

Kluwer Copyright Blog

Fixing Copyright Reform: How to Address Online Infringement and Bridge the Value Gap

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1. Introduction

In September 2016, the European Commission published its proposal for a new Directive on Copyright in the Digital Single Market, including its controversial draft Article 13. The main driver behind this provision is what has become known as the ‘value gap’, i.e. the alleged mismatch between the value that online sharing platforms extract from creative content and the revenue returned to the copyright-holders. [Yet, as many commentators have argued](#), the obligations introduced by the proposed text are incompatible with existing EU directives, as well as with the EU Charter of Fundamental Rights, as interpreted by the CJEU. It thereby risks creating more legal uncertainty than it resolves.

We suggest that the proposal additionally suffers from a more fundamental shortcoming: it misconceives the real problem afflicting EU copyright law, i.e. the proliferation of copyright infringement online *in general*, not only through Web 2.0 hosts. This problem is compounded by an increasingly outdated EU copyright framework: currently, this allows infringing end-users to hide behind their online anonymity, while failing to provide any mechanism for the compensation or remuneration of right-holders for the infringements these users commit. Faced with this impasse, right-holders have shifted their focus to internet intermediaries. Yet, while the CJEU’s recent case law has waded into the tricky area of intermediary liability, no complete system of rules determining what obligations intermediaries have to prevent or remove online copyright infringement currently exists at the EU level.

Absent a more stable legal basis, targeted superstructure initiatives such as the current proposal are set up for [failure](#). If EU copyright law is to be reformed, it is on these crucial weak spots that proposals should focus. To address them, we suggest an alternative approach that better tackles the problem of the unauthorised use of protected content over digital networks. Our proposal is two-pronged, consisting of: **a)** the introduction of a harmonised EU framework for accessory copyright liability; and **b)** the adoption of an alternative compensation system for right-holders covering non-commercial direct copyright use by end-users of certain online platforms. As we explain below, this solution avoids the difficulties encountered by the current reform proposal, while successfully targeting the copyright framework’s real failings.

2. A Better Way Forward: A Two-pronged Approach to Online Infringement

2.1. Harmonisation of Accessory Copyright Liability

One of the most prominent gaps in EU copyright law is the lack of a harmonised regime for accessory liability. In view of the ubiquity of intermediation in internet-based communications, this fragmentation is particularly problematic for online infringement. Introducing a harmonised solution would thus enable addressing such infringement, helping to resolve the ‘value gap’ controversy.

The big question, of course, is how to shape such a harmonised accessory liability framework. Helpfully, the case law of the CJEU has indicated the way forward. Instead of reinventing the wheel, we suggest that the EU legislator should take its cue from that case law.

In its recent decisions on communication to the public, the CJEU has emphasised the need both for an ‘act of communication’ and for that act to be done with some level of knowledge. Following this lead, a future EU intermediary liability copyright regime would have to comprise what we have termed a ‘conduct element’ and a ‘mental element’. While the first would focus on whether the defendant’s behaviour has contributed to an infringement, the second would consider their mindset. Where at least one of the elements is absent, the defendant should be absolved from liability. If both are satisfied, either the defendant should immediately be held liable for the infringement or they should be placed under an obligation to take appropriate action.

? **The Conduct Element of Accessory Liability**

The CJEU’s decisions on the notion of an ‘act of communication’ are helpful in indicating the appropriate threshold for the conduct element. In recent years, the Court has taken an expansive approach, focusing on what it has termed ‘interventions to give access’. While initially it required that such interventions be ‘**indispensable**’ for the dissemination of the work to third parties, eventually, in *Ziggo*, it broadened the notion to include any intervention without which the public would be able to enjoy the work ‘only with difficulty.’ This is in contrast to **Recital 23 of the InfoSoc Directive**, according to which the right of communication to the public should not cover any acts other than ‘transmissions or retransmissions’.

Following the CJEU’s model, we suggest that the ‘conduct element’ should incorporate **any non-minimal participation in the copyright infringement of another party**. All that is required is that, without the defendant’s involvement, ‘in principle’ infringing would be ‘**more complex**’. We consider that this permissive approach is appropriate. In our view, it is the defendant’s state of mind that should determine which conduct elements give rise to accessory liability.

? **The Mental Element of Accessory Liability**

In addition to ‘acts of communication’, the case law of the CJEU has emphasised that a mental element must also be present. So far, the mental element has only been mentioned by the Court in accessory liability cases. It is reasonable to assume this limitation will be maintained in future, preserving the ‘strict’ nature of primary copyright liability. The result would be a divide between classic ‘transmission’ cases (governed by Recital 23), for which no mental element is necessary, and ‘intervention short of transmission’ cases, where a mental element would be required.

Two main types of mental element exist: **intent** and **knowledge**. *GS Media, Filmspeler* and *Ziggo*

all indicate that the lower standard of knowledge of the primary infringement should suffice.

Further than this, we suggest that **both specific and general knowledge** should be accepted. Historically, national European courts have tended to opt for the stricter ‘specific’ approach; however, with the rise of modern technologies, a relaxing of the standard towards ‘general’ knowledge is suitable. Notably, in *Ziggo*, general knowledge that the defendant’s services were used to provide access to works published without authorisation from the right-holders was deemed sufficient by the CJEU.

Similarly, given the oft-referenced objective of EU copyright law to provide right-holders with a ‘high level of protection’, our proposal suggests that **both actual and constructive knowledge** should be acceptable. After all, *GS Media* imposed liability where the provider of a hyperlink ‘knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet’. At the same time, the wording ‘ought to have known’ carries real meaning: the accessory cannot be expected to go to unreasonable lengths to uncover infringements. Most importantly, the general monitoring prohibition of [Article 15 of the E-Commerce Directive \(ECD\)](#) must be respected, as must [the limits set by the Charter of Fundamental Rights of the EU](#). An accessory cannot be said to have constructive knowledge where that knowledge could only be acquired through monitoring its entire platform.

? **The Violation of a Reasonable Duty of Care**

The scope of the mental element should affect the consequences for the defendant where both the conduct and mental elements are present. The CJEU is again helpful here: while in *GS Media*, where only knowledge was considered, the Court indicated that a notice-and-takedown framework might apply to hyperlink providers, in *Filmspeler* and *Ziggo*, where there were indications of intention, this option was not discussed.

We propose that this approach be further pursued in EU accessory copyright liability. A sensible framework would require that, **if an accessory intended an infringement, its behaviour should be by definition unacceptable**. Liability should therefore ensue. On the other hand, **if the intermediary only has knowledge of the infringement, the violation of a duty of care must first be established**.

The type of duty should depend on the type of knowledge. So, as in *GS Media*, if the intermediary has specific knowledge of an infringement it has through its conduct supported, it will be reasonable to expect that it remove it. Depending on the circumstances, other measures (including preventive ones) might also be appropriate, e.g. the suspension of repeat infringers, notifying the authorities or the provision of identifying data on the user to the authorities. On the other hand, if the intermediary has only general knowledge of mass infringements using its systems, the removal of content would require unacceptable general monitoring. As a result, other measures must be considered. The posting of warning duties is an obvious candidate.

Where the accessory fails to take the measures due by it, assuming it had the ability to take those measures or at least ought to have ensured that it had that ability, it should be held liable. **If the intermediary did not take the appropriate measures that would have been expected of it on a flagrantly persistent basis, intent may also arguably be inferred.**

Undoubtedly, this system alone would not give right-holders the tools to eliminate online copyright

infringement. An EU regime for accessory copyright liability can only offer part of the answer. If no liability can reasonably be imposed on the intermediary, attention should then shift to the primary liability of infringing end-users.

2.2. An Alternative Compensation System for Content-sharing Platforms

By itself, the harmonisation of intermediary liability is not a complete solution to the problem of online infringement. As such, more novel approaches are necessary. Building on precedents with a long tradition in copyright law, such as continental European private copying schemes, one such possibility is the adoption of a system that replaces direct authorisation of certain types of online activities with a scheme for licensing such use and ensuring remuneration to right-holders. In the current ‘value gap’ debate, a number of authors and policy makers have been calling for similar solutions as a supplement to the harmonisation of certain aspects of intermediary liability (see e.g. [here](#), [here](#), [here](#), and [here](#)). Our proposed ‘alternative compensation system’ goes in a similar direction.

• Statutory License and Mandatory Exception

The system we envisage involves a statutory license based on a mandatory exception for individual online users that covers the non-commercial use of works on user-generated content platforms (**‘content-sharing platforms’**). The exception directly covers and authorizes acts by individual natural persons who are end-users of such platforms. It would enable users that meet its conditions to freely upload and share content with legal certainty, without the risk of filtering or removal. Right-holders (and especially creators) would benefit from a clearer set of legal rules and, as explained below, an additional stream of rights revenue. The exception would also indirectly benefit certain content-sharing platforms, as it heightens the threshold required for a finding of knowledge or intent of infringement by the platform as regards uses outside the exception.

Compared to the value gap proposal, our system would also increase legal certainty for platforms by clarifying their liability for acts of their users, while preventing the extension of the exclusive right to their normal activity of encouraging/supporting online user creativity. For exempted acts of end-users, platforms would be allowed breathing space to provide their services and would not be subject to injunctions under Article 8(3) InfoSoc Directive. Finally, due to the privilege granted to users, our proposal would discourage preventive filtering of protected content by design. At the same time, there would remain ample space for reactive duties of care, such as notice-and-takedown obligations, to be imposed on platforms, upon obtaining knowledge of infringements regarding content or uses outside the exception’s scope.

• Scope: Subject Matter and Substantive Rights

In theory, the system could apply to all types of protected works and other subject matter, domestic or foreign to an EU Member State, that is susceptible to upload and use on a content-sharing platform. In practice, for reasons of compliance with the three-step test, some subject matter exclusions might be sensible, namely for computer programs, databases and videogames. These would be justified by the idiosyncratic legal nature and market logic of these categories of works, as well as by the fact that they have largely remained outside the scope of statutory licensing and collective licensing, on which our system relies.

The exception would cover non-commercial online acts of reproduction and communication to the public by users of content-sharing platforms, under Articles 2 and 3 InfoSoc Directive. It would

also apply to transformative uses (e.g. certain types of remixes or mashups), including those that lie in the grey area between reproduction and adaptation.

Only *non-commercial* use would be covered. This concept features in different provisions in the *acquis* and is central to the [JURI version of Article 13](#) (Amend. 77). We argue that it is better understood as a legal standard (as opposed to a rule) and an autonomous concept of EU law. It should apply to the use of works by individuals that is not in direct competition with use by the copyright-holders. To determine the standard, recourse could be had to criteria that are both subjective, like the profit-making purpose of the user, and objective, such as the commercial character of the use. In the context of content-sharing platforms, where most individual users do not carry out a business activity or make profit from the platform, the application of such a standard should, as a rule, be straightforward.

The distinction between commercial and non-commercial uses could be clarified through recitals supporting the exception, listing positive and negative examples (e.g. excluding uploads to peer-to-peer platforms, as proposed by [Hilty and Bauer](#)). It could be further clarified that non-commercial use focuses on online activities by users (*not platforms*) for consumption, enjoyment, reference, or expression, outside of the context of a market or business activity, and excludes acts with a direct profit intention or acts for which payment is received. Grey area cases will be decided by national courts, as well as ultimately by the CJEU in the interpretation of this autonomous concept.

Lastly, only works that are freely available online (being either uploaded from an authorised source or covered by an exception or limitation) should benefit from the exception. This requirement provides a clear legal basis for right-holders to notify platforms that are otherwise (prior to this knowledge-making notification) not accessorially liable, so that they may remove or disable access to the infringing copy.

- **Fair Compensation**

Our proposal relies on an exception tied to an unwaivable right of fair compensation that vests solely in the authors and holders of related rights affected thereby, i.e. those listed in Articles 2 and 3 of the InfoSoc Directive. This right of fair compensation ensures that: **a)** creators receive a fair share of the amounts collected under the statutory licence system (which we propose to be at least 50% of collected rights revenue); and **b)** they are not forced to transfer that share to publishers and other derivative right-holders in the context of unbalanced contractual negotiations.

The amount of compensation should reflect the harm suffered by right-holders. In the absence of an actual market to determine the price for non-commercial uses, this can be calculated by measuring users' willingness to pay for such a system through methods of [contingent valuation](#). The calculation should also take into consideration mitigating factors already recognized in the *acquis*, adjusted to the context of content-sharing platforms: the *de minimis* nature of a use, prior payments for such use, and the application of technological protection measures. If a type of use does not cause economic harm to right-holders, it should not give rise to an obligation to pay fair compensation.

- **Payment Obligations and Safeguards for Platforms**

The obligation to pay compensation would lie with content-sharing platform providers whose users benefit from the exception. Like with existing levy-systems, platforms would have the option of either shifting the burden of the compensation to users (e.g. as a subscription fee) or absorbing part

of that cost, e.g. by financing it out of advertising revenue. The platforms payment obligation should be counterbalanced by safeguards. Importantly, the alternative compensation system should operate harmoniously with the accessory liability framework set out above. Thus, the new regime should clarify and strengthen the prohibition on the imposition of general monitoring obligations of Article 15 ECD. Platforms should only be subject to obligations to take action against infringing content where: **a)** it can be shown that they intend to cause infringement *or* **b)** after obtaining knowledge of a copy of a work being uploaded in contravention of the exception.

3. Conclusion

There are no perfect solutions to the challenge of online infringement. Any new proposal will have to be built on top of a fragmented and highly complex EU legal framework. Its benefits and drawbacks should therefore be measured not against an ideal system, but rather compared to the current ‘value gap’ proposal and its potential impact on the *acquis*. A pragmatic approach is thus appropriate. We propose the parallel implementation of two legal mechanisms: one geared at improving the EU law on intermediary copyright liability and the second directed at providing compensation to right-holders for at least some online infringement. Our solution, like most levy-based systems, undoubtedly represents a ‘rough justice’ response to a real-world problem. Nevertheless, it could contribute to achieving the ‘fair balance’ between the rights and interests of right-holders and users that the CJEU places at the heart of EU copyright law. The joint operation of the two proposed mechanisms would increase legal certainty for all stakeholders, enable the development of the information society, and provide fair compensation for right-holders for uses of their works in the online environment.

Note: This proposal builds upon the authors’ pre-existing research into the respective areas of intermediary liability and alternative compensation systems. A more detailed version will be published in an upcoming academic article (on file with the authors). For further information, see: C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016) and JP Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017).

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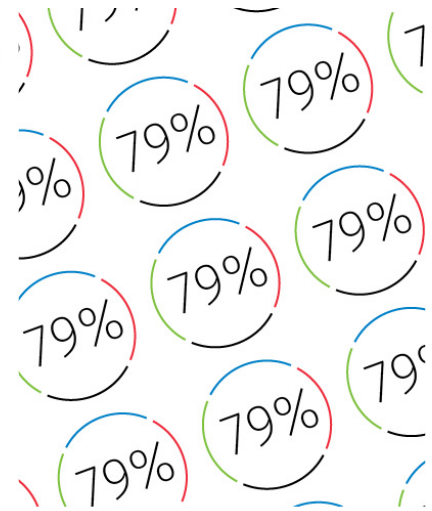
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