

The Best Available Technology Standard

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IPSC 2011

Significance

- The scope and extent of webhosts liability is an important determinant of the future of the internet.
- Concern for liability may stunt growth of the internet.
- The need to fight legal battles may lead to the demise of small webhosts even if claims against them are without merit.
- Large-scale copyright infringement online must be addressed

Copyright Liability of Webhosts

- In principle, webhosts are exposed to direct, contributory and vicarious liability for reproducing, distributing, displaying, performing, and in some case, adapting copyrighted content without permission.

Extant Regime

- Section 512(c) Safe Harbor (monetary liability)
 - Ex ante, encourages webhosts to remain passive; discourages monitoring by webhosts, except in red flag cases (interpreted very narrowly).
 - Ex post, encourages reactive behavior of webhosts. Notice and take down procedure.
 - Consequently, webhosts have a disincentive to monitor; may lose safe harbor status.

Cost of Present Regime

1. Disincentivizes monitoring by webhosts.
2. Generates high level of uncertainty—rule riddled with exceptions. As a result, current safe harbor foments unnecessary litigation.
3. Fails to spur competition in the market for filtering technologies.
4. Harms to speech and users interests, resulting from private ordering and placement of enforcement in the hands of rightsholders).

Our Proposal

- Redesign safe harbor—
Webhosts that employ the best available filtering technology will be exempt from liability for infringing content uploaded by end users (direct and derivative liability).

Theory

- Design principle: place cost on least cost avoider.
- In this case, the burden of preventing copyright infringements should be divided as follows:
 - Copyright Owners should bear the burden of notification of what works are copyrighted.
 - Webhosts should bear the burden of screening out infringing content.
 - Technology companies will bear the burden of developing filtering technologies.

Implementation

Step 1:

Establish a single database under auspices of copyright office, or a private agency, onto which content owners can inform of content.

Step 2:

Determine “best available technology,” or, more accurately, **technologies**. Task to be performed by a body of **experts**. (Agency at the Copyright Office, after consulting members of the copyright and technology industries, webhosts and the general public.)

Implementation (con'd)

Step 3:

create several filtering clearinghouses to review user content before it is uploaded.

But, allow in-house filtering to big webhosts that prefer to do so.

Potential Advantages

1. Adaptive legal standard that spurs competition among technology providers.
2. Better enforcement of copyright law.
3. Certainty for webhosts.

Potential Challenges & Problems

1. Tolerated Uses.
2. Fair Use.
3. Improvements.

Possible Extensions

- Providers of Peer-2-Peer technologies—may work.
- Internet Service Providers—unclear. Need to proceed with caution.