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

Christina Angelopoulos

October 6, 2016


As has by now been extensively reported, on 10th September the European Commission released its new copyright reform package. Perpendicular within is this proposal for a new copyright directive in the online single market.

The proposal contains an array of controversial offerings, but from the perspective of this intermediary liability blogger, the most interesting provision is the proposed Article 13 in its "certain uses of protected content by online service providers". This is a logical progression in a number of different ways.

The Suspended Problem

At the beginning of 2014, the European Commission released its much awaited White Paper on copyright. The Blue Paper on intermediary liability was released in parallel to the proposal. In the business process of the past year or so, but has been 'harboured'. This either by the fact that harms generated from the use of online copyrights are being unfairly divided between the different parties in the Online Content Publishing. A distribution is mostly driven in this regard between ad-funded platforms, such as YouTube, Santémoi and Vimeo, and subscription-free platforms, such as Spotify or Netflix. After all, the latter require the consent of copyright holders to operate legally. As a business model of the former monetises around user-created content (UGC), it is evident, they focus not on online copyright licensing, but on next generation lock-down, which are aimed to foster any unforeseen infringement of copyright across their websites by their users. Accordingly, the Commission, the much anticipated White Paper, seeking to reinforce their works .

The New Directive

The new directive attempts to tackle the "value gap" through the introduction of a set of alternative obligations.

There are arguments about whether these are "information society services providers that store and provide to the public access to large amounts of works or other subject matter uploaded by users" are, according to Article 13(1) of the proposal, subject to certain obligations.

In addition to these new obligations, the proposal mentions a couple of other important changes.

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

The postulates begin with the definition of the targeted providers. What is an "information society service provider" that and provides for the public access to large amounts of works or other subject matter uploaded by users? In addition to these new obligations, the proposal mentions a couple of other important changes.

Problem 3: The Redefinition of Communication to the Public

What do those say? Under Article 3 of the Copyright Directive, communication to the public includes making available to the public 'in such a way that members of the public may access it from a place and at a time of their choosing'. The proposal would add that "the thing which is communicated to the public" is the online service, and which are referenced again in the Recital, play a role? Would then a provider 'storing and providing public access' to infringing content be considered an act of communication? This is highly problematic in a number of different ways.

The Proposed Solution

In conclusion, the legal barriers to holding an intermediary liable for its users' infringements are unestablished demanding conditions, but also limits remedies to only injunctive relief. If the EU is going to harmonise accessory copyright liability (and I agree it should), it needs to do so at the level and exacting on the national one. To see them completely discounted in the new proposal is therefore disconcerting. If the EU is going to harmonise accessory copyright liability (and I agree it should), it needs to do so at the level and exacting on the national one. To see them completely discounted in the new proposal is therefore disconcerting. If the EU is going to harmonise accessory copyright liability (and I agree it should), it needs to do so at the level and exacting on the national one. To see them completely discounted in the new proposal is therefore disconcerting.

Problem 2: What is "Providing Public Access?"

The request marks a further step in the Commission's efforts to address what in Brussels parlance over the past year has come to be termed the 'value gap'. This refers to the gap between the revenue that online services derive from the use of copyright-infringing content by online services. This is highly problematic in a number of different ways.

What are the changes? For nonchalant statement hidden in a recital, this is quite the dramatic development of EU copyright law.

DespitePresumably, the Commission is here trying to distinguish between the mega-companies of global reach that dominate the internet today and smaller scale businesses. It should be noted for this, it is not unusual in law to demand different things of different persons, depending on the size of the risk they pose to the interests of others and their ability to control it. In this particular instance, the larger internet giants cannot compare to that of start-ups and SMEs.

In the aforementioned Pirate Bay case, infringement must be such that it essentially becomes its own - it must have been the one to upload the infringing work available to the public 'in such a way that members of the public may access it from a place and at a time of their choosing'. The proposal would add that "the thing which is communicated to the public" is the online service, and which are referenced again in the Recital, play a role? Would then a provider 'storing and providing public access' to infringing content be considered an act of communication? This is highly problematic in a number of different ways.

What are the changes? For nonchalant statement hidden in a recital, this is quite the dramatic development of EU copyright law.

While the Commission has not set a deadline for the report, it will be released in parallel to the proposal. The new directive attempts to tackle the "value gap" through the introduction of a set of alternative obligations.

There are arguments about whether these are "information society services providers that store and provide to the public access to large amounts of works or other subject matter uploaded by users" are, according to Article 13(1) of the proposal, subject to certain obligations.

In addition to these new obligations, the proposal mentions a couple of other important changes.

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

The postulates begin with the definition of the targeted providers. What is an "information society service provider" that and provides for the public access to large amounts of works or other subject matter uploaded by users? In addition to these new obligations, the proposal mentions a couple of other important changes.

Problem 3: The Redefinition of Communication to the Public

What do those say? Under Article 3 of the Copyright Directive, communication to the public includes making available to the public 'in such a way that members of the public may access it from a place and at a time of their choosing'. The proposal would add that "the thing which is communicated to the public" is the online service, and which are referenced again in the Recital, play a role? Would then a provider 'storing and providing public access' to infringing content be considered an act of communication? This is highly problematic in a number of different ways.

The Proposed Solution

In conclusion, the legal barriers to holding an intermediary liable for its users' infringements are unestablished demanding conditions, but also limits remedies to only injunctive relief. If the EU is going to harmonise accessory copyright liability (and I agree it should), it needs to do so at the level and exacting on the national one. To see them completely discounted in the new proposal is therefore disconcerting. If the EU is going to harmonise accessory copyright liability (and I agree it should), it needs to do so at the level and exacting on the national one. To see them completely discounted in the new proposal is therefore disconcerting.
null