

ECONOMIC ANALYSIS OF SAFE HARBOR PROVISIONS

Professor Liebowitz has conducted what is to date the most detailed economic examination of how copyright owners have been damaged by what is known as the “safe harbour” exception in copyright law. The safe harbour was intended to protect Internet service providers from copyright liability in case its users uploaded copyrighted content, on the condition that any infringing content would be expeditiously removed when copyright owners objected (notice and takedown). Safe harbour legislation came about in the mid-90s, long before websites specializing in user uploaded content (UUCs), such as YouTube, came into existence.

The Liebowitz study clarifies how the safe harbor, contrary to its intended purpose, creates an inefficient and unfair advantage for UUCs when bargaining with copyright owners, meaning that UUCs either do not pay for copyright permissions or, if they pay something, they pay less than the market rate. The reduced copyright payments caused by the uneven bargaining position has been described by copyright owners as the “value gap” or “transfer of value”.

The Liebowitz study broadens the usual analysis to include the impact of safe harbours on the entire competitive music landscape, and not just UUCs. It demonstrates that safe harbor laws disadvantage music services that are not UUCs (permission based services such as Spotify and Apple Music) compared with UUC platforms. Competing at a disadvantage to UUC sites causes traditional permission-based vendors to have lower revenues (and user bases) than they would have had, if not for the distorting effects of the safe harbor legislation. The reduced revenues of these traditional vendors cause their copyright payments to decline (relative to what they would have been without safe harbors) and the extent of this decline might be a very substantial addition to the decline that has until now been the focus of value gap discussions.

The study further broadens the analysis by recognizing that some UUC sites provide information that is valued and monetized by companies commercially affiliated with them. For example, Google uses information provided by its wholly owned subsidiary and the largest UUC site, YouTube, to learn more about its users. This should enhance YouTube’s value to Google above and beyond the advertising revenues generated by YouTube. Thus, in a properly functioning market, YouTube would be expected to pay more for copyright permissions than would an otherwise equivalent stand-alone music site, causing prior estimates of the value gap that do not include this factor, to be too low.

Professor Liebowitz then describes how safe harbours could allow UUCs to create business models based mainly upon the avoidance of copyright payments. He then backs up this analysis by profiling an actual example of such an entity (Grooveshark), whose business model was to use the safe harbour to avoid having to pay anything to copyright owners as it grew to a large size.

Finally, the study directly addresses Google’s critique of the claims that the safe harbor harms copyright owners, a critique that is based on YouTube’s “Content ID” system, a method of identifying and removing illegal content from the system. The study first notes that the safe harbour prevents YouTube from having the proper incentives to produce an efficient content ID system. The study then provides evidence that the current content ID system is insufficiently accurate to alter the prior conclusions about the harm caused by the safe harbour. The study concludes with an explanation, and an illustration, of how the damage to copyright owners from the distortionary impacts of the safe harbor may be estimated.