

Hosting providers' safe harbour is not THE problem of copyright owners

The EU Ecommerce Directive envisages a number of immunities (known as safe harbours) that shield internet service providers (ISPs) from liability for third-party content that they transmit, cache or host.

In the context of its Digital Single Market Strategy the EU Commission is currently engaged in a discussion of whether the liability principles and rules contained in that EU directive for the benefit of ISPs should be amended.

With specific regard to copyright, one of the principal concerns relates to a particular type of ISP, ie hosting providers. Unlicensed hosting providers have been increasingly said to invoke the relevant safe harbour immunity in the EU Ecommerce Directive lacking the conditions for its application. This alleged abuse has led to a distortion of the online marketplace and the resulting 'value gap' indicated by some rightholders.

This Working Paper discusses a recent proposal advanced in France and advocating the removal – at the EU level – of the safe harbour protection for hosting providers that give access to copyright works. This would be necessary to enable the effective enforcement of copyright and related rights in the digital environment, particularly on platforms that disseminate protected content.

This Working Paper addresses some of the points raised by the French proposal. It concludes that the removal of the safe harbour protection for passive hosting providers that give access to copyright works would not provide any distinct advantages to copyright owners, at least in relation to the primary liability of ISPs. Overall, the current framework already sets an adequate degree of protection: what is required is a rigorous application by national courts of the principles enshrined in the EU Ecommerce Directive, as interpreted by the Court of Justice of the European Union.