

**FIXING ‘VALUE GAP’ IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS OF
ONLINE SERVICE PROVIDERS’ SECONDARY LIABILITY FOR COPYRIGHT
INFRINGEMENTS IN THE U.S. AND THE E.U.**

by Anastasia Kachanova

LL.M SHORT THESIS

COURSE: International and Comparative Intellectual Property Law

PROFESSOR: Caterina Sganga, LL.M, Ph.D.

Central European University

1051 Budapest, Nádor utca 9

Hungary

ABSTRACT

The rise of the giant Internet-related platforms in the Digital Age has created new challenges for copyright law. This thesis addresses the issue of secondary liability of online service providers (OSPs) for third-party copyright infringements in the light of the recent proposal for the E.U. copyright reform. The aim of this study is to determine whether the proposed measures would serve the purpose of eliminating the causes of an unfair distribution of revenues received from the copyright-protected content, i.e. a ‘value gap’ problem. The comparative and functional analysis of the U.S. and the E.U. legal frameworks demonstrates that the former imposes more lenient obligations on OSPs and encourages their cooperation with copyright owners in combating copyright infringements, while the latter provides a possibility to impose additional duties on OSPs, which forces them to be more proactive in detecting and eliminating online copyright violations. Based on the results of this analysis and the assessment of compatibility of the draft Directive on Copyright in the Digital Single Market with the existing legal regime in the E.U., it is concluded that the proposed measures on clarification of a hosting ‘safe harbor’ and imposition on OSPs of an obligation to apply content recognition technologies would not be effective and efficient, since they will, *inter alia*, result in an imbalance between the rights of copyright holders and the rights of OSPs. In addition, alternative measures on improvement of the copyright legal framework in the E.U. are formulated.

TABLE OF CONTENTS

INTRODUCTION.....	1
CHAPTER I. SECONDARY LIABILITY OF ONLINE SERVICE PROVIDERS FOR THIRD-PARTY COPYRIGHT INFRINGEMENT IN THE UNITED STATES.....	7
A. GENERAL OVERVIEW OF SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENTS	8
1. Contributory Infringement	9
a. Knowledge of Infringing Activity.....	9
b. Material Contribution to Infringing Activity	13
2. Vicarious Liability.....	14
a. Right and Ability to Supervise and Control Infringing Activity	15
b. Direct Financial Benefit	16
3. Inducement Liability.....	16
a. Affirmative Intent and Active Steps to Encourage Infringement	18
b. Effects of Grokster case	19
B. LIABILITY LIMITATIONS UNDER THE U.S. DIGITAL MILLENNIUM COPYRIGHT ACT	22
1. General Scope of Liability Limitations	23
2. ‘Safe Harbor’ for Online Service Providers	25
a. Knowledge of Infringing Activity.....	26
b. Control over and Financial Benefit from Infringing Activity.....	30
c. Expeditious Removal of Infringing Material (Notice and Takedown Procedure).	31
3. Relationship Between the Elements of Secondary Liability and ‘Safe Harbor’	32
a. Exemption from Contributory Infringement and Vicarious Liability.....	33
b. Exemption from Inducement Liability	34
4. Obligations Beyond ‘Safe Harbor’: Injunctive Reliefs and Content Monitoring	35
C. CONCLUDING REMARKS ON THE U.S. LEGAL FRAMEWORK.....	36
CHAPTER II. SECONDARY LIABILITY OF ONLINE SERVICE PROVIDERS FOR THIRD-PARTY COPYRIGHT INFRINGEMENT IN THE EUROPEAN UNION	39
A. LIABILITY LIMITATIONS UNDER THE E-COMMERCE DIRECTIVE 2000/31/EC.....	40
1. General Scope of Liability Limitations	41
2. ‘Safe Harbor’ for Online Service Providers	43
a. Knowledge of Infringing Activity.....	45
b. Expeditious Removal of Infringing Material (Notice and Takedown Procedure).	46
3. Obligations Beyond ‘Safe Harbor’: Injunctive Reliefs and Content Monitoring	48
a. Obligations based on Injunctive Reliefs	48

<i>b. Obligations of General and Specific Monitoring</i>	<i>50</i>
B. SELECTED OVERVIEW OF SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENTS UNDER THE NATIONAL LAW OF THE E.U. MEMBER STATES	52
1. Secondary Liability of Online Service Providers in France	53
2. Secondary Liability of Online Service Providers in Germany.....	55
3. Secondary Liability of Online Service Providers in the U.K.....	58
<i>a. Authorization Liability.....</i>	<i>59</i>
<i>b. Joint Tortfeasorship.....</i>	<i>61</i>
4. Harmonization of Secondary Liability Rules through Primary Liability Rules	63
C. CONCLUDING REMARKS ON THE E.U. LEGAL FRAMEWORK	65
CHAPTER III. E.U. COPYRIGHT REFORM: MEASURES TO CLOSE THE ‘VALUE GAP’	68
A. DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: COMPLIANCE WITH THE EXISTING LEGAL REGIME IN THE E.U.	70
1. Clarification of the ‘Safe Harbor’ for Online Service Providers.....	70
2. Implementation of Content Recognition Technologies.....	74
B. DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: ASSESSMENT IN THE LIGHT OF THE EXISTING LEGAL REGIMES IN THE U.S. AND THE E.U.	75
1. Leaving ‘False Hosting Providers’ out of ‘Safe Harbor’	75
<i>a. Option 1: Clarification of ‘Safe Harbor’ for OSPs</i>	<i>75</i>
<i>b. Option 2: Reliance on Passivity Requirement and National Rules on Secondary Liability.....</i>	<i>76</i>
<i>c. Assessment and Recommendations for Improvement</i>	<i>77</i>
2. Non-Collaborative Hosting Providers	78
<i>a. Option 1: Implementation of Content Recognition Technologies</i>	<i>78</i>
<i>b. Option 2: Reliance on Notice and Takedown System and Injunctive Relief</i>	<i>79</i>
<i>c. Assessment and Recommendations for Improvement</i>	<i>80</i>
CONCLUSION	83
BIBLIOGRAPHY	86
TABLE OF CASES	91
TABLE OF LEGISLATION	94

INTRODUCTION

Copyright law has been inevitably affected by the technological advancements of the Digital Age. In the last few decades, giant Internet-based platforms, such as YouTube, Vimeo, Tumblr and SoundCloud, have effectively taken up a role as important distributors of copyright-protected content. While their highly profitable activities have provided for simple as well as inexpensive accessing and sharing of copyright-protected works, they have also created new conditions for massive infringements of the intellectual property rights of copyright holders, resulting in the impossibility of obtainment of a fair remuneration by the latter. Such an imbalance in sharing of the profits generated from the online exploitation of copyright-protected content has been recently referred to as a ‘value gap’ problem.

Proclaiming the need to close a so-called¹ ‘value gap’ in the E.U. Member States, the European Commission has recently proposed to increase the role and liability of internet intermediaries in the context of tackling third-party copyright infringements. Importantly, Article 13 together with Recitals 37-39 of the draft Directive on Copyright in the Digital Single Market (DSMD) seeks to impose additional obligations on the online platforms engaged in storing and providing access to considerable amounts of copyright-protected works.² This proposal has already faced a substantial amount of criticism from legal scholars and business actors due to its alleged incompatibility with existing E.U. directives and case law of the Court of Justice of the

¹ See Giancarlo F. Frosio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe*, 12 OXFORD JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE 565, 571-573 (2017), available at <https://ssrn.com/abstract=2956859> (arguing that a ‘value gap’ problem is not supported by an empirical study) [hereinafter “Frosio, *From Horizontal to Vertical*”].

² Commission Staff Working Document – *Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes*, SWD (2016) 301 final, Brussels, 14 September 2016, at 155 [hereinafter “*Impact Assessment on the Modernisation of EU Copyright Rules*”].

European Union (CJEU) as well as a possible disproportionately burdensome effect on the business activities of hosting providers, especially those which constitute small and medium-sized enterprises.³

The main aim of this thesis is to determine whether the reformulation of liability exemptions for online service providers (OSPs)⁴ and imposition of enhanced obligations on them would serve the purpose of eliminating the causes of unfair distribution of revenues received from the use of the copyright-protected content. This study rests on the hypothesis that in the light of the existing legal framework such measures would not be effective and efficient in achieving its stated purpose and will likely result in an imbalance between the interests of copyright holders and OSPs, particularly, small enterprises.

The thesis will address several research issues. First, it will clarify how secondary liability of OSPs is currently regulated in the United States of America and the European Union - two jurisdictions that throughout two last decades have been developing the regulation in this sphere but are still facing copyright holders' amendment proposals, including those in connection with a 'value gap'.⁵ Second, it will analyze to what extent the proposed copyright

³ See, e.g.: Sophie Stalla-Bourdillon, Eleonora Rosati et al., *Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society*, 30 September 2016, available at: <https://ssrn.com/abstract=2850483>; S. Stalla-Bourdillon, E. Rosati, K. Turk, C. Angelopoulos, A. Kuczerawy, M. Peguera, M. Husovec, *A brief exegesis of the proposed Copyright Directive*, 24 November 2016, <https://ssrn.com/abstract=2875296> [hereinafter "Stalla-Bourdillon et. al, A brief exegesis of the proposed Copyright Directive"]; Christina Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market* (January 2017), available at: <https://ssrn.com/abstract=2947800> [hereinafter – "Angelopoulos, On Online Platforms"].

⁴ Hereinafter, unless the context otherwise requires, the term "**online service providers**" will be used to identify operators of hosting facilities for provision of online services or network access.

⁵ In the U.S., this problem has received a widespread attention, for instance, in the context of the so-called "YouTube Question", when, in June 2016, a large group of music artists, songwriters and other representatives of the U.S. music industry forwarded a letter to the U.S. Congress in which they asked for the DMCA amendment to exclude the user-uploaded platforms from the scope of the 'safe harbor' exceptions.

reform is compatible with the current E.U. legal framework. Finally, the proposed regulatory measures will be assessed in the light of the comparison of legal regimes existing in the U.S. and the E.U.

Legal scholars have previously addressed the issues of indirect liability of Internet intermediaries for third-party copyright infringements in the U.S.⁶ as well as in the EU.⁷ In addition, as mentioned above, this topic has recently received a special attention of researchers in the light of the DSMD.⁸ Nevertheless, the existing body of scholarly writings currently lacks a comparative study of the abovementioned jurisdictions aimed at analyzing the effectiveness and efficiency of the copyright reform measures through the prism of the “value gap” problem. This thesis, therefore, will analyze the proposed measures from this perspective.

Although the questions of a liability of OSPs may arise in respect of different intellectual property rights, such as trademarks, trade secrets and copyright, this thesis will focus on the infringements of the latter, since it is particularly relevant for the examination of the ‘value gap’ problem. This study will likewise limit the discussion of a primary liability of the OSPs,

⁶ See, e.g., Miquel Peguera *Converging Standards of Protection from Secondary Liability for Trademark and Copyright Infringement Online*, 37 COLUM. J.L. & ARTS 609 (2014) [hereinafter “Peguera, *Converging Standards of Protection*”]; Miquel Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481 (2009) [hereinafter “Peguera, *The DMCA Safe Harbors*”]; R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, 8 STAN. TECH. L. REV. (2011) [hereinafter “Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*”]; JERRY JIE HUA, TOWARD A MORE BALANCED APPROACH: RETHINKING AND READJUSTING COPYRIGHT SYSTEMS IN THE DIGITAL NETWORK ERA (2014).

⁷ See, e.g., CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS (2015); Tatiana-Eleni Synodinou, “*Intermediaries' liability for online copyright infringement in the EU: Evolutions and confusions*”, Computer law & security review 31 (2015); Jan Bernd Nordemann, *Liability for Copyright Infringements on the Internet: Host Provider (Content Providers) – The German Approach*, 2 JIPITEC 37 (2011) [hereinafter “Nordemann, *Host Provider (Content Providers) – The German Approach*”]; JAANI RIORDAN, LIABILITY OF INTERNET INTERMEDIARIES (2016) [hereinafter – “RIORDAN”].

⁸ See, e.g., Angelopoulos, *On Online Platforms*; Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NORTHWESTERN UNIVERSITY LAW REVIEW 19 (2017) [hereinafter “Frosio, *Reforming Intermediary Liability*”].

taking place when they become direct infringers of copyright rights, to the extent necessary for secondary liability considerations. At the same time, this thesis will focus on the analysis of the legal regulations of the secondary liability of OSPs in cases when the infringing actions of third parties are deemed to be attributed to the former. Furthermore, considering that the latest proposals on the amendment of existing copyright regimes are directly targeting recently emerged OSPs, such as Web 2.0 (participative-networked) platforms (or User Generated Content (UGC) websites) whose services are built upon a user-generated content,⁹ this study will be mainly devoted to the issues of secondary liability relevant for such OSPs. Finally, for the purposes of this thesis, the existence of a ‘value gap’ in the Digital Age is presumed and, thus, the issue whether it constitutes an actual problem is outside the scope of this work.

The thesis will be based on a comparative legal research of the legislation (currently in force and proposed one) as well as relevant case law regulating the issues of secondary liability of the hosting providers for third-party copyright infringements in the U.S. and the E.U. Given that the E.U. Directive 2000/31/EC on electronic commerce (E-Commerce Directive)¹⁰ is aimed at the harmonization of the liability exceptions to be applied by the E.U. Member States, this study will also compare the national legal systems and respective legal developments of three E.U. countries, namely, France, Germany and the United Kingdom. Furthermore, this study will also employ the functional method in analysis of the regulatory regimes and their effectiveness in solving existing practical problems. Finally, the assessment of scholarly

⁹ See OECD, *Participative Web: User-Created Content* (2007), <https://www.oecd.org/sti/38393115.pdf> (“Participative networked platforms facilitate social communication and information exchange. They are services based on new technologies such as the web, instant messaging, or mobile technologies that enable users to contribute to developing, rating, collaborating and distributing Internet content and developing and customizing Internet applications, or to conduct social networking”).

¹⁰ 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, OJ L 178, 17.7.2000 [hereinafter “E-Commerce Directive”].

writings of the renowned experts in the field of liability of internet intermediaries will be conducted to analyze the theoretical implications of the research topic.

The thesis will be organized in three chapters. The first chapter will be devoted to an analysis of a secondary liability of OSPs employed in the U.S. First, the case law development regarding three secondary liability doctrines (contributory infringement, vicarious liability and inducement liability) will be described with a special focus on the effects of *The Betamax case*¹¹ and *Grokster case*.¹² This chapter will further assess the scope of liability limitations established by the U.S. Digital Millennium Copyright Act (DMCA) of 1998¹³ and analyze the conditions for an insulation of OSPs from liability (a so-called hosting ‘safe harbor’ provision). Finally, the relationship between the requirements of secondary liability doctrines and a hosting ‘safe harbor’ immunity will be clarified.

The second chapter will address the conditions for the OSPs’ liability exemption which have been harmonized at the E.U. level through the adoption of the E-Commerce Directive and its relevant interpretations by the CJEU, including *Google France*,¹⁴ *L’Oreal v. eBay*,¹⁵ and *SABAM v Netlog*¹⁶ cases. Furthermore, it will explain the regulation of additional obligations of OSPs, including the related prohibition of general monitoring obligations. Given the absence of a harmonization of secondary liability rules on the E.U. level, this chapter will also contain

¹¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹² *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹³ *Digital Millennium Copyright Act*, Public Law 105-304, 112 Stat. 2860 (1998).

¹⁴ Judgement of 23 March 2010, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, C-236/08 and C-237/08, ECLI:EU:C:2010:159 [hereinafter “*Google France*”].

¹⁵ Judgement of 12 July 2011, *L’Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2011:474 [hereinafter – “*L’Oréal v eBay*”].

¹⁶ Judgement of 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, ECLI:EU:C:2012:85 [hereinafter “*SABAM v. Netlog*”].

a concise analysis of the national approaches to secondary liability of OSPs adopted in France (absence of a special regime), Germany (*‘Störerhaftung’*) and the United Kingdom (*‘authorization liability’* and *‘joint tortfeasorship’*), as well as related case law developments on the issues of a primary liability for third-party copyright infringements.

The third chapter will be devoted to the analysis of the recent E.U. copyright reform proposal. First, the measures introduced by draft Article 13 and Recitals 37-39 of the DSMD will be considered from the perspective of the existing E.U. legal framework, including the E-Commerce Directive, the Charter of Fundamental Rights of the European Union (E.U. CFR)¹⁷ and related jurisprudence of the CJEU. Second, the effectiveness and efficiency of the proposed measures on clarification of a hosting ‘safe harbor’ and imposition on OSPs of an obligation to apply effective content recognition technologies will be evaluated in the light of their goal and the comparative findings from the analysis of the legal regulation in the U.S. and E.U. Finally, the thesis will be concluded with a formulation of recommendations for amendment of the DSMD and a discussion of alternative methods for improvement of the E.U. copyright law reform proposals to resolve a ‘value gap’ problem while securing the appropriate balance between the protection of intellectual property rights and other fundamental rights and freedoms.

¹⁷ Charter of Fundamental Rights of the European Union, O.J. C 326/391, 26.10.2012 [hereinafter “E.U. CFR”].

CHAPTER I. SECONDARY LIABILITY OF ONLINE SERVICE PROVIDERS FOR THIRD-PARTY COPYRIGHT INFRINGEMENT IN THE UNITED STATES

Section 106 of the U.S. Copyright Act protects the exclusive rights which belong to a copyright owner.¹⁸ At the same time, the Copyright Act does not expressly address the questions of the derivative liability for copyright infringements committed by third parties. As a result, secondary liability doctrines have been developed in the jurisprudence of the U.S. and affirmed by the U.S. Supreme Court.¹⁹ The courts relied on the existing common law principles of tort with the aim of ensuring a suitable balance between protection of the rights of copyright holders and owners of new valuable Internet technologies that created obstacles in establishing liability of numerous unidentifiable primary infringers. Subsequently, the U.S. Congress relied on the case law developments to further contribute to the establishment of the aforementioned balance by introducing amendments to the Copyright Act,²⁰ thus, opting for a “vertical” regulation approach and formulating rules exclusively for a copyrighted content.²¹

Although OSPs may be directly liable for copyright infringements, more controversies arise regarding their possible secondary liability for the actions of the Internet users.²² In order to assess the scope of the secondary liability regime in the U.S., which nowadays constitutes the

¹⁸ 17 U.S.C.A. § 106 (West 2002).

¹⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984).

²⁰ Miquel Peguera, *Secondary Liability for Copyright Infringement in the Web 2.0 Environment: Some Reflections on Viacom v. Youtube*, 6 JICLT 18, 21 (2011) [hereinafter “Peguera, *Secondary Liability for Copyright Infringement*”].

²¹ Lilian Edwards, *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, Report Commissioned by the World Intellectual Property Organization, Geneva (2011), at 7, available at http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf [hereinafter “Edwards, *Role and Responsibility of Internet Intermediaries*”].

²² Seagull Haiyan Song, *A Comparative Copyright Analysis of ISP Liability in China versus the United States and Europe* 27 THE COMPUTER & INTERNET LAWYER 1, 7 [hereinafter – “Song, *A Comparative Copyright Analysis of ISP Liability*”]; Alfred C. Yen, *Third Party Copyright Liability After Grokster*, 16 INFO. & COMM. TECH. L. 184, 187 (2007) [hereinafter “Yen, *Third Party Copyright Liability After Grokster*”].

main ground for holding providers of technologies liable for third-party violations of copyright,²³ this chapter is aimed at identifying, first, key features of the doctrines on secondary liability for copyright infringements (A.) and, second, the immunities provided to OSPs by statutory law (B.).

A. GENERAL OVERVIEW OF SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENTS

The rationale behind the imposition of indirect liability rests on the assumption that in certain cases it may constitute the only practical means for effective enforcement of the copyright owner's rights against all primary infringers.²⁴ Until recently, the U.S. courts in the context of large-scale copyright infringements applied two main doctrines of secondary liability, namely, contributory infringement (1) and vicarious liability (2). In general, majority of the courts employed a rather limited application of the existing doctrines establishing derivative liability in cases of a close connection with third-party infringements, while only several courts opted for a broader interpretation of the doctrines.²⁵ Subsequently, however, rapid advancements of new technologies capable of a copyright infringing use have led to further extension of possible grounds for secondary liability, including the introduction of an additional²⁶ theory of inducement liability (3).

Even though the boundaries of each types of secondary liability are not precisely clear,²⁷ the following sub-sections will describe common criteria applied by the U.S. courts in addition to

²³ Peguera, *Secondary Liability for Copyright Infringement*, at 4.

²⁴ *In re Aimster Copyright Litig.*, 334 F.3d 643, 645–646 (7th Cir. 2003).

²⁵ Yen, *Third Party Copyright Liability After Grokster*, at 193.

²⁶ Several courts, however, considered inducement of copyright infringement to be a part of contributory infringement doctrine: *See*, e.g., *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161, 1169–1171 (9th Cir. 2007).

²⁷ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

one essential requirement without which the imposition of a secondary liability on a person is impossible, i.e. a direct infringement conducted by a third party.²⁸

1. Contributory Infringement

The doctrine of contributory infringement grew out from the tort-law principles of enterprise liability.²⁹ It is premised on the common law notion that a person who knowingly contributes to the third party's tortious act shall be jointly and severally held liable with the direct infringer.³⁰ The said doctrine thus requires a copyright holder to prove that a defendant not only knew or had a reason to know of the third party's direct infringement **(a)** but also materially contributed to such an infringement **(b)**.³¹

a. Knowledge of Infringing Activity

The knowledge requirement may be fulfilled when the defendant has either actual knowledge of the third party's copyright infringement or constructive knowledge of the latter.³² Therefore, this test prong employs both: subjective and objective standards.³³

²⁸ RONALD S. ROSEN, MUSIC AND COPYRIGHT 551 (2008); *see also* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001).

²⁹ *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

³⁰ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996); Steven Hetcher, *The Fault Liability in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 432 (Shyamkrishna Balganes, ed., 2013).

³¹ *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971); *Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002).

³² *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 487 (1984); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

³³ Miquel Peguera, *Converging Standards of Protection*, at 612.

As for the subjective standard, the courts found actual knowledge, for instance, in cases when defendants, upon receipt of relevant notifications, failed to remove the infringement materials³⁴ or failed to do the same promptly,³⁵ as well as where defendants provided users with the links to infringing content.³⁶ The recent case law, however, suggests that in establishing contributory infringement, courts tend to apply the objective standard.³⁷ As for the latter, the courts imputed knowledge where a defendant had reason to know about the infringement (for example, in cases when the defendant had researched related copyright implications and made statements on potential incompliance with copyright law in subscription agreements for investors³⁸ or used promotional materials displaying infringing content³⁹) or was willfully blind towards it (where defendants deliberately avoided information on infringing activity⁴⁰).

Furthermore, the general knowledge of the fact that a website or service is used or may be used for infringing activity would not be sufficient to give rise to a secondary liability.⁴¹ Instead, majority of courts would require the knowledge of a relatively specific nature.⁴²

One of the early cases on the matter, *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,⁴³ provided the basis for a limited interpretation of the knowledge prong. In

³⁴ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995); *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 658–659 (S.D.N.Y. 2013); *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

³⁵ *Oppenheimer v. Allvoices*, No. C 14-499 LB, 2014 WL 2604033, at *7-8 (N.D. Cal. June 10, 2014).

³⁶ *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 Copr. L. Dec. P 28483, 2002 WL 1997918 (S.D.N.Y. 2002).

³⁷ *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 658–659 (S.D.N.Y. 2013).

³⁸ *Id.*

³⁹ *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁴⁰ *See Id.*; *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003); *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013).

⁴¹ *Id.*, at 1072 (9th Cir. 2013).

⁴² *Yen, Third Party Copyright Liability After Grokster*, at 195; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007); *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 733, 751 (S.D.N.Y. 2012).

⁴³ *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2nd Cir. 1971).

this case, the defendant was engaged in organization of performances for concert artists as well as management of their related activities.⁴⁴ As part of such performance organization functions, the defendant organized performance associations and assisted its clients in managing their performances held by such associations which, in its turn, did not acquire the necessary copyright licenses.⁴⁵ In finding the defendant contributory liable for these third-party copyright infringements, the Court of Appeal for the Second Circuit has considered the knowledge of identities of the primary infringers, titles of copyrighted works infringed by their artists, and circumstances of such primary infringements, to be sufficient to satisfy the knowledge requirement.⁴⁶ Clearly, the said case illustrates an application of a very high threshold of specification of information about the primary infringement, where the defendant's contribution to the latter may not be overlooked by the court.

Such a restrictive approach to requirement interpretation was subsequently affirmed by the U.S. Supreme Court in the famous *Sony Corp. of America v. Universal City Studios, Inc.* (“*The Betamax case*”), concerning Sony’s alleged secondary liability for its clients’ copyright infringements conducted with the use of videotape recorders produced and distributed by Sony.⁴⁷ Accepting the fact that Sony possessed a general actual knowledge of its customers’ intentions to buy the recorders to commit copyright infringements, the U.S. Supreme Court ruled that a mere constructive knowledge of infringement is not sufficient for imposition of a secondary liability. Therefore, Sony was not held liable for the knowledge of the possible infringing use of its product.⁴⁸ It is important to note that the court relied on the “staple article

⁴⁴ *Id.*, at 1160.

⁴⁵ *Id.*, at 1161.

⁴⁶ *Id.*, at 1163.

⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁴⁸ *Id.*, at 439.

of commerce” doctrine existed in patent law to hold that contributory infringement would not take place as long as the product is “capable of substantial non-infringing use”,⁴⁹ which in case of Sony’s videotape recorders was time-shifting.⁵⁰ Consequently, while being concerned with finding an appropriate balance between protection of copyright and development of new technologies, the court indeed created a ‘safe harbor’ for the owners of the latter⁵¹ and significantly increased the threshold of the knowledge requirement.

The said requirement was further extended in *A&M Records, Inc. v. Napster, Inc.*,⁵² concerning the issue of secondary liability of the Internet service which provided for search and sharing of music digital files, including copyright-infringing ones, between the users. The Ninth Circuit ruled that the ability of peer-to-peer file sharing technology to be utilized for exchanging copyright infringing materials alone was not sufficient to meet the requirement.⁵³ Interestingly, the court refused to accord a special weight to the assessment of the proportion of potential infringing and non-infringing uses, formulating instead the requirement of an actual knowledge of specific infringing activity conducted through the defendant’s system. It was clarified that in case when a computer system operator is aware of specific infringing material on its system and fails to remove it from the latter, the intent to facilitate the infringement may be imputed and such an operator should be deemed a contributory infringer.⁵⁴

Subsequently, the courts assessed the existence of constructive knowledge on the part of the defendant by relying on these two latter cases to determine whether the defendant’s service or technology had a few non-infringing uses and was produced with the aim of copyright

⁴⁹ *Id.*, at 442.

⁵⁰ *Id.*, at 493.

⁵¹ Peguera, *Converging Standards of Protection*, at 612.

⁵² *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

⁵³ *Id.*, at 1021.

⁵⁴ *Id.*

infringing utilization or, to the contrary, had a substantial non-infringing application and thus qualified for *Sony* ‘safe harbor’.⁵⁵

b. Material Contribution to Infringing Activity

The second condition of contributory infringement requires to prove that an OSP materially assisted to a third party in infringing copyright.⁵⁶ The standard of material contribution is, however, not precisely defined by courts.

Several courts used the standard of substantial participation to find the defendants contributory liable.⁵⁷ In *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, for example, the U.S. Court of Appeals analyzed the examples of activities, such as lawful placement of advertisements for infringing materials, broadcasting of such advertisements, and packaging of infringing materials, which could be considered material contribution to the infringement of copyrighted musical composition.⁵⁸ Therefore, the standard entailed a very high threshold of contribution for fulfillment of the requirement.

The lower threshold, on the other hand, was employed by the courts that looked for a “personal conduct that encourages or assists the infringement”.⁵⁹ For instance, in *Fonovista, Inc. v. Cherry Auction, Inc.*, the Ninth Circuit citing previous case law confirmed that a mere provision of the means for conducting copyright infringement, such as provision of the premises, is

⁵⁵ See, e.g., *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 Copr. L. Dec. P 28483, 2002 WL 1997918 (S.D.N.Y. 2002).

⁵⁶ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

⁵⁷ See *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004); *Faulkner v. National Geographic Society*, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002), *aff'd in part, rev'd in part on other grounds*, 409 F.3d 26 (2d Cir.), *cert. denied*, 546 U.S. 1076 (2005).

⁵⁸ *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971).

⁵⁹ *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).

enough for finding contributory infringement.⁶⁰ Nevertheless, in holding the defendant liable for organization of the swap meets where third parties sold counterfeited musical recordings, the court also took into account the fact that copyright infringements would not have taken place without the defendant's facilitation. Later, the Ninth Circuit applied the same standard in *A&M Records, Inc. v. Napster, Inc.*, holding that material contribution took place, since without the defendant's actions the primary infringers would not have been able to locate and download the infringing materials.⁶¹ It should be noted, however, that, as follows from *Flava Works, Inc. v. Gunter*, the claim of contributory infringement may be denied in case when the connection between the said personal conduct of the defendant and the infringement is too remote.⁶²

2. Vicarious Liability

Even though the common law doctrine of vicarious liability has its roots in the doctrine of *respondeat superior*, the U.S. courts did not find the existence of an agency-principal relationship to be a necessary requirement for establishing such a liability for copyright infringement.⁶³ Instead, the case law confirmed that an OSP will be deemed vicariously liable in cases when it possesses the right and ability to control the direct infringement **(a)** as well as a direct financial interest in the infringing activity **(b)**.⁶⁴ It should be noted, however, that the requirements of vicarious liability were slightly reformulated by the U.S. Supreme Court

⁶⁰ *Fonovista, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996); see also *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 155 (S.D.N.Y. 2009); *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 659 (S.D.N.Y. 2013).

⁶¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

⁶² *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012).

⁶³ *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁶⁴ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

requiring “profiting from direct infringement while declining to exercise a right to stop or limit it”.⁶⁵

a. Right and Ability to Supervise and Control Infringing Activity

Case law provides a number of examples of capacities to supervise the infringing conduct of the users compliant with the standard of vicarious liability, such as, for instance, the right to block user’s access,⁶⁶ the right of supervision of their infringing activity,⁶⁷ the ability to clean database from links to infringing content,⁶⁸ and the ability to limit speed for downloading infringing materials.⁶⁹ To the contrary, the courts did not find the test prong fulfilled where the defendants did not have ability to control the transmission of infringing files due to a decentralized nature of the service involved.⁷⁰ Moreover, the defendant may be found vicariously liable in cases when its employees were directed to facilitate the infringing activity.⁷¹ Additionally, it is not required that the defendant possessed a formal right to control rather it is an actual and practical ability to supervise or user’s dependence on such a supervision which is sufficient.⁷² Likewise, contractual formalities between the hosting provider and its users alone are not enough to prove the required control.⁷³

⁶⁵ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 930 (2005); *See also Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1071 (9th Cir. 2013).

⁶⁶ *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁶⁷ *Id.*

⁶⁸ *See Arista Records, Inc. v. Mp3Board, Inc.*, 2002 Copr. L. Dec. P 28483, 2002 WL 1997918 (S.D.N.Y. 2002).

⁶⁹ *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 157 (S.D.N.Y. 2009).

⁷⁰ *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

⁷¹ *UMG Recording, Inc. v. Escape Media Group, Inc.*, No. 11 Civ. 8407, 2014 WL 5089743 (S.D.N.Y. 2014).

⁷² *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971).

⁷³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

b. Direct Financial Benefit

The financial interest prong of the test requires establishment of two elements: the infringing content should constitute a draw for the customers and a causal link must be present between the infringing conduct of the users and financial benefit derived by the defendant.⁷⁴ In case of the former condition, the courts are excluding the situations when the infringing content constitutes only an additional benefit rather than a draw for the customers.⁷⁵

3. Inducement Liability

As has been demonstrated above, as well as acknowledged by legal scholars,⁷⁶ the U.S. courts have adopted different interpretations of secondary liability doctrines in cases of third-party copyright infringements. This resulted in fundamental contradictions in decisions⁷⁷ and, thus, potential for unpredictable outcomes of the new cases.

In 2005, however, the U.S. Supreme Court attempted to address this problem in *MGM Studios, Inc. v. Grokster, Ltd.*⁷⁸ The case may be considered a landmark decision on secondary liability for copyright infringement as well as the *Sony Betamax case* re-examination.⁷⁹

The Court in *Grokster* had to decide the issue of secondary liability of the providers of free computer software programs which were distributed for the purposes of sharing of copyright infringing materials by their users through peer-to-peer network.⁸⁰ The software enabled its

⁷⁴ *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017).

⁷⁵ *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117–18 (9th Cir.).

⁷⁶ See, e.g.: Yen, *Third Party Copyright Liability After Grokster*; Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZONA LAW REVIEW 577 (2008) [hereinafter “Ginsburg, *Separating the Sony Sheep from the Grokster Goats*”]; Kathryn D. Holt, *Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances*, 19 J. INTELL. PROP. L. 173 (2011).

⁷⁷ Yen, *Third Party Copyright Liability After Grokster*, at 187.

⁷⁸ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁷⁹ ANDREJ SAVIN, EU INTERNET LAW 150-151 (2017) [hereinafter “SAVIN”].

⁸⁰ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-920 (2005).

users to locate the requested files and share them directly from each other's computers.⁸¹ It was established that around 90% of the files available through the program were protected by copyright⁸² and that defendants knew of a large-scale infringing activities of its users.⁸³

Despite the abovementioned facts, the existing interpretations of secondary liability requirements were inapplicable to the defendants. Firstly, the Court refused application of contributory infringement theory since the defendants' product was capable of significant non-infringing use and fell within the Sony 'safe harbor' because the decentralized character of the file sharing precluded defendants from obtaining actual knowledge of specific infringing activities. The latter likewise prevented the Court from finding the defendants vicariously liable due to resulting absence of ability to control the actions of the software users.

Nevertheless, the Court deemed appropriate to subject the defendants to secondary liability considering the impossibility of protecting the rights of copyright holders by imposition of direct liability on millions of primary infringers.⁸⁴ The Court relied on patent law to find the defendants liable for inducement⁸⁵ of the copyright infringements and clarified that *Sony* 'safe harbor' "was never meant to foreclose rules of fault-based liability derived from the common law."⁸⁶ The Court, therefore, established the rule according to which "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of

⁸¹ *Id.*, at 921-922.

⁸² *Id.*, at 922.

⁸³ *Id.*, at 923.

⁸⁴ Mark Bartholomew, *Copyright, Trademark and Secondary Liability After Grokster*, 32 COLUM. J.L. & ARTS 445, 461 (2009).

⁸⁵ Notably, the reference to inducement was not new to U.S. jurisprudence on third-party copyright infringement: *See, e.g., Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 686 (N.D. Cal. 1994).

⁸⁶ *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2768 (2005).

infringement by third parties.”⁸⁷ Applying this test to the facts of the case, the Court decided that the defendants did not merely distribute a neutral device capable of non-infringing use but instead encouraged the copyright infringements and financially benefited from them.⁸⁸ It also clarified that liability will not be established “on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.”⁸⁹

The following sub-sections will describe the criteria for establishment of inducement liability (a) as well as analyze the effects of *Grokster case* on further development of secondary liability theories (b).

a. Affirmative Intent and Active Steps to Encourage Infringement

According to the inducement theory developed in *Grokster*, a “mere knowledge of infringing potential or of actual infringing uses” would not be deemed sufficient to establish liability. Instead, there should be an intent evidenced by “purposeful, culpable expression and conduct”, which, as follows from patent law, requires demonstration of “affirmative steps to bring about the desired result”.⁹⁰

The Court identified three types of evidence demonstrating the intent of the defendants to induce copyright infringements by their users. Firstly, the Court took into account the marketing strategy of the defendants which was based on promotion of the service’s products to former users of Napster as a substitute to the infringing content of the latter.⁹¹ Secondly, the Court viewed the failure to implement any filtering technologies or other means of minimizing

⁸⁷ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-937 (2005).

⁸⁸ *Id.*, at 941.

⁸⁹ *Id.*

⁹⁰ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 760 (2011).

⁹¹ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923-924 (2005).

the infringements as another proof of “intentional facilitation of their users' infringement”.⁹² Thirdly, the Court also relied on the defendant’s business plan which was dependent on a high volume of infringing activities.⁹³ Importantly, the Court clarified that, given the ruling in the *Sony Betamax* case, the absence of filtering technologies and business model directed at infringements alone would not be sufficient to establish liability, but the combination of the abovementioned three conditions may well produce such a result.⁹⁴

b. Effects of Grokster case

There is a considerable discussion among legal scholars regarding the effects of *Grokster* on subsequent development of rules on secondary liability for third-party copyright infringements. According to one opinion, the case has provided the basis for further advancement of the legal framework.⁹⁵ To the contrary, the case is condemned by some scholars for unnecessary reliance on the intent requirement in cases of copyright infringements, since such an approach is perceived to be inconsistent with the economic function of copyright as an incentive for making creative works.⁹⁶

Special concerns relate to the obscurity of the test applied for finding the defendant’s intent to induce copyright infringement. Considering the types of evidence used by the Court, some scholars believe that the assessment of the level and magnitude of infringements may prevail over the establishment of the defendant’s bad intentions.⁹⁷ Moreover, it remained unclear whether one may be found liable in case of building its business model on benefits from the

⁹² *Id.*, at 939.

⁹³ *Id.*, at 916.

⁹⁴ *Id.*, at 939-940.

⁹⁵ Yen, *Third Party Copyright Liability After Grokster*, at 189.

⁹⁶ Timothy Wu, *The Copyright Paradox: Understanding Grokster*, 2005 SUP. CT. REV. 229, 249-251 (2005) [hereinafter “Wu, *The Copyright Paradox: Understanding Grokster*”].

⁹⁷ Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, at 9.

direct infringements and failure to adopt the filtering technologies, since the Court did not state that all three types of evidence must be necessary present.⁹⁸

More importantly, *Grokster* has been viewed as contributing to a shift of the burden of proactive monitoring on OSPs,⁹⁹ in particular those who derive financial benefit from infringing materials.¹⁰⁰ As a result of the court's decision, a permanent injunction was issued against StreamCast Networks, the only defendant which did not settle with the plaintiff, ordering the former to introduce a content filter in its P2P software by choosing "the most effective means available to reduce the infringing capabilities" of such a software, "while preserving its core non-infringing uses".¹⁰¹ At the same time, the court ruled that the appropriate technologies should be recommended by a specially appointed expert, while copyright holders must provide the defendant with the information identifying copyrighted material for the purposes of implementation of the filter.¹⁰² By doing this, notably, the district court also adopted a limited approach to the scope of permissible injunction similar to the Ninth Court's decision in *Napster* case where the initial broad injunction allocating the whole burden of monitoring on a service provider was limited by requiring copyright owners to supply the lists of specific copyrighted materials.¹⁰³

Considering the clarification provided in *Global-Tech Appliances, Inc. v. SEB S.A.*, that the level of the defendant's knowledge sufficient to find inducement liability may be derived from

⁹⁸ *Id.*, at 10.

⁹⁹ David O. Blood, Kee-Min Ngiam, *A Focus on Filters: Latest Developments in MGM v. Grokster*, 20 INTELLECTUAL PROPERTY & TECHNOLOGY LAW JOURNAL 1, 1 (2008).

¹⁰⁰ *Id.*, at 4.

¹⁰¹ *Id.*, at 1 (citing Order Granting in Part Plaintiffs' Motion for a Permanent Injunction, MGM Studios, Inc. v. Grokster, Ltd. CV 01-8541:1215, at 83 (Oct. 16, 2007)).

¹⁰² *Id.*, at 1.

¹⁰³ William C. Harrelson, *Filtering the Internet to Prevent Copyright Infringement: ISP Safe Harbors and Secondary Liability in the U.S. and France*, <https://www.jdsupra.com/documents/045cf8b4-3388-412d-9322-e10395852ba8.pdf> (last visited on 28 March 2018), at 9-10.

not only actual knowledge but also from a willful blindness,¹⁰⁴ it is indeed questionable to what extent an OSP should perform monitoring activities. In relation to *Grokster*, for instance, scholars have argued that this case has given a rise to entrepreneurs' "obligation of good faith efforts to avoid infringement",¹⁰⁵ and to considering their use of filtering technologies as a 'safe harbor' from secondary liability.¹⁰⁶ Therefore, the case has been seen as creating an incentive for businesses to adopt filtering technologies in order "to be perceived as "legitimate".¹⁰⁷

The actual business practices of online content distributors seem to confirm such conclusions. For instance, the requirement to utilize filtering technologies stems from the "Principles for User Generated Content Services" adopted by major companies in media sector¹⁰⁸ as well as is evident from a wide-spread use of watermarking fingerprinting, Copyright Alert Systems and Google's Content ID technology.¹⁰⁹ Such a shift of the burden to prevent copyright violations, however, poses a potential problem for the extension of Web 2.0 business, since, under the *Grokster* standard, big-scale businesses are more exposed to liability for copyright inducement in case of massive copyright violations.¹¹⁰ Contrary to the foregoing, it is argued that the implementation of filtering technologies has occurred voluntary as a successful result of a voluntary approach to content monitoring adopted by the U.S. legislator in the context of statutory liability immunities under the DMCA.¹¹¹

¹⁰⁴ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

¹⁰⁵ Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, at 4, 12.

¹⁰⁶ Wu, *The Copyright Paradox: Understanding Grokster*, at 247.

¹⁰⁷ Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, at 11-12.

¹⁰⁸ *Principles for User Generated Content Services*, <https://ugcprinciples.com/> (last visited Feb, 09, 2018).

¹⁰⁹ Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZONA STATE LAW JOURNAL 801, 824-826 (2015).

¹¹⁰ Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, at 32-33.

¹¹¹ Evan Engstrom, Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (March 2017), www.engine.is/events/category/the-limits-of-filtering-a-

B. LIABILITY LIMITATIONS UNDER THE U.S. DIGITAL MILLENNIUM COPYRIGHT ACT

2018 marks the 20th anniversary of the adoption of the DMCA as an amendment to the Copyright Act.¹¹² Since late 1990s, this Act has been attempting to combat copyright violations taken place online and, therefore, ensure the balance between the rights of copyright holders and internet intermediaries in the time of the rapid advancement of Internet technologies.

To prevent the ‘chilling effect’ of the development of primary and secondary liability theories in the online context and incentivize the service providers’ investments in further development of the Internet,¹¹³ the Online Copyright Infringement Liability Limitation Act (OCILLA, Title II of the DMCA),¹¹⁴ introduced several safe harbors to provide immunity from liability for third-party copyright violations to different types of internet intermediaries subject to their compliance with prescribed requirements.¹¹⁵ As demonstrated below, over twenty years of its enforcement, however, the said Act has proven to be not without controversies.¹¹⁶

To determine the effects of the above-mentioned approach to limitation of the OSPs’ liability, this section explores the general scope of available immunities **(1)** as well as focuses on assessing what kind of hosting service providers and under what conditions are entitled to such a protection **(2)**.

lookat-the-functionality-shortcomings-of-content-detection-tools, at 8 [hereinafter “Engstrom & Feamster, *The Limits of Filtering*”].

¹¹² *Digital Millennium Copyright Act*, Public Law 105-304, 112 Stat. 2860 (1998).

¹¹³ Pardis Moslemzadeh Tehrani, Tahereh Amoozegar, *How Is The Liability Of Internet Service Providers Limited Under The Digital Millennium Copyright Act?* 28 IPEDR 258, 258 (2012).

¹¹⁴ DMCA Title II or ‘The Online Copyright Infringement Liability Limitation Act’ (OCILLA) Bill Number H.R.2281 for the 105th Congress, 112 Stat. 2860 (1998).

¹¹⁵ *Ellison v. Robertson*, 357 F.3d 1072, 1076–1077 (9th Cir. 2004).

¹¹⁶ Peguera, *Converging Standards of Protection*, at 609.

1. General Scope of Liability Limitations

Instead of directly regulating the issue of secondary liability, Section 512 DMCA established four liability exemptions available to the service providers which are engaged in performance of the following types of functions: transitory communication,¹¹⁷ system caching,¹¹⁸ hosting of information¹¹⁹ or use of information location tools.¹²⁰ Additional protection was also introduced for service providers in the sphere of non-profit education.¹²¹ Each liability limitation is formulated specifically for each separate type of activity performed by a service provider and, thus, availability of protection based on one of the grounds is independent from compliance with the conditions imposed by any of the other grounds.¹²² Importantly, Section 512(m) DMCA expressly guarantees that provider's monitoring of its services or accessing material in prohibition of law shall not constitute preconditions for acquiring immunity pursuant to the Act.¹²³

As for the effect of the said immunities, qualification for each of the latter results in complete elimination of the monetary liability and substantial restriction of injunctive liability for copyright infringements.¹²⁴

It shall be specifically emphasized here that qualification for immunity under the DMCA does not exclude the liability for the copyright infringement. In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, while considering the issue of availability of a 'safe harbor' defense to an OSP in relation to its vicarious liability for storing unauthorized copies of materials belonged to an

¹¹⁷ 17 U.S.C. Sec. 512(a).

¹¹⁸ 17 U.S.C. Sec. 512(b).

¹¹⁹ 17 U.S.C. Sec. 512(c).

¹²⁰ 17 U.S.C. Sec. 512(d).

¹²¹ 17 U.S.C. Sec. 512(e).

¹²² 17 U.S.C. Sec. 512(n).

¹²³ 17 U.S.C. Sec. 512(n).

¹²⁴ 17 U.S.C. Sec. 512(j).

adult magazine, the District Court confirmed that ‘safe harbor’ provisions “do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability” but instead “they limit the relief available against service providers that fall within these safe harbors”.¹²⁵ Therefore, the function of the DMCA provisions is not to establish the liability of a service provider for violation of copyright law, but to limit its liability to the prescribed extent.

Considering the above, in theory, the evaluation of whether a service provider qualifies for certain immunity shall be preceded by the establishment of a liability for copyright infringement, though, in practice, U.S. courts may opt to non-traditional order of assessment. For instance, in *CoStar Group Inc. v. LoopNet, Inc.* relating to the issue of alleged liability for copyright infringement due to online hosting of real estate catalogues for brokers, the District Court explained its decision to analyze the ‘safe harbor’ issue first by emphasizing, firstly, that parameters of liability doctrine and requirements for immunities under the DMCA are not identical and, secondly, the practical convenience of such an order to the extent the applicability of the DMCA would exclude the necessity of considering the issue of damages.¹²⁶

It should also be clarified that the unavailability of ‘safe harbor’ protection does not automatically entail the liability of a service provider. The latter will still have the right to resort to other defenses provided by applicable law.¹²⁷ Regarding the immunity eligibility requirements, a service provider shall comply with general and specific conditions for protection. Firstly, a service provider shall qualify with the statutory definition,¹²⁸ which is

¹²⁵ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1174 (C.D.Cal. 2002).

¹²⁶ *CoStar Group Inc. v. LoopNet, Inc.*, 164 F.Supp.2d 688, 699 (D. Md. 2001).

¹²⁷ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004).

¹²⁸ 17 U.S.C. Sec. 512(k).

sufficiently broad.¹²⁹ Secondly, it must fulfill two general conditions aimed at establishment of a policy allowing to prevent repeat infringers from subscribing for services as well as at accommodation of “statutory technical measures” used for identification and protection of copyrighted materials at no substantial costs or hardship of service providers.¹³⁰ Thirdly, a service provider shall comply with specific requirements prescribed for each distinct kind of activities performed by it. The following sub-section will contain the analysis of specific requirements applicable to service providers engaged in online hosting.

2. ‘Safe Harbor’ for Online Service Providers

Section 512(c) DMCA allows to limit liability of a service provider engaged in storing materials on its system or network at the direction of any of its users.¹³¹ In *UGM Recording v. Shelter Capital Partners*, it was clarified that the intent of a legislator was to extend the application of this provision beyond “mere electronic storage of” information to specifically cover “the access-facilitating processes that automatically occur when a user uploads” the material to a platform service.¹³² Thus, the statutory definition has been interpreted as sufficiently broad to cover various types of hosting providers, such as social networks, social media platforms, various websites, including user-generated content (UGC) ones. Considering the great number of the Web 2.0 platforms, such as YouTube, Flickr, Tumblr and many other, storing enormous amounts of user-generated copyrighted content, it is not surprising that this Section 512(c) represents the most often used provision out of four DMCA ‘safe harbors’.¹³³

¹²⁹ *In re Aimster* 334 F.3d 643, 655 (7th Cir. 2003).

¹³⁰ 17 U.S.C. Sec. 512(i).

¹³¹ 17 U.S.C. Sec. 512(c).

¹³² *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) at 3, affirming *UMG Recordings v. Veoh Networks Inc.*, 690 F. Supp. 2d at 1088-89 (C.D. Cal, 2009).

¹³³ Peguera, *Secondary Liability for Copyright Infringement*, at 1.

To be accorded protection under this ‘safe harbor’, an OSP must comply with a set of conditions, more specifically, it shall not actually know of the copyright infringement or be aware of facts or circumstances from which such an infringement is apparent, or in case of having such a knowledge or awareness expeditiously remove the relevant material **(a)**, shall not acquire financial benefit directly related to infringing activity if possessing the right and ability of control over such an activity **(b)**, and shall expeditiously remove or terminate access to the infringing material upon the relevant notification from the copyright owner **(c)**.

The following sub-sections contains the analysis of the above-mentioned hosting exception requirements. It is demonstrated that, though appearing to be identical with the requirements of the secondary liability doctrines, these two sets of requirements have several significant differences.

a. Knowledge of Infringing Activity

Apart from ensuring copyright protection in the digital environment, the DMCA liability exemptions were designed to create immunities for service provider whose system is used by third party to commit the copyright infringements without the provider’s knowledge thereof. Thus, safe harbor immunity is not presumed but accorded exclusively to “innocent” service providers, i.e. those who do not have either actual or constructive knowledge of the infringement.¹³⁴ Conversely, the protection is lost with the loss of such an innocence,¹³⁵ unless the service provider “acts expeditiously to remove or disable access to the [infringing] material”.¹³⁶

¹³⁴ *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001).

¹³⁵ *Id.*

¹³⁶ 17 U.S.C. § 512(c)(3)(A)(iii).

The U.S. courts¹³⁷ have consistently ruled that the described knowledge or awareness must concern “specific and identifiable infringements”,¹³⁸ rather than constitute a general knowledge of possible infringing use of the provider’s platform or website.¹³⁹ As pointed out by the Second Circuit in *Viacom Int’l, Inc. v. YouTube, Inc.*, this requirement of specificity stems from the resulting obligation of expeditious removal of infringing material, performance of which would be impossible in cases where the knowledge has only a general character.¹⁴⁰ Such a high threshold is in accordance with the general aim of the DMCA ‘safe harbors’ directed at facilitation of cooperation between copyright owners and service providers in dealing with infringements.¹⁴¹ Indeed, considering the OSPs’ exposure to an enormous amount of undifferentiated content, it seems more effective to require copyright holders to detect specific infringements and notify service providers thereof but not *vice versa*.¹⁴²

Furthermore, two possible scenarios in which OSPs may acquire the aforementioned actual knowledge or awareness of infringing content and conduct are the receipt of a takedown-notice from the copyright holder and the presence of the ‘red flags’,¹⁴³ i.e. special circumstances to suspect the infringing character of the activity which requires further action.¹⁴⁴ It means that the said requirement implies two alternative standards: subjective (whether provider had an

¹³⁷ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30–32 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021–1023 (9th Cir. 2013); *BWP Media USA, Inc. v. Clarity Digital Group, LLC*, 820 F.3d 1175, 1182 (10th Cir. 2016).

¹³⁸ *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp.2d 514, 523 (S.D.N.Y.2010).

¹³⁹ See also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

¹⁴⁰ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30–32 (2d Cir. 2012).

¹⁴¹ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021–1022 (9th Cir. 2013).

¹⁴² *Id.*, at 1022.

¹⁴³ Song, *A Comparative Copyright Analysis of ISP Liability*, at 8.

¹⁴⁴ US Senate, *The Digital Millennium Copyright Act of 1998*, S. Rpt. 105-190, 11 May 1998.

actual knowledge of infringement) and objective (whether a reasonable person had an objective knowledge of infringement).¹⁴⁵

As for the subjective standard, it was acknowledged in *Corbis Corp. v. Amazon.com, Inc.*, that a proper copyright owner's notification describing the alleged copyright infringement constitutes "the most powerful evidence of [actual] knowledge".¹⁴⁶ At the same time, it has been recently clarified by the Ninth Circuit that the lack of such a notice shall not be considered a conclusive evidence of the absence of actual knowledge of the infringement. Therefore, a full assessment of the court should not end on this but needs to be extended to analyzing "subjective knowledge of the infringing nature" of the object of assessment.¹⁴⁷

Regarding the objective standard, the legislator expressly introduced several limitations related to establishment of the existence of 'red flags'. Firstly, the objective knowledge may not be established based on a copyright holder's notification which is incompliant with the listed statutory requirements.¹⁴⁸ Nevertheless, at least one court argued that it may be possible in certain circumstances, even though refusing to give such a weight to the infringement notification sent by a person other than a copyright holder.¹⁴⁹ Secondly, and more importantly, it is explicitly recognized that a service provider does not have a duty to conduct a proactive search of infringing content.¹⁵⁰ Admitting that the imposition of the duty of manual or automatic monitoring on service providers was not technologically feasible,¹⁵¹ the U.S. Congress included this guarantee against the essential burden of identifying copyright

¹⁴⁵ *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1057 (9th Cir. 2017).

¹⁴⁶ *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1107 (W.D. Wash. 2004).

¹⁴⁷ *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1057 (9th Cir. 2017) (in that case, it was the posts of the social media platform, LiveJournal, containing copyrighted photographs).

¹⁴⁸ 17 U.S.C.A. § 512(c)(3)(B)(i).

¹⁴⁹ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1024–1025 (9th Cir. 2013).

¹⁵⁰ 17 U.S.C.A. § 512(m).

¹⁵¹ Engstrom & Feamster, *The Limits of Filtering*, at 5.

infringing materials in order to balance the interests of service providers with the interests of copyright holders who is usually in a better position to effectively identify violations of their copyright.¹⁵² The innocence of an OSP, however, will be lost in case of willful blindness, i.e. whenever it would deliberately avoid receiving specific knowledge of copyright infringements.¹⁵³ In this respect it should be noted that in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, the court refused to accept the claimant's argument that the delay of the defendant in implementing allegedly more effective filtering system constituted its willful blindness of the infringements taken place on the defendant's UGC video-platform due to the DMCA's guarantee against imposition of a general monitoring obligation.¹⁵⁴

Consequently, in general, an OSP in the U.S. will be held liable in case when it possessed an actual knowledge of specific infringing activity due to the receipt of a statutory-compliant notification from a copyright holder or in case of a purposeful avoidance of such a notification.¹⁵⁵ The recent U.S. case law developments also demonstrate that courts may consider another evidence for establishing the availability of the defendant's knowledge, such as a subjective knowledge of infringing posts possessed by voluntary moderators in case of a UGC platform.¹⁵⁶

¹⁵² *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013).

¹⁵³ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013); See also Rachel N. Agress, *Is There Ever A Reason to Know? A Comparison of the Contributory Liability "Knowledge" Standard for Websites Hosting Infringed Trademarked Content Versus Infringed Copyrighted Content*, 5 J. BUS. ENTREPRENEURSHIP & L. ISS. 179, 193-194 (2011), available at: <https://digitalcommons.pepperdine.edu/jbel/vol5/iss1/7>.

¹⁵⁴ *UMG Recordings v. Veoh Networks Inc*, 665 F. Supp. 2d 1099, 1113 (C.D. Cal, 2009).

¹⁵⁵ Béatrice Martinet Farano, *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches*, 14 TTLF Working Paper 1, 79-82 (2012) [hereinafter "Farano, *Internet Intermediaries' Liability*"].

¹⁵⁶ See *Mavrix Photographs, LLC v. Livejournal, Inc*, 873 F.3d 1045, 1057 (9th Cir. 2017).

b. Control over and Financial Benefit from Infringing Activity

To seek a refuge in a hosting ‘safe harbor’, an OSP is additionally required to demonstrate the absence of a financial benefit connected to infringement in cases when such a service provider possesses the right and ability to control the copyright infringing activity of a third party.¹⁵⁷ This means that an OSP would fail to qualify with this condition only in case of cumulative presence of both elements: financial benefit and control.

Considering the element of financial interest, the courts are focusing on an existence of “a causal relationship between the infringing activity and any financial benefit a defendant reaps”, rather than the amount of such a benefit in comparison to the provider’s profits.¹⁵⁸ For this reason, the main subject of the courts’ analysis is whether the infringing activity constitutes a factor which attracts users to the provider’s service.¹⁵⁹ Applying this standard, the courts found financial benefit, for instance, in case of deriving income from advertisements on the websites which attracted users by its very high percentage of infringing materials,¹⁶⁰ and refused the same in cases of insufficient evidence of the existence of a draw for users.¹⁶¹

According to the prevailing interpretation of the Second Circuit, right and ability of control for the purposes of a hosting ‘safe harbor’ requires “something more than the ability to remove or block access to materials posted on a service provider's website”.¹⁶² In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, by analyzing previous jurisprudence, the Court also clarified that “something more” refers to substantial influence with regard to the users’ activities, which

¹⁵⁷ 17 U.S.C.A. § 512(c)(1)(B).

¹⁵⁸ *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1044 (9th Cir. 2013).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, at 1044-1045.

¹⁶¹ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117–1018 (9th Cir. 2007); *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

¹⁶² *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012).

may result from, for example, the monitoring program imposing obligatory conduct on users or inducement of copyright violations.¹⁶³ As for the application of filtering systems, it should be particularly emphasized that U.S. courts do not interpret this fact as evidencing the right and ability to control the infringement, since the decision to the contrary will make a “safe harbor” immunity conditional upon availability of such a monitoring which, in its turn, is expressly prohibited under the DMCA.¹⁶⁴

c. Expeditious Removal of Infringing Material (Notice and Takedown Procedure)

The DMCA defines an obligatory notice and takedown procedure allowing copyright holders to let hosting providers know about an infringing activity or content as well as rapidly remove and prevent the latter. Such a system came as a “formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement”¹⁶⁵ and nowadays represents a cornerstone of the statutory liability exemptions, availability of which is expressly conditioned upon the expeditious removal of the infringing material by non-innocent service providers.¹⁶⁶

First and foremost, the U.S. statutory framework lays down formal requirements for a valid notification by specifying its essential elements,¹⁶⁷ substantial incompliance with which will result in a refusal to find an actual knowledge or awareness of the infringing content on the part of a service provider.¹⁶⁸ In case of receipt of a valid notice, a service provider is obliged to either remove or disable access to illicit content in order to secure its entitlement to the ‘safe

¹⁶³ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013).

¹⁶⁴ *UMG Recordings v. Veoh Networks Inc*, 665 F. Supp. 2d 1099, 1113 (C.D. Cal, 2009).

¹⁶⁵ US Congressional Senate Rep No 105-190, 45 (1998).

¹⁶⁶ Peguera, *The DMCA Safe Harbors*, at 490.

¹⁶⁷ 17 U.S.C.A. § 512(c)(3).

¹⁶⁸ 17 U.S.C.A. § 512(c)(3)(b)(i) (note, however, that insignificant incompliance, on the other hand, leads to the obligation of a service provider to take reasonable steps in receiving additional information supplementing the incomplete notification).

harbor' immunity.¹⁶⁹ Such an immunity will generally be available regardless of whether the content in question is found to be infringing or not,¹⁷⁰ and conditionally available where the data is residing at the direction of the users, only subject to a service provider performing the prescribed reasonable actions.¹⁷¹ The statute likewise provides for a counter-notice procedure which protects the interests of the alleged copyright infringer and allow to secure a non-infringing hosted material.¹⁷² Finally, appropriate remedies relating to a bad faith conduct are put in place in respect of all parties concerned,¹⁷³ which serve as a guarantee against abusive claims.¹⁷⁴ All in all, the U.S. notice ad takedown system offers sufficient certainty about the procedure that must be followed by the parties concerned, which enables the latter to adjust their conduct accordingly.¹⁷⁵

3. Relationship Between the Elements of Secondary Liability and 'Safe Harbor'

It was previously believed that the DMCA protection extends only to claims of direct liability.¹⁷⁶ Such a confusion was caused by the similarity in the language of statutory provisions and court decisions on secondary liability. Although the criteria employed in contributory infringement and vicarious liability doctrines were reflected in the DMCA, the standards in question are not identical **(a)**. Moreover, until recently, additional debate existed as to what extent (whether at all) the DMCA 'safe harbor' provision limits the inducement liability **(b)**.

¹⁶⁹ 17 U.S.C. § 512(c)(3)(A)(iii).

¹⁷⁰ 17 U.S.C. § 512(g)(1).

¹⁷¹ 17 U.S.C. § 512(g)(2).

¹⁷² 17 U.S.C. § 512(g)(3).

¹⁷³ 17 U.S.C. § 512(f).

¹⁷⁴ GRAEME B. DINWOODIE, *SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS* 42-43 (2017).

¹⁷⁵ *Id.*, at 43.

¹⁷⁶ Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 427-428.

a. Exemption from Contributory Infringement and Vicarious Liability

Although legal scholars¹⁷⁷ and courts¹⁷⁸ reiterated that the similar elements employed under secondary liability doctrines and the DMCA are not identical and provide for different thresholds, the latter have become more similar with the case law development.

As for the comparison of knowledge requirements, it is argued that the relevant threshold may be fulfilled easier in case of finding a secondary liability rather than disqualification from DMCA protection.¹⁷⁹ It appears, however, that in case when both elements are deemed to require proof of the knowledge of specific infringements, the elements of secondary liability and ‘safe harbor’ would not substantially differ. The requirements for content of a copyright owner’s notice may likewise be similar. Previous case law indicated that the knowledge of infringing content or conduct obtained by OSP through the notice from a copyright holder will be sufficient to find the possession of knowledge required for establishment of a secondary liability.¹⁸⁰ Therefore, it was argued that there were no specific requirements as to the form or content of such a notice, if the latter sufficiently informed a service provider about the infringing conduct of its user.¹⁸¹ Nevertheless, the Ninth Circuit has subsequently clarified that a claim for contributory infringement would fail if the notice would not be in compliance with DMCA standards.¹⁸²

Regarding the ability and control element, scholars confirm that in drafting the DMCA it was not the Congress’s intention to exclude the vicarious liability from the scope of ‘safe

¹⁷⁷ *Id.*, at 429.

¹⁷⁸ *CoStar Group Inc. v. LoopNet, Inc.*, 164 F.Supp.2d 688, 699 (D. Md. 2001).

¹⁷⁹ Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 433-436; Peguera, *Converging Standards of Protection*, at 614.

¹⁸⁰ *Religious Tech. Ctr. V. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995); *Fonovista, Inc. v. Cherry Auction, Inc.*, 76 F. 3d 259, 261, 264 (9th Cir. 1996).

¹⁸¹ Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 437.

¹⁸² *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072-1073 (9th Cir. 2013).

harbors'.¹⁸³ Subsequently, the courts have consistently interpreted the statutory provisions in a manner that a higher level of an ability or control is required to preclude an OSP from availing itself from the DMCA protection if compared to the threshold required for establishing a secondary liability for copyright infringement (something additional to mere ability to block users' access or remove infringing materials).¹⁸⁴

b. Exemption from Inducement Liability

The issue whether the DMCA protection also extends to the cases where service provider is liable for inducing copyright infringement was debated in scholarly writings¹⁸⁵ This stems from the lack of precise boundaries of inducement liability theory formulated in *Grokster*.¹⁸⁶ Indeed, given the Ninth Circuit's interpretation in *Perfect 10, Inc. v. Amazon, Inc.*, according to which "under *Grokster*, an actor may be contributorily liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such a direct infringement",¹⁸⁷ any OSP storing user-uploaded content may potentially be found liable on the basis of the inducement theory.¹⁸⁸ Such an interpretation, according to R. Anthony Reese, may take place, for example, in cases when a service provider organizes the content stored or indexed by it in a certain way.¹⁸⁹ A recent case law, however, has clarified that DMCA protection does not depend on the type of copyright liability and thus also extends to the cases

¹⁸³ Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM'S & HIGH TECH. L. 101, 104 (2007).

¹⁸⁴ See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002); *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1027 (9th Cir. 2013); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36, 38 (2d Cir. 2012); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004).

¹⁸⁵ See Peguera, *Secondary Liability for Copyright Infringement*; Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 4.

¹⁸⁶ Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 12.

¹⁸⁷ *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007).

¹⁸⁸ Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 17.

¹⁸⁹ *Id.*, at 18.

of inducement liability.¹⁹⁰ Nevertheless, the relevant ‘safe harbor’ will be provided only upon the fulfillment of the statutory requirements which in case of inducement seems to be unlikely.¹⁹¹ Particularly, the defendant who is found liable for actively inducing copyright infringing activity and thus acting in bad faith will unlikely prove its compliance with the ‘knowledge or awareness’ requirement under the DMCA’s hosting ‘safe harbor’.¹⁹² Nevertheless, Miquel Peguera notes that this is possible in theory albeit admitting that even though it was the case such a defendant would unlikely qualify with other ‘safe harbor’ requirements.¹⁹³ In this respect it should be reiterated that, although the DMCA does not impose an obligation to conduct proactive monitoring of infringing activity and content, the defendant’s implementation of filtering systems may be considered by a court as the evidence of its “good faith efforts to avoid or limit storage of infringing content”.¹⁹⁴

All in all, it should be again emphasized that the standards of the DMCA ‘safe harbor’ protection are generally higher and are applicable to all types of secondary liability upon the fulfillment of appropriate conditions.¹⁹⁵

4. Obligations Beyond ‘Safe Harbor’: Injunctive Reliefs and Content Monitoring

As has been noted above, the DMCA establishes strict limitations on the scope of injunctive reliefs.¹⁹⁶ In respect of an OSP which is entitled to a hosting ‘safe harbor’ protection, courts are entitled to issue injunctions only “from providing access to infringing material or activity

¹⁹⁰ *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013).

¹⁹¹ Peguera, *Secondary Liability for Copyright Infringement*, at 11.

¹⁹² Reese, *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, at 24.

¹⁹³ Peguera, *Secondary Liability for Copyright Infringement*, at 10-11.

¹⁹⁴ *UMG Recordings v. Veoh Networks Inc*, 665 F. Supp. 2d 1099, 1112 (C.D. Cal, 2009); *See also* Peguera, *Secondary Liability for Copyright Infringement*, at 11-12 (stating that YouTube’s considerable efforts in implementation of filtering technologies are indicative of the absence of its bad faith and intent to induce copyright infringements).

¹⁹⁵ *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013).

¹⁹⁶ 17 U.S.C. § 512(j).

residing at a particular online site” and/or “from providing access to” a specified subscriber or account holder engaged in infringing conduct”.¹⁹⁷ Any other injunctive relief may be imposed if, according to the court, it is necessary to prevent or restrain copyright infringement and only in case it will constitute the least burdensome measure in comparison to other available effective reliefs.¹⁹⁸ Therefore, the issuance of injunctions imposing a monitoring obligation directed at unidentified infringements, online sites, or users is not allowed under the DMCA. It should be noted, however, that despite the general prohibition, a general monitoring is permitted albeit “to the extent consistent with a standard technical measure”,¹⁹⁹ which allows copyright owners to detect and protect copyrighted content and has been developed, among other, on a voluntary basis.²⁰⁰

C. CONCLUDING REMARKS ON THE U.S. LEGAL FRAMEWORK

The analysis of U.S. case law demonstrates that OSPs may be found secondary liable for knowingly contributing, controlling and financially profiting from, or intentionally encouraging third-party copyright infringements. U.S. courts do not impute a culpable intent from a general knowledge of infringing content or activity to protect the potential commercial value of the technology’s non-infringing uses. Nevertheless, following the U.S. Supreme Court’s decision in *Grokster*, U.S. courts may find an OSP liable even in cases when it does not possess a specific knowledge of infringements and its service is capable of substantial non-infringing uses, but where such an OSP exhibits a purposeful intent and affirmative steps to facilitate copyright infringements. The test for this inducement liability, however, is not clearly defined and creates a legal uncertainty for OSPs.

¹⁹⁷ 17 U.S.C. § 512(j)(a)(i)-512(j)(a)(ii).

¹⁹⁸ 17 U.S.C. § 512(j)(a)(iii).

¹⁹⁹ 17 U.S.C. § 512(m)(1).

²⁰⁰ 17 U.S.C. § 512(i)(2).

Furthermore, in the U.S. the definition of a hosting ‘safe harbor’ is interpreted sufficiently broadly and covers UGC websites which not only store the copyrighted content but also perform other related activities. Although the conditions for losing a hosting liability exemption under the DMCA largely resemble the requirements for holding OSPs secondary liable, the thresholds for the former are generally higher. The DMCA potentially shields OSPs from a secondary liability irrespective of its type, even though it is unclear whether an OSP would be able to fulfill the ‘safe harbor’ requirements, including the absence of a knowledge of infringement, in case of a liability for inducement.

The hosting ‘safe harbor’ is available for innocent OSPs and conditional upon an expeditious removal of the infringing content for the OSPs that have a knowledge of an infringing content or activity. The possession of such a knowledge depends on the compliance with a statutory notice and takedown procedure, which specifies the requirements for a valid notice of an infringement and, thus, clarifies for an OSP when it is required to act expeditiously for securing a ‘safe harbor’ protection. Moreover, the DMCA’s notice and takedown system provides guarantees for the users and implements a voluntary approach to content monitoring. The latter, in its turn, implies that neither the OSP’s failure to implement effective filtering technologies amounts to a willful blindness, nor their application is giving rise to the OSP’s control over the third-party infringing activity.

Additionally, U.S. courts are entitled to issue the injunctions imposing obligations of proactive monitoring for elimination of infringing activities against those OSPs that are found secondary liable for third-party copyright infringements. Case law demonstrates, however, that such injunctions should not place the whole burden of monitoring upon the OSP and should be balanced by the respective obligation of the copyright holders to identify specific copyrighted materials. The OSPs which qualify for the hosting ‘safe harbor’, on the other hand, enjoy a full protection from a monetary relief and a limited protection from an injunctive relief. Regarding

the latter, the DMCA strictly prescribes the limits of permissible injunctions, which exclude the injunctions imposing monitoring obligations aimed at unspecified infringements or users.

It follows that the U.S. legal framework imposes comparatively lenient obligations on OSPs²⁰¹ and encourages their cooperation with copyright owners in combating copyright infringements. At the same time, due to unclear standards of secondary liability, OSPs are incentivized to adopt monitoring measures to demonstrate good faith efforts in avoiding copyright infringements.

²⁰¹ Ali Amirmahani, *Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union*, 30 BERKELEY TECH. L.J. 865, 873 (2015).

CHAPTER II. SECONDARY LIABILITY OF ONLINE SERVICE PROVIDERS FOR THIRD-PARTY COPYRIGHT INFRINGEMENT IN THE EUROPEAN UNION

Directive 2001/29/EC (InfoSoc Directive)²⁰² and the E-Commerce Directive represent two instruments of the E.U. legislation particularly relevant for assessing the copyright liability framework in the Digital Age. The InfoSoc Directive specifies the rights and limitations on copyright and related rights in the context of a digital environment, including the right of reproduction and the right of making available to the public, which also impact the activities of Internet intermediaries.²⁰³ The E-Commerce Directive, in its turn, resembling the legal scheme and objectives of the DMCA, lays down, among other, general rules on limitation of liability of Internet intermediaries performing specific types of activities. Unlike its U.S. counterpart, however, the E-Commerce Directive utilizes a “horizontal” approach to regulation and, thus, addresses issues of secondary liability not only in respect of copyright infringing material but also other types of illicit content.²⁰⁴ Considering the foregoing, even in the presence of a certain regulation harmonizing liability of Internet intermediaries on the E.U. level, substantial part of substantive and procedural rules rests within the regulatory realm of the E.U. Member States.

For a comparative analysis with the U.S. legal framework and due to uneven character of the rules on indirect liability for third-party copyright infringements developed within the E.U, this

²⁰² Directive 2001/29/EC of the European Parliament and of the Council. of 22 May 2001. on the harmonisation of certain aspects of copyright and related rights in the information society OJ 2001 L 167, 22.05.2001 [hereinafter “InfoSoc Directive”].

²⁰³ For a comprehensive analysis of the legal framework and its adoption by E.U. Member States *see* Lucie Guibault, Guido Westkamp, Thomas Rieber-Mohn, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (2007) Report to the European Commission, DG Internal Market; Amsterdam Law School Research Paper No. 2012-28; Institute for Information Law Research Paper No. 2012-23.

²⁰⁴ Edwards, *Role and Responsibility of Internet Intermediaries*, at 7.

chapter assesses, first, the immunities from liability available to OSPs across the E.U. (A.) and, second, relevant legal frameworks of selected E.U. Member States (B.).

A. LIABILITY LIMITATIONS UNDER THE E-COMMERCE DIRECTIVE 2000/31/EC

The E-Commerce Directive was adopted only few years after the U.S. DMCA and unlike the latter went far beyond the aim of the elimination of online copyright violations. Among the main objectives of this Directive are securing a “free flow of information” and improving electronic networks,²⁰⁵ creating “rapid and reliable procedures for removing and disabling access to illegal information”,²⁰⁶ as well as establishing a comprehensive legal regime for an unimpeded enhancement of electronic commerce.²⁰⁷ To achieve these objectives the Directive sought to clarify the role of Internet intermediaries as important information carriers and hosts. By implementing a horizontal approach to regulation of the limitations on intermediary liability, the E-Commerce Directive lays down safe harbors to provide an effective protection to Internet intermediaries which is independent of the nature of a relevant legal wrong.²⁰⁸ Therefore, operating as comprehensive legal tool, the E-Commerce Directive incentivizes intermediaries to stay neutral.²⁰⁹ As would be demonstrated further, however, the new

²⁰⁵ E-Commerce Directive, Recital 8.

²⁰⁶ E-Commerce Directive, Recital 40.

²⁰⁷ E-Commerce Directive, Recital 60.

²⁰⁸ Christina Angelopoulos, Stijn Smet, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, TAYLOR & FRANCIS IN JOURNAL OF MEDIA LAW, DOI: 10.1080/17577632.2016.1240957, 21 October 2016, at 3-4, available at: <https://ssrn.com/abstract=2944917>.

²⁰⁹ Opinion of 22 September 2009, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, C-236/08 to C-238/08, ECLI:EU:C:2009:569 (Advocate General), paras. 142-143; Evi Werkers, *Intermediaries in the Eye of the Copyright Storm – A Comparative Analysis of the Three Strike Approach within the European Union*, ICRI WORKING PAPER NO. 4/2011, 3 (2011).

legislative proposals signal the E.U. Commission's shift from horizontal to vertical approach of regulation.²¹⁰

To assess the existing E.U. approach to secondary liability of OSPs, this section envisages a general scope of liability exemptions (1), qualification requirements for the hosting “safe harbor” (2), as well as additional obligations which may be imposed on OSPs (3).

1. General Scope of Liability Limitations

The E-Commerce is not aimed at harmonizing the substantive rules on secondary liability,²¹¹ but instead prescribes minimum requirements compliance with which insulates Internet intermediaries from civil and criminal liability.²¹² The functional approach to formulation of such requirements is identical to the one of the DMCA, and leads to the provision of immunities depending on the following three types of activities performed by a service provider: “mere conduit” (transitory communication),²¹³ system caching,²¹⁴ or hosting of information (third-party content).²¹⁵ The use of information location tools²¹⁶ is, thus, out of the scope of regulation along with a number of spheres, such as taxation, competition law, gambling and other, where ‘safe harbors’ do not apply and regulation of liability rules is at the discretion of the E.U. Member States.²¹⁷ Again, each liability limitation functions separately for each type of activity performed by a service provider.

²¹⁰ See Chapter III of the thesis.

²¹¹ Opinion of 9 December 2010, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2001:757 (Advocate General), para. 55.

²¹² See RIORDAN, at 377-387 (paras. 12.01-12.48).

²¹³ E-Commerce Directive, Art. 12.

²¹⁴ E-Commerce Directive, Art. 13.

²¹⁵ E-Commerce Directive, Art. 14.

²¹⁶ 17 U.S.C. Sec. 512(d).

²¹⁷ E-Commerce Directive, Art. 1(5).

In addition, the Directive is only applicable to Internet intermediaries whose services fall within a rather broad definition of ‘information society services’,²¹⁸ i.e. “services provided for remuneration and at a distance by means of electronic equipment, for the processing and storage of data, and at the individual request of a service recipient”.²¹⁹

Furthermore, similar to the express guarantee employed in Section 512(m) DMCA,²²⁰ Article 15 of the E-Commerce Directive enshrines a prohibition of imposition of general monitoring duties on service providers for establishment of facts and circumstances indicating illegal content or activity.²²¹ This provision seeks to ensure the prevention of a significant ‘chilling effect’ on activities of Internet intermediaries potentially deriving from the imposition of such impractical obligations.

Despite the foregoing, the immunities established by the E-Commerce Directive does not offer an absolute protection for service providers. First and foremost, ‘safe harbors’ in the E.U. shield only from monetary liability and do not create limitations on an injunctive relief.²²² Second, the E-Commerce Directive expressly allows the E.U. Member States through their courts and administrative authorities to impose ‘duties of care’ for detection and prevention of illegal conduct.²²³ Finally, E.U. Members are also allowed to impose certain obligations on informing their competent public authorities about illegal conduct or information as well as data on their services recipients.

²¹⁸ For a detailed interpretation of the definition *see* RIORDAN, at 387-394 (paras. 12.49-12.79).

²¹⁹ E-Commerce Directive, Art. 2(a).

²²⁰ 17 U.S.C. Sec. 512(n).

²²¹ E-Commerce Directive, Art. 15.

²²² E-Commerce Directive, Recital 45.

²²³ E-Commerce Directive, Recital 48.

2. ‘Safe Harbor’ for Online Service Providers

Like Section 512(c) DMCA, Article 14 E-Commerce Directive creates a ‘safe harbor’ protection for a service provider performing a hosting function, i.e. “the storage of information provided by the recipient of the service”.²²⁴ Nevertheless, while in the U.S., the scope of a hosting ‘safe harbor’ is nowadays interpreted broadly and includes, among other, recently emerged UGC websites, which not only store content but also make it accessible on the Internet,²²⁵ in the E.U. it is still debatable whether Web 2.0 platforms are covered by the aforementioned provision on a limitation of liability,²²⁶ which at the time of drafting was assumed to apply to services on making available server disk-space and processors.²²⁷

The aforementioned controversy as to the scope of European hosting ‘safe harbor’ partially stems from the limitation on the application of the E-Commerce Directive, which entails that a service provider will be entitled to a relevant liability regime only if it acts as a passive intermediary.²²⁸ Such a limitation, despite the relevant opinion of the Advocate-General Jääskinen to the contrary,²²⁹ was applied by the CJEU to hosting providers in *Google v LVHM (Google France)*²³⁰ and later in *L’Oréal v. eBay*.²³¹ By doing this, the Court specified that the

²²⁴ E-Commerce Directive, Art. 14.

²²⁵ See Section I(B)(2) of the thesis.

²²⁶ Farano, *Internet Intermediaries’ Liability*, at 66; US Congressional Senate Rep No 105-190, 45 (1998).

²²⁷ Christina Angelopoulos, *European intermediary liability in copyright: A tort-based analysis*, *Institute for Information Law* (2016), at 51, available at <http://hdl.handle.net/11245/1.527223>.

²²⁸ More specifically, Recital 42 of the E-Commerce Directive provides that the activities of service providers eligible for liability exemptions shall be “limited to the technical process of operating and giving access to a communication network... for the sole purposes of making the transmission more efficient” and must be of a “a mere technical, automatic and passive nature”, i.e. absent knowledge or control over the material stored.

²²⁹ Opinion of 9 December 2010, *L’Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2001:757 (Advocate General), paras. 140-142 (arguing that Recital 42 of the E-Commerce Directive should apply only to service providers performing mere conduit or caching activities).

²³⁰ See *Google France*.

²³¹ *L’Oréal v eBay*, paras. 112-114, 119.

storage of data transmitted to users alone is not sufficient and that, in order to qualify for a hosting ‘safe harbor’ immunity, a service provider must be “neutral” intermediary²³² and shall not play “an active role” giving rise to a knowledge or control over the stored information.²³³ In the former case, it was also acknowledged that the fact that the service was provided against payment did not suffice for fulfilment of such a knowledge or control requirement. Instead, the Court gave weight to the provider’s role in preparing accompanying commercial messages.²³⁴ Despite the foregoing decisions, in *Netlog* case,²³⁵ it was found that the social network may be considered an information society service provider merely by storing information of its users, while in *Google France* case the same conclusion was reached by the Court in respect of a search engine. All in all, it is the level of control which, according to the CJEU, constitutes the key factor for considering whether a service provider is innocent enough to qualify for a hosting ‘safe harbor’ immunity.²³⁶ The assessment of the extent of such a control exercised by a service provider, in its turn, is left with national courts.²³⁷

Apart from fulfilling a threshold requirement described above, as in the U.S. a service provider in the E.U. must comply with several conditions for limitation of liability. Article 14 of the E-Commerce Directive likewise establishes a notice and takedown regime²³⁸ and contains very similar to its DMCA counterpart requirements of the absence of an actual knowledge of illegal conduct or content as well as awareness of facts or circumstances pointing to the latter (a), and

²³² *Google France*, paras. 113-114.

²³³ *L’Oréal v eBay International*, paras. 111-117; Judgement of 11 September 2014, *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others*, C-291/13, ECLI:EU:C:2014:2209, para. 41.

²³⁴ *Google France*, para. 114, 118.

²³⁵ *SABAM v Netlog*, para. 27.

²³⁶ SAVIN, at 160.

²³⁷ *Id.*

²³⁸ Broder Kleinschmidt, *An International Comparison of ISP’s Liabilities for Unlawful Third Party Content*, 18(4) IJLIT 332, 345 (2010) [hereinafter “Kleinschmidt, *An International Comparison of ISP’s Liabilities*”].

expeditious removal or blocking of such an illegal information upon obtainment of the relevant knowledge or awareness (b).²³⁹ Overall, despite being similar, the aforementioned conditions are applied differently in two jurisdictions. The following sub-sections, therefore, describe the requirements for entitlement to a hosting ‘safe harbor’ immunity in the E.U.

a. Knowledge of Infringing Activity

While both U.S. and E.U. legal regimes are based on the idea that innocent service providers should be shielded from the liability for third party copyright infringements of which they were unaware or in respect of which they did not adopt proper actions, European approach is different in terms of distinguishing the types of liability exemptions based on the level of a service provider’s awareness.²⁴⁰ As a result, under the E-Commerce Directive, a service provider in addition to not being subject to either criminal or civil liability in case of absence of both actual and constructive knowledge, will also be protected from criminal liability but not from claims for damages, even when having a certain level of awareness albeit absent an actual knowledge.²⁴¹

In contrast to the DMCA, the E-Commerce Directive does not unify the ways of obtaining the knowledge of infringing activity or information. While the exact limits of the ‘knowledge’ requirement are subject to determination by the E.U. Member States, the only test for establishing a constructive knowledge of illegal activity or content on the part of a website operator was formulated by the CJEU in *L’Oreal v. eBay*. In this case concerning intellectual property rights infringements taken place on an online marketplace, the Court found that such an awareness will be deemed present where "a diligent economic operator would have

²³⁹ E-Commerce Directive, Art. 14(1).

²⁴⁰ Peguera, *The DMCA Safe Harbors*, at 481.

²⁴¹ E-Commerce Directive, Art. 14(1)(a).

identified the illegality and acted expeditiously".²⁴² In addition, the Court further provided two examples of the ways when such an awareness may become apparent, namely, "as a result of investigation undertaken" by a service provider itself or by receiving a notification of the infringing activity or material.²⁴³ Importantly, the CJEU admitted that not all notifications will necessary prove the presence of a website operator's awareness due to the fact "that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated".²⁴⁴ Despite the foregoing, the notifications were confirmed to be "a factor of which the national court must take account".²⁴⁵ Moreover, it has been acknowledged that sufficiently precise and adequately substantiated notices will definitely trigger actual knowledge.²⁴⁶ It is remained unclear, however, whether the repeated infringing activity conducted by the same party shall be viewed as one or multiple infringements giving rise "to proactive duty of care".²⁴⁷

b. Expeditious Removal of Infringing Material (Notice and Takedown Procedure)

Like Section 512 DMCA, Article 14 of the E-Commerce Directive provides that an OSP may still be entitled to a 'safe harbor' protection if, upon the obtainment of the relevant knowledge or awareness, it "acts expeditiously to remove or to disable access to the information" which is illegal.²⁴⁸ Contrary to the DMCA, however, the E-Commerce Directive does not impose a specific notice and take-down procedure, but instead is aimed at providing the basis for development of such a system in the context of voluntary agreements between the service

²⁴² *L'Oréal v eBay*, para. 122.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ MARTIN HUSOVEC, *INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE?* 53 (2017).

²⁴⁷ *Id.*

²⁴⁸ E-Commerce Directive, Art. 14(1)(b).

providers and copyright holders.²⁴⁹ Despite leaving the issue of a unified notice and takedown procedure outside the regulatory scope of the Directive, its drafters, nevertheless, expressly assumed the possibility of its amendment,²⁵⁰ which up to the present moment has not taken place. Nowadays, such an approach to a legal regulation has resulted in a lack of negotiated agreements within the industry as well as uneven legal regulation of the issue across the E.U. Member States.²⁵¹

Analyzing ‘safe harbors’ under the E-Commerce Directive, Jaani Riordan rightfully points out the uncertainties arising out of the lack of clarification of the notion of expeditious removal.²⁵² Indeed, how much time is allocated for a service provider to respond to a notice about particular infringing conduct or material? To what extent shall a service provider achieve the aim of removing illegal material and, specifically, are any future infringements also covered? Is a service provider obliged to act upon receiving information not about the specific content but only an infringing activity?²⁵³ Finding answers to these questions is important, since they will ultimately determine whether a service provider is entitled to a ‘safe harbor’ protection and to what amount of monitoring obligations it will be subjected.²⁵⁴

Drawing on the examples of France, Germany and the U.K., it may be observed that at least several E.U. Member States have attempted to define the scope of notice and takedown obligations by adopting relevant statutory schemes. Nevertheless, several problems stem from the absence of a uniform statutory notice and takedown regime in the E.U. which, in contrast, are mitigated by the DMCA in the U.S. First, the lack of specific notification requirements

²⁴⁹ E-Commerce Directive, Recital 40.

²⁵⁰ E-Commerce Directive, Art. 21(2).

²⁵¹ Peguera, *The DMCA Safe Harbors*, at 490.

²⁵² RIORDAN, at 408 (paras. 12.144-12.149).

²⁵³ *Id.*

²⁵⁴ RIORDAN, at 408 (para. 12.147).

forces service providers to respond even to vague notifications to escape potential liability.²⁵⁵ Indeed, the only indirect guidance on the E.U. level in this respect was provided by the CJEU in *L’Oreal v. eBay*, where the Court commented on a sufficiently precise or adequately substantiated nature of the notifications required.²⁵⁶ Moreover, despite the attempts of the E.U. Member States’ national courts to formulate certain criteria,²⁵⁷ the requirements for such notices remained to be unclear.²⁵⁸ Second, the absence of a counter-notification procedure and remedies against bad faith conduct, which at the same time are present in the DMCA, creates the conditions for an overly extensive enforcement of the notice and takedown system and, thus, additional burden on service providers.²⁵⁹

3. Obligations Beyond ‘Safe Harbor’: Injunctive Reliefs and Content Monitoring

Despite the immunity provided to OSP upon its compliance with a notice and takedown principle, the liability shield available under the E-Commerce Directive is not absolute, since certain duties may be imposed on service providers based on injunctions **(a)**. Nevertheless, such duties may not lead to imposition of a general monitoring obligation **(b)**.

a. Obligations based on Injunctive Reliefs

Article 14(3) of the Directive is claimed to provide “a gateway to extend liability beyond the liability upon knowledge”.²⁶⁰ This provision, first, entitles courts and administrative authorities

²⁵⁵ DINWOODIE, at 44.

²⁵⁶ *L’Oréal v eBay*, para. 122.

²⁵⁷ See UK: *Tamiz v Google, Inc.* [2012] EWHC 449 (where in the defamation context the trial judge applied a diligent host standard for the assessment of sufficient precision and substantiation of a notice); Germany: BGH Aug. 17, 2011, 191 BGHZ 19, (Ger.) (*Perfume Stick*) in 44 INT’L REV. INTELL. PROP. & COMPETITION L. 123, 128, PARA. 28 (2013) (stating that the wording of the notice should be clear enough to enable its recipient to easily determine a violation without a detailed analysis of facts or legal issues).

²⁵⁸ DINWOODIE, at 44.

²⁵⁹ DINWOODIE, at 45; RIORDAN, at 406 (para. 12.137).

²⁶⁰ Kleinschmidt, *An International Comparison of ISP’s Liabilities*, at 346.

to issue injunctions against OSPs requiring them to terminate or prevent copyright infringements, and, second, the E.U. Member States - to adopt regulations providing for removal or disabling of access to illegal information.²⁶¹ In addition, the E.U. Member States have the right to impose duties of care on OSPs but only to the extent they are “reasonably expected” from them.²⁶² What is more, according to Article 8(3) of the InfoSoc Directive, copyright holders have the right to request injunctions directed at OSPs when their services are utilized by a third party to conduct violations of copyright and related rights.²⁶³ Notably, Jan Bernd Nordemann describes this InfoSoc Directive provision as a harmonization tool of E.U. liability rules, albeit exclusively in the sphere of injunctions regarding prevention duties.²⁶⁴ At the same time, Recital 59 of the InfoSoc Directive explains the rationale behind the imposition of additional duties on the basis of injunctions against service providers who is not necessarily liable for a certain legal wrong, by stating that “intermediaries are best placed to bring such infringing activities to an end”.²⁶⁵ Therefore, according to Martin Husovec, in this context service providers are “accountable, not liable”.²⁶⁶

As for the scope of such injunctions, it is significantly broad as Article 14(3) of the E-Commerce Directive and Article 8(3) of the InfoSoc Directive may constitute the basis for imposition of duties of takedown, staydown as well as prevention.²⁶⁷ This is confirmed, for

²⁶¹ E-Commerce Directive, Article 14(3).

²⁶² E-Commerce Directive, Recital 48.

²⁶³ InfoSoc Directive, Art. 8(3).

²⁶⁴ Jan Bernd Nordemann, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?* IP/A/IMCO/2017-08 1, 22 (2018), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA\(2017\)614207_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf) [hereinafter “Nordemann, *Liability of Online Service Providers*”].

²⁶⁵ InfoSoc Directive, Recital 59.

²⁶⁶ For an elaborated opinion see MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? (2017).

²⁶⁷ Nordemann, *Liability of Online Service Providers*, at 20.

instance, by the practice of German courts applying the doctrine *Störerhaftung* exactly for the aforementioned purposes.²⁶⁸ The prevention duties, in particular, also cover a duty to prevent infringements of the same kind²⁶⁹ and a duty of website blocking.²⁷⁰

b. Obligations of General and Specific Monitoring

Despite the foregoing, Article 15 of the E-Commerce Directive prohibits the E.U. Member States from imposing monitoring duties of general nature on information society service providers.²⁷¹ This provision serves as a limitation on the scope of injunctions against OSPs as well as ensures an appropriate balance between the fundamental rights of the parties involved.²⁷²

More specifically, in relation to hosting providers, this prohibition extends to a general obligation to monitor the information stored by them as well as “a general obligation actively to seek facts or circumstances indicating illegal activity”.²⁷³ At the same time, the E.U. Member States are entitled to introduce monitoring obligations in specific cases.²⁷⁴ It is, however, unclear where the line between a ‘general’ and ‘specific’ monitoring lies.²⁷⁵

Several cases decided in the context of copyright infringements have shed the light on what may constitute a general monitoring obligation. In *SABAM v Scarlet*, the CJEU has clarified that imposition of the filtering obligation for, among other, actively monitoring all content, indiscriminately in respect of all customers as well as for an unlimited time, is contrary to

²⁶⁸ Kleinschmidt, *An International Comparison of ISP’s Liabilities*, at 347, Nordemann, *Host Provider (Content Providers) – The German Approach*, at 42-43; see Sub-section II(B)(2) of the thesis.

²⁶⁹ *L’Oréal v eBay*, para. 127.

²⁷⁰ Judgement of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192, paras. 42 et seq.

²⁷¹ E-Commerce Directive, Art. 15.

²⁷² *SABAM v Netlog NV*, para. 55; Nordemann, *Liability of Online Service Providers*, at 16-17.

²⁷³ E-Commerce Directive, Art. 15(1).

²⁷⁴ E-Commerce Directive, Recital 47.

²⁷⁵ Nordemann, *Liability of Online Service Providers*, at 17.

protection of fundamental rights and, thus, prohibited.²⁷⁶ The same conclusion was reached by the Court in *SABAM v Netlog*²⁷⁷ and *L'Oréal v eBay*,²⁷⁸ where Article 15(1) of the E-Commerce Directive was found to be prohibiting active monitoring obligations of all content and each customer against further violations of intellectual property rights. Finally, in *McFadden* case dealing with a copyright infringement by the user of the German free unsecure WI-FI service provider, the CJEU likewise ruled that Article 15(1) of the E-Commerce Directive excludes monitoring of all information in relation, “inter alia, communication network access providers”.²⁷⁹ At the same time, on the specific monitoring obligations, in *L'Oréal v eBay*, concerning trademarks infringements taken place on online shopping site, the CJEU confirmed the right of national courts to order hosting providers not only to end the infringements which had already took place but also to prevent further violations albeit of the same kind.²⁸⁰

It should be also emphasized that in the above-mentioned cases, the CJEU based on the principle of proportionality was imposing limitations on injunctions with the aim of striking a fair balance between the rights protected by the measures in question and substantive rights enshrined in the E.U. CFR. For instance, in *SABAM v Netlog*, where the CJEU analyzed the permissibility of the injunction imposing a broad preventive filtering obligation on a social network, while recognizing intellectual property rights as fundamental rights protected under Article 17(2) of the E.U. CFR,²⁸¹ the Court emphasized that they must be balanced with other

²⁷⁶ Judgement of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, ECLI:EU:C:2011:771 [hereinafter – “*Scarlet Extended SA v SABAM*”].

²⁷⁷ *SABAM v Netlog*, para. 38.

²⁷⁸ *L'Oréal v eBay*, para. 139.

²⁷⁹ Judgement of 15 September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, ECLI:EU:C:2016:689, para. 87 [emphasis added].

²⁸⁰ *L'Oréal v eBay*, paras. 131-132, 144.

²⁸¹ E.U. CFR, Art. 17(2).

fundamental rights.²⁸² As a result of weighing fundamental rights against each other, the CJEU ruled that preventive monitoring obligation targeting all future copyright infringements of current and future copyrighted materials would require filtering of almost all content on the defendant's server and, for this reason, will result in a violation of the defendant's freedom to conduct business (Article 16 of the E.U. CFR),²⁸³ as well as a violation of the right to the protection of the personal data (Article of the E.U. CFR)²⁸⁴ and freedom of information (Article 11 of the E.U. CFR)²⁸⁵ of the defendant's users.²⁸⁶

B. SELECTED OVERVIEW OF SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENTS UNDER THE NATIONAL LAW OF THE E.U. MEMBER STATES

As has been shown above,²⁸⁷ there are three secondary liability doctrines that have been applied by courts across the U.S. to address the problem of third-party copyright infringements committed on the Internet. Similar to the U.S. experience, the European countries' reaction to a rapidly growing number of online copyright violations has taken the form of adjusting the rules on primary and indirect liability to hold accountable Internet intermediaries instead of countless unidentified infringers. Due to an unharmonized nature of general tort law rules within the E.U., this process has resulted in a divergence of national approaches to liability for third-party copyright infringements, including the uncertainty of applicable legal standards as well as the existence of conflicting judicial interpretations.²⁸⁸ Therefore, legal experts have argued for the need of a harmonization reform to tackle existing legal uncertainties across the

²⁸² Case C-360/10, *SABAM v Netlog NV*, 16 February 2012, para. 41-44.

²⁸³ E.U. CFR, Art. 16.

²⁸⁴ E.U. CFR, Art. 8.

²⁸⁵ E.U. CFR, Art. 11.

²⁸⁶ *SABAM v Netlog*, paras. 48-51.

²⁸⁷ See Section (I)(A) of the thesis.

²⁸⁸ Christina Angelopoulos, *Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe*, Amsterdam Law School Paper No. 2013-72 1, 2 (2013), available at <https://ssrn.com/abstract=2360997> [hereinafter "Angelopoulos, *Beyond the Safe Harbours*"].

E.U. and opted for a case-by-case analysis of the selected legal jurisdictions.²⁸⁹ For the sake of the present research, the following sections contain a concise description of the national approaches adopted in three jurisdictions following the main tort law traditions, namely: France (1), Germany (2) and the United Kingdom²⁹⁰ (3).

1. Secondary Liability of Online Service Providers in France

In the absence of a clear distinction between primary and accessory liability,²⁹¹ the initial practice of French courts was to treat hosting providers as publishers or co-publishers of the content in cases when they possessed the ability to control the online infringements and received a financial benefit therefrom.²⁹² Under such a practice,²⁹³ for instance, online social network *MySpace* was refused to be considered a hosting provider for the purposes of a ‘safe harbor’ protection as a result of the website’s accommodation of the pre-designed user pages along with the profit received from website advertisements.²⁹⁴

Following the relevant clarifications of the CJEU on the ‘neutrality’ of intermediaries required for claiming the hosting ‘safe harbor’,²⁹⁵ however, the practice of French courts has changed, and both aforementioned elements of the involvement of presentation or classification of

²⁸⁹ See, e.g.: *Id.*; Christina Angelopoulos, *European intermediary liability in copyright: A tort-based analysis*, *Institute for Information Law* (2016), available at <http://hdl.handle.net/11245/1.527223>; Farano, *Internet Intermediaries’ Liability*.

²⁹⁰ Limited to the law of England and Wales.

²⁹¹ Angelopoulos, *On Online Platforms*, at 25-26.

²⁹² Farano, *Internet Intermediaries’ Liability*, at 131-132; see also Peguera, *The DMCA Safe Harbors*, at 500-501.

²⁹³ See, e.g. Farano, *Internet Intermediaries’ Liability* (citing *Tiscali Media c. Dargaud Lombard*, Lucky Comics, Cour d’appel de Paris, 7 June 2006).

²⁹⁴ Angelopoulos, *On Online Platforms*, at 26 (citing *Jean Yves L. dit Lafesse c. Myspace*, Tribunal de Grande Instance de Paris, Ordonnance de référé 22 juin 2007).

²⁹⁵ See Sub-section II(A)(2) of the thesis.

content as well as the financial benefit derived therefrom were considered irrelevant for the liability exemption purposes.²⁹⁶

Subsequently, French courts treated UGC platforms as hosting providers albeit along with imposing specific monitoring obligations upon them.²⁹⁷ With regard to *Google video* platform, for instance, the courts recognized such a hosting provider's obligation to monitor the content against the recurrent of infringing materials regardless of the specification of the user who reposted them.²⁹⁸ Therefore, subject to some exceptions,²⁹⁹ French courts used to interpret 'safe harbor' immunity as conditional not only upon the takedown of specific material in accordance with the relevant notice but also upon the performance of specific monitoring for the prevention of subsequent uploading of an infringing content.³⁰⁰ Later, however, such a 'notice and staydown' practice was found to be in violation of the prohibition under Article 15 of the E-Commerce Directive.³⁰¹ Nevertheless, French courts still utilize injunctions on other occasions involving hosting providers.³⁰²

As for the notice and takedown requirements, in France issues of copyright infringements are covered by a general statutory procedure for notification of illegal material, which stipulates the formal requirements for a valid notice as well as specifies the moment when the obligation

²⁹⁶ Angelopoulos, *On Online Platforms*, at 26 (citing *Sté Nord-Ouest c. Dailymotion* (09-67.869), Cour de cassation, 17 February 2011); Angelopoulos, *Beyond the Safe Harbours*, at 8.

²⁹⁷ *Id.*; Farano, *Internet Intermediaries' Liability*, at 132-133.

²⁹⁸ Farano, *Internet Intermediaries' Liability*, at 132 (citing C.A. Paris, Feb. 4, 2011, *André Rau v. Google and Aufeminin.com* (prec.), C.A. Paris, Jan. 14, 2011, *Google Inc. v. Bac Films, The Factory et al* (prec.), TGI Paris 19 October 2007, *Zadig Production v. Google Inc, Afa* (prec.)).

²⁹⁹ See Angelopoulos, *On Online Platforms*, at 26 (citing *Sté Nord-Ouest c. Dailymotion* (09-67.869), Cour de cassation, 17 February 2011, where the court affirmed *Dailymotion's* entitlement to the hosting 'safe harbor' in the view of the platform's mere awareness that its service may be utilized for infringing purposes along with the proof of its willingness to take down infringing material).

³⁰⁰ Angelopoulos, *On Online Platforms*, at 26.

³⁰¹ *Id.*, at 27.

³⁰² *Id.*, at 28.

to remove the illicit content is triggered.³⁰³ It is also acknowledged that in France an obligation to takedown an allegedly infringing material will arise immediately only in cases of a manifest illegality of the content.³⁰⁴ Regarding an obligation of expeditious removal, case law demonstrates that a hosting provider may be found liable for the failure to remove the notified infringing content within five days following the notification.³⁰⁵

2. Secondary Liability of Online Service Providers in Germany

Since German copyright law lacks any specific rules on secondary liability for copyright infringements, like French courts German courts have relied on general tort law for the purposes of establishing a liability for the actions of primary infringers.³⁰⁶ While OSPs may be found liable as direct infringers (by virtue of intentional or unintentional violation of exclusive rights of a copyright holder or adopting an infringing content as its own),³⁰⁷ a statutory-based³⁰⁸ disturber liability (*Störerhaftung* or “responsibility of disquieter”)³⁰⁹ represents the most commonly used ground for liability of Internet intermediaries who “knowingly and causally contributes to”³¹⁰ a third-party copyright infringement.³¹¹ This secondary liability doctrine provides for an injunction relief only and does not cover claims for monetary damages.³¹²

³⁰³ Peguera, *The DMCA Safe Harbors*, at 490-491.

³⁰⁴ Peguera, *The DMCA Safe Harbors*, at 491 (discussing interpretations of French courts practice).

³⁰⁵ Angelopoulos, *On Online Platforms*, at 27.

³⁰⁶ JIE WANG, REGULATING HOSTING ISPS' RESPONSIBILITIES FOR COPYRIGHT INFRINGEMENT. THE FREEDOM TO OPERATE IN THE US, EU AND CHINA 25 (2016) [hereinafter “WANG, REGULATING HOSTING ISPS' RESPONSIBILITIES”].

³⁰⁷ Angelopoulos, *Beyond the Safe Harbors*, at 12-14.

³⁰⁸ German Civil Code (BGB), Sec. 1004, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

³⁰⁹ Nordemann, *Host Provider (Content Providers) – The German Approach*, para. 14.

³¹⁰ Angelopoulos, *Beyond the Safe Harbors*, at 14.

³¹¹ WANG, REGULATING HOSTING ISPS' RESPONSIBILITIES, 25; *Id.*

³¹² *See, e.g.* Nordemann, *Host Provider (Content Providers) – The German Approach*, para. 14 (fn 12) (citing German Federal Supreme Court (2004) GRUR 860 864 – *Internetversteigerung I*).

Despite lacking a precise scope of application,³¹³ *Störerhaftung* requires the fulfillment of the following three conditions: (i) the existence of an adequately causal contribution to the copyright infringement; (ii) the disturber's possession of a legal capacity to prevent the copyright infringement; and (iii) the breach of the distributor's reasonable duty of care.³¹⁴ Importantly, neither the presence of the disturber's intent nor the recourse to the remedies against the primary infringer are necessary for the imposition of such a liability,³¹⁵ although, the latter is generally aimed at cases of unavailability of effective relief against a primary violator.³¹⁶

In general, three above-mentioned requirements of the disturber liability mean that there should be a primary copyright infringement, to creation or maintenance of which the disturber contributed by performing a certain action, along with the disturber's violation of its duty of care.³¹⁷ Such duties usually arise out of the OSP's awareness of the infringing material, which, in its turn, is usually obtained via the receipt of a notice and takedown letter from a copyright owner pursuant to a statutory system.³¹⁸ According to German law, the scope of such duties of care includes two types of obligations, namely, "a duty of care to prevent the repetition of the specific infringement"³¹⁹ (as defined in the notice and takedown letter or constituting a 'clear' infringement) and a duty "to prevent the same type but just as clearly recognizable rights

³¹³ For a comprehensive analysis see Alexander Bayer, *Liability 2.0 - Does the Internet environment require new standards for secondary liability? An overview of the current legal situation in Germany*, in PRINZ ZU WALDECK UND PYRMONT ET AL. (HRSG.), PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 365 (2008).

³¹⁴ Nordemann, *Host Provider (Content Providers) – The German Approach*, at 39-40 (para. 15).

³¹⁵ WANG, REGULATING HOSTING ISPS' RESPONSIBILITIES, at 25.

³¹⁶ Angelopoulos, *Beyond the Safe Harbors*, at 15.

³¹⁷ *Id.*, at 15-16.

³¹⁸ Nordemann, *Host Provider (Content Providers) – The German Approach*, at 40-41 (para. 18).

³¹⁹ *Id.*, at 41 (para. 20).

infringements”.³²⁰ This means that in Germany a hosting provider’s obligation to remove the infringing material goes well beyond specific infringements described in the notice and extends also to future infringements of the same type as well as respective “clear” infringements where their obviousness does not require additional legal assessment.³²¹

While the duty of care entails the obligation to terminate or prevent the copyright infringement upon receipt of the relevant notification, it is important to note that this requirement is assessed from the point of reasonableness, which allows German courts to take all related facts and circumstances into account on a case-by-case basis and, thus, flexibly adjust the liability contours.³²² As a result, while the assessment of the said reasonableness necessarily entails weighing the interests of the primary infringer, copyright holder and service provider,³²³ it affects the degree of care the latter shall exercise in order to escape the liability.³²⁴ Based on this, German courts have looked at the behavior and business models adopted by services providers and, in particular, whether they incite copyright infringements by third parties.³²⁵ For instance, service providers would be under higher degree of care in cases of deriving financial benefit from infringing activity,³²⁶ advertising copyright-infringing materials,³²⁷ or distributing technology capable of substantial infringing uses.³²⁸ Conversely, the provision of technology capable of significant non-infringing uses will result in a lower degree of the duty of care.³²⁹

³²⁰ *Id.*, at 41 (para. 21).

³²¹ For a comprehensive description of case law *see Id.*, at 41-44 (paras. 22-37).

³²² Angelopoulos, *Beyond the Safe Harbors*, at 15-16.

³²³ Nordemann, *Host Provider (Content Providers) – The German Approach*, at 40 (para. 15) and 44 (para. 38).

³²⁴ Nordemann, *Host Provider (Content Providers) – The German Approach*, at 44 (para. 39).

³²⁵ *Id.*

³²⁶ *See* Nordemann, *Liability of Online Service Providers (citing Wilmer, (2008) NJW, 1845, 1849)*.

³²⁷ *Id.*

³²⁸ *See* Angelopoulos, *Beyond the Safe Harbors (citing BGH, Cybersky, 15 January 2009, I ZR 57/07)*.

³²⁹ Angelopoulos, *Beyond the Safe Harbors*, at 17.

Interestingly enough, such decisions resemble the U.S. approach in *The Betamax* case and *Grokster*. The flexibility of the criterion of reasonableness, however, has been criticized due to the resulting uncertainty and unpredictability of the applicable liability standard.³³⁰

Störerhaftung, for instance, was applied by the German Federal Supreme Court in case of *Rapidshare (Alone in the Dark)*, where despite the sharehoster's neutrality and non-infringing nature of its service, *Rapidshare* was considered a disturber who was obliged not only delete the existing infringing materials described in the notice but also conduct content monitoring and filtering to prevent future infringements of such copyrighted materials.³³¹ Therefore, despite being passive and willfully blind about the copyright infringements on its service, *Rapidshare* was held liable due to its dangerous business model which fostered third-party infringing activity.³³² The content monitoring obligations for the prevention of future infringements were also imposed on *YouTube*.³³³

3. Secondary Liability of Online Service Providers in the U.K.³³⁴

Although there is a lack of case law involving hosting providers in the U.K.,³³⁵ English courts have been mainly relying on two legal grounds for deciding on their secondary liability for online copyright infringements, namely, authorization liability **(a)** and joint tortfeasorship **(b)**.

³³⁰ *Id.*

³³¹ BGH, *Rapidshare I*, 12 July 2012, I ZR 18/11.

³³² Nordemann, *Liability of Online Service Providers*, at 12.

³³³ See Jan Bernd Nordemann, *YouTube is a hosting provider, but one with extensive duties of care, say two German Courts*, Kluwer Copyright Blog (6 November, 2015), <http://copyrightblog.kluweriplaw.com/2015/11/06/youtube-is-a-hosting-provider-but-one-with-extensive-duties-of-care-say-two-german-courts/>.

³³⁴ For an overview of the principles of secondary liability in the U.K. see RIORDAN, Ch. 5.

³³⁵ RIORDAN, at 144 (para. 6.64) (arguing that possible reasons for this include application of 'safe harbor' immunities and effective enforcement of notice and takedown procedures).

a. Authorization Liability

In accordance with the doctrine of authorization liability, deriving from statutory law,³³⁶ a service provider may be found liable for a third-party copyright infringement by virtue of its unlawful authorization granted or purported to be granted to an infringer.³³⁷ Like any other secondary liability doctrine, authorization liability requires the existence of a primary copyright infringement.³³⁸ The main policy consideration behind the development of the said doctrine is a common assumption that in cases where primary infringers are out of reach the protection of copyright holder's rights is more effective if liability is directed at an involved intermediary.³³⁹

As for the scope of the doctrine, since its introduction in the beginning of the 20th century, the notion of 'authorization' has been subject to considerable and varying judicial interpretations with the recent ones focusing on the assessment of the level of control over the means of committing an infringement.³⁴⁰ Several cassette recording cases are relevant for assessing the narrow construction of 'authorization' in the context of new technologies capable of reproducing copyrighted works. In *A&M Records*,³⁴¹ *Ames Records and Tapes*³⁴² and *CBS v Amstard*³⁴³ the defendants were not found liable for illegal 'home taping' by their customers due to the absence of authorization of the latter's infringing activity. Importantly, neither the active advertising of possible infringing uses of blank cassette tapes³⁴⁴ nor the knowledge of

³³⁶ Copyright, Designs and Patents Act 1988, Sec. 16(2), <https://www.legislation.gov.uk/ukpga/1988/48/contents>.

³³⁷ See *Falcon v The Famous Players Film Co Ltd* [1926] 2 KB 474; See also Angelopoulos, *Beyond the Safe Harbors*, at 3.

³³⁸ RIORDAN, at 135 (para. 6.15).

³³⁹ RIORDAN, at 135 (para. 6.14).

³⁴⁰ For a more comprehensive analysis, see RIORDAN, at 133-138 (paras. 6.08-6.30).

³⁴¹ *A&M Records Inc v Audio Magnetics Incorporated (UK) Ltd* [1979] FSR 1.

³⁴² *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91, 92.

³⁴³ *CBS Song Ltd v Amstard Consumer Electronics plc* [1988] 1 AC 1013.

³⁴⁴ *A&M Records Inc v Audio Magnetics Incorporated (UK) Ltd* [1979] FSR 1, 9-10 (Foster J).

its inevitable use for such infringing activities³⁴⁵ were deemed sufficient to invoke secondary liability of the distributors of such products or related subscription services.³⁴⁶ It should be emphasized that one of the crucial factors for reaching such conclusions was the absence of the defendants' control over the primary infringers.³⁴⁷ Therefore, similar to the U.S. Supreme Court approach in *The Betamax case*,³⁴⁸ English courts in the aforementioned cases treated a constructive knowledge and a mere facilitation³⁴⁹ of copyright infringement as insufficient for imposing a secondary liability.

Despite the foregoing interpretations, in more recent decisions English courts sought to stretch the authorization liability in cases of online copyright infringements where both facilitation and knowledge of the latter were present. In *Newzbin*³⁵⁰ and *Dramatico*,³⁵¹ two cases concerning secondary liability of website operators for supply of hyperlinks to copyright-infringing content, a multi-faceted test of authorization was introduced, pursuant to which a provision of means for copyright infringements, a maintenance of control over the infringing conduct as well as a failure to reasonably prevent further copyright violations were considered, among other factors, relevant in establishing the authorization of copyright infringements.³⁵² While the intention of the British courts to address the large-scale online copyright violations by recourse to available legal constructions is obvious, it is reasonable to agree with the scholarly critics that such an approach represents a misleading interpretation of an

³⁴⁵ *CBS Song Ltd v Amstard Consumer Electronics plc* [1988] 1 AC 1013, at 189 (Whitford J).

³⁴⁶ See also *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91, 92, at 118.

³⁴⁷ RIORDAN, at 136-137 (para. 6.23).

³⁴⁸ See Sub-Section A(1)(a).

³⁴⁹ Angelopoulos, *Beyond the Safe Harbors*, at 4.

³⁵⁰ *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch).

³⁵¹ *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).

³⁵² RIORDAN, at 142 (para. 6.53) and 143-144 (paras. 6.59-6.60); Angelopoulos, *Beyond the Safe Harbors*, at 4-5.

authorization doctrine³⁵³ and creates the basis for misapplication of the latter to cases involving Internet intermediaries.³⁵⁴

b. Joint Tortfeasorship

Joint tortfeasorship doctrine stems from a common law and allows for the establishment of a joint liability of several associated persons in relation to the same primary copyright infringement.³⁵⁵ Pursuant to the said doctrine, joint tortfeasors shall be so engaged “in the commission of the tort as to make the infringing act their own”.³⁵⁶ Regarding the applicable test, two connecting factors are generally considered by the courts in cases on secondary liability of Internet intermediaries: procurement and combination (common design).³⁵⁷

As for the procurement link, it was clarified in *CBS v Amstard* that it requires the presence of a cause, i.e. an infringement must be induced, incited, or procured (physical element), as well as an intention to authorize the infringement (mental element).³⁵⁸ Therefore, it can be said that English courts have employed similar criteria to those applied later by the U.S. Supreme Court in *Grokster* where the P2P network provider was found liable due to affirmative intent and active steps to encourage copyright infringements.³⁵⁹ On the criterion of incitement, Jaani Riordan notes that it likely involves “an assumption of responsibility for infringing uses of technology, and may be evidenced by a deliberate request or instruction that the technology should be used for infringing purposes”.³⁶⁰ Therefore, like in case of authorization liability, resembling *The Betamax* case approach in this regard, either the mere knowledge of the fact

³⁵³ Angelopoulos, *Beyond the Safe Harbors*, at 5.

³⁵⁴ RIORDAN, at 142-143 (para. 6.55).

³⁵⁵ *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583, at 608 (Mustill LJ).

³⁵⁶ *SABAF SpA v MFI Furniture* [2003] RPC (14), para. 59.

³⁵⁷ RIORDAN, at 138 (para. 6.31).

³⁵⁸ *CBS Song Ltd v Amstard Consumer Electronics plc* [1988] 1 AC 1013, at 1058 (Lord Templemann).

³⁵⁹ See Sub-section I(A)(3) of the thesis.

³⁶⁰ RIORDAN, at 139 (para. 6.35).

that certain technology is capable of infringing as well as non-infringing use or intent to supply it for infringing use is not enough for the establishment of a joint tortfeasorship liability with a primary infringer.³⁶¹

As for the common design factor, it also requires the establishment of both physical and mental elements in the form of a “concerted action to a common end”³⁶² and an intention that an infringing activity will take place,³⁶³ respectively. The physical element implies the existence of an agreement, either express or tacit, covering the infringement.³⁶⁴ Additionally, there must be an involvement in the infringement,³⁶⁵ though recent practice demonstrates that the relevant bar is not high.³⁶⁶ The mental element, on the other hand, establishes a high threshold, where a mere knowledge or approval of the infringing act would not be sufficient, while a willful blindness or a combination of relevant circumstances may provide evidence of the intent.³⁶⁷ Again, it follows that the mere fact that a technology is capable of an infringing use would not be sufficient for the purposes of imposing a secondary liability.³⁶⁸

Nevertheless, in the aforementioned *Newzbin* and *Dramatico* cases, English courts decided to infer a common design for copyright infringements from the structure and organization of the defendants’ websites directed at facilitating unauthorized downloads of copyrighted materials as well as from the defendants’ financial benefit derived therefrom.³⁶⁹ Importantly, the lack of demonstration of specific infringements on the part of the claimants was not considered to be

³⁶¹ RIORDAN, at 139 (paras. 6.36-6.37).

³⁶² *The Koursk* [1924] P 140, 156 (Scrutton LJ).

³⁶³ *CBS Song Ltd v Amstard Consumer Electronics plc* [1988] 1 AC 1013, at 1058 (Lord Templemann).

³⁶⁴ *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583, at 608 (Mustill LJ).

³⁶⁵ *Unilever plc v Chefaro Properties Ltd* [1994] FSR 135, 138, 141 (Gildewell LJ).

³⁶⁶ RIORDAN, at 140 (para. 6.40).

³⁶⁷ RIORDAN, at 122-123 (paras. 5.44-5.45).

³⁶⁸ RIORDAN, at 140 (para. 6.42).

³⁶⁹ Angelopoulos, *Beyond the Safe Harbors*, at 7.

precluding the finding of liability but instead just a relevant factor for consideration.³⁷⁰ Therefore, the fact that the services had no non-infringing uses whatsoever was interpreted in favor of finding a joint liability.³⁷¹

While initially being reluctant to use injunctions for forcing defendants to prevent future infringements, English courts, in conformity with Article 8(3) of the InfoSoc Directive, have granted injunctive relief in the copyright law context.³⁷² The blocking injunctions, for instance, were issued against both *Newzbin* and *Dramatico* to oblige them to prevent subscribers from accessing their websites³⁷³ albeit to the extent there was an actual knowledge about such a subscriber using the service for conducting copyright violations.³⁷⁴

4. Harmonization of Secondary Liability Rules through Primary Liability Rules

The foregoing discussion of secondary liability rules also requires mentioning of the recent case law of the CJEU on the questions of link providers' primary liability for copyright infringement. In *GS Media/Sanoma*,³⁷⁵ *Filmspeler*³⁷⁶ and *The Pirate Bay*,³⁷⁷ the CJEU analyzed whether the activities of the respective link providers fell within the scope of Article 3(1) of the InfoSoc Directive by constituting an act of communication to the public.

³⁷⁰ *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch); [2010] FSR 21, paras. 75-77 (Arnold J).

³⁷¹ *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), para. 81 (Arnold J).

³⁷² Angelopoulos, *Beyond the Safe Harbors*, at 21.

³⁷³ See *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011].

³⁷⁴ Angelopoulos, *Beyond the Safe Harbors*, at 21.

³⁷⁵ Judgement of 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, ECLI:EU:C:2016:644 [hereinafter "*GS Media*"].

³⁷⁶ Judgement of 26 April 2017, *Stichting Brein v Jack Frederik Wullems*, C-527/15, ECLI:EU:C:2017:300 [hereinafter "*Filmspeler*"].

³⁷⁷ Judgement of 14 June 2017, *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, ECLI:EU:C:2017:456 [hereinafter "*Ziggo/Brein*"].

By assessing the criteria for finding an infringement developed in its previous case law (namely, two main criteria: ‘act of communication’ aimed at a ‘public’, and complementary ones, which are not autonomous but interdependent: ‘indispensable intervention’ and ‘profit-making intent’),³⁷⁸ the CJEU ruled that link providers are directly liable for copyright infringement, where they “knew or ought to have known” that their links refer to illicit materials,³⁷⁹ and where they intentionally facilitated access to copyright-protected content otherwise not easily accessible or, in other words, sufficiently intervened.³⁸⁰

Importantly, in *The Pirate Bay*, the CJEU has recently held that the operators of a search engine for P2P file-sharing shall be primary responsible for copyright infringements by virtue of “making available and management of an online sharing platform”.³⁸¹ What is more, the Court has decided that primary liability may be imposed not only in cases of actual knowledge of infringement but also in cases of the platform operator’s constructive knowledge thereof.³⁸² According to the Court, such a constructive knowledge may be presumed in cases of the profit-making intention of the platform operator.³⁸³

It should be also emphasized that, in *The Pirate Bay*, the CJEU did not consider the issues of ‘safe harbor’ protection, which has led scholars to question the applicability of the E-Commerce Directive’s protection to the cases of primary infringements. According to the opinion of Eleonore Rosati, one of the possible interpretations of the absence of consideration of ‘safe harbor’ protection is the CJEU’s understanding that the latter will be available only in

³⁷⁸ See Eleonora Rosati, *The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms* (July 21, 2017), <https://ssrn.com/abstract=3006591>, at 3-4 (citing previous case law of the CJEU) [hereinafter “Rosati, *The CJEU Pirate Bay Judgment*”].

³⁷⁹ *GS Media*, para. 49.

³⁸⁰ *Filmspeler*, para. 38 et seq; *Ziggo/Brein*, para. 38.

³⁸¹ *Ziggo/Brein*, para. 47.

³⁸² *Id.*, para. 45.

³⁸³ *Id.*, para. 46; see also *GS Media*, paras. 47-54.

cases where the users commit primary copyright infringements but not in situations of primary liability of the online platform operators.³⁸⁴ Contrary to this, Martin Husovec and Jaani Riordan argue that ‘safe harbor’ protections under the E-Commerce Directive should be available in cases of third-party content irrespective of the type of liability in question.³⁸⁵

Overall, it seems reasonable to agree with the scholars arguing that the CJEU case law demonstrates the Court’s intention to harmonize the rules on secondary liability through the rulings on primary liability.³⁸⁶

C. CONCLUDING REMARKS ON THE E.U. LEGAL FRAMEWORK

Given that the E-Commerce Directive does not purport to harmonize the substantive rules on liability of OSPs for third-party infringements, the practice of the E.U. Member States in this context, as follows from the selected examples of France, Germany and the U.K., is quite different and even contradictory. Nevertheless, the grounds for holding hosting providers liable in all these three countries have been developed mainly through the judicial practice of adjusting the existing tort law theories. The common feature of these E.U. jurisdictions is that the courts have been assessing the level of involvement of hosting providers in the infringing content and activity, the level of their knowledge thereof, as well as the existence of their culpable intent. As a result, national courts have been considering providers’ role in infringing activities, their business models, and the potential for non-infringing uses of their services, as well as have been imposing duties of care upon such providers based on the nature of their activities. Furthermore, the CJEU recent case law signals that a hosting provider may

³⁸⁴ Rosati, *The CJEU Pirate Bay Judgment*, at 3-4, 16.

³⁸⁵ Rosati, *The CJEU Pirate Bay Judgment*, at 12 (citing MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? CH. 4 (2017)); RIORDAN, at 377 and 384-385 (paras. 12.01 and 12.37).

³⁸⁶ Nordemann, *Liability of Online Service Providers*, at 22; Angelopoulos, *On Online Platforms*, at 33.

potentially be found primarily liable for copyright-infringing content in cases when it intentionally facilitates the infringement. The related rulings, however, are criticized for the alleged overextension of the notion of ‘communication to the public’ to cases of online intermediaries.

While the ‘safe harbor’ protection from a secondary liability is potentially available for the providers engaged in hosting of a third-party content, qualification conditions for such an immunity are not clearly defined at the E.U. level and applied differently by the national courts of the E.U. Member States. Certain level of uncertainty exists regarding UGC websites’ eligibility for such an immunity in the light of the CJEU’s ‘neutrality’ requirement.

The hosting ‘safe harbor’ is available for innocent OSPs and conditional upon an expeditious removal of the infringing content for OSPs that have a knowledge of an infringing content or activity. However, the only CJEU’s clarification of the ‘knowledge’ requirement establishes a vague mixed test of a ‘diligent economic operator’ and links the obtainment of a knowledge of infringing content or activity to the provider’s independent investigation or its receipt of the notification from a copyright holder. Such an interpretation is problematic in the view of the prohibition of the general monitoring obligation and the lack of unified requirements for a notice and takedown system at the E.U. level. Despite certain attempts to define the notice and takedown procedures at the national level, the application of the requirement of expeditious removal of infringing content across the E.U. is divergent and unpredictable for OSPs.

In addition, the scope of the liability exemptions in the E.U. does not extend to injunctions. Instead, the competent authorities of the E.U. Member States are empowered to impose additional obligations of due care on OSPs even if they qualify for a ‘safe harbor’. The overview of the legal regimes in France, Germany and the U.K. shows that national courts in the E.U. tend to rely on injunctions to subject hosting providers to obligations beyond the takedown of the notified illegal content, including a proactive duty to prevent future

infringements by means of adopting content monitoring and filtering. To what extent such a practice complies with the E-Commerce Directive's prohibition of imposition of general monitoring obligations is questionable due to the unclear distinction between the latter and permissible specific monitoring obligations in the E.U.

It follows that E.U. legal framework provides a significant level of protection to the copyright owners and forces OSPs to be more proactive in detecting and eliminating copyright infringements.

CHAPTER III. E.U. COPYRIGHT REFORM: MEASURES TO CLOSE THE ‘VALUE GAP’

For the purposes of establishing a Digital Single Market in the European Union, the E.U. Commission has recently emphasized the need of improving copyright and its enforcement by addressing the role played by Internet platforms and their respective liability in the context of the E-Commerce Directive.³⁸⁷ In particular, it was asserted that, in the light of the flaws of the current liability regime, it should be analyzed whether the enhanced responsibility and due diligence obligations must be imposed on the Internet intermediaries.³⁸⁸

Later, the findings of the public consultation, which addressed the opinions on the sufficiency of the existing liability regime and necessity of its amendment by imposing an enhanced duty of care on online platforms,³⁸⁹ were presented in the respective report of the E.U. Commission.³⁹⁰ The latter notably did not deny the majority’s opinion on the adequacy of the current ‘safe harbors’ regime pursuant to the E-Commerce Directive, but nevertheless drawn upon the controversies in understanding of the entitlements to liability immunities as well as the necessity of introducing a duty of care regime for certain categories of illicit content.³⁹¹ The report also described the rightsholders’ concerns that intermediary liability limitations along with the unclear scope of the right to communication to the public under the E-Commerce Directive and the InfoSoc Directive, respectively, produce negative effect on licensing of

³⁸⁷ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A digital single market strategy for Europe, COM (2015) 192 final.

³⁸⁸ *Id.*, at para. 3.3.2.

³⁸⁹ European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10932, paras. 18 and 21.

³⁹⁰ European Commission, Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15877, at 4.

³⁹¹ *Id.*, at 2.

copyrighted content and, as a result, lead to an imbalance in distribution of revenues received from such a content between them and online platforms, i.e. a ‘value gap’.³⁹²

Consequently, in pursuit of closing a ‘value gap’,³⁹³ the E.U. Commission has proposed a sector-specific solution for clarifying the role and liability of online intermediaries in the field of copyright law in the form of the DSMD.³⁹⁴ Immediately after the announcement, draft Article 13 together with Recitals 37-39 of the DSMD have caused the concerns of several E.U. Member States,³⁹⁵ as well as faced a massive criticism of various academics³⁹⁶ and researches,³⁹⁷ all of whom have questioned the compatibility of the aforementioned provisions with the E-Commerce Directive, the Charter of Fundamental Rights of the European Union, and the case law developed by the CJEU.

³⁹² *Id.*, at 11.

³⁹³ Proposal for a Directive on copyright in the Digital Single Market, COM (2016) 593 final, Recital 37 [hereinafter “DSMD”].

³⁹⁴ DSMD.

³⁹⁵ See Council of the European Union, 13 September 2017, Document 12127/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market – Questions by the Belgian, Czech, Finnish, Hungarian and Dutch Delegations to the Council Legal Service Regarding Article 13 and Recital 38, *available at* <http://statewatch.org/news/2017/sep/eu-copyright-directive-ms-questions-council-legal-service-25-7-17.pdf>; Council of the European Union, 18 September 2017, Document 12291/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market – Questions by the German Delegation to the Council Legal Service Regarding Article 13, *available at* <http://statewatch.org/news/2017/sep/eu-council-copyright-directive-german-questions-cl-12291-17.pdf>.

³⁹⁶ See, e.g. Stalla-Bourdillon et. al, *A brief exegesis of the proposed Copyright Directive*; Angelopoulos, *On Online Platforms*; Max-Planck Institute for Innovation and Competition, *Position Statement on the Proposed Modernisation of European Copyright Rules*, Part A, General Remarks, 27 January 2017, Part G, *Use of Protected Content on Online Platforms*, 1 March 2017, <http://www.ip.mpg.de/en/research/intellectual-property-and-competitionlaw/positionstatement-modernization-of-european-copyright-rules.html>.

³⁹⁷ See Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market, https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hiltey_Moscon-rev-18_9.pdf; Copyright Reform: Open Letter from European Research Centre, <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>.

This chapter, therefore, describes the main shortcomings of the proposal in the light of the current E.U. legal framework (A.), provides an effectiveness and efficiency assessment of the proposed regulatory measures, as well as includes suggestions on possible improvement of the copyright protection regime in the E.U. (B.).

A. DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: COMPLIANCE WITH THE EXISTING LEGAL REGIME IN THE E.U.

It has been argued that the DSMD is targeted at two main groups of online intermediaries: “false intermediaries and non-(sufficiently-)collaborative intermediaries”.³⁹⁸ It is assumed that the former, while allegedly not compliant with the requirements of a hosting ‘safe harbor’ protection have availed themselves of such a protection, thus, contributing to a ‘value gap’, and the latter have allegedly not been cooperative enough towards the rightsholders out of fear of falling out of the immunity scope.³⁹⁹

Considering the foregoing, draft Article 13 and related Recitals of the DSMD pursue to limit the scope of the hosting ‘safe harbor’ (1) and impose obligation on application of the content recognition technologies upon certain OSPs (2). These issues are further assessed in the light of the current E.U. legal framework.

1. Clarification of the ‘Safe Harbor’ for Online Service Providers

As follows from the title and wording of Article 13 of the DSMD, it is intended to apply to “information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”.⁴⁰⁰ Recital 38 of the DSMD further stipulates that

³⁹⁸ Eleonora Rosati, *Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law*, CREATE WORKING PAPER 2016/11 (August 2016), at 3, available at <https://ssrn.com/abstract=2830440> [hereinafter “Rosati, *Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary*”].

³⁹⁹ *Id.*

⁴⁰⁰ DSMD, Art. 13.

such an activity on storage and provision of access to copyrighted works constitutes more than “the mere provision of physical facilities” and amounts to “performing an act of communication to the public”.⁴⁰¹ Therefore, read together, these provisions imply that the providers of the aforementioned activities are considered to be primary infringers of the communication right of the copyright holder,⁴⁰² unless they enter into a respective license agreement with the latter or qualify for a ‘safe harbor’ protection.⁴⁰³ Furthermore, with regard to a ‘safe harbor’ immunity it is also clarified that “it is necessary to verify whether the service provider plays an active role, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor”.⁴⁰⁴ Such a proposal, however, does not fully comply with the existing interpretations of Article 3 of the InfoSoc Directive as well as Article 14 of the E-Commerce Directive.

From the perspective of the InfoSoc Directive, despite the scholars’ concerns about overextension of the notion of ‘communication to the public’ for the purposes of holding hosting providers liable for the provision of means for copyright infringements,⁴⁰⁵ the E.U. Commission’s approach seems to be supported by recent decisions of the CJEU,⁴⁰⁶ including in *The Pirate Bay*.⁴⁰⁷ Nevertheless, contrary to the latter, Recital 38 omits different supplementary infringement criteria developed in the practice of the CJEU, including criteria of ‘knowledge’ or ‘profit-making intent’. This fact in conjunction with the analysis of the CJEU jurisprudence has led many scholars to argue that the activity on storing and providing access

⁴⁰¹ DSMD, Recital 38(1).

⁴⁰² InfoSoc Directive, Art. 3(1); Angelopoulos, *On Online Platforms*, at 31.

⁴⁰³ DSMD, Recital 38(1).

⁴⁰⁴ DSMD, Recital 38(2).

⁴⁰⁵ Angelopoulos, *On Online Platforms*, at 33.

⁴⁰⁶ See Sub-section II(B)(4) of the thesis.

⁴⁰⁷ Rosati, *The CJEU Pirate Bay Judgment*, at 15.

alone is insufficient for establishing a primary liability of an online platform operator.⁴⁰⁸ Such an argument seems to be sufficiently convincing. Indeed, previous case law of the CJEU suggests the necessity of assessment of additional criteria, such as “new public”, “knowledge”, including constructive knowledge inferred from a “profit-making motive”, which should be conducted on a case-by-case basis.⁴⁰⁹ In line with these arguments, Eleonore Rosati rightfully suggests that, according to the existing CJEU case law, a passive online intermediary would unlikely qualify with the “indispensable intervention” requirement and, thus, should not be held directly liable for copyright infringement.⁴¹⁰

If put in the context of the E-Commerce Directive, the proposed Recital 38⁴¹¹ significantly limits the application of the ‘safe harbor’ immunity by automatically excluding from the protection all service providers which promote or optimize the presentation of the user-generated material.⁴¹² This, however, runs counter to the neutrality test elaborated by the CJEU in *L’Oreal v. eBay* and *Google France*. As described above,⁴¹³ such a test implies that in order to avail itself of the ‘safe harbor’ immunity, a service provider must not perform “an active role of such a kind as to give it knowledge of, or control over” the illegal content.⁴¹⁴ While, indeed, the Court expressly named an optimization of the presentation of offers as an example of

⁴⁰⁸ Martin Senftleben, Lionel A. F. Bently, Graeme B. Dinwoodie, Christophe Geiger, Jonathan Griffiths, Annette Kur, Ansgar Ohly, Alexander Peukert, Marco Ricolfi, Jens Schovsbo, Katja Weckstrom Lindroos, Lukasz Zelechowski, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law*, European Intellectual Property Review 2015, at 21-23, available at <https://ssrn.com/abstract=2496351> [hereinafter “Senftleben, *et al*, Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition”].

⁴⁰⁹ Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 21-22.

⁴¹⁰ Rosati, *Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary*, at 12-13.

⁴¹¹ DSMD, Recital 38(1).

⁴¹² Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 16.

⁴¹³ See Sub-section II(A)(2) of the thesis.

⁴¹⁴ *LOréal v eBay*, para. 113; *Google France*, paras. 114, 120.

assistance which demonstrates the lack of neutrality on the part of a service provider,⁴¹⁵ the former implied the presence of the provider's knowledge by analyzing specific activities of eBay.⁴¹⁶ Given the particularities of *L'Oréal v. eBay*, it, thus, does not seem reasonable to implement its assessment factors into a legislative provision, since it would unjustifiably limit the availability of the immunity under the E-Commerce Directive.⁴¹⁷ In any event, such assessment factors are not specific enough, leading scholars to disagree on whether they should be interpreted narrowly⁴¹⁸ or broadly.⁴¹⁹

Moreover, from the provision's wording, which expressly excludes the importance of consideration of the character and means utilized for the said optimization or promotion, it may also follow that even the employment of automatic optimization processes will suffice to exclude the application of the liability limitation under the Directive.⁴²⁰ This, in its turn, would also constitute an extremely restrictive approach to the eligibility for the 'safe harbor' immunity. The argument to the contrary, according to which an active role of the platform operator may not be denied, since even automatic algorithms are always programmed by humans,⁴²¹ is not convincing, considering the large amounts of data stored as well as the difficulty of assessing the copyright-infringing nature of the latter.

⁴¹⁵ *L'Oréal v eBay*, para. 116.

⁴¹⁶ Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 15.

⁴¹⁷ *Id.*, at 16.

⁴¹⁸ Angelopoulos, *On Online Platforms*, at 12.

⁴¹⁹ Agnès Lukas-Schloetter, *Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)* (March 2017), <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf>, at 15 [hereinafter "Lukas-Schloetter, *Transfer of Value Provisions*"].

⁴²⁰ Rosati, *The CJEU Pirate Bay Judgment*, at 14; Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 16.

⁴²¹ Lukas-Schloetter, *Transfer of Value Provisions*, at 15.

Finally, the qualifying requirement of “large amounts of works” also adds to ambiguity of the proposed provisions due to the absence of any guidance on what amount of content should be considered large in case of UGC platforms.⁴²²

2. Implementation of Content Recognition Technologies

Additionally, pursuing the purpose of ensuring effective collaboration between service providers and copyright holders, Article 13 of the DSMD in general targets “[i]nformation society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” and imposes an obligation to implement “effective content recognition technologies” upon them.⁴²³ Recital 39 further clarifies that copyright holders are obliged to provide the data necessary to detect copyright-protected content, and service providers have a duty to be transparent about the technologies they implement.⁴²⁴

The introduction of such an “enhanced due diligence obligation”⁴²⁵ has been condemned⁴²⁶ and supported⁴²⁷ at the same time. Two main concerns on potential incompatibility with the existing E.U. legal framework have been explored by legal scholars, namely, incompatibility with Article 15 of the E-Commerce Directive and related CJEU case law as well as with the E.U. Charter.

The critics of the DSMD particularly point out that, if tested against the conclusions at which the CJEU arrived in *Sabam v. Netlog*, which also concerned the social network platform with

⁴²² Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 17.

⁴²³ DSMD, Art. 13(1), Recital 39.

⁴²⁴ DSMD, Recital 39.

⁴²⁵ Lukas-Schloetter, *Transfer of Value Provisions*, at 16.

⁴²⁶ Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 10-14, 18-20.

⁴²⁷ Lukas-Schloetter, *Transfer of Value Provisions*, at 17-21.

a user-generated content, the proposed measure should not be deemed permissible as it will likely result in imbalance between fundamental rights and freedoms protected under the E.U. CFR.⁴²⁸ One of the potential effects of such a filtering system, in particular, may be blocking or removal of a lawful content subject to copyright law exceptions but nevertheless unrecognized by the filter.⁴²⁹ Despite the foregoing, both critics and proponents of the DSMD agree that copyright holders involvement in identification of illegal content online which is prescribed by Recital 39 may decrease the potential burden of OSPs,⁴³⁰ though, it is arguable that such a collaboration will ensure a proper balance of fundamental rights concerned.⁴³¹

B. DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: ASSESSMENT IN THE LIGHT OF THE EXISTING LEGAL REGIMES IN THE U.S. AND THE E.U.

This section further assesses the effectiveness and efficiency of the ‘value gap’ provisions under the proposed DSMD in addressing the alleged problems of the aforementioned ‘false intermediaries’ (1) and ‘non-(sufficiently-)collaborative intermediaries’ (2) based on the comparative findings from the analysis of the legal solutions already implemented in the U.S. and the E.U.

1. Leaving ‘False Hosting Providers’ out of ‘Safe Harbor’

a. Option 1: Clarification of ‘Safe Harbor’ for OSPs

As analyzed above, the proposed measure on clarification of the boundaries of the hosting ‘safe harbor’ is incompatible with the existing E.U. legal framework.⁴³² Moreover, such a measure constitutes an attempt to hold OSPs strictly liable rather than liable for negligence.⁴³³

⁴²⁸ Senftleben, *et al*, *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition*, at 12.

⁴²⁹ *Id.*; see *SABAM v Netlog*, paras. 48-50.

⁴³⁰ Angelopoulos, *On Online Platforms*, at 38; Lukas-Schloetter, *Transfer of Value Provisions*, at 20.

⁴³¹ Stalla-Bourdillon *et. al*, *A brief exegesis of the proposed Copyright Directive*, at 8.

⁴³² See Sub-section III(A)(1) of the thesis.

⁴³³ Frosio, *From Horizontal to Vertical*, at 10-13.

Therefore, the implementation of such a measure will conflict with the existing E.U. liability regime which may be categorized as “a negligence regime based on actual or constructive knowledge”⁴³⁴ and, therefore, result in imbalance of the rights of service providers and the rights of copyright holders.⁴³⁵ Moreover, it will lead to an unjustifiable exclusion of all UGC websites which perform content optimization and promotion functions as well as hosting providers which implement automatic optimization processes, regardless of their knowledge or control of the infringing activity.

b. Option 2: Reliance on Passivity Requirement and National Rules on Secondary Liability

As demonstrated above, in adopting ‘safe harbor’ regulations both the U.S. and the E.U. pursued the aim of protecting neutral intermediaries facilitating the information flow on the Internet. While in the U.S. the statutory definition of an OSP was interpreted sufficiently broadly, in the E.U. the scope of the hosting ‘safe harbor’ may be considered as not precisely clear. Nevertheless, the neutrality criterion developed by the CJEU together with the practice of the national courts of the E.U. Member States provide a solid basis for achieving the objective of excluding non-neutral providers from the scope of the liability limitation.

First, the CJEU’s passivity requirement is flexible enough to exclude the new forms of ‘active role’ hosting providers from the scope of ‘safe harbor’ protection.⁴³⁶ Second, subject to its careful application, this criterion may prove to be effective in distinguishing a ‘safe harbor’-eligible hosting provider from a non-eligible publisher of a third-party content.⁴³⁷ Therefore,

⁴³⁴ Frosio, *Reforming Intermediary Liability*, at 41.

⁴³⁵ *Id.*

⁴³⁶ Nordemann, *Liability of Online Service Providers*, at 10.

⁴³⁷ MARTIN HUSOVEC, *INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE?* 57 (2017).

such a test already defines the boundaries of the hosting liability exemption and precludes the E.U. Member States to unjustifiably refuse such an immunity to sufficiently passive hosting providers, including those performing their services for remuneration.

At the same time, such requirements as knowledge or control of the infringing content or activity as well as culpable intent to facilitate or induce the latter have already been utilized by national courts of the E.U. Member States to decide on the secondary liability of the ‘bad faith’ hosting providers. Nevertheless, national rules on secondary liability of OSPs are not harmonized across the E.U. which may represent an obstacle to the creation of the Digital Single Market.

c. Assessment and Recommendations for Improvement

The effectiveness of Option 1 is likely to be greater considering its overreaching effect of limiting the availability of ‘safe harbor’ protection in comparison to divergent national practice on secondary liability of the OSPs in the E.U. Member States. Nevertheless, such measure will be inappropriate and disproportionate due to its incompatibility with the existing legal framework and its effect of creating an imbalance between the protection of intellectual property rights and other fundamental rights and freedoms.

Option 2 will be more efficient, since it allows the E.U. Member States to apply a sufficiently flexible requirement of passivity on a case-by-case basis and, thus, consider all relevant circumstances of the case, including the character of technologies used and the type of activities performed by the OSP.

In addition, to be more effective, Option 2 will require the adoption of the harmonized rules or criteria on secondary liability at the E.U. level.⁴³⁸ For this purpose, the practice of U.S. courts

⁴³⁸ See e.g. Angelopoulos, *Beyond the Safe Harbors*.

on inducement liability may be used as an example of the legal tool to hold liable ‘bad faith’ hosting providers that adopt dangerous business models, derive profit from large-scale copyright infringements and avoid preventing the latter.

Alternatively, Option 1 may be amended to ensure its compliance with the current legal regime in the E.U., including by means of the elimination of automatic consideration of the storage and provision of access as an act ‘of communication to the public’ as well as the proper incorporation of the neutrality test.⁴³⁹

2. Non-Collaborative Hosting Providers

a. Option 1: Implementation of Content Recognition Technologies

First, the proposed measure will likely result in the OSP’s duty of proactive general filtering and monitoring incompatible with their fundamental rights and freedoms guaranteed in the E.U.⁴⁴⁰ In addition, while pursuing the aim of ensuring proper functioning of license agreements and prevention of infringing material, this measure will also negatively affect the rights of the users of online platforms, including their freedom to impart information as well as their entitlement to limitations and exceptions provided by copyright laws.⁴⁴¹ Furthermore, the effectiveness of the content recognition technologies is highly questionable.⁴⁴² Even though the supporters of the DSMD argue that in recent years new content identification technologies have developed and been effectively applied to identify copyright-infringing files (e.g. Dailymotion’s Audio Magic and iTunes’ Gracenote),⁴⁴³ the researchers of filtering

⁴³⁹ See Angelopoulos, *On Online Platforms*, at 41-43.

⁴⁴⁰ See Sub-section III(A)(2) of the thesis.

⁴⁴¹ See e.g. Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237 (2015), available at <http://scholarlycommons.law.hofstra.edu/hlr/vol44/iss1/8>.

⁴⁴² The Impact Assessment confirms false results produced by such technologies, see *Impact Assessment on the Modernisation of EU Copyright Rules*, at 140-141.

⁴⁴³ Lukas-Schloetter, *Transfer of Value Provisions*, at 20.

technologies point out that existing audio and video fingerprinting techniques, albeit working better than hash-based and metadata filters, still constitute imperfect tools for identifying infringing content due to, among other, their constraint to a limited scope of copyrighted works, ability to be circumvented, and, more notably, examination focus on the file content without analyzing the latter's compatibility with copyright law.⁴⁴⁴ Furthermore, the research shows that high potential costs associated with implementation of the proposed content recognition technologies may drastically affect the development of small and medium-sized enterprises wishing to invest in the online business.⁴⁴⁵ Finally, the existing practice of implementation of filtering technologies provides an additional evidence of their low effect on the prevention of copyright infringements.⁴⁴⁶

b. Option 2: Reliance on Notice and Takedown System and Injunctive Relief

The comparison of 'safe harbor' regimes in the U.S. and the E.U. demonstrates that both jurisdictions have opted for notice and takedown systems which only to a certain extent limit a liability for an injunctive relief or does not exempt OSPs from it, respectively. Despite this similarity, the U.S. statutory-defined notice and takedown system along with strictly specified limits for injunctions and relevant case law interpretations of the 'knowledge' requirement result in imposition of more lenient obligations on OSPs and provision of additional guarantees to them.⁴⁴⁷ To the contrary, the E.U. legal framework does not prescribe specific requirements for a notice and takedown procedure leaving the E.U. Member States to rely on vague 'knowledge' standards developed by the CJEU, and ultimately puts a bigger burden of

⁴⁴⁴ Engstrom & Feamster, *The Limits of Filtering*, at 13-15.

⁴⁴⁵ *Id.* at 22-23, 25-26.

⁴⁴⁶ *Id.* at 26-27.

⁴⁴⁷ Ali Amirmahani, *Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union*, 30 BERKELEY TECH. L.J. 865, 873 (2015).

detecting copyright infringements on the OSPs rather than copyright holders.⁴⁴⁸ Therefore, the E.U. legal framework already contains mechanisms for enhancing the OSPs' collaboration in detecting and preventing the copyright infringements.

First, E.U. notice and takedown system allows copyright owners effectively detect the content infringing their copyright and request its expeditious removal. The E.U. legal framework only requires their notices to be sufficiently precise and adequately substantiated. In addition, copyright owners always may request the competent authorities of the E.U. Member States to impose on the OSPs obligations beyond mere takedown. The analysis of the national practices in the E.U. confirms that such obligations cover proactive duties to detect and prevent future copyright infringements, including by means of effective content recognition technologies.

Nevertheless, such measure likewise produces negative effects. First, the lack of statutory notice and takedown system does not allow users to dispute the legality of their content removal and does not clarify when the OSP shall be obliged to act, both of which lead to the unnecessary and/or unlawful removal of the online content. Second, in absence of a strict delimitation between prohibited general monitoring obligations and permissible specific monitoring obligations, the scope of injunctions issued against the OSPs may be unjustifiably broad and upset the balance between the rights of copyright owners and the OSPs.

c. Assessment and Recommendations for Improvement

Considering the existing level of technological development and related drawbacks of using content recognition technologies in detecting intellectual property rights violations as well as its incompatibility with the existing legal framework, Option 1 will unlikely produce a plausible effective and efficient result for copyright owners, at the same time creating an

⁴⁴⁸ Peguera, *The DMCA Safe Harbors*, at 489; Frosio, *From Vertical to Horizontal*, at 5.

imbalance between the protection of intellectual property rights and other fundamental rights and freedoms, as well as a ‘chilling effect’ on the investments into the development of the Internet.

Option 2 is more efficient in safeguarding the freedom of information and striking a fair balance between the rights of interested parties. As has been shown above, the research suggests that current state of development of filtering technologies does not provide an effective solution for identifying, among other, the compatibility of a digital content with copyright law. The notice and takedown system, however, obliges and encourages both copyright holders and service providers to consider the infringing character of material in question before taking it down and, thus, ensures that non-infringing content remains available online.⁴⁴⁹

In this respect Giancarlo Frosio correctly points out that the negligence-based ‘safe harbor’ system would be more effective in ensuring the appropriate balance between intellectual property rights of copyright holders and the freedom of expression, while monitoring obligations undermining knowledge and takedown principle would produce “chilling effects over freedom of information”.⁴⁵⁰ Similar argument is made by Patrick Van Eecke, according to whom a notice and takedown procedure constitutes a tool which significantly contributes to the achievement of the E-Commerce Directive’s aim of balancing the rights and interests of the parties concerned.⁴⁵¹ Indeed, the U.S. statutory-defined notice and takedown procedure has several significant advantages and, as a result, provides substantial guarantees to online intermediaries, copyright owners, as well as users.⁴⁵²

⁴⁴⁹ Frosio, *Form Horizontal to Vertical*, at 15.

⁴⁵⁰ *Id.*

⁴⁵¹ Patrick Van Eecke, *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48(5) COMMON MARKET L REV 1455, 1457-1461 (2011).

⁴⁵² See Section I(B) of the thesis.

In addition, as outlined above, the E.U. legal framework allows an imposition on the OSPs of additional obligations, including duty to apply different content recognition technologies for detecting copyright infringements. Providing opportunity to the courts to decide on the scope of the necessary measure is likely to be a more efficient solution, since the courts will be able to weight the rights and freedoms at stake, including from the perspective of the guarantee against general monitoring enshrined in Article 15 of the E-Commerce Directive.

Despite the foregoing, the effectiveness of Option 2 may be improved in several important ways to ensure a greater legal clarity and predictability for the players on the digital single market. First, a unified notice and takedown system should be introduced on the E.U. level to specify the requirements for a valid notice of infringement, as well as to include a counter-notice procedure and remedies for the abuse of the system. The DMCA's notice and takedown system and its respective interpretation by U.S. courts may constitute a useful example for this purpose. Second, the lack of clarity regarding the extent to which specific filtering obligations, including those aimed at prevention of future unnotified infringements, are permissible may be rectified by clarifying the delineation between them and general monitoring obligations.⁴⁵³ Finally and alternatively, the duty to take appropriate and proportionate measures may be formulated as a positive obligation of an OSP resembling the negative obligation under the hosting 'safe harbor', which would determine the requirements an OSP must meet in order to secure a liability exemption.⁴⁵⁴

⁴⁵³ See also Nordemann, *Liability of Online Service Providers*, at 18 (arguing that such a clarification may be made through court case law, i.e. absent regulatory action).

⁴⁵⁴ Angelopoulos, *On Online Platforms*, at 45.

CONCLUSION

This thesis assessed the possible measures for solving a ‘value gap’ problem, that has been recently used to justify the need for a copyright reform in the E.U. The aim of this study was to determine whether the reformulation of liability exemptions for OSPs and imposition of enhanced obligations on them would serve the purpose of eliminating the causes of unfair distribution of revenues received from the use of the copyright-protected content.

The analysis of the legal regimes employed in the U.S. and the E.U. revealed that, even though pursuing the same objectives and implementing similar legal concepts, two jurisdictions achieved different outcomes in regulating the OSPs’ liability for third-party copyright infringements. Although the standards for secondary liability of OSPs are not precisely defined in both jurisdictions, in the U.S. the balance between the rights of OSPs and the rights of copyright owners is struck by a statutory-defined notice and takedown system as well as a voluntary approach to monitoring, while in the E.U. a notice and takedown principle is diluted by a possibility to impose additional duties on OSPs, which forces the latter to be more proactive in detecting and eliminating copyright infringements.

These comparative findings laid down the basis for the assessment of the measures under the draft Directive on Copyright in the Digital Single Market. The hypothesis was that in the light of the existing legal framework the proposed measures on clarification of a hosting ‘safe harbor’ and imposition on OSPs of an obligation to apply content recognition technologies would not be effective and efficient. The results of this study confirmed this hypothesis.

The assessment demonstrated that the measure on clarification of the boundaries of the hosting ‘safe harbor’, which seeks to impose a strict liability on OSPs rather than holding them liable upon negligence, will be inappropriate and disproportionate, since it is incompatible with the existing E.U. legal framework, will unjustifiably exclude UGC websites from the scope of the ‘safe harbor’ protection and will likely upset the balance between the rights of OSPs and the

rights of copyright holders. Furthermore, it was shown that the existing requirement of passivity developed in the case law of the CJEU along with the practice of application of secondary liability doctrines by the E.U. Member States already provide a sound basis for denying a ‘safe harbor’ immunity to ‘active role’ hosting providers. Therefore, it was suggested that the reliance on the latter legal solution will be more effective and efficient. Moreover, to increase the effectiveness of such alternative measure it was recommended to harmonize the rules on secondary liability at the E.U level and use the U.S. experience in application of inducement liability doctrine as a relevant example.

The assessment also showed that the measure on imposition of a duty to implement content recognition technologies on OSPs will not be efficient, since it will likely create a duty of proactive general filtering and monitoring incompatible with the enjoyment of fundamental rights and freedoms guaranteed in the E.U. as well as will be too costly precluding small and medium-sized enterprises from investing in the online business. Moreover, it was demonstrated that the effectiveness of such a measure is also doubtful, given the lack of identification technologies capable of assessing online content’s compatibility with copyright law. Hence, it was recommended to rely on the notice and takedown principle that ensures the appropriate balance between intellectual property rights of copyright holders and the freedom of expression, as well as promotes cooperation of OSPs and copyright holders in eliminating copyright-infringing materials. In addition, it was likewise suggested to utilize the available mechanisms of injunctive relief for imposing obligations of specific monitoring on OSPs where necessary. Finally, the recommendations on improvement of both alternatives measures were formulated, including the specification of a notice and takedown procedure and clarification of the delineation between prohibited general monitoring obligations and permissible specific monitoring obligations at the E.U. level with the use of the relevant U.S experience.

In conclusion, it was demonstrated that the proposed DSMD is flawed in many respects and requires amendment. Although the comparative analysis revealed that the existing legal frameworks in the U.S. and the E.U. may already contain legal solutions to the proclaimed ‘value gap’ problem, their effectiveness and efficiency may also be improved through the adoption of an appropriate regulatory action. In the light of the ongoing discussions of the proposed E.U. copyright reform, this thesis, therefore, provides a basis for further research of the measures to stop the *#CensorshipMachine* and to *#FixCopyright* in the Digital Age.

BIBLIOGRAPHY

Agress R.N., *Is There Ever A Reason to Know? A Comparison of the Contributory Liability "Knowledge" Standard for Websites Hosting Infringed Trademarked Content Versus Infringed Copyrighted Content*, 5 J. BUS. ENTREPRENEURSHIP & L. ISS. 179, 193-194 (2011), available at: <https://digitalcommons.pepperdine.edu/jbel/vol5/iss1/7>

Amirmahani A., *Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union*, 30 BERKELEY TECH. L.J. 865 (2015)

Angelopoulos C., *Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe*, Amsterdam Law School Paper No. 2013-72 1, 2 (2013), available at <https://ssrn.com/abstract=2360997>

ANGELOPOULOS C., EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS (2015)

Angelopoulos C., *European intermediary liability in copyright: A tort-based analysis*, Institute for Information Law (2016), available at <http://hdl.handle.net/11245/1.527223>

Angelopoulos C., *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market* (January 2017), available at <https://ssrn.com/abstract=2947800>

Angelopoulos C., Smet S., *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, TAYLOR & FRANCIS IN JOURNAL OF MEDIA LAW, DOI: 10.1080/17577632.2016.1240957, 21 October 2016, at 3-4, available at: <https://ssrn.com/abstract=2944917>

Bartholomew M., *Copyright, Trademark and Secondary Liability After Grokster*, 32 COLUM. J.L. & ARTS 445 (2009)

Bayer A., *Liability 2.0 - Does the Internet environment require new standards for secondary liability? An overview of the current legal situation in Germany*, in PRINZ ZU WALDECK UND PYRMONT ET AL. (HRSG.), PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 365 (2008)

Blood D.O., Ngiam K-M., *A Focus on Filters: Latest Developments in MGM v. Grokster* 20 INTELLECTUAL PROPERTY & TECHNOLOGY LAW JOURNAL 1 (2008)

Commission Staff Working Document – *Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes*, SWD (2016) 301 final, Brussels, 14 September 2016

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A digital single market strategy for Europe, COM (2015) 192 final

Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market, https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf)

Copyright Reform: Open Letter from European Research Centre, <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>

Council of the European Union, 13 September 2017, Document 12127/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market – Questions by the Belgian, Czech, Finnish, Hungarian and Dutch Delegations to the Council Legal Service Regarding Article 13 and Recital 38, *available at* <http://statewatch.org/news/2017/sep/eu-copyright-directive-ms-questions-council-legal-service-25-7-17.pdf>

Council of the European Union, 18 September 2017, Document 12291/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market – Questions by the German Delegation to the Council Legal Service Regarding Article 13, *available at* <http://statewatch.org/news/2017/sep/eu-council-copyright-directive-german-questions-cls-12291-17.pdf>

DINWOODIE G.B., SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS (2017)

Edwards L., *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, Report Commissioned by the World Intellectual Property Organization, Geneva (2011), *available at* http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf

Eecke P.V., *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48(5) COMMON MARKET L REV 1455 (2011)

Engstrom E., Feamster N., *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (March 2017), www.engine.is/events/category/the-limits-of-filtering-a-lookat-the-functionality-shortcomings-of-content-detection-tools

European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015, http://ec.europa.eu/newsroom/dac/document.cfm?doc_id=10932

European Commission, Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy, http://ec.europa.eu/newsroom/dac/document.cfm?doc_id=15877

Farano B.M., *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches*, 14 TTLF Working Paper 1 (2012)

Frosio G., *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe*, 12 OXFORD JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE 565 (2017)

Frosio G.F., *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NORTHWESTERN UNIVERSITY LAW REVIEW 19 (2017)

Ginsburg J. C., *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZONA LAW REVIEW 577 (2008)

Guibault L., Westkamp G., Rieber-Mohn T., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (2007) Report to the European Commission, DG Internal Market; Amsterdam Law School Research Paper No. 2012-28; Institute for Information Law Research Paper No. 2012-23.

Harrelson W.C., *Filtering the Internet to Prevent Copyright Infringement: ISP Safe Harbors and Secondary Liability in the U.S. and France*, <https://www.jdsupra.com/documents/045cf8b4-3388-412d-9322-e10395852ba8.pdf> (last visited on 28 March 2018)

Harris D.P., *Time to Reboot?: DMCA 2.0*, 47 ARIZONA STATE LAW JOURNAL 801 (2015)

Hetcher S., *The Fault Liability in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 432 (Shyamkrishna Balganes, ed., 2013)

Holt K.D., *Grokster and Beyond: Secondary Liability for Copyright Infringement During Live Musical Performances*, 19 J. INTELL. PROP. L. 173 (2011)

HUA J. J., TOWARD A MORE BALANCED APPROACH: RETHINKING AND READJUSTING COPYRIGHT SYSTEMS IN THE DIGITAL NETWORK ERA (2014)

HUSOVEC M., *INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE?* (2017).

Kleinschmidt B., *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18(4) IJLIT 332 (2010).

Lemley M.A., *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM'S & HIGH TECH. L. 101 (2007)

Lukas-Schloetter A., *Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)* (March 2017), <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf>

Max-Planck Institute for Innovation and Competition, *Position Statement on the Proposed Modernisation of European Copyright Rules*, Part A, General Remarks, 27 January 2017, Part G, *Use of Protected Content on Online Platforms*, 1 March 2017, <http://www.ip.mpg.de/en/research/intellectual-property-and-competitionlaw/positionstatement-modernization-of-european-copyright-rules.html>

Nordemann J. B., *Liability for Copyright Infringements on the Internet: Host Provider (Content Providers) – The German Approach*, 2 JIPITEC 37 (2011)

Nordemann J.B., *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?* IP/A/IMCO/2017-08 1, 22 (2018), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA\(2017\)614207_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf)

Nordemann J.B., *YouTube is a hosting provider, but one with extensive duties of care, say two German Courts*, Kluwer Copyright Blog (6 November, 2015), <http://copyrightblog.kluweriplaw.com/2015/11/06/youtube-is-a-hosting-provider-but-one-with-extensive-duties-of-care-say-two-german-courts/>

OECD, *Participative Web: User-Created Content* (2007), <https://www.oecd.org/sti/38393115.pdf>

Opinion of 22 September 2009, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, Joined Cases C-236/08 to C-238/08, ECLI:EU:C:2009:569 (Advocate General).

Opinion of 9 December 2010, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2010:757 (Advocate General)

Peguera M., *Converging Standards of Protection from Secondary Liability for Trademark and Copyright Infringement Online*, 37 COLUM. J.L. & ARTS 609 (2014)

Peguera M., *Secondary Liability for Copyright Infringement in the Web 2.0 Environment: Some Reflections on Viacom v. Youtube*, 6 Journal of International Commercial Law and Technology (2011), available at: <https://ssrn.com/abstract=1716773>

Peguera M., *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481 (2009)

Principles for User Generated Content Services, <https://ugcprinciples.com/> (last visited Feb, 09, 2018)

Proposal for a Directive on copyright in the Digital Single Market, COM (2016) 593 final

Reese R.A., *The Relationship Between the ISP Safe Harbors and Liability for Inducement*, 8 STAN. TECH. L. REV. (2011)

RIORDAN J., LIABILITY OF INTERNET INTERMEDIARIES (2016)

Rosati E., *The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms* (July 21, 2017), <https://ssrn.com/abstract=3006591>

ROSEN R.S., MUSIC AND COPYRIGHT (2008)

SAVIN A., EU INTERNET LAW (2017)

Senftleben M., Bently L.A.F., Dinwoodie G.B., Geiger C., Griffiths J., Kur A., Ohly A., Peukert A., Ricolfi M., Schovsbo J., Weckstrom K., Zelechowski L., *Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade*

Mark Law, *European Intellectual Property Review* 2015, at 21-23, available at <https://ssrn.com/abstract=2496351>

Solomon L., *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237 (2015), available at <http://scholarlycommons.law.hofstra.edu/hlr/vol44/iss1/8>

Song S.H., *A Comparative Copyright Analysis of ISP Liability in China versus the United States and Europe* 27 THE COMPUTER & INTERNET LAWYER 1, 7

Stalla-Bourdillon S., Rosati E. et al., *Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society* (30 September 2016), available at <https://ssrn.com/abstract=2850483>

Stalla-Bourdillon S., Rosati E., Turk K., Angelopoulos C., Kuczerawy A., Peguera M., Husovec M., *A brief exegesis of the proposed Copyright Directive*, 24 November 2016, available at <https://ssrn.com/abstract=2875296>

Synodinou T-E., *Intermediaries' liability for online copyright infringement in the EU: Evolutions and confusions*, COMPUTER LAW & SECURITY REVIEW 31 (2015)

Tehrani P.M., Amoozegar T., *How Is The Liability Of Internet Service Providers Limited Under The Digital Millennium Copyright Act?* 28 IPEDR 258 (2012)

US Congressional Senate Rep No 105-190, 45 (1998).

US Senate, *The Digital Millennium Copyright Act of 1998*, S. Rpt. 105-190, 11 May 1998.

WANG J., *REGULATING HOSTING ISPS' RESPONSIBILITIES FOR COPYRIGHT INFRINGEMENT. THE FREEDOM TO OPERATE IN THE US, EU AND CHINA* (2016).

Werkers E., *Intermediaries in the Eye of the Copyright Storm – A Comparative Analysis of the Three Strike Approach within the European Union*, ICRI WORKING PAPER NO. 4/2011, 3 (2011).

Wu T., *The Copyright Paradox: Understanding Grokster*, 2005 SUP. CT. REV. 229 (2005)

Yen A.C., *Third Party Copyright Liability After Grokster*, 16 INFO. & COMM. TECH. L. 184, 187 (2007)

TABLE OF CASES

A&M Records Inc v Audio Magnetics Incorporated (UK) Ltd [1979] FSR 1

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

ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619 (4th Cir. 2001)

Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009)

Arista Records, Inc. v. Mp3Board, Inc., 2002 Copr. L. Dec. P 28483, 2002 WL 1997918 (S.D.N.Y. 2002)

BGH Aug. 17, 2011, 191 BGHZ 19, (Ger.) (*Perfume Stick*) in 44 INT’L REV. INTELL. PROP. & COMPETITION L. 123, 128, PARA. 28 (2013)

BGH, *Cybersky*, 15 January 2009, I ZR 57/07

BWP Media USA, Inc. v. Clarity Digital Group, LLC, 820 F.3d 1175 (10th Cir. 2016)

C.A. Paris, Feb. 4, 2011, *André Rau v. Google and Aufeminin.com* (prec.)

C.A. Paris, Jan. 14, 2011, *Google Inc. v. Bac Films, The Factory et al* (prec.)

Capitol Records, LLC v. ReDigi, Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013)

CBS Inc v Ames Records & Tapes Ltd [1982] Ch 91, 92

CBS Song Ltd v Amstard Consumer Electronics plc [1988] 1 AC 1013

Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013)

Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (W.D. Wash. 2004)

CoStar Group Inc. v. LoopNet, Inc., 164 F.Supp.2d 688 (D. Md. 2001)

CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004)

Dramatico Entertainment Ltd v British Sky Broadcasting Ltd [2012] EWHC 268 (Ch).

Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004)

Falcon v The Famous Players Film Co Ltd [1926] 2 KB 474

Faulkner v. National Geographic Society, 211 F. Supp. 2d 450 (S.D.N.Y. 2002).

Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012)

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996)

German Federal Supreme Court (2004) GRUR 860 864 – *Internetversteigerung I*

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971)

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011)

In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003)

Jean Yves L. dit Lafesse c. Myspace, Tribunal de Grande Instance de Paris, Ordonnance de référé 22 juin 2007

Judgement of 12 July 2011, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2011:474

Judgement of 15 September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, ECLI:EU:C:2016:689

Judgement of 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, ECLI:EU:C:2012:85

Judgement of 23 March 2010, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, joined cases C-236/08 and C-237/08, ECLI:EU:C:2010:159

Judgement of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, ECLI:EU:C:2011:771

Judgement of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192

Luvdarts, LLC v. AT&T Mobility, LLC, 710 F.3d 1068 (9th Cir. 2013)

Matthew Bender & Co. v. West Publishing Co., 158 F.3d 693 (2d Cir. 1998).

Mavrix Photographs, LLC v. Livejournal, Inc., 873 F.3d 1045 (9th Cir. 2017)

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)

MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004)

Order Granting in Part Plaintiffs' Motion for a Permanent Injunction, *MGM Studios, Inc. v. Grokster, Ltd.* CV 01-8541:1215, at 83 (Oct. 16, 2007)

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)

Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007)

Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146 (C.D.Cal. 2002)

Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657 (9th Cir. 2017)

Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007)

Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)

SABAF SpA v MFI Furniture [2003] RPC (14)

Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994)

Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963)

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

Sté Nord-Ouest c. Dailymotion (09-67.869)

Sté Nord-Ouest c. Dailymotion (09-67.869), Cour de cassation, 17 February 2011

Tamiz v Google, Inc. [2012] EWHC 449

TGI Paris 19 October 2007, *Zadig Production v. Google Inc*, Afa (prec.)

The Kursk [1924] P 140

Tiscali Media c. Dargaud Lombard, Lucky Comics, Cour d'appel de Paris, 7 June 2006

Twentieth Century Fox Film Corp v British Telecommunications plc [2011]

Twentieth Century Fox Film Corp v Newzbin Ltd [2010] EWHC 608 (Ch)

UMG Recording, Inc. v. Escape Media Group, Inc., No. 11 Civ. 8407, 2014 WL 5089743 (S.D.N.Y. 2014)

UMG Recordings v. Veoh Networks Inc, 665 F. Supp. 2d 1099 (C.D. Cal, 2009)

UMG Recordings, Inc. v. Bertelsmann AG, 222 F.R.D. 408 (N.D. Cal. 2004)

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011)

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013)

Unilever plc v Chefaro Properties Ltd [1994] FSR 135

Unilever plc v Gillette (UK) Ltd [1989] RPC 583

Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)

Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp.2d 514 (S.D.N.Y.2010)

Wilmer, (2008) NJW, 1845, 1849

Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 733 (S.D.N.Y. 2012)

TABLE OF LEGISLATION

Charter of Fundamental Rights of the European Union, O.J. C 326/391, 26.10.2012

Copyright, Designs and Patents Act 1988,
<https://www.legislation.gov.uk/ukpga/1988/48/contents>

Digital Millennium Copyright Act, Public Law 105-304, 112 Stat. 2860 (1998)

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, OJ L 178, 17.7.2000

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ 2001 L 167, 22.05.2001.

DMCA Title II or 'The Online Copyright Infringement Liability Limitation Act' (OCILLA) Bill Number H.R.2281 for the 105th Congress, 112 Stat. 2860 (1998).

German Civil Code (BGB), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html

U.S. Copyright Act, 17 U.S.C. §§ 101 et seq. (West 2002)