

Executive Summary

We now live in a 24/7 digital age – the internet, mobile communications, satellite television, wireless computers and instant access have all radically changed the way we work, live and play. At astounding speeds we now have access to the kind of information, news, and entertainment which was previously only reserved for science fiction novels. But with success and change also come difficulties.

A clear example is the case of intellectual property protection on the internet. Concomitant with the digitisation of our lives has been a transformation in the shape of our economies which are now, predominantly, based around the selling and provision of services, rather than industry or manufacturing. The recent growth in Knowledge Intensive Industries (KIIs) and so-called creative products has been phenomenal, but in an online, digital age the problem of intellectual property infringement is greater and more acute than ever.

In this context, the recent conflict over copyright abuse has largely taken place between the creators of content, the copyright holders, and internet mediators – in other words, the search engines, data aggregation and download sites. Indeed, the number of pending and decided court cases in the United States in the past 10 years attests to this. The biggest manifestation of this conflict is the pending court case of *Viacom v YouTube*.

The purpose of this paper is to put this debate on internet mediators and the protection of intellectual property into a theoretical as well as practical context. The paper examines and analyses what the concept of intellectual property rights (IPRs) entails from an economic point of view, as well as from a legal and practical perspective. This includes analysing a number of past court cases concerning the concepts fair use and safe harbor. These two legal concepts are very important because they have come to set the tone for US law and the US court's philosophical approach towards the protection of copyright.

The idea of fair use is to devise the right balance between the interests of the great mass of people who would like to access copyrighted material, and the interests of those who hold the copyrights. With a set of similar goals, the safe harbor provision of the 1998 Digital Millennium Copyright Act (DMCA) sought to ensure that providers of online services were not limited in the kind of service they could offer consumers by the illegal acts of third party users. This has also been a useful piece of legislation as it has allowed search engines and internet mediators to maintain a degree of freedom of operation and non-liability with regards to the third-party actions of their users.

From the current evidence it is clear that the concepts of fair use and safe harbor are no longer adequately balancing the interests of creators of knowledge and content with those of internet mediators and the general public. While the intent of both fair use and safe harbor are laudable – and these copyright principles should be protected and relied upon – the current situation in which the

safe harbor provision puts the onus of policing the internet for copyright infringement on the creators of content is unsatisfactory. In the long run, copyright infringement hurts everyone – creators, internet mediators, as well as the general public. It is therefore imperative that internet mediators to a greater extent share that responsibility with the creators of content. To this end, this paper makes 3 main policy recommendations:

- The principle of safe harbour (as expressed in the Digital Millennium Copyright Act) needs to be redefined and a due diligence clause on the part of mediators needs to be inserted;
- If the technology to filter out copyright content is not available and the sheer volume of such infringements is too great for even mediators to deal with, then some form of monetary compensation to copyright holders must be established. Such a levy system should be used as a supplement to cases in which the technology to hinder such infringement combined with practical considerations – in this case the sheer scope of the web – place severe limits on the extent to which copyright can be enforced; and
- Finally, the balance established in *Sony v Universal* must be upheld and reinforced with regards to search engines and data aggregations sites – so that their noninfringing use and benefits should overwhelmingly outweigh any activity that may lead to the infringement and violation of IPRs.

While perhaps not providing a definitive answer to the current dispute over intellectual property protection between internet mediators and creators of content, these policy recommendations point the respective parties in a direction which recognises the important contributions both parties make to the public, yet also balances their responsibilities and seeks to protect their core business models.