A ‘Unitary Approach’ to Platforms and Intermediaries’ Liability

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Current Copyright System

• Divide between primary and secondary liability

• EU:
  – Full harmonization of primary liability for copyright infringement
  – Legal framework for secondary liability more ‘patchy’ (see Leistner, JIPLP 2014 75)
Result of the EU framework

- ‘Pressure’ against primary liability
  - CJEU in C-160/15 (GS Media)
  - AG in C-610/15 (Ziggo)
Article 13 CDSM Proposal

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.

• Is ‘provide to the public’ the same as ‘communication to the public’?
Recital 38(1) CDSM Proposal

Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

- Is this approach compatible with the concept of ‘communication to the public’ or does it go beyond this?
CJEU GS Media (C-160/15)

- Introduces subjective criteria to ‘communication to the public’
  - Knowledge or reasonable knowledge about unauthorized content
  - Rebuttable presumption of knowledge for ‘linkers’ acting for profit
  - Basis: «Does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet» (para 48, see also case C-162/10 (PPS) para. 31)
AG in Ziggo (C-610/15)

- The operator of a PtP network who is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible, carries out an act of communication to the public.
AG in Filmspeler (C-527/15)

• In relation to the reproduction right: «the subjective component is more appropriate for excluding personal liability than for deciding on objective unlawfulness and, as the case may be, the classification of the conduct» (para. 71)

• Still: Applies subjective criteria to the communication right (eg para 45): Plausible explanation: The knowledge of full consequences criterion (PPS para 31)
My opinion

- The blurring of primary/secondary liability distinction is symptomatic for the technological development which has led to the ‘collapse’ of the traditional copyright concepts

- Have launched ‘an alternative model’ for restructuring the economic rights in copyright, see Rognstad, J. Cop. Soc. USA 2015 503
The Current Structuring of Economic Rights: The Big Picture (Six Step-Structure)

- Exclusive Rights Definitions
- Exceptions and Limitations
- Secondary Liability
- Safe Harbors for Service Providers
- Protection of TPMs
- Exceptions

Possible Compensation Rules
Concerns (not exhaustive)

• (1) The current structure is extremely complex/complicated
• (2) Too much time/effort are spent on defining the exclusive rights
• (3) The exclusive rights concepts are not designed to reflect tradeoffs of interests
• (4) The concepts fit poorly with the technological development
• (5) So does also the «individual use based approach»
• (6) The main rule vs. exceptions kind of structure is prejudicial in favor of right holders
An Alternative Model: One-Step Structure

Exclusive Right to a Reasonable Exploitation of the Work

Supplement 1: Overriding Principles (Eg. Public Domain, Proportionality, Efficiency, Dignity, Freedom of Expression)

Supplement 2: Delineating rights by way of catalogue of non-exhaustive examples. Existing delineation (incl. exceptions and limitations) may serve, but no straitjacket
How does the model apply to intermediaries/platforms?
‘Alternative Model’

• Suggests a more comprehensive regulation of the intermediaries/platform problem addressing it directly, instead of the ‘either/or’ regulation

• Eg. leaving room for distinctions between competitive and complementary intermediaries, cf. the ‘Berliner Gedankenexperiment’, https://irights.info/2015/08/29/ein-gedankenexperiment-zur-neuordnung-des-urheberrechts/25980
What is ‘reasonable exploitation’?


• Based on a welfare economic approach; ‘incentive based’, but taking fundamental values into consideration
‘Operating Principle’

- give a creator exclusive rights with respect to acts that, as a consequence of the public good market failure, negatively and significantly affect the current or future exploitation opportunities for the right holder and hence negatively interfere with incentives to creation
Intermediaries/Platforms: Some key points

• Unauthorized distribution or exploitation of works undermines the basic control required for reasonable exploitation and may reduce incentives to invest in creating and exploiting works

• Problematic to enforce against users

• Against platform providers
  – damage of unauthorized distribution, and potential benefits of platform liability, has, to be weighed against dead weight losses and transaction costs concerned with such liability, including also potential chilling effects
Approaching Core Elements of Platforms Activity

• (1) Building infrastructure for sharing and accessing contents
  – Reasonable that the right holder controls?

• (2) Enabling access to content
  – Who shall be responsible for the establishment of rights clearance systems; right holders, users, platforms?

• (3) Acting upon knowledge of unauthorized content
  – Notice and take down/stay down procedures
In addition

• Room for intermediary solutions – compensation systems instead of exclusive rights/right to control where transaction costs concerned with enforcing rights are prohibitive
Function of the model

• As such: «Utopia»

• But may serve as an analytical framework for improving the current system
  – Eg. Commission Proposal: Blurs the distinction between primary and secondary liability, but is the solution reasonable?
Thank you for your attention