Copyright Liability and the Internet from the Finnish Law Point of View

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1 Responses in Copyright Law to Challenges Because of Developments in Technology

The expanded use of copyright protected works and other protected products in the Internet has dramatically weakened the position of rightholders. This has caused pressure to solve the problems on different levels, internationally and nationally, within politics, economy and law. The main change has been in the speed and globality of transmissions, the easiness for copying, linking etc. This is actually put down elegantly and sharply by the American Professor Paul *Goldstein*: "Digital technologies for the storage, retrieval, and transmission of copyrighted works have intensified the conflict between copyright owners, concerned over their inability to police infringing activities in this new market place, and service providers, such as telephone companies and search services, that provide the infrastructure for this marketplace but are unable to monitor and control infringing activities of their subscribers."[1]

In some countries, new specific acts on Internet and liability have been enacted (e.g. USA, Germany and Sweden).[2] In Finland, it has been quite silent so far. During the last years, the first cases concerning the use of protected contents in the Internet have reached the courts, however. There is and hopefully will be further development on all legal levels.

The first cases concerning copyright liability and the Internet reached the supreme level of the Finnish judiciary at the end of the last millennium. One of these cases involved copying and transmitting computer programs. In this case criminal liability was not enforced. The accused was not properly heard about

1 Goldstein, Paul, *International Copyright. Principles, Law and Practice*. Oxford 2001 p. 272.

2 *See e.g.* Kamiel Koelman – Berndt Hugenholtz, *Online Service Provider Liability for Copyright Infringement*. WIPO Workshop on Service Provider Liability. Geneva December 9-10, 1999, Report pp. 19-24.

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the claims at every phase of the proceedings; the claim was not successful due to procedural reasons. The case was not published as a precedent.[3]

However, in 1999 (1st November) the Finnish Supreme Court decided another case concerning person X who had set up a bulletin board system, taken care of its functionality and accepted its users. This became the first precedent in this area (Supreme Court 1999:118). X allowed other users to copy computer programs that already existed in the system. The condition to become and remain a user of this bulletin board was that a user submitted new computer programs into the system. X also monitored the activities of the users and contents stored into his system. The conclusion of the Supreme Court was that by doing all this X had committed a copyright crime. But the description by the court of the act from the copyright point of view gives possibility for criticism (see below). This refers especially to the question which rights were affected, right of reproduction or something else?

2 Structural Points of Liability and the Purpose of the Study

From the structural point of view we can see the traditional main legal problems of liability as being:

– What are the preconditions for liability,
– who is liable,
– for what, and
– what are the remedies for the right holder (the contents of liability)?

The aim of this article is to discuss the basic questions of liability in the Internet in light of the Finnish copyright law and practice. The legal frame is about to be developed further. The formulations of future law, especially the exemptions of liability for the benefit of intermediaries, are still a little open for some time. The main focus in the discussions has so far been, who is liable, and what role do the exemptions have.

3 Basic Concepts of Liability: Are These Sufficient for the Digital Environment?

When speaking about liability we tend to start to do it in confusingly broad terms, without fixing attention on the fact that we normally have to make a difference between two main types of liability: criminal and civil liability. The procedure is different within the main types of liability. As for preconditions the knowledge (fault) is an essential (subjective) element, especially with regard to criminal liability. Fault refers to the knowledge of the tortfeasor, a certain state

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3 *See* the *Yearbook of the Finnish Supreme Court* from 1998 p. 1138 in the special list of the cases where non-precedents are listed (the case number: R 95/923;2788;22.8.1997).

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of mind. In addition, objective criteria in defining unlawfulness are also of importance.

As for civil liability and copyright, traditionally four main criteria for the liability have existed:

- Unlawfulness: the act must be against the Copyright Act.
- certain harm (damage) to the right holder: somebody must have used his protected work in public,
- causal connection between the harm and the persons activity.
- as for subjective criteria a non fault is enough to become obliged to pay a normal license fee (fair remuneration); but if there is fault (negligence) on the side of the infringer, the obligation to award damages becomes higher (Article 58 of the Finnish Copyright Act).

Liability under Finnish Law is based on the concept of direct infringement. In general there is no third party civil liability in Finnish law: only when the party itself violates (or is contributing in violating) the protected exclusive rights as defined in the Finnish Copyright Act, Art. 2, the right of dissemination, the right of reproduction and the right to make the work available to the public in any manner as well as moral rights.

This means i.a. that if an intermediary is one part of a chain participating either in the reproduction or in making protected content available to the public (e.g. public performance), then he faces the risks of liability. If he is not involved at all in the direct infringing activity he does not normally become liable.

Copyright crime presupposes besides unlawfulness as an objective criterion, wilfulness as subjective criterion. This means the goal to earn by the infringement by the infringer as well as remarkable harm to the right holder (The Finnish Penal Code Chapter 49, Article 1). Instead, for copyright offence, which is regulated in Copyright Act (Article 56 a), gross negligence needs to be proved without any such additional conditions prescribed for the copyright crime.

Remedies include the possibility of imprisonment for up to two years in copyright crimes, but only fines in copyright offences.

Criminal liability presupposes certain kind of activity: passivity is seldom a crime, which is due to the legalistic approach in our criminal law.[4] Although national concepts in the various fields of liability differ a lot from each other, we can still argue that quite a lot of similarities exist. In Finland, we have certain kind of contributory infringement as well an important (but exceptional) form of third party liability: an employer becomes liable for the faults of his employees.

Causal connection means that there should be a connection between the activity of the infringer and the illegal use of another's copyrighted works. Causality, of course, is also a problem of burden of proof: it is the plaintiff's "headache" to prove that the precondition is there.

The formulations in the written law are general but followed with creative attitude by the courts. As globally, liability is decided on a case-by-case basis. It

4 *See also* the Swedish MP3-case and comments by Jan Rosén, *Ansvar för uttnyttjanden av skyddade prestationer i nätverk*. Svensk Juristtidning 2000 pp. 817.

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is the plaintiff who must prove the conditions for liability, which of course in network environment means a heavy burden. But a system with notice and take down procedure can be of some help here: notice means knowledge.

The remedies, which as such should be effective, preventive and proportional, vary from provisional measures to damages and punishments (from fines to imprisonment). In Finland, we can speak about a functional copyright system with several operators. These include the official machinery with judges and policemen (serving as investigators in cases of copyright crimes), private attorneys and the Finnish Copyright Council which acts as an out-of-court-body giving non-binding opinions to the parties.[5] Among preliminary remedies we can see e.g. the new *ex parte*-search). As for the eligibility of different enforcement measures, the main difference has traditionally been the separation between the civil and criminal procedure and the relative advantages of these main ways of enforcement. In Finland, the rightholder can benefit from the criminal procedure in the form of official help from local prosecutors (and assisting policemen in the investigation procedure). The prosecutor collects the facts important for the burden of proof etc. But subjective and objective elements for criminal liability are normally higher than in cases of civil liability.

The general judicial framework concerning Internet liability has put pressure on the legislators everywhere. This might develop the judicial concepts, especially with regard to the transmission and other kind of use of protected works and licensing of them in the Internet. For Internet liability, no specific legislation exists in Finland, as in some other countries (e.g. the USA, Germany and Sweden).

The directives and other norms of the European Community for its member states, like Finland, are binding. The development here has been very important to national law also. As for liability in Internet the government has submitted a national proposal on exemptions for liability for the benefit of transmitters in cases of mere conduit, caching and hosting as required in the directive on E-commerce (Nr. 194/2001).

4 WIPO Internet Treaties, the E-commerce Directive and the Infosociety Directive

The pace of development has led to two new conventions for protecting copyrights in the Internet, namely the two WIPO Internet treaties (The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty) from 1996 and the regional directives within the European union, especially the directive on electronic commerce (2000/31/EC) (the E-Commerce Directive) and the directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) (the Infosociety Directive).

WIPO treaties can be described as remarkable international responses to the problems caused by the digital technology and network environment to the exclusive copyright system. The treaties have tried to set up minimum

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5 *See* "http://www.minedu.fi" and press the button copyright for a description of functions of the Copyright Council.

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requirements concerning the different elements of copyrights. Although the conventions really are big steps in the international regulation of the problems described here it was not possible to adopt provisions on every matter of importance. E.g. the reproduction right was included in agreed statements and not in the Copyright convention itself. As for liability the WIPO Treaties are silent but they have indirect effect for questions of liability by trying to clarify and define copyrights in international context.[6]

The directives mentioned above have a common link, namely liability questions. There was a wish to write down more liability provisions than achieved (see e.g. recitals 58 and 59 of the Infosociety Directive) and a tendency to adopt these directives concurrently, but also this failed.[7]

As for liability issues the Infosociety Directive, as a clarifying instrument for contents of copyrights was not unsuccessful at all. This directive harmonised the author's right of communication to the public by covering all communication to the public not present at the place where the communication originates (see recitals 23 - 26 and Article 3 of the Infosociety Directive). Besides this, the directive contains an obligation for the Member States to provide for the exclusive right to authorise or prohibit any communication to the public by wire or wireless means.

At the same time the E-Commerce Directive is providing Member States with the possibility to restrict liability for the benefit of a certain group of operators, namely intermediaries of information, which are regarded to be in a central position in the value added chain of information society services. Coordination in the material implementation of the directives was an essential requirement set down by the Commission.[8]

The two main directives in the field and the WIPO treaties from 1996 have at least led to some new approaches to traditional liability: namely the question of the very nature of copyrights in the Internet: how is the movement of electronic impulses to be defined from the copyright point of view, are liability exemptions justified, to whom they are given and on what conditions? The aim of the new regulations was to strengthen the weakened position of the rightholders in the digital environment. We don't know yet whether this goal has been reached, but the effort to clarify the basic rights of authors and other protected groups, is to be welcomed. One intention has also been to give some new power for protection: although notice and take down procedures are not mandatory according to the E-Commerce Directive, there is a tendency to support these measures. Although the possibility for these kind of *interim* measures, are included in the directives, they are not in the form of absolute obligation.

6 *See* Jörg Reinbothe – Silke von Lewinski, *The WIPO Treaties* 1996.

7 *See* recital 16 of the E-Commerce directive where it is stated that liability questions indeed have a horizontal nature and that both directives should have been implemented within similar timescale, but there was approximately one year's time difference with the times of adoption of the two directives.

8 As stated by Jörg Reinbothe there can partly be seen some kind of inner relationship between the directives, but wiht a closer look probably not. The directives are not in contradiction with each other. Jörg Reinbothe, *Die EG-Richtlinie zum Urheberrecht in der Informations-gesellschaft*. GRUR Int. 2001 pp. 744-745.

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5 Reality Bites the Norms

As for operational network perspective the traditional division between users and rightholders is not clear and detailed enough. Instead, we may say that there are at least following groups of operators of importance:

– Feeders (those who put the material in the network),
– content providers (publishers, music and film producers, different authors and performing artists),
– service providers (information service providers, hosting services),
– network providers (access services),
– endusers. [9]

As for liability purposes the role of intermediaries, such as ISP's (Internet Service Providers) is of course interesting. However the functions of different groups can become confusing because of overlapping features, which is due to the technological developments especially with regard to the convergence of media. A transmitter is not always a transmitter, but he can become a publisher or anything under the sun. A telecommunications service provider can become a content provider and vice versa. A mobile phone producer can become a transmitter (communications or network provider or access provider) of protected material etc. The tendencies of new businesses know no boundaries. It seems to be a question of time only, when we are looking at movies from our mobile phones at the end of the pier of the lakeside or in the vacation houses. The value added chain of distributing copyright protected works has become simple and complex at the same time. Who has to bargain and with whom and for what price, is not a simple question in the environment, where the end user only clicks a button.

The end user, e.g. an ordinary consumer, can receive protected material everywhere without distinction to time, place and other factors. The value added chain can become so alluring that we cannot easily see who is doing what, and the agreements between the parties can make it still more confusing. As for the subject for liability it is no wonder if a judge cannot determine who are to be held liable for illegal use, copying, transmission, distribution, performing etc. Before answering the question, we must know something about the general concepts of liability. The written law has been quite silent on the question concerning whom and under what circumstances could be held responsible for the illegal transmission of protected contents in the Internet. Partly we could assume that there is no consensus on this or preferably we can say that it is too

9 An interesting perspective is also the perspective of antitrust authorities towards digital markets. *See especially* Ilkka Rahnasto, *How to Leverage Intellectual Property Rights*. Intellectual Property Rights, External Effects and Antitrust in the Communication Industry. Helsinki 2001. Especially pp. 175-225.

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complex a question to answered with a general norm, as liability must always be decided in every separate case individually.[10]

6 Why Restrictions to Liability?

Why are restrictions to or exemptions from liability reasonable?[11] There are many questions concerning not only why it is wise to treat somebody in a different way, but also to answer the question whether it is fair or just that other actors are treated in a different way in the law than the others. It is the principle of equality which also should be looked at here.

Liability is the last part of the chain of the process we can call enforcement or ”access to justice”, a certain kind of right to effective judicial remedies. When a right holder wants to enforce her rights either in a contractual situation or outside one, she has several ways and measures to choose from. First she might consider whether to react at all, and ask whether it would satisfy her strategic objectives. But for copyrighted works the risk is, that there will be a growing number of imitators and illegal users which will weaken their market position. Because the conditions for production and use of copyright protected works have changed dramatically, there is a perpetual need for new regulation in copyright law in order to clearly strengthen the position of legal rightholders.

Seen from this perspective, are the exemptions to liability still justified? We can easily see that liability exemptions as such are not a new phenomenon in the judicial system. In the statutes we can find them in different areas of civil and commercial law (e.g. law of transports, law of insurance etc.). For the current purposes, a good object for comparison is the law of transports where the powerful parties (carriers, insurers) gained a strong bargaining position during the making of conventions in the field of transportation laws and during the enactment of national laws. This teaches us that a result of the legislator is always a pragmatic solution which reflects the least common denominator of the pressure groups involved during the time of enactment. There might be several theories on this legal development, and I do not want to go more into that, but an ordinary citizen or consumer can and should ask whether a specific piece of legislation, e.g. liability exemptions, serve a general goal of fairness in a society.

There are still some arguments that speak for the exemptions with certain listed preconditions. In the network environment, it is very difficult for a pure intermediary and transmitter to know about the nature of the transmission or the contents of information. Moreover, he does not normally have any impact on the amount of information so transferred not to speak about the illegal nature of the contents. But this is of course provided that the intermediary stays in her role as a pure carrier. However, as stated above the roles of different groups are converging, which makes liability more complicated.

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10 *See e.g.* Kamiel J. Koelman’s article, *Online Intermediary Liability in Copyright and Electronic Commerce*. Legal Aspects of Electronic Copyright Management. The Hague 2000 p. 22 pp.

11 *See* Mark Hafke’s Opinion, *Net Liability: Is an Exemption from Liability for On-Line Service Providers Required?* EntL.R. 1996 pp. 47 – 48.

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It is sufficient to see, for the purpose of this article, that the traditional knowledge principle as a precondition in cases of intermediary liability is still recognised. In spite of this fact, the strongest participants, such as transmitters, and other intermediaries, and their representatives succeeded in lobbying and in getting exemptions. But this did not lead to the abolishment of the knowledge principle. However, the pressure groups have had their say to some extent when "mother Brussels" dictated new forms and norms towards the Member States. As an obeying child of the Community, Finland has accepted norms quite easily. Although there is strong nationalism and also anti-federalism in Finland, the country has followed a kind of minimalist approach in its implementations: only the least possible change in the law has been made. In implementing the E-Commerce Directive we can even see an adulatory approach in order to strengthen copyright law with more far reaching measures than required by the directive. For instance, new measures for notice and take down procedure are accepted in the government proposal 194/2001 (prepared "horizontally" by the Ministry of Justice' although generally copyright matters belong to the Ministry of Education).

An additional question to all this is whether a horizontal approach is justified. The goals and needs for protection concerning e.g. privacy and copyright differ from each other. Without going into details, it is worth saying, that there is some criticism of the horizontal approach, because the needs in different fields are varying. Here again we must live with this approach, i.e. we are obliged to give exemptions in cases of copyright as well as privacy and other possible infringements.[12]

However, the general application of exemptions is very limited: only real transmitters in their varying activities can benefit from the exemptions. This means that the role of search engines and location tool providers is on the borderline.

7 The Current Legal Status of Liability in the Finnish Law

So there is no new redefinition of liability in the Finnish law (preconditions, subject, contents, consequences in detail, procedural questions). This means that the general principles and norms of civil and criminal liability still apply.

The application of general principles of both civil and criminal liability has not happened without difficulties. Knowledge has a meaning here, although more in cases of criminal liability (gross negligence and wilfulness), but it is not without importance in the cases of civil liability either (impact on the amount of compensation).

Copyright infringement requires activity connected to the public use of protected works and other protected products. Somebody must have encroached into the protected sphere of rights, e.g. the exclusive rights to make copies (reproduction right) of the work, and to make the work available to the public in whatever manner (making the work available) (online – transmission included).

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12 Dreier, Thomas, *Some Thoughts on Internet Liability*. In Festskrift for Gunnar Karnell. Stockholm 1999 pp. 151-152.

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Infringements of moral rights – although not unimportant at all – are left aside here.

In the landmark case (Supreme Court 1999: 118) mentioned above we look closer at the terminology and arguments put by the Supreme Court, we can find some confusion. Although the arguments for the liability as such are acceptable and described in detail, there is some room for criticism too. This is especially true on how copyright terminology is approached in the judgement, especially when taking into consideration the international background as outlined by the WIPO Treaties and by the Infosociety Directive. In both of these documents, a specific on-line transmission-right is emphasized. In spite of this, in the summary of the Finnish judgement it is explicitly stated that X had *made copies* of computer programs and *made them available to the public* (see the description of the case above: X let other people copy and receive programs and X had installed an exchange service of programs through the network). By letting this happen, X was regarded as *distributing copies* (!) to the users of the post box. On the other hand, the Supreme Court stated that the right of making available to the public was linked here but without defining whether it was a case of public performance or showing a copy or something else. So as for statutes in force, there clearly is a need to clarify the current Finnish Copyright Act where only three ways of making available (art. 2, para 3) are mentioned, namely public performance, offering the copy for sale, lease or loan or other public distribution, and showing the work publicly. One can defend the Supreme Court in that it must follow valid norms during the making of the decision: the Infosociety Directive was not yet implemented and the WIPO Treaties from 1996 have a status of international agreements not yet ratified by the country. But was this wise judiciary? We must say no, of course. At least a more creative approach by the Supreme Court would have had its place here. Furthermore, the judgement in the above case includes internal controversies concerning copyright terminology: whereas the reproduction right is emphasized in the summary of the judgement, the making available right is analysed weakly if not incorrectly in the opinion itself. Transmission right, especially on line-transmission right would have had a role here. There is no trace about this right here.[13] [14]

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13 There has not been so much criticism about the formulation in this case. This is noticed by Brita Kristina Herler in her doctoral thesis *Upphovsrättsligt skydd av digitala musikaliska verk vid marknadsföring i Internet*. Vasa 2001 pp. 250-251.

14 Comparison of summaries in Finnish and Swedish gives confusion. While the summary in Swedish says that X was regarded to have reproduced computer programs in his computer and made them available to the public at the same time. But the summary in Finnish states that X was regarded to have distributed copies of computer programs stored in his computer. The final and most solid judicial version on the grounds of the decision is naturally to be found in the decision itself (in Finnish) although the summaries as such should point to some guiding principles. The above mentioned confusing description that the interactive change of computer programs would also have meant the act of distribution of copies to the public can also be found in the decision. On the other hand, the court regarded the activities of X as being wilful. According to the court, he was doing this by reproducing copies of the protected programs and making the programs available to the public. X did make copies on DAT-tapes and did allow copying so that the users could copy programs from his server.

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8 Liability Exemptions in the E-Commerce Directive

The E-Commerce Directive 2000/31/EC is based on the division of three types of activities, where exemptions according to the specific prerequisites are listed: ”mere conduit”, ”caching” and ”hosting”. The aim of the directive is to give horizontal guidelines on liability exemptions for the benefit of actors who are in the position of an intermediary. Horizontal nature as stated above means here that the restrictions cover not only copyright infringements but violations in other fields as well (privacy infringements, acts against the general morality (e.g. child pornography) etc.).

The applicability of the exemptions here is based on the nature of the activity. What seems to be important, is that only true intermediaries enjoy the benefits. For example an active search system operator probably cannot enjoy these exemptions. But purely technical intermediaries seem to have a lower threshold to enjoy the benefit of exemptions than hosting providers, who normally have a more active role in the information service market.

As stated in recital 42 of the E-Commerce directive, the exemptions from liability cover only three cases. The first one is when the service provider is limited to the pure transmitting activities only (“mere conduit”). That is, information is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient. In this case, the information service provider has neither knowledge nor control over the information which is transmitted or stored.

The other exemption, “caching”, applies when the service provider has not participated in the production of contents that he transmits (recital 43). In case the service provider would turn out to be a collaborator with a recipient in order to enhance their activity in order to undertake illegal acts he cannot benefit from the exemptions named here. The directive provides to act expeditiously to remove or to disable access when the service provider has become aware of illegal activities connected to the storage and distribution of information (recital 46). On the other hand, there is always the problem whether this is in line with the goals of the freedom of expression. Therefore, it is clearly stated in the directive that Member States should not create general obligations for monitoring information traffic. Although no general obligation to monitor is accepted, this does not mean that the Member States are not required to impose some duties of care on the hosting service providers.

As for liability, one provision of the directive is interesting, and actually reflects the general spirit of liability provisions here: the importance of knowledge according the article 14 (hosting providers actual knowledge of illegal activity or illegal nature of information). It seems that knowledge as one element of the basis for liability is of universal importance: knowledge breaks the exemption. If you have knowledge of the illegal nature of the information or the illegal way of bringing the information to the public, you cannot avoid liability unless you try to prevent the further transmission of the information.

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9 Repeated Criticism of Formulation of Economic Rights in the Finnish Act

Unlawfulness and fault concepts required by Finnish Copyright Act and by the Criminal Code turn out being complicated concepts, especially in the network environment. For copyright crime, certain kind of "professionalism" and wilfulness as well a certain wide scope of activity are required. For copyright offence, gross negligence suffices. Instead for tort liability unlawfulness without subjective criteria can lead to high damages for copyright infringement.

In the case mentioned earlier in the article (*Supreme Court Case 1999:115)* the court stated that X had distributed copies (!) to the public of the protected computer programs stored on his computer.

The "failure" to describe economic subright infringed here correctly, was due to several reasons, probably. The flurry can be one explanation because there were plenty of other questions for the court to answer, such as the amount of compensation of harm to the rightholders.

In a preliminary government report for the government for the implementation of the Infosociety Directive no redefinition of economic rights is proposed. Hopefully this will change, because there is not only a pedagogic need for the courts to understand the essence of different economic rights and how they have been changed in the digital environment.

This also supported by the legalistic needs of criminal law. This speaks also for that the government should propose a change in the Article 2 of the Finnish Copyright Act where the forms of making available to the public are defined: a specific transmission should be mentioned in the law text.

Already in the 1996 WIPO Copyright Treaty, we can see that it codifies the "Right of Communication to the Public". This exclusive right contains acts of "any communication to the public – by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (art. 8)." According to Art. 3 of the Infosociety Directive Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The Finnish Act in art 2 is construed in such a way that after the general right to make the work available to the public, which is given in the 1st paragraph, there is a list of examples of this right in the 3rd paragraph. One could ask whether the list is exhaustive or not; but the formulation of the wording speaks for that although it is wide it is not exhaustive.

One gets the impression that the Act essentially has tried to dress for dinner with too little clothes to cover the whole body. Public performance, distribution of copies to the public and showing the work publicly as mentioned in the acts do not cover or suit the activities in the network environment. Already showing a work in a display meets difficulties in how to define this from a copyright point of view, is it a public performance or showing? In many cases the

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performance right has been used, but it should be noted that a work not in movement (a text, artistic work such as a photograph) is not naturally seen as an object for performing but showing. Therefore it is to be argued that the Nordic Acts would need clarification when implementing the Infosociety Directive. The Swedish Committee SOU 1956:25 already from 1956, contains a guiding position also for Finland in the lack of more detailed guiding principles in our own country (free translation p. 92): – ”The wish to find a description of authors right, a description, that not very fast becomes out-of-date with the developments of the technologies, is obviously very important, when it comes to denote or express the different ways on how to use a work. One starting point for the committee has been to find a description – to the extent it is possible to foresee the developments of the technology – that could last for a longer time. –”

10 Exemptions to Liability according to the Finnish Government Proposal 194/2001 on the implementation of the EU Directive on Electronic Commerce

The approach of the Finnish Government basically follows the structures and concepts of the European Parliament and Council directive on E-commerce. So the cases of “mere conduit”, “caching” and “hosting” are named as special cases to enjoy the liability exemptions on a horizontal level. So these apply both in the copyright infringement cases as well as in cases of privacy infringements etc. Knowledge has also a meaning here. In the cases of caching and host service provider activity, there is an obligation to take down certain kind of materials after having received notice of the illegality of the information.

The proposed new procedure to get fast access to justice here is that the court can give *ex parte* order to prevent the availability of the information, if it is obvious that information as such is illegal or if it is illegally transferred. So the proposal introduces a “notice and take down”– procedure in cases where the on line service provider has actual knowledge either of the nature of the contents or of the way on how the information is copied and transmitted. There is no general obligation to monitor, but there is an obligation to remove the material after a clear written notification either from the court or the right holder or its organisation.

11 Conclusions

The exemptions from liability are necessary clarifications in the judicial environment of today. Firstly the exemptions are of limited scope, and therefore do not dilute the core of the copyright system. It seems that because of the amount of information transferred in the networks as well as reasons based on freedom of expression speak for that exemptions for the benefit of on-line service providers after all are justified in cases when they don’t have any knowledge of the illegal nature of the information or the illegal way the information is made available to the public and provided that their role is

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passive. This is in line with the principles of copyright law as well as the late court practice, where the knowledge principle and the preconditions of unlawfulness have had their place as starting points in the enforcement system also in Finland.

The exemptions have no role in cases such as the ones described above where a service provider have been active and has been able to know about the illegal nature of the activities. This is in line with what has been said in the legal doctrine in the Nordic countries.[15]

The last conclusion is that one can support the quite often raised finding that despite of many differences in various legal systems in the copyright liability regimes, the results in cases concerning Internet liability are not so far from each other.

[15] Jan Rosén, *Ansvar för utnyttjanden av skyddade prestationer i nätverk. Noteringar i anslutning till Högsta domstolens prövning av länkning till MP3-filer*. Svensk Juristtidning. 2000 pp. 822-824.

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