

## Major Challenges in Digital Contents Copyright Protection

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**Abstract.** This work aims to study how major digital platforms deal with copyright protection in the year 2019 while also complying with many other regulations originating from different countries. Introducing firstly with a study case where it will be recognized what kind of regulations do digital platforms tend to comply with in order not to be held accountable with copyright claims and since digital content can be accessed worldwide, it will be presented a comparison between regulations from the United States of America and Europe. Finally, as per the addition of the new Copyright Directive in the Digital Single Market to Europe regulations, more accurately the Article 17, it will also be mentioned the conflict it came to with the American Safe Harbor Law.

**Keywords:** Copyright, Rights Protection, Digital Platforms, Digital Millennium Copyright Act, Fair Use, Safe Harbor, Information Society Directive, Exceptions and Limitations, Copyright in the Digital Single Market, Article 17.

### 1 Introduction

Digital content, also known as digital media, is anything that exists in the form of digital data. It is known, but not limited, to be digital files that can be uploaded, broadcasted or streamed to a cloud storage service, digital file-sharing platform or another computer.

With the evolution of technology, the meaning of the word copyright has also matured from being directly associated with the use of the printing press to today's definition.

“In an era of restriction, copyright was a permission. In an era of freedom, it became a restriction.”[1]

Copyright is now defined by Lexico Dictionary as the exclusive and assignable legal right, given to the originator for a fixed number of years, to print, publish, perform, film, or record literary, artistic, or musical material [2].

Many people have the misconception that copyright is something you apply to, but the truth is, once you create something in a fixed form, in a range of media content, writing, visual art, etc. , you automatically have the copyright of that content.

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Of course, that is not enough if you want to take legal action against someone who infringed on your copyright. For that, the copyright must be registered so it can be legally established with a date of creation, as well as have the creator as the copyright owner of the work.

Copyright Protection constitutes a wide range of content protection by various holders, and in this article will be given attention specifically to digital contents and to how digital platforms comply with the regulations that every country or country union imposes. Sector 2 will be detailing what regulations digital platforms follow, how they act to remove copyrighted content from their platforms and also tackling the matter of what should happen if copyright holders engage in abusive or improper conduct in exploiting or enforcing the copyright.

Sector 3 will start by explaining some United States Regulations such as the Digital Millennium Copyright Act, the Fair Use Doctrine and the Safe Harbor provision.

Proceeding with some European Regulations, such as the Copyright in the Information Society Directive, which also includes an “Exceptions and Limitations” clause.

It will be given a comparison between the previously stated countries' regulations. This Sector will be finalized with an interpretation of the newly added Article 17 to European Regulations.

## **2 Digital Platforms compliance with regulations**

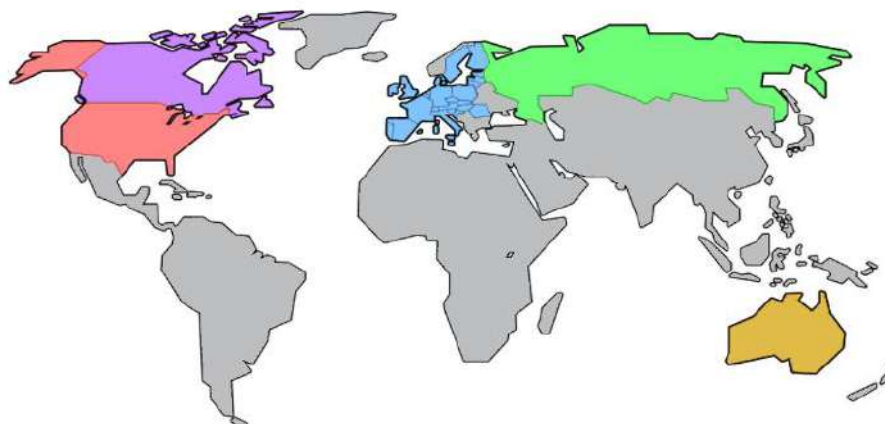
Every company has to follow their countries regulations, but what happens if one is multinational with millions of users around the world. This section will analyze what regulations these Digital Platforms follow, how they act when they have the need to remove Copyrighted works from their service, and it will be displayed a few examples of improper conduct on Copyright enforcement.

### **2.1 What regulations they follow**

With the evolution of the Internet, people's understanding of its properties has also evolved. In a world where everything is connected the probability of a person using any type of copyrighted work has risen to a point where digital content provider platforms had to make drastic changes to their systems so they could detect that type of behavior, creating services and algorithms to follow the regulations they were set.

It's hard to express with accuracy which regulations they follow but, stating that Digital Platforms tend to obey the strictest or most advanced set of laws available from each country would be a fair assessment, as it would be easier to enforce the same rules universally.

If the previous statement is considered valid, the following two figures will present a possible before and after states, within a small sample of countries, where these countries have different Copyright Regulations and what happens after these laws are applied globally by Digital Platforms.



**Fig. 1.** Depiction of a few select Countries with different Copyright Regulations



**Fig. 2.** Depiction of a few select Countries that were applied with the same Copyright Regulations globally by Digital Content Provider Platforms

Using the new General Data Protection Regulation (GDPR) as an example, Digital Platforms not based in the European Union would have no need to enforce this regulation if they had no clients who resided in the EU as written in Article 3 – Territorial Scope of the General Data Protection Regulation:

“2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

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(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”[4]

This regulation, once it was put into action, made a ripple effect on the internet. Every Digital Platform, even those not based in Europe, had to rewrite their privacy policies and, in turn, update the users of the changes to accommodate this new European directive.

## 2.2 How they act to remove copyrighted content

Using the platform YouTube as a study case, Copyright holders can use one of their services called Content ID “to easily identify and manage their content”[3] on the platform.

With this service, Copyright owners can choose one of three options, between:

- blocking a video from being viewed;
- monetizing the Video by running ads against it and in some cases sharing the revenue with the uploader; and
- tracking a video’s viewership statistics. [3]

Copyright holders can also issue a takedown notice and, once it's complete and valid, YouTube has to remove the content as it's required by law. If the creator thinks the takedown was wrongfully issued, falling into the fair use doctrine, he can then send a counter-notification to the Digital Platform which forwards it to the person/company who requested the removal.

If there is an impasse between both parties, it would be up to them to settle the issue in court. [5]

## 2.3 Improper conduct on Copyright Enforcement

In the study case of YouTube, as this platform can’t serve as a mediator, if the creator of content considers the content in question not in the right of being copyrighted, he can take the matter into court so it can be decided by an impartial jury.

For instance, until late 2018, Sony Music Entertainment was claiming 47 seconds of music from the composer Bach to anyone who posted it on Facebook. It is unclear whether it was caused by a takedown algorithm or an employee at Sony.[6] This displays a great example of how people or faulty algorithms can still make mistakes by copyrighting content from a Composer that died in the 1750s when it is known that Copyright Protections endures for the life of its owner with an additional 70 years.[7] It was also made known that the European Union was, at that time, debating the implementation of these algorithm filters “on all major technology platforms that host

user content.”[6] Concluding with a statement that if the proposal became law, “it was approved by the European Parliament on Wednesday”(at the time)[6], users could end up suffering from these mistakes more often.

### **3 United States and European relevant regulations**

This section will analyze the most relevant regulations from the United States and Europe to the topic at hand and will also compare them.

#### **3.1 United States Regulations**

##### *Digital Millennium Copyright Act (DMCA)*

The Digital Millennium Copyright Act is a copyright law that “addresses the rights and obligations of owners of copyrighted material who believe their rights under U.S. copyright law have been infringed”. [8]

But "With the continuing evolution of the digital age, the U.S. Copyright Office has gravitated from its original purpose of registering copyrights and serving as a copyright records office, to regulating copyright and copyright use through the implementation of laws, such as the DMCA"[9], not only including the discussed subject of this paper but also a wide range of Copyright and Security-related matters, such as the exception of Copyright for Security Testing which "permits circumvention of access control measures, and the development of technological means for such circumvention, for the purpose of testing the security of a computer, computer system or computer network, with the authorization of its owner or operator." [10].

On account of this copyright law, media companies are able to issue takedown notices to website owners, requesting the removal of infringing content on their website as written under Title II - Online Copyright Infringement Liability Limitation Act where “Under the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider’s designated agent”. [10]

While companies can issue takedown notices when their copyright is infringed, they also have to beware of existing exceptions, so that creators can make their content.

One of the main exceptions comes with the Fair Use Doctrine, which allows creators to use as a defense to copyright claims on the use of creative works.

##### *Fair Use Doctrine*

The United States Fair Use Doctrine would allow the use of copyrighted content for specific purposes with the intention of balancing copyright owners' interests with the public, to promote freedom of expression. [11]

This ruling, written in Section 107 of the Copyright Act "provides the statutory framework for determining whether something is a fair use "[11] while also identify-

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ing a few examples, such as criticism, comment, news reporting, teaching, scholarship, and research.[11]

When evaluating these activities to consider them as Fair Use, Section 107 considers four factors:

- Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; [11]
  - where courts verify how the party claiming fair use is using the copyrighted work. [11]
- Nature of the copyrighted work; [11]
  - This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. [11]
- Amount and substantiality of the portion used in relation to the copyrighted work as a whole; [11]
  - where courts look at both the quantity and quality of the copyrighted material that was used. [11]
- Effect of the use upon the potential market for or value of the copyrighted work;
  - In this last factor courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work.[11]

When the claimed content is deemed as “Fair” under Section 107 of the Copyright Act, the Digital Platforms are allowed to re-enable the display of the content in question.

### *Safe Harbor*

Safe harbor is a provision of the "Online Copyright Infringement Liability Limitation Act"[10] that shields Digital Content providers from being liable for the infringing acts of Content Creators.

These Digital Content providers are considered only a middleman for their users, intending to provide a simpler and efficient way to share content not actively engaging in infringing activities whenever they happen, which means they should be protected against these actions.

According to the statute "Limitation for Information Residing on Systems or Networks at the Direction of Users"[10], Digital Content providers are eligible for this limitation when they meet one of the following conditions:

- “The provider must not have the requisite level of knowledge of the infringing activity, as described below;” [10]
- “If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity;” [10]
- “Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.” [10]

### 3.2 European

#### *Copyright in the Information Society Directive*

The Information Society Directive is a regulation enacted by the European Union in 2001 to implement the World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty).

This directive addresses and explains the definitions of the exclusive rights granted to copyright holders, differentiating article 2's "reproduction right" from article 3's "communication to the public".[11]

The fifth article covers "Exceptions and limitations" of this regulation expressing how these may apply to articles 2, 3 and 4. These constraints permit the use (in this case private copying) of copyrighted works under a certain amount of leniency, as said in addendum number 52 of the Information Society Directive: "Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation"[13]. If these constraints are exploited, it could be provided legal action to cease any abusive activity.

The third point on the fifth article is the U.S. Fair Use Doctrine equivalent pointing out the exception cases where user created content are considered permitted, a few being:

- "the sole purpose of illustration for teaching or scientific research" [13] Article 5 3(a);
- "quotations for purposes such as criticism or review" [13] Article 5 3(d);
- "use for the purpose of caricature, parody or pastiche" [13] Article 5 3(k);

Addendum 59 of the Information Society Directive includes that even in cases exempt under Article 5, Exceptions and Limitations, "rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter"[13].

### 3.3 Comparing United States and European regulations

United States and European regulations are similar in nature, both exercising the WIPO Copyright Treaty, which provides a "basis for the digital protection for the countries throughout the world through its convention and treaties"[14].

With the U.S. Digital Millennium Copyright Act, rightholders are able to perform Takedown Notices against the Copyright infringer which is processed by the Digital Platform, and, with the Information Society Directive, rightholders can file an injunction for the same purpose.

The Fair Use doctrine from Section 107 of the U.S. Copyright Act provides a list of exemplary exceptions where the use of copyrighted works is considered "fair". The permitted "Exceptions" from Article 5 of the Information Society Directive present a list of "Exceptions and Limitations" where the use of copyrighted works is permitted.

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Although similar, the European Copyright Directive becomes more restrictive because of the way it was written. Users could claim an alleged fair use right under DMCA regulations but that could not be deemed as such under EU's Copyright Laws.

### 3.4 Addition of Article 17 to European Regulations

As of June 2019, the Directive on Copyright in the Digital Single Market was published to complement and enforce a new set of jurisdictions on a few particular Directives: " 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU of the European Parliament and of the Council"[15].

This Directive was conceived with the intent to contribute "to the proper functioning of the internal market" and to stimulate innovation and creativity.[15]

This topic will focus on this regulation's article 17, which is the most relevant to the current work, and relevant paragraphs.

Article 17, "Use of protected content by online content-sharing service providers"[15], states that these Digital Platforms should "obtain an authorization from the rightholders" in order to share the content they hold with the public. In most platforms, this content is not always uploaded by them, which means they would have to be proactive to ensure that unauthorized copyrighted works would not be uploaded to their platform. This approach interferes with providers because no service or algorithm yet can have an accurate decision on this matter.

If no authorization is provided for such copyrighted works, Digital Platforms will be accountable for making the content public, unless they showed "efforts to obtain an authorization" or made their best by trying to remove the content from being online.[15]

This paragraph, 4, conflicts directly with the U.S. Safe Harbor provision making Digital Platforms liable of possible copyright infringing content that is being published in their service.

The sixth paragraph of the 17th Article is directed firstly to Digital Platforms that "have been available to the public in the Union for less than three years" [15] and have an annual turnover "below EUR 10 million"[15] and will have their conditions limited to paragraph 4.a, service providers demonstrate they have "made best efforts to obtain an authorization" [15] from the rightholders, after receiving a complete and valid notice "to disable access" to the content in question; secondly to such service providers where the "average number of monthly unique visitors" exceeds 5 million[15], they have to demonstrate that the best efforts were made to prevent further uploads of the content in question.

This action could hinder the service or algorithm used by the platform to monitor the contents they share over the internet because in the current state of technology it's very improbable that an algorithm can complete a scan of the content before it is shared on the platform.

The paragraph 7 emphasizes the "Exceptions and Limitations" still in action, with this Directive ensuring that "The cooperation between online content-sharing service



providers and rightholders”[15] will not prevent these constraints from covering works that do not infringe copyright.

#### 4 Conclusion

In this paper, was provided an explanation of how Digital Platforms should be applying their regulations on their services, how could they act to remove Copyrighted Content, and was shown an example of Improper Conduct on the Enforcement of Copyright. Afterward, it was made known about predominating Copyright Regulations from the United States and Europe, where they were explained and compared with each other, finishing with an explanation on the new Directive on Copyright in the Digital Single Market, specifically Article 17. This addition affected the security Digital Platforms had with the Safe Harbor Law, where they would not be condemned for their users' infringement.

Copyright Law was introduced firstly in 1710 in England, where it would acknowledge authors as the main beneficiary of this regulation. With only a duration of 28 years, at that time, copyright law rapidly grew to include new regulations and other types of creators, and by the 21st century, “more than 140 countries were party to the (Berne) convention”[16], formally known “as the International Convention for the Protection of Literary and Artistic Works.”[16].

Nowadays, copyright law is an everyday occurrence, and it is applied to a wide range of content, not only on the internet and with various intentions. But the existence of different regulations to reach the same purpose have produced conflicts across countries that should be handled carefully when dealing with them.

#### References

1. Copyright Law In 2019, <https://www.whoishostingthis.com/resources/copyright-guide/>, last accessed at December 08<sup>th</sup>, 2019
2. Definition of Copyright by Lexico, <https://www.lexico.com/en/definition/copyright>, last accessed at November 26<sup>th</sup>, 2019
3. How Content ID works, [https://support.google.com/youtube/answer/2797370?hl=en&ref\\_topic=9282364](https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=9282364), last accessed at December 11<sup>th</sup>, 2019
4. European Parliament and Council of the European Union, Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Directive)
5. What is Copyright?, <https://support.google.com/youtube/answer/2797466?hl=en>, last accessed at December 12<sup>th</sup>, 2019
6. Sorry, Sony Music, you don't own the rights to Bach's music on Facebook, <https://arstechnica.com/tech-policy/2018/09/sorry-sony-music-you-dont-own-the-rights-to-bachs-music-on-facebook/>, last accessed at December 18<sup>th</sup>, 2019
7. How Long Does Copyright Protection Last?, <https://www.copyright.gov/help/faq/faq-duration.html>, last accessed at December 18<sup>th</sup>, 2019

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8. What is DMCA?, <https://www.dmca.com/faq/What-is-DMCA>, last accessed at December 12<sup>th</sup>, 2019
9. Katherine Weigle, How the Digital Millennium Copyright Act affects Cybersecurity (2017)
10. 105th United States Congress, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998
11. More Information on Fair Use, <https://www.copyright.gov/fair-use/more-info.html>, last accessed at December 13<sup>th</sup>, 2019
12. 17 U.S. Code § 107. Limitations on exclusive rights: Fair use, <https://www.law.cornell.edu/uscode/text/17/107>, last accessed at December 13<sup>th</sup>, 2019
13. European Parliament & Council, Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive)
14. Mark Zhou (Ed.), Education and Management, <https://books.google.pt/books?id=6WOrCAAAQBAJ&printsec=frontcover&hl=pt-PT#v=onepage&q&f=false>, last accessed at December 18<sup>th</sup>, 2019
15. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
16. Copyright | law, <https://www.britannica.com/topic/copyright>, last accessed at December 19<sup>th</sup>, 2019