

Insights Blog: Safe harbours in five steps

By [Chris Cooke](#) | Published on Wednesday 26 April 2017



The International Federation Of The Phonographic Industry yesterday once again hit out at user-upload platforms like YouTube utilising the copyright safe harbour to operate an opt-out rather than opt-in streaming service. Next month CMU Insights will present a session at the SPOT+ conference in Aarhus, Denmark, putting the spotlight on the safe harbours and attempts to reform them. Ahead of that, let's recap the safe harbour debate in five simple steps.

1. The safe harbour first emerged as internet usage was about to go mainstream

In the 1990s, companies like internet service providers and server hosting companies were concerned that – if they could be held liable for copyright infringement if and when their customers used their servers to distribute copyright material without licence – then that would limit the mass market roll out of the internet.

The safe harbour basically says that internet companies cannot be held liable when their customers use their networks to infringe copyright, providing said internet companies provide some kind of 'takedown system' via which rights owners can request that infringing material be removed. A

rights owner could sue the individual customer for copyright infringement, but not the internet company whose services they use.

2. The music industry reckons services like YouTube are exploiting the safe harbour

User-upload sites like YouTube routinely host unlicensed content that has been uploaded by their users. Such services argue that they cannot be held liable for the infringing material because of the safe harbour – rights owners can only request that content be removed via their takedown system; in YouTube's case that's Content ID.

The music industry reckons that this is a misuse of the safe harbour, which was originally designed for companies like ISPs and server hosting companies, not media platforms that operate like and compete with other content services such as Netflix and Spotify.

Many music companies argue that companies like YouTube should have to take responsibility for ensuring content uploaded to their servers does not infringe copyright, rather than just offering the option for rights owners to remove videos after the fact.

3. The music industry argues that this creates a 'value gap'

By exploiting the safe harbour – the music industry says – companies like YouTube get to operate an 'opt-out' rather than 'opt-in' streaming service, where a rights owners' content appears on the platform without their involvement or consent, and they are obliged to monitor this and remove the content. YouTube does, of course, have licences with most music companies. However, the record labels and music publishers argue that these are bad deals which they are forced to sign up to because YouTube is exploiting the safe harbour. Which

is to say, labels and publishers are faced with a difficult choice: work with YouTube on its terms or refuse to work with YouTube, but then have to spend money constantly monitoring its platform and requesting content be removed, because YouTube itself can't be forced to do perform that task via the threat of a copyright infringement lawsuit, because of the safe harbour.

The music industry argues that this distorts the streaming business, because the 'opt-out' services like YouTube enjoy much better rates than the 'opt-in' services like Spotify, which are where the labels and publishers make most of their money. This distortion is referred to as the 'value gap'.

4. Attempts have been made to reform the safe harbour

The music industry wants the safe harbour reformed so to deprive user-upload sites like YouTube from having the protection. The safe harbour is being reviewed in the US – where the principle stems from the Digital Millennium Copyright Act – though that's a Copyright Office review rather than an active attempt to rewrite copyright law.

In the European Union, where a new Copyright Directive is on the table, there is a proposed new rule that would limit the safe harbour in Europe, which originally stemmed from an E-commerce Directive. The music industry is currently optimistic that, if this new rule goes through, it could provide the tool it needs to force the hand of services like YouTube.

5. There is disagreement about how effective those reforms will be

Even if the new safe harbour rule in Europe goes through as it is currently written – and it could as yet be revised – some feel that there is enough wiggle room in the way it is drafted for YouTube in particular to claim it is already compliant.

Testing that claim would likely require someone taking

YouTube to court somewhere in the EU.

Given the time it will take to pass the new copyright directive, implement the new safe harbour rule at a national level, and pursue legal action, it could be years before this is all tested. And given how fast the digital music sector is evolving, concerns about YouTube distorting the market may have already subsided by then.

One key issue with the deal offered to rights owners by YouTube is that the video site refuses to offer a minimum guaranteed payment for each stream, so that its arrangement with the labels and publishers is simple revenue share – meaning if no ads play, so that no revenue is generated, the rights owners earns nothing.

Opt-in streaming services provide a minimum guarantee in addition to their revenue share arrangements. Although, arguably, that's not sustainable, and the opt-in services will look to shift to a revenue share only arrangement down the line as well. Meaning that, by the time the music industry has the power to force YouTube's hand, the deal it is offering may be more in line with the deal Spotify-style services are offering anyway.

'CMU Insights Presents Youtube – Friend or Foe?' takes place at the SPOT+ conference in Aarhus, Denmark, on Saturday 6 May. CMU's Chris Cooke will provide a beginner's guide to the safe harbour debate and then discuss the issues with Niels Mosumgaard, Chairman of Danish CMO Koda and songwriter association DPA, and Rasmus Nordqvist, spokesman on cultural and media affairs for The Alternative in the Danish parliament.