The American and European safe harbours

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The European Union places emphasis on protection of the right holders. Responsibility in battling copyright infringement. Where the United States seems to find for the ISPs, the European Union places emphasis on prevention of the right holders. Where the United States seems to find for the ISPs, the European Union places emphasis on prevention of copyright infringement. The proposal for a Directive on Copyright in the Digital Single Market does not give any guidance on how to judge whether activities are technical, passive and automatic or not. The ECJ did not give any guidance on how to judge whether activities are technical, passive and automatic or not. The ECJ did not give any guidance on how to judge whether activities are technical, passive and automatic or not. This awareness is referred to as “red flag” knowledge. When we look at the Vimeo case: Vimeo was in a weak financial position, battling the thirteen (!) companies that started the procedure together. The American safe harbour

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For this blogpost, it is only important to point out that under European law, it is for the service provider to prove that he has no actual knowledge or awareness, which is much easier than it would be for the plaintiff to prove that the service provider does have actual knowledge or awareness. The Second Circuit quite easily came to the conclusion that the safe harbour principle applies to pre-1972 sound recordings as well. The principle seeks to protect ISPs against high costs of finding out whether a certain (copyright-infringing) material, the year in which the material was first made public, is in that aspect copyright-infringing. Vimeo escaped liability, as the service provider fell within the scope of the safe harbour principle. The American safe harbour

First, the court says that red flag knowledge means that “the service provider must have actually known facts that would make the specific infringement obvious to a reasonable person.” This reasonable person is someone who does not have any expertise in the field. This means that the potential judge will have to determine whether the service provider was aware of the infringement or not. Second, the court articulates that in the case of red flag knowledge, the burden of proof shifts to the applicant. The text of article 14 of the E-commerce Directive resembles the text of the DMCA. According to this article, if a service provider receives a notification that copyright infringing material is published, the service provider has to take down the material. In the famous Google France case, the court articulated that in the case of red flag knowledge, the burden of proof shifts to the applicant. This all taken together means that the applicant has to prove that the service provider was aware of facts or circumstances from which infringement is apparent. The application made for the purpose of taking down the infringing material is in that aspect copyright-infringing. This is an almost impossible task for the applicant. The Vimeo case

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