Online intermediary liability and copyright enforcement

Position paper by Giuseppe Colangelo

Executive Summary

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1. The EU Commission is eager to reform the current rules governing Internet Service Providers' copyright liability. According to the Commission, online services providing access to copyright protected content uploaded by their users without the involvement of right holders have become main sources of access to content online. On this matter, a debate between right holders and digital players has been raising during the last years. The right holders complain about a so called "value gap", a lack of possibilities to determine whether, and under which conditions, their works and other subject-matters are used as well as their possibilities to get an appropriate remuneration for them (value gap). Digital players have challenged since the beginning this view, highlighting the positive impact of that the digital brings to the content industry (the very opposite of a value gap).

Notwithstanding this dichotomy, the Proposal for a Directive on copyright within the Digital Single Market proposed by the European Commission endorses the reported value gap approach and suggests to tackle it with a wider definition of the communication to the public and by imposing new control obligations on ISPs.

This approach raises a series of concerns mainly related to the coordination between the Copyright Proposal and the current legislative framework, and the lack of robust statistical evidence supporting the ratio of the intervention.

2. The real question underpinning the coordination between the Copyright Proposal and the current legislative framework is: **in light of Recital 38, it is not clear whether what is at stake is a communication to the public consistent with Article 3 of the InfoSoc Directive and how the goals of the Recital 38 and of Article 13 of the Proposal can be pursued without reforming Articles 14 and 15 of the E-Commerce Directive** and therefore radically affecting the framework of the intermediary liability regime.

At first sight, the intent of the Commission is to codify the CJEU case law, as the references to the active role of ISPs (imported from *Google France v. Louis Vuitton* and *L'Oréal v. EBay*) and to the adoption of technologies for content recognition (taken from the abovementioned *Scarlet* and *Netlog* judgments) could suggest. However, at a deeper analysis, the initiative of the Commission seems to go beyond the mere codification of the European case law, as the notion of the communication to the public right and the new ISPs' liability regime demonstrates. In particular, it seems that the Commission intervenes in this way on the regulatory framework so to better protect right holders from the new challenges posed by digital technologies.

Indeed, Recital 38 of the Proposal states that the ISPs that go beyond the mere provision of physical facilities and store and provide access to the public to copyrighted materials uploaded by their users are thereby performing an act of communication to the public.

Therefore, one should argue that either they conclude licensing agreements with the rights holders of those uploaded materials, or they are liable for a direct copyright infringement, that is, not in a contributory or vicarious way. However, **this notion of 'communication to the public' seems quite new, if compared with what the CJEU established by interpreting Article 3(1) of the InfoSoc Directive**.

Moreover, it does not seem that the CJEU in *The Pirate Bay* is willing to endorse the suggestions made by the Commission in its Copyright Proposal. In that case the Court states that it falls within the notion of communication to the public the case where an ISP makes publicly available infringing materials, since in this way the ISP facilitates the sharing by indexing metadata and providing a search engine. However, the Court references to the criteria – ISPs' awareness of the possible violations, the existence of a potential new audience, the interest to make a profit – it had already used to describe the act of communication to public. In addition, while Recital 38 and Article 13 of the Copyright Proposal refer to the E-Commerce Directive in order to re-define the boundaries of ISPs' safe harbor, *The Pirate Bay* decision does not even mention such Directive. Therefore, the 'interoperability code' that should make work *The Pirate Bay* case together with the E-Commerce Directive is not clear and this is consistent with the interpretation according to which the E-Commerce Directive should govern only secondary liability cases. Hence, the concern is that the Commission is trying to use the E-Commerce Directive to punish also cases of direct liability.

3. A further pitfall regards the possible 'active role' that ISPs could play in the spreading of illicit materials. On the one hand, it is stated that such active role of the ISPs prevents them from enjoying the safe harbor provided for by Article 14 of the E-Commerce Directive. On the other hand, any reference to the element of knowledge and control by the provider of a hosting service in relation to the stored materials is explicitly omitted, whereas it was explicitly requested by both the aforementioned Article 14 and *Google France* and *L'Oréal* judgments. Therefore, **it is hard to understand whether a hosting provider that optimizes the presentation of the materials uploaded by users is active or can still benefit from the immunity, even where such conduct occurs through an automatic process and, therefore, without knowledge or control of the materials**. If the first option were right, a *de facto* transformation of the liability regime of intermediaries would be realized: we would pass from a regime of responsibility for fault (such as that deriving from the notice-and-take down system enucleated in the E-Commerce Directive) to a regime of objective responsibility.

4. A similar problem emerges with regard to the obligation to adopt adequate and proportionate measures, such as technologies for content recognition, to ensure the functioning of licensing agreements.

First of all, Article 13 of the Copyright Proposal does not clearly identify the ISPs subject to this obligation. Indeed, the reference to the generic threshold («large amounts of works») is only a source of confusion and uncertainty that cannot operate any real discrimination among providers. Moreover, in *Scarlet* and *Netlog* the CJEU has defined the conditions under which a filtering system is compatible with Article 15 of E-Commerce Directive, that is, with both the prohibition to impose ISPs a general obligation to monitor the information they transmit or memorize and with the general obligation for ISPs to actively seek facts or circumstances that indicate the presence of illicit activities.

From the Copyright Proposal, instead, **it is not clear how these filtering measures should work in practice and, in particular, if the Commission simply intends to codify what the CJEU has stated, or if it wants to broaden the obligation to impose the adoption of content recognition technologies.** In this last scenario, then, the Commission should also clarify how such a choice would fit with Article 15 of the E-Commerce Directive. Moreover, no redress mechanism is provided for the hypothesis that legal contents are removed.

From a policy perspective, then, one should take into consideration **the economic impact a mandatory provision imposing the abovementioned technologies**. Recent studies have indeed reported that filtering technologies do not only bear high costs that would be unsustainable for start-ups and small ISPs, but also have a limited effectiveness, as they are easy to circumvent and however unable to identify numerous types of files and contents.

5. The critical issues highlighted with respect to the European project to reform the liability of ISPs for copyright infringement are not limited to legislative drafting and coordination with the current regulatory framework.

A reform of the discipline of copyright in the digital field postulates not only the identification of a market failure, but also the presentation of clear and unequivocal empirical evidence to support the thesis advocated. Unfortunately, the structure outlined by the proposed Directive is not supported by any empirical evidence. And this starting right from the ratio of the intervention, that is, from the reported value gap and the consequent need to assure the right holders of an adequate remuneration for the circulation of works on the Internet.

The lack of robust statistical evidence of displacement of sales by online copyright infringements undermines the ratio of the intervention. The empirical evidence is called to support the economic justifications put forward for regulatory intervention. It is therefore legitimate to expect and to pretend that the thesis of the value gap is supported by studies and analyzes that provide indications on the size of the problem and its causes. The same methodological path should accompany the provision of new measures for ISPs.

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