

Regulating hosting ISPs' responsibilities for copyright infringement

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Summary

Hosting ISPs' services are featured with dual uses, which means their services can be used for both infringing and non-infringing purposes. In practice, many users upload materials copyrighted by others on hosting platforms without authorization, and a large number of these uploadings constitute copyright infringement. Because it is very much less cost-effective for copyright owners to sue Internet users who directly commit copyright infringement, copyright owners turn to hosting ISPs and request them as gatekeepers to be responsible for copyright infringement on their platforms. In the US, EU and China, lawsuits between copyright owners and hosting ISPs have occurred on a tremendous scale, which poses obstacles for hosting ISPs to conduct business in these jurisdictions. For these hosting ISPs which are operating or planning to operate in the US, EU and China, it is necessary to know the legal risks they face and then adapt their ways of operation so as to avoid these legal risks. Further, in order to ensure the freedom to operate of hosting ISPs, it is also necessary to examine whether current rules that regulate hosting ISPs' responsibilities for copyright infringement impose an unreasonable burden on them, and if the answer is "yes", how should current responsibility rules be adjusted so as to avoid imposing such an unreasonable burden, or is there any other way which can better regulate hosting ISPs' responsibilities for copyright infringement? In addition, the Internet is borderless, so hosting ISPs naturally have the advantage to conduct international business, but this advantage can decline if lacking the harmonization of rules that regulate their responsibilities for copyright infringement at the international level. In the US, EU and China, "safe harbor" provisions which grant hosting ISPs liability exemption under certain circumstances have been commonly adopted, so in this respect, a certain degree of harmonization has been reached. Nevertheless, the liability rules in the US, EU and China are diverse, and the courts in these jurisdictions tend to interpret "safe harbor" provisions in different ways, so hosting ISPs still face a high level of legal uncertainty when expanding their business in these jurisdictions. Therefore, it is necessary to check whether and how further harmonization can be achieved at the judicial level in the US, EU and China. Based on the above observations, Chapter 1 first narrates some background information of this study. Then it presents the research question: how to regulate hosting ISPs' responsibilities for copyright infringement while preserving their maximum freedom to operate in the US, EU and China? Thereafter, it introduces the methodology and outline of this study.

Chapter 2 narrates the rules that regulate hosting ISPs' responsibilities for copyright infringement in the US, EU and China, including the liability rules relevant to decide indirect copyright infringement and "safe harbor" provisions. It concludes that in the US, EU and China, the rules of indirect copyright infringement are diverse, but the liability exemption rules are substantially similar. Further, "safe harbor" provisions play an important role in regulating hosting ISPs' responsibilities for copyright infringement.

The introduction of responsibility rules in this Chapter provides the basis for the analysis of relevant case law in the next four chapters.

In the light of “safe harbor” provisions, hosting ISPs need to keep passive in operation so as to fall under “safe harbor”. Chapter 3 takes a comparative approach to examine how the courts in the US, EU and China interpret “keeping passive” in case law. Based on the examination of case law, it summarizes the circumstances in which courts hold hosting ISPs not qualifying for keeping passive, and they are: commercially exploiting the uploaded content, editing or categorizing the uploaded content, displaying its logo with uploaded content, requiring rights transfer by “terms and conditions,” and uploading some content by itself. Then, it concludes that these circumstances should not exclude hosting ISPs from “safe harbor” provisions, except editing, categorizing or actively exploiting the uploaded contents. Finally, this chapter asserts that it is unreasonable to require hosting ISPs to keep purely passive anymore. In order to preserve maximum freedom for hosting ISPs to operate, the following two criteria ought to be employed when deciding whether the management done by hosting ISPs is permissible: (1) check whether this management will result in a hosting ISP’s knowledge or control of uploaded content, (2) whether this management is conducive to preventing infringements or not. Once hosting ISPs fall under “safe harbor”, they still need to meet the prescribed conditions so as to be exempted from liability. Chapter 4 explores how the courts in the US, EU and China decide hosting ISPs’ copyright liability under the roof of “safe harbor” provisions. Generally, the courts evaluate the following factors: (1) hosting ISPs are not obligated to undertake general monitoring responsibility; (2) whether hosting ISPs have specific knowledge of infringement; (3) whether hosting ISPs take reasonable measures against repeat infringement; (4) whether hosting ISPs benefit from infringement; (5) whether hosting ISPs induce infringement, or intend to facilitate infringement. In the light of case law, factors (3) and (5) become much more important in deciding whether hosting ISPs are liable. Regarding factor (3), Chapter 4 asserts, specific monitoring against repeat infringement should not be defined as an obligation but rather a positive factor to grant hosting ISPs liability exemption. Regarding factor (5), Chapter 4 concludes that only when a hosting ISP bears a specific intent to induce copyright infringement, should it be held liable. Through interpreting factors (3) and (5) in these ways, it helps to preserve maximum freedom for hosting ISPs to operate in the US, EU and China.

Besides being subject to copyright liability under certain circumstances, hosting ISPs are also obligated to fulfill certain duties to facilitate copyright protection on their platforms. Chapters 5 and 6 explore the notice-and-takedown procedures and identity disclosure mechanism respectively. In the light of notice-and-takedown procedures, hosting ISPs need to expeditiously remove the alleged infringing materials upon receiving competent notices. Based on the examination of case law, Chapter 4 summarizes the main questions

that need to be dealt with by courts when ruling on notice-and-takedown procedures, and then concludes how these questions ought to be answered from the perspective of preserving hosting ISPs' freedom to operate. These questions are as follows: how to define a competent notice, how to deal with the defect notices, how to define "expeditiously remove", how to regulate the liability of wrong deletion, and the validity of *ex ante* notices. Overall, in notice-and-takedown procedures, copyright owners ought to shoulder the responsibility of seeking and identifying infringing materials, and the duty of hosting ISPs is to help copyright owners protect their rights, such as expeditiously removing the suspected infringing materials after receiving notices. Further, hosting ISPs also function as a communication conduit between copyright owners and Internet users, such as forwarding notices and counter notices. Regarding wrong deletion, more duties should be imposed upon copyright owners rather than on hosting ISPs in order to reduce it.

According to identity disclosure mechanisms, hosting ISPs are obligated to disclose the infringers' identities under certain circumstances. Based on the examination of identity disclosure mechanisms in the US, EU and China, Chapter 6 concludes that hosting ISPs' duties are mainly based on the answers to these two questions: (1) under what circumstances is a hosting ISP obligated to conduct disclosure; (2) to what extent should a hosting ISP disclose a suspected infringer's identity. Generally, hosting ISPs assume a passive obligation in identity disclosure mechanisms, and that is to disclose the identity information of alleged infringers to the extent that such information is available to them, upon receiving orders from competent third parties. Further, they are not responsible for the failure of identifying suspected infringers once they disclose the identity information retained by them. In addition, hosting ISPs should be forbidden to disclose their users' identity information to copyright owners without court orders. These duties require a little effort to fulfill, and do not unreasonably restrict hosting ISPs' freedom to operate. The disputes between copyright owners and hosting ISPs have not been solved through state regulation, so at private level, they start to cooperate and reach self-regulation so as to reduce the endless lawsuits. Chapter 7 explores two types of self-regulation which are codes of conduct and second level agreements. Compared with state regulation regimes, self-regulation can better preserve the freedom for hosting ISPs to operate. Within a self-regulation regime, hosting ISPs face more legal certainty in operation. Further, self-regulation can avoid imposing unreasonable burdens on hosting ISPs, and even entitle more freedom to hosting ISPs to commercially exploit the content on their platforms. Nevertheless, the applicability of self-regulation is limited, and particularly, small hosting ISPs have little chance join the self-regulation agreements controlled by several dominating market players. Further, self-regulation is generally the "best practice" reached between copyright owners and hosting ISPs, and may put Internet users' interests in danger. From the legal perspective, hosting ISPs can usually avoid being held liable for endangering Internet users' interests, because Internet users

need to agree with the “terms of services” before using the services, and the “terms of services” grant wide rights and liability exemptions to hosting ISPs. Nevertheless, the measures taken by hosting ISPs should avoid violating the mandatory norms which aim at protecting Internet users’ interests.

Finally, Chapter 8 summarizes and assesses the research findings in previous chapters, and then answers the main research question and sub-research questions. In addition, it also provides some recommendations for hosting ISPs who are currently conducting business or planning to operate in the US, EU and China. Furthermore, it addresses the limitations of this research and points out what could be done in the future.