

# Reforming Copyright Liability of Internet Service Providers from a User-Based Copyright Perspective

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## ABSTRACT

The online content sharing service platforms (OCSSPs) provide users with a space to share and access copyrighted works at any time with the lowest restrictions and costs, which facilitates an ease of conducting copyright infringement. As an online gatekeeper, the platforms are held as the best place to deal with infringements. The current copyright reform in Europe, including copyright and related rights in the Digital Single Market and Amending Directives (CDSM), has increased the liability of the platform. However, this cannot effectively end the infringement problem, because in the user-based online economy, it is guided by personalised methods that harm the interests of users. On the contrary, legislation should be dominated by cultural approaches related to market reality.

**Keywords:** Copyright, Platform, Licensing, Digital copyright exchange.

## 1. INTRODUCTION

Increased liability was imposed on online content sharing platform (OCSSP) to combat online piracy in EU, which is beneficial to copyright owners based on exclusivity of the right. However, in the digital environment based on large-scale collaboration, sharing thoughts and constructing identities has become an inevitable demand. Due to the imbalance between the growing demand for copyright work and the inefficient licensing schemes in the digital environment, the problem of piracy is difficult to eliminate. Besides, the strong enforcement of copyright conflicts with the fundamental right of users.

Therefore, legislation in the user-generated content (UGC) environment should focus on the compensation to rightholders and the efficiency of licensing. To carve out more space for legitimate content, we should introduce new UGC exceptions and open user-based sharing economy clause.

## 2. THE INCREASED LIABILITY ON OCSSP

The copyright reform in Europe is carried out under the background of inadequate adaptation of copyright law and the common occurrence of online piracy [1]. Since the cost of identifying and charging individual users is actually difficult and expensive, the platforms

themselves are liable for users' copyright infringement. Prior to CDSM, the notification and takedown regime was the main enforcement tool. The knowledge of infringing actions is the decisive factor to determine whether the platform is liable of users' conduct [2]. In addition to the notification issued by the rightholders, the mental element of knowledge could be proved by the design of the platform. For example, in the *Brein v. Ziggo BV* case, CJEU found that intermediaries induced users to visit and download infringing content by publishing advertisements and operators' comments on blogs and forums [3]. The E-commerce directive stipulates that the platform can be exempted from liability if it does not know that illegal activities are satisfied.

In the UK, OCSSPs may be liable for granting unlicensed file-sharing rights under infringing authorisation. Mere enabling, assisting and even encouraging can not satisfy the threshold. There are many other circumstances that can imply authorisation, such as the relationship between the alleged authoriser and infringer, whether the infringement is inevitable, and the degree of control.

It can be seen that before CDSM, whether the OCSSPs are directly liable of the content uploaded by users depends on whether the platform is neutral to other situations [4].

In contrast, under CDSM, mental knowledge requirement becomes largely irrelevant, and OCSSP

would automatically be assumed to bear direct infringement liability. There are four cumulative conditions in Article 17 that can exempt platform from communicating to the public [5]. OCSSPs are interested in avoiding its liability under Article 17 (1) and have the incentive to filter all notified content that it has not obtained a license on a larger scale.

Either before or after the infringements, the platform needs to prevent these specific works from being uploaded in the future because the copyright holder provides information related to the copyright works [6].

### 3. VALUE GAP

The aim of CDSM is to bridge the value gap, that is, the platform allegedly unfairly transfers revenue to rightholders. However, this rhetoric might not be supported by sufficient empirical evidence. The Draft Directive's Impact Assessment pointed out that the limited availability of data hinders the quantitative analysis of policy impact [7]. In addition, the European Copyright Society reinforced that the proposal lacked reliable scientific and economic evidence [8]. Besides, there is no robust statistical evidence for the impact of copyright infringement on displacement sales [9].

Moreover, it is difficult to bridge the so-called value gap through the transparency obligation and 'best seller' clause in CDSM. This is because both are *ex post* mechanism for concluding contracts afterwards, and rightholders are rarely able to file a lawsuit against the platform for financial reasons. It is still ineffective to provide proportional remuneration for the commercial success of works, which shows that authors often do not get a fair share [10].

### 4. PROBLEMS OF TAKEDOWN AND NOTICE REGIME AND ALGORITHM

The demand for takedown has increased significantly, mainly due to robo-notices. In an empirical study in 2018, 65% of their sample of notices were sent by a single entity [11]. Robots are exploited to send a large number of takedown notifications by major copyright owners.

With the over-inclusive liability of OCSSPs and the growing volume of takedown requirements, the platform tends to avoid liability by following taking-down requirement without considering copyright exceptions, which leads to over-removal of legitimate content. In many empirical experiment, we found that after the rightholders requests to takedown works that should benefit from copyright exceptions, a large part of them were removed by the platform [12, 13].

To lessen the burden of a large number of notices, the platforms has invested in an automated filtering system, which cannot successfully identify the content of

reasonable use. In addition, it is argued that blocking and filtering violated the right to freedom of expression.

Online free speech advocates protested that the notice-and-takedown mechanism is open to abuse by parties wishing to suppress unpopular and dissenting speech, who forced intermediaries to remove content on the grounds of copyright infringement.

It was argued that Article 17(4) infringes the right of the freedom of expression by requiring OCSSPs to block and filter content posted online, including non-infringing materials [6]. Indeed, due to the possible result of over-blocking, any matching and block policy implemented without human scrutiny should be regarded as disproportionate restriction on freedom of expression [14].

Taken together, it can be seen that copyright failed to compensate rightholders sufficiently and restrict the dissemination of knowledge justifiably.

### 5. COPYRIGHT REFORM: A USER-BASED APPROACH

The unsatisfactory results is caused by the market failure of the imbalance between supply and demand of copyright works. Too much weight is put on the enforcement of copyright to prevent the unlawful filesharing, however, the supply of accessible and affordable resources is insufficient compared with the growing demand for cultural production in the free-flow of information. As a result, in the Internet era of extensive and rapid dissemination of information, it is inefficient to increase the copyright infringement liability of the platform.

Therefore, to accommodate the user-based sharing economy, copyright law should carve out more space for the legitimate use of work by adding licensing mechanism and introducing new copyright exceptions.

#### 5.1 Digital copyright exchange

The existing functioning licensing schemes include individual online licensing, voluntary collective licensing, extended collective licensing, and compulsory licensing. By simplifying the transaction process, these schemes are more effective in increasing the supply of copyrighted works than the traditional individual based licensing schemes. For collective licensing, the collective society relieves users of the burden of seeking permission from the rightholders, and supervises and enforces rights on behalf of the rightholders. For individual online licensing, such as Creative Commons, a set of easy-to-use standardised licensing models allows users to copy and distribute works for their own purposes [15]. Compulsory licensing obliges rightholders to provide a license to users who want to exploit the work.

However, they are still inadequate to adapt to the evolving business models in the digital environment. Specifically, collective societies are generally specialists. Therefore, for users who want to use various types and degrees of obscure work in low-value activities, the conditions of collective societies are very poor [16]. In addition, for rightholders who need copyright compensation, Creative Commons licenses are not considered [16]. Besides, compulsory licenses have been criticised for failing to reflect the exact value of licenses, which need to be determined through market negotiations.

To make the content more accessible without depriving the rightholders of bargaining rights, it is recommended to use a general platform called 'Digital Copyright Exchange' to support the delivery of legal content to consumers through cross-sectoral licensing transactions [17]. The Hooper report proposed the establishment of a 'copyright hub' with additional licensing information and conditions. Transaction costs could be greatly reduced through automated 'one click' processes and one-stop services for all copyright licensing requirements [17]. Licensing terms can be more flexible to adapt to new delivery technologies. In addition, a dispute resolution system is envisaged to improve transparency in all aspects, especially on pricing issues.

### 5.2 UGC exception and open clause

To promote follow-on creativity in the sharing economy, copyright exception is perceived as a privileged tool to legitimise the reworking of existing materials in order to achieve new significance or purpose. It is proposed to introduce new copyright exceptions for uploading and further disseminating user generated remixes and mash-ups of protected, and expand the nature and scope of EU exceptions in the Berne three-step test [18]. The InfoSoc directive rejected such an exception. The US copyright statute allows the use of 'transformative works' in fair use exceptions. The purpose of this exception is to enable the creator to rework material for new purposes or with new meanings. Such new works can create new value and even create new markets [19].

The enumerated list of fairness factors constitutes considerations that were more relevant in the non-digital context and the pre-internet society. The evolving markets and technologies require an open clause. However, the uncertainty arising from the general fair use of defense may increase transaction costs and benefit stronger market players [20]. This uncertainty could be reduced through a three-step test, that is, the combination of enumerated list approach and open and fair use norm method [21]. In this way, the open clause could adapt to exploitations on the grounds of fundamental rights such as freedom of expression, on the grounds of fundamental

rights such as freedom of expression, but the existing exceptions do not include these exploitation. In compliance with the three-step test, fair remuneration to rightholders would be allowed when their interests of the right conflict with the use of the work.

## 6. CONCLUSION

Strengthening the exclusivity of copyright and the damage to the interests of users is ineffective in solving online piracy. On the contrary, to promote creativity and fair remuneration to rightholders, the efficiency of licensing should be improved and the UCG exceptions with an open clause should be introduced in the EU.

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