EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence

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[Image: A legal document

As has by now been extensively reported, on October 9th the European Commission released its new copyright reform package. Positioned within this is its proposal for a new Communication on a fair, efficient and competitive European copyright-based economy in the Digital Single Market. The problems in this new Communication are manifold. Let us start with its treatment of intermediary liability.

The proposal states that the array of content offerings, but then the premises of this intermediary liability clause, the most interesting provision is the proposed Article 13 on "certain uses of protected content by online service providers." This is logically predicated on a number of different ways. It is on this insecure legal basis that Article 13(1) relies. It is not entirely clear how the two obligations this clause seeks to impose can be combined.

If the EU is going to harmonise accessory copyright liability (and I agree it should), it does not make sense if it is to be combined with the primary wrongdoer to bring about the infringement, induced liability.

This has been interpreted by the BGH to mean that, to be liable, any third party must have knowingly and intentionally combined with the primary wrongdoer to bring about the infringement. To answer this question we have to look at the substantive rules of copyright law. It is first important to remember in this regard that the E-Commerce safe harbours are immunities, i.e. defences against liability. Failure to qualify for a safe harbour does not therefore necessarily mean that the provider of service is liable. Recital 38 declares that where a provider does store and provide access to copyright-protected content, it is liable for infringement. For a nonchalant statement hidden in a recital, this is quite the dramatic development of EU intermediary liability law. Most importantly, the proposed Article 13(1) can be seen as compatible with the higher-level tests of the ECHR, if not of the EU Charter of Fundamental Rights.

The new Communication contains an array of controversial offerings, but from the perspective of this intermediary liability, the most interesting provision is the proposed Article 13 on "certain uses of protected content by online service providers." This is logically predicated on a number of different ways.

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The new Communication attempts to balance the "value gap" through the introduction of a set of alternative obligations. There are targets at all of which is currently the "information society service providers" that show and provide to the public across large amounts of works on other subject matter uploaded by their users. According to Article 11(1) of the proposal: "Such and providing public access to copyrighted content shall be permitted where:

1. the service providers has not been notified that content is illegal and has taken measures to ensure the functioning of agreements concluded with right-holders for the use of their works or other subject matter;

2. the service provider is not aware that the service has been used for the purpose of distributing information society services to the public.

The proposal is not a good one. In addition to using unnecessary ambiguous language for a legal text, the proposal makes in a somewhat interpretative interplay of existing EU copyright law and EU intermediary liability law. Most importantly, the proposed Article 13(1) can be seen as compatible with the higher-level tests of the ECHR, if not of the EU Charter of Fundamental Rights.

Problem 1: What are "large amounts of content"?

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The proposal seeks to introduce a new obligation for online intermediaries to take measures to prevent the availability of copyright-infringing content on their platforms. This is intended to strike a balance between the need to protect the rights of creators and the protection of users’ freedom of expression. The proposal is based on the assumption that online intermediaries have sufficient resources and capabilities to implement effective content recognition technologies.

The proposal is controversial because it would require online platforms to monitor and remove content at a significant scale, which could involve significant costs and impact on user freedom of expression. The proposal has been criticized for potentially leading to excessive filtering and censorship, which could undermine the free flow of information and innovation.

The proposal is part of a broader European Union (EU) copyright reform package, which also includes measures to allow for the cross-border enforcement of copyright remedies, and to harmonize the law of the European Union concerning the protection of rights in certain respects, namely, those that are considered to be of primary importance for the coordination of the internal market.

The proposal is also part of a broader trend towards increased regulation of online content, which has been driven by concerns about the spread of harmful content, such as hate speech, terrorism, and child sexual exploitation. This trend has also been influenced by the growth of social media and the rise of user-generated content, which has made it easier for people to create and share content online.

Overall, the proposal is a significant development in the field of copyright law, and it will have important implications for the way in which online content is regulated and protected in the future.