



BUILDING TRUST

#01: SAFE HARBOUR

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BUILDING TRUST

Platform responsibility and online harms have become big talking points among policy makers and the political community in recent years.

While the debates continue, it's clear that the regulation of online platforms is going to increase in the years ahead, and that the corporate reputation of digital companies is going to increasingly depend on well-thought out and communicated policies in this domain.

It's important that platforms, rights-holders and responsibility facilitators are all well informed to ensure and enable productive discussions around these topics. But understanding many of these issues means navigating often complex areas of law and contentious social debates.

To help inform and educate all the stakeholders, Friend MTS has teamed up with media and music consultancy CMU Insights to present Building Trust, a series of white papers exploring the economic and social responsibilities of digital platforms and other online service providers.

In this first white paper we look at the debate around the copyright safe harbour, and the changing responsibilities of platforms that facilitate and enable the distribution of content.

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SECTION 1

INTRODUCING COPYRIGHT AND THE SAFE HARBOUR

The copyright safe harbour is a legal principle found in many countries that limits the liabilities of internet companies whose customers use their networks or servers to distribute other people's copyright-protected content without permission.

To understand the safe harbour, you first need to understand some basics about copyright itself. What is the principle of copyright all about? How does it work? What happens when someone infringes copyright?

Copyright is all about control – it gives creators and their business partners control over the outputs of their creativity, whether that's literature, journalism, scripts or screenplays, musical compositions, artistic works, recordings, films, and so on.

Copyright actually allows creators to control what happens to their content in a number of different ways.

Every country has its own copyright system with its own specific rules, but generally copyright owners can control the reproduction, distribution, rental, adaptation, public performance, communication and making available of their works.

If anyone else wants to do any of those things with someone else's content they must first get permission. The copyright owner usually charges for that permission – ie: for granting a licence to whoever is using the content – which is how copyright makes money.

But what happens if a third party reproduces, distributes, rents out, adapts, publicly performs, communicates or makes available a copyright protected work without permission? Well, that's copyright infringement.

And when that happens, the law says that the copyright owner should sue the infringer through the courts for damages.

As well as the person who actually infringes a copyright, you might also be able to sue any other person or company that facilitates the infringement.

Quite how this works varies greatly from country to country, though you'd usually sue that facilitator for secondary, contributory or authorising infringement. This is helpful, because the facilitator may be much easier to find than the actual infringer, or they might have more money.

However, the copyright safe harbour restricts the copyright liabilities of internet companies that unknowingly facilitate infringement.

That facilitation might involve providing networks, servers or other internet tools that third parties then use to infringe. Or, it might involve employing automated systems that index and link to infringing content.

Because of the safe harbour, the copyright owner cannot sue the internet companies. Though that safe harbour protection is conditional on said company having a system in place via which copyright owners can request for any infringing content stored on or linked to by its networks or platforms to be removed. We call these "takedown systems."

The copyright owner can still sue the individual who actually used or distributed the copyright protected work without permission, but not the internet company that provided the network or platform which that person used.

Providing, of course, that company has a system in place to remove the infringing content when requested to do so by the copyright owner.

“You might say that the modern safe harbour – and mere conduit – is a grandson of the legal protection given to telecoms companies in the early 1900s when they first laid phone lines under the streets – and some bright spark within the company said, ‘are we going to be liable for any crime that happens over our phone lines?’ Most countries’ laws had a forerunner of safe harbour insofar as, so long as the phone company had no actual knowledge of the offending phone conversations, and so long as the company reacted once they were informed, they would have no liability”

Tom Frederikse, Partner, Clintons

“When passed in 1998, the primary purpose of Section 512 was to combat online piracy. Section 512 of the DMCA includes a notice and takedown process for copyright owners and a safe harbour for online service providers. OSPs were concerned about being party to lawsuits over isolated acts of infringement by their users, even if they were otherwise cooperative in remedying the infringement as soon as they were put on notice. In exchange for OSPs’ cooperation in detecting and addressing infringement, Congress created safe harbours to minimise the possibility that fear of liability would inhibit technological innovation. The safe harbour for OSPs was meant to be a limitation on monetary liability, not an exception to copyright infringement”

Keith Kupferschmid, CEO, Copyright Alliance

SECTION 2

ORIGINS OF THE COPYRIGHT SAFE HARBOUR

The copyright safe harbour was conceived in the 1990s when internet access first started to go mainstream. It was developed in response to concerns among internet companies that – as they started to provide internet access to everyone – the likelihood of customers accessing and distributing unlicensed content over their internet connections increased.

If those internet companies could be held liable by copyright owners for that copyright infringement, those liabilities would simply be too high, and the associated risks could limit the ability of said companies to expand internet access to everyone. The safe harbour was therefore a compromise, limiting the liabilities of internet companies, but ensuring copyright owners still had some control because of the accompanying takedown obligations.

Many copyright systems include some sort of safe harbour for internet companies, but the copyright safe harbours most talked about are those contained in American and European law, specifically the Section 512 provisions created by the 1998 Digital Millennium Copyright Act in the US and the 2000 E-Commerce Directive in the European Union.

“When Section 512 was first agreed, the core aims were to balance the rights of both the platforms and the content rights-holders, in order to foster innovation while protecting intellectual property. Of course, the platforms then were thought of as ‘dumb pipes’, not the sophisticated services featuring user-generated content that we see today”

Jeff Liebenson, Partner, Liebenson Law

“The E-Commerce Directive was adopted in 2000, with discussions starting several years before. It reflects the needs of a period when the internet economy was in its infancy and some of the services that now dominate the online markets, including the media environment, did not even exist. It created a conditional non-liability regime for certain types of services to be provided online”

Burak Özgen, General Counsel, GESAC

The Section 512 provisions created by the DMCA say that an online service provider “shall not be liable for monetary relief ... for infringement of copyright by reason of the provider’s transmitting, routing or providing connections for material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections.”

Though there are some limitations to that general rule. For example, it only applies if the transmission of the infringing material is “initiated by or at the direction of a person other than the service provider.” And if “the transmission, routing, provision of connections or storage is carried out through an automatic technical process without selection of the material by the service provider,” and “the material is transmitted through the system or network without modification of its content.”

Additionally, “a service provider shall not be liable for monetary relief ... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,” providing the service provider “does not have actual knowledge that the material ... is infringing” and “is not aware of facts or circumstances from which infringing activity is apparent.”

Section 512 then states that another condition of that restricted liability is that “upon obtaining such knowledge or awareness, [the online service provider] acts expeditiously to remove, or disable access to, the material.” This is where the obligation to provide copyright owners with some sort of takedown system begins.

Similar provisions are found in Articles 12 and 14 of the 2000 EU E-Commerce Directive, which set out new rules that each EU member state was then obliged to implement within its own national copyright or internet laws.

Article 12 says that EU member states must ensure that an online service provider is not liable for content distributed over its networks providing it “does not initiate the transmission; does not select the receiver of the transmission; and does not select or modify the information contained in the transmission.”

Article 14 says that EU member states must ensure that an online service provider is not liable for content stored on its servers as long as “the provider does not have actual knowledge of [any] illegal activity or information and ... is not aware of facts or circumstances from which the illegal activity or information is apparent.”

And once again, that protection is conditional on the provider “upon obtaining such knowledge or awareness” acting “expeditiously to remove or to disable access to the information.”

“The ‘safe harbour’ regime of the directive was provided for three types of services. They were mere conduit, like the telcos providing access to internet; caching; and hosting, so storage of data on a network. The courts then expanded it to hosting services that also give access to content to the public – but in time the courts have had difficulties with that, as those platforms have become mainstream sources of content”

Burak Özgen, General Counsel, GESAC

“While Section 512 remains a workable legal framework, it is evident that the statute is under strain and that stakeholder collaboration is needed in order for the statute to live up to its potential as imagined by Congress. And if such collaboration doesn’t come to fruition, it may be time for Congress to reconsider this 22-year-old bargain with an eye toward determining what areas of Section 512 may need to be recalibrated in order to rebalance the system”

Keith Kupferschmid, CEO, Copyright Alliance

SECTION 3

SAFE HARBOUR CONTROVERSIES

Copyright owners are usually resistant to any changes in the law that seem to reduce or restrict the control they enjoy over the copyright protected works they own.

However, the basic principle of safe harbour seems sound. And it arguably enabled the roll-out of internet access to everyone, which has ultimately benefited the copyright industries. Nevertheless, there have been certain controversies regarding the way the copyright safe harbour has been implemented and the way that it works in practice.

Any new laws will be open to interpretation and copyright owners haven't always been pleased with how the safe harbour provisions have been interpreted, by the tech sector itself, as well as by governments and the courts.

Many copyright owners also argue that the subsequent evolution of the internet and internet technologies has made aspects of the safe harbour unworkable, because the law-makers who crafted it could not have foreseen those subsequent developments.

There have been a number of specific controversies over the years, with the following four issues sparking significant debate...

- The quality of the takedown systems operated by platforms claiming safe harbour protection.
- The quality of the repeat infringer policies employed by platforms claiming safe harbour protection.
- The kinds of platforms claiming safe harbour protection, and especially when user-upload platforms have claimed protection.
- The impact of the safe harbour on copyright exceptions and fair use.

“I commend the draftsmen and women behind the DMCA. They tackled a very complex and very fluid area and set up road markers. Twenty plus years on, there is now more than enough room for improvement. That’s not a criticism. Very simply when music is at the crossroads of law and technology, technology evolves much more rapidly than the law. Once the ink was dry on the DMCA, technology was already two steps ahead”

Keith Hauprich, General Counsel North America, BMG

TAKEDOWN SYSTEMS

The DMCA does provide some guidance on how copyright owners should notify online service providers of copyright infringing material, on receipt of which that provider must “expeditiously remove, or disable access to, the material.”

However, it provides much more detail about what the copyright owner needs to do to put the online service provider on notice than it does explaining how the service provider should respond. Many copyright owners feel that this leaves too much to the discretion of the online service provider when it comes to what their takedown system looks like.

Some providers have developed sophisticated takedown systems that go well beyond their legal obligations, although those systems are not always available to all copyright owners. Meanwhile other providers have much less sophisticated systems in place.

And some have been accused of having deliberately mediocre systems so as not to inconvenience any customers who are infringing copyright. Or even because the internet company’s own business model relies on its users uploading a steady stream of unlicensed content to its servers.

There have been some key cases in the US courts testing how efficient a takedown system should be in order for a company to enjoy safe harbour protection. Copyright owners initially complained that the courts were generally setting the bar far too low, although that has arguably started to change in more recent years.

Of course, the DMCA only has jurisdiction within the US, and the takedown obligations of companies relying on the safe harbour elsewhere will be subject to local copyright laws and how they are interpreted. Although a lot of global companies have traditionally set up their takedown systems to comply with US law, assuming that is sufficient to assure safe harbour protection in other countries too.

In more recent years, some copyright owners have started to call for reform to safe harbour laws so to remove any ambiguities regarding the takedown obligations of safe harbour dwelling companies, or to overtly increase those obligations.

One key mantra of the copyright industries is that to be effective, takedown systems should actually be takedown-and-stay-down systems.

“The statute requires that a takedown notice provide information ‘reasonably sufficient’ for the platform to locate the infringing material. The courts have gone on to interpret this as requiring file-specific URL information. This has resulted in the current Whac-A-Mole process in which content that appears at one URL is taken down, and then the same content reappears at a new URL. The current debate is whether this appropriately balances the rights of the platforms and the rights holders, or if the safe harbour should rely on a ‘notice-and-stay-down’ system”

Jeff Liebenson, Partner, Liebenson Law

“A review of the legislative history reveals that the intent of the safe harbours was to afford reasonable immunity to reasonable actors; not to create a mechanism by which OSPs could disregard copyright law. In passing the notice and takedown provisions in Section 512 of the Act, Congress intended to encourage copyright owners and OSPs to work together to combat existing and future forms of online infringement. This approach was designed to remedy hardships faced not only by large copyright owners and OSPs, but also individual creators who undeniably lack meaningful tools to fight online infringement”

Keith Kupferschmid, CEO, Copyright Alliance

“Allowing the posting of the same infringing work time and time again while the rights holders are forced to burn time and money playing Whac-A-Mole must be revisited. Take down must mean stay down. If a platform can incorporate intellectual property it must have the rights management systems in place to identify same and ensure that it has the requisite licences in place. The burden must now fall on the shoulders of the tech companies. As music revenue continues to erode, and start up after start up continue to build their business models off of the back of songwriters, the pendulum must swing”

Keith Hauprich, General Counsel North America, BMG

That would mean that once a takedown notice has been issued relating to one piece of content, an online service provider should not only remove that piece of content, but also ensure it is never re-uploaded.

Some companies have developed takedown systems that embrace this principle, at least to a point, but it has not previously been a legal obligation under US or EU law, and therefore not industry standard by any means.

As a result, many copyright owners argue that a fundamental flaw of the current system is that as soon as a specific infringing content file has been removed from an online service provider's servers, it is re-uploaded by another or even the same user.

This then requires the copyright owner to issue a new takedown notice for the same content file. Copyright owners often compare this to a game of Whac-A-Mole, and say that it results in a constant stream of takedown notices having to be submitted for a single piece of content, which makes the process onerous and inefficient.

REPEAT INFRINGERS

Another obligation for internet companies seeking safe harbour protection under the DMCA is that the online service provider "has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."

This is another area where many copyright owners argue that the bar has often been set too low by online service providers seeking safe harbour protection. Because, of course, any law that talks about "reasonable" implementation and "appropriate" circumstances is always going to be open to interpretation.

“BMG partnered with forensic tracking company Rightscorp to combat the use of the bit torrent protocol to pirate music. Rightscorp was able to track the unauthorised use of music and send notices to the applicable internet service providers that would then be passed along the applicable, infringing subscriber. The notices were robust and powerful. They contained time, date, duration of use, and other unique identifiers that established the infringement as well as the IP address of the subscribers behind the infringement. It became quite clear that there were good corporate citizens and less honorable actors. After a series of escalating manoeuvres, it became quite clear that certain ISPs were not going to comply – and forward notices – and that BMG would have no option but to take the road less traveled to ensure that its songwriters, producers and publishers were justly compensated for their efforts”

Keith Hauprich, General Counsel North America, BMG

As a result, some internet companies have been accused of having repeat infringer policies that pay lip service to the law but which achieve nothing in practice.

Though this is an area where – in the US at least – things are in flux as a result of precedents set in two legal battles involving internet service provider Cox Communications, which was successfully sued by music company BMG and then subsequently by all three major record companies – Universal Music, Sony Music and Warner Music – led by its trade body the Recording Industry Association Of America.

In those cases the courts basically concluded that the ISP's repeat infringer policies were not fit for purpose, and as a result it could be held liable for its users' copyright infringement.

There were some complications in the BMG case on appeal and the dispute was ultimately settled out of court. However, the subsequent jury ruling in favour of the major record companies seemed to reaffirm the precedents that were arguably set in the original BMG v Cox judgement.

That said, the latter Cox case is still subject to appeal. Although initial efforts by the ISP to overturn the judgement or cut-back the billion dollar damages that were awarded to the record companies were unsuccessful, as of the start of 2021 the dispute is heading to America's Fourth Circuit court of appeal.

Meanwhile, a number of other lawsuits are testing whether the repeat infringer policies of other ISPs were similarly insufficient to provide those companies with safe harbour protection.

However, various recent rulings in the Cox and other cases do seem to have raised the bar somewhat when it comes to the obligations of safe harbour dwelling companies in terms of constructing and enforcing a repeat infringer policy.

“BMG’s groundbreaking victory against Cox Communications on the basis of contributory copyright infringement set the precedent in the way US law regards the safe harbour defence of internet service providers. The subsequent case brought by the RIAA leaves no doubt that the law is as clear as a fire on a hillside on a starry night. Clearly, the safe harbour protection of the DMCA isn’t as wide and as cavernous as ISPs would like to believe it is”

Keith Hauprich, General Counsel North America, BMG

“Internet companies need to take repeat infringer policies more seriously in the wake of the Cox Communication cases, if they weren’t already doing so. Otherwise they will lose the safe harbour protections. Cox Communications is one of the largest internet providers in the US, but a court found it not only needed to have a repeat infringer policy, but it also needed to implement it. Cox didn’t do so and it was held liable for \$25,000,000 in damages and \$8,500,000 in costs, and then it settled. So even the most powerful companies can take a serious hit if they do not take this seriously”

Jeff Liebenson, Partner, Liebenson Law

RANGE OF SERVICES

The highest profile controversy around safe harbour relates to the range of services claiming safe harbour protection, and in particular the use of safe harbour by user-upload platforms of the YouTube model, which not only allow users to upload and store content on their networks, but then also re-aggregate that content via a home page, recommendations tool and/or search engine.

This is a high profile controversy mainly because of efforts to reform this aspect of the safe harbour within the European Union, which resulted in prolific public-facing lobbying campaigns by the copyright and tech industries, and in particular, the music industry and YouTube.

Copyright owners – and especially the music industry – argue that the law-makers who created the safe harbour in the 1990s never envisaged user-upload platforms of the YouTube model ever enjoying protection.

These platforms, it is argued, are not “mere conduits” or “hosting companies,” they are media platforms that compete head-on with the internet services of traditional broadcasters, studios and media businesses.

The music industry argued that by utilising the safe harbour, user-upload platforms were skewing the digital market. In some cases, it said, platforms were basically operating piracy services but using safe harbour as an excuse.

And even in those cases where a platform sought licences from music companies – such as YouTube – safe harbour created problems. Because with other online music services like Spotify and Apple Music, copyright owners had to “opt-in” for their content to appear.

Whereas with the user-upload platforms that were claiming safe harbour protection and providing takedown systems, copyright owners were obliged to “opt-out.”

“User-upload platforms will have new obligations under the copyright directive. It was important because – even though the courts in Europe were saying these operators were responsible and needed a licence – some still tried to hide behind safe harbour rules. The directive clarified this and pushed back on safe harbour”

Helen Smith, Executive Chair, IMPALA

That “opt-out” approach greatly weakens the negotiating hand of the copyright owner, because if it refuses to do a licensing deal with a platform it will have to cover the costs of opting-out, ie: of utilising whatever takedown system the platform has built. The music industry referred to this weakening of negotiating power as the “value gap.”

It was because of that issue that the music industry – with some support from other copyright industries – sought to change safe harbour specifically in relation to user-upload platforms. Article 17 of the 2019 EU Copyright Directive seeks to do that: user-upload platforms can still claim safe harbour protection, but have extra obligations to do so.

FAIR USE

Although copyright law provides copyright owners with control over their content, there are also usually scenarios where that control is restricted.

These are sometimes referred to as copyright exceptions. They commonly include things like critical analysis, news reporting and parody, which may all be scenarios where people can actually legally make use of copyrighted material without getting the copyright owner’s permission.

These exceptions often exist to ensure that copyright does not hinder freedom of expression.

In the US, there is a wide-ranging exception called “fair use.” This is much more extensive and ambiguous than the exceptions under many other copyright systems. Fair use obviously only applies within the US, though it’s a term used much more widely on the internet.

Copyright exceptions and fair use create an extra complication when it comes to safe harbour and takedown systems. Should a copyright owner consider whether the unlicensed use of their content online is fair use before issuing a takedown? Should an online service provider likewise consider fair use before complying with a takedown request?

In the US, a key test case in this domain involved a YouTube video of a young child dancing to a Prince track – as a result it became known as the “Dancing Baby Case.” In this long-running legal battle, it was ultimately ruled that copyright owners should consider fair use before issuing a takedown. Although it wasn’t really explained what that consideration should involve or how rigorous it needs to be.

“There still are plenty of ambiguities despite the ruling in the Dancing Baby Case. First, fair use is particularly fact specific and it depends on various factors that shift on a case-by-case basis. So there inevitably are ambiguities whenever fair use is involved. The clarity provided by the Dancing Baby Case is that the good faith requirement for issuing a takedown notice requires a good faith evaluation that a particular use is not a fair use. Since so many takedown notices are computer-generated, this increases the challenge for rights-holders issuing these notices to ensure that the possibility of fair use is taken into account”

Jeff Liebenson, Partner, Liebenson Law

Also, while that case was going through the motions, an increasing number of online service providers started to develop automated systems for spotting and removing copyright infringing material. The final ruling in the Dancing Baby Case conceded that automated systems might struggle to identify fair use. However, because no such system had been employed in relation to the dancing baby video, this problem was left unresolved.

The issue of copyright exceptions was also raised during the debate around Article 17 of the EU Copyright Directive. That article makes the filtering of content on user-upload platforms a legal obligation. In most cases such filtering will require automated systems. But can such systems deal with critical analysis, news reporting and parody?

“I believe Article 17 properly tackles any concerns around exceptions, as it provides several layers of safeguards. First, it requires cooperation between rights-holders and services to ensure that all relevant interests are properly addressed, and provides that licences given to [online service providers] cover also the acts of consumers. Then, certain exceptions that are related to freedom of expression are made mandatory, so if any content that is not licensed, and for which relevant information is provided by the rights-holder, is wrongly made unavailable – because, for instance, that act falls under those exceptions – consumers can ask for redress anywhere. And moreover, start-up services are excluded from the stay-down obligation, and bigger ones are more than capable of cooperating and doing it properly”

Burak Özgen, General Counsel, GESAC

“With copyright law, you are always seeking a balance between the interests of rights-holders and the interests of the public. And if you don’t pay attention to copyright exceptions, then there is no balance. So asking how those exceptions are going to be considered is really important. But then think about how many takedown notices are being issued: hundreds of millions per year. Manually assessing every one of those to see if the use of the copyright-protected work was fair use would cost a fortune in man-hours, not to mention legal fees for the many thousands that are particularly complicated. But can you create a technology to deal with something as nuanced as fair use? Certainly not yet – and I don’t know that an acceptable tech solution for this will ever be possible”

Tom Frederikse, Partner, Clintons

“Services like YouTube, SoundCloud, Dailymotion, Vimeo, Facebook, and so on, have become the main point of access to creative works for consumers, and they are also hugely involved in making the consumer experience on their platforms similar, if not better, to normal online streaming services. Developing such a model became the preferred option to enter the market. So, those newer, and bigger, and more social but parasitic services operated without liability, while legitimate online services that clear rights, pay taxes and abide by the rules were disadvantaged. Which meant the biggest usage on the internet was not being remunerated properly, if at all, and setting the real value of creative works in the online market was becoming more and more challenging. Article 17 was needed to bring long-sought fairness to the online market”

Burak Özgen, General Counsel, GESAC

SECTION 4

SAFE HARBOUR REFORM

Many copyright owners would like to see the copyright safe harbour reformed to raise the bar on takedown systems and repeat infringer policies, and to restrict the use of the safe harbour by user-upload platforms.

Meanwhile, many free speech and digital rights campaigners believe more needs to be done to ensure the takedown systems required by safe harbour laws do not result in copyright exceptions and fair use being overlooked.

There are four key areas in which safe harbour reform has been or is being considered and proposed in the EU and the US.

EUROPEAN COPYRIGHT DIRECTIVE 2019

The most significant safe harbour reform to date is that contained in the aforementioned EU Copyright Directive. As noted, this was specifically focused on user-upload platforms, and set out to increase the obligations of any such platforms that claim safe harbour protection. These reforms were contained in what began as Article 13 of what was a wide-ranging document of copyright reforms and became Article 17 in the final draft.

Article 17 remains one of the most controversial elements of the entire directive. As 2021 gets under way, it is still being implemented by EU member states, and opinion remains divided across Europe as to exactly how it should work. Many rights-holders have been particularly critical of the approach being taken by law-makers in Germany.

“Most countries are being pretty faithful to the text, which makes sense as directives should harmonise rules across the EU. In Germany, the debate that took centre stage during the EU legislative process – about whether certain content might be prevented from being posted – is still playing out”

Helen Smith, Executive Chair, IMPALA

“EC guidance can help, if it focuses on giving guidance on actual practical implementation, rather than introducing too much detail and novelty to the provisions of the directive. Therefore the best way is to stick to the language of the directive and the requirements of cooperation. It can usefully explain that not getting a licence as a choice means full liability. Moreover, it can stress that licensing requires full information on usage, and cooperation in enriching data for accuracy, as the basic requirements through which transparency can be ensured”

Burak Özgen, General Counsel, GESAC

“The EC guidance is intended to provide examples of best practice between rights holders and platforms. It will have no legal impact as such and the language of the directive itself will be what counts, but obviously it’s still important that the EC sticks to the language and purpose of the directive”

Helen Smith, Executive Chair, IMPALA

The European Commission is concurrently working on specific Article 17 guidance. Various groups representing copyright owners who campaigned for and welcomed Article 17 have also expressed concern that the EC's guidance, although not legally binding, could still water down the reforms. So, all in all, quite how these reforms end up being implemented, and what new obligations result for user-upload platforms, remains to be seen.

EU DIGITAL SERVICES ACT & UK ONLINE HARMS BILL

In the final weeks of 2020, both the European Union and the UK published proposals for new laws to regulate online platforms.

The former's Digital Services Act will likely result in new EU regulations and amendments to the E-Commerce Directive. In the UK, ministers responded to a previous white paper on the responsibilities of online platforms with proposals that will inform a new Online Harms Bill to go before the country's Parliament.

These proposals are not copyright reforms, the focus being extremist, violent and abusive content, and misinformation and disinformation. However, some copyright groups hope that any new obligations that require online platforms to monitor and remove illegal content could also apply to copyright infringing content.

And, that as a result of these reforms, online platforms may be obliged to ensure that when illegal content is removed once it stays offline – ie: there would be a takedown-and-stay-down obligation.

It remains to be seen to what extent these reforms also increase the obligations of online platforms in relation to copyright. But lobbyists for the copyright industries will seek to ensure their concerns feature among the wider debates around platform responsibility.

US COPYRIGHT OFFICE REVIEW

In the US, the country's Copyright Office published a specific report in May 2020 reviewing the copyright safe harbour. A long time coming, the report was based on a wide-ranging consultation of copyright owners and internet companies that began in 2016.

The report doesn't call for a radical overhaul of the US safe harbour, but does state that efforts by US Congress to balance the interests of copyright owners and internet companies in the section 512 provisions have been "tilted askew" as the digital market has evolved, against the interests of rights-holders. To that end, the report suggested that lawmakers in the US might want to "fine-tune" the safe harbour.

It stated: "Based upon its own analysis of the present effectiveness of section 512, the Office has concluded that Congress's original intended balance has been tilted askew. [However], the Office is not recommending any wholesale changes ... instead electing to point out where Congress may wish to fine-tune section 512's current operation."

Needless to say, copyright owners welcomed the report, even though it wasn't clear what "fine-tuning" might mean, and the Copyright Office's conclusion didn't seem to support the level of reform most copyright industries have been pushing for.

US DIGITAL COPYRIGHT ACT

Throughout 2020, the subcommittee on Intellectual Property in the US Senate staged a number of hearings regarding the DMCA and in particular section 512. Senators heard from creators, copyright owners, internet companies, academics and free speech advocates who discussed the copyright safe harbour, how it was working more than two decades after it was conceived, and the arguments for and against possible reform.

Following the publication of the Copyright Office's report, the chair of the committee, Thom Tillis, the Republican Senator for North Carolina, let it be known that he supported more significant reform of the US safe harbour than mere "fine-tuning."

In a letter to interested parties, Tillis wrote: "Rather than tinker around the edges of existing provisions, I believe Congress should reform copyright law's framework to better encourage the creation of copyrightable works and to protect users and consumers making lawful uses of copyrighted goods and software-enabled products."

Suggesting that reform would in particular deal with criticisms by copyright owners regarding takedown systems, Tillis also said in his letter that: "I believe US copyright law should move towards some type of a notice-and-stay-down system."

"In other words", he went on, "once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorised by law (eg fair use)."

At the end of 2020, Tillis published more detailed proposals for what those reforms might involve, under the banner the Digital Copyright Act. That document confirmed that the senator is proposing the introduction of a takedown-and-stay-down system, as well as reforming the rules around the issuing of takedown notices.

In an explanation of his proposals, Tillis said his reforms would change "the requirements for sending notices of infringement and counter-notices by lowering the specificity with which copyright owners must identify the location of infringing material and, when multiple works are on the same service, broadens the applicability of a representative list of infringing works."

They would also allow "copyright owners to identify infringement and submit notices through standardised takedown web forms."

They would also replace “the notice-and-takedown system in existing law with a notice-and-stay-down system for complete and near complete works,” and require online platforms “to make users click a button when they upload material that affirms that they hold the copyright, have permission, or are otherwise authorised by law, including but not limited to fair use.”

Lobbyists for the copyright industries have already welcomed the proposals, though the tech sector is sure to raise numerous concerns and objections.

“Perhaps the biggest change in the EU Copyright Directive is that, to qualify for the EU’s version of safe harbour as a user-upload platform, you may have to deploy a tech system to identify and block uploads of pirated content. The legislation talks about using ‘proportionate measures’, which is often a favourite word for European lawmakers, but ‘proportionate’ requires a benchmark. We could take a certain tech giant as a benchmark. Let’s say it’s a billion-dollar company and it spent \$100 million on its content blocking system. Would a new online service, worth only a tiny fraction of that amount, need to spend only a similar tiny fraction to build a content system? ‘Proportionate’ is a worrying word, and we will have to see how the directive is implemented, and then interpreted, by each EU member state”

Tom Frederikse, Partner, Clintons

“The copyright community stands ready to work with the Copyright Office, the administration, and other stakeholders to ensure that section 512 is an effective and meaningful statutory scheme to combat online infringement in the digital world. We are also prepared to work with online service providers and other stakeholders on voluntary agreements, technological solutions, standard technical measures, educational programmes, and any other initiatives that might help stem the tide of online infringement – and that is a sincere pledge. But as long as OSPs sit on the sidelines making empty gestures, creators across the United States will continue to be ravaged by the tremendous harms caused by online infringement”

Keith Kupferschmid, CEO, Copyright Alliance

SECTION 5

NEXT STEPS

It seems certain that the debate around the copyright safe harbour will be as loud as ever in 2021 in both Europe and North America.

Quite what new obligations and liabilities that will mean for internet companies remains unclear – even with Article 17 of the copyright directive that is already European law.

However, those obligations and liabilities will definitely change and will likely increase. A future white paper in the Building Trust series will delve deeper into the ongoing reforms in Europe, the US and elsewhere, and ask the experts what changes they think are most likely to occur in the years ahead and how internet companies should prepare.

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