

Closing the value gap

The need for a nuanced EU approach to direct and indirect copyright liability

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How do rightholders receive a fair share of the revenues generated by the dissemination of content online?

Copyright has always been about addressing the party who disseminates and creates revenues by doing so.

No need to address (charge or hold liable) the consumer.



Somehow the attention has shifted to the consumer.

Why are we focusing on the consumer? Why are we discussing consumer levies and limitations and exceptions directed at exempting consumer uses?

What happened?



(1) Safe harbor regime E-commerce Directive

- has long served as a shield for all kinds of commercial platforms, including those that are designed to generate revenue by disseminating copyright content
- has had a negative effect on the development of a nuanced liability approach:
 - development of member states' indirect liability regimes hindered by EU safe harbor regime
 - absence of EU harmonization of indirect liability



(2) Technical approach to the notion of communication to the public

- liability only for those who actually transmit a content data file
- inability to regard the platform or the initiator and operator of the network as the party responsible for uploads by consumers
- inability to regard on line services as content providers where the content is functionally disseminated by the on line service but actually stored on a third party server



Now (15 years after the E-Commerce Directive was adopted and Napster got sued..) we can say that:

- ECJ and national case law have gradually started to nuance the scope of the safe harbor.
- ECJ and national case law have started to move towards a more functional approach of the notion of communication to the public



Too slow! Victims all over:

- rightholders failing to close the value gap
- consumers suddenly in the center of the debate:
 - direct liability for uploading
 - direct liability for downloading
- maximum legal uncertainty
- rightholders suing consumers
- platforms steering away attention from their own responsibility by stressing consumer needs



Pressing need for EU action:

- return to the essence of copyright: addressing the party who disseminates and creates revenues by doing so.
- recognizing responsibility for such parties, also if the content is uploaded by someone else or stored somewhere
- clarifying the scope of safe harbour
- legislating the currently grey area between safe harbour and direct liability



This will help the market: rightholders and CMO's are better positioned to strike remuneration deals with platforms.

This will help consumers: with solid remuneration deals for platforms, the consumer is out of the picture. No one will mind a consumer uploading content and being creative with it. No need to focus on consumer responsibility.



And finally: creating a consumer levy on Internet uses may serve rightholders. However, without the measures proposed here, I am afraid it may set back the development towards a more nuanced approach on safe harbor and indirect copyright liability (there is a levy so no need for copyright liability). Which will negatively affect the ability of rightholders to negotiate remuneration from the parties who make money with copyright content. This goes to meeting the three step test. What levy is needed to really compensate this? And will there be political support for such a levy?

Thank you

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