

Regulating hosting ISPs' responsibilities for copyright infringement

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Valorization Addendum

1 Social and Economic Relevance

How to define hosting ISPs' responsibilities for copyright infringement on their platform has become an increasingly important issue in our society. In the last decade, with the development of information technologies, the services offered by hosting ISPs have been steadily updated. Because hosting ISPs' services are featured with dual-use, the update of hosting services not only helps the public to access lawful information more conveniently, but also allows copyrighted materials to be more easily shared and accessed without authorization. Copyright owners claim that copyright infringement on hosting platforms causes tremendous damage to them, and therefore request hosting ISPs to undertake more responsibilities to reduce copyright infringement. By contrast, hosting ISPs argue that imposing too many copyright responsibilities on them would stifle their freedom to operate. In the US, EU and China, lots of litigations have occurred between copyright owners and hosting ISPs, and different courts tend to interpret responsibility rules in different ways, which results in different impacts on hosting ISPs' freedom to operate.

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How much freedom hosting ISPs should have in operation is a question which generates substantial effect on **e-commerce**. The business engaged by hosting ISPs accounts for an important part in e-commerce. The hosting ISPs like YouTube, Facebook and eBay have been playing a leading role in e-commerce. Therefore, in order to promote the development of e-commerce, it is necessary to avoid imposing too burdensome copyright responsibilities on hosting ISPs so as to ensure their freedom to operate. If the legal risks faced by hosting ISPs are too high, there will be much less investment being poured in this sector, which is detrimental to e-commerce. First, technology innovators will lack incentives to develop and implement new technologies which can optimize their hosting services. Second, investors will reduce their capital investment in the hosting service industry because of the dim prospects to make profits. In the US, EU and China, although "safe harbor" provisions have been commonly adopted to ensure hosting ISPs' freedom to operate, the courts in these jurisdictions have developed several liability criteria which may impose too far-reaching obligations on hosting ISPs. These far-reaching obligations to a large extent increase the legal risks faced by hosting ISPs in operation. Particularly, for many start-up hosting ISPs, they may be not capable of fulfilling these obligations. This study examines the responsibility rules in the US, EU and China, and then suggests how these responsibility rules ought to be adjusted so as to avoid imposing unreasonable burden on hosting ISPs.

Benefiting from the borderless Internet, hosting ISPs naturally have the advantages to expand their business into other countries. However, in different jurisdictions, hosting ISPs are subject to different copyright responsibilities, which causes legal uncertainty for those hosting ISPs who operate internationally, and thus poses obstacles to the development of **cross-border** e-commerce. This study examines the legislations and

case law relevant to regulating hosting ISPs' responsibilities for copyright infringement, and then draws the copyright responsibilities imposed on hosting ISPs in the US, EU and China, which helps hosting ISPs map their legal risks in these jurisdictions. After knowing the legal risks, hosting ISPs can more easily make their business plans when operating in the US, EU and China. In addition, for the purpose of promoting cross-border e-commerce, it would be quite helpful to harmonize the rules that regulate hosting ISPs' copyright responsibilities in different jurisdictions. Currently, the "safe harbor" provisions are per se homogenous in the US, EU and China, so in this regard, certain harmonization has been achieved in regulating the copyright responsibilities of hosting ISPs. This study examines how the "safe harbor" provisions are interpreted by the courts in the US, EU and China, and then discusses whether and how further harmonization can be done in respect of interpreting "safe harbor" provisions.

With the development of information technologies, nearly all kinds of works, including books, music, movies, games and software, can easily be uploaded on hosting platforms without authorization. Copyright owners complain that infringement on hosting platforms results in huge damage on the **copyright industry**. This study bears in mind that hosting ISPs' freedom to operate should be restricted by copyright protection, and it is necessary to require hosting ISPs to undertake certain responsibilities for reducing copyright infringement on their platforms. In addition, this study also explores the self-regulation between copyright owners and hosting ISPs, and demonstrates how to reach mutually beneficial agreements regarding dealing with infringing materials on hosting platforms.

The copyright responsibilities imposed on hosting ISPs also affect the **Internet users' freedom of expression**. The services offered by hosting ISPs help Internet users access knowledge and information immensely. It is quite convenient for Internet users to find the information they need on hosting platforms. In addition, with the help of services offered by hosting ISPs, Internet users can not only passively receive the information they need, but also can actively engage in generating and distributing information. For instance, video-sharing websites like YouTube and Dailymotion not only allow Internet users to listen to music, watch and movies, but also allow them to share the videos generated by them with others; social networking platforms like Facebook and Twitter allow Internet users to post their opinions online and exchange their ideas with others. Therefore, the services offered by hosting ISPs enlarge the public's ability to the freedom of expression. If imposing too many copyright responsibilities on hosting ISPs, hosting ISPs may be forced to shut down their services, and there will be fewer hosting services that allow Internet users to access, generate and distribute information. Moreover, facing too high a level of legal risk, hosting ISPs may over-react towards the materials uploaded by Internet users, which causes lots of lawful materials to be taken down. This study recommends how to preserve maximum freedom for hosting ISPs to operate, which can generate a positive externality on Internet users' freedom of speech.

2 Target Groups

The results of this study should be interesting to various groups, including academics and practitioners, who are engaged in dealing with hosting ISPs' copyright responsibilities. This thesis takes a comparative approach to study the hosting ISPs' copyright responsibilities in the US, EU and China. The comparison covers the legislation, case decisions and self-regulation agreements, which could offer useful clues for **legislators** to revise the current law, for **judges** to decide the cases about hosting ISPs' copyright responsibilities, and for **copyright owners** and **hosting ISPs** to lay down their market plans.

All of the US, EU and China adopt "safe harbor" provisions at legislative level, which grant hosting ISPs liability exemption under certain conditions while requiring them to undertake certain duties so as to facilitate copyright enforcement on hosting platforms. In this regard, the laws that regulate hosting ISPs' copyright responsibilities are per se homogenous. Nevertheless, the norms provided by the "safe harbor" provisions in these jurisdictions are not the same. This study compares these different norms and finds out the different impacts resulting from these norms in practice. These findings can help legislators evaluate whether the norms concerned need to be revised and how to revise these norms.

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The result of this study should be of interest to copyright owners and hosting ISPs. This thesis not only examines the norms of hosting ISPs' copyright responsibilities at legislative level in the US, EU and China, but also examines how the courts in these jurisdictions interpret these norms when hearing relevant cases. From the perspective of copyright owners, the result of this study can help them evaluate the responsibility

norms in the US, EU and China, and then decide whether to sue hosting ISPs and choose the most suitable litigation strategies in these jurisdictions. From the perspective of hosting ISPs, the result of this study can help them evaluate the legal risks of conducting business in the US, EU and China, and then take the corresponding measures to reduce the legal risks they face in these jurisdictions. In addition, this study also covers the self-regulation agreements reached between copyright owners and hosting ISPs. These self-regulation agreements demonstrate how copyright owners and hosting ISPs cooperate with each other and solve the copyright disputes on hosting platforms. Copyright owners and hosting ISPs can learn from these self-regulation agreements, and reach similar agreements so as to settle the disputes between them.

3 Activities and Products

The result of this study will be published as a book. Therefore, it will be available to the people including students, academics, judges, legislators, policy makers, copyright owners and hosting ISPs who are interested in the topic of how to regulate hosting ISPs' responsibilities for copyright infringement. By reading this book, students and academics can know the rules of hosting ISPs' copyright responsibilities at both legislative and case law levels, and based on this knowledge, they can develop their own arguments and ideas on regulating the copyright responsibilities of hosting ISPs. In addition, this study also points out that some provisions in legislation need to be revised, and these recommendations may be considered by legislators. Besides, this study gives some recommendations on how to interpret current rules when deciding hosting ISPs' copyright responsibilities, which can be adopted by judges. Finally, as has already been mentioned above, copyright owners and hosting ISPs can make their litigation strategies by referring to this study.

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Parts of this study have been published in academic journals. For instance, Chapter 3 has been published in *European Intellectual Property Review*, and parts of Chapter 4 related to the US, Germany and China have been published in *International Review of Intellectual Property and Competition Law*. Further, parts of this study are results of the research projects that the author was engaged in. For instance, Part of Chapter 5 in relation to the EU and China is an updated version of a report submitted to China-EU Law School (Research project: "A Comparative Study on Secondary Liability of Hosting ISPs"). Part of Chapter 6 in relation to China is an updated version of a research report submitted to Google and University of Washington (Research Project: "UW-Google Intermediary Liability Research Project"). Chapter 7 is an updated version of a conference paper "Self-regulation: a New Way against Copyright Infringement on UGC Websites" which was presented at the "Intellectual Property Work-in-Progress Colloquium" held in the University of Washington. The feedback from other experts

made a great contribution to the improvement of this research.

Under the support of CESL (China-EU School of Law) and Prof. A.W.J. Kamperman Sanders, the author held a workshop “Secondary liability of hosting Internet Service Providers in the European Union” at the Faculty of Law in Maastricht University. The speakers at this workshop included several professors and lawyers from the Netherlands, Germany, Belgium and China, and the author benefited a lot from their presentations and comments.

4 Innovation

292 Although there exists a number of reports, research papers and publications which study hosting ISPs’ responsibilities for copyright infringement on their platforms, these research studies have not taken a comparative approach to comprehensively study the responsibility rules in the US, EU and China. In addition, the “safe harbor” provisions which regulate hosting ISPs’ copyright responsibilities in the US, EU and China are per se homogenous, but the courts in these jurisdictions interpret these homogenous rules in different ways. This study examines at length the relevant case law in the US, EU and China, and compares how the courts in these jurisdictions interpret the norms set in “safe harbor” provisions. Besides finding out the differences between case laws, this study also contributes to analyzing how these differences affect the freedom to operate of hosting ISPs. Moreover, based on the comparison, this study concludes how the norms in “safe harbor” provisions ought to be interpreted so as to preserve maximum freedom for hosting ISPs to operate in the US, EU and China.

In addition, this study does not stop by examining the traditional legal norms, and also contributes to exploring the self-regulation agreements reached between copyright owners and hosting ISPs. In order to solve copyright disputes on hosting platforms, a number of self-regulation agreements have been reached. This study examines self-regulation norms by comparing them with traditional legal norms, and then draws the advantages and disadvantages of self-regulation in respect of preserving the freedom to operate of hosting ISPs. Moreover, this study also provides several recommendations for these hosting ISPs who are currently operating or planning to operate in the US, EU and China.

5 Planning and Implementation

How to regulate hosting ISPs' responsibilities is still an ongoing issue that attracts the attention of academics and practitioners, so there are many seminars, workshops and conferences which discuss this issue each year. In the past years, the author joined several workshops which focused on discussing the liability of online intermediaries, and got much useful feedback from experts during the discussions with them. Therefore, the author plans to present the results of study in different seminars, workshops and conferences. By doing so, the results of the study can be better spread, and the author can also obtain comments or even critiques from other experts, which can contribute to improving the author's research.

The author plans to translate parts of this study into Chinese and get them published in Chinese journals. When China drafted its own "safe harbor" provisions, the legislators in China took DMCA § 512 and E-commerce Directive as two important references. The academics and practitioners in China should be quite interested to read this study, especially the parts about how the courts in the US and EU interpret the norms set in "safe harbor" provisions, and then learn a lesson from the case law in the US and EU. The author also plans to refine Chapters 5 and 6 of this thesis, and then publish them in English journals. These two chapters are the study results of two research projects that the author was engaged in. They take a comparative approach to study the notice-and-takedown procedures and identity disclosure mechanisms in the US, EU and China. The author believes that after refining, these two chapters can be accepted by the journals which are interested in publishing comparative study.

The Internet has become an important way for the public to access the information they need, so the author plans to publish parts of this study on the Internet. The Center for Internet and Society in Stanford University has been running a project called World Intermediary Liability Map (WILMap), which invited both academics and practitioners from the world to draw an intermediary liability map of their own jurisdictions. This study makes a comprehensive analysis about hosting ISPs' copyright responsibilities in China, and the WILMap is a perfect platform to publish this research. The author has already contributed several case decisions to the Chinese webpage and will continue to send other parts of the study to WILMap in the future.