



COMPARATIVE ANALYSIS OF ONLINE INTERMEDIARY LIABILITY REGIMES IN US AND EU

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ABSTRACT

This thesis provides comparative analysis of liability regimes established for different types of online intermediaries in US and EU. The issues of online intermediaries' liability are of the crucial significance due to the fact that they are the main structural actors in cyberspace environment providing access to the web, different facilities and services for the end users and ensuring further technological development. Such a choice for comparison is explained by the fact that US and EU are two jurisdictions with higher concentration of established online intermediaries. The paper evaluates whether the prescribed regimes are adequate to existing state of online environment, points out some differences in regulation, legislative deficits and concerns; special attention is devoted to the freedom of expression and fair competition issues arising in the context of hosting providers' liability regimes. Characteristic of peer-to-peer networks as a new type of intermediaries is provided; the strong necessity for the legal regulation of their activities is emphasized.

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INTRODUCTION

Technological progress had a big impact on different spheres of society's functioning at every stage of human history. The current phase could be characterized as a time of information society development, and internet is one of the most significant features of this process. Initially military workout,¹ with the passage of time became truly a new medium for people interaction with wide range of social functions - informational, commercial, educational, entertaining, etc. A new phenomenon always inevitably creates range of legal disputes and collisions that should be regulated.

Online intermediaries are the main organizing actors in virtual space: they provide access, different facilities and services for the end users, ensure further technological development. It is quite logical that "the problem of liability of online intermediaries on the Internet was one of the earliest problems in the cyberspace environment to grab headlines, worry the fledgling internet industry and demand serious attention from lawyers".² However, the first cases in early 90's merely involved the issues of liability of intermediaries for hosting and dissemination of misleading, defamatory or pornographic materials.³ Along with the process of technical improvement, the appearance of broadband connection and growth of speed, development of new services and rise of e-commerce, the potential scope of liability has become much wider, including among others the issues of copyright, trademark infringements and unfair trade practices.

¹ "Brief History of the Internet", *Internet Society*, accessed March 2, 2012,

<http://www.internetsociety.org/internet/internet-51/history-internet/brief-history-internet>.

² Charlotte Waelde and Lilian Edwards, "Online intermediaries and copyright liability", *Edinburgh Research Archive*, accessed March 2, 2012, <http://hdl.handle.net/1842/2305>, p. 4

³ *Ibid.*

Internet is an innovative and attractive field for the business and commerce. The economic component of the internet has gained a huge significance during last 15 years. For example, experts estimate that intermediary activities only in EU contributed around €310 billion to European GDP in 2009.⁴ And the current prognosis that e-commerce will grow by 50-75 percent over the following four year period from 2011 to 2015.⁵ This economic growth, increasing number of internet users, invention of new services and technologies will lead to the appearance of new issues in online intermediary activities that should be legally regulated. And one of the reasons why USA and EU were chosen for the comparative analysis of online intermediaries regulatory approaches is that they are leading economies with highest concentration of big players in the field of internet technologies.

The necessity for the regulation of internet intermediaries' activities was realized on state institutional level in the middle of 90's. First regulatory acts specifically dedicated to the online intermediaries were enacted in USA at the end of last century. EU E-commerce Directive⁶ was adopted in 2001. From that time there were not sufficient changes in regulatory mechanisms and no amendment of the acts. But whether these proposed approaches are still adequate for the current situation and existing internet practices, and what are the main drawbacks of established regimes? It is indisputable fact that characteristics of the internet has changed dramatically for the last 10 years, different kinds of technologies and new types of intermediaries evolved every year: peer-to-peer networks, accelerators, Web 2.0 platforms with huge amount of user-generated content, cloud services newly introduced

⁴ Martin H. Thelle and Svend Torp Jespersen, "Assessing the economic impact of the EU's online intermediary liability regime", *European Digital Media Association*, accessed March 2, 2012, <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>, p. 5

⁵ *Ibid.*, p. 29

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (EU E-commerce Directive), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

during last two years. Different studies concerning the comparison of online intermediaries' liability regimes have been conducted by legal scholars both on academic and institutional level during last 10 years but increasing number of specifically new online intermediaries raises new points for assessment. Summarizing all the facts mentioned above the main goal of this thesis could be formulated as follows: to compare online intermediaries' liability regimes in US and EU, assess the effectiveness of these regulative approaches in the context of the current cyberspace environment.

The first part of the thesis is devoted to the description of different types of online intermediaries and potential areas of possible violations and subsequent liability. The second chapter covers the issues of existing concepts of online intermediaries liability, comparison and evaluation of regimes established by US Online Copyright Infringement Liability Act⁷ and EU E-commerce Directive (2000/31)⁸ is provided. The third structural chapter is dedicated to the analysis of the question whether the existing models of regulation is appropriate for the newly invented technologies like peer-to-peer networks.

⁷ Online Copyright Infringement Liability Act (OCILLA), 17 U.S.C. §512 (1998), available at <http://www.copyright.gov/legislation/hr2281.pdf>.

⁸ Directive 2000/31/EC, *supra* n. 6.

1. DIFFERENT TYPES OF ONLINE INTERMEDIARIES AND POSSIBLE AREAS OF LIABILITY

1.1 Notion and classification of online intermediaries

In order to deeply assess and compare online intermediaries' liability regimes in US and EU short characteristic of internet intermediaries, description of their roles and activities should be provided.

Online intermediaries are the main functional actors that provide users with necessary facilities and services and make the usage of the internet possible in terms of connecting, receiving and providing information, performing different transactions - in other words, they are the crucial elements in the organizing structure of online environment. Every internet-user is inevitably involved in relationships with different kind of online intermediaries: he/she uses services of internet-access provider in order to be connected, facilities provided by social networks, weblogs, video hostings in order to share and obtain information; different auctions and online trading platforms are the good instruments for purchasing goods, etc.

“Internet intermediaries bring together or facilitate transactions between third parties on the internet: they give access to, host, transmit and index content, products and services originated by third parties on the internet or provide internet-based services to third parties”.⁹

This definition of online intermediaries contained in OECD report seems to be reasonable and complete, but it nevertheless needs some clarification. The biggest point of concern and difficulties here is the problem of classification of online intermediaries and division of different types of online actors into categories. As will be shown in the next chapter, upon this classification and affiliation of online actors to the specific type of intermediary depends the regime of their liability.

⁹ “The Economic And Social Role Of Internet Intermediaries”, *Organization For Economic Co-Operation And Development*, accessed March 4, 2012, <http://www.oecd.org/dataoecd/49/4/44949023.pdf>, p. 9

There is a big variety of services provided and activities performed by the online intermediaries, each of them with their own peculiar properties. The existing diversity leads also to the big number of classifications that proposed by scholars and also contained in regulatory acts. OECD papers, for instance, specify internet access and service providers, web hosting and data processing providers, internet search engines and portals, participative networking platforms with high percent of user-generated content (Web 2.0), internet payment systems.¹⁰ In addition to them different types of peer-to-peer networks, software and online game providers, aggregators, weblogs, chatrooms are indicated by other scholars.¹¹ Cloud services also should be included into the list of online intermediaries. Some experts specify the categories of destination intermediaries, payment intermediaries and auction platforms.¹² However, all these classifications are inherently blurry, and intermediaries are in the permanent process of evolving and changing in a variety of ways.¹³ Nowadays one specific online intermediary can be involved in a lot of activities and provide bid range of services. For example, Google is not only search engine, but also participative networking platform, hosting provider, resource with functionality of weblogs and chatrooms, etc.

Considering above mentioned facts another important question arises: whether these approaches of such a broad classification with a big number of specific activities are appropriate for the usage in regulatory practices in a way to prescribe specific liability regimes for each and every kind of activity? It would be a quite doubtful mechanism because internet technologies are evolving and developing very fast, new technical facilities have been introduced every year; existing services are in the process of permanent improvement

¹⁰ *Ibid.*, p. 7

¹¹ Waelde and Edwards, *supra* n. 2, p. 6

¹² Ronald Mann J. and Seth Belzley R., "The Promise of Internet Intermediary Liability", *William and Mary Law Review*, 47 (2005), accessed March 4, 2012, <http://ssrn.com/abstract=696601>, p. 5

¹³ Thelle and Jespersen, *supra* n. 4, p. 10

and modification. That's why the separate regulation of every specific activity or service would be unreasonable and unjustified.

The alternative method of classification is to distinguish a small number of categories with very vague criteria. For example, Pablo Asbo Baistrocchi distinguishes only four specific groups of online intermediaries: network operators, access providers, search engines and host service providers.¹⁴ This classification with very vague categories is quite similar to the one that used in regulatory acts both in US and EU. Small number of categories (including hosting, caching providers, "mere conduit" and location tools providers) is used with very broad formula and criteria prescribed that need to be applied in order to determine under which category specific online actor is qualified. Detailed description and comparison of every category described in regulative sources are provided below.

1.2 Areas of possible liability of online intermediaries

Internet is a principally new medium that allows every person to disseminate huge amount of information practically without any territorial and time limits. This opportunity is available practically to any person without special technical knowledge and no money.¹⁵ That gives the possibility to use the internet effectively in commercial and educational purposes. But it is not a secret that often these internet facilities are used not in a proper and legal way.

A lot of illegal acts from offline world are realizable on the internet with much bigger harmful effects and negative consequences. Modern internet and telecommunication technologies provide the incredible possibility for the distribution of illegal and infringing content. Liability issues can appear in connection with many different types of content and

¹⁴ Pablo Baistrocchi, "Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce", *Santa Clara Computer & High Technology Law Journal*, Vol. 19 Is. 1 (2012), accessed March 5, 2012, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1315&context=chtlj>, p. 6

¹⁵ *Ibid.*, p. 4

might raise different issues depending on the type of the material.¹⁶ The most significant examples of violations occurring in the process of information dissemination on the internet are the following:

- Defamatory and libelous content. In the first cases on liability of intermediaries merely the issues of hosting, transmitting or publishing material with defamatory and notably libelous content were considered. *Cubby v CompuServe*, a libel hosting case, was one of the earliest cyberlaw cases of any kind that was decided in 1991.¹⁷
- Copyright infringing material. Internet causes a lot of problems and concerns for right holders. Creative rights are among of the most affected areas of the law because the internet environment is one of that nature where it is exceptionally easy to distribute copyrighted works.¹⁸ The technologies of copyright infringement on the internet have been evolving rapidly during last 15 years.¹⁹ Amount of infringing content disseminated through the internet is not really countable. Private persons and big online intermediaries very often become parties of the litigation initiated by right holders. *Napster*,²⁰ *Grokster*,²¹ *Pirate Bay*²² and *Megaupload*²³ cases are the most significant examples. Decisions on some of these cases even provoked changing of

¹⁶ Lilian Edwards, "Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights", *World Intellectual Property Organization*, accessed March 6, 2012, http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf, p. 4

¹⁷ *Ibid.*

¹⁸ Baistrocchi, *supra* n. 14, p. 4

¹⁹ Mann and Belzley, *supra* n. 12, p. 45

²⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), available at http://scholar.google.com/scholar_case?case=14102696336550697309&hl=en&as_sdt=2,5&as_vis=1.

²¹ *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005), available at <http://www.law.cornell.edu/supct/html/04-480.ZS.html>.

²² Case no. B 13301-06, Stockholm District Court, unofficial translation commissioned by IFPI, accessed March 6, 2012, <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf>.

²³ "5th person arrested in Megaupload case; no bail for mogul", *MSNBC.com*, accessed March 6, 2012, http://www.msnbc.msn.com/id/46122134/ns/business-world_business/t/th-person-arrested-megaupload-case-no-bail-mogul/#.T46qmsX9MfU.

technologies of information transfer by online intermediaries in order to avoid liability.

- Trademark infringements. Claims for the trademark infringements arising on the internet are also widespread. For example, violations frequently arise in the context of using “banners ads”²⁴ and “ad words”²⁵ appearing on search result pages in search engines; many suits were failed against online auctions that often are used by persons as a trading platform for the infringing goods. *Tiffany*²⁶ and *L’Oreal*²⁷ actions against E-bay are notable illustrating examples for that matter.
- Illegal and harmful content. Under this category fall the materials that can be described as pornographic, racist or terrorist.²⁸ The biggest concern causes the problem of child pornography distribution. With the appearance and evolution of the internet, the operations of distribution and selling online of child pornography have become much cheaper and less risky – as a result, child pornography had been widely proliferated over the internet.²⁹ In some countries other types of information are also included in the list of illegal for the reasons of public policy. For example, Section R645-1 of the French Penal Code criminalizes the exhibit or display of Nazi emblems and artifacts, prohibits dissemination of information that “may be construed as

²⁴ *Playboy Enterprises, Inc. v. Netscape Communications Corporation*, 354 F.3d 1020 (9th Cir. 2001), available at <http://www.internetlibrary.com/pdf/Playboy-Netscape-9th-Cir.pdf>.

²⁵ *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA and Others* (Joined Cases C-236/08 to C-238/08), available at <http://curia.europa.eu/juris/celex.jsf?celex=62008CJ0236&lang1=en&type=NOT&ancre=>.

²⁶ *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), available at http://scholar.google.com/scholar_case?case=7620716488025661377&hl=en&as_sdt=2&as_vis=1&oi=scholar

²⁷ *L’Oréal SA and others v. eBay International AG, eBay Europe SARL, eBay (UK) Ltd and others* (C-324/09), available at <http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0324&lang1=en&type=NOT&ancre=>.

²⁸ Baistrocchi, *supra* n. 14, p. 5

²⁹ Mann and Belzley, *supra* n. 12, p. 39

constituting an apology for Nazism or a contesting of Nazi crimes”.³⁰ This provision was the basis for the famous proceedings against Yahoo Inc.³¹

As was demonstrated above, the internet is a principally new medium with a big number of intermediary actors that provide wide range of services and facilities that allow users to disseminate big amount of content and materials which often can be illegal, prohibited or infringe the rights of another persons. The important issue is whether the internet intermediaries should be liable for any infringement arising in connection to the usage of their services and what are the limitations of this liability? In order to illustrate possible solutions next chapter is devoted to the analysis and comparison of two existing online intermediary liability regimes in US and EU.

³⁰ Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, a French Association; L'union Des Etudiants Juifs De France, 433 F.3d 1199 (9th Cir. 2006), available at <http://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/>.

³¹ *Ibid.*

2. ONLINE INTERMEDIARIES' LIABILITY REGIMES UNDER ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION ACT AND EU E-COMMERCE DIRECTIVE

2.1 Reasons for the adoption and common manner of regulation

There are two existing mechanisms of regulation of the liability of online intermediaries – vertical and horizontal. Vertical approach is applied in US: different liability regimes are established for the different areas of law.³² Communication Decency Act³³ (CDA) adopted in 1996 regulates the exoneration from liability in any matter, except for intellectual property, if the content is supplied by third party.³⁴ Online Copyright Infringement Liability Limitation Act (OCILLA)³⁵ contained in the body of Digital Millennium Copyright Act 1998 (DMCA) regulates the scope of liability in the matter of copyright but only under certain conditions.³⁶ Whereas Telecommunication Act of 1996³⁷ deals with other forms of liability originated from violations of other areas of law.³⁸ In the EU the limits of online intermediaries' liability are established horizontally: they could be found only in one act – the E-commerce Directive and apply to all kinds of illicit content provided by third parties, including copyright, trademark, defamatory and libelous information, pornography, etc.³⁹ In addition to the E-commerce Directive for the purpose of analysis and comparison OCILLA is chosen because the structure of both acts and regulated activities of intermediaries are quite similar and copyright infringements, the only issue regulated by OCILLA, are more widespread on the internet than cases of defamatory speech and have more economic impact.

³² Baistrocchi, *supra* n. 14, p. 7

³³ Communication Decency Act (CDA) 47 U.S.C. §230 (1996)

³⁴ Mihaela Giuraniuc (Tudorache), "Liability of intermediary service providers in Romania", *Juridical Tribuna*, Vol. 1 Is. 2 (2011), accessed March 8, 2012, <http://www.tribunajuridica.eu/arhiva/An1v1/nr2/art5eng.pdf>, p. 138

³⁵ Online Copyright Infringement Liability Act, *supra* n. 7

³⁶ Giuraniuc, *supra* n. 34, p. 138

³⁷ Telecommunication Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

³⁸ Baistrocchi, *supra* n. 14, p. 7

³⁹ Rosa Julia Barcelo and Kamiel J. Koelman, "Intermediary Liability in the E-commerce Directive: So Far So Good, But Not Enough", *Institute for Information Law*, accessed March 8, 2012, <http://www.ivir.nl/publicaties/koelman/notenough.html>.

According to the legislative history by the adoption of OCILLA US legislators intended to provide “more certainty . . . in order to attract the substantial investments necessary to continue the expansion and upgrading of the internet”.⁴⁰ US Congress also wanted to preserve “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”.⁴¹

Before the adoption of the E-commerce Directive some burdensome obligations and responsibilities were imposed on online service providers in the EU, they entailed the risk that the further development of the internet would be impeded.⁴² The European Commission recognized existed problems and initiated the procedure of the Directive adoption in 1998.⁴³ The recital 40 of the Directive specifically mentions that “both existing and emerging disparities in MS' legislation and case-law concerning the liability of service providers acting as intermediaries prevent the smooth functioning of the internal market”.⁴⁴ From the wording of recital 3 is clear that the purpose of the Directive is to remove legal obstacles for the proper functioning of information society services within the internal market.

Generally speaking, the reasons for the adoption of both OCILLA and E-commerce Directive are common: ensure the liquidation of existed burdensome obligations and potential uncertainty in the sphere of online intermediary liability, guarantee the basis for further development of technologies and evolution of cyberspace environment. Potential results of

⁴⁰ DMCA Safe Harbors, accessed March 9, 2012, http://itlaw.wikia.com/wiki/DMCA_Safe_Harbors#cite_ref-2.

⁴¹ *Ibid.*

⁴² Legal analysis of single market for the information society: Liability of Online Intermediaries, *European Commission's Information Directorate General*, accessed March 9, 2012, http://www.google.com/url?sa=t&rct=j&q=legal%20analysis%20of%20single%20market%20for%20the%20information%20society%3A%20liability%20of%20online%20intermediaries%2C%20european&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fec.europa.eu%2Finformation_society%2Fnewsroom%2Fcf%2Fdocument.cfm%3Faction%3Ddisplay%26doc_id%3D835&ei=waxoT7rREofIswbmtcHpBw&usq=AFQjCNG4I VJi8QU0KCEravbb6ddZg8gNfA&cad=rja, p. 6

⁴³ Electronic commerce: Commission proposes legal framework, accessed March 9, 2012, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/999&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁴⁴ Directive 2000/31/EC, *supra* n. 6.

this development are the various economic benefits and social values in the lights of information society building.

2.2 Regulated activities of online intermediaries

a. Defined scope of regulation

Article 1 of the Directive defines the scope of its applicability and mentions that the provisions of the Directive complement Community law applicable to information society services. That means that the special liability regime established by the Directive applies to information society services. Definition of information society service set forth in article 1(2) of the Directive 98/34/EC: “any service normally provided for remuneration, at a distance, by electronic means and at individual request of a recipient of service”.⁴⁵ But there are some ambiguities distinguished in this definition. The question arises how one of the key elements (normally provided for remuneration) of definition must be interpreted. Some activities are explicitly excluded from the scope of the Directive as not normally being provided for remuneration – public education and government services. Another point of concern is about the activities that paid indirectly, for example, through the banner ads; portals functioning on the basis of so called “freemium model”, when primary service is entirely free, but additional ones could be paid.⁴⁶ Experts admit that there is a risk that some online activities could be deemed not to meet the condition “normally provided for remuneration” and could be deprived of the protection of special liability regime provided by the Directive.⁴⁷

Since information society service providers should provide services ‘at the individual request’, television broadcasting and radio broadcasting are exempted from E-commerce

⁴⁵ Directive 98/34/EC Of The European Parliament And Of The Council of 22 June 1998 Laying Down A Procedure For The Provision Of Information In The Field Of Technical Standards And Regulations And Of Rules On Information Society Services, available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1998/L/01998L0034-20070101-en.pdf>.

⁴⁶ Legal analysis of single market for the information society: Liability of Online Intermediaries, *supra* n. 42, p. 12

⁴⁷ *Ibid.*

Directive liability regime.⁴⁸ But different on-demand services such as video-on-demand, game-on-demand, e-mail are included.⁴⁹

In addition, article 1(5) expressly excludes from the scope of application of the Directive the “field of taxation, questions relating to information society services with regard to the processing of personal data and protection of privacy; questions relating to agreements or practices governed by cartel law; the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority; the representation of a client and defense of his interests before the courts; gambling activities of different kind”.⁵⁰

At the same time OCILLA does not provide the common broad definition and criteria for online service providers in order to fall under the scope of act and benefit from the established liability regime but only enumerates the activities and operations (transmission, storage, caching, linking to online location). For the purpose of the limitation relating to the transitory communication, “service provider” defined as an entity offering the transmission, routing, or providing of connections”.⁵¹ For the purposes of other three functions the provider is defined “as a provider of online services or network access, or the operator of facilities thereof”.⁵² Additionally, special provisions prescribe the liability regime for non-profit educational institutions.

b. Transitory communication and mere conduit activity

Article 12 of the Directive establishes the liability regime of online intermediaries that act as mere conduit. Article distinguishes the two types of mere conduit activities – “the

⁴⁸ Directive 2000/31/EC, *supra* n. 6

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, accessed March 10, 2012, <http://www.copyright.gov/legislation/dmca.pdf>.

⁵² *Ibid.*

transmission in a communication network of information provided by a recipient of the service” and “the provision of access to a communication network”. In the first case service provider plays the passive role by acting as mere “carrier” of third parties’ data through its network facilities.⁵³ The second formulation includes the service of providing internet access. The Directive expressly states that the service providers acting as mere conduit should not be liable for the any information transmitted on conditions that they do not initiate the transmission, do not select the receiver and do not modify the information contained in the transmission.⁵⁴ Such a regime is very much in line with liability mechanism for “common carriers” such as the post office and the phone company.⁵⁵

One arguable question arises in connection to the last condition that prescribes that service providers should not modify transmitted information in order to benefit from liability exemption. Recital 43 of the Directive states that “manipulations of a technical nature which take place in the course of the transmission” are allowed only if “they do not alter the integrity of the information contained in the transmission”.⁵⁶ With regard to this provision some experts point out that sometimes internet access providers are legally required to filter the traffic received by their customers, internet providers can also insert banners into the body of the webpages visited by customers, etc.⁵⁷ Whether such actions alter the integrity of the transmitted information, and whether service providers in this case should be deprived of the protection provided by the Directive?

The second paragraph of the article 12 also specifies the process of “packet switching transmission” that allows to store information for a short period of time in order to carry out

⁵³ Baistrocchi, *supra* n. 14, p. 9

⁵⁴ Directive 2000/31/EC, *supra* n. 6.

⁵⁵ Waelde and Edwards, *supra* n.2, pp. 21-24

⁵⁶ Directive 2000/31/EC, *supra* n. 6.

⁵⁷ Legal analysis of single market for the information society: Liability of Online Intermediaries, *supra* n. 42, p.

the transmission of information, without making it available to the users.⁵⁸ It is admitted that such a short storage is acceptable and reasonably necessary for the transmission.⁵⁹

OCILLA prescribes practically identical conditions of liability exemption for service providers who perform transmission, routing, or provide connection for, materials through a system controlled or operated by or for service provider.⁶⁰ In order to qualify for the protection established by OCILLA service provider should meet the following conditions: transmission should be initiated by third person; service provider should not select the recipient of information; not to make any copy or modification of transferred material.⁶¹ Process of the intermediate and transient storage (packet switching transmission) is also among the regulated issues: operators performing these activities are also exempted from liability for the infringing content.

Provisions of both acts are quite similar in enumerated requirements for the providers performing transmitting activities and acting as mere conduit in order to benefit from the exemptions from liability. Liability regime of mere conduit intermediaries in a lesser degree debatable than the existing liability regime prescribed for other types of intermediaries – there are no sufficient argues, disputes and complaints about any lacks of mere conduits’ liability regulation neither in the legal doctrine nor in case law.

c. Caching

Article 13 of the Directive deals with the issues of liability for the caching activities. “The essential purpose of caching function is to avoid saturating the internet with the repetitive high demand of some material”⁶² – providers decrease the overloading demand for some information by placing high demand data on remote servers and storing copies of the material

⁵⁸ Baistrocchi, *supra* n. 14, p. 9

⁵⁹ *Ibid.*

⁶⁰ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

⁶¹ *Ibid.*

⁶² Baistrocchi, *supra* n. 14, p. 10

on local servers.⁶³ Automatic, temporary and intermediate storage of the data on local servers that called caching for the purpose of the Directive allows to reduce the time for the information delivery to the end-user.⁶⁴ The effect of caching is speed up of the internet and that's why it is important that caching not be legally discouraged.⁶⁵

Article 13 lists the following conditions under which service providers performing caching are exempted from liability: the provider does not modify the information; the provider complies with conditions on access to the information (conditions on access to the initial data should be respected); the provider should comply with “rules regarding the updating of the information, specified in a manner widely recognized and used by industry; the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement”.⁶⁶ The last condition may cause serious concerns for some search engines that automatically maintain the copies of big amounts of information in order to assist the search even in case when the original source has been moved or deleted.⁶⁷ Question also arises in connection to the notion “in a manner widely recognized and used by industry”, but still there were no cases where the assessment of some practices in the light of this wording was provided. It is also noted that this requirement to comply with some

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Waelde and Edwards, *supra* n. 2, p. 24

⁶⁶ Directive 2000/31/EC, *supra* n. 6.

⁶⁷ Waelde and Edwards, *supra* n. 2, p. 24

industrial standards seems to be “dead letter” law because there are hardly any industry standards in MSs.⁶⁸

OCILLA also deals with the issues of liability for caching functions. It limits the liability of service providers for “the practices of retaining copies for a limited time of material that has been made available online by a person other than the provider, and then transmitted to a user at his or her direction”.⁶⁹ The storage should be carried out by automatic technical process.⁷⁰

There are several conditions for obtaining the immunity status in this situation: the content of the stored material cannot be modified; the provider must comply with the requirement of “refreshing” material (analog of the E-commerce condition of “updating”); the provider must not interfere with technology that returns “hit” information to the person who posted the material;⁷¹ access conditions to the cached data should be identical to those applied to the original information; any materials that were made available online without the authorization of the copyright owner must be expeditiously removed or disabled for access;⁷²

As it could be observed, conditions for service providers performing caching operations in order to be exempted from liability are practically identical in the Directive and OCILLA. But it is not a big surprise - European legislators paid a lot of attention to the American act and evaluated the experience during the preparatory works under the Directive. Nevertheless, as will be shown below, liability regime of intermediary hosting providers is in many aspects different as provided by the E-commerce Directive and OCILLA.

⁶⁸ Gerald Spindler, Maria Riccio and Aurelia Van der Perre, “Study On The Liability Of Intermediaries”, accessed March 12, 2012, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf.

⁶⁹ Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, *supra* n. 51

⁷⁰ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

⁷¹ Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, *supra* n. 51

⁷² Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

c. Hosting

Prescribed by the Directive and OCILLA regimes of hosting intermediary liability raised a lot of controversies and discussions.

A notion of “hosting” generally means “the service that provides the offers to users to rent space and facilities to incorporate any kind of data on that space” – this opportunity is a key to the success of internet, where you can post any kind of material, at any time and at very low cost.⁷³

According to the article 14(1) of the Directive information society service provider shall not be liable for the information stored at the request of a recipient of the service unless provider has actual knowledge of illegal activity or information and aware of fact or circumstances from which illegal activity is apparent.⁷⁴ The second condition for obtaining immunity is that provider should expeditiously remove or disable access to the illegal materials.

Substantive provisions of the article describing exemptions from liability for hosting providers in OCILLA are almost identical to those in the Directive: in order to be eligible for liability limitation hosting providers should not have actual knowledge, not to be aware of the facts and circumstances from which infringing activity is apparent, upon obtaining knowledge or awareness expeditiously act to remove or disable access to the infringing content.⁷⁵ In that part, as it is shown, even the wording of the articles is similar to some extent. Accordingly, two keystone conditions provided by both acts are: absence of actual knowledge or unawareness of facts and expeditious removal after the notification.

⁷³ Baistrocchi, *supra* n. 14, p. 12

⁷⁴ Directive 2000/31/EC, *supra* n. 6.

⁷⁵ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

Expeditious removal requirement

The first point of concern in these formulas is the requirement to expeditiously remove the content. Neither provisions of both acts nor the case law provide any interpretation of the term or any guidance on how the expeditious removal shall be conducted. Whether this concept implies the possibility of consultation with some qualified personnel on the matter of illegality of the content? What is the allowed period for such consultation? Whether the service providers shall organize special bodies in order to deal with the removal and to make it in expedience? Furthermore, both acts imply that after the notice of illegality was given and grace period for the expeditious removal expired, liability is strict even in the case when take-down or blockage is not possible due to some technical or administrative problems.⁷⁶

A better suggested alternative, as it done by Australian legislators, is to prescribe the liability only after the service provider failed to undertake some reasonable steps to remove or block the access to the material.⁷⁷

“Actual knowledge” and notification procedure

The next important question is when the “actual knowledge” about illegal activity and information is really present? Actual knowledge condition is established by the Directive and OCILLA also in relation to the caching function. But how to determine whether the service provider is properly informed about illicit content, whether the received information reliable and founded or not? “Whilst in some cases it might be easy to assess the illegality of content and activities, such as those dealing with pedophilia, it is quite hard, even for the professional lawyers, to tell if a trademark or a copyright has been infringed”.⁷⁸

Article 15 of the Directive expressly prohibits imposition by MSs of a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the

⁷⁶ Waelde and Edwards, *supra* n.2, p. 28

⁷⁷ Waelde and Edwards, *supra* n.2, p. 28

⁷⁸ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 14

information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.⁷⁹ However, it is important condition not only in relation to hosting services. At the same time recital 48 provides that the Directive does not affect the possibility for MS of requiring service providers that host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.⁸⁰ These two provisions are to some extent controversial and contradictory because requirement of duty of care is too wide and implies the possibility for dangerous interpretation.

There is no any clarification of the “actual knowledge” concept provided in the Directive’s body giving the MSs the free room for its interpretation in implementation and court practice. Some MSs prescribed a formal procedure and mandatory official notification by authorities in order to assume actual knowledge of provider, another approach is to entitle the courts to determine whether there is an actual knowledge or not.⁸¹ For example, the Netherlands implemented the Directive in such way that a simple notification by anybody is cannot be sufficient, whereas the court order always meets the requirement of notice.⁸²

There are considerable drawbacks in both of two approaches mentioned above. Strict adherence to the practices of removal and blockage only after the official notification or issued court order can lead to the situations when service providers become aware of the infringing material but do not delete it and still can benefit from liability exemptions. At the same time simple notification system can impose additional burden of evaluation of legality

⁷⁹ Directive 2000/31/EC, *supra* n. 6

⁸⁰ *Ibid.*

⁸¹ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 14

⁸² *Ibid.*, p. 15

of the content on the providers and in these circumstances provider is incentive to remove all the materials after any simple and possible unfounded notification.

The questions of awareness and knowledge were discussed in some German cases. It was decided that term “actual knowledge” means actual positive human knowledge instead of virtual computer knowledge.⁸³ It is also specified that negligent knowledge and second-degree (conditional) intent does not constitute knowledge.⁸⁴

Issue of awareness and actual knowledge was also to some extent considered by the ECJ in the context of preliminary ruling proceeding for the recent case between *E-bay* and *L’Oreal*. As was stated by ECJ, “it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with article 14(1)(b) of Directive 2000/31”.⁸⁵ ECJ mentioned that online marketplace where operator plays an active role allowing it to have knowledge or control of the data stored is deemed to be denied to benefit from the exemption provided by article 14 of the Directive. In this case E-bay played such an active role by optimizing the presentation of the offers for sale in AdWords referencing and promoting these offers. Taking that into account, ECJ concluded that E-bay was aware of the facts and circumstances on the basis of which a diligent economic operator should realize that the offers for sale in question were unlawful, being aware of these facts it failed to expeditiously remove the material and, consequently, cannot rely on the exemptions from the liability. Thus, according to the ruling of ECJ, service provider could be denied the protection provided by the Directive even in

⁸³ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 36

⁸⁴ *Ibid.*, p. 37

⁸⁵ *L’Oréal SA and others v. eBay International AG, eBay Europe SARL, eBay (UK) Ltd and others (C-324/09)*, *supra* n. 27

case when it failed to remove infringing materials not after any simple or official notification, but, instead, based only on the fact that it was not able to determine the illegality of the content by its own means. This ruling could be interpreted as imposing on service provider additional obligation of assessment of the materials provided by third persons if service providers in some way play an active role allowing it to have knowledge or control over the data stored.

The issue of actual knowledge seems to be a cornerstone in the upcoming *Megaupload* case. Megaupload.com was one of the biggest fileshare providers in the world and it was used for dissemination of huge amounts of illegal content. In January 2012 US Justice Department issued an indictment in which alleged that Megaupload was a “mega conspiracy” and a global criminal organization “whose members engaged in criminal copyright infringement and money laundering on a massive scale.”⁸⁶ As was already mentioned, the important condition for obtaining protection under OCILLA is the absence of actual knowledge about the infringement. The text of the indictment states that founders of Megaupload “have actual knowledge that the materials on their systems are infringing (or alternatively know facts or circumstances that would make infringing material apparent)”.⁸⁷ In support of this position the facts are provided about practices of downloading infringing materials by Megaupload employees and even examples of uploading of illicit content by them.⁸⁸

Notice and take down mechanism

OCILLA deals with the problem of actual knowledge and degree of awareness by establishing so-called notice and take-down procedure. It is specifically prescribed by section

⁸⁶ Justice Department indictment of MegaUpload, *Los Angeles Times*, accessed March 14, 2012 <http://documents.latimes.com/justice-department-indictment-file-sharing-site-megaupload/>.

⁸⁷ United States of America v. Kim Dotcom, MegaUpload, Ltd. and others, US Department of Justice Indictment, available at <http://s3.documentcloud.org/documents/284649/united-states-of-america-v-kim-dotcom-megaupload.pdf>.

⁸⁸ Why the feds smashed Megaupload, *Ars Technica*, accessed March 18, 2012, <http://arstechnica.com/tech-policy/news/2012/01/why-the-feds-smashed-megaupload.ars>.

512 (c)(2) that limitations on liability apply to hosting service providers only if the service provider has designated an agent to receive notifications of claimed infringements.⁸⁹ Each hosting service provider should make available to the public contact information of the designated agent: the name, address, e-mail, phone number, etc. Additionally OCILLA establishes detailed description of elements of notification: it should be signed (physically or by electronic signature); identification of the copyrighted work and infringing material should be present; contact information of complaining party; statement of a good faith belief that the use of the infringing material was not authorized and statement that the information in notification is accurate, and that the complaining party is authorized to claim the infringement.⁹⁰ What is also important, OCILLA prescribes the liability (damages, including costs and attorney fees) for the intentionally false and unauthorized claims⁹¹ – it is necessary condition in order to prevent the distortion of competition.

In addition to the “notice and take down procedure”, OCILLA sets up so-called “put back procedure” that describes under which circumstances the person whose materials have been removed can object and claim the restoration of the access to the content.⁹² This provision is intended to serve the freedom of information, as it gives the possibility to object.⁹³ Provisions of sections 512 (g)(2)-(3) describe in details the contents of counter notifications. Service provider is under the obligation to restore the deleted materials in 10 business days after the receipt of the counter claim.⁹⁴ Final possible measure for the copyright owner after the put back procedure is a court action.

⁸⁹ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Barcelo and Koelman, *supra* n. 39

⁹⁴ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

One important element of notice and take down procedure was evolved by American courts in a case law. In *Lentz v. Universal Music Corp.* District Court for the Northern California established the requirement for the copyright owners to consider fair use before applying for the take down of the content.⁹⁵ Court admitted that this requirement will help “to ensure that the efficiency of the internet will continue to improve and that the variety and quality of services on the internet will expand without compromising the movies, music, software and literary works that are the fruit of American creative genius”.⁹⁶

Summing up described facts up, it is possible to make a conclusion that American mechanism of dealing with the actual knowledge condition and prescribed system of informing providers about the illicit content are much more detailed, balanced and efficient than those defined by the E-commerce Directive.

It is also fairly to mention that article 14(3) of the Directive retains the possibility for MSs to establish procedures governing the removal or disabling of access to information on their own discretion.⁹⁷ As a result, some MSs, for example, Spain, Finland, Lithuania adopted their own notice and take down mechanisms in some manner similar to one established by OCILLA.⁹⁸ But even these notice and take down mechanisms are sufficiently different in some aspects and the gap in regulation between MSs with notice and take down procedures and those MSs without any formal requirement for the notification (Germany)⁹⁹ is huge. As a result, there is no uniform and harmonized procedure around the EU what could lead to possible distortions of competition on online intermediaries market taking into account

⁹⁵ Stephanie Lenz v. Universal Music Corp., Universal Music Publishing, Inc., And Universal Music Publishing Group, 572 F. Supp. 2d 1150 (2008), available at https://www.eff.org/files/filenode/lenz_v_universal/lenzorder082008.pdf.

⁹⁶ *Ibid.*

⁹⁷ Directive 2000/31/EC, *supra* n. 6

⁹⁸ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 16

⁹⁹ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 42

country of origin rule described in article 3 of the Directive.¹⁰⁰ Online intermediaries can have incentives to be established on the territory of the MS where notice and take down mechanism exists and conditions of this procedure are more favorable. It can release service providers from the assessment and checks of extensive number of notifications.

Freedom of expression concerns

Risk of the abuse of freedom of expression on the internet that brought by the E-commerce Directive is widely discussed. Prescribed regime is strongly criticized for being incentive for internet service providers to remove the material without proper assessment of its illegality. According to the provision of the Directive, which were implemented strictly in some MSs, there are no any formal requirements for the notification about illicit content – any private person or company can claim the removal of any type of the content sometimes even without any founded ground. Accordingly, the Directive has created a liability regime which imposes on online intermediaries “the burden of deciding whether or not to remove suspicious information”.¹⁰¹ Online intermediaries are forced to be very cautious and remove the content even if it is very doubtful that this material in any way violates a law or infringes a right – because if provider fails to remove illicit materials he will lose the liability limitations.¹⁰² As a result, freedom of expression and fair competition are abused.

The research “Mystery Shopper”, conducted at Oxford, is very demonstrative on this matter. Major hosting provider in the United Kingdom was requested to remove the page alleged to be a pirate copy.¹⁰³ However, the page contained an extract from Mill’s “On Liberty” dated to 1869 and long in the public domain.¹⁰⁴ Nevertheless, the page was deleted without any

¹⁰⁰ Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

¹⁰¹ Barcelo and Koelman, *supra* n. 39

¹⁰² *Ibid.*

¹⁰³ Edwards, *supra* n. 16, p. 11

¹⁰⁴ *Ibid.*

objections and requests.¹⁰⁵ The research provides the conclusion that “current regulatory settlement has created an environment in which the incentive to take down content from the internet is higher than the potential costs of not taking it down”.¹⁰⁶

Similar research was also conducted in the Netherlands by digital human rights group Sjoera Nas at Bits of Freedom.¹⁰⁷ Organization asked 10 Dutch hosting providers to remove the works of Dutch writer Multatuli, who died in 1860 and hence was in public domain: seven providers deleted the text without any checking; one forwarded the request to the site owner; one did not respond; and only one examined the text complained and noted it was in public domain.¹⁰⁸ These examples are explicit illustrations that hosting providers in most of the cases tend to delete materials without any investigation.

Regime prescribed by OCILLA causes fewer concerns on the matters of freedom of expression and fair competition because, as it was described above, it establishes the formal requirement to provide a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right. Additionally, OCILLA gives the opportunity to object to the take down of the material through the put-back procedure. But private persons are often simply unaware of the possibility to object and to replace the removed material.¹⁰⁹ There are also some burdens that can restrict the willingness of the content owner to refer to put-back procedure: only after effective removal of the material he/she gets the right to object and it is

¹⁰⁵ *Ibid.*

¹⁰⁶ Cristian Ahlert, Chris Marsden and Chester Yung, How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation, accessed March 20, 2012, http://essex.academia.edu/ChrisMarsden/Papers/700006/How_Liberty_Disappeared_from_Cyberspace_The_Mystery_Shopper_Tests_Internet_Content_Self-Regulation.

¹⁰⁷ Waelde and Edwards, *supra* n. 2, p. 31

¹⁰⁸ *Ibid.*

¹⁰⁹ Barcelo and Koelman, *supra* n. 39

necessary, under the penalty of perjury, to swear that content was removed as result of mistake or misidentification.¹¹⁰

Research of takedown practices under OCILLA¹¹¹ specifies that around third of takedown complaints were apparently unjustified and more than half of the notifications were sent by competitors companies.¹¹² Authors of the research noted: “the surprising number of questionable takedowns observed, taken in conjunction with the ex ante removal of content, the minimal remedies for abuse of process, and the lack of knowledge about counter notice procedures, suggest that few are well served by [OCILLA]”.¹¹³

One possible solution in order to limit the abuses of freedom of expression and fair competition in this field is to establish competent public institutions that will be responsible for the examination and assessment of filed complaints.¹¹⁴ This would allow creating uniform system and relieving hosting service providers from the burden to check the notifications. They will just fulfill the decision of public body. As a result, service providers will not delete materials unconditionally in order to safe the right to be exempted from liability as it happens now.

d. Information location tools

The EU E-commerce Directive left unregulated the liability regime of information location tools. Under the definitions of “information location tools” fall hyper links aggregators (automatically collect and provide links to upstream content) and search engines which form the core of the modern internet structure. “Linking today is over great significance as the

¹¹⁰ Legal analysis of single market for the information society: Liability of Online Intermediaries, *supra* n. 42, p. 39

¹¹¹ Jennifer M. Urban and Laura Quilte, Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, accessed March 16, 2012, <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>.

¹¹² Edwards, *supra* n. 16, p. 12

¹¹³ Urban and Quilte, *supra* n. 111

¹¹⁴ Waelde and Edwards, *supra* n. 2, p. 33

internet becomes manageable only with help of search engines and other linking facilities”.¹¹⁵

It is pointed out that information location tools generally serve a social need, facilitate the use of the internet and are of big social value.¹¹⁶

In contrast with the Directive, section 512 (d) of OCILLA expressly provides the immunity for the activities of linking (including directory, index, reference, pointer or hyper links)¹¹⁷ to infringing materials. Information location tools are exempted from liability on conditions of absence of actual knowledge and awareness of the facts and circumstances from which infringing activity is apparent.¹¹⁸ Upon obtaining such knowledge or awareness service providers shall expeditiously remove or disable access to the content.¹¹⁹ These conditions are almost identical to those prescribed for hosting providers.

At the same time, Spain, Austria, Lichtenstein and Portugal on their discretion extended the intermediary immunities to cover the linking activity, while other MS so far not, creating to some extent regulatory disharmony across the EU.¹²⁰ Nevertheless, there are still no any significant cases dealing with the liability for the linking activity. This question remains as an exclusive matter of MS domestic law.¹²¹ The ECJ reviewed the issue of Google’s liability as a hosting provider in *Google v. Louis Vuitton*¹²² but not yet as an information location tool. But in order to reduce the level of legal uncertainty and possible legal risks for search engines and aggregators it is reasonable to amend the Directive and provide liability limitations for the linking activities.

¹¹⁵ Edwards, *supra* n. 16, p. 14

¹¹⁶ Spindler, Riccio and Van der Perre, *supra* n. 68, p. 17

¹¹⁷ Online Copyright Infringement Liability Act (OCILLA), *supra* n. 7

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Waelde and Edwards, *supra* n. 2, p. 25

¹²¹ Edwards, *supra* n. 16, p. 14

¹²² *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA and Others* (Joined Cases C-236/08 to C-238/08), *supra* n. 25

e. Liability of non-profit educational institutions

Section 512 (e) of OCILLA expressly limits the liability of public and other non-profit educational institutions in case when they act as online service providers. At the same time, online activities provided by public educational institutions in the EU are explicitly excluded from the scope of the E-commerce Directive. The Directive is applicable only in relation to information society service providers and information society service required to be normally provided for remuneration. The case law of ECJ explicitly considers public education services as not being provided for remuneration.¹²³ It is also defined in the recital 51 of the Directive 98/34.¹²⁴ Such an exclusion is quite doubtful and disputed because internet has become essential element of educational process.

As was shown above, OCILLA provides more deep and efficient regulation of online intermediary liability. Range of online service providers which can benefit from liability exemptions is wider including in contrast with the Directive information location tools and public education institutions. Regulation of hosting provider liability with mechanisms of “notice and take down” and “put back”, prescribed liability for misrepresenting notification brings more formal certainty and reduces the numbers of possible abuses of freedom of expression and fair competition. Necessity of the amendments of the Directive also was realized on institutional level – European Commission initiated Public Consultation on the future of electronic in the internal market which devoted significant attention to the issues of intermediary liability.¹²⁵

¹²³ Legal analysis of single market for the information society: Liability of Online Intermediaries, *supra* n. 42, p.

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¹²⁴ Directive 98/34/EC, *supra* n. 45

¹²⁵ http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf.

3. PEER-TO-PEER INTERMEDIARIES AS A NEW OBJECT FOR REGULATION

After the adoption of OCILLA and EU E-commerce Directive new types of internet services have appeared and evolved. Legislators did not pay significant attention to brave new classes of online intermediaries at the time of the drafting existing immunity mechanisms for online intermediaries. Established liability regimes deal with activities of transmission, caching, and hosting of content. A typical situation envisaged, for example, in the sphere of copyright infringements was where hosting service provides to the customer some space and the customer uses this space for uploading and sharing illegal copies of protected work.¹²⁶ In last ten years absolutely new technical instruments of online information distribution have been evolving, they allow to disseminate huge amounts of content in a very high speed with a less possibility to trace the transmissions. Peer-to-peer programs and networks like Napster, Grokster, Emule, BitTorrent significantly changed the online environment.

The core idea of peer-to-peer technology is based on direct interchange of requested information between users. In peer-to-peer systems several intermediaries could be present: creators of the software, distributors of the programs; in case of BitTorrent technology three parties need to be involved: torrent portals, trackers and seeders. The important feature is that peer-to-peer intermediaries do not store any content on their servers.

There are three types of peer-to-peer intermediaries distinguished. First, the so-called Napster type of peer-to-peer intermediaries: they provide centralized index to all files stored and available for download on the users' individual computers.¹²⁷ Under the second model each user of service maintains only index of files stored on his/her own computer (this model become widespread after Napster lawsuit).¹²⁸ The third and more popular model nowadays is a BitTorrent protocol. It is not purely based on peer-to-peer architecture because users

¹²⁶ Waelde and Edwards, *supra* n. 2, p. 7

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

provide torrent links to the files they share through ordinary web sites (for example, The Pirate Bay, Demonoid). The transferred file is split into the parts that can be disseminated independently from different sources (each user that stores the file on his/her machine can transfer only one part of the file while the other parts are transferred by different users). This technology enormously improves the transfer speed by transferring the load from one particular source to a distributed cloud of sources making the system very useful for distribution of very large files.¹²⁹ The BitTorrent approach significantly complicates the copyright situation because there is no any possibility to say that any particular file was copied from one source.¹³⁰

Peer-to-peer intermediaries do not fall under the protection of any safe harbor provided by existing liability regimes in US and EU. But, nevertheless, issues of peer-to-peer intermediary liability were deeply considered in court proceedings what evidences that there is necessity for legislative regulation of this activity.

The first notable dispute involving the questions of peer-to-peer intermediary liability is *A&M Records, Inc. v. Napster, Inc.*¹³¹ where the US Court of appeals for the Ninth Circuit declined the application of Sony Betamax liability exemption principle to Napster service. In *Sony Corp. v. Universal Corporation of America*¹³² the US Supreme Court held that Sony, producer of VCR Betamax machines, was not vicariously or contributory liable for the copyright infringements carried out by the users of Betamax that allowed to make unauthorized copies of the cassettes. Court mentioned that in order to impose vicarious liability on Sony in this case, “it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make

¹²⁹ *Ibid.*, p. 8

¹³⁰ *Ibid.*

¹³¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *supra n. 19*

¹³² *Sony Corp. v. Universal City Studios* - 464 U.S. 417 (1984), available at <http://supreme.justia.com/cases/federal/us/464/417/case.html>.

unauthorized copies of copyrighted material”.¹³³ It was also admitted that “there is no any precedent in the law of copyright for the imposition of vicarious liability on such a theory”.¹³⁴ Considering the issue of contributory liability Supreme Court concluded that “the sale of copying equipment does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial non-infringing uses”.¹³⁵

Napster relied on described substantial non-infringing use principle in proceedings against A&M but Ninth Circuit Court of Appeal declined this line of arguments stating that Napster had not only constructive but also actual knowledge of direct infringements renders. Napster provided centralized index and it could block access to the system to suppliers of the infringing material and it failed to remove the index materials.¹³⁶ Based on that fact Court concluded that contributory infringement was present.

The decision of US Supreme Court in *Grokster* case¹³⁷ reaffirmed the Sony-Betamax rule, but nevertheless held that this principle does not immunize the distributor of technology from liability for the copyright infringements made by users of software when the distributor of this software intentionally induce the direct infringements of copyright by users.¹³⁸ Assuming that Grokster software (peer-to-peer file distribution) is capable of significant non-infringing use Court, at the same time, concluded that the distributors' words and deeds went beyond distribution and as such showed a purpose to cause and profit from third-party acts of copyright infringement. By adding concept of inducement Supreme Court even more complicated the issue of peer-to-peer intermediary liability.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *supra* n. 19

¹³⁷ MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005), *supra* n. 20

¹³⁸ Grokster case decided, accessed March 15, 2012, <http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=10782&TEMPLATE=/CM/ContentDisplay.cfm>.

Recent *Pirate Bay* case¹³⁹ shows how the activities of peer-to-peer intermediaries could be treated in Europe, particularly in Sweden. The Pirate Bay is one of the biggest torrent trackers on the internet. It doesn't actually store copyrighted files – “it simply allows users to post links to materials hosted on third-party servers”.¹⁴⁰ Stockholm District Court concluded that The Pirate Bay has facilitated and, consequently, aided and abetted the offences of copyrights infringements by “providing a website with advanced search functions and easy uploading and downloading facilities, and by putting individual filesharers in touch with one other through the tracker linked to the site”.¹⁴¹ Consequently, four co-founders of the portal have been held guilty for the act of complicity in copyrights infringements. Court sentenced each of them to a year in a jail and a \$3.6 million fine.

On February 2, 2012 Swedish Supreme Court rejected the request from two of the plaintiffs to seek a preliminary ruling (they relied on the E-commerce Directive provisions on mere conduit exemptions) from the ECJ and decided not to hear an appeal on Court of Appeal decision.¹⁴²

Described cases shows that courts do not deem to qualify peer-to-peer intermediaries as transitory intermediaries (mere conduit) and, consequently, they are not granted liability exemptions for their activities.

Another practice that used by right holders is suing directly users of peer-to-peer software rather than peer-to-peer intermediaries. In 2010 Microsoft filed suits against 106 users of Lithuanian torrent tracker LinkoManija who were accused of illegal dissemination of MS

¹³⁹ Case no. B 13301-06, Stockholm District Court, *supra* n. 21

¹⁴⁰ The Pirate Bay Verdict and the Future of File Sharing, *PC WORLD*, accessed March 17, 2012, http://www.pcworld.com/article/163339/the_pirate_bay_verdict_and_the_future_of_file_sharing.html.

¹⁴¹ Case no. B 13301-06, Stockholm District Court, *supra* n. 21

¹⁴² Pirate Bay fails in bid to take case to Supreme Court, accessed March 18, 2012, <http://www.news.com.au/technology/pirate-bay-fails-in-bid-to-take-case-to-supreme-court/story-e6frfro0-1226260370880>.

Office 2003 and 2007.¹⁴³ But this approach reasonably causes the legal concerns about anonymity that is normally treated as an important civil rights in many jurisdictions.¹⁴⁴

As it was demonstrated, peer-to-peer intermediaries have become more and more widespread in last 10 years and they cause a lot of controversies in legal practice. There is need to find balance between the interest of rights holders and necessity of effective development of technologies that can be socially valuable. Among alternative solutions to the existing practices of suing intermediaries and end users are introduction of levy systems and digital rights management (DRM) in relation to peer-to-peer services proposed.¹⁴⁵ The introduction of levy system is widely criticized because it could run the copyright from property right into liability scheme – all users, both using the software for non-infringing and infringing purposes, would be obliged to pay.¹⁴⁶ Problem with DRM application is that it requires complex and expensive technical procedures.¹⁴⁷ In addition, there is no real assurance that effective and uncrackable DRM could be ever created.¹⁴⁸

Current situation, when some peer-to-peer intermediaries are pushed to close their operation under the fear to be liable for the copyright infringement,¹⁴⁹ is not conducive for the future technology development. These facts once again underline pressing necessity for the adoption of proper instruments of peer-to-peer liability regulation taking into account interest of rights holders.

¹⁴³ Microsoft sues top Lithuanian Torrent Tracker for \$43M, accessed March 18, 2012, <http://habrahabr.ru/post/82369/>.

¹⁴⁴ Waelde and Edwards, *supra* n. 2, p. 56

¹⁴⁵ *Ibid.*, p. 61

¹⁴⁶ *Ibid.*, p. 62

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ BitTorrent Giant BTjunkie Shuts Down For Good, accessed March 18, 2012, <http://torrentfreak.com/btjunkie-shuts-down-for-good-120206/>.

CONCLUSION

Online intermediaries are indispensable actors for the functioning of the internet with its variety of services and functions. It is widely recognized that they play a significant role in current development of the online environment and facilitate the future progress of technology. Therefore, it is essentially necessary that the activity of internet intermediaries to be regulated not in a restrictive or unclear way. Such a regulation can impede any progress and constrain intermediaries from evolving new facilities. At the same time the facts that services provided by online intermediaries could be used with illegal purposes also should be taken into account.

The EU E-commerce Directive and the US OCILLA are significant examples of the acts that prescribe the regime of online intermediary liability, establishing the regulative mechanisms in jurisdictions with higher concentration of different online actors. It should be admitted that the drafting of the EU E-commerce provisions on intermediary liability was done with caution to the already adopted OCILLA. Nevertheless, some significant differences in these two mechanisms still could be identified. Both acts provide almost identical liability regimes in relation to the mere conduits (transmitting) and the caching providers. Existing practice and case law demonstrate that the liability regimes prescribed for these two categories of intermediaries are appropriate and do not cause a lot of concerns. The liability regimes of hosting providers, the most significant category of online intermediaries, differ seriously in formal procedures: OCILLA in contrast to the Directive establishes notice and take down and put back procedures. As a result, content removal, blockage and restoration in the US have less arbitrary character, the degree of control is higher and providers are less incentive to take down the materials. Nevertheless, the problem of actual knowledge and freedom of expression concerns are still the main issues to be dealt by legislators both in US and EU. Actual knowledge concept should be clarified, clear and precise criteria of evaluation need to

be established; however, the possible solution of actual knowledge and freedom of expression problems is a creation of specific public body responsible for the examination of the content. Requirement of the expeditious removal is also one that appears to be too vague and needs some additional clarification and interpretation.

European legislators should also be aware of the fact that the leaving untouched the issues of liability of information location tools and public educational body is not up-to-date and is a dangerous step. Search engines are the most modern and innovative actors on the internet space that drive the further technical development and perform considerable social functions, and the current state of legal uncertainty do not promote the future progress and creates reasonable anxiety for them. As concerns public educational bodies, the internet and modern information technology nowadays play a significant role in educational process. With regard to these issues European legislators can refer to the American legislative practice and provisions of OCILLA that specifically deals with these two issues.

Meanwhile, the necessity for the regulation of newly evolving online intermediaries' activities should be actualized. The internet is a dynamic environment and after the adoption of both acts some new technologies have been developed, the new types of intermediaries have appeared. Considerable example is peer-to-peer intermediaries. However, legislators are still ignoring these challenges and by doing so to some extent prevent the technology evolution. The urgent need of regulation in this field is obvious and this regulation should take into account interest of all parties evolved: intermediaries, users and right holders. Balance between the protection of the interests of the right holders and social need for the further technology development need to be founded.

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