency Act having recently been lauded (by Jeff Kosseff) as "the twenty-six words that created the internet" – Wilman asks the simple question of whether these rules are still striking the right balance between fostering the internet and regulating unlawful content 20 years later.

Wilman does not describe these two systems in isolation but, following a detailed account of their core provisions (i.e. s. 230 of the Communications Decency Act, s. 512 of the Digital Millennium Copyright Act, and Arts. 14 and 15 of the e-Commerce Directive) in the first four

chapters, analyses their wider implications (in terms of the interests at stake, the fundamental rights concerned, and the problems associated with private entities acting as regulators) by reference to both of them. Based on the insights gained from these chapters, he critically assesses the European regime by reference to its American counterpart and makes proposals for its reform.

In essence, Wilman argues that the legal framework created by Articles 14 and 15 e-Commerce Directive and its focus on knowledge-based liability is testimony to a difficult compromise between conflicting paradigms, which "continues to allow, broadly speaking, for a legally sound, balanced and workable approach" (p. 295). Still, significant developments over the last twenty years such as the drastically increased importance of the internet and the much wider variety of private intermediaries – ranging from small start-ups to some of the most valuable and powerful companies of the world – arguably make it necessary to both complete and complement this system through a range of specific changes and additions. In particular, Wilman suggests rendering the private enforcement of national law more efficient by requiring specific pro-active measures from intermediaries and an improved regime of injunctions for parties aggrieved by illegal content while also strengthening the position of users through the introduction of binding rules on notice and takedown procedures that include counter-notice procedures and the development of a double-sided duty of care that includes safeguards against unjustified removal of user content.

It has been argued (by Jorge Luis Borges) that Dickens was, in fact, unable to write a tale of two cities because "he was resident of just one city: London". With Wilman having worked for about a decade at the Legal Service of the European Union and with all the later chapters of his book focusing on EU law, his work could easily have become subject to similar criticism. Yet, Wilman, who undertook research at the University of Colorado, is clearly on top of both systems and the parts of his book that focus on US law offer just as much detail as their EU counterparts. In fact, they provide a very useful point of reference for his critical assessment of the e-Commerce Directive.

If there is a blind spot to Wilman's analysis, it is arguably the wider context of private law. This is true, first, with regard to substantive private law. Wilman focuses on the *obligations* of intermediaries (in both private and public law) to monitor and, if necessary, remove the content they store at the request of their users but appears to ignore the question of whether, and to which degree, said intermediaries actually have the *right* to moderate the services they provide as a matter of contract law. Yet, limits to the prerogatives of platform hosts resulting from contract law arguably constitute an increasingly important element of the regulatory framework. Although Wilman acknowledges the fact that incentivizing the removal of certain kinds of manifestly illegal content is just as important as incentivizing restraint with regard to all other content when proposing a double-sided duty of care, his proposal would arguably have profited from an inquiry as to whether such a duty of care might already exist as a matter of contract law. In fact, the German *Bundesgerichtshof* has recently (in two decisions of 29 July 2021 – III ZR 179/20 and III ZR 192/20) held several standard terms that allowed *Facebook* to remove content and ban users for violations of its "community rules" to be ineffective for falling short of transparency requirements that arguably look not too different from the standards Wilman proposes.

Second, the book also ignores virtually all questions of private international law. Considering not only the significant differences between the regimes applying on either side of the Atlantic that the book reveals, but also the limited degree of harmonization within the EU and the resulting room for national legislation that Wilman repeatedly emphasizes, a discussion of the relevant rules of private international law (including the highly controversial country-of-origin provision in Art. 3(2) e-Commerce Directive) might have added another interesting layer to the analysis.

Dickens' *Tale of Two Cities* is well known to be a cautionary tale against the systemic oppression and exploitation of the poor that led to the French Revolution. Wilman's book, in

similar fashion, aims to point out the slowly growing gaps in the current legal framework of intermediary liability in order to enable (and urge) the EU carefully to reform it – before Member States and private parties fully take matters into their own hands, potentially with much less respect for fundamental rights and the creation of a digital single market. With the legislative process for the planned Digital Services Act now well under way, Wilman's insightful book and its balanced arguments – not least with regard to the need of strengthening user rights: what is illegal offline should be illegal online, but "what is *legal* offline should also be legal online" (p. 383) – could hardly have come at a better time.

Tobias Lutzi
Cologne