To many, ‘intermediary liability law’ may hardly sound as a topic that is relevant for their daily lives. The topic’s relevance quickly becomes evident, however, once you point out that it is, in fact, central to what many of us say and do online almost on a daily basis. Keeping in touch with your friends and family, selling or buying a second-hand good, reading or writing a blog, following an electoral campaign, watching an amusing or instructive online video, renting a holiday home, storing data in the cloud, checking out consumer reviews before booking a hotel or restaurant – all such activities tend to involve user content stored and disseminated by online intermediaries. The use and importance of these services is now such that the highest courts in the US and in Europe have deemed them essential to the exercise of individuals’ freedom of expression.

That makes the rules regulating the activities of the intermediaries providing these services (Facebook, Twitter, Instagram, TikTok, YouTube, eBay and many thousands of others) equally essential. That goes especially for the rules determining the extent to which the intermediaries can be held liable for the content provided by their users, such as Articles 14 and 15 of the e-Commerce Directive in the EU and Section 230 of the Communications Decency Act (CDA) and Section 512(c) of the Digital Millennium Copyright Act (DMCA) in the US. For plentiful and beneficial as the legal uses of the services may be, they are also broadly used for a variety of illegal and harmful purposes. Think of the exchange of child sexual abuse material, copyright infringement, privacy violations and terrorist recruitment and propaganda.

There is a remarkable synchronism between the evolution of the aforementioned laws, on which this book concentrates. They were adopted within a few years from each other: the CDA in 1996, the DMCA in 1998 and the e-Commerce Directive in 2000. These laws were then left untouched for about two decades. More recently, things started moving again, however. At first this occurred gradually. In 2018, the US legislature amended the CDA for the first time, through a law called FOSTA. A year later its EU counterpart did the same thing with Article 14 e-Commerce Directive, by enacting a new directive – the Directive on Copyright in the Digital Single Market – that aims to deal with copyright infringement online. While limited in scope and different in nature, both amendments proved highly controversial. And now law-makers on both sides of the Atlantic are warming up for the next phase, involving potentially more fundamental revisions of all three laws. In Europe, that revision is likely to take the shape of a new Digital Services Act. Concerns that those revisions should address include – depending on who you ask – the broad availability of terrorist content or child sexual abuse material, alleged bias against certain political viewpoint, the increasing dominance of some intermediaries and the spread of disinformation on political issues or the Corona-virus, just to name some examples.

In the light of the diverging opinions on what the main problems are as well as on how they should be addressed, it remains to be seen for now whether and if so, how, the CDA, the DMCA and the e-Commerce Directive will be amended (or replaced). One thing is all but certain, however: more will likely be required from intermediaries, especially when it comes to
tackling illegal user content. Back in 1996, the first of the laws under consideration (the CDA) sought to encourage intermediaries to act like ‘Good Samaritans’. This phrase ultimately goes back to a parable contained in the New Testament, told by Jesus, about showing mercy to a traveller left robbed, beaten and injured alongside the road. It would be an exaggeration to say that, today, people feel robbed, beaten and injured by some of the large intermediaries referred to above. Nonetheless, few will associate them with deeds of charity. In view of their generally increased means and importance, they are rather expected to behave in a more responsible manner towards their many users as well as society at large.

This book aims to contribute to the ongoing debates about the future of laws such as the CDA, the DMCA and, most of all, the e-Commerce Directive, as well as the process of increased responsabilisation of online intermediaries in respect of stored user content more generally. It seeks to do so by taking a comprehensive approach, having regard to developments in both the EU and the US in respects of all kinds of illegal online content, whilst also taking account of more general issues such as the relevant fundamental rights law and practical and technological developments. This ultimately leads to five recommendations for the further evolution of the current EU system, which, it is hoped, may be of interest to policymakers and other parties struggling with the many challenges identified in this book, both in Europe and in other parts of the world.