

Copyright Rules for UGC Platforms: From the Safe Harbor Rule to a Levy Scheme

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ABSTRACT

The safe harbor rule was introduced to exempt Internet service providers (ISPs) from liability for copyright infringement committed by ISP users. Nevertheless, the safe harbor rule was crafted for ISPs that provide passive, content-neutral service to distribute copyrighted works. Therefore, the safe harbor rule is difficult to accommodate UGC (user-generated-content) platforms due to their active role in facilitating the distribution and even the creation of copyrighted works. The uncertainty of UGC platforms' liability has led copyright owners to directly target individual UGC creators. In order to unleash the creativity of users without harming the interests of copyright owners, a levy scheme should be introduced. Under the levy scheme, users are allowed to freely use copyrighted works to create UGC for non-commercial purpose. UGC platforms are required to remunerate the copyright owners of the copyrighted works used in the UGC posted on the platforms based on the popularity of the UGC.

1. Introduction

The Internet age features a sharp drop of the cost to distribute and share copyrighted works, followed by large-scale copyright infringement. Due to the large number of actual infringers, i.e., internet users, and the high cost of launching lawsuits against individual users, copyright owners have tended to shift their target to distribution intermediaries with deep pockets, i.e., internet service providers (ISPs) [1]. Nevertheless, with the ambition to promote information technology to achieve competitive advantages in the global market, legislators have decided to side with ISPs. The two most representative copyright laws in the early Internet age, the Digital Millennium Copyright Act (DMCA) enacted by the US in 1998 and the

Electronic Commerce Directive (eCommerce Directive) passed in the EU in 2000, were both characterized by such national strategy. The most obvious manifestation of such strategy is called the safe harbor doctrine, a rule that exempts certain Internet service providers (ISPs) from liability for copyright infringements committed by ISP users.

The ISPs shielded by the safe harbor rule do not facilitate or profit from the distribution of copyrighted works, but merely transmit, cache, store and locate copyrighted works as passive conduits [2]. In other words, these ISPs have played a passive role in distributing copyrighted content. The safe harbor rule has indeed encouraged the development of information technology, as the legislators wished. However, the breathing

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space provided by the robust safe harbor doctrine has engendered new online intermediaries that the legislators did not anticipate. These online platforms have played a much more active role in distributing or even producing copyrighted content, and thus it is difficult to be accommodated by the safe harbor rule. One example is UGC (user-generated-content) platforms, such as YouTube, Tiktok and Wechat.

This article articulates the need for a new copyright rule governing UGC platforms. By analyzing the origin and purpose of the safe harbor doctrine, Section 2 explains the reason for crafting it in the Web 1.0 era. Section 3 describes how the safe harbor doctrine cannot be adapted to UGC platforms, and the inefficiency and injustice of imposing liability on individual users. The article concludes with a call for a levy scheme for UGC platforms to balance the interests of users, copyright owners and online platforms.

2. The Origin and Purpose of the Safe Harbor Rule

The safe harbor doctrine is generally considered to be proposed to develop domestic Internet technologies to maintain a national competitive edge in the 21st century. As the U.S. congressional report noted, ISPs' liability for third-party infringement required clarification for fear that ISPs 'may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet'^[3]. This article argues that a more essential but often overlooked reason for introducing the safe harbor doctrine is that ISPs played a much more passive role in distributing copyrighted works than previous distributors had.

In the pre-Internet age, some distributors, such as broadcasters and cable television operators, directly used the copyrighted works. In this article, they are referred to as user-distributors. User-distributors directly subject to the proprietary copyright rules as they are the users. Some distributors, such as the video cassette recorders and digital audio recorders, did not directly use the copyrighted works, but provided devices to facilitate the use of the works and profited from users' use of copyrighted work. In this article, this category of distributors is referred to as facilitator-distributors. They are usually subject to levy schemes under which facilitator-distributors need to remunerate copyright owners while users can freely use copyrighted material for non-commercial purpose^[4].

ISPs under the safe harbor doctrine have played an even more passive role than facilitator-distributors. The safe harbor doctrine only applies to ISPs that perform

the following functions: (i) transitory digital network communications, (ii) system caching, (iii) storage of information at the direction of the users and (iv) information location tools^[5]. These ISPs do not supply tools to facilitate users' distribution of copyrighted works, but merely provide technical, passive and content-neutral services for copyrighted works generated by third parties. ISPs' passiveness and neutrality are the prerequisites for them to enter the safe harbor.

3. Inadaptability of the Safe Harbor Rule to UGC Platforms

UGC (user-generated-content), which refers to content created or re-created by amateurs online, has attracted the attention of copyright owners as most UGC have used and adapted others' copyrighted material. UGC creators who use others' copyrighted material to create UGC may constitute infringement, but UGC platforms seem to be sheltered by the safe harbor doctrine as they seem to meet the category of "storage of information at the direction of the users". Nevertheless, case law has shown the hesitance of courts to place UGC platforms into the safe harbor^[6].

This article finds that the uncertainty of the applicability of the safe harbor doctrine to UGC platforms is rooted in the UGC platforms' active and volitional role in the management and even promotion of content. UGC is characterized by the decentralization of content production. In the pre-Internet era, content production engendered enormous cost and could only be undertaken by professional producers such as publishing houses. Producers were motivated to select a few high-quality creations to recoup investment. In this sense, producers acted as a filter of content. In the UGC age, every user can make their creation available to the public regardless of the quality of the content. Decentralized and abundant creations call for a centralized intermediary to manage and organize the content. UGC platforms have emerged to take on this role by, for example, categorizing unordered UGC according to individualized preferences, guiding content production by cooperating with MCNs (Multi-Channel Networks), and enhancing the appeal of UGC by promoting the interaction between UGC creators and users^[7].

Furthermore, UGC platforms can draw direct financial benefits such as advertisement from popular UGC. For example, YouTube was valued at US\$170 billion in 2020 with more than 500 hours of videos uploaded per minute^[8]. Wechat's revenue reached RMB 108.2 billion in 2020, an increase of nearly 20% compared to 2019^[9]. In a word, UGC platforms have gone far beyond ISPs' passive, content-neutral and profit-free role assumed by

the legislators of the safe harbor rule, but have played a role more like facilitator-distributor.

The uncertainty of whether UGC platforms should be liable for copyright infringement, in turn, has encouraged the cooperation of UGC platforms and copyright owners against users^[10]. By requiring UGC platforms to disclose information of the infringing users, copyright owners can directly launch lawsuits against the users. Although most of the creation and the use of UGC is non-commercial, copyright owners claimed that the wide distribution of UGC would unreasonably prejudice their legitimate interests and seize their opportunity to make derivative works^[11]. Nevertheless, imposing liability on individual users for their non-commercial use of copyrighted works is unfair and would hamper users' creativity and privacy. Furthermore, it would encourage violations of the law. Given the countless number of individual users and the cost of litigation, targeted users would be randomly chosen. If a user knows that there is only a small probability of being sued and that s/he cannot control such probability, s/he would have no incentive to obey the law^[12]. Furthermore, copyright owners would have difficulties in enforcing their copyright due to the high cost of litigation. The uncertainty of the safe harbor rule would also prevent UGC platforms from making technological innovation to promote the creation and management of UGC. It is urgent to craft a new copyright rule addressing the copyright infringement committed by platform users.

4. A Levy Scheme for UGC Platforms

This article proposes a levy scheme imposed on UGC platforms. The history of copyright law indicates that distributors' liability is equivalent to the role they play in the distribution of works. User-distributors are subject to proprietary rules under the exclusive copyright regime as they directly use copyrighted works. Facilitator-distributors are subject to levy schemes since they do not use but facilitate users to use of copyrighted works, and gain profit from users' use. ISPs that do not facilitate the use of copyrighted works, but merely provide technical, passive and content-neutral services to distribute copyrighted works are therefore sheltered by the safe harbor rule. UGC platforms do not directly use copyrighted works, but promote the dissemination and even the creation of copyrighted works and benefit from it. Therefore, UGC platforms have assumed the role of facilitator-distributors rather than the role of the passive, content-neutral ISPs. Accordingly, UGC platforms should be regulated by a levy scheme.

The levy scheme is not only faithful to earlier copyright history, but also responds well to actual needs

of spurring creativity brought by the decentralization of content production and distribution. Users are free to use copyrighted material to create UGC for non-commercial purposes. UGC platforms should make reasonable payment, i.e., levies, to copyright owners of the copyrighted works used in the UGC posted on the platforms according to the popularity of the UGC. In this way, users can acquire breathing space for private use and re-creation. Copyright owners can gain fair remuneration of their works. UGC platforms can save the cost of monitoring and avoid legal risks.

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