

The Best Available Technology Standard

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Copyright liability for webhosting will be a key determinant of the evolution of the Internet in years to come. Depending on their design, the legal rules that shape the liability of webhosts can stunt the development of the Internet as a medium of expression or enhance it. Hence, adopting the optimal liability regime is a matter of crucial importance.

In this article, we propose a radical change in webhosts' copyright liability for illegal content posted by users. Our main thesis is that webhosts' liability should be guided by the "Best Available Technology" principle, according to which webhosts that employ the best filtering technology available on the market will be immune from liability for copyright infringement.

Adoption of our proposed liability regime would offer several key advantages relative to the extant regime. First, it would provide webhosts with the certainty they need to continue to operate and grow. Second, it would result in superior and more balanced enforcement of the rights of copyright holders and would achieve this at a much lower cost. Third, it would spur competition in the market for filtering technology and induce constant improvement in enforcement technology. Fourth, and finally, it would dramatically reduce the rate of copyright infringement suits against website operators and the cost of adjudicating them.

We further demonstrate that the analytical framework we construct represents a superior approach not only to the liability of webhosts, but also to those of file sharing and possibly Internet Service Provider liability.