

**FIXING COPYRIGHT REFORM:
HOW TO ADDRESS ONLINE INFRINGEMENT AND BRIDGE THE VALUE GAP**

ABSTRACT
(474 words)

Research Question

How to achieve a fair, effective and future-proof reform of EU copyright law to address online copyright infringement?

Short Description

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 the so-called ‘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 Charter of Fundamental Rights.

This paper suggests 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 This problem is compounded by an increasingly outdated legal framework that allows infringing end-users to hide behind their online anonymity, while failing to provide any mechanism for the remuneration of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 two-pronged approach consisting of: (i) the adoption of a harmonised EU framework for accessory copyright liability; (ii) an alternative compensation system for right-holders covering non-commercial online use by individuals in the context of user-upload platforms.

Our proposal would allow breathing space for online platforms to conduct their business and innovate, while also adding a novel revenue stream for right-holders – especially for creators – and focusing enforcement measures on bad-faith platforms that foster large-scale infringement. Users and the public in general would benefit from a rich and diverse online ecosystem, where the risks of content censorship and enforcement in the private sphere are diminished, but possibilities for online enjoyment, expression and creation are promoted.

Methodology

The paper builds upon the authors’ pre-existing research into the respective areas of intermediary liability and alternative compensation systems. The perspective taken is a legal one and the analysis descriptive, as well as prescriptive/normative. The descriptive analysis focuses on the EU secondary law on copyright, in particular the Information Society Directive and the E-Commerce Directive, as interpreted by the CJEU. On this basis, the paper then proceeds to its normative offering, in the form of a two-pronged approach to online copyright infringement.

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