

**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 This problem is compounded by an increasingly outdated legal framework that allows infringing end-users to hide behind their online anonymity, while failing to provide any mechanism for the remuneration of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.

## REFERENCES

1. C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016)
2. C Angelopoulos, 'Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (January 2017), available at <https://ssrn.com/abstract=2947800>.
3. P S Davies, *Accessory Liability* (Hart Publishing 2015)
4. J Ginsburg, 'The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on *Brein v. Filmspelers* [C-527/15] (2017) and *Brein v. Ziggo* [C-610/15] (2017)
5. J Ginsburg and A Strowel, 'Copyright Liability for Hyperlinking in the U.S. and the EU', forthcoming in T Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2018).
6. R Hilty and A Bauer, 'Use of Protected Content on Online Platforms' in R Hilty and V Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (September 2017), Max Planck Institute for Innovation & Competition Research Paper No. 17-12. Available at <https://ssrn.com/abstract=3036787>, pp. 99-112.
7. M Leistner, 'Copyright Law on the Internet in Need of Revision: Hyperlinks, Online Platforms and Aggregators', *JIPLP* (2016) 12 (2), 136-149.
8. JP Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017).
9. JP Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public', *Journal of World Intellectual Property Law* (2018), <https://doi.org/10.1111/jwip.12107>.
10. M Senftleben *et al.*, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (October 2017), available at <https://ssrn.com/abstract=3054967>