The proposal contains an array of controversial offers, but then the perspective of this intermediary liability clause, the most interesting provision is the proposed Article 9 on “certain acts of protected content by online services.” This is a logical progression in a number of different ways.

The Proposal

A new “sanction” clause, Article 13, is designed to tackle the spread of copyright infringement online. It introduces a new “certain acts of protected content by online services” which are presumed to be outside the scope of the safe harbours and will therefore trigger liability. This clause applies to the intermediary services of internet service providers. It introduces a new “certain acts of protected content by online services” which are presumed to be outside the scope of the safe harbours and will therefore trigger liability. This clause applies to the intermediary services of internet service providers. The intermediary will be classified as a “provider” in the scope of application of Article 13 for the purposes of this provision if it makes available to members of the public communications to the public, or to the public, on the basis of its information and/or other content of the work or other subject-matter uploaded by its users, unless it is otherwise subject to enforcement proceedings.

The Proposal

The new proposal attempts to tackle the issue of third parties’ infringement and the risk of intermediary liability. The proposal introduces a new “certain acts of protected content by online services” which are presumed to be outside the scope of the safe harbours and will therefore trigger liability. This clause applies to the intermediary services of internet service providers. The intermediary will be classified as a “provider” in the scope of application of Article 13 for the purposes of this provision if it makes available to members of the public communications to the public, or to the public, on the basis of its information and/or other content of the work or other subject-matter uploaded by its users, unless it is otherwise subject to enforcement proceedings.

The Problem

The proposal is not a good one. In addition to using unwarrantedly ambiguous language for a key term, the new proposal makes one a questionable interpretation of the existing EU copyright law and the intermediary liability law. This is, however, the key to the provision’s main success. According to Article 13(3) of the proposal, such providers should:

- be more involved in the enforcement of agreements concluded with right-holders for the use of their works or other subject-matter
- present the availability as their services or works or other subject-matter identified by right-holders through cooperation with the service provider.

Assessment

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