

# UC Berkeley

## UC Berkeley Electronic Theses and Dissertations

### Title

A Tale of Two Legal Regimes: An Empirical Investigation into How Copyright Law Shapes Online Service Providers' Practices and How Online Service Providers Navigate Differences in U.S. and EU Copyright Liability Standards

### Permalink

<https://escholarship.org/uc/item/6xb3s3f6>

### Author

Hinze, Gwenith

### Publication Date

2019

Peer reviewed|Thesis/dissertation

A Tale of Two Legal Regimes: An Empirical Investigation into How Copyright Law  
Shapes Online Service Providers' Practices and How Online Service Providers  
Navigate Differences in U.S. and EU Copyright Liability Standards

By

Gwenith Alicia Hinze

A dissertation submitted in partial satisfaction of the  
requirements for the degree of  
Doctor of Juridical Science  
in the  
Graduate Division  
of the  
University of California, Berkeley

Committee in charge:

Professor Molly S. Van Houweling, Chair  
Professor Robert P. Merges  
Associate Professor Deirdre K. Mulligan  
Professor Pamela Samuelson

Spring 2019

This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. To view a copy of this license, see:

<https://creativecommons.org/licenses/by-nc-nd/4.0/>

## Abstract

# A Tale of Two Legal Regimes: An Empirical Investigation into How Copyright Law Shapes Online Service Providers' Practices and How Online Service Providers Navigate Differences in U.S. and EU Copyright Liability Standards

by

Gwenith Alicia Hinze

Doctor of Juridical Science

University of California, Berkeley

Professor Molly S. Van Houweling, Chair

Most online communication takes place on centralized platforms operated by private companies. These services are accessible globally but operated by companies subject to national laws, including copyright laws, which vary greatly across countries, creating incentives for online service providers (OSPs) to geographically segment their services. Because copyright law is territorial in nature and licensing markets are often national, scholars assumed that national copyright laws exacerbate fragmentation pressures on online services and drive the use of geoblocking technologies to enforce territorial licensing restrictions on digital music and movie content. This dissertation seeks to understand how copyright law actually shapes the practices, policies, and decision-making processes of OSPs, through interviews with current and former legal and policy staff at a range of globally accessible OSPs, including operators of user-generated content hosting and web search services. It also seeks to understand whether, and to what extent, operators of globally accessible online services take into account other jurisdictions' copyright laws in their day-to-day operations where they differ from U.S. copyright law's liability standards and enforcement mechanisms.

Based on interviews, this dissertation concludes that copyright law has both direct and indirect effects on the practices, decision-making processes, and governance structures of OSPs. It finds that the U.S. statutory OSP limitation of liability regime established by the Digital Millennium Copyright Act (DMCA) plays a key role in shaping OSPs' practices. For OSPs that have operationalized its eligibility requirements, the DMCA has become constitutive, resulting in companies adopting staffing structures and training programs to implement the DMCA's notice and takedown process and using its standards to manage nondomestic copyright liability risk. Some also use the DMCA's ex-post takedown process to afford national treatment to foreign copyright holders' works, relying on the internationally harmonized nature of copyright law, and the DMCA's compatibility with other jurisdictions' statutory limitation of liability regimes. Contrary to the assumed fragmentary impact of national copyright laws, OSPs appear to be using a part of the U.S. copyright system that is not part of the internationally-harmonized copyright framework—the U.S. statutory safe harbor regime's takedown process—to mediate complex conflict of law issues, reduce transaction costs for copyright holders, and mitigate the potential fragmentary effects of national copyright laws for users of online services.

Additionally, it finds that divergences between national copyright laws have differential impacts on OSPs, depending on their level of resources. Some OSPs engage in jurisdictional copyright risk analysis, design and build new products, and modify existing services to minimize copyright liability in multiple jurisdictions. Less-resourced OSPs rely on the DMCA safe harbor regime to manage potential nondomestic copyright liability. This is significant because pending European Union copyright legislation will create a divergence between U.S. and EU copyright liability rules governing OSPs. This dissertation concludes that the new EU Copyright Directive is likely to have a differential and more detrimental impact on less-resourced OSPs but may result in further entrenchment of more-resourced incumbent hosting OSPs. It concludes by considering some of the limitations and safeguards in the pending EU Copyright Directive and how it may affect U.S. copyright law and the regulation of OSP liability globally.

## DEDICATION

*For E, C and R*

## TABLE OF CONTENTS

|  |    |
|--|----|
| CHAPTER 1 INTRODUCTION.....  | 1  |
| 1.1 Project Scope and Methodological Approach .....  | 2  |
| 1.2 Research Questions .....   | 3  |
| 1.3 Conclusions .....  | 3  |
| 1.4 Overview and Organization of Material.....   | 4  |
| CHAPTER 2 BACKGROUND AND PRIOR LITERATURE.....   | 6  |
| 2.1 Background.....  | 6  |
| 2.1.1 Copyright Law’s Distinctive Features.....  | 6  |
| 2.1.2 National Treatment and Limits on Harmonization.....  | 7  |
| 2.1.3 Developments in Internet Jurisdiction and Conflicts of Law .....   | 10 |
| 2.1.4 Displacement of National Copyright Law by Voluntary Measures—<br>Private Ordering Regimes Backed by Filtering Technology and Rights<br>Management Systems..... | 13 |
| 2.2 Literature—Framing the Research Agenda.....  | 15 |
| 2.2.1 Territorial Laws, Harmonization, and Fragmentation .....   | 15 |
| 2.2.2 Regulatory Arbitrage .....   | 16 |
| 2.2.3 Regulatory Theory and Governance Scholarship.....  | 16 |
| 2.2.4 Gatekeeper Liability .....   | 19 |
| 2.2.5 Economics Literature.....  | 21 |
| 2.2.6 Socio-Legal Scholarship and Organizational Theory.....   | 22 |
| 2.2.7 Differential Impacts of Laws Based on Level of Resources .....   | 24 |
| CHAPTER 3 HISTORY AND INTERNATIONAL CONTEXT: COMMUNICATION<br>TO THE PUBLIC AND MAKING AVAILABLE RIGHTS IN THE WCT<br>AND WPPT.....                                  | 27 |
| 3.1 Introduction .....   | 27 |
| 3.2 The New Rights.....  | 28 |
| 3.3 Historical Background.....   | 29 |
| 3.4 Implementation of the Communication and Making Available Rights.....   | 33 |
| 3.4.1 Implementation in U.S. Law .....   | 33 |
| 3.4.2 Implementation in European Union Law .....   | 35 |
| CHAPTER 4 ONLINE SERVICE PROVIDERS’ LIABILITY FOR LINKING UNDER<br>THE COMMUNICATION TO THE PUBLIC RIGHT .....   | 37 |
| 4.1 Introduction .....   | 37 |

|         |  |    |
|---------|--|----|
| 4.2     | The EU Communication to the Public Right.....  | 39 |
| 4.2.1   | Overview of Interpretive Principles .....  | 39 |
| 4.2.1.1 | Act of Communication .....   | 39 |
| 4.2.2.2 | Communication “to the Public”.....   | 40 |
| 4.2.2.3 | Knowledge Requirement and Rebuttable Presumption of<br>Knowledge for For-Profit Linking Activity ..... | 40 |
| 4.3.1   | CJEU Hyperlinking Judgments .....  | 41 |
| 4.3.1.1 | Links to Freely Accessible Copyrighted Content.....  | 41 |
| 4.3.1.2 | When Links Constitute Communications to a “New Public” .....   | 43 |
| 4.3.1.3 | Links to Copyright-Infringing Material.....  | 43 |
| 4.3.1.4 | Duty to Inspect or Monitoring Obligation.....  | 44 |
| 4.3.2   | Further Expansion of the Scope of Direct Liability .....   | 45 |
| 4.3.3   | Rebuttable Presumption of Knowledge for For-Profit Search Engines .....                                | 46 |
| 4.3.4   | Continuing Uncertainty .....   | 48 |
| 4.4     | United States.....   | 48 |
| 4.4.1   | Overview .....   | 48 |
| 4.4.2   | The Server Test—Copyright Liability for Framing .....  | 49 |
| 4.4.3   | Embedded Links .....   | 52 |
| 4.5     | Conclusion.....  | 53 |

CHAPTER 5 MONITORING OBLIGATIONS AND ONLINE SERVICE PROVIDER  
STATUTORY SAFE HARBOR REGIMES .....

|         |   |    |
|---------|---|----|
| 5.1     | Introduction .....  | 55 |
| 5.2     | U.S. Legal Framework .....  | 56 |
| 5.2.1   | Overview .....  | 56 |
| 5.2.2   | The DMCA Safe Harbor Regime .....   | 56 |
| 5.2.3   | Contested Ground.....   | 61 |
| 5.2.4   | Litigation Contesting Knowledge Standards.....  | 62 |
| 5.2.4.1 | Actual Knowledge and Red Flag Knowledge .....   | 62 |
| 5.2.4.2 | Willful Blindness and Prohibition on Conditioning Safe Harbor<br>Eligibility on Duty to Monitor or Affirmatively Seek Out Facts ..... | 65 |
| 5.2.4.3 | Notice and Stay Down—Right and Ability to Control Infringing<br>Behavior .....  | 65 |
| 5.2.4.4 | No Obligation to Monitor—But a Specific Monitoring Obligation<br>for Certain Types of Locker Services.....                            | 66 |
| 5.2.5   | Conclusion.....   | 67 |
| 5.3     | EU Intermediary Liability Framework.....  | 68 |

|   |   |     |
|---|---|-----|
| 5.3.1   | Overview .....  | 68  |
| 5.3.2   | EU Statutory Limitation of Liability Regime.....  | 68  |
| 5.3.2.1   | Overview of Safe Harbors .....  | 68  |
| 5.3.2.2   | Eligibility for the EU Safe Harbors—Active, Passive, and Neutral Intermediaries .....     | 71  |
| 5.3.2.3   | Scope of Hosting Safe Harbor—National Duties of Care.....                                 | 72  |
| 5.3.3   | EU Copyright Injunctions.....   | 73  |
| 5.3.4   | Limitations on Monitoring Obligations Imposed Through Injunctions .....                   | 75  |
| 5.3.4.1   | Limitations in Article 3 of the 2004 IPR Enforcement Directive .....                      | 75  |
| 5.3.4.2   | No General Obligation to Monitor .....  | 75  |
| 5.3.5   | Other Structural Limitations on Monitoring Obligations—EU Fundamental Rights Law.....     | 77  |
| 5.3.6   | Conclusion—EU Legal Framework .....   | 79  |
| 5.4   | European National Law .....   | 79  |
| 5.4.1   | Overview .....  | 79  |
| 5.4.2   | Germany .....   | 80  |
| 5.4.2.1   | Overview of National Situation.....   | 80  |
| 5.4.2.2   | <i>GEMA v. RapidShare</i> (2013)—German Supreme Court—Duty to Monitor External Sites..... | 82  |
| 5.4.2.3   | Conclusion—German Law .....   | 83  |
| 5.4.3   | France .....  | 83  |
| 5.4.3.1   | Overview of National Situation.....   | 83  |
| 5.4.3.2   | Injunctions against Hosting Platforms—Notice and Stay Down .....                          | 83  |
| 5.4.3.3   | Injunctions Against Search Engines .....  | 85  |
| 5.4.3.4   | Conclusion—French Law.....  | 88  |
| 5.4.4   | U.K. Law—Website Blocking Injunctions .....   | 88  |
| 5.5   | Conclusion—European National Court Injunctions.....                                       | 90  |
| CHAPTER 6 STATUTORY SAFE HARBOR REGIME REFORM PROPOSALS ..... |   | 91  |
| 6.1   | Introduction .....  | 91  |
| 6.2   | United States.....  | 91  |
| 6.3   | European Union.....   | 97  |
| 6.3.1   | European Commission Proposal for a New Copyright Directive .....                          | 97  |
| 6.3.1.1   | Background and Rationale .....  | 97  |
| 6.3.1.2   | Scope and Obligations .....   | 99  |
| 6.3.2   | European Parliament Text Provisionally Adopted in September 2018.....                     | 100 |
| 6.3.3   | Council of European Union Negotiating Mandate Text.....                                   | 101 |

|   |  |     |
|---|--|-----|
| 6.3.4                                       | Responses to Proposed Directive .....  | 101 |
| 6.3.5                                       | Final Text of Article 17 (Formerly 13) of the EU Copyright Directive .....   | 105 |
| 6.4   | Conclusion .....   | 108 |
| CHAPTER 7 METHODOLOGY .....                 |  | 109 |
| 7.1   | Background Framing Analysis .....  | 109 |
| 7.2   | Qualitative Data Analysis .....  | 109 |
| 7.2.1                                       | Interview Objectives .....   | 109 |
| 7.2.2                                       | Data Sampling .....  | 110 |
| 7.2.3                                       | Data Collection and Analysis .....   | 110 |
| 7.2.4                                       | Limitations of the Data and Qualitative Approach .....   | 111 |
| CHAPTER 8 INTERVIEW DATA AND FINDINGS ..... |  | 114 |
| 8.1   | Overview .....   | 114 |
| 8.2   | Research Questions .....   | 114 |
| 8.3   | Findings .....   | 114 |
|   | <i>OSPs' level of resources affects how they navigate differences between national copyright laws and copyright law has differentiated impacts on OSPs depending on their level of resources .....</i> | 114 |
| 8.3.1                                       | Awareness of Differences in U.S. and EU Copyright Liability Standards in Regard to Linking Liability .....   | 114 |
|   | <i>Differences between the U.S. and EU statutory safe harbor regimes had little effect on operations because OSPs' operations were standardized around U.S. law .....</i>                              | 116 |
| 8.3.2                                       | Experience with Differences Between U.S. and EU Statutory Safe Harbor Regimes .....  | 116 |
| 8.3.3                                       | Role of Copyright Law in OSP Staff's Work .....  | 118 |
| 8.3.4                                       | Recognition and Accommodation of Other Jurisdictions' Copyright Laws in DMCA Notice Processing .....   | 118 |
| 8.3.5                                       | Operationalization of DMCA Notice and Takedown Process .....   | 119 |
| 8.3.5.1                                     | Differences in OSPs' Notice Processing Practices Based on Resources and Volume of Notices Received .....   | 119 |
| 8.3.5.2                                     | Processing of International Copyright Infringement Claims Through The DMCA .....   | 120 |
| 8.3.5.3                                     | Instantiation of DMCA Safe Harbor in Infrastructure and Staffing Structures .....  | 121 |
| 8.3.6                                       | Role of U.S. and EU Safe Harbor in OSPs' Operations and OSPs' Differing Capacities to Analyze Jurisdictional Risk .....  | 122 |
| 8.3.7                                       | Role of Copyright in Launch Strategy .....   | 123 |

|           |  |            |
|-----------|--|------------|
| 8.4       | Injunctions and Other Sanctions That Can Be Issued Against OSPs .....  | 125        |
| 8.4.1     | Experience with Foreign Injunctions.....   | 125        |
| 8.4.2     | Experience with U.S. and Foreign Nonparty Injunctions.....   | 125        |
| 8.4.3     | Impact of Injunctions and Statutory Damages on OSPs’ Decision-Making Processes .....   | 126        |
| 8.4.4     | Technical Responses to Injunctions .....   | 127        |
| 8.5       | Jurisdiction, Enforcement, and Uncertainty about Applicable Law.....   | 128        |
|           | <i>Widespread awareness of and concern about the filtering mandate in Article 13 (now Article 17) of the proposed EU Copyright Directive and the narrowing scope of the EU hosting safe harbor .....</i> | <i>129</i> |
| 8.5.1     | EU Copyright Directive Proposal.....   | 129        |
| 8.5.2     | Comparisons with Implementation Strategy for the EU General Data Protection Regulation .....   | 131        |
| 8.6       | Governance Practices—Comparing Copyright and Privacy .....   | 133        |
| 8.6.1     | Technical Infrastructure.....  | 133        |
| 8.6.2     | Training .....   | 133        |
| 8.6.3     | Staffing .....   | 133        |
| 8.6.4     | Role of Copyright in Design and Development Process .....  | 134        |
| 8.6.5     | Regulatory Traction.....   | 134        |
| CHAPTER 9 | ANALYSIS .....   | 135        |
| 9.1       | A Tale of Two Legal Systems—How Copyright Law Regulates According to the Law on the Books .....  | 135        |
| 9.2       | Law in Action—Executive Summary of Interview Findings on How Copyright Law Affects OSP Practices and Decision-Making.....  | 136        |
| 9.3       | Copyright Law Has Both Direct and Indirect Impacts on OSPs but OSPs Experience Copyright Law Differently Depending on Their Resource Level.....  | 137        |
| 9.3.1     | Differentiated Experiences .....   | 137        |
| 9.3.1.1   | Less-Resourced OSPs.....   | 137        |
| 9.3.1.2   | More-Resourced OSPs .....  | 138        |
| 9.3.2     | Observed Differences Between OSPs with Different Resource Levels .....   | 138        |
| 9.3.2.1   | Ability to Take Account of Varying National Copyright Law Standards .....  | 138        |
| 9.3.2.2   | Capacity to Assess and Build for Jurisdictional Risk.....  | 139        |
| 9.3.2.3   | Governance Impacts .....   | 140        |
| 9.3.2.4   | Sensitivity to Statutory Damages, Injunctions, and Penalties .....   | 140        |
| 9.4       | Standardization Around U.S. Law and Global Application of DMCA Safe Harbors .....  | 142        |

|                             |  |     |
|-----------------------------|--|-----|
| 9.4.1                       | The Role of International Harmonization in Copyright Governance and Its Relationship to the DMCA Safe Harbor Regime .....        | 142 |
| 9.4.2                       | The DMCA’s Role in “Signaling Compliance” .....  | 144 |
| 9.5                         | The Emergence of DMCA-Plus Private Ordering Systems Backed by Content Filtering Technologies and Rights Management Systems ..... | 146 |
| 9.6                         | The Fundamental Role of the DMCA Safe Harbor for All OSPs .....  | 148 |
| 9.6.1                       | Accommodation of Other Jurisdictions’ Copyright Laws in the Notice and Takedown Process .....                                    | 148 |
| 9.6.2                       | Accommodation of Fair Use in Assessing Copyright Infringement Removal Requests .....   | 149 |
| 9.6.3                       | The DMCA Safe Harbor’s Role in Launch Strategies .....   | 149 |
| 9.7                         | Article 17 (Formerly Article 13) of the EU Copyright Directive.....  | 149 |
| 9.7.1                       | Concerns About Draft Article 13/17 Proposal .....  | 149 |
| 9.7.2                       | Potential Impact of Article 17 on Existing OSP Practices .....   | 150 |
| 9.7.3                       | Implications .....   | 153 |
| 9.7.3.1                     | Displacement of DMCA’s Knowledge-Based Legal Rule as Global Paradigm.....  | 153 |
| 9.7.3.2                     | Increased Compliance Costs and Differential Impacts on Hosting OSPs .....  | 155 |
| 9.7.3.3                     | Geographic Segmentation of Online Services and Entrenchment of Incumbent Hosting Platforms.....                                  | 156 |
| 9.7.3.4                     | Possible Countervailing Effects .....  | 157 |
| CHAPTER 10 CONCLUSION ..... |  | 158 |
| 10.1                        | Significance of Findings in Broader Context .....  | 158 |
| 10.2                        | Limits of Data and Areas for Further Research.....   | 159 |
| 10.3                        | Concluding Thoughts .....  | 160 |
| BIBLIOGRAPHY .....          |  | 162 |

## ACKNOWLEDGEMENTS

I am grateful for the thoughtful comments and suggestions I have received from my committee of advisors, Professors Molly Shaffer Van Houweling, Deirdre Mulligan, Pamela Samuelson, and Robert Merges, and for their encouragement and support for my undertaking an empirical research project.

This project would not have been possible without the assistance of the interviewees who generously shared their deep knowledge and experiences of copyright law “in action” with me. I benefited greatly from their explanations of how copyright and data protection laws influence their thought processes and practices, and from their insights about broader global legal and policy developments and other forces that are driving regulation of online service providers and shaping the communications platforms they operate.

Finally, heartfelt thanks to my family and friends, who provided inspiration, encouragement and support across multiple time zones and several continents.

# CHAPTER 1

## INTRODUCTION

Most of our online expression now takes place on centralized communication platforms operated by private companies such as Google (YouTube), Facebook, Twitter, Microsoft (LinkedIn), Dailymotion and Vimeo. Although the Internet is global in reach, the private companies that operate these online services have to operate under national laws, which may differ significantly from country to country.

This work considers how copyright law affects the practices and decision-making processes of online service providers (OSPs), and specifically, how operators of globally accessible online services navigate differences in liability standards and enforcement mechanisms across national copyright law systems.

In recent decades, legal scholars have highlighted the multi-faceted role that copyright law plays in the global knowledge economy—creating frameworks and institutions that incentivize the creation of books, music, film and software, and foster innovation. The role of OSPs in facilitating access to knowledge, supporting freedom of expression, and shaping innovation has been a major focus of international policy and norm-setting forums.<sup>1</sup> Doctrinal copyright scholarship has explored differences in direct and indirect copyright liability standards and in statutory OSP safe harbor frameworks in national legal systems.<sup>2</sup> Recent legal scholarship has illuminated how U.S.-based online service providers have implemented particular aspects of the U.S. statutory regime that limits the liability of qualifying online service providers.<sup>3</sup> Other scholars have documented global trends that have sought to make online intermediaries play a more active role in preventing copyright infringement on an *ex ante* basis,<sup>4</sup> and the policy implications of this for democratic discourse.<sup>5</sup> However, to date, there are no published accounts

---

<sup>1</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES, OECD Doc. DSTI/ICCP(2010)11/FINAL (2011), <http://www.oecd.org/sti/ieconomy/theroleofinternetintermediariesinadvancingpublicpolicyobjectives.htm>; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES (2010), <http://www.oecd.org/internet/ieconomy/44949023.pdf>

<sup>2</sup> See, e.g., CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORTS-BASED ANALYSIS (2017); MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? (2017); BEATRICE MARTINET FARANO, LIABILITY OF INTERNET INTERMEDIARIES IN RELATION TO TRADEMARK AND COPYRIGHT INFRINGEMENTS: A COMPARATIVE ANALYSIS OF THE EU AND U.S. LEGAL FRAMEWORKS (Stanford-Vienna Transatlantic Technology Law Forum, TTLF Working Paper No. 14, 2012), [http://www.law.stanford.edu/sites/default/files/publication/300252/doc/slspublic/farano\\_wp14-4.pdf](http://www.law.stanford.edu/sites/default/files/publication/300252/doc/slspublic/farano_wp14-4.pdf); Miquel Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems* 32 COLUM. J.L. & ARTS 481 (2009).

<sup>3</sup> JENNIFER URBAN, JOE KARAGANIS & BRIANNA SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE (Mar. 29, 2016; Version 2: Mar. 2017), U.C. Berkeley Public Law Research Paper No. 2755628, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628)

<sup>4</sup> Jeremy DeBeer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?* 49(4) JURIMETRICS J. 375 (2009); Patrick Van Eecke, *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48 COMMON MKT. L. REV. 1455 (2011).

<sup>5</sup> Niva Elkin-Koren, *After Twenty Years: Revisiting Copyright Liability of Online Intermediaries*, in THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE (Susy Frankel & Daniel J. Gervais eds., 2015).

of *how* OSPs are actually navigating differences in liability standards across national laws in practice. This work seeks to address this gap in our understanding.

Understanding how OSPs deal with differences in national copyright law regimes is particularly timely because the European Union is poised to adopt a new legal framework for online intermediary liability that would create a major divergence between the U.S. and EU copyright legal systems and end the transatlantic legal consensus on regulation of OSPs that has existed since the late 1990s. Historically, both the U.S.<sup>6</sup> and EU<sup>7</sup> legal systems included statutory frameworks that limited OSPs' liability for copyright-infringing acts of their users where OSPs had no actual or constructive knowledge of infringing content on their services and acted to remove or block access to infringing content after being notified by copyright holders.

This would no longer be the case if the pending EU Digital Single Market Copyright Directive<sup>8</sup> were to be adopted in its current format. Article 17 (formerly Article 13)<sup>9</sup> of the pending Directive would alter the status quo in several ways: first, by imposing direct liability on relevant hosting platforms for communication to the public of unauthorized copyrighted content uploaded by their users; second, by requiring OSPs that host user-generated content to obtain authorization, in the form of licensing agreements, from all copyright holders of all types of works available on their platforms; third, by eliminating the EU statutory safe harbor for affected hosting OSPs; and fourth, by providing for exemptions from direct liability for hosting OSPs that are able to meet a new ex-ante obligation to ensure the unavailability of particular copyrighted works on their platforms and an obligation to prevent the future reappearance of unauthorized copyrighted content, which would likely have to be enforced through use of technological means.

## 1.1 Project Scope and Methodological Approach

This work explores how copyright law affects OSPs' practices and how OSPs are affected by divergences between national copyright laws through two perspectives. First, it uses doctrinal analysis to explore the "law-on-the-books" by mapping out emerging differences between U.S. and EU law in three areas that were anticipated to have a bearing on the behavior and practices of OSPs that operate globally accessible online services:

---

<sup>6</sup> The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Title II, codified as 17 U.S.C. § 512 (2006).

<sup>7</sup> 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, 2000 O.J. (L 178), arts.12–15.

<sup>8</sup> Copyright in the Digital Single Market—European Parliament Legislative Resolution of 26 March 2019 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. P8\_TA-PROV 0231 (2019) (COM 0593) (2016) (C8-0383) (2016) (COD 0280) (2016), accompanying Position of the European Parliament Adopted at First Reading on 26 March 2019 with a View to the Adoption of Directive (EU) 2019 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, EUR. PARL. DOC. P8-TC1 (COD 0280) (2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0231+0+DOC+PDF+V0//EN> [hereinafter Pending EU Copyright Directive].

<sup>9</sup> Article 13 was renumbered to be Article 17 in the final version of the Pending EU Copyright Directive.

1. Direct copyright liability for infringement of copyright holders' right to communicate copyrighted works to the public in regard to hyperlinking;
2. The scope and eligibility conditions of the respective U.S. and EU statutory safe harbor regimes; and
3. The types of injunctions and other sanctions that copyright holders can obtain against online service providers in each jurisdiction, to enlist their cooperation to stop or prevent copyright infringement.

Second, it provides an empirically grounded “law-in-action”<sup>10</sup> account of how copyright law actually affects OSPs' practices and decision-making processes, based on interviews with 15 current and former legal and policy staff working at 11 globally accessible online service providers. The empirical account is based on qualitative analysis of data collected in the interviews and covers various aspects of organizational practices and decision-making processes.

## 1.2 Research Questions

This project considers how national copyright laws shape the practices of operators of online services and influence decisions about product design and service locations. The key questions this project sought to understand through interviews with OSP staff were:

1. How does copyright law shape the practices of OSPs that operate globally accessible platforms? Does it operate directly, or indirectly by producing governance impacts, or does it have multi-tiered effects?
2. How do U.S.-based globally accessible OSPs encounter and navigate differences between national copyright legal systems? To what extent do they take account of differences between national copyright legal systems in their operations?

## 1.3 Conclusions

There are several main findings from the interviews:

1. Copyright law has both direct effects and indirect impacts on OSPs. Apart from visible effects such as territorially based licensing agreements, it has direct effects on the design and modifications of products and services. Copyright law also can be observed to have indirect impacts via the governance structures of OSPs. Implementing the DMCA's notice and takedown system and eligibility conditions of the U.S. statutory safe harbor regime established by the Digital Millennium Copyright Act (DMCA) has had constitutive effects on OSPs' practices.
2. Differences between national copyright liability standards and sanctions have differential effects on OSPs, depending on the level of resources of the OSP, as discussed in chapter 9.

---

<sup>10</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM L. REV. 12 (1910).

3. The DMCA statutory safe harbor regime plays a key role in all OSPs' operations by shielding them from potentially crippling statutory damages awards and injunctions in the United States. Some OSPs are relying on the U.S. statutory OSP limitation of liability regime to manage potential foreign copyright liability risk.
4. A key unexpected finding was the extent of the role played by international harmonization in copyright governance, which appears to be mitigating what might otherwise be fragmentary effects of territorial copyright laws. The U.S. and EU statutory safe harbor regimes are not part of the harmonized international copyright law framework. Despite this, respondents at OSPs with various resource levels appeared to be comfortable relying on the DMCA safe harbor regime to manage potential foreign copyright liability risk because they viewed the DMCA regime as being interoperable, or substantially compliant with, the EU statutory safe harbor regime. Some also appeared to view use of the DMCA takedown procedure to process copyright infringement claims from non-U.S. copyright holders as a means to afford them national treatment under the principles of the internationally harmonized copyright framework. In doing so, OSPs appear to have reduced transaction costs for copyright owners, mediated potential conflict of laws issues, and limited what might otherwise be fragmentary impacts of territorial copyright laws on online communications.

The interview findings highlight a range of current OSP practices facilitated by the DMCA safe harbor regime that would be curtailed if Article 17 (formerly 13) of the pending EU Copyright Directive were to be adopted in its current form. The interview findings also suggest that Article 17 would have highly differential impacts on OSPs with different resource levels, as discussed in chapter 9. However, irrespective of whether the EU Copyright Directive is adopted in its current form, the interview findings suggest that well-resourced OSPs may have a significant and persistent competitive advantage over less-resourced OSPs and new market entrants in navigating the complexity of EU intermediary liability law.

#### **1.4 Overview and Organization of Material**

This work is organized into ten chapters. Chapter 2 considers background legal developments and prior literature from several fields that have considered the effects of laws on regulated entities.

Chapters 3 to 6 provide framing analysis for the questions asked in the interviews with staff working at globally accessible OSPs. Chapter 3 provides a historical overview of the international legal framework governing online copyright liability. It explores the history of the creation of the new communication to the public and making available rights in the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and the way in which these rights were implemented in the U.S. and EU legal systems respectively.

Chapter 4 surveys how courts have interpreted the scope of the communication to the public and making available rights in relation to OSPs' direct liability for hyperlinking by exploring key judgments of U.S. courts and the Court of Justice of the EU (CJEU). The CJEU's pronouncement that OSPs had direct copyright liability for linking to and hosting their users'

links to copyrighted works highlights a clear difference between U.S. and EU law, in an area of high interest to OSPs. This was used to frame questions for the interviews conducted as part of this project, which sought to explore how U.S.-based OSPs viewed and responded to divergences between U.S. and EU law.

Chapter 5 examines the scope and eligibility conditions of the respective statutory safe harbor regimes in the United States (DMCA)<sup>11</sup> and the European Union (the EU e-Commerce Directive)<sup>12</sup>. It situates this within the prior literature by tracing efforts to impose monitoring and notice and staydown obligations on OSPs in both jurisdictions. It illustrates how differences in the structural features of each statutory regime and judicial interpretations of U.S. and EU courts produced differences in the types of monitoring obligations that have been imposed on OSPs in recent years. It finds that U.S. courts have largely rejected interpretations of the eligibility conditions of the DMCA statutory safe harbor regime that would have resulted in *ex-ante* monitoring obligations for OSPs. The chapter also documents how, in contrast, European national courts in Germany and France have imposed both notice and staydown obligations and proactive monitoring obligations on OSPs through the EU's distinctive copyright injunction mechanism.

Chapter 6 considers proposals for reforming the statutory safe harbor regimes. It reviews the various U.S. policy dialogues (from 2013 to the present) that considered whether DMCA safe harbor protection should be made conditional on OSPs adopting a notice and staydown obligation. It then considers the history and rationale of the pending EU legislative copyright reform proposal in Article 17 (formerly Article 13) of the EU Copyright Directive. It reviews the text agreed upon between the three European institutions in February 2019 and adopted by the European Parliament in March 2019,<sup>13</sup> which would impose direct liability on commercial platforms that host user-generated content, and provides for an exemption from liability for OSPs that make best efforts to prevent unauthorized copyrighted content from being available on their platforms and enforce a “notice and staydown” obligation to preclude the reappearance of identified copyrighted content, likely through use of technological measures.

Chapter 7 sets out the methodology for conducting the interviews for this project, the nature of the questions asked, and the qualitative data analysis process. Chapter 8 presents the findings of the interviews with current and former legal and policy staff at globally accessible OSPs about how copyright law shapes their practices and decisions, and how they actually encounter and navigate liability standards in other jurisdictions' copyright laws that differ from those in U.S. law. Chapter 9 analyzes how the interview findings about OSPs' current practices and decision-making processes fit with regulatory theories from the literature in chapter 2. It also explores the likely impact on OSPs' current practices if the pending EU Copyright Directive is adopted in its current form. Chapter 10 concludes with general observations from the research project and identifies areas for further research.

---

<sup>11</sup> *See supra* note 6.

<sup>12</sup> *See supra* note 7.

<sup>13</sup> Pending EU Copyright Directive, *supra* note 8. This will likely be put before the European Parliament for final approval in the second quarter of 2019.

## CHAPTER 2

### BACKGROUND AND PRIOR LITERATURE

#### 2.1 Background

##### 2.1.1 Copyright Law's Distinctive Features

Copyright law has several distinctive features that set it apart from privacy law and other forms of content regulation.

First and most importantly, copyright law operates within an internationally harmonized framework created by the Berne Convention<sup>14</sup> and the Agreement on Trade-Related Intellectual Property Rights (TRIPs),<sup>15</sup> which require countries that are members of the World Trade Organization to recognize and afford legal protection to copyright owners in respect of a minimum set of exclusive rights. This creates positive obligations and places real limits on domestic copyright legal systems. However, what is often underappreciated is that substantive copyright law is only *partially* harmonized across nations, and that there are significant differences between national copyright systems in areas that are not harmonized by existing international treaties.

Second, copyright law is private international law enforced primarily by private parties through litigation. In the U.S. utilitarian tradition, copyright's core goal is the creation of knowledge for the benefit of society as a whole. However, the means by which it achieves this goal is by providing market-based incentives to authors and creators. In contrast, privacy and data protection law are enforced primarily by government regulators, via fines and other public law mechanisms, and more recently, citizens' private right of action. Traditionally, copyright law's main mechanisms for influencing behavior were the threat of monetary damages awards (where liability exists) and injunctions. However, recent scholarship has recognized that the conditions under which OSPs have immunity from liability under national statutory safe harbor regimes also have an important effect on OSPs' practices.<sup>16</sup>

A third distinctive feature of the current operating environment of OSPs is a shift toward voluntary measures and private ordering mechanisms that operate outside of copyright law.<sup>17</sup> In recent years, OSPs have created various structures and processes in the area of online copyright

---

<sup>14</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>15</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, Vol. 31, 33 I.L.M. 81 (1994) (amended Jan. 23, 2017) [hereinafter TRIPs Agreement].

<sup>16</sup> Graeme B. Dinwoodie, *A Comparative Analysis of the Secondary Liability of Online Service Providers*, in SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS (Graeme B. Dinwoodie ed., 2017).

<sup>17</sup> The shift to voluntary measures is particularly visible in regard to copyright but can also be seen in other regulatory fields. *See, e.g.*, EU Code of Conduct on Countering Illegal Hate Speech Online between the European Commission, YouTube, Facebook, Microsoft and Twitter (May 31, 2016), [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf) (agreement to review notifications of hate speech and remove or disable access to it where necessary within 24 hours).

enforcement that are not formally requirements of copyright law. They are “voluntary” in that sense but can be viewed as having been negotiated or adopted in the shadow of the threat of litigation or legislation.<sup>18</sup> The most prominent of these voluntary measures is the use of content identification and filtering technology on hosting platforms to control or preclude the display of copyrighted material. In the case of Google-owned YouTube, its proprietary Content ID system combines use of content identification technology and a sophisticated copyright rights management system that operates as a private ordering system largely outside of traditional copyright law. Other voluntary measures include demotion in search engine results of URLs to websites that have received a significant volume of valid DMCA copyright notices. Google has voluntarily done this since 2010. More recently, the practice was formalized and expanded to Microsoft’s Bing search engine through the UK Voluntary Code of Practice entered into between Microsoft (Bing) and Google (Web Search) and various creative sector organizations in 2017, in an agreement brokered by the UK government’s Intellectual Property Office.<sup>19</sup>

The fourth characteristic of the operating environment affecting globally accessible online services is increasing uncertainty about when their online services may be subject to jurisdiction in a foreign court and have exposure to liability under foreign law. Even though copyright (unlike data protection law) is partially internationally harmonized, differences exist between national copyright law systems. OSPs face legal uncertainty about which countries’ laws govern their services, and with which particular standards and requirements their services must comply. Although the potential for multiplicity of applicable laws is not a new issue, it has come to have heightened significance in recent years as a result of orders with extraterritorial application issued by foreign courts against U.S.-headquartered search engines and OSPs. These have been issued on copyright and other intellectual property-related bases, as well as in regard to the Right to Be Forgotten under EU data protection law. These matters are introduced in this chapter.

### **2.1.2 National Treatment and Limits on Harmonization**

Indirect liability for copyright infringement is not harmonized through the existing multilateral treaties that comprise the international copyright framework. Discussions about whether it should be, and what would be the appropriate scope of Internet intermediary liability for copyright infringement have been a major focus of international norm-setting and policy organizations in recent years at the World Intellectual Property Organization<sup>20</sup> and at the

---

<sup>18</sup> This phrase is borrowed from Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>19</sup> See UK Intellectual Property Office, *Search Engines and Creative Industries Sign Anti-Piracy Agreement*, Press Release (Feb. 20, 2017), <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>.

<sup>20</sup> See set of reports commissioned by WIPO: LILIAN EDWARDS, *ROLE AND RESPONSIBILITY OF INTERNET INTERMEDIARIES IN THE FIELD OF COPYRIGHT* (2011), [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf); DANIEL SENG, *COMPARATIVE ANALYSIS OF THE NATIONAL APPROACHES TO INTERNET INTERMEDIARY LIABILITY* (2011), [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf); IGNACIO GARROTE FERNANDEZ-DIAZ, *COMPARATIVE ANALYSIS ON NATIONAL APPROACHES TO THE LIABILITY OF INTERNET INTERMEDIARIES FOR COPYRIGHT AND RELATED RIGHTS* (2013), [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries\\_garrote.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf).

OECD.<sup>21</sup> Similarly, the special statutory schemes adopted in the United States,<sup>22</sup> the European Union,<sup>23</sup> and in many countries that limit OSPs' potential liability for secondary copyright infringement are also not part of the internationally harmonized copyright framework. While the U.S. and EU statutory OSP regimes have shared a common conceptual underpinning until recently, this was not driven by de jure harmonization obligations. Instead, it was motivated by common policy concerns about finding a mechanism to balance protection of the rights of intellectual property owners with providing adequate legal certainty to encourage investment in the then-nascent Internet industry.<sup>24</sup> As discussed in chapter 3, enactment of the U.S. statutory safe harbor regime, the Digital Millennium Copyright Act (DMCA) was motivated in large part by developments that took place in U.S. domestic law prior to the adoption of the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, including national policy and legislative proposals, and inconsistent U.S. judicial rulings on whether bulletin board providers had liability for material posted by users of their services.<sup>25</sup> However, the new communication to the public rights established by the 1996 WIPO Treaties spurred national legislatures to adopt statutory limitation of liability regimes.

Partly because it was enacted first in time, the U.S. DMCA was viewed as a model by other nations and exerted a strong influence over the structure and features of the EU statutory limitation of liability regime, embodied in the EU e-Commerce Directive.<sup>26</sup> While the U.S. and the EU statutory safe harbor regimes share the similar conceptual framing of conditional immunity, there are significant differences between the two regimes, which are discussed in chapter 5. Although this has received little attention in U.S. legal scholarship, prior European scholarship has documented differences in liability standards and the scope of the two statutory regimes, such as the absence of an explicit EU safe harbor for search engines, and the availability

---

<sup>21</sup> OECD 2010, and OECD 2011, *supra* note 1.

<sup>22</sup> The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Title II, codified as 17 U.S.C. § 512 (2006).

<sup>23</sup> 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, 2000 O.J. (L 178), arts. 12–15.

<sup>24</sup> See, e.g., FARANO, *supra* note 2 (arguing that the statutory frameworks are similar in structure and purpose, but U.S. and EU courts have adopted differing interpretations of their respective provisions, which she claims can be reconciled through judicial reinterpretation of the statutory frameworks).

<sup>25</sup> JESSICA LITMAN, DIGITAL COPYRIGHT (2017 REPRINT), *infra* note 128 (discussing the U.S. legislative history); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, *infra* note 120 (discussing the history of the U.S. legislative proposals and the impact of the negotiations of the WIPO Internet Treaties on the U.S. legislative proposals that resulted in the DMCA); Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 506–08 (2017) (discussing U.S. cases that suggested that OSPs could be held liable for infringing conduct of users, and other cases that reached the opposite conclusion, including Religious Technology Center v. Netcom OnLine Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995), various aspects of which were embodied in the final DMCA statutory regime); CHARLOTTE WAEDELDE & LILIAN EDWARDS, ONLINE INTERMEDIARIES AND COPYRIGHT LIABILITY (Apr. 2005), World Intellectual Property Organization Workshop Keynote Paper, WIPO DOCUMENT WIPO/IIS/05/1, <https://ssrn.com/abstract=1159640> (discussing history in various jurisdictions).

<sup>26</sup> Seth Ericsson, *The Commodification of Internet Intermediary Safe Harbors: Avoiding Premature Harmonization Around a Sub-Optimal Standard*, in TRIPS PLUS 20: FROM TRADING RULES TO MARKET PRINCIPLES (Hanns Ullrich, Reto M. Hilty, Matthias Lamping & Josef Drexel eds., 2016); Max Planck Institute for Innovation and Competition Research Paper No. 16-05.

of broader injunctions against intermediaries under EU law.<sup>27</sup> EU scholars have also documented how EU member states' national court decisions have narrowed the protection offered by the EU statutory regime.<sup>28</sup> As a result, even though the two statutory regimes use many common terms and concepts, the scope of protection offered to OSPs in each region is markedly different.

Although the statutory schemes for OSPs are not part of the internationally harmonized copyright framework, they are affected by the national treatment obligations of the treaties that constitute the international framework. The primary international copyright treaty, the Berne Convention,<sup>29</sup> rests on three pillars. First, a set of minimum rights, which creates a floor of minimum protection that Berne Convention member countries must provide to copyright owners. Second, the principle of national treatment,<sup>30</sup> which requires Berne Convention member states to accord foreign copyright holders from other Berne Convention member states no lesser treatment than the treatment that a country's national copyright law affords to its own nationals, in respect of the Berne Convention's minimum rights.<sup>31</sup> Third, the Berne Convention requires member countries to extend reciprocity to foreign copyright owners in a limited set of circumstances and for certain rights.<sup>32</sup> The Berne Convention required national treatment for authors of foreign works protected under the Berne Convention. However, these obligations were broadened by the TRIPs Agreement, which binds all members of the World Trade Organization, requiring national treatment for the set of intellectual property rights protected under the TRIPs Agreement.<sup>33</sup>

Prior scholarship does not appear to have considered the broader transatlantic implications of the structural differences between the U.S. and EU statutory safe harbor regimes for OSPs, nor how the principles of national treatment might apply to claims of copyright infringement made by non-U.S. copyright owners to U.S.-based OSPs. This may be because to date, the statutory regimes in the United States and the European Union have shared a common basis and were viewed as interoperable. However, as discussed in chapter 9 below, that will no

---

<sup>27</sup> Peguera, *The DMCA Safe Harbors*, *supra* note 2; LUKAS FEILER, WEBSITE BLOCKING INJUNCTIONS UNDER EU AND U.S. COPYRIGHT LAW—SLOW DEATH OF THE GLOBAL INTERNET OR EMERGENCE OF THE RULE OF NATIONAL COPYRIGHT LAW? (Stanford-Vienna Transatlantic Technology Law Forum, TTLF Working Paper No. 13, 2012), <http://www.law.stanford.edu/program/centers/ttlf/>; HUSOVEC, *supra* note 2.

<sup>28</sup> Christina Angelopoulos, *Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe* 2013-3 INTELLECT. PROP. Q. 253 (2013), abstract available at <http://ssrn.com/abstract=2360997>; Amsterdam Law School Research Paper No. 2013-72; Institute for Information Law Research Paper No. 2013-11.

<sup>29</sup> Berne Convention, *supra* note 14.

<sup>30</sup> *Id.* Article 5(1) requires national treatment for authors “in respect of works for which they are protected under this Convention.” See also PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT—PRINCIPLES, LAW AND PRACTICE (3d ed. 2013) 106–10.

<sup>31</sup> 2 SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, ¶ 20.08 (2d ed. 2006).

<sup>32</sup> *Id.* citing Berne Convention art. 2(7) (works of applied art) and art. 14ter (droit de suite). Ricketson and Ginsburg consider duration to require only partial reciprocity because of the operation of the rule of shorter term in article 7(8).

<sup>33</sup> However, see GOLDSTEIN & HUGENHOLTZ, *supra* note 30 at 113 (noting that the national treatment obligations of Article 3(1) of TRIPS are broader than those in the Berne Convention because they are framed in terms of rights and ancillary incidents of rights such as use and enforcement, rather than “works protected,” but they contend that the national treatment obligations remain subject to the exceptions of the Berne Convention. This has particular implications in respect of neighboring rights, such as production of sound recordings.).

longer be the case if the pending EU Copyright Directive is adopted and implemented in EU member states' national legal systems.

### 2.1.3 Developments in Internet Jurisdiction and Conflicts of Law

Legal scholars have long been divided about whether the global nature of the Internet poses insurmountable challenges to the traditional rules governing jurisdiction and applicable law and whether there is increasing uncertainty about which law applies to online activities.<sup>34</sup> If intermediaries view jurisdiction and applicable law as sources of legal uncertainty and are concerned about being subject to jurisdiction and conflicting obligations under laws of other countries where their services are accessible, they may make design choices and adopt technical measures to restrict access to their services in countries with more onerous liability standards to limit risk exposure.

A large body of scholarship has explored the legal issues arising out of the potential for multiple jurisdictions' laws to apply to online services that host copyrighted works, or link to them.<sup>35</sup> Uncertainty about applicable law for intellectual property disputes in the online environment has motivated four transnational academic projects, which have each crafted proposed rules for determining when jurisdiction can justifiably be asserted over online services and which country's or countries' laws should apply to copyright infringement claims, and other incidents of copyright ownership.<sup>36</sup>

Some scholars have claimed that Internet jurisdiction is not problematic because there have only been a small number of reported cases involving true cross-border disputes; thus, the prospect of being subject to conflicting legal obligations has not turned out to be a significant

---

<sup>34</sup> See, e.g., David R. Johnson & David C. Post, *The Rise of Law on the Global Network*, in BORDERS IN CYBERSPACE—INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles Nesson eds., 1998), 3 at 18–19 (arguing for treating cyberspace as its own distinct place as a way to resolve tensions arising from the application of multiple national territorially based laws, including copyright law (citing from Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions on the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318 (1995) (describing the problematic nature of the principle of territorial copyright rights as potentially giving rise to multiple inconsistent laws applying to a work of authorship uploaded on a digital network)); but see JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?—ILLUSIONS OF A BORDERLESS WORLD (2008); see also Michael Geist, *Is There a There There? Towards Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001); DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2d ed. 2012); UTA KOHL, JURISDICTION AND THE INTERNET (2007).

<sup>35</sup> See, e.g., Ginsburg, *Global Use/Territorial Rights*, *supra* note 34; William Patry, *Choice of Law and International Copyright*, 48 AM. J. OF COMP. L. 383 (2000); Anita B. Frohlich, *Copyright Infringement in the Internet Age—Primetime for Harmonized Conflict-of-Laws Rules?*, 24 BERKELEY TECH. L.J. 851 (2009); Pedro A. De Miguel Asensio, *Internet Intermediaries and the Law Applicable to Intellectual Property Infringements*, 3 J. INTELL. PROP., INFO. TECH. & E. COMMERCE LAW 350 (2012); Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORD. INT. PROP., MEDIA & ENT. L.J. 339 (2015).

<sup>36</sup> AM. LAW INST., INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008); MAX-PLANCK GROUP FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, PRINCIPLES FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (2011), [https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/the\\_draft-clip-principles-25-03-20117.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/the_draft-clip-principles-25-03-20117.pdf); JAPANESE TRANSPARENCY PROJECT PRINCIPLES, [www.tomeika.jur.kyushu-u.ac.jp](http://www.tomeika.jur.kyushu-u.ac.jp); and the JOINT JAPANESE-KOREAN (WASEDA) PROPOSAL, discussed in Toshiyuki Kono and Paulius Jurcys, *General Report*, at 12 and *Applicable Law to Infringement of Intellectual Property Disputes*, at 146–48, 153–54 and 157–62, in INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: COMPARATIVE PERSPECTIVES (Toshiyuki Kono ed., 2012).

problem.<sup>37</sup> In practice, foreign court orders would be problematic only if they could be enforced in the U.S. against U.S.-headquartered companies. Since U.S. courts have generally been reluctant to enforce foreign judgments that conflict with U.S. law, the prospect of U.S. intermediaries being subjected to conflicting legal obligations under foreign law has not come to pass in actuality.<sup>38</sup>

However, recent developments have highlighted increasing uncertainty about when a U.S. online service provider will be subject to foreign jurisdiction and what law applies to their online services for several reasons. First, there has been a marked increase in non-U.S. courts asserting jurisdiction over U.S.-based OSPs and issuing injunctions directing OSPs to take particular actions on a global basis. In regard to copyright, in 2016, a French Appeals Court ordered U.S.-headquartered search engines, Microsoft's Bing, and Yahoo! to remove links in search results to websites that were alleged to infringe the copyright of French film producers, on all domains where they operated search engines, including .com. The terms of the order (discussed in chapter 5) appeared to impose a proactive monitoring obligation on the U.S. search engines, because it required them to remove links to the existing unauthorized sites, but also to prevent re-indexing of sites and displaying links to mirror copies of the infringing sites in search results for a period of at least 12 months.<sup>39</sup>

In June 2017, the Supreme Court of Canada directed Google, Inc. to remove links in all of its search engines' indices to websites selling particular intellectual property-infringing products, including search results on the google.com index.<sup>40</sup> In December 2017, Google obtained a permanent injunction from a U.S. federal district court blocking enforcement of the Canadian court order against it in the United States.<sup>41</sup> In a further case in May 2014, the Court of Justice of the European Union (CJEU) ruled that Google Inc.'s data processing activities in the

---

<sup>37</sup> See, e.g., ANDREW F. CHRISTIE, PRIVATE INTERNATIONAL LAW ISSUES IN ONLINE INTELLECTUAL PROPERTY INFRINGEMENT DISPUTES WITH CROSS-BORDER ELEMENTS: AN ANALYSIS OF NATIONAL APPROACHES (Sept. 2015), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_rep\\_rfip\\_2015\\_1.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_rep_rfip_2015_1.pdf).

<sup>38</sup> See Trimble, *supra* note 35.

<sup>39</sup> Tribunal de Grande Instance de Paris, Nov. 28, 2013, APC et al v. Google, Inc., Google France, Microsoft Corporation, France Telecom, et al., *Telejugement*, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3935](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3935); also available at 1709 BLOG, <http://the1709blog.blogspot.com/2013/11/breaking-news-film-producers-and.html>.

<sup>40</sup> Google, Inc. v. Equustek Solutions, Inc. [2017] 1 SCR 824; 2017 SCC 34 (Sup. Ct. Can), *aff'g* Equustek Solutions, Inc. v. Google, Inc. [2015] CCA 265 (Ct. App. Brit. Columbia), *aff'g* Equustek Solutions Inc. et al. v. Morgan Jack et al., 2014 BCSC 1063 (Sup. Ct. British Columbia, June 13, 2014).

<sup>41</sup> Google LLC v. Equustek Solutions et al. (N.D. Cal., Case No. 5:17-cv-04207-EJD, Dec. 14, 2017 (Order granting permanent injunctive relief)). However, the Supreme Court of British Columbia subsequently declined to set aside the original global delisting order pending the trial in the underlying lawsuit to which Google was not a party, despite the existence of the U.S. district court's permanent injunction. It declined to do so because Google was not required to make available links to websites selling the trade secret-infringing device, and thus there was no direct conflict of laws warranting the order to be set aside. See Equustek Solutions, Inc., et al. v. Morgan Jack et al., 2018 BCSC 610, <https://www.courts.gov.bc.ca/jdb-txt/sc/18/06/2018BCSC0610.htm>; see also MICHAEL GEIST, THE UNINTENDED EQUUSTEK EFFECT: HOW ONE CASE SET A PRECEDENT FOR CANADIAN COURTS' GROWING JURISDICTION OVER INTERNET ACTIVITIES, Center for International Governance Innovation paper (Feb. 28 2019), <https://www.cigionline.org/articles/unintended-equustek-effect>.

United States were subject to EU data protection law.<sup>42</sup> The French national data protection regulator subsequently obtained a court order directing Google, Inc. to implement global delisting of search results on the basis of validated “right to be forgotten” complaints on all the search index domains it operates, including the .com index. That ruling was subsequently appealed to the highest court in Europe, the CJEU.<sup>43</sup> These events had a noticeable impact on the data processing practices of U.S. headquartered online services, leading them to quarantine processing of their EU customers’ data in the European Union, while continuing to process data from U.S. users in the United States.<sup>44</sup> In March 2016 Google announced it would reverse its previous stance, and remove right to be forgotten search results globally, but would use geo-identification technology to limit the display of differentiated content to viewers located in Europe. The French data protection agency took the view that this was not sufficient to satisfy EU data protection law and the issue is pending before the CJEU.<sup>45</sup> The “right to be forgotten” was subsequently formalized as part of the EU General Data Protection Regulation, which came into operation on May 25, 2018 (GDPR).<sup>46</sup>

In a second development, the CJEU adopted a “mere accessibility” test for assertion of jurisdiction over foreign online entities in cases of alleged copyright infringement. This was a significantly lower threshold than the “targeting” test used by U.S. courts since 2004 and raised concerns about increased possibilities for conflicts of law in the future.<sup>47</sup> The “mere accessibility” test has been relied on by French and Italian national courts in several recent cases where cross-border injunctions or liability determinations were made against U.S.-headquartered search engines and hosting platforms. French and Italian courts have found they had jurisdiction over U.S.-headquartered entities on the basis that their online services were accessible to European viewers, despite the existence of local subsidiaries.<sup>48</sup>

Third, applicable law appears likely to become a significant issue for U.S.-based services that host user-generated content because of the pending EU Copyright Directive, which imposes

---

<sup>42</sup> Case C-131/12, *Google Spain SL and Google, Inc. v. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez*, CJEU (Grand Chamber) (May 31, 2014) EU:C:2012:140.

<sup>43</sup> Case C-507/17, *Google LLC v. Commission nationale de l’informatique et des libertés*, CJEU (pending); Kent Walker, *Defending Access to Lawful Information at Europe’s Highest Court*, GOOGLE PUBLIC POLICY BLOG (Nov. 15, 2017), <https://www.blog.google/topics/public-policy/topics/google-europe/defending-access-lawful-information-europes-highest-court/>.

<sup>44</sup> For illustrative examples: in May 2015 Twitter adopted a revised privacy policy stating that it had segmented its EU data processing operations; in July 2015 Etsy released a revised privacy policy disclosing it had done the same.

<sup>45</sup> Case 507/17, *Google LLC v. Commission nationale de l’informatique et des libertés*, CJEU (pending).

<sup>46</sup> Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (2016 O.J. (L 119) 1) and corrigendum (2018 O.J. (L 127) 2) [hereinafter GDPR].

<sup>47</sup> Case C-170/12, *Peter Pinckney v. KDG Mediatech AG*, CJEU (Fourth Chamber) (Oct. 3, 2013) EU:C:2013:635; Case C-441/13, *Pez Hejduk v. EnergieAgentur NRW GmbH*, CJEU (Fourth Chamber) (Jan. 22, 2015) EU:C:2015:28; *cf.* *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002) (applying a targeting test for jurisdiction over a website).

<sup>48</sup> *See e.g.* Eleonora Rosati, *Facebook Found Liable for Hosting Links to Unauthorized Content*, IPKAT BLOG (Feb. 19, 2019), <http://ipkitten.blogspot.com/2019/02/facebook-found-liable-for-hosting-links.html> (reporting that Court of Rome had found Facebook, Inc. and Facebook Northern Ireland liable for copyright infringement for hosting a Facebook Group’s links to unauthorized videos posted on YouTube).

direct liability on OSPs for unauthorized content that is uploaded to their platforms by users. Based on the experience with the EU GDPR, it appears likely that U.S.-based hosting OSPs that are not able to qualify for an exemption from copyright liability because they cannot afford to develop or license content filtering technology, might be inclined to proactively block access to EU users of their services in order to limit their potential liability under EU copyright law.

Taken together, this set of developments suggested that: (a) OSPs viewed the prospect of being subject to conflicting foreign laws as a live issue and significant influence on their governance decisions; and (b) conflicts of law (at least in relation to data protection and copyright) may increasingly be handled through technical mediation by private sector OSPs using geo-identification technologies to display differentiated content, based on the viewer's perceived national law.

#### **2.1.4 Displacement of National Copyright Law by Voluntary Measures—Private Ordering Regimes Backed by Filtering Technology and Rights Management Systems**

In recent years, a number of larger platforms that host user-uploaded content have voluntarily implemented automated content identification technology systems to assist in identifying copyrighted material uploaded by users of their platforms. These systems are “DMCA-Plus” in the sense that they are not a requirement to obtain the benefits of the DMCA’s statutory safe harbor regime. Platforms that are reported to be using some form of automated content identification include YouTube, Facebook, Pinterest, Vimeo, Scribd, Veoh, 4Shared, Dropbox, SoundCloud, Twitch, TuneCore, and Tumblr, and DailyMotion (based in France).<sup>49</sup>

Some of these OSPs, most notably YouTube, are using content filtering technology in combination with rights management systems. While U.S. copyright law contains limitations such as fair use, and exceptions that permit access to copyrighted works for particular sanctioned purposes, in practice it is the business rules set by copyright holders and collective management organizations and the algorithms of YouTube’s Content ID system and other technologies that determine whether copyrighted content is viewable on these platforms. Thus, for these hosting OSPs, the development and use of automated content identification and rights management systems appears to have largely displaced the operation of substantive copyright law in these platforms’ operations.

YouTube’s Content ID proprietary system, first deployed in 2007, is the most well-known of these systems. It matches all content uploaded to YouTube by its users against a set of

---

<sup>49</sup> See Google, Inc., *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, <https://www.regulations.gov/document?D=COLC-2015-0013-90806> [hereinafter *Google First Round Comments*]; Jay Rosenthal & Steven Metalitz, Mitchell Silberberg & Knupp LLP, *First Round Comments of American Association of Independent Musicians et al.*, in *Response to Section 512 Study: Notice and Request for Public Comment*, at 29 (Apr. 1, 2016), <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-92433&attachmentNumber=1&contentType=pdf> [hereinafter *Music Community First Round Comments*] (noting that third-party acoustic fingerprinting software vendor Audible Magic has public partnerships with Facebook, SoundCloud, Twitch, TuneCore, Veoh, and Vimeo).

more than 80 million reference files provided by more than 8,000 content copyright holders.<sup>50</sup> In addition to Copyright ID, YouTube also uses the Copyright Match tool. Google reports that about 400 hours of videos are uploaded to YouTube every minute, and Content ID now handles 98% of copyright-related transactions on YouTube.<sup>51</sup> In addition to use of automated content identification technology, YouTube has entered into DMCA-Plus agreements that include contractual takedown rights, permitting content to be removed directly by the contract party on copyright or noncopyright grounds, independent of whether uploaded content has a match with the Content ID copyright reference database.<sup>52</sup>

Facebook uses a similar proprietary content filtering and copyright management system, Rights Manager, in conjunction with third-party Audible Magic's acoustic fingerprinting software.<sup>53</sup> Facebook's technological system operates slightly differently to YouTube's Content ID system. Facebook uses Audible Magic's acoustic fingerprinting technology to scan user-uploaded files. Audible Magic may prevent a file from being uploaded where it has a match with Audible Magic's database of audio and audiovisual copyrighted content. Facebook also operates Rights Manager, a video-matching tool, which does not preclude files containing copyrighted material from being uploaded, but instead surfaces videos that contain copyrighted material after they have been uploaded by users to the copyright owners and allows them to send Facebook a DMCA takedown notice.<sup>54</sup> Unlike YouTube, Facebook's Rights Manager does not automatically remove content on the basis of a match in their copyright reference database. Similar to Content ID, Rights Manager reportedly allows copyright holders to elect to leave user-uploaded content visible on Facebook and to watch analytics on how the content is viewed, or to monetize the display, by receiving a share of the advertising revenue associated with views of the content, or to block copyrighted content. Like YouTube, Facebook has stated that it employs global teams of content moderators to review flagged content posted to its platform. Finally, Google (Google Play and YouTube) and Facebook have entered into licensing agreements with various major recorded music labels in regard to use of their copyrighted works on their respective platforms.<sup>55</sup>

---

<sup>50</sup> Google LLC, "Content ID" in *How Google Fights Piracy* (Nov. 7, 2018), at 24–25, [https://www.blog.google/documents/27/How\\_Google\\_Fights\\_Piracy\\_2018.pdf](https://www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf).

<sup>51</sup> *Google First Round Comments*, *supra* note 49.

<sup>52</sup> See, e.g., Mike Masnick, *An Explanation for Why UMG May Be Right That It Can Pull Down MegaUpload's Video*, TECHDIRT BLOG (Dec. 16, 2011), <https://www.techdirt.com/articles/20111216/01463417102/explanation-why-umg-may-be-right-that-it-can-pull-down-megauploads-video.shtml>.

<sup>53</sup> Analisa Tamayo Keef & Lior Ben-Kereth, *Introducing Rights Manager*, FACEBOOK BLOG (Apr. 12, 2016), <https://www.facebook.com/facebookmedia/blog/introducing-rights-manager>; Facebook Help Center—Copyright—FAQs, What tools does Facebook provide to help me protect my Intellectual Property in my videos?, <https://www.facebook.com/help/1020633957973118>.

<sup>54</sup> Mark Fiore, Facebook, Inc., *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, 6–8, Answers to Questions 11 & 15, <https://www.regulations.gov/document?D=COLC-2015-0013-90724>.

<sup>55</sup> Universal Music Group Press Release, *Facebook and Universal Music Group Strike Unprecedented Global Agreement*, Dec. 21, 2017, <https://www.universalmusic.com/facebook-universal-music-group-strike-unprecedented-global-agreement/>; Facebook and Sony/ATV Music Publishing Announce Licensing Agreement, VARIETY, Jan. 8, 2018, <https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/>; Chris Welch, *Facebook Now Has Music Licensing Deals with All Three Major Labels—Warner Music is the Latest to Allow Its Songs in User Videos*, THE VERGE, Mar. 9, 2018,

## 2.2 Literature—Framing the Research Agenda

Several bodies of literature have explored the role of national laws and other types of external forces in shaping the practices of organizations and the broader environment in which they operate. To provide context for the findings of the interviews conducted for this project, this section reviews theories about (1) fragmentation caused by territorial laws; (2) regulatory arbitrage; (3) regulatory theory and new governance literature; (4) economics literature; (5) socio-legal and organizational scholarship; and (6) literature addressing differential impacts of regulations on organizations based on size and resource levels.

### 2.2.1 Territorial Laws, Harmonization, and Fragmentation

Early Internet law scholarship focused on the potential for diverging national laws to create fragmentation of online services. While the Internet is global in scope, online services are operated by firms that are subject to national laws, which vary across countries and might lead OSPs to segment services along territorial boundaries. Scholars assumed that copyright laws would create fragmentation along territorial boundaries. This was not necessarily because of apparent divergences between the content of national copyright laws; rather, it was assumed that because copyright law is territorial in nature and licensing markets are usually national, what an online service could display lawfully in one jurisdiction may constitute copyright infringement in another, and this would create incentives for online service providers to geographically segment their services.<sup>56</sup>

In contrast to the semi-harmonized nature of copyright law across countries, early Internet scholars were aware of the significant differences between countries' national laws on defamation, hate speech, and privacy. These national laws often reflect particular historical contexts within nations and are not subject to external harmonization pressures because no international treaties or harmonization mechanisms operate in these areas. Internet scholars theorized that differences between national laws in these areas would lead to fragmentation or “zoning” of the Internet.<sup>57</sup>

---

<https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/>.

<sup>56</sup> See, e.g., Jane Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA HIGH TECH. L.J. 347 (1999) (explaining the potential problem of conflicting standards in the law of the defendant and law of the plaintiff with regard to infringement analysis, but contending (at 356) that it could be resolved by use of forum law in countries of reception because the forum law in a Berne Convention or WTO member country should be assumed to include the minimum standards of protection of the Berne Convention and TRIPs); see also Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT. LAW. 799, 805–06 (2008) (contending that two forces would lead to Internet fragmentation: first, territorial delimitation by states exercising regulatory and adjudicative jurisdiction, driven by public policy pressures. This would lead states to develop “increasingly efficacious and legitimate processes of juridical and technological control in order to safeguard local values.” Second, online service providers, particularly online e-commerce markets, would develop their own normative orders, driven by commercial efficiency, including simplified applicable law and dispute arbitration rules (such as those developed by online auction platform eBay)).

<sup>57</sup> Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998).

### 2.2.2 Regulatory Arbitrage

A second body of scholarship has documented the impact of divergent regulatory regimes on financial and other markets and analyzed intermediaries' behavior in terms of regulatory arbitrage. This theory posits that companies determine where to make their services available by analyzing which jurisdictions offer the most favorable legal and regulatory regimes for their particular business. Companies may choose not to offer a particular product or service in a jurisdiction with a less favorable legal regime or might offer differentiated versions of their product or service in different jurisdictions, tailored to the particular features of the regulatory environment. The hallmarks of markets dominated by regulatory arbitrage are strongly differentiated product offerings and flows of capital away from jurisdictions perceived to have higher regulatory complexity and greater legal or market risk.<sup>58</sup>

Some economists have linked the theory of regulatory arbitrage with the concept of competitive advantage, to provide a more nuanced explanation for global firms' observed behavior. They theorize that well-resourced companies that operate globally might not choose to forgo a particular market with an adverse regulatory environment. Instead, these companies might use their resources to better understand the stricter regulatory requirements and modify or build their product or service to comply to obtain a competitive advantage over smaller competitors in their industry, which might view the cost of obtaining legal certainty, or restructuring to meet the regulatory burden of compliance, to be too great to justify entry into that market.<sup>59</sup> In the financial services sector, better-resourced intermediaries that are in a position to tailor their services for compliance in multiple jurisdictions are able to obtain a long-term competitive advantage over smaller entities that can build for only one regulatory environment. In a similar vein, recent empirical scholarship in the field of political economy has shown that well-resourced multinational exporter corporations may benefit from the existence of regulatory barriers in their destination markets because the direct cost of the regulation is outweighed by the benefits of decreased competition from lesser-resourced competitors. Regulation adds to the cost of production, and less productive firms may not be able to afford the additional costs.<sup>60</sup>

### 2.2.3 Regulatory Theory and Governance Scholarship

Outside of copyright law, in areas where there are no external international harmonization forces, prior scholarship theorized that differences between U.S. and EU law in the areas of privacy and data protection law, consumer protection, and environmental regulations would lead to harmonization towards the higher standards in EU law for various reasons. Some prior scholars theorized that the higher standards of the prior EU personal data protection law would lead to legal harmonization, because the divergence would create changes in the dynamics

---

<sup>58</sup> H. Rao, L. Q. Yue & P. Ingram, *Laws of Attraction: Regulatory Arbitrage in the Face of Activism in Right-to-Work States*, 76 AM. SOCIOLOGICAL REV. 365 (2011).

<sup>59</sup> See, e.g., DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 9–10 (1995).

<sup>60</sup> Robert Gulloty, *Regulatory Protectionism, MNC Profits and the Limits of International Cooperation*, March 25, 2015 (unpublished manuscript, on file with author).

of the U.S. domestic environment and encourage U.S. legislators to harmonize the sectoral U.S. privacy laws with the more comprehensive EU regime.<sup>61</sup>

Other scholars have contended that the existence of the prior stronger EU data protection legal standards created de facto global design standards, rather than market segmentation, because non-EU firms elected to adopt the more stringent EU legal standards or regulations due to the business need to cater for the EU market. Bradford theorized that EU institutions have succeeded in having particular stricter EU regulatory standards and legal requirements adopted by firms operating outside of the European Union through a process of unilateral regulatory globalization and market-driven (as opposed to legal or political) harmonization.

Bradford terms this “the Brussels Effect.” Bradford identifies four factors that have resulted in certain EU laws and regulations being adopted beyond its borders:<sup>62</sup> First, the regulation or standard governs an area or product for which there is a significant market in the EU, relative to the size of the market in the producers’ home country. Drawing on trade theory, she contends that to secure access to important markets, producers of goods will gravitate towards adopting the standards prevailing in the more economically significant market. The larger the size of the market of the importing country with strict regulations, relative to the market of the exporting country (usually with more lenient standards), the more likely it will be that EU standards will prevail. Second, the regulation must govern an area where the EU possesses significant regulatory capacity—specifically the ability to enforce its stricter standards by imposing costs or the ability to exclude noncompliant firms from EU markets.<sup>63</sup> Third, the stricter EU regulation must be enforced over inelastic subjects (such as consumers), rather than elastic targets (such as capital). Fourth, the benefits of adopting a uniform global standard must exceed the benefits of adhering to multiple regulatory standards. This will be the case where the regulated activity is nondivisible, and it is not legally or technically feasible, or economically viable, for the firm to maintain different standards in different markets. Bradford claims that the Brussels Effect can be seen in global privacy regulation. She contends that U.S. firms active in the EU market comply with EU rules even when their data are processed in the United States because multinational Internet companies “find it difficult to create different programs for different markets and therefore tend to apply the strictest international standards across the board” to reduce their compliance costs with multiple regulatory regimes.<sup>64</sup>

In contrast to the theories grounded in market effects, recent empirical governance scholarship has highlighted the *indirect* way in which national laws shape organizations’ practices and governance structures. In the field of privacy law, Bamberger and Mulligan contend that differential national data protection standards play a role in governance decisions, but the mechanisms for policy diffusion within and across firms are more complex than Bradford’s unilateral market-driven model suggests. Based on interviews with chief privacy

---

<sup>61</sup> Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT’L L. 1 (2000).

<sup>62</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, at 13.

<sup>64</sup> *Id.*, at 25.

officers employed within U.S. firms, Bamberger and Mulligan<sup>65</sup> found that U.S. companies have adopted governance structures, technical infrastructures, and best practices that are similar to those seen in German corporations operating under the 1995 EU Data Protection Directive.<sup>66</sup> This appeared to have been driven at the outset by compliance with the EU Data Protection Directive and the desire to have one set of globally consistent policies, with the result that the higher standards of EU law operated as a regulatory floor.

However, through interviews, Bamberger and Mulligan trace a much deeper shift in U.S. firms' privacy management practices from formal procedural protection under the patchwork of sector-specific U.S. regulations, to a context-dependent risk assessment approach to privacy decision-making that is more consistent with the substantive values of the EU data protection regime. They contend that this has been driven by factors other than mere minimization of compliance costs in a global marketplace. They identify several factors motivating the shift in normative practices. First, a shared understanding of the concept of privacy as a substantive value, and privacy regulation as tied to consumers' expectations and the need to build and maintain trust. Second, the professionalization of the privacy officer profession, and its interaction with a broader group of outside stakeholders, which have given more visibility to good privacy management as a reputational asset of the organization and increased the credibility of privacy officers within the firm. Third, the rise of the U.S. Federal Trade Commission as an activist regulator, which has increased the financial and reputational stakes for privacy violations by corporations, and correspondingly empowered and expanded the scope of authority of privacy officials within the firm.

Bamberger and Mulligan's subsequent empirical research revealed that these practices—even if driven initially by the desire for compliance with EU data protection legal requirements—were sustained due to governance practices and staffing structures that were viewed as best practices within their industries because they were grounded in their customers' expectations regarding use of personal data. Mulligan and Bamberger provide an “outside-in” account of how laws affect regulated entities, which explains why U.S. firms appear to be acting “in the shadow” of EU law, despite not being formally subject to its requirements. They identify several components that have led to this outcome. First, a shift from rule-based regulations in the privacy field towards management-based outcomes with open-ended mandates, which require regulated firms to develop their own understanding of what compliance requires and individualized processes to achieve it. Second, legal uncertainty about standards, and the presence of an activist regulator that selectively and unevenly enforces them, which in turn creates incentives for corporations to hire privacy professionals with the relevant expertise to navigate the legal requirements and operationalize them in the company. Companies are also incentivized to hire professionals with the relevant expertise to signal to regulators that they

---

<sup>65</sup> Kenneth Bamberger & Deirdre Mulligan, *Privacy on the Books and On the Ground*, 63 STAN. L. REV. 247, 251–52, 278 (2010).

<sup>66</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281, 23/11/1995 P. 0031-0050.

understand, and are taking seriously, the regulatory mandates with which they must comply. This signaling, in turn, elevates the importance of professionalized experts and credentialing.<sup>67</sup>

Third, the presence of a diffuse set of stakeholders outside of the regulated firm, including government and civil society actors, which seek to have the company comply with the legal standards.<sup>68</sup> Fourth, transparency about corporations' privacy failures (through data breach notification requirements and other mechanisms), which allows external stakeholders to hold the company accountable, and thereby amplifies the authority and scope of power within the company of the boundary-spanning privacy experts.<sup>69</sup> In short, a combination of internal and external forces work together to create and reinforce incentives for companies to develop practices and procedures that embed privacy protection in design and technological infrastructure at a deeper level than the "tick-a-box" compliance checklist approach that might be expected under the U.S. legal system's fragmentary privacy regulations.<sup>70</sup>

In a similar vein, other recent governance scholarship on online platforms' content moderation practices on non-copyright-related grounds contends that U.S.- headquartered global online platforms have developed standards and processes for moderating their users' online content that are based on their staff's perceptions of their users' expectations regarding speech.<sup>71</sup> According to Klonick, the existence of multiple diverging national legal standards that might apply to globally accessible platforms has little direct role in shaping governance structures within platforms. This is because employees within platforms are motivated not by external laws, but instead by the expectations of early users of the U.S.-based platforms, who were sensitized to the particular standards and values of U.S. First Amendment jurisprudence. Klonick contends that the large U.S.-based communication platforms developed their standards and procedures for content moderation based on the particular standards and values embedded in U.S. law because they aligned with their early users' expectations about speech-related activity. Platforms now apply these standards and processes to all users of the platform, wherever they are located, and irrespective of whether the company's standards would conflict with the local law in the country where a particular user resides.

#### 2.2.4 Gatekeeper Liability

Another body of scholarship contends that national laws can affect the behavior of regulated entities by creating incentives for third parties ("gatekeepers") to regulate the behavior of individuals or organizations with whom they have relationships. Kraakman contended that the imposition of liability on private parties, who are not themselves the primary authors or beneficiaries of misconduct, may be justified where two conditions exist: (i) the private party is

---

<sup>67</sup> KENNETH BAMBERGER & DEIRDRE MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* at 34 (2015).

<sup>68</sup> *Id.* at 36–37 (noting how state and federal regulators can shape companies' social license to operate by enlisting and empowering nongovernmental actors to discuss policy and collaborate on development of evolving best practices); *also see* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (conceiving of governance as a set of negotiated relationships between public and private entities).

<sup>69</sup> BAMBERGER & MULLIGAN, *supra* note 67, at 37.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> K. Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

able to disrupt or prevent misconduct by others by withholding cooperation or support from the wrongdoer, and (ii) legal rules can be used to induce the gatekeeper intermediary to detect misconduct at a reasonable cost. He identified four conditions for evaluating when it would be appropriate to compel gatekeepers intermediaries to do this:<sup>72</sup> “(1) serious misconduct that practicable penalties cannot deter; (2) missing or inadequate private gatekeeping incentives; (3) the existence of gatekeepers who can and will prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers; and (4) gatekeepers whom legal rules can induce to detect misconduct at reasonable cost.”<sup>73</sup> Kraakman identified several categories of gatekeepers: First, *bouncer* regimes and gatekeepers, which disrupt misconduct by excluding certain actors from the relevant market in goods or services. Second, *chaperone* regimes and gatekeepers, in which gatekeepers can detect and disrupt misconduct in an ongoing relationship with enforcement targets, through imposition of monitoring duties.<sup>74</sup>

In the context of copyright law, Zittrain has contended that the history of U.S. regulation of online service providers and the judicial development of secondary copyright liability doctrines demonstrates a historical *forbearance* toward the use of gatekeeper liability.<sup>75</sup> Zittrain expanded Kraakman’s theory to *technological gatekeeping* (“*Lessig’s gatekeepers*”) where technological gatekeepers “are induced to make changes in the nature of the technological architectures that others cannot undo or widely circumvent.”<sup>76</sup> Zittrain argues that U.S. regulators and courts made a deliberate policy choice to make only limited use of gatekeeper liability, despite its enforcement potential, in order to preserve space for innovation in the nascent online sector. In considering how the DMCA safe harbor regime maps to Kraakman’s gatekeeper liability model, Zittrain concludes that the ex-post conditional liability immunity structure of the DMCA’s hosting safe harbor in 17 U.S.C. § 512(c) makes sense from the policy perspective because hosting OSPs operate like “chaperones” on Kraakman’s model. Under the safe harbor, they do not have to worry about actively chaperoning their users’ activities, but if something is drawn to their attention, they can remove it and be assured that they would not have copyright liability.

Zittrain identifies two points where the DMCA regime could be used to increase technological gatekeepers’ responsibilities beyond the limits of the policy justifications for gatekeeper liability. First, the location tools provider safe harbor in 17 U.S.C. § 512 (d) could encourage search engines and other OSPs that deal with links to block lawful innocent content.<sup>77</sup> Unlike financial services gatekeepers, search engines often have no direct relationship with the operators of websites whose URLs are removed after notice and will be incentivized to simply

---

<sup>72</sup> Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 61 (1986).

<sup>73</sup> *Id.*

<sup>74</sup> Kraakman, *supra* note 72, at 63.

<sup>75</sup> Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006).

<sup>76</sup> Zittrain, *supra* note 75, at 257.

<sup>77</sup> *Id.* at 267. However, 512(d) had not produced undesirable consequences because U.S. courts have taken a “delicate” approach in applying liability for hyperlinking. He notes that in the absence of the safe harbor, websites have been found to be contributory infringers of copyright works when providing links to allegedly infringing material. *See, e.g., Intellectual Reserve Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1292–95 (D. Utah 1999).

remove noticed content. Second, the requirement in the DMCA’s eligibility conditions that OSPs adopt and reasonably implement a policy of terminating accounts of repeat infringers could be used to encourage ISPs to play a more active role in gatekeeping. However, in both respects, Zittrain concluded that U.S. courts had not interpreted these provisions in a way that has required OSPs to operate as technical bouncer gatekeepers.<sup>78</sup>

For a period, it appeared that the influence of gatekeeper liability’s third-party enforcement model on regulation of OSPs was diminishing, as the emergence of peer-to-peer filesharing networks led to the decentralization of means of seeking and distributing unauthorized copyrighted content.<sup>79</sup> However, in recent years, there has been a shift toward centralized modes of content distribution through the emergence of large user-uploaded communication platforms such as YouTube and Facebook, social media networks such as Twitter, and subscription-based streaming services such as Spotify, Apple Music, Netflix, Hulu, and Amazon Prime Video. This has led to renewed efforts to use hosting OSPs as technological gatekeepers to prevent or restrict primary copyright infringement by users of these platforms. It has also resulted in additional pressure on web search engines to remove links to content on unauthorized streaming sites and to proactively demote links to previously notified websites in search results.<sup>80</sup> More recently, it has increased use of injunctions directing mere conduit Internet service providers in the EU, Asia, and Australia, to block access to allegedly infringing websites.<sup>81</sup>

### 2.2.5 Economics Literature

As its legislative history makes clear, the DMCA was intended to create a set of safe harbors for qualifying OSPs from direct, contributory, and vicarious liability for copyright infringement. While the safe harbor regime was intended to operate against the backdrop of the substantive U.S. direct and secondary copyright liability doctrines, failure to qualify for the safe harbor does not imply that an OSP has direct or secondary copyright liability.<sup>82</sup> Even though the DMCA regime was intended to create a safety zone from liability, in common with the substantive underlying liability doctrines of U.S. law, it is not cost-neutral. The safe harbor regime imposes costs and allocates risks and burdens as between copyright holders and OSPs.

A body of prior literature has considered the economic impact of statutory safe harbor regimes on Internet intermediary start-ups. Prior scholarship has considered the economic efficiency of the various U.S. OSP statutory liability regimes.<sup>83</sup> Prior empirical literature has also

---

<sup>78</sup> Zittrain, *supra* note 75, at 269–70 (“Thus, while the ‘repeat infringer’ provision of § 512(i) could in theory drastically increase the degree of intervention asked of intermediaries, especially of passive ISPs who must satisfy the provision to enjoy their safe harbor of § 512(a), it has not to date resulted in significant bouncer-like activities by either ISPs or OSPs.”)

<sup>79</sup> Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679 (2003); REBECCA GIBLIN, *CODE WARS: 10 YEARS OF P2P SOFTWARE LITIGATION* (2011).

<sup>80</sup> *How Google Fights Piracy*, *supra* note 50, “Demoting Infringing Websites,” at 39–40.

<sup>81</sup> Ernesto Van der Sar, *Nearly 4,000 Pirate Sites are Blocked by ISPs Around the World*, TORRENT FREAK BLOG (Feb. 10, 2019), <https://torrentfreak.com/nearly-4000-pirate-sites-are-blocked-by-isps-around-the-world-190210/>.

<sup>82</sup> S. REP. 105-190 (May 11, 1998), accompanying S. 2037, at 40.

<sup>83</sup> Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002) (concluding that near-unconditional immunity as embodied in § 230 of the Communications Decency Act is

documented the important role that the DMCA and similar statutory safe harbor regimes in other jurisdictions play for start-ups that are dependent on venture capital and angel seed investments, by providing investors and ventures with legal certainty.<sup>84</sup> Prior research has analyzed the costs and benefits of differing intermediary liability legal frameworks in Europe and other jurisdictions.<sup>85</sup>

This literature identifies several ways in which the structure of national statutory safe harbor regimes and broader intermediary liability legal frameworks affect OSPs. First, by determining the risk that OSPs will face legal action for facilitating access to illegal content and the scope of a potential exemption to liability. Second, by prescribing how much effort, in terms of compliance, OSPs need to make to be considered exempt from liability under a statutory safe harbor regime—for instance, in the case of the DMCA, the compliance costs involved in setting up and maintaining a notice and takedown system. This literature contends that the combination of these factors shapes the size and vibrancy of Internet start-up communities and identifies activities that may become too burdensome for OSPs to internalize the costs.<sup>86</sup>

## 2.2.6 Socio-Legal Scholarship and Organizational Theory

A further body of literature from organizational theory and socio-legal scholarship approaches questions about the impact of law on organizations from a different starting point. It rejects the view of law and legal process as a “top-down” given authority that organizations either obey or reject; instead, it views regulation and compliance with laws as an interactive process, in which the regulated organization plays an active role, albeit to varying degrees in different regulated industries.<sup>87</sup>

This scholarship has explored the role of laws and other types of external forces on organizations and the broader environment in which they operate. Socio-legal scholarship theorizes that the process by which laws impact organizations is indirect. Organizations respond to legal mandates by creating visible formal structures that signal compliance to regulators, and legitimacy to their users and stakeholders. Laws that are ambiguous or emphasize procedure over outcome are more likely to lead organizations to create visible responses as a way to signal legitimacy and compliance. When faced with legal uncertainty and in legal environments where they may be subject to liability, organizations may create new rules, procedures, and structures even though a law might not expressly require it, as a way to signal legitimacy and minimize the risk of legal liability.<sup>88</sup> Larger organizations are usually the frontrunners in this process because

---

more efficient than strict liability regimes (“publisher liability”) for defamation and speech-related activity due to the social costs of monitoring duties, or notice-based liability regimes (“distributor liability” in common law defamation case law) (and as embodied in the DMCA)).

<sup>84</sup> MATTHEW LE MERLE, RAJU SARMA, TASHFEEN AHMED & CHRISTOPHER PENCAVEL, BOOZ & CO., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT—A QUANTITATIVE STUDY (2011).

<sup>85</sup> OXERA, THE ECONOMIC IMPACT OF SAFE HARBOURS ON INTERNET INTERMEDIARY START-UPS, 2 (Feb. 2015).

<sup>86</sup> *Id.*

<sup>87</sup> Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1534 (1992); *see also* IAN AYERS & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

<sup>88</sup> Edelman, *supra* note 87, at 1542, 1545 (noting that creation of symbolic structures plays a key role in broader legal change, through the diffusion of symbolic structures across organizations in the legal environment).

they are more sensitive to legal risks in their legal environments. They are motivated to adopt structural responses to laws because they have the resources to do so and view themselves as enforcement targets.

Similarly, organizational theory contends that organizations shape their behavior to secure external resources they require.<sup>89</sup> Through compliance with externally imposed procedural requirements, organizations signal their legitimacy to outsiders. External perceptions of legitimacy expand the organization's "social license" and provide it with a greater scope of autonomy to self-direct its operations.<sup>90</sup> Organizational theory scholars identify several mechanisms by which institutions shape their behavior and structures.<sup>91</sup> One of these, mimetic isomorphism, occurs where uncertainty motivates organizations to imitate the structures of other organizations in their field that they perceive to be more legitimate or successful.<sup>92</sup> The greater the level of uncertainty, the more likely an organization will be dependent on presenting the appearance of legitimacy. Copying other organizations with established, legitimated procedures enhances the organization's legitimacy and survival characteristics.<sup>93</sup>

Other socio-legal scholarship has identified corporate policies and organizational structures that are present in companies that have moved beyond "mere compliance" and integrated legal norms in firm practices more structurally. These include the existence of a decentralized or distributed governance structure, with staff with relevant content expertise integrated into the corporation's subunits. Such distributed staffing structures promote consistency across organizational teams in the way the company understands and applies legal norms in day-to-day operations and ensures that legal norms are integrated into decision-making in all aspects and stages of corporate practices.<sup>94</sup> Interaction with stakeholders external to the

---

<sup>89</sup> JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* 60 (Stanford University Press reprint ed. 2003) (the resource dependence theory holds that organizations are dependent on their environment to survive, and that organizations form interorganizational relationships to control resources or absorb uncertainty. "The effective organization . . . satisfies the demands of those in its environment from whom it requires support for its continued existence."); *see also* Michelle Shumate, Yannick Atouba, Katherine R. Cooper & Andrew Pilny, *Interorganizational Communication*, in *THE INTERNATIONAL ENCYCLOPEDIA OF ORGANIZATIONAL COMMUNICATION* 4 (Craig R. Scott & Laurie Lewis eds., 2017).

<sup>90</sup> K. A. Bamberger & D. K. Mulligan, *PIA Requirements and Privacy Decision-Making in U.S. Government Agencies*, in *PRIVACY IMPACT ASSESSMENT, LAW, GOVERNANCE AND TECHNOLOGY* 230 (D. Wright & P. De Hert eds., 2012).

<sup>91</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields*, 48(2) *AM. SOCIOLOGICAL REV.* 147 (1983).

<sup>92</sup> *Id.* at 150.

<sup>93</sup> *Id.* at 152. DiMaggio and Powell contend that the third type of isomorphism, normative isomorphism, arises from professionalization. Isomorphism stems from two factors. First, the development of norms by professionals within firms who have received formal education or training that leads them to create similar approaches. Second, structures and models diffuse across firms due to the growth of networks of professionals that span across organizations.

<sup>94</sup> Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 *LAW SOC. INQ.* 307, 325 (2004); Bamberger & Mulligan, *supra* note 90, at 245 & 248; BAMBERGER & MULLIGAN, *supra* note 67, at 30 (citing PAUL LAWRENCE & JAY LORSCH, *ORGANIZATION AND ENVIRONMENT: MANAGING DIFFERENTIATION AND INTEGRATION*, rev. ed. 1986).

organization promotes deeper integration of legal norms within organizations, and creates social legitimacy and expands the “license to operate” for firms.<sup>95</sup>

### 2.2.7 Differential Impacts of Laws Based on Level of Resources

Finally, another body of literature suggests that regulations have differential impacts on regulated entities based on their size and level of resources.

Prior economics literature has found that introduction of general application regulations may have a negative differential impact on small businesses due to the uneven burden of compliance costs.<sup>96</sup> Recent academic scholarship has demonstrated that general application regulations may have a negative impact on venture capital funding for regulated entities, which disproportionately impacts start-ups and small-scale entities. In the context of privacy regulation, recent literature suggests that the coming into force of the EU General Data Protection Regulation in May 2018 had a disproportionately negative impact on EU technology venture start-ups and entities that were 0-3 years old.<sup>97</sup> Similarly, prior theoretical economic scholarship has contended that privacy regulation and compliance costs may act as barriers to entry for smaller firms.<sup>98</sup> At the same time, other industry research suggests that the costs of GDPR compliance may have operated to the benefit of large companies, such as Google, which was able to absorb compliance costs and increase its market share in the online advertising sector, while smaller website advertisers lost market share as they were not able to afford compliance costs.<sup>99</sup>

Organizational theory literature on resource dependence also suggests that regulatory effects of copyright liability standards would be different within OSPs of different sizes.<sup>100</sup> A

---

<sup>95</sup> NEIL GUNNINGHAM, ROBERT A. KAGAN & DOROTHY THORNTON, SHADES OF GREEN—BUSINESS, REGULATION AND ENVIRONMENT 51–60 (2003).

<sup>96</sup> Nicole V. Crain and W. Mark Crain, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS, Report Prepared for Small Business Administration, Office of Advocacy (Sept. 2010), [https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\)\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf).

<sup>97</sup> Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Nov. 5, 2018) (finding that the roll-out of the GDPR had a negative effect on investment in EU technology ventures in the six months after GDPR came into force in three dimensions: first, a decrease of \$3.38 million in aggregate funding raised by EU ventures; second, a 17.6% reduction in the number of weekly deals completed; and third, a 39.6% decrease in the amount raised in an average deal. Based on the decrease in aggregate funding, the authors estimated that venture-capital funded EU firms would have job losses in the range of 3,604 to 29,819 jobs, compared to an increase of 4.09%–11.20% in jobs created in U.S. venture-funded firms during the same six-month period following the GDPR coming into force.).

<sup>98</sup> *Id.* at 4–7, citing to J. Campbell, A. Goldfarb & C. Tucker, *Privacy Regulation and Market Structure*, 24 J. ECON. MANAG. STRATEGY 47–73 (2015); and S. Krasteva, P. Sharma, and L. Wagman, *The 80/20 Rule: Corporate Support for Innovation by Employees*, 38 INT’L J. INDUS. ORG., 32–43 (2015).

<sup>99</sup> Mark Scott, Laurens Cerulus & Laura Kayali, *Six Months In, Europe’s Privacy Revolution Favors Google, Facebook*, POLITICO EU, Nov. 23, 2018, <https://www.politico.eu/article/gdpr-facebook-google-privacy-data-6-months-in-europes-privacy-revolution-favors-google-facebook/>; CLICQZ, STUDY: GOOGLE IS THE BIGGEST BENEFICIARY OF THE GDPR, Oct.10, 2018, <https://cliqz.com/en/magazine/study-google-is-the-biggest-beneficiary-of-the-gdpr>.

<sup>100</sup> JEFFREY PFEIFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE 40–42 (2003).

prior 2016 empirical study of the way in which OSPs are operationalizing the notice and takedown requirements of the U.S. DMCA statutory regime documented significant differences between OSPs' practices.<sup>101</sup> That study found that OSPs' practices divided into three main categories. (1) "DMCA Classic OSPs," for which the volume of takedown notices received from copyright holders had remained relatively infrequent and constant over recent years, and where substantial human review of notices received was still the norm—these constituted the majority of respondent OSPs in the study's sample; (2) "DMCA Auto OSPs," which had received a significant and increasing volume of notices in recent years, and had shifted away from human review to more expensive automated notice processing systems in response; and (3) "DMCA-Plus OSPs," which had adopted procedures that go beyond the notice and takedown requirements of the DMCA and involve additional costs for the OSP. These include adoption of content identification filtering technology and copyright rights management systems, such as Content ID on Google's YouTube platform, and contractual agreements with streamlined rights of takedown for trusted copyright holders, as discussed above.<sup>102</sup>

That study found that resource levels of OSPs are significant in two respects. First, it determined whether and how intermediaries were able to implement the DMCA's required notice and takedown process—specifically, whether they were able to manage notice processing through human review or had moved to more automated notice processing systems, due to the volume of notices received. Second, it suggested that OSPs' size and resources could affect the standards for eligibility and smaller intermediaries' ability to stay within the safe harbor in the longer term. Previous empirical studies have documented increased use of automated notice sending processes by copyright holders, and a rise in adoption of automated notice processing systems by OSPs in response in recent years.<sup>103</sup> The Berkeley 2016 study posited that there may be a feedback loop in the way that these twin processes have evolved from the interplay between more well-resourced intermediaries and rights enforcement organizations. This in turn, suggested that less-resourced OSPs could be vulnerable to losing safe harbor protection if either the volume of notices they receive were to increase substantially and they were not in a position to acquire automated notice processing technology, or if the use of costly content filtering technology systems by larger DMCA-Plus OSPs were to change normative expectations about what was necessary to comply with the DMCA safe harbor regime's requirements.

Other literature suggests that more-established OSPs with global presence and deep in-house expertise might be expected to do better than smaller online service start-up entities in navigating divergent standards and complexity in the longer term due to the structural advantages of being "repeat players" in the global legal system. Various scholars have considered the benefits that accrue to repeat players in systems. In the context of litigation, repeat players obtain various structural benefits, including the ability to execute long-term strategies, trading off short-term defeats for more useful longer-term rewards, and the ability to "play for rules"; and the ability to discern which rule changes are likely to be most useful, in the

---

<sup>101</sup> URBAN ET AL., *supra* note 3.

<sup>102</sup> *Id.*

<sup>103</sup> Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of the State of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369 (2014).

sense of penetrating into the “law in action.”<sup>104</sup> Socio-legal scholars contend that organizational repeat players develop systemic structural advantages through the internalization of elements of the public law system, such as legal dispute processing, within their firm practices.<sup>105</sup>

---

<sup>104</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

<sup>105</sup> Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y. REV. 941 (1999).

## CHAPTER 3

### HISTORY AND INTERNATIONAL CONTEXT: COMMUNICATION TO THE PUBLIC AND MAKING AVAILABLE RIGHTS IN THE WCT AND WPPT

#### 3.1 Introduction

New rights created by the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty laid the foundation for the legal developments that are analyzed in the following chapters. This chapter sets the stage by reviewing the competing proposals put forward by the U.S. and EU delegations for framing the rights in the negotiations leading up to the adoption of the 1996 WIPO treaties, and how the differing conceptions of those rights shaped policymakers' choices in how these rights were implemented in U.S. and EU law, respectively.

Although Internet intermediary liability for copyright infringement has featured prominently in recent negotiations of international trade agreements,<sup>106</sup> policy dialogues,<sup>107</sup> and norm-setting efforts,<sup>108</sup> its footing in the international copyright framework is surprisingly tenuous. Existing international copyright treaties do not require countries to recognize Internet intermediary liability for copyright infringement. There are no harmonized standards or principles of secondary copyright liability across those countries that do recognize indirect liability for copyright infringement. Some countries have developed specific-purpose Internet intermediary copyright liability doctrines; others rely on background tort law, or accessory liability principles.<sup>109</sup> However, liability of Internet service providers and online service providers

---

<sup>106</sup> Numerous U.S. free trade agreements have included obligations for U.S. trading partners to adopt legal measures limiting the liability of OSPs modeled on the U.S. DMCA statutory safe harbor regime in 17 U.S.C. § 512. *See, e.g.*, U.S.–Singapore Free Trade Agreement, art. 16.9(22), May 6, 2003 (in force from 2003); U.S.–Chile Free Trade Agreement, art. 17.11(23), June 6, 2003 (in force from 2004); U.S.–Australia Free Trade Agreement, art. 17.11(29), May 18, 2004 (in force from 2005); U.S.–Central America–Dominican Republic Free Trade Agreement, art. 15.11(27), Aug. 5, 2004–Dec. 1, 2006 (in force from 2006–2009, depending on country); U.S.–Bahrain Free Trade Agreement, art. 14.10(29) and Side Letter (on written notice and counternotice requirements), Sept. 14, 2004 (in force from 2006); U.S.–Morocco Free Trade Agreement, art. 15.11(28) and Side Letter, June 15, 2004 (in force from 2006); U.S.–Oman Free Trade Agreement, art. 15.10(29) and Side Letter, Jan. 19, 2006 (in force from 2009); U.S.–Peru Trade Promotion Agreement, art. 16.11(29) and Side Letter, Apr. 12, 2006–June 25, 2007 (in force from 2009); U.S.–Colombia Trade Promotion Agreement, art. 16.11 (29) and Side Letter, Nov. 22, 2006 (in force from 2012); U.S.–Panama Trade Promotion Agreement, art. 15.11(27), June 28, 2007 (in force from 2012); and U.S.–Korea Free Trade Agreement, art. 18.10(30) and Side Letter (requiring Korea to adopt legal measures providing for written notification by copyright holders of claimed copyright-infringing material, and procedures for written counter-notification to ISPs by persons who have had content removed based on a copyright infringement claim), June 30, 2007 (in force from 2012); all available at <https://ustr.gov/trade-agreements/free-trade-agreements>. The proposed Anti-Counterfeiting Trade Agreement (2010) also included provisions concerning Internet intermediary copyright liability; *see* Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559 (2011), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1708&context=auilr>.

<sup>107</sup> OECD, THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES (2011), <http://www.oecd.org/sti/ieconomy/theroleofinternetintermediariesinadvancingpublicpolicyobjectives.htm>; OECD, THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES (2010), <http://www.oecd.org/internet/ieconomy/44949023.pdf>.

<sup>108</sup> SENG, *supra* note 20; FERNANDEZ-DIAZ, *supra* note 20.

<sup>109</sup> *See, e.g.*, SENG, *supra* note 20; FERNANDEZ-DIAZ, *supra* note 20; Angelopoulos, *Beyond the Safe Harbours*, *supra* note 28; SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS (Graeme B. Dinwoodie ed., 2017).

for copyright infringement was very much in the minds of country representatives at the inter-governmental diplomatic conference that resulted in the adoption of the 1996 World Intellectual Property Organization Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

### 3.2 The New Rights

The WCT and the WPPT established new rights that were intended to protect copyrighted works used in digital transmissions on the Internet. The existing foundational treaty in the international copyright regime, the Berne Convention, already contained a right of “public performance” for performable works and a right of “communication to the public,” but the latter was fragmentary. It applied only to certain types of works and to particular means of communication, reflecting the piecemeal amendment process of the Berne Convention and the technologies in common use at that time. The Berne Convention provided exclusive rights of wireless communication to the public (including broadcasting) and secondary transmission by wire and wireless means for all Berne-protected works, but copyright owners’ right of primary communication by wire did not apply to the text of literary works (including computer programs), musical, dramatic and dramatico-musical works, and still artistic images.<sup>110</sup>

The communication to the public right created by the WCT filled in these gaps in scope and subject matter. The new (sub) right of making available created by the WCT and the WPPT was explicitly intended to protect two new types of transmissions—first, interactive digital transmissions, involving communication of copyrighted works to viewers in a different location from where the transmission originated; and second, on-demand transmissions, at a time chosen by the individual viewers.<sup>111</sup>

The making available right in Article 8 of the WCT provides that:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of

---

<sup>110</sup> 1 SAM RICKETSON & JANE GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* § 12.17 (2d ed. 2006).

<sup>111</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, *BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY ON CERTAIN QUESTIONS CONCERNING THE PROTECTION OF LITERARY AND ARTISTIC WORKS TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS*, WIPO DOC. CRNR/DC/4, QUESTIONS 44 n.10.11 (Aug. 30, 1996), [http://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr\\_dc/cmr\\_dc\\_4.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr_dc/cmr_dc_4.pdf) [hereinafter DRAFT BASIC PROPOSAL]; MIHALY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET—THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* ch. 4 (2002); JÖRG REINBOHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996* 108–10 (2002); SARI DEPREEUW, *THE VARIABLE SCOPE OF THE EXCLUSIVE ECONOMIC RIGHTS IN COPYRIGHT* 352–58 (2014).

the public may access these works from a place and at a time individually chosen by them.<sup>112</sup>

Article 10 of the WPPT created a related right for sound performers—an exclusive right to authorize the making available to the public of fixations of their performances in phonograms by wire or wireless means, and in such a way that members of the public can access the fixed performances from a place and at a time of their choosing. Article 14 of the WPPT created a parallel exclusive right for phonogram producers—to authorize the making available of their phonograms by wire or wireless means, in a way that members of the public may access from a place, and at a time of their choosing.<sup>113</sup>

### 3.3 Historical Background

As the following section highlights, the United States and the European Union chose different paths for implementing these rights in their legal systems. This was not accidental. The implementation approach taken in each jurisdiction reflects the proposals that were put forward in the negotiations that preceded the adoption of the 1996 WIPO treaties. Those proposals, in turn, reflected U.S. and EU policymakers’ considered policy preferences about the scope, objectives, and role of copyright law as a mechanism for regulating information flows.

Prior to the adoption of the WIPO treaties, discussions had been underway since the early 1990s on how to adapt the international copyright framework to meet the opportunities and challenges posed by the then-nascent Internet. While there was general agreement amongst the interested WIPO member states on the need to protect copyrighted works in interactive digital transmissions, national representatives did not agree on the mechanism for doing so. At the request of the WIPO secretariat, the governments of the United States, the European Union, Australia, Japan, and Argentina, each put forward proposals for differing mechanisms to cover interactive digital transmissions. Some of these countries proposed the creation of new digital network-specific rights. In contrast, the U.S. delegation proposed using bundles of existing rights recognized in member countries’ national laws, expanded to cover digital networks.<sup>114</sup>

In parallel to the international negotiations, the National Information Infrastructure Task Force appointed by President Clinton and chaired by the U.S. Commissioner of Patents and Trademarks had been considering how to modify copyright law to address Internet infringement. It issued a report in 1995, the National Information Infrastructure White Paper (the NII White Paper),<sup>115</sup> which surveyed the challenges posed by the Internet and made a set of

---

<sup>112</sup> WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc/No 105-17 (1997); 36 I.L.M. 65 (1997), art. 8 [hereinafter WIPO Copyright Treaty], [https://www.wipo.int/treaties/en/text.jsp?file\\_id=295166#P78\\_9739](https://www.wipo.int/treaties/en/text.jsp?file_id=295166#P78_9739).

<sup>113</sup> WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76 (1997), arts. 10 & 14, [https://www.wipo.int/treaties/en/text.jsp?file\\_id=295578#P109\\_12974](https://www.wipo.int/treaties/en/text.jsp?file_id=295578#P109_12974).

<sup>114</sup> FICSOR, *supra* note 111, ¶ 4.130 (noting that the first U.S. proposal (WIPO Document BCP/CE/V/3, ¶ 8) sought recognition of a digital “transmission” right as part of the reproduction right); and ¶ 4.135 (describing second U.S. proposal for an expanded distribution right that included digital transmissions, including making available by transmission, and importation by transmission (WIPO Document BCP/CE/VI/12, 29)).

<sup>115</sup> INFORMATION INFRASTRUCTURE TASKFORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 213–20 (Sept. 1995) [hereinafter NII WHITE PAPER].

recommendations for reforming U.S. copyright law to deal with these. The Report recommended that digital transmissions of copyrighted works should be addressed by a legislative expansion of the U.S. distribution right. This would cover Internet transmissions, when used in conjunction with a broad interpretation of the U.S. reproduction right, as covering temporary and transient reproductions of copyrighted works in computer random access memory. The final proposal put forward by the U.S. delegation in the international negotiations leading up to the 1996 WIPO Diplomatic Conference was based on the domestic approach recommended in the NII White Paper.<sup>116</sup>

Other WIPO member states did not agree with the U.S. approach for covering Internet transmissions, and it was the EU delegation's proposal for a broad communication right that was eventually included in the Basic Proposal, the draft treaty text that formed the basis of the negotiations at the 1996 Diplomatic Conference.<sup>117</sup> However, WIPO member states were not able to reach agreement on the form and scope of the communication right during negotiations at the Diplomatic Conference. As a result, a compromise "umbrella" solution was adopted in Article 8 in the final adopted treaty text. This was intended to allow countries to implement the WCT's communication to the public and making available rights through new rights, or a combination of existing rights in national law.<sup>118</sup>

In the months preceding the treaty's adoption, several member states, copyright scholars, and representatives of U.S. telecommunications and consumer electronic companies, had expressed concern that the broad scope of the communication and making available rights would implicate transmission of content over the Internet, and create a new basis of liability for OSPs. The potential scope of the communication right was particularly concerning to them when read together with the U.S. delegation's proposal to extend the reproduction right to temporary reproductions, including those in computer memory.

Telecommunications companies expressed concern that the U.S. delegation's proposed Article 7 would have extended the right of reproduction to direct and indirect reproductions, and all temporary reproductions, in any manner or form.<sup>119</sup> If adopted, this would have created a new international right allowing copyright owners to control temporary copies of their works in

---

<sup>116</sup> FICSOR, *supra* note 111, ¶ 4.130, n.336; U.S. second proposal for expanded digital distribution right in WIPO Document BCP/CE/VI/12, 29.

<sup>117</sup> DRAFT BASIC PROPOSAL, *supra* note 111.

<sup>118</sup> FICSOR, *supra* note 111, ¶ 4.155. This understanding was reflected in a statement of the U.S. delegation recorded in the records of the 1996 WIPO Diplomatic Conference at 782:

[The delegate] stressed the understanding—which had never been questioned during the preparatory work and would certainly not be questioned by any Delegation participating in the Diplomatic Conference—that [the rights of communication to the public and making available] might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights.

<sup>119</sup> DRAFT BASIC PROPOSAL, *supra* note 111, art. 7, n.7.05, providing in part:

The result of reproduction may be a tangible, permanent copy like a book, a recording or a CD-ROM. It may as well be a copy of the work on the hard disk of a PC, or in the working memory of a computer. A work that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device.

computer memory, which in turn would have laid the foundation for a global framework under which copyright owners could control access to, viewing, and use of digital copyrighted works on computer networks and networked devices.<sup>120</sup> It also raised the concern that Internet service providers and online service providers would suddenly become directly liable for temporarily storing infringing copies of copyrighted works made by their users or transmitting them over the Internet.<sup>121</sup> Since transmitting material across the Internet involves serial reproduction and distribution of digital copies of content, an exclusive right for copyright holders to control temporary and “indirect” reproductions of their works would have created liability both for online service providers such as hosting platforms, but also for mere conduit Internet service providers,<sup>122</sup> which merely pass packets over networks in transmissions that were initiated by end users, and often have no knowledge of the copyright status of the transmitted material. The text of the second part of Article 7 raised concerns about whether OSPs would be required to monitor the contents of communications to try to identify unauthorized content.<sup>123</sup>

The U.S. delegation to WIPO strongly supported draft Article 7 because it would have helped to accomplish two key goals of the U.S. Patent and Trademark Office’s domestic copyright reform agenda, which had been set out in the NII White Paper report authored by the head of the U.S. delegation to WIPO the year before. The 1995 NII White Paper<sup>124</sup> made a number of recommendations for changes to U.S. intellectual property law that were similar to what would have resulted from the proposed treaty provisions.<sup>125</sup> The NII White Paper characterized U.S. law as already providing that temporary reproductions of works in computer memory were actionable copyright infringement,<sup>126</sup> and argued that Internet service providers and online service providers should be held strictly liable both directly and vicariously for transmitting infringing copies of copyrighted works made by their users, on the basis that they were effectively acting as publishers and should be held to the same standard.<sup>127</sup> This characterization of existing U.S. law was viewed as controversial by leading copyright law scholars.<sup>128</sup> Draft legislation to implement several of the NII White Paper proposals had been put

---

<sup>120</sup> Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 382–83 (1997).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 385 n.93.

<sup>123</sup> *Id.* at 386 (noting concerns of the Ad Hoc Alliance for the Digital Future on proposed art. 7(2)’s text permitting WIPO Member States to create exceptions only in the course of a use of the work “authorized by the author or permitted by law”).

<sup>124</sup> NII WHITE PAPER, *supra* note 115.

<sup>125</sup> Samuelson, *supra* note 120, at 373.

<sup>126</sup> NII WHITE PAPER, *supra* note 115, at 65–66 (claiming that “The 1976 Copyright Act, its legislative history, the CONTU Final Report, and repeated holdings of courts make it clear” that copies in computer RAM are “copies” and that “multiple copies” are made when a file is transmitted from one computer network user to another).

<sup>127</sup> NII WHITE PAPER, *supra* note 115, at 114–24.

<sup>128</sup> Samuelson, *supra* note 120. The NII WHITE PAPER, *supra* note 115, and the draft implementing legislation considered additional issues, including an expansion of the distribution right. See JESSICA LITMAN, DIGITAL COPYRIGHT 75 (Maize Books reprint ed. 2017) (noting that the Lehman Working Group’s Green Paper had recommended amending the copyright statute to enhance copyright holders’ rights to control transmissions of their works by providing that instead of, or in addition to, considering transmissions to be performances, the law should treat them as distributions of copies and that the statute be amended to provide that the first sale doctrine would not

forward before Congress, but stalled in the Committee process.<sup>129</sup> The U.S. delegation to WIPO sought to have the same digital agenda incorporated into the draft WIPO treaties, with the goal of creating new international standards that would then require implementation into U.S. law by Congress, thereby effectively bypassing the stalled domestic legislative reform process.<sup>130</sup>

Aside from the treaty proposal's treatment of the reproduction right in Article 7, the WCT's new exclusive right for copyright holders to authorize communication to the public of their works by wire or wireless means<sup>131</sup> also raised potential liability concerns for ISPs and OSPs regarding transmission of digital copyrighted works over their networks. Because the communication and making available rights were drafted very broadly, U.S. telecommunications and consumer electronics companies and U.S. copyright scholars were concerned that they would implicate transmission of content over networks and create an additional new basis of liability for intermediaries.

The proposed Article 7 on the reproduction right was not ultimately included in the final version of the WCT adopted in 1996.<sup>132</sup> This was due in large part to the awareness-raising efforts of an ad hoc group of U.S. telecommunications companies, consumer electronics manufacturers, copyright scholars, libraries, educators, and concerned civil society groups, who expressed their concerns about the potential liability implications of the draft provisions to the U.S. President, U.S. congressional representatives on committees with oversight over the USPTO, and other WIPO member states' delegates at various meetings in Geneva in the months leading up to the Diplomatic Conference in 1996.<sup>133</sup>

Other WIPO member states did not agree with the proposed extension of the reproduction right to temporary reproductions, including those in computer memory. They also did not share the U.S. delegation's view that mere conduit Internet service providers and other online service providers should be strictly liable for copyright infringement done by their users. The text of the final treaties included a broader right of communication and the new sub-right of making available in Article 8, based on the EU proposal but framed in the compromise "umbrella" solution language. In an attempt to address the concerns raised by the telecommunications and

---

apply to any transmission); *id.* at 103 (noting that the draft legislation would have expanded the distribution right to encompass transmissions of works).

<sup>129</sup> Samuelson, *supra* note 120, at 373 n.29 & 374 (discussing NII Copyright Protection Act of 1995, H.R. 2441, 104th Cong., 1st Sess. (1995); *see also* LITMAN, *supra* note 128, at 109.

<sup>130</sup> Samuelson, *supra* note 120, at 373–74; LITMAN, *supra* note 128, at 109.

<sup>131</sup> WIPO Copyright Treaty, art. 8, [https://www.wipo.int/treaties/en/text.jsp?file\\_id=295166#P78\\_9739](https://www.wipo.int/treaties/en/text.jsp?file_id=295166#P78_9739).

<sup>132</sup> Although proposed Article 7 was removed, the U.S. delegation succeeded in inserting a second Agreed Statement in the WCT preamble. *See* Agreed Statement to art. 1(4) of WIPO Copyright Treaty, *supra* note 112; *see also* Samuelson, *supra* note 120, at 391–92.

<sup>133</sup> Samuelson, *supra* note 120, at 385 n.95 (discussing the Suggested Revisions to the Chairman's Basic Proposal for the Treaty Formerly Known as the Berne Protocol 1-2 of the Ad Hoc Alliance for a Digital Future (Oct. 31, 1996), with proposed text that would have mandated exemption of temporary copies) and 387 n.103 (Letter from William L. Schrader, Chairman and CEO of PSINet, Inc., and ten other senior telephone and online service provider executives to President William J. Clinton II (Dec. 10, 1996)).

consumer electronics sectors, WIPO member states adopted an Agreed Statement on Article 8.<sup>134</sup> It stated:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).<sup>135</sup>

The adoption of the Agreed Statement on Article 8, together with the omission of the proposed temporary reproduction right of proposed Article 7 in the final text of the WCT, were viewed by commentators as reflecting the international consensus amongst other national representatives at the Diplomatic Conference that Internet service providers should not be held strictly liable where they merely provide physical facilities for enabling or making a communication of a copyrighted work.<sup>136</sup>

### 3.4 Implementation of the Communication and Making Available Rights

#### 3.4.1 Implementation in U.S. Law

The U.S. Congress chose not to enact specific making available and communication to the public rights at the time that it implemented the 1996 WIPO Treaties. Both Congress and the administration concluded that the existing U.S. public performance, public display, and distribution rights in 17 U.S.C. § 106 covered interactive digital transmissions.<sup>137</sup>

Subsequent conflicting court decisions on the scope of the U.S. distribution right in the context of peer-to-peer file-sharing cases created pressure to reconsider whether the U.S. Congress should enact a specific making available right to ensure that file-sharers who merely offer infringing copies of copyrighted music or other works for download by others would be held liable for copyright infringement.<sup>138</sup> A 2013 Report from the U.S. Patent and Trademark

---

<sup>134</sup> FICSOR, *supra* note 111, ¶ C8.24 (noting that the inclusion of the Agreed Statement was the result of “an intensive lobbying campaign of non-governmental organizations representing Internet service providers and telecommunications companies.”).

<sup>135</sup> WIPO Copyright Treaty, Agreed Statement to article 8.

<sup>136</sup> See Samuelson, *supra* note 120, at 392; *but see* FICSOR, *supra* note 111, ¶ C8.24 (claiming that the Agreed Statement provides no guarantee of limitation on liability for Internet service providers because the WIPO Copyright Treaty did not deal with Internet intermediary liability issues) and ¶¶ 4.85–4.87, 4.158.

<sup>137</sup> H.R. REP. NO. 105-551, pt. 1, at 9 (1998) (“The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”); S. REP. NO. 105-190, 105th Cong., 2nd Sess., at 11 (1998) (“The Committee believes that in order to adhere to the WIPO treaties, legislation is necessary in two primary areas— anticircumvention of technological protection measures and protection of the integrity of rights management information . . . This view is shared by the Clinton administration.”); Statement of Bruce Lehman, Assistant Secretary of Commerce for Intellectual Property, Hearing on WIPO Copyright Treaties Implementation Act (H.R. 2281) and On-Line Copyright Liability Limitations Act (H.R. 2180) before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, 105th Cong., 1st Sess. (Sept. 16, 1997).

<sup>138</sup> See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008); *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 282 (D. Conn. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981–84 (D. Ariz. 2008) (finding that actual dissemination was required); *contra*, *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2011);

Office recommended that further consideration should be given to enacting a specific making available right.<sup>139</sup> In 2014, the U.S. Copyright Office opened an inquiry into whether the U.S. Congress should enact a specific right of making available of copyrighted works.<sup>140</sup> However, legislative reform did not follow.

The U.S. implementation of the WCT and WPPT assigned the offering and communication of digital streams to the public performance right, and assigned downloads to the reproduction and distribution rights.<sup>141</sup> Some scholars have argued that some of the activities intended to be covered by the WCT have fallen through the gaps in U.S. courts' interpretation of the scope of these rights, and that the United States has not complied with its international obligations as a result.<sup>142</sup> Other scholars have argued that the legislative history prior to the enactment of the distribution right in the 1976 Copyright Act indicates that Congress intended that digital transmissions would be covered by the distribution right, so the U.S. rights are broad enough to cover the WCT's intended activities, but courts have interpreted them narrowly.<sup>143</sup>

---

Universal City Studios Productions LLP v. Bigwood, 441 F. Supp. 2d 185, 191 (D. Me. 2006); Motown Records Co. v. DiPietro, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); UMG Recordings, Inc. v. Alburger, Civ. No. 07-3705, 2009 WL 3152153 (E.C. Pa. Sept. 29, 2009); Diversey v. Schmidly, 738 F.3d 1196 (10th Cir. 2013).

<sup>139</sup> INTERNET POLICY TASK FORCE, U.S. DEPARTMENT OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (July 2013), <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

<sup>140</sup> U.S. Copyright Office, Notice of Inquiry, Study on the Right of Making Available: Notice and Request for Public Comments and Notice of Public Roundtable, Docket No. 2014-2, Feb. 25, 2014, 79 Fed. Reg. 10571.

<sup>141</sup> Jane Ginsburg, *Comments to U.S. Copyright Office Study on the Right of Making Available, Docket No. 2014-2*, (Apr. 7, 2014), 2, [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Jane\\_Ginsburg.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Jane_Ginsburg.pdf). The Copyright Act defines public performance to include transmission. 17 U.S.C. § 101 provides that to perform or display a work "publicly" means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place, or in separate places and at the same time or different times.

It further provides that: "To 'transmit' a performance or display is to communicate it by any device or process whereby the images or sounds are received beyond the place from which they are sent." Since the WCT's making available right applies to a public that is remote from the place of the original transmission (as distinct from the public performance right in the Berne Convention), it is the transmit clause, in the second part of this definition, that most directly implements the WCT's making available right. The statutory definition of "transmit" appears to support that transmission is a constitutive feature of the U.S. right of public performance to remote audiences, although the reference to "otherwise communicate" arguably allows for other forms of communication.

<sup>142</sup> Ginsburg, *Comments, supra* note 141.

<sup>143</sup> Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 41–51 (2011) (contending that the legislative history of the distribution right introduced in the 1976 Copyright Act, together with the United States' ratification and implementation of the Geneva Phonograms Convention by the Sound Recording Amendments Act of 1971, indicates that Congress intended the right of distribution to cover the range of activities covered by the publication right in the prior statutes, which was defined to include the offering of infringing content); Professor Menell subsequently recommended that Congress should amend the U.S. Copyright statute by including a definition of "distribute," defined to mean making

### 3.4.2 Implementation in European Union Law

In contrast to the United States, the European Union chose to implement the WIPO Treaties by creating broad new communication rights. Article 8 of the WCT and Articles 10 and 14 of the WPPT are implemented in EU law in Article 3(1) of the 2001 Information Society Directive (2001/29/EC).<sup>144</sup> Article 3 requires two elements: (1) a “communication” that (2) is made to “the public.” Recital 23 of the 2001 Directive makes clear that the communication must be to a public that is not physically present at the same location where the communication originates. Consistent with the WCT communication right, Article 3 does not cover local communications to a present audience, such as performances, displays or recitations, but may cover transmissions of fixed versions of them.<sup>145</sup>

The Information Society Directive does not define “communication” or “the public.” As a result, national legislatures and courts in EU member states developed their own understanding of these terms, and the scope of the right had varied across member states.<sup>146</sup> Inconsistent interpretations across member states resulted in the referral of many cases by national apex courts to the Court of Justice of the European Union (CJEU) in recent years. The CJEU has recently taken the view that there must be a uniform interpretation of these terms, and that member states do not have the freedom to formulate their own definitions.<sup>147</sup> The CJEU has considered the scope of the communication to the public right in more than twenty judgments, spanning both offline and online activities (including hyperlinking and the operation of a website containing links to unauthorized copyrighted works).<sup>148</sup> Importantly, and arguably in contrast to many U.S. courts’ interpretations of the U.S. distribution right,<sup>149</sup> the CJEU has held that

---

available. See Peter Menell, *Comments to U.S. Copyright Office Study on the Right of Making Available*, Docket No. 2014-2 (Apr. 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Peter\\_Menell.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Peter_Menell.pdf).

<sup>144</sup> 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, 2001 O.J. (L 167/10), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>. The communication rights of the WCT, WPPT, Berne, and Rome Conventions are implemented in EU law in various different directives, depending on the nature of the subject matter and means of transmission involved. Communication of copyrighted works by satellite broadcast is defined to take place in the country of uplink/upload to a satellite by Article 1(2) of the 1993 EU Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC), and in Article 8 of the Rental Rights Directive, 2006/115/EC for related rights.

<sup>145</sup> S. Bechtold, *Commentary on Information Society Directive*, in CONCISE EUROPEAN LAW 360 (1st ed. 2006).

<sup>146</sup> See, e.g., the description of scope of communication/making available rights implemented in UK and German law in Tanya Aplin, *United Kingdom*, and Martin Schaefer, *Germany*, in COPYRIGHT IN THE INFORMATION SOCIETY: A GUIDE TO NATIONAL IMPLEMENTATION OF THE EUROPEAN DIRECTIVE (Brigitte Lindner & Ted Shapiro eds., 2011).

<sup>147</sup> Case C-306/05, *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA*, CJEU (Third Chamber) (Dec. 7, 2006) at ¶ 31, 2006 E.C.R. I-11519, EU:C:2006:764 (*SGAE*).

<sup>148</sup> João Pedro Quintais, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public Right*, 21 J. WORLD INTELLECT. PROP. 385 (2018).

<sup>149</sup> See *supra* cases cited in note 138.

violation of the EU communication to the public right does not require a transmission of a copyrighted work.<sup>150</sup>

---

<sup>150</sup> CJEU, *SGAE*, ¶ 43 (finding that it was a communication to the public when a hotel proprietor provided its customers with access to copyrighted television programs on television sets in their individual hotel rooms by distributing a broadcast signal to customers' rooms, even if it was not accessed by customers). However, there is a sharp disagreement among EU scholars as to whether the EU communication to the public and making available rights require a transmission. See EUROPEAN COPYRIGHT SOCIETY, OPINION ON THE REFERENCE TO THE CJEU IN CASE C-466/12 SVENSSON, <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/> (contending that hyperlinking should not be regarded as an activity covered by the right to communicate a copyrighted work to the public in Article 3 of the Information Society Directive (2001/29/EC) because (1) a communication requires a transmission, and creating a hyperlink does not involve a transmission, but is merely a reference marker; and (2) the drafting history of the WCT indicates that WIPO member countries intended that the new international right of making available in Article 8 of the WCT would cover transmissions); *contra* ASSOCIATION LITTERAIRE ET ARTISTIQUE INTERNATIONALE, REPORT AND OPINION ON THE MAKING AVAILABLE AND COMMUNICATION TO THE PUBLIC IN THE INTERNET ENVIRONMENT—FOCUS ON LINKING TECHNIQUES ON THE INTERNET, adopted unanimously by the Executive Committee, Sept. 16, 2013 (ALAI First Opinion), <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (contending that the right of making available under the WCT, and as implemented in the EU Directive, covers “the offering to the public of a work for individualized streaming or downloading,” and also the “the actual transmission of a work to members of the public,” irrespective of the technical means used. It concludes that the making available right covers links that enable members of the public to access specific protected material but does not cover links that “merely refer to a source for which a work may subsequently be accessed.” Thus, a surface link is not a “communication to the public” (because it requires a user to click on it to access content), but deep-links, in-line links that frame content from another web server in a browser window, and embedded links that allow for content to be automatically streamed from another server, each constitute an act of “communication”); see also *supra* U.S. court cases cited in note 138.

## CHAPTER 4

### ONLINE SERVICE PROVIDERS' LIABILITY FOR LINKING UNDER THE COMMUNICATION TO THE PUBLIC RIGHT

#### 4.1 Introduction

This chapter considers OSPs' differing liability for linking under EU and U.S. copyright law. In the EU, since 2016, OSPs that host or deal with links for a for-profit purpose have faced liability for communicating copyrighted works to the public. As a result of the CJEU's *GS Media* ruling,<sup>151</sup> commercial OSPs are presumed to have liability where an OSP links to or hosts a user's link to an unauthorized copyrighted work, unless the OSP can prove that it did not have actual or constructive knowledge that the targeted material was not authorized. The CJEU's *GS Media* ruling appeared to create either an ex-ante obligation for commercial OSPs to proactively screen links, or else an ex-post notice and takedown obligation for linked content.

This chapter highlights the divergence that has recently emerged between U.S. and EU law in regard to liability for linking to copyrighted material for two purposes. First, because it highlights a clear difference between the U.S. and EU copyright law systems, which was used to frame questions for the interviews that formed the basis of the qualitative analysis in this dissertation. Given the central role of hyperlinking in communication and exchange of information on the Internet and because links are part of many routine OSP activities, it could be expected that OSPs would be sensitive to differences in liability standards across jurisdictions. The emergence of liability for OSPs for linking or hosting links under EU law (but not under U.S. law) could be anticipated to be something that OSPs would consider meaningful for their operations, and decisions about product design and availability of services. To sharpen the focus on potential impacts on OSPs for the "law on the books" versus "law in action" analysis, this chapter focuses narrowly on comparison of linking liability, and does not attempt a broader comparative analysis of the differences between the scope of the communication to the public right as recognized in U.S. and EU law.

Second, the CJEU's rulings on the scope of the EU communication to the public right as it applies to hyperlinking shed light on one of the core elements of the controversial Article 17 (formerly Article 13) in the pending EU Digital Single Market Copyright Directive (discussed in chapters 6 and 9). This would make most commercially operated platforms that host user-generated content directly liable for communication to the public of unauthorized copyright works uploaded to their platforms by their users.<sup>152</sup> In parallel to the effects of Article 17, a set of cases pending before the CJEU raises the question whether hosting platform YouTube and cloud storage locker service Uploaded.net have direct liability for communication to the public for

---

<sup>151</sup> Case C-160/15, *GS Media BV v. Sanoma Media NL GB, Playboy Enterprises International, Inc., and Britt Geertruida Dekker*, CJEU (Second Chamber) (Sept. 8, 2016), EU:C:2016:644 (*GS Media*).

<sup>152</sup> Two other parts of the pending EU Digital Single Market Copyright Directive would also affect other linking-related activities, but on a different basis than the communication to the public right, and are outside the scope of this chapter. First, the scope of the proposed exception for text and data mining for noncommercial purposes (Article 3) might be viewed as implicitly raising questions about whether creation of a commercial web-search engine index through crawling or scraping processes might generate copyright liability. Second, the proposal for a news publishers' right (Article 11) would require anyone that uses links and snippets of news stories (and not just aggregator services such as Google News), to pay remuneration to news publishers.

copyrighted content uploaded by their users.<sup>153</sup> There are clear differences between different types of linking activities, such as linking done in the context of news reporting, where content is linked intentionally as a source of facts or basis for commentary, and the automated process involved in creating links for web search engines such as Google Web Search. However, because of the broad interpretation of the communication to the public right in the first CJEU judgment concerning hyperlinking, all types of linking activity involving copyrighted works have been subject to the same legal analytical framework for the purposes of EU copyright infringement analysis, and differences in motivation for different types of linking were initially not able to be taken into account in the liability analysis. As a result, it has fallen to member states' national courts to find mechanisms to take account of differences in the nature and motivation of the linking activity when applying the principles articulated by the CJEU. The CJEU's broad initial interpretation of the scope of the communication right also posed difficulties for distinguishing between linking and hosting activities of OSPs. The same interpretive principles articulated in the CJEU's hyperlinking cases—particularly in the *Ziggo/Pirate Bay* ruling, discussed below—have direct bearing on the determination of whether operators of user-generated content hosting platforms face direct liability for communicating works to the public in the cases pending before the CJEU. The same principles illuminate the nature of the direct liability that many hosting OSPs may soon face under Article 17 (formerly Article 13) of the pending EU Copyright Directive.

The divergence between U.S. and EU law in regard to linking liability results from several factors. First, differences in the approach of U.S. and EU courts to how they treat the activity of linking. As discussed below, some U.S. appellate courts have approached linking liability analysis by analyzing the technological architecture and type of link at issue. In contrast, EU courts have focused on the way that linked content appears on a viewer's screen, and not drawn distinctions based on different types of links (e.g., surface versus embedded links) or linking techniques.<sup>154</sup> Second, differences between U.S. and EU courts' interpretations of the scope of the communication to the public right, which have resulted in a far broader scope of direct liability for OSPs in Europe, as compared to U.S. copyright law. Third, the existence of a structural difference between the U.S. and EU statutory safe harbor regimes that limit the liability of eligible online intermediaries. The U.S. safe harbor regime contains an explicit safe

---

<sup>153</sup>Case C-682/18, *YouTube & Ors*, CJEU (pending) (referred to CJEU by BGH on Sept. 13, 2018) (BGH Case No. I ZR 140/15—*YouTube*) (*YouTube & Ors*); Christina Etteldorf, *Germany—BGH Refers Questions to ECJ Concerning YouTube's Liability for Copyright Breaches*, IRIS Bulletin IRIS 2018-9:1/10, <https://merlin.obs.coe.int/iris/2018/9/article10.en.html> (noting first question referred: does the operator of an Internet video platform on which users make available to the public videos containing copyright-protected content without the rightsholder's permission carry out "communication to the public" in the sense of Article 3(1) of Directive 2000/29/EC); Case C-683/18, *Elsevier & GEMA*, CJEU (pending) (referred to CJEU by BGH on Sept. 20, 2018) (BGH Case No. I ZR 53/17—*Uploaded*) (*Elsevier & GEMA*); Christina Etteldorf, *Germany—Federal Supreme Court Refers "Uploaded" to ECJ*, IRIS Bulletin 2018-10:1/9, <https://merlin.obs.coe.int/iris/2018/10/article9.en.html> (in both cases the CJEU is also being asked to determine whether the respective hosting OSPs are excluded from the EU's hosting safe harbor because their role in operating the platforms and optimizing content uploaded by users makes them active intermediaries, which would be disqualified from relying on the EU safe harbors under the CJEU's prior rulings in Cases C-236/08-238/08, *Google France SARL et al. v. LVMH SA*, Judgment of the Court of Justice of the EU (Grand Chamber) (Mar. 23, 2010), 2010 E.C.R. I-2417, EU:C:2010:159; and Case C-324/09, *L'Oréal SA & Ors v. eBay International AG*, Judgment of the Court of Justice of the EU (Grand Chamber) (July 12, 2011), EU:C:2011:474, discussed in chapter 5.)

<sup>154</sup> See, e.g., *Copyright Aspects of Hyperlinking and Framing*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Copyright\\_aspects\\_of\\_hyperlinking\\_and\\_framing](https://en.wikipedia.org/wiki/Copyright_aspects_of_hyperlinking_and_framing).

harbor for OSPs that deal with links, including search engines and aggregators (17 U.S.C. § 512(d)). In contrast, the EU-level statutory safe harbor framework in the 2001 e-Commerce Directive<sup>155</sup> does not contain an explicit safe harbor for information society service providers that deal with links.

This chapter provides a high-level overview of the evolution of linking liability under EU copyright law by tracing principles articulated by the CJEU in a series of cases interpreting the scope of the communication to the public right. For the purpose of providing a general comparison and understanding the liability analysis undertaken by many U.S.-based OSPs, it then briefly highlights the contrasting approach taken by several U.S. appellate courts. It then profiles a recent ruling from one lower court in another district that has disrupted the perception that linking liability was settled under U.S. law and raised uncertainty in regard to embedded links and the practice of in-line linking.

## 4.2 The EU Communication to the Public Right

### 4.2.1 Overview of Interpretive Principles

In a series of cases, the CJEU has articulated a set of principles for determining what conduct constitutes a copyright-infringing communication to the public for the purposes of EU law. These principles were mostly articulated in cases involving offline environments but have been further developed in the CJEU's recent hyperlinking cases. A communication to the public involves two cumulative elements. First, there must be an act of communication. Second, the communication must be "to the public." In the context of hyperlinking, the CJEU has identified a third element, the profit-making nature or purpose of the communication. The CJEU has identified subelements for each of these elements, as described below. In its 2016 *GS Media* ruling, the CJEU emphasized that analyzing whether there has been a communication to the public requires an individualized assessment and identified additional criteria which should be taken into account in making this assessment. The CJEU characterized these as "complementary," "not autonomous," and "interdependent" because they must be applied both individually and in their interaction with one another.<sup>156</sup>

#### 4.2.1.1 Act of Communication

An act of communication has two elements. First, it requires a *deliberate intervention* by a person or entity that provides access to a copyright-protected work.<sup>157</sup> An entity makes an act of communication when it intervenes with full knowledge of the consequences of its action, to

---

<sup>155</sup> 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, 2000 O.J. (L 178), arts. 12–14; 17 U.S.C. § 512 (2006).

<sup>156</sup> CJEU, *GS Media*, ¶ 34.

<sup>157</sup> CJEU, *SGAE*, ¶ 31, ¶ 46–47 (finding that it was a communication to the public when a hotel proprietor provided its customers with access to copyrighted television programs on television sets in their individual hotel rooms by distributing a broadcast signal to customers' rooms).

give access to a protected work to its customers.<sup>158</sup> The intervention must also be “indispensable” or “essential” to the communication act in the sense that in the absence of that intervention, downstream users would not be able to access the work. It also must be more than a mere technical means that improves the quality of the communication.<sup>159</sup> The more recent hyperlinking cases have weakened the “indispensable” nature of this element to an *important* role, in the absence of which, access to the works would only be possible with greater difficulty.”<sup>160</sup> Second, an act of communication requires only that the option of access to the protected work is made available, irrespective of whether content is actually accessed.<sup>161</sup> A communication occurs independently of the work being received or accessed by the public.<sup>162</sup>

#### 4.2.2.2 Communication “to the Public”

The second cumulative element is that the communication must be to “the public.” While the CJEU has interpreted what constitutes an act of communication very expansively, it has used this second requirement as a limiting principle on the scope of the making available right. To be a “public” communication, the communication must be to a “fairly large number of persons,” or to “an indeterminate number” of potential viewers.”<sup>163</sup> This is assessed by the cumulative effects and the successive nature of communications.<sup>164</sup> The CJEU has identified two alternative criteria for determining whether a communication is made “to the public.” First, the communication must be to a “new public” in the sense of a public that is different to that which the copyright owner intended to target at the time of the initial communication. Second and alternatively, the communication must be to a public that is reached through a different specific technical means.

#### 4.2.2.3 Knowledge Requirement and Rebuttable Presumption of Knowledge for For-Profit Linking Activity

In the hyperlinking context, the CJEU has introduced a third element. It has looked at whether the nature or the purpose of the communication involved profit-making. In the *GS Media* ruling, the CJEU affirmed that linking was within the scope of copyright holders’ exclusive right of communication of works to the public but introduced a knowledge requirement

---

<sup>158</sup> CJEU, *GS Media*, ¶ 35 (citing Case C-135-10, Società Consortie Fonografici (SCF), CJEU (Mar. 15, 2012), ¶ 84, EU:C:2012:140; and Case C-162/10, Phonographic Performance (Ireland) Ltd, CJEU (Mar. 15, 2012), ¶ 31, EU:C:2012:141).

<sup>159</sup> CJEU, *SGAE*, ¶ 42.

<sup>160</sup> Quintais, *supra* note 148, at 391 (citing Case C-527/15, Stichting Brein v. Jack Frederik Wullems, CJEU (Second Chamber) (Apr. 26, 2017), ¶ 41, EU:C:2017:300 (*Filmspeler*); Case C-610/15, Stichting Brein v. Ziggo BV and XS4All Internet BV, CJEU (Second Chamber) (June 14, 2017), ¶¶ 26, 36, EU:C:2017:99 (*Ziggo*). In *Ziggo*, the CJEU found that the operators of The Pirate Bay website had made an intervention without which the “works could not be shared by the users or, at the very least, sharing them on the Internet would prove to be more complex.”

<sup>161</sup> CJEU, *SGAE*, ¶ 43.

<sup>162</sup> Quintais, *supra* note 148, at 392 (contending that the CJEU judgments show a distinction in situations of linear transmission (where the CJEU has required a transmission, for instance in the case of broadcasting) in contrast to interactive communication, where no transmission is required for making works available online, citing *Filmspeler*, ¶ 36 and *Ziggo*, ¶ 11).

<sup>163</sup> CJEU, *SGAE*, ¶ 37–38, citing CJEU, Case C-89/04 *Mediakabel* [2005] ECR I-4891, ¶ 30, and Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, ¶ 31).

<sup>164</sup> CJEU, *SGAE*, ¶¶ 38–39.

and a rebuttable presumption that relevant knowledge exists (and hence liability attaches) where for-profit websites link to infringing content.<sup>165</sup>

### 4.3.1 CJEU Hyperlinking Judgments

This section reviews the five CJEU judgments that have considered whether linking constitutes a communication to the public, and potential copyright infringement. Two 2014 decisions dealt with links to content that was freely accessible on the Internet. The CJEU found that using surface links and embedded links that enabled display of copyrighted material residing on another server were “communications” but in both cases it found that there was no copyright infringement because there was no communication to a “new public” since the linked content was already freely accessible online. A 2016 CJEU judgment found that providing links to copyrighted content may be a copyright-infringing communication to the public where the linker knew or should have known that the linked content was not authorized by the copyright holder, or was not freely accessible on the Internet, or the link provided access to copyrighted content protected by technological protection measures. Two 2017 judgments expanded the scope of direct liability for communication of copyrighted works to individuals that sold technologies or provided online services that enabled users to access unauthorized copyrighted works via links.

#### 4.3.1.1 Links to Freely Accessible Copyrighted Content

In the 2014 *Svensson* judgment,<sup>166</sup> the CJEU held that posting a surface link to copyrighted works that were freely available on another website does not infringe copyright. The CJEU followed this in its second linking case, *BestWater International*,<sup>167</sup> discussed below, where it held that use of an embedded link by someone other than a copyright owner was not a copyright-infringing communication to the public. In both cases the CJEU held that posting a link to copyrighted content constitutes an act of communication and indicated that it would infringe copyright in particular circumstances.

*Svensson* arose out of litigation brought by four Swedish journalists against Retriever Sverige AV, the operator of a subscription news service. The journalists wrote news articles that were published in the Goteborgs-Posten newspaper and available for free on the newspaper’s website. Retriever Sverige operated a news service that provided its clients with links to news articles published on Goteborgs-Posten and other websites. Applying the principles discussed above, the CJEU found that providing a link to copyright-protected works that were freely accessible on another website, and had been published without any access restrictions, was an act of communication because the links gave the news service’s clients direct access to the copyrighted articles hosted on the newspaper’s website. It was not necessary to prove that anyone had actually accessed the articles by clicking on the links; mere provision of the links was sufficient to establish a communication.<sup>168</sup>

---

<sup>165</sup> CJEU, *GS Media*.

<sup>166</sup> Case C-466/12, Nils Svensson, Sten Sjogren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB, CJEU (Fourth Chamber) (Feb. 13, 2014), EU:C:2014:76 (*Svensson*).

<sup>167</sup> Case C-348/13, BestWater International GmbH v. Michael Mebes and Stefan Potsch, CJEU (Ninth Chamber) (Oct. 21, 2014), O.J. C 325, 9.11.2013, EU:C:2014:2315 (*BestWater*).

<sup>168</sup> CJEU, *Svensson*, ¶ 16–20.

However, there was no communication to a “new public.” Because the news articles had been posted on the newspaper’s websites without any restrictions and were freely accessible there, it had to be assumed that the intended audience at the time of the initial publication was everyone. The CJEU found that the public targeted by the initial communication consisted of all potential visitors to the newspaper’s website, which included all Internet users. The use of the links by the news service did not result in a communication to a “new” public in the sense of an audience that was not taken into account by the copyright holder at the time that they authorized the initial communication to the public.<sup>169</sup> Since there was no new public, no fresh authorization was required from the copyright holders for Retriever to communicate the journalists’ works through clickable links, and there was no copyright infringement.<sup>170</sup>

The CJEU followed this reasoning in regard to the use of embedded links in the *BestWater* judgment.<sup>171</sup> *BestWater* involved the use of embedded links to display a video created by water filter company BestWater International, which had been posted on YouTube. Two independent sales consultants who worked for BestWater’s competitors had embedded links to BestWater’s video to make it display on their own websites. When Internet viewers clicked on the embedded link on the sales consultants’ website, the BestWater video hosted on YouTube played in a window frame in the Internet user’s browser, giving the impression that the video was located on BestWater’s competitor’s site. The CJEU found that the sales consultants’ use of embedded links was an act of communication because it provided direct access to the video that was hosted on YouTube. However, the embedded links in the defendants’ websites were not a communication to a “new public” because BestWater’s video was freely accessible on YouTube without technical restrictions, and thus the embedded links did not communicate the video to a new public broader or different from the original intended audience.<sup>172</sup>

---

<sup>169</sup> *Id.* ¶ 24, citing CJEU, *SGAE*, ¶ 40, 42; Case C-136/09, *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, CJEU (Seventh Chamber) (Mar. 18, 2010), ¶ 38, EU:C:2010:151; and Case C-607/11, *ITV Broadcasting & Others*, CJEU (Fourth Chamber) (Mar. 7, 2013), ¶ 39, EU:C:2013:147.

<sup>170</sup> CJEU, *Svensson*, ¶ 29 (finding that the conclusion that there was no new public would not be called into question if the referring court were to find that “when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work come from another site.”).

<sup>171</sup> CJEU, *BestWater*.

<sup>172</sup> See unofficial translation of the court’s conclusion provided by Oliver Loffel, referenced in Eleanora Rosati, *That BestWater Order: It’s Up to the Rightsholders to Monitor Online Use of Their Works*, IPKAT BLOG (Oct. 27, 2014), <http://ipkitten.blogspot.com/2014/10/that-bestwater-order-its-up-to.html> (noting that claimant BestWater had claimed that its video was uploaded to YouTube without its authorization); Ernesto Van der Sar, *Embedding is Not Copyright Infringement*, EU COURT RULES, TORRENT FREAK BLOG (Oct. 24, 2014), <https://torrentfreak.com/embedding-copyright-infringement-eu-court-rules-141025/>; Stephen Zimprich & Dr. Sven-Alexander von Normann, *BestWater—ECJ Forces Copyright Owners to Employ Access Restrictions*, FIELD FISHER LLP BLOG (Nov. 3, 2014), <https://www.fieldfisher.com/publications/2014/11/bestwater-ecj-forces-copyright-owners-to-employ-access-restrictions>; Martin Husovec, *What Does BestWater Decision Mean for Future of Embedding?*, HUTKO’S TECHNOLOGY LAW BLOG (Nov. 1, 2014), <http://www.husovec.eu/2014/11/what-does-bestwater-decision-mean-for.html> (discussing *BestWater* at ¶ 18). The court did not rule on the fact that the video had apparently been posted on YouTube without BestWater’s authorization. The key issue for the “new public” analysis was whether it was freely accessible on the Internet. The court found that when the video was uploaded on YouTube, it was intended to be accessible by all who had access to the Internet, and thus, there was no new public accessing the video through the use of the embedded links.

#### 4.3.1.2 When Links Constitute Communications to a “New Public”

The CJEU held in *Svensson* that a link would constitute a communication to a new public and require authorization of a copyright owner in three situations.

First, where a link made it possible for viewers who followed the link to circumvent restrictions put in place to restrict public access to the copyrighted material to the first site’s subscribers. The CJEU reasoned that in these circumstances, the link would constitute an intervention without which the second site’s users would not be able to access the copyrighted works. Authorization of the copyright holder would therefore be required to communicate the linked works to the additional viewers from the second site, as they would be a new public not taken into account by the copyright owner at the time that it authorized the initial communication of its works online. Second, where a link provided access to a copyrighted work that was no longer available to the public on the website where it was first communicated. Third, where a link provided access to a copyrighted work that was previously freely accessible on the original website, but was now only available to a smaller, restricted audience. This would cover the situation where a link provided access to copyrighted content that was originally freely accessible but had been moved behind an online platform’s paywall and was otherwise available only to paying subscribers.<sup>173</sup>

What remained uncertain after the *Svensson* and *BestWater* judgments was whether linking to unauthorized copyrighted material would constitute copyright infringement. The CJEU ruled on this issue in its 2016 judgment in *GS Media v. Sanoma*.<sup>174</sup>

#### 4.3.1.3 Links to Copyright-Infringing Material

The *GS Media* case concerned the posting of links by a popular Dutch celebrity news website, *GeenStijl*, to unauthorized copies of photos of a celebrity, which were intended to be published in a forthcoming edition of *Playboy* magazine. The unauthorized photos were located on a file storage website operated in Australia, *FileFactory.com*. The CJEU held that linking to copyrighted material that is freely accessible on another website but is made available there without the authorization of the copyright owner, constitutes a communication to the public and infringes copyright where the linker had actual or constructive knowledge that the linked copyrighted material was not authorized by the copyright owner. The CJEU created a rebuttable presumption of knowledge (and hence liability) for websites using links with a for-profit motive or for the purposes of financial gain. It found websites that provide links to copyrighted material in the pursuit of financial gain can be presumed to have tested and cleared all links and thus can be deemed to have knowledge where linked content is infringing.

The CJEU’s introduction of a knowledge requirement as a necessary element of a communication to the public appears to have been motivated by policy concerns about the broad reach of the *Svensson* judgment’s conclusion that posting a link was an act of communication. It acknowledged that treating hyperlinks as potential communications to the public of copyrighted works could produce unintended policy outcomes. It noted that hyperlinks contribute to the sound operation of the Internet and are necessary for the exchange of information, which is at the

---

<sup>173</sup> CJEU, *Svensson*, ¶ 31.

<sup>174</sup> CJEU, *GS Media*.

core of freedom of expression in the online environment. The court also acknowledged that it will often be difficult for individuals who wish to post links to ascertain whether content that they seek to link to is made available with the consent of the relevant copyright holder.

In recognition of the burden that the prior decisions placed on individuals, the CJEU appeared to craft a knowledge requirement and rebuttable presumption of knowledge as pragmatic limiting principles. The court found that where a person is not pursuing profit when s/he posts a hyperlink to content that is freely available on another website, whether the link constitutes copyright infringement turns on whether the linker had actual knowledge or could reasonably have been expected to know that the linked content was posted without the consent of the copyright owner. If the linker knew or ought to have known that the link provided direct access to copyrighted content published without the copyright owner's authorization, the link would constitute an infringing communication to the public. Where a link allowed viewers to bypass access restrictions put in place by the copyright holder, the CJEU reasoned that the decision to post the link would amount to a deliberate intervention, without which the website's viewers would not have been able to access the copyrighted work.

Where the posting of the hyperlink is "carried out for profit," the court found that there is a rebuttable presumption of knowledge, and hence liability for commercially motivated linking where a link provides access to unauthorized copyrighted content. The court reasoned that a person who posts hyperlinks with a for-profit motivation or for financial gain can be expected to have carried out the necessary checks to ensure that the linked work is not illegally published on the other website. The posting of links to infringing content could therefore be presumed to have taken place with knowledge of the infringing material. To the extent that the presumption of knowledge is not able to be rebutted, the link would then constitute an infringing communication of copyrighted works to the public. The CJEU reasoned that this would serve the broader objectives of copyright law, by enabling copyright owners to take enforcement action not only against the person who wrongfully makes an initial unauthorized publication of their copyrighted works on the Internet, but also against any persons who subsequently posted links to the unauthorized copy for the purpose of financial gain.<sup>175</sup>

The CJEU's decision to introduce a knowledge requirement rather than categorically excluding links from being acts of communication has been criticized for the damage it has done to the integrity of EU copyright law, by transforming EU copyright holders' communication to the public right from an exclusive property right into a liability rule.<sup>176</sup> It has also raised concerns about the blurring of the line between primary and secondary liability in EU law by expanding the scope of direct liability from its historical mooring as a strict liability tort doctrine.

#### **4.3.1.4 Duty to Inspect or Monitoring Obligation**

Some commentators viewed *GS Media* as creating an ex-ante obligation for commercial OSPs to screen links on their platforms, to ensure that links do not provide viewers with direct

---

<sup>175</sup> CJEU, *GS Media*, ¶¶ 50–53.

<sup>176</sup> Jane C. Ginsburg, *The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. Filmspeler [C-527/15] (2017) and Brein v. Ziggo [C-610/15] (2017)* (Aug. 22, 2017). Forthcoming (in French) in 2016/5-6 AUTEURS ET MÉDIAS 401 (Belgium); Columbia Law and Economics Working Paper No. 572; Columbia Public Law & Legal Theory Paper No. 14-557. Available at [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3054&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3054&context=faculty_scholarship)

access to unauthorized copyrighted content, and to ensure that links do not provide access to copyrighted works by circumventing technical restrictions put in place by a copyright holder.<sup>177</sup> Such a duty could be burdensome because it would require the OSP to conduct ongoing inspections to ensure links did not provide access to copyrighted content that was previously freely accessible when first published, but has since become available only to a restricted audience—for example, because it had been paywalled.

Other commentators have viewed the *GS Media* ruling’s “rebuttable presumption” as having created a notice and takedown regime for linked content, where OSPs who receive notice from a copyright owner would then have knowledge that the linked content was not authorized and could remove the identified link. While an ex-post notice and takedown responsibility would be a sensible solution from a policy perspective, it was not clear from the CJEU’s ruling whether a takedown process would be sufficient to address the full scope of liability that attaches to linking. Since the *GS Media* ruling presumes that liability exists where a person or platform engages in linking for a for-profit purpose, even if the OSP were to mitigate liability by removing an identified link upon being notified of it, this might not address the potential liability that would attach from the time that the link was posted until the time when it was taken down. If notice and takedown were sufficient to remove all liability for the commercially oriented linker, the copyright owner would not be able to recover for financial loss caused to it during that period. The legal uncertainty caused by the *GS Media* ruling has been further exacerbated for OSPs by the absence of an explicit EU-level statutory safe harbor for OSPs that deal with links, such as search engines and aggregators and platforms that host users’ embedded links.<sup>178</sup> In contrast, the U.S. DMCA statutory safe harbor regime contains an explicit safe harbor for OSPs that deal with location tools such as links, in 17 U.S.C. § 512(d).

### 4.3.2 Further Expansion of the Scope of Direct Liability

Two subsequent CJEU judgments have further expanded the scope of the communication to the public right. These judgments appear to have created a new harmonized accessory copyright liability doctrine for intermediaries that facilitate copyright infringement through providing or hosting links that afford direct access to unauthorized copyrighted works.<sup>179</sup> These cases have further blurred the boundary between primary and secondary liability, increasing legal uncertainty for commercial OSPs that deal with links.

---

<sup>177</sup> Neville Cordell & Beverley Potts, *Communication to the Public or Accessory Liability? Is the CJEU Using Communication to the Public to Harmonise Accessory Liability Across the EU?* 40 E.I.P.R., Issue 5, 289 (2018).

<sup>178</sup> It has been further complicated by varying understandings across EU member states as to what level of specificity is required in copyright holder notices to trigger knowledge that will disqualify a hosting OSP from the statutory safe harbors. See, e.g., Eleonora Rosati, *Facebook Found Liable for Hosting Links to Unauthorized Content*, IPKAT BLOG (Feb. 19, 2019), <http://ipkitten.blogspot.com/2019/02/facebook-found-liable-for-hosting-links.html> (reporting on judgment of Rome Court of First Instance, Tribunale di Roma, sentenza 351/2019, holding that Facebook was disqualified from relying on the Italian statutory hosting safe harbor and was liable for hosting a Facebook user’s links to unauthorized copyrighted videos posted on YouTube).

<sup>179</sup> Christina Angelopoulos, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, KLUWER COPYRIGHT BLOG (June 30, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>; Christina Angelopoulos, *AG Szpunar in Stichting Brein v. Ziggo: An Indirect Harmonisation of Indirect Liability*, KLUWER COPYRIGHT BLOG (Mar. 23, 2017), <http://copyrightblog.kluweriplaw.com/2017/03/23/ag-szpunar-stichting-brein-v-ziggo-indirect-harmonisation-indirect-liability/>; Ginsburg, *Observations on Brein v. Filmspeler*, supra note 176.

In the 2017 *Filmspeler* judgment, the CJEU found that the sale of Internet streaming devices was an infringing communication to the public where the vendor had pre-loaded software and integrated third-party add-on extensions that embedded links to streaming sites on to the devices, which allowed purchasers to access unauthorized copyrighted content.<sup>180</sup> The court held that the sale of these devices was not a situation where the vendor was merely “providing physical facilities for enabling or making a communication,” which the 2001 EU Information Society Directive permitted, reflecting the language of the Agreed Statement to Article 8 of the WIPO Copyright Treaty. Instead, by pre-installing the third-party add-ons to the player software, the vendor allowed purchasers of the box to have direct access to unauthorized copyrighted works published on particular streaming sites. The court found that the vendor’s act in pre-installing the software was a deliberate intervention that was done with full knowledge that the device would be used by purchasers to watch unauthorized content from the linked streaming sites because the vendor had marketed the device as being optimized for precisely that purpose. Because the unauthorized streaming sites were freely accessible on the Internet, the vendor’s intervention was not strictly necessary for device users to access infringing works. However, it was important, because absent the installation of the third-party add-ons with embedded links, device users would have had greater difficulty in locating infringing content.

In the subsequent *Ziggo* ruling, the CJEU held that the operators of the commercially operated torrent tracker index website, The Pirate Bay, were directly liable for making available unauthorized copyrighted works on the basis of links to infringing content that had been posted to the site by its users. Even though the Pirate Bay site did not host any copyrighted content, and the court acknowledged that links to the infringing files were uploaded by the site’s users, the CJEU found that the Pirate Bay was not merely providing physical facilities that enabled a communication to take place. The court found that the operators had violated the communication to the public right because of their role in making available and managing a sharing platform that indexed torrent files and associated metadata in a way that made it easier for torrent users to find and download them. In addition to providing a search engine, the operators had created an index classifying infringing content by category type and popularity. The CJEU also found that the operators deleted “obsolete and faulty” torrent files and actively filtered some content.<sup>181</sup> The court concluded that the operators had knowledge of the infringing content that was indexed and accessible through the website because they had been informed of it, and because they “could not be unaware” that the platform provided access to a high volume of torrent files not authorized by copyright holders that were linked from the site, and the platform was operated for a profit-making purpose.<sup>182</sup>

### 4.3.3 Rebuttable Presumption of Knowledge for For-Profit Search Engines

Following the *GS Media* ruling, the scope of linking liability in the EU depends on how the CJEU’s “for-profit” proviso is interpreted. While the CJEU has not yet had an opportunity to provide further guidance on that, European national courts issued conflicting broad and narrow interpretations of when the presumption of knowledge for for-profit linking would be deemed

---

<sup>180</sup> CJEU, *Filmspeler*.

<sup>181</sup> CJEU, *Ziggo*.

<sup>182</sup> *Id.* at ¶¶ 45–46.

rebutted.<sup>183</sup> In 2017, in a case involving the display of thumbnail images of copyrighted photos in Google Image Search results, the German Federal Court of Justice, the BGH, ruled that despite being a for-profit operation, Google could not be presumed to have knowledge of unauthorized content linked from its Google Search Image index and therefore was not directly liable for communicating unauthorized copyrighted works to the public.<sup>184</sup>

In reaching its conclusion that the operator of a web search engine could not be presumed to have knowledge of unauthorized content linked from its index, the BGH emphasized the vital role played by search engines in helping individuals find information and in promoting freedom of expression and information exchange on the Internet. Because of their essential importance to the functioning of the Internet, the court held that a search engine provider could not reasonably be expected to ascertain whether copyrighted photos found by search bots had been lawfully posted on the Internet. It would be inappropriate to impose a general duty on search engine operators to investigate the legality of published images found by search bots because that could jeopardize or complicate search engines' operations and expose the operators of search engines to "the incalculable risk of being claimed by a large number of copyright holders."<sup>185</sup>

The court also placed weight on the fact that links in Google's search engine index were created in an automated process by a computer program that could not differentiate between content that was made available on the Internet with authorization or not. They were therefore different from the "deliberate and intentional" interventions of users that had placed links in the prior CJEU cases where links were held to be acts of communication.<sup>186</sup> The BGH concluded that search engine operators could not be presumed to have knowledge of potential infringing

---

<sup>183</sup> *Sweden*: Attunda District Court found Belgian media company had embedded link to Swedish plaintiff's YouTube video on its commercial website, L'Avenir, with the intent of pursuing a profit (see Eleanora Rosati, *Linking to Unlicensed Content: Swedish Court Applies GS Media*, IPKAT BLOG (Oct. 27, 2016), <http://ipkitten.blogspot.co.uk/2016/10/linking-to-unlicensed-content-swedish.html>); *Czech Republic*: District Court for Prague found knowledge could be assumed because website that obtained advertising revenue was operated for-profit (see summary reported by Juraj Vivoda, in Eleanora Rosati, *After Sweden and Germany, GS Media Finds Its Application in the Czech Republic*, IPKAT BLOG (Feb. 6, 2017), <https://ipkitten.blogspot.com/2017/02/after-sweden-and-germany-gs-media-finds.htm>); *Germany*: in interim injunction application, Regional Court of Hamburg found website operator liable for linking to an unlicensed work, because website was assumed to be operated for profit as it offered educational materials, irrespective of commercial value of the particular link in issue (see Eleanora Rosati with summary reported by Sascha Abrar, *GS Media Finds Its First Application in Germany*, IPKAT BLOG (Dec. 16, 2016), <https://ipkitten.blogspot.com/2016/12/gs-media-finds-its-first-application-in.html>). However, three subsequent German court judgments have narrowly interpreted the CJEU's presumption of knowledge for commercially operated websites. In particular, the German Federal Court of Justice, the BGH, held on September 21, 2017, that Google could not be presumed to have knowledge of unauthorized content linked from the Google Image Search index. (See Eleanora Rosati, *German Federal Court of Justice Rules that GS Media Presumption of Knowledge Does Not Apply to Google Images*, IPKAT BLOG (Sept. 22, 2017), <http://ipkitten.blogspot.co.uk/2017/09/german-federal-court-of-justice-rules.html>); Eleanora Rosati, *Another German Decision Warns Against Broad Application of GS Media Presumption for For-Profit Link Providers*, 1709 BLOG (Oct. 23, 2017), <https://the1709blog.blogspot.com/2017/10/another-german-decision-warns-against.html>).

<sup>184</sup> Bundesgerichtshof [BGH], Sept. 21, 2017, Case No. I ZR 11/16, *Thumbnail III* (in German), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=87734d1e17e813d0d6bab25ec216d797&nr=80322&os=0&anz=1> (*Thumbnail III*).

<sup>185</sup> BGH, *Thumbnail III*, at ¶ 64, citing to BGHZ 194, 339, at ¶ 28—Alone in the Dark, BGHZ 206, 103 at ¶ 27—Liability for Hyperlinks.

<sup>186</sup> BGH, *Thumbnail III*, at ¶ 63.

linked content. Instead, it would have to be shown that the operator of a search engine actually knew or ought to have known that publication of a work was unauthorized in order for it to be liable for linking to it.<sup>187</sup>

#### 4.3.4 Continuing Uncertainty

Following the CJEU's *Ziggo* ruling and the expansion of the communication to the public right to cover activities traditionally viewed as being in the realm of secondary liability, there has been uncertainty about how the broader principles from that judgment interoperate with the EU statutory safe harbor regime.<sup>188</sup> A set of cases referred to the CJEU by the German Federal Court in September 2018 asked the CJEU to clarify whether YouTube and cloud locker service provider, Uploaded.net, have direct liability for damages for communicating copyrighted works to the public, on the basis of their respective roles in operating platforms that allow users to upload copyright-infringing content. The pending cases also ask the CJEU to clarify whether these platform operators are disqualified from relying on the EU statutory hosting safe harbor because they may be viewed as “active” intermediaries on the basis of certain activities undertaken by the platform operators, such as optimizing presentation of user-uploaded content.<sup>189</sup> If the CJEU were to answer the referred questions in the affirmative, it would achieve two of the objectives embodied in the pending legislative reform proposal in Article 13 (now Article 17) of the EU Digital Single Market Copyright Directive—first, imposition of direct liability on hosting OSPs for communication to the public or making available of copyrighted works on the basis of storing and providing public access to unauthorized content uploaded by their users; and second, the exclusion of UGC hosting platforms from the EU statutory safe harbor regime.

### 4.4 United States

#### 4.4.1 Overview

In the United States, courts have analyzed online service providers' direct liability for linking by reference to the rights of reproduction, distribution, public display, and public

---

<sup>187</sup> BGH, *Thumbnail III*, at ¶ 65.

<sup>188</sup> In the *Ziggo* ruling, the CJEU found that the operators of The Pirate Bay had knowledge of the infringing content that was linked from the platform, and thus would not be able to rely on the statutory safe harbor for hosting activity. EU law is not harmonized as to secondary copyright liability. EU law is partially harmonized in respect of remedies available to copyright holders against online service providers, through EU copyright injunctions available under Article 8(3) of the 2001 Information Society Directive, 2001/29/EC, but not as to damages. The CJEU's *Ziggo* ruling was noteworthy because it was the first case at the EU level where an OSP had been found to have liability for copyright infringement (and hence was subject to damages). See Christina Angelopoulos, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, KLUWER COPYRIGHT BLOG (June 30, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>.

<sup>189</sup> *YouTube & Ors, and Elsevier & GEMA*; see also Kristina Ehle & Stephan Kress, *Time to Hit Pause: Copyright Infringement on User Generated Platforms—When Is the Platform Provider Liable for Damages?*, Morrison Foerster Client Alert, Jan. 24, 2019, <https://www.mofo.com/resources/publications/190122-copyright-infringement.html>; Jurriaan van Mil, *German BGH—Does YouTube Perform Acts of Communication to the Public*, KLUWER COPYRIGHT BLOG (Jan. 27, 2019), <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>.

performance, and the right to prepare derivative works.<sup>190</sup> In contrast to the approach taken by EU courts, some U.S. appellate courts have followed a more technical approach to analyzing infringement liability for linking, taking account of how particular types of links and/or linking techniques operate when analyzing whether they implicate copyright holders' reproduction, public display, and public performance rights. U.S. courts have drawn distinctions based on different types of linking, and the differing level of knowledge or intent of the person or entity creating the link, from the creation of web search engines that are produced through an automated process of a "bot" crawling webpages and storing URLs, to an individual blogger or news site that intentionally places a link to particular content as part of the expressive content of a post or story. This chapter does not seek to present a comprehensive survey of the range of contexts where linking has attracted liability. Instead, for the purpose of providing a high-level comparison with EU legal developments, the following section briefly highlights two of the most prominent recent U.S. judicial rulings on OSPs' direct copyright liability for linking.<sup>191</sup>

#### 4.4.2 The Server Test—Copyright Liability for Framing

In the most well-known U.S. case analyzing copyright liability for framing, *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>192</sup> the Ninth Circuit Court of Appeals considered whether Google, Inc. could be held liable either directly, or under a secondary liability theory, for in-line linking used in the presentation of search results from the Google Image Search service. The court found that Google was not liable for direct infringement of Perfect 10's exclusive rights to control reproduction, display, and distribution of its images, but could potentially be subject to liability for indirect contributory copyright infringement. However, while this judgment and the "server test" articulated by the Ninth Circuit are widely known, it is not clear how widely courts outside of the Ninth and Seventh Circuits have followed this approach.

---

<sup>190</sup> One court has analyzed OSPs' indirect liability for hosting links by reference to the public performance right. *See Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012) (finding that hosting embedded links did not give rise to contributory liability for assisting unauthorized public performance of infringing videos by users).

<sup>191</sup> For more comprehensive discussions of linking liability, *see* Alain Strowel & Vicky Hanlon, *Secondary Liability for Copyright Infringement with Regard to Hyperlinks*, in PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW, 71-109 (Alain Strowel ed., 2009); and Alain Strowel & N. Ide, *Liability With Regard to Hyperlinks*, in 24 COLUM.-VLA J.L. & ARTS 403 (2001). U.S. courts have contemplated that platforms may face *secondary liability* for linking in various contexts, including for operating a search engine, for hosting links posted by users, and for offering cloud storage services that combine sideloading of files by users. In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), reprinted as amended on Dec. 10, 2007, the Ninth Circuit indicated that Google could be held contributorily liable for operating its image search engine in particular circumstances. Departing from the frequently cited contributory liability test in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971), the court announced a two-prong test: Google could face liability where (i) it had actual knowledge that infringing images were locatable with its search engine, and (ii) it could have taken simple measures to prevent further infringement but failed to do so. On the evidence before the court, it was not clear that Google had such actual knowledge because there were deficiencies in the copyright infringement notices that Perfect 10 had sent to Google. It was also not clear whether any "simple measures" existed that could have been taken by Google to avoid infringement. As a result, the court did not make a determination on contributory liability and remanded several issues to the district court for further fact finding. Only one U.S. court appears to have considered whether linking may implicate copyright owners' public performance right. In *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012), the Seventh Circuit Court of Appeals considered this somewhat obliquely, in the context of a contributory copyright infringement claim as a potential basis for holding an online platform liable for sideloading done by its users and by unknown third parties.

<sup>192</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), reprinted as amended on Dec. 10, 2007.

Perfect 10, the owner of the copyright in a collection of photographs of naked models, brought the lawsuit against Google for the unauthorized appearance of Perfect 10's copyrighted photos in search results produced by Google's Image Search service. At that time, when users searched for particular images, the results were displayed by framing content in the viewer's screen. Users saw thumbnails of images on webpages indexed by Google's search engine, together with text about the actual web location of the original image. When a searcher clicked on a thumbnail, the full-size image displayed in a frame on the viewer's computer browser. Clicking on the thumbnail triggered a set of HTML instructions to be sent from Google's webpage to the searcher's browser. This instructed the viewer's browser to fetch the original image from the third-party website on which it was located, and to display that in a window in the lower half of the viewer's screen. Google did not store the full-size images, nor did it transmit them during this process. Although to a viewer the resulting page may have looked like an integrated whole, it was in fact dynamically assembled and comprised of elements from multiple servers—the thumbnails and text being served from Google, and the full-size image of an infringing copy of Perfect 10's photographs being served from a third-party website that had been indexed by Google's search engine.

Perfect 10 claimed that Google's search results directly violated its rights of reproduction, public display, and distribution,<sup>193</sup> and argued that this should be assessed by how material appeared to web searchers. It sought an injunction preventing Google from creating and publicly displaying thumbnails of Perfect 10's images, and to stop it from indexing websites that displayed infringing copies of its photos.

The lower federal district court analyzed this from a technological perspective. It looked at the location of the server hosting the infringing copies of the photos to assess whether Google had violated Perfect 10's right of public display ("the Server Test"). It found that a computer owner that stored an electronic copy of a copyrighted image and served it to another Internet searcher's web browser violated the copyright owner's exclusive right of public display. Conversely, the operator of a website that in-line linked or framed the electronic information constituting the photo but did not itself store and serve that electronic information to a user's browser, did not violate the public display right. On that understanding, the district court concluded that Google did not infringe the display right by framing the infringing image in the search results it displayed. It described this approach as the Server Test.

On appeal, the Ninth Circuit Court of Appeals endorsed the technical approach in the district court's server test and analyzed whether Google's use of framing in its image search results violated Perfect 10's exclusive right to publicly display its copyrighted photos by applying the U.S. copyright statute's definitions of "display," "copies," and "fixed" to the technical processes involved in framing. The court noted the statute defines the "display" of a copyrighted work to mean "show[ing] a copy of it, either directly or by means of a film, slide, television image, or any other device or process." Further, the Act defines "copies" as "material objects, . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" and provides that a work is "fixed" in a tangible medium when it is embodied in a copy, "by or under the authority of the author, [and] is sufficiently permanent or

---

<sup>193</sup> Perfect 10 also claimed that Google's creation of thumbnails of its original full-size photos—smaller, lower resolution copies of the indexed images—infringed its exclusive rights of reproduction and display.

stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>194</sup> Based on these definitions, the court analyzed both Google’s creation and use of thumbnail images and the links in its search results to full-size images on webpages it had indexed.

The court concluded that Google did not “display” an infringing copy of a full-size Perfect 10 photographic image when it framed in-line linked images that appeared on its users’ computer screens. While the photographic image was a work that was fixed on the computer server storing and sharing it, since Google’s servers did not store the photographs, Google did not have a “copy” of the image for the purpose of the Copyright Act and therefore was not engaged in a “display” within the statutory definition. Rather than communicating a copy of the image, Google provided HTML instructions that directed a user’s browser to go to the website publisher’s computer where the full-size image was stored. Providing HTML instructions was not equivalent to showing a copy of the image because the HTML instructions were text, not an image. Moreover, the HTML instructions could not, by themselves, cause the infringing images to display on the users’ computer screen. Where an image was framed, it was the interaction between the user’s browser and the server hosting the infringing copy of the photo that caused the infringing image to appear on the viewer’s screen. It was the viewer who undertook the volitional act to click on the link. The court noted that Google might be said to facilitate users’ access to infringing images but found that this type of assistance could only raise secondary contributory copyright infringement liability and did not constitute direct infringement of Perfect 10’s public display right.<sup>195</sup>

In relation to the full-size images, the court found that Google had not violated Perfect 10’s right to prepare derivative works because the framing did not incorporate a protected work in a concrete or permanent form. Any reproduction of the full-size images in the process of showing the results was temporary, and was done by the user’s browser, as a result of the user’s volitional act in clicking on the thumbnail, and not by Google. The framing process did not infringe Perfect 10’s right to distribute its works because the court concluded that distribution requires an actual dissemination of a “copy” and Google did not communicate the full-size image to the searcher’s computer. Instead, it was the website publisher’s computer that distributed copies of the images by transmitting the electronic information comprising the photo to the searcher’s computer. Finally, the court acknowledged that framing the full-size images might give some web searchers the impression that it was Google that was showing the image within its results page. However, while in-line linking might cause some viewers to erroneously believe that they were viewing a single integrated page with content communicated from Google’s servers, consumer confusion was not the focus of copyright policy, and was better addressed by trademark law.<sup>196</sup>

---

<sup>194</sup> 17 U.S.C. § 101.

<sup>195</sup> Perfect 10 v. Amazon, 508 F.3d 1146, 1161. The court’s careful analysis of the public display right in terms of the technical process of framing and the role played by HTML code is particularly noteworthy because the court revised its original opinion on this point to correct errors in the original description of how the technical process of framing operates. *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. May 16, 2007), *reprinted as amended* at Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. Dec. 3, 2007).

<sup>196</sup> In contrast, in regard to the thumbnail images that appeared in Google Image search results, the Ninth Circuit Court of Appeals found that Perfect 10 had established that Google was *prima facie* liable for displaying the

### 4.4.3 Embedded Links

While the Server Test continues to be the governing approach in the Ninth and Seventh Circuit Courts of Appeals, lower district courts in the Second Circuit and another federal district have declined to follow it in analyzing linking in terms of copyright's display right. Most recently, the Southern District of New York declined to follow the technological approach in analyzing copyright liability for linking in the more controversial area of embedded links, where linked content displays automatically on a viewer's screen. In *Goldman v. Breitbart News Network LLC, et al.*,<sup>197</sup> the court was asked to consider whether the defendant media companies had infringed the photographer plaintiff's exclusive right to display its copyrighted photo by incorporating a third party's tweet with an unauthorized copy of the plaintiff's photo in the defendants' news reports. The district court analyzed the copyright liability issue on the basis of how the content appeared on readers' screens, rather than by where the content was physically located, and the court emphasized the automatic nature of the display of embedded linked content and the absence of volitional conduct by viewers. The court drew a functional analogy with the Supreme Court's approach to analyzing infringement of the public performance right in the *Aereo* judgment, where the Supreme Court decided that "invisible" technical distinctions that did not affect the viewers' experience were not the determining factor in infringement analysis.<sup>198</sup>

The district court declined to follow the Server Test because it found that the language of the copyright statute and its legislative history did not support "a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act."<sup>199</sup> It also concluded that outside of the Ninth and Seventh Circuits, there was no evidence that other courts had followed the Server Test in analyzing liability for linking.<sup>200</sup> Finally, it distinguished the Ninth Circuit's Perfect 10 ruling on

---

thumbnail images (which were created by Google and stored on its servers), but found that creation and use of the thumbnail images was fair use.

<sup>197</sup> *Goldman v. Breitbart News Network, LLC, Time, Inc., Yahoo, Inc., Vox Media, Inc., Gannett Co. Inc., Herald Media, Inc., Boston Globe Media Partners, Inc., and New England Sports Network, Inc.*, 302 F. Supp. 3d 585 (S.D.N.Y. Feb. 15, 2018).

<sup>198</sup> *Id.* at 589 and 594–95 (discussing the Supreme Court's ruling in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), which considered whether Aereo had infringed copyright holders' public performance by selling its subscribers a technologically complex service that allowed them to watch television programs over the Internet. Aereo argued that its service did not infringe the public performance right of the broadcaster plaintiffs because the user chose the programs and Aereo's technology merely responded to the user's choice; it was the user and not Aereo who was in fact "transmitting" the performance. Judge Forrest noted that the Supreme Court rejected this analysis, comparing Aereo to the cable companies that parts of the 1976 Amendments were intended to reach. "When comparing cable technology (where the signals 'lurked behind the screen') to Aereo's technology (controlled by a click on a website), the Court stated: '[T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into 'a copy shop that provides its patrons with a library card.'").

<sup>199</sup> *Id.* at 593.

<sup>200</sup> *Id.* at 592 (finding that outside of the Ninth Circuit only three judgments had considered infringement of the display right in light of the Perfect 10 v. Amazon Server Test: (1) *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012), adopting Server Test for analysis of secondary liability for infringement of public performance right; (2) *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 652 (S.D.N.Y. 2013) (stating (without apparently endorsing) that "the Ninth Circuit has held that the display of a photographic image on a computer may implicate the

its facts, because it found that the liability analysis in that case took account of the volitional action requirement for direct liability, since it was searchers who clicked on the link provided in the Google Image Search results that initiated the process that fetched the full-size infringing photos. In contrast, in the case before the court involving embedded links to the third-party tweet, it was the defendant media companies that were the actors that had undertaken an intentional act that caused the *automatic* display of the infringing photo in viewers' screens.<sup>201</sup> Each defendant had taken "active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown."<sup>202</sup>

The Second Circuit Court of Appeals declined to hear an interlocutory appeal on the ruling in 2018 and the case is awaiting trial.<sup>203</sup> As a result, there is currently considerable uncertainty about the legal status of in-line linking done by individuals and operators of news websites, and there may be a de facto division of approaches to analyzing direct copyright liability for different types of linking under U.S. law in different federal districts. Nevertheless, in contrast to the situation in the EU, at the level of secondary liability, OSPs that qualify for the DMCA's statutory safe harbor regime continue to have a safe harbor limiting their financial liability for links posted by their users where they remove identified links to unauthorized copyrighted content upon receiving notice from a copyright holder.

#### 4.5 Conclusion

This chapter's survey of cases suggests that OSPs face greater exposure to direct copyright liability under EU law where they link, or host links posted by users, to unauthorized copyrighted content, than their U.S. counterparts. This is a result of the combination of the broader scope of the EU communication right, the absence of an express safe harbor in the ECD regime for link and location tools providers, and the existence of mandatory injunctions that may be issued against Internet intermediaries to prevent copyright infringement, which are discussed in chapter 5.

Although the CJEU's *GS Media* ruling has clarified EU law on linking liability in relation to individual Internet users, the CJEU's judgments in the *GS Media*, *Filmspeler*, and *Ziggo* cases have amplified the scope of potential liability for OSPs that deal with or host links. The CJEU's introduction of the rebuttable presumption of knowledge for OSPs that deal with links on a for-profit basis appears to have added cost and complexity to copyright clearance analysis. While the German BGH's 2017 *Thumbnails III* ruling has provided some certainty to search engines operating in Germany, the CJEU is yet to provide definitive clarification of what constitutes "for-profit" linking activity, for the purposes of identifying who is subject to the knowledge presumption. Finally, the *Filmspeler* and *Ziggo* rulings have left open many questions

---

display right, though infringement hinges, in part, on where the image was hosted."); (3) The Leader's Institute, LLC v. Jackson, 2017 WL5629514 (N.D. Tex. Nov. 22, 2017) (rejecting its application).

<sup>201</sup> *Id.* at 593–94.

<sup>202</sup> *Id.*

<sup>203</sup> Eriq Gardner, *Appeals Court Won't Take Up Copyright Decision that Raised Alarm About Embedding, Linking*, THE HOLLYWOOD REPORTER ESQ. BLOG (July 17, 2018), <https://www.hollywoodreporter.com/thr-esq/appeals-court-wont-take-up-copyright-decision-raised-alarm-embedding-linking-1127852>.

about when Internet intermediaries will face direct liability for their role in operating a platform that allows users to upload potentially infringing content and optimizes its presentation.

## CHAPTER 5

### MONITORING OBLIGATIONS AND ONLINE SERVICE PROVIDER STATUTORY SAFE HARBOR REGIMES

#### 5.1 Introduction

This chapter considers a second mechanism through which copyright law shapes the practices of online service providers—statutory safe harbor regimes that limit online service providers’ liability for copyright infringement by their users. It analyzes the eligibility conditions and scope of the protection afforded by the regimes created by the U.S. Digital Millennium Copyright Act (DMCA) and the EU e-Commerce Directive (ECD) from a comparative doctrinal perspective.<sup>204</sup> This chapter does not seek to provide a comprehensive comparison of either the U.S. or the EU intermediary framework, recognizing that other scholarly accounts have done so.<sup>205</sup> Instead, it highlights key differences in the structural features of the two statutory regimes and judicial interpretations of the two systems, to explain how these differences have manifested in the types of monitoring, filtering, and blocking obligations that have been imposed on OSPs in the United States and the European Union.

It does this for several reasons. First, to provide context for the data presented in chapter 8, gathered from the interviews conducted as part of this project, which sought to understand how OSPs use the U.S. and EU safe harbors in their operations. Second, to provide the background that is necessary to understand what would change if the pending EU copyright reform proposal (discussed in the next chapter) is adopted in its current form.

There are many similarities between the U.S. and EU statutory safe harbor regimes for OSPs. Both are structured as conditional immunity systems, providing qualifying entities with protection against financial liability for copyright infringement done by their users.<sup>206</sup> Both regimes currently provide OSPs with a safe harbor from liability where they have no actual or constructive knowledge of copyright infringement, and both require OSPs to act to remove or disable access to alleged copyright-infringing material upon being notified of it by a rightsholder or its representative, on an ex-post basis. In recent years, differences in the scope of protection have emerged as a result of diverging judicial interpretations in U.S. and EU courts, and the increasing use by European national courts of copyright-specific injunctions against OSPs.

At the same time, there has been a noticeable overarching effort in both the U.S. and the EU in recent years to recalibrate the balance between copyright holders and OSPs that is embodied in the respective statutory safe harbor frameworks through imposition on OSPs of a notice and stay down obligation or an ex-ante duty to monitor for potential infringing content. This move was strongly opposed in the U.S. In contrast, it is at the core of the proposal for

---

<sup>204</sup> This chapter reflects legal developments up to March 2018, with the exception of the references to the pending EU Copyright Directive.

<sup>205</sup> For more detailed accounts of the EU intermediary liability regime, *see* ANGELOPOULOS, *supra* note 2, and HUSOVEC, *supra* note 2; for national accounts, *see* Graeme B. Dinwoodie, *A Comparative Analysis of the Secondary Liability of Online Service Providers*, in *SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS* (Graeme B. Dinwoodie ed., 2017); SENG, *supra* note 20; and FERNANDEZ-DIAZ, *supra* note 20; for comparative accounts *see* Peguera, *The DMCA Safe Harbors*, *supra* note 2, and Farano, *supra* note 2.

<sup>206</sup> *See* EDWARDS, *supra* note 20.

reforming the existing EU intermediary liability framework in the pending EU Copyright Directive, which has been the subject of much discussion since 2016. If adopted in its current form, Article 17 (formerly Article 13) of the pending EU Digital Single Market Copyright Directive<sup>207</sup> would disrupt the transatlantic consensus on OSP liability rules that has operated for nearly two decades. The proposed directive would alter the existing intermediary liability framework in the European Union in three ways: (1) it would impose direct liability on for-profit hosting platforms for unauthorized content uploaded by their users; (2) it would exclude most user-uploaded content hosting platforms from the EU statutory hosting safe harbor in respect of copyright liability; and (3) it would create incentives for OSPs to adopt content identification and filtering technology to enable ex-ante monitoring and enforce a new notice and stay down obligation, as conditions for obtaining an exemption from direct liability. If adopted in its current form, the Copyright Directive would also shift the underlying orientation of the EU safe harbor system from an ex-post knowledge-reactive regime, to one based on an ex-ante duty for hosting platforms to monitor and prevent infringement. This would result in a major divergence between the U.S. and EU legal frameworks for intermediary liability in regard to commercial platforms that host user-generated content.

## **5.2 U.S. Legal Framework**

### **5.2.1 Overview**

In the United States, efforts to impose monitoring or notice and stay down obligations on OSPs can be seen in three areas. First, a series of lawsuits demonstrates a concerted effort—mostly unsuccessful—to weaken the knowledge requirements that form the core of the DMCA statutory safe harbor regime. In these cases, rightsholders sought particular interpretations of the eligibility conditions for the safe harbor regime, which, if they had been accepted by U.S. courts, would have lowered the threshold for OSPs to be disqualified from the statutory regime’s protections and could have increased obligations for hosting OSPs seeking safe harbor protection. Second, one district court ruling appears to have imposed a monitoring obligation on a music locker service with a specific architecture. However, this ruling was narrowed on appeal, and appears to be limited to its particular facts. Third, policy consultations on requiring OSPs to adopt a notice and stay down policy as a condition for safe harbor eligibility took place from 2014 to 2017. These are reviewed in chapter 6.

### **5.2.2 The DMCA Safe Harbor Regime**

The DMCA established a statutory safe harbor regime, now incorporated in § 512 of the U.S. copyright statute, which limits the direct and secondary liability of “Internet service providers”<sup>208</sup> that meet its qualifying conditions.<sup>209</sup> Qualifying OSPs obtain immunity from

---

<sup>207</sup> See Pending EU Copyright Directive, *supra* note 8. Article 13 was renumbered to Article 17 in the final version of the EU Digital Single Market Copyright Directive adopted by the European Parliament on March 26, 2019.

<sup>208</sup> The DMCA regime provides safe harbors to two categories of “Internet service providers,” which are defined in 17 U.S.C. § 512(k). However, as that term has come to be generally understood as designating entities that provide Internet access services, the more general term “online service provider” (OSP) will be used in this chapter.

<sup>209</sup> The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Title II (codified at 17 U.S.C. § 512 (2006)).

monetary damages awards and are subject to a narrower set of injunctions.<sup>210</sup> The DMCA regime provides a safe harbor to OSPs that engage in four types of activities: (a) transitory digital network communications, where an ISP acts as a “mere conduit” in providing Internet access;<sup>211</sup> (b) system caching;<sup>212</sup> (c) for information residing on systems or networks at the direction of a user (including hosting);<sup>213</sup> and (d) for providing information location tools, such as hyperlinks.<sup>214</sup> It also provides a further limited exemption for public and other nonprofit educational institutions of higher learning, in respect of infringing activities of faculty members and employee graduate students in certain circumstances.<sup>215</sup>

To obtain safe harbor protection, all OSPs must comply with two threshold conditions. First, they must adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of account holders who are “repeat infringers” and inform their subscribers and account holders of this. Second, they must accommodate and not interfere with “standard technical measures,” a term which has a specific definition in the DMCA.<sup>216</sup> In addition, to qualify for the safe harbor for hosting, OSPs must designate an agent to receive notifications of claimed infringements and make available the name, email address and contact information for that person on its website. They must also notify the Copyright Office of the name and contact information for the designated agent and keep that information up to date in the Copyright Office’s directory of DMCA-designated agents on an ongoing basis.<sup>217</sup>

To qualify for the safe harbors for caching, hosting, and provision of links and location tools, respectively, OSPs must comply with three additional conditions. First, they must not have actual knowledge that material or an activity using material on the OSP’s system or network is

---

<sup>210</sup> 17 U.S.C. § 512(j); *The Digital Millennium Copyright Act of 1998*, COPYRIGHT OFFICE SUMMARY (Dec. 1998) at 9, <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>211</sup> 17 U.S.C. § 512(a).

<sup>212</sup> 17 U.S.C. § 512(b).

<sup>213</sup> 17 U.S.C. § 512(c).

<sup>214</sup> 17 U.S.C. § 512(d).

<sup>215</sup> 17 U.S.C. § 512(e).

<sup>216</sup> 17 U.S.C. § 512(i)(2).

<sup>217</sup> 17 U.S.C. § 512(c)(2); failure to register the designated agent with the U.S. Copyright Office, and to keep the email and contact information of the designated DMCA agent up-to-date may result in loss of the hosting safe harbor protections, even if the designated agent’s contact information is made available on the OSP’s website. *See* BWP Media U.S.A., Inc. v. Hollywood Fan Sites, LLC, 115 F. Supp. 3d 397, 400 (S.D.N.Y. June 30, 2015), citing to *Wolk v. Kodak Imaging Network, Inc.* 840 F. Supp. 2d 724, 745 (S.D.N.Y. 2012), *aff’d sub nom.* *Wolk v. Photobucket.com, Inc.*, 569 Fed. Appx. 51 (2d Cir. 2014); *see also* *Costar Grp Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 697, n.4 (D. Md. 2001) (safe harbor protection is only available after notification of a designated agent; safe harbor protection does not operate retroactively); *see also* *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (finding that there was a triable issue of material fact as to AOL’s eligibility for the DMCA safe harbors on the grounds that (i) the failure to notify the U.S. Copyright Office of the change in the DMCA designated agent’s email address and (ii) failure to implement forwarding of messages to the new email address was relevant to determining whether AOL had met the threshold condition of adopting and reasonably implementing a policy to terminate accounts of repeat infringers under 17 U.S.C. § 512(i)). A reasonable trier of fact could also find that AOL would be deemed to have disqualifying knowledge of infringing material hosted on a Usenet group to which it provided access because AOL failed to update the DMCA designated agent contact information on the U.S. Copyright Office’s registry when it changed the email address and notice was sent to the listed address).

infringing,<sup>218</sup> or in the absence of actual knowledge, they must not be aware of facts or circumstances from which infringing activity is apparent (“red flag” knowledge). Upon obtaining such knowledge or awareness, the OSP must act expeditiously to remove, or disable access to, the allegedly infringing material.<sup>219</sup> Second, the OSP must not have received a financial benefit that is directly attributable to an infringing activity where the OSP has “the right and ability to control” that activity.<sup>220</sup>

Third, OSPs must put in place a “notice and takedown” system. When an OSP receives a valid notice from a copyright holder or its agent identifying specific allegedly infringing content uploaded to the hosting platform, or allegedly infringing material to which a search engine or other location tool provider has linked, the OSP must act expeditiously to remove or disable access to the identified material.<sup>221</sup> OSPs are only required to act to remove or disable access to identified content on receipt of a valid notice, containing the information specified in § 512 and which identifies the location of the alleged infringing content with sufficient specificity.<sup>222</sup> Notices that do not identify the alleged infringing content with sufficient specificity will not be deemed to provide the OSP with knowledge that would disqualify the OSP from relying on the safe harbor.<sup>223</sup>

The DMCA regime contains several procedural safeguards that were intended to provide due process to persons whose content is removed as a result of a takedown notice, and to minimize misuse of the takedown mechanism and overbroad removal of content. First, a person whose content has been removed may be able to send a counternotice to the OSP and request that the content be reinstated. An OSP that receives a valid counternotice can put back the removed content within 10–14 days without attracting liability, unless the copyright complainant files a lawsuit.<sup>224</sup> Second, to deter misuse of the takedown process, the DMCA provides a right of action to recover damages, costs, and attorney’s fees, where content is inappropriately removed or reinstated as a result of a knowing material misrepresentation in a notice or a counternotice.<sup>225</sup> In addition, the DMCA contains a very important limitation—eligibility for the safe harbors cannot be conditioned on a requirement for an OSP to monitor its service, or affirmatively seek

---

<sup>218</sup> 17 U.S.C. § 512(c)(1)(A); § 512(d)(1).

<sup>219</sup> 17 U.S.C. § 512(c)(1)(A); § 512(d)(1).

<sup>220</sup> 17 U.S.C. § 512(c)(2); § 512(d)(2).

<sup>221</sup> 17 U.S.C. § 512(c)(1)(C). Access must be disabled for a period of at least 10 days.

<sup>222</sup> 17 U.S.C. § 512(c)(3). A notice that does not comply with all the specified statutory requirements does not constitute knowledge for the purposes of the DMCA. However, where an OSP receives a notice that substantially complies with certain of the statutory requirements, it will not be deemed to have knowledge if the OSP promptly contacts the notice sender or takes other reasonable steps to assist in the receipt of a notice that does substantially comply with all the relevant statutory requirements (*see* § 512(c)(3)(B)(ii)).

<sup>223</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108–09 (C.D. Cal. 2009), *aff’d sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and suspended on rehearing*, 718 F.3d 1006 (9th Cir. 2013).

<sup>224</sup> 17 U.S.C. § 512(g) (2)–(3).

<sup>225</sup> 17 U.S.C. § 512(f).

out facts indicating infringing activity, except to the extent that is consistent with a “standard technical measure.”<sup>226</sup>

The DMCA’s legislative history indicates that Congress intended that the safe harbor regime would “provide strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements.”<sup>227</sup> To encourage that cooperation, Congress divided the burdens of compliance in the notice and takedown regime between copyright owners and OSPs. OSPs are required to act expeditiously to remove or disable access to allegedly infringing content that is identified with specificity in valid copyright infringement notices. Congress placed the burden on copyright holders to identify infringing material because it considered that copyright owners were in a better position to know what material they own. It reasoned that copyright owners are “thus better able to efficiently identify infringing copies than service providers . . . who cannot readily ascertain what material is copyrighted and what is not.”<sup>228</sup> The Court of Appeals for the Ninth Circuit subsequently affirmed this division of responsibilities. It concluded that the DMCA notification procedures “place the burden of policing ongoing copyright infringement—identifying potential infringing material and adequately documenting infringement—squarely on the owners of the copyright.”<sup>229</sup>

Finally, OSPs that qualify for the DMCA safe harbors can only be subjected to a narrow set of injunctions. Internet access providers that qualify for the mere conduit safe harbor in 17 U.S.C. § 512(a) can only be subject to two specified types of injunctions. OSPs that qualify for the hosting safe harbor in § 512(c), the link provider safe harbor in § 512(d), or the caching safe harbor in § 512(b), may only be subjected to three specified types of injunctions.<sup>230</sup> Injunctions issued under § 512(j) are tied to OSPs meeting the DMCA regime’s qualifying conditions. They are also subject to the general procedural and evidentiary standards required to obtain an injunction in a copyright lawsuit, including a showing of irreparable injury.<sup>231</sup> Unlike the situation under the EU safe harbor framework (discussed below), before an injunction can be issued against an OSP that qualifies for one of the DMCA safe harbors, four conditions must be satisfied. These were intended to ensure that DMCA injunctions would be proportionate in their impacts on qualifying OSPs and on Internet users. Also unlike the situation in the EU, injunctions issued under 17 U.S.C. § 512(j) can only be issued against an OSP that is a party to a lawsuit.<sup>232</sup> The legislative history of the copyright injunction provisions and a set of U.S. court

---

<sup>226</sup> 17 U.S.C. § 512(m).

<sup>227</sup> S. REP. NO. 105-190 at 20; H.R. REP. NO. 105-551, pt. 2, at 49.

<sup>228</sup> S. REP. NO. 105-190 at 48; H.R. REP. NO. 105-551, pt. 2 at 57–58.

<sup>229</sup> *Perfect 10 v. CCBill*, 488 F.3d 1102, 1113 (9th Cir. 2007).

<sup>230</sup> 17 U.S.C. § 512(j).

<sup>231</sup> *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006); *MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (N.D. Cal. 2007). The text of 17 U.S.C. § 512(j) makes clear that the special rules in the section apply (a) “in the case of any application for an injunction under section 502”; and (b) against “a service provider that is not subject to monetary remedies under [section 512]”—i.e., complies with the threshold and safe-harbor specific eligibility conditions.

<sup>232</sup> However, in recent years, movie and publishing copyright industry groups have developed a practice of seeking injunctions against third party technical intermediaries using the general copyright injunction provision in 17 U.S.C. § 502 and the All Writs Act, rather than the DMCA injunction provision in 17 U.S.C. § 512(j). Copyright industry groups brought lawsuits against the operators of offshore websites that offer unauthorized copyright content for streaming or download and obtained default judgments against the site operators and orders that prohibit the foreign site operators from continuing to make available the unauthorized copies of copyrighted movies. The wording of the

decisions have affirmed that general copyright injunctions in 17 U.S.C. § 502, and the more tailored DMCA injunctions in § 512(j), are both subject to the due process standards embodied in rule 65 of the Federal Rules of Civil Procedure (FRCP).<sup>233</sup>

---

orders also purported to direct U.S.-based technical and financial intermediaries that were not party to the lawsuit against the direct infringer and often would qualify for one of the DMCA safe harbors, to terminate provision of their services to the foreign website. By doing so, U.S. copyright holders have been able to bypass the perceived limitations of the DMCA injunction mechanism. *See, e.g.*, MovieTube litigation (Paramount Pictures Corporation; Warner Bros. Entertainment Inc.; Twentieth Century Fox Film Corporation; Columbia Pictures Industries, Inc.; Universal City Studios LLC; Universal Studios Home Entertainment LLC; and Disney Enterprises, Inc. v. John Does, Jane Does and /or X/Y/Z Corporations d/b/a MovieTube; and John Does, Jane Does and/or X/Y/Z Corporations 2-100, Civ. No. 15-CV-5819 (PAC) (S.D.N.Y.), preliminary injunction issued July 29, 2015; followed by default judgment and permanent injunction issued on November 24, 2015, <https://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/MPAA%20injunction.pdf>; Eriq Gardner, *MPAA Testing the Limits of Pirate Site Blocking in MovieTube Lawsuit*, THE HOLLYWOOD REPORTER ESQ BLOG (July 30, 2015), <https://www.hollywoodreporter.com/thr-esq/mpaa-testing-limits-pirate-site-812126/>); *see also* MP3Skull (Arista Records LLC et al. v. Monica Vaslenko et al., Chambers Order issued by Cooke J. (S.D. Fla. Mar. 23, 2017), Case No. 15-21450-Civ-COOKE/TORRES, at \*4-5); ACS v. Sci-Hub litigation (American Chemical Society v. Sci-Hub, d/b/a/www.sci-hub.cc, John Does 1-99, E.D. Va. Civ. No. 1:17cv0726 (LMB) (seeking injunction restraining “any Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, to cease facilitating access to any or all domain names and websites through which Defendant Sci-Hub engages in unlawful access to [ACS’s works].”); Brief of Computer and Communications Industry Association as Amicus Curiae in Support of Objections to Magistrate Judge’s Proposed Findings of Fact and Recommendations, <https://torrentfreak.com/images/cciabrief.pdf>; American Chemical Society v. John Does 1-99 et al., E.D. Va., No. 1-17-cv-00726-LMB- JFA, Order of Judge Leonie Brinkema dated November 3, 2017, <https://torrentfreak.com/images/acsorder.pdf>; and Final Injunction issued by Judge Leonie Brinkema dated November 3, 2017, <https://torrentfreak.com/images/sciinjunc.pdf>; *see also* Ernesto Van der Sar, *Tech Giants Protest Looming U.S. Pirate Site Blocking Order*, TORRENT FREAK BLOG (Oct. 13, 2017), <https://torrentfreak.com/tech-giants-protest-looming-us-pirate-site-blocking-order-171013/>; Ernesto Van der Sar, U.S. Court Grants ISPs and Search Engine Blockade of Sci-Hub, TORRENT FREAK BLOG (Nov. 6, 2017), <https://torrentfreak.com/us-court-grants-isps-and-search-engine-blockade-of-sci-hub-171106/>; Ernesto Van der Sar, Sci-Hub Loses Domain Names But Remains Resilient, TORRENT FREAK BLOG (Nov. 22, 2017), <https://torrentfreak.com/sci-hub-loses-domain-names-but-remains-resilient-171122/>.

<sup>233</sup> 17 U.S.C. § 512(j)(2). David Nimmer notes that injunctions are rooted in equity and copyright injunctions issued under § 502 do not bind nonparties because they must comply with Fed.R.Civ.P. 65(d), which limits the application of federal court injunctions to parties, their officers, agents, and other persons “who are in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” (4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 14.06[C][2][b] n.626 (2018)). In order for a nonparty to be bound, the entity “must either aid and abet the defendant or be legally identified with it.” (NIMMER, *Id.*, n. 627 citing from Paramount Pictures Corp. v. Carol Publ’g Group 25 F. Supp.2d 372, 374 (S.D.N.Y. 1998), *aff’d mem.* 181 F.3d 83 (2d Cir. 1999)). Finally, in relation to injunctions against ISPs that qualify for the DMCA safe harbor regime, the legislative history of the DMCA injunctive provision, § 512(j), appears to confirm that Congress intended that injunctions would only be available against internet service providers that had previously been determined to have engaged in copyright infringement (H.R. REP. NO. 105-551 at 62 (1998); S. REP. NO. 105-190 at 52 (1998)). In discussing when DMCA injunctions directing ISPs to block specific online locations would be available, both the House and Senate Committee Reports contemplated that such orders would be available in cases where the provider was itself engaging in infringing activity. The legislative history states that the DMCA was intended to create a safe harbor regime, but not to rewrite the existing principles of secondary copyright liability. Failure to meet the conditions for the safe harbor regime therefore did not create liability for intermediaries, and injunctions would only be available against intermediaries where the ISP would otherwise be liable under existing principles of secondary liability (S. REP. NO. 105-190 at 52; H.R. REP. NO. 105-551, at 62).

### 5.2.3 Contested Ground

The DMCA safe harbor regime embodies a carefully crafted compromise that was reached between two large industries in 1998—entertainment industry copyright holders and telecommunications companies. The DMCA compromise mirrors the compromise that was struck between the same industries in the negotiations of the 1996 WIPO treaties, discussed in chapter 3.<sup>234</sup> The compromise has not proven to be durable. It has been under constant pressure since 1998, which has manifested in litigation, legislative reform proposals,<sup>235</sup> and policy dialogues about recalibrating the allocation of costs and responsibilities in the DMCA’s notice and takedown process (as discussed in chapter 6).

Many aspects of the DMCA regime have been the subject of intense litigation between music and movie copyright holders on the one side, and technology companies, hosting platforms, and their founders and investors, on the other side. Of the DMCA’s four main safe harbors, the safe harbor for hosting platforms, 17 U.S.C. § 512 (c), has been the most litigated.<sup>236</sup> While this might be viewed as evidence that hosting is the OSP activity that is most controversial for copyright holders, it might equally reflect the pattern of development of Web 2.0, and the emergence of highly visible venture-capital-funded hosting platforms over the last decade. More recent litigation has sought to limit the availability of the hosting safe harbor for a broader range of hosting platforms, including those that rely on volunteer community moderators.<sup>237</sup> Another set of cases has explored the boundaries of the safe harbor for search engines and other link providers in § 512(d).<sup>238</sup> A more recent wave of litigation has sought to adopt more restrictive interpretations of the DMCA threshold conditions, to encourage ISPs to cooperate with rights holders in restricting access of users that have received multiple copyright infringement allegations.<sup>239</sup> In contrast, the safe harbor for caching in 17 U.S.C. § 512(b) has been less tested

---

<sup>234</sup> LITMAN, DIGITAL COPYRIGHT, *supra* note 128, Afterword.

<sup>235</sup> For proposed but not enacted reforms, *see* Combatting Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2009–2010) (COICA); Stop Online Piracy Act, H.R. 3261, 112th Cong. 1st Sess. (2011) (SOPA); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011) (PIPA).

<sup>236</sup> *See, e.g.*, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (*Viacom II*); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108–09 (C.D. Cal. 2009), *aff’d sub nom.* *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and suspended on rehearing*, 718 F.3d 1006 (9th Cir. 2013); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 972 F. Supp. 2d 537 (S.D.N.Y. 2013); *Capitol Records, Inc. v. MP3tunes, LLC et al.*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) (*MP3tunes I*), *partially vacated on other grounds* by *Capitol Records, Inc. et al. v. MP3tunes, LLC et al.* 2013 WL 1987225, 2013 Copr.L.Dec. P 30,427, 107 U.S.P.Q.2d 1770 (S.D.N.Y. May 14, 2013) (*MP3tunes II*), *partially affirmed, partially vacated, partially reversed and remanded* by *EMI Christian Music Group, Inc. v. MP3tunes LLC*, 844 F.3d 79 (2d Cir. 2016), *superseding and replacing* 840 F.3d 69 (2d Cir. 2016).

<sup>237</sup> *Mavrix Photographs LLC v. LiveJournal, Inc.*, 853 F.3d 1020 (9th Cir. 2017).

<sup>238</sup> *See, e.g.*, *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *withdrawn and replaced by* 336 F.3d 811 (9th Cir. 2003) (considering whether creation of thumbnail images was fair use); *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007) (discussed in chapter 4).

<sup>239</sup> *See, e.g.*, *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *EMI Christian Music Group, Inc. v. MP3tunes LLC*, 844 F.3d 79 (2d Cir. 2016), *superseding and replacing* 840 F.3d 69 (2d Cir. 2016); *BMG Rights Management (US) LLC and Round Music LP v. Cox Communications, Inc.*, 881 F.3d 293 (4th Cir. 2018).

in litigation, but may become more contentious in the future as more hosting services rely on Content Distribution Network providers to operate their platforms.<sup>240</sup>

Litigation has focused on almost every aspect of the statutory regime, including the eligibility conditions for obtaining safe harbor protection,<sup>241</sup> the scope of the safe harbors, the level of specificity with which copyright holders are required to identify alleged infringing content, and the level and type of knowledge of infringing content that will disqualify an OSP from being able to rely on the statutory regime's protections. The following section reviews some of the efforts to seek judicial interpretations that would have lowered the standard for disqualifying knowledge and required OSPs to use filtering technology to create a de facto notice and takedown obligation.

The online ecosystem has evolved significantly since the enactment of § 512. Many of the online entities that now play major roles in online communication, such as centralized social media networks, Web 2.0 platforms, and content distribution network providers were not in existence in 1998 and were not contemplated by Congress when it designed the DMCA's notice and takedown regime. The same is true for the diverse and distributed set of entities that may be utilized to play a role in the dissemination of unlawful content from Bit Torrent tracker index sites, to unauthorized streaming and one-click download websites. This has raised questions about the effectiveness of the DMCA in the changed online environment. There has been very little agreement about whether the DMCA should be legislatively modified to address these developments.

## 5.2.4 Litigation Contesting Knowledge Standards

In litigation, rightsholders sought broad interpretations of the level of knowledge that would disqualify an OSP from obtaining the benefits of the safe harbor regime in four dimensions (i) actual knowledge; (ii) red flag knowledge; (iii) willful blindness; and (iv) the right and ability to control. U.S. courts have generally rejected these efforts to date.

### 5.2.4.1 Actual Knowledge and Red Flag Knowledge

U.S. courts have set a high bar for what constitutes disqualifying knowledge. OSPs will only be disqualified from the safe harbors where they have actual knowledge or red flag awareness of "specific and identifiable" instances of infringement.<sup>242</sup> The Second Circuit Court

---

<sup>240</sup> Field v. Google, 412 F. Supp. 2d 1106 (D. Nev. 2006); see also Ernesto Van der Sar, *Cloudflare and RIAA Agree on Tailored Site Blocking Process*, TORRENTFREAK BLOG (May 1, 2018), <https://torrentfreak.com/cloudflare-and-riaa-agree-on-tailored-site-blocking-process-180501> (reporting on agreement that the RIAA could file emergency motions to have Content Delivery Network service Cloudflare block new domain names if third-party infringing site MP3Skull relocated its service to new domain location).

<sup>241</sup> See, e.g., recent litigation concerning the "repeat infringer policy" requirement of 17 U.S.C. § 512(i), *BMG Rights Management (US) LLC and Round Music LP v. Cox Communications, Inc.*, 881 F.3d 293, 305 (4th Cir. 2018) (finding that "Cox failed to qualify for the DMCA safe harbor because it failed to implement its policy in any consistent and meaningful way—leaving it essentially with no policy."); *MP3tunes I*, 821 F. Supp. 2d 627, *partially vacated on other grounds by MP3tunes II*, 2013 WL 1987225, *partially affirmed, partially vacated, partially reversed and remanded by EMI Christian Music Group*, 844 F.3d 79, *superseding and replacing* 840 F.3d 69 (2d Cir. 2016); see also *Mavrix Photographs LLC v. LiveJournal, Inc.*, 853 F.3d 1020 (9th Cir. 2017) (considering the scope of the 17 U.S.C. § 512(c) hosting safe harbor and what is "storage at the direction of a user.")

<sup>242</sup> *Viacom Int'l, Inc. v. YouTube, LLC*, 676 F.3d 19, 31(2d Cir. 2012) (*Viacom II*).

of Appeal has held that knowledge of specific instances is required for OSPs to fulfil their obligation to remove content expeditiously; to require expeditious removal in the absence of specific knowledge or awareness “would be to mandate an amorphous obligation to ‘take commercially reasonable steps’ in response to a generalized awareness of infringement.”<sup>243</sup>

Red flag knowledge plays a key role in demarcating the responsibilities of OSPs and copyright owners within the DMCA’s takedown system. How courts define its boundaries has great bearing on the respective responsibilities of copyright owners and OSPs and on OSPs’ costs of compliance to maintain the safe harbor. U.S. appellate courts have considered “red flag” knowledge in four judgments.<sup>244</sup> While both the Ninth and Second Circuit Courts of Appeal have held that red flag knowledge must relate to specific infringing content, its boundaries are not clear. In the first judgment, in *Viacom II*, the Second Circuit found that reasonable jurors could conclude that internal YouTube emails and reports created by employees were disqualifying red flag knowledge, so long as they referred to particular infringing copyrighted works.<sup>245</sup> In the second judgment, the Court of Appeals for the Ninth Circuit found that hosting platform Veoh did not have red flag awareness merely because it hosted a category of copyrightable material for which it did not have licenses from all content holders, and Veoh executives knew that its platform could be used to post infringing content. The Ninth Circuit rejected the argument that Veoh had red flag knowledge because a news report indicated that its CEO was aware that users were using the platform to infringe copyright. It held that disqualifying an OSP on this basis would make the notice and takedown process pointless and nullify the safe harbor.<sup>246</sup> The Ninth Circuit found that an email that did not come directly from the relevant copyright holder, which stated that unauthorized copies of specific copyrighted works were available on the Veoh website did not constitute red flag knowledge in this case, but in other circumstances might create a duty to investigate.<sup>247</sup>

The Second Circuit Court of Appeals set a very high bar for establishing red flag knowledge in the third judgment, *Capitol Records v. Vimeo*. The Second Circuit rejected the music label plaintiff’s argument that hosting platform Vimeo had disqualifying red flag knowledge where its employees reviewed and interacted with user-uploaded videos that incorporated copyrighted material, by commenting on the videos, placing them in channels,

---

<sup>243</sup> *Viacom II*, 676 F.3d at 30–31.

<sup>244</sup> *Viacom II*. The *Viacom II* litigation settled in 2014 without judicial clarification of the red flag standard. See Peter Kafka, *It’s Over: Viacom and Google Settle YouTube Lawsuit*, RECODE (Mar. 18, 2014), <http://recode.net/2014/03/18/its-over-viacom-and-google-settle-youtube-lawsuit/>.

<sup>245</sup> *Viacom II*, 676 F.3d at 19, 33. (On remand, the District Court found no red flags existed because copyright owners could not establish that YouTube had subjective knowledge of facts relating to *particular* infringing clips, and the Court rejected copyright owners’ efforts to impose an investigative duty, or shift the burden of identifying instances of infringing content to YouTube.)

<sup>246</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1024.

<sup>247</sup> *Id.* at 1024–25. (The Ninth Circuit appeared to endorse a context-specific test for red flag knowledge. It found that an email from Disney’s CEO to Disney executive and Veoh investor, Michael Eisner, which Eisner forwarded to Veoh executives, stating that unauthorized copies of a Disney movie and several Disney television programs were available on the Veoh website, was not a valid DMCA notice that created actual or red flag knowledge when sent by a copyright owner because it did not comply with the DMCA’s prescribed notice requirements. However, the same email might have met the red flag knowledge standard if it had been sent by someone *other* than a copyright owner.)

whitelisting some of them, and “burying” others.<sup>248</sup> To be disqualified from the statutory safe harbor based on red flag knowledge, an OSP must have actual knowledge of facts that would make the claimed infringement *objectively obvious* to a “reasonable person” who was not an expert in copyright law.<sup>249</sup> The Court found that red flag knowledge involves a shifting burden of proof. Once a defendant has satisfied the burden of asserting compliance with the DMCA safe harbor as a defense, the burden shifts to the copyright holder plaintiff to prove the OSP had actual knowledge or red flag knowledge.<sup>250</sup> It found that a mere showing that an OSP’s employee saw some part of a video uploaded by a user that included substantially all of a sound recording of a recognizable song was insufficient to meet the copyright owner plaintiff’s burden of proof for five reasons.<sup>251</sup> First, the employee’s viewing may have been brief, and was not sufficient to show that the employee had ascertained that the audio track contained all or most of a copyrightable musical work. Second, the employee may have been reviewing user-uploaded works for a different business reason than copyright compliance. Third, the fact that the audio track for a user-uploaded video contained music that the copyright owner claimed was recognizable was not sufficient to demonstrate that it was, in fact, recognized by the hypothetical ordinary individual without specialized knowledge of music. It reasoned that lovers of music of one genre would not necessarily be familiar with music from another genre, and music lovers of different ages would not necessarily be familiar with the same music. Fourth, it could not be assumed that OSPs’ employees have expertise in copyright law, or that they could ascertain whether use of a copyrighted work had been licensed or not. Finally, the Court held that 17 U.S.C. § 512(m) makes clear that an OSP is under no legal obligation to have its employees investigate to determine answers to these questions.

In contrast to the high bar established by the Second Circuit in *Vimeo*, the fourth opinion, an interlocutory ruling from the same court several months later in the *EMI v. MP3tunes* case, appeared to endorse a lower threshold. It found that a jury could reasonably conclude that red flag knowledge existed on the basis of categories of copyrighted works, because the CEO of MP3tunes was aware that major music labels had not generally authorized their music to be distributed in the mp3 format at the relevant time, prior to 2007, and therefore could be assumed to know that any mp3 version of the major music labels’ works would be unauthorized.<sup>252</sup>

---

<sup>248</sup> *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 522 (S.D.N.Y. 2013), *aff’d* 826 F.3d 78 (2d Cir. 2016).

<sup>249</sup> *Capitol Records, LLC et al. v. Vimeo LLC*, 826 F.3d 78, 94 and 95 (2d Cir. 2016), citing *Viacom II*, 676 F.3d at 31.

<sup>250</sup> *Capitol Records, LLC et al. v. Vimeo LLC*, 826 F.3d 78, 95 (2d Cir. 2016). *Contra*, *Mavrix Photographs LLC v. LiveJournal, Inc.*, 853 F.3d 1020, 1027 (9th Cir. 2017) (holding that because the hosting in § 512(c) is an affirmative defense, the defendant platforms bears the burden of establishing every element beyond controversy).

<sup>251</sup> *Capitol Records, LLC et al. v. Vimeo LLC*, 826 F.3d at 96–97.

<sup>252</sup> *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 91–92 (2d Cir. 2016). The Second Circuit Court of Appeals reversed and vacated a prior judgment from the district court because it found that a jury could reasonably have concluded that MP3tunes and its CEO were aware of facts and circumstances from which infringement would have been obvious to a hypothetical reasonable person. It rejected the District Court’s reason for declining to hold that MP3tunes was not eligible for the DMCA safe harbor, namely that that would have required it to “actively conduct routine searches and eliminate material likely to be infringing” in violation of § 512(m). (*Capitol Records, Inc. v. MP3tunes LLC*, 48 F. Supp. 3d 703, 716 (S.D.N.Y. 2014)). It cited two grounds. First, the jury had been instructed that MP3tunes did not have a continuing affirmative duty to monitor its servers for infringement, so the jury had the information it needed to conclude that a time-based, targeted duty did not give rise to an “amorphous” duty to monitor, which would have contravened § 512(m). Second, the court seems to have based its conclusion on an inducement theory. It concluded that the jury could have found that the MP3tunes platform was

However, it is possible to distinguish the *MP3tunes* judgment on its particular facts, and the adverse evidence in the record that might point to inducement liability.<sup>253</sup>

#### **5.2.4.2 Willful Blindness and Prohibition on Conditioning Safe Harbor Eligibility on Duty to Monitor or Affirmatively Seek Out Facts**

U.S. Courts have held that disqualifying knowledge can be imputed to an OSP when an OSP willfully blinds itself to acquiring actual or red flag knowledge, where it is aware of a high probability of a fact in dispute and consciously avoided confirming that fact. U.S. Courts have set a high bar for establishing this by finding that willful blindness must relate to specific instances of infringement.<sup>254</sup> While willful blindness can be used to impute knowledge, it does not extend to the creation of an affirmative duty to monitor because 17 U.S.C. § 512(m) is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring. U.S. courts have noted that there is an inherent tension between the willful blindness doctrine and § 512(m). For this reason, willful blindness must be tailored to specific instances of infringing content.<sup>255</sup> While a service provider may lose the protection of the safe harbors for being willfully blind to specific instances of infringement, it cannot be disqualified for failure to affirmatively seek out instances of infringement under § 512(m).

#### **5.2.4.3 Notice and Stay Down—Right and Ability to Control Infringing Behavior**

Separate from the possibility of disqualification from the safe harbor on the basis of actual or red flag knowledge, a hosting OSP might lose safe harbor protection where it has the “right and ability to control infringing behavior” for which it has received a financial benefit directly attributable to the infringing behavior.<sup>256</sup> Copyright owners have sought judicial interpretations of the “right and ability to control” prong of the DMCA eligibility conditions as requiring hosting OSPs to enforce a “notice and stay down” policy through the use of filtering technology, to ensure that infringing content that has been removed by the OSP after being notified by a copyright holder is not re-posted subsequently. The Ninth Circuit Court of Appeal

---

conceived of, and designed to, facilitate copyright infringement due to evidence that the CEO had personally encouraged the platform’s executives to use sideload.com to download infringing content, as well as subjective awareness by the CEO of the existence of notable copyrighted material that had been downloaded and stored in users’ lockers.

<sup>253</sup> It is noteworthy that the Second Circuit issued a revised opinion that cited Ninth Circuit jurisprudence that found that active encouragement of infringement is sufficient to constitute disqualifying red flag knowledge. *See EMI Christian Music Group*, 844 F.3d 79, *superseding and replacing* 840 F.3d 69 (2d Cir. 2016), citing *Columbia Pictures Industries, Inc. et al. v. Fung et al.*, 710 F.3d 1020, 1043 (9th Cir. 2013).

<sup>254</sup> *Viacom II*, 676 F.3d at 35.

<sup>255</sup> *Capitol Records v. Vimeo*, 972 F. Supp. 2d 500, 523–24 (S.D.N.Y. 2013), citing *Viacom Int’l Inc. v. YouTube, LLC*, 940 F. Supp. 2d 110,116 (S.D.N.Y. 2013) (*Viacom III*) and *Capitol Records, Inc. v. MP3tunes et al.*, 2013 WL 1987225, at \*2 (S.D.N.Y. May 14, 2013).

<sup>256</sup> 17 U.S.C. § 512(c)(1)(B), and § 512(d)(2).

conclusively rejected that construction in *UMG v. Veoh* on the basis of the structure, purpose, and legislative history of the DMCA.<sup>257</sup>

The legislative history of the DMCA indicates that Congress intended the DMCA regime to protect qualifying OSPs against claims for direct, contributory and vicarious copyright liability. In light of that, U.S. Courts have held that the “right and ability to control” prong of the DMCA eligibility conditions requires “something more” than having the ability to remove or block access to materials posted on a website and the contractual right and ability to terminate users’ access.<sup>258</sup> The Second Circuit Court of Appeals in the *Viacom II* judgment held that to meet this standard, an OSP must exert “substantial influence” over its users, either through a high level of control, or by engaging in purposeful conduct that encouraged its users to infringe.<sup>259</sup>

Applying that standard in the *UMG v. Veoh* judgment, the Ninth Circuit Court of Appeals declined to accept the argument made by the music copyright owner plaintiff that “right and ability to control” required hosting platforms to engage in ongoing monitoring to ensure that identified infringing content that had been taken down was not reposted. The music company plaintiff argued that in order to qualify for the safe harbor, hosting platform Veoh should have programmed its hash filtering technology to ensure that all other instances of notified copyrighted works were also removed from Veoh’s platform, and that any attempt to repost the same content from another user account or IP address would be blocked. The Court held that although Veoh could have used the filtering technologies it had implemented to conduct a search, it did not have an obligation to police its service to the fullest possible extent, and would not be disqualified from the safe harbor for not doing so.<sup>260</sup> The Court noted that plaintiff UMG’s interpretation of “right and ability to control” would make the DMCA internally inconsistent. It would run afoul of the no monitoring mandate in § 512(m) and would have transferred the burden of identifying potentially infringing content on to Veoh, contrary to the divided compliance burden intended by Congress and affirmed in the prior *CCBill* ruling.<sup>261</sup>

#### **5.2.4.4 No Obligation to Monitor—But a Specific Monitoring Obligation for Certain Types of Locker Services**

Despite the clear Congressional intent evident in § 512(m)’s wording, one U.S. district court appeared to have imposed a limited monitoring obligation on certain types of Cloud storage

---

<sup>257</sup> *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108–09 (C.D. Cal. 2009), *aff’d sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and suspended on rehearing*, 710 F.3d 1006, 1029–30 (9th Cir. 2013).

<sup>258</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 710 F.3d 1006, 1030 (9th Cir. 2013), citing *Viacom II*, 676 F.3d at 38, citing *Perfect 10, Inc. v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002) and quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 635 (S.D.N.Y. Oct. 25, 2011)).

<sup>259</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 710 F.3d 1006, 1029–30 (9th Cir. 2013), citing *Viacom II*, 676 F.3d at 38 (citing high levels of control as in *Cybernet*, and purposeful, culpable conduct rising to the level of control in *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

<sup>260</sup> *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108–09 (C.D. Cal. 2009), *aff’d sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and suspended on rehearing*, 710 F.3d 1006, 1029–30 (9th Cir. 2013), citing *Viacom II*, 676 F.3d at 38.

<sup>261</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 710 F.3d 1006, 1029.

providers. In *Capitol Records v. MP3tunes, LLC et al.*,<sup>262</sup> the court found that the MP3tunes music locker service was required to monitor and remove content stored in private accounts on its platform as a condition for obtaining the benefit of the hosting safe harbor, where it had built its online service in a way that allowed it to retain possession of information about allegedly infringing copyrighted works that had been stored in its users' lockers.<sup>263</sup> However, on appeal, the Second Circuit appeared to affirm but limit the ruling.<sup>264</sup> On the particular facts in the case, the appeals court found it was not unreasonably burdensome to require MP3tunes to track and remove potentially infringing content that was stored in personal lockers by users who had sideloaded that content. It found that doing so would not require MP3tunes to "monitor" or "affirmatively seek facts" about infringing activity in a manner inconsistent with § 512(m)(1) because it already had adequate information at its disposal and would "simply have had to make use of this information that was already in its possession and connect that information to known users."<sup>265</sup>

### 5.2.5 Conclusion

This chapter's survey of judicial rulings demonstrates that U.S. online service providers do not currently have a general duty to monitor communications on their platforms for potential copyright-infringing content. It also highlights that rightsholders have used litigation strategically to attempt to reset the balance that Congress struck in the DMCA between the interests of copyright holders and online service providers, by seeking judicial interpretations that would have lowered the knowledge standard in various dimensions of the DMCA eligibility conditions. U.S. courts have largely declined to embrace a lower knowledge standard in its various forms. If courts had accepted the arguments put forward by copyright owner plaintiffs regarding knowledge standards, this would have increased obligations on online service providers that seek the benefit of the statutory safe harbor regime, while also lowering the threshold for when OSPs would be disqualified from the DMCA's statutory protections.

The survey also demonstrates that U.S. courts have been reluctant to embrace interpretations of the DMCA eligibility conditions that would have amounted to a notice and stay

---

<sup>262</sup> *MP3tunes I*, 821 F. Supp. 2d 627, partially vacated on other grounds by *MP3tunes II*, 107 U.S.P.Q.2d 1770. (Order of Pauley J, vacating parts of the 2011 grant of summary judgment in favor of MP3tunes LLC in relation to red flag knowledge, and that it had not willfully blinded itself to knowledge of specific infringement, and referred those issues to a jury for fact-finding, on a motion for reconsideration in light of the Second Circuit's 2012 ruling in *Viacom v. YouTube*); partially affirmed, partially vacated, partially reversed and remanded by *EMI Christian Music Group*, 844 F.3d 79, superseding and replacing 840 F.3d 69 (2d Cir. 2016).

<sup>263</sup> *MP3tunes I*, 821 F. Supp. 2d at 643. The District Court articulated a special rule for hosting platforms with a similar type of structure and features as MP3tunes: "Where service providers such as MP3tunes.com allow users to search for copyrighted works posted to the Internet and to store those works in private accounts, to qualify for DMCA protection, those service providers must (1) keep track of the source and web address of stored copyrighted material, and (2) take content down when copyright owners identify the infringing sources in otherwise compliant notices."

<sup>264</sup> *EMI Christian Music Group*, 844 F.3d 79, 91 ("by comparison, requiring MP3tunes to extend that policy to users who sideloaded infringing content may not be an unreasonably burdensome request. Furthermore, doing so would not require MP3tunes to "monitor" or "affirmatively seek facts" about infringing activity in a manner inconsistent with § 512(m)(1) because it already had adequate information at its disposal in the form of takedown notices provided by EMI as to which links were allegedly infringing." and "MP3tunes would simply have had to make use of information already within its possession and connect that information to known users.")

<sup>265</sup> *EMI Christian Music Group*, 844 F.3d at 91.

down obligation, entailing a shift from an obligation to act triggered by knowledge to a duty to proactively monitor to prevent future instances of copyright infringement. In contrast to German and French courts (as discussed in section 5.3), U.S. courts have found that other aspects of the DMCA regime’s framework, including the requirement of specificity of knowledge, the divided burdens of compliance recognized in the Ninth Circuit’s *CCBill* judgment, and the no obligation to monitor mandate in § 512(m), impose real limits on what can be demanded of OSPs.

### **5.3 EU Intermediary Liability Framework**

#### **5.3.1 Overview**

In the European Union there has been a more noticeable effort to impose duties on OSPs to take measures to stop or prevent copyright infringement, irrespective of their actual or apparent knowledge of specific infringements, and despite a statutory prohibition against imposing *general* monitoring obligations on Internet intermediaries. Monitoring obligations can be seen to have arisen in three contexts. First, national courts in Germany and France have imposed monitoring obligations on hosting platforms and on search engines. The mechanism used to impose these obligations is an injunctive remedy that all EU member states must make available to copyright owners under a 2001 EU Directive. In addition, monitoring obligations are in issue in a set of cases pending before the CJEU, which consider whether operators of hosting OSPs have direct liability for communicating copyrighted works to the public for copyright-infringing content uploaded by their users (referenced in chapter 4). Finally, proactive monitoring obligations are at the core of Article 17 (formerly 13) of the pending EU Digital Single Market Copyright Directive,<sup>266</sup> which is considered in chapter 6.

The following section begins with an overview of the EU statutory safe harbor legal framework in the 2000 e-Commerce Directive. It then considers the broad EU copyright injunction mechanism established by other directives. It reviews recent cases from the Court of Justice of the EU interpreting the relationship between national injunctions, EU directives, and EU fundamental rights law. It reviews several judgments from courts in Germany and France, that issued injunctions imposing specific monitoring and filtering obligations on hosting platform providers and search engines, despite the apparent prohibition on doing so in the European Union-level legal framework. It concludes by highlighting some implications of using the broad free-standing EU copyright injunction power to impose duties to monitor on Internet intermediaries.

#### **5.3.2 EU Statutory Limitation of Liability Regime**

##### **5.3.2.1 Overview of Safe Harbors**

Although the rules governing substantive liability of OSPs in regard to secondary or indirect copyright liability are not harmonized at the EU level,<sup>267</sup> the European Union adopted harmonized rules for limitations on liability of “Information Society Service Providers” (ISSPs) at EU level in the 2000 EU e-Commerce Directive (ECD). Articles 12–14 of the ECD provide

---

<sup>266</sup> Article 13 was renumbered to be Article 17 in the final version of the EU Digital Single Market Copyright Directive approved by the European Parliament on March 26, 2019.

<sup>267</sup> ANGELOPOULOS, *supra* note 2; Matthias Leistner, *Structural Aspects of Secondary (Provider) Liability in Europe*, 9 J. INTELL. PROP. L. & PRACT. 75 (2014).

for limitations on liability for qualifying OSPs, including immunity from liability in regard to claims for monetary damages for three types of activities: (i) acting as a mere conduit (Article 12); (ii) caching (Article 13); and (iii) hosting (Article 14).<sup>268</sup>

Similar to 17 U.S.C. § 512(m) in U.S. law, Article 15(1) of the ECD contains an express prohibition against conditioning the limitations of liability on a general obligation for OSPs to monitor the content they transmit or store, or to seek out facts or circumstances indicating illegal activity.<sup>269</sup> Article 15(1) acts as a limit on all types of legal measures that can be imposed on qualifying OSPs for activities that fall within one of the three safe harbors. However, the ECD version of the “no obligation to monitor” prohibition is narrower than that in the U.S. DMCA, as discussed below.<sup>270</sup>

At first glance, the statutory limitation of liability frameworks in the DMCA and the ECD appear superficially similar. However, there are several substantial differences in their scope of coverage and eligibility conditions. First, the ECD applies horizontally, creating a framework for limited liability for a range of potential bases of liability, including but going beyond copyright infringement. Second, the ECD does not contain an explicit safe harbor for search engines and other online service providers that deal with provision of links; there is no analogue to 17 U.S.C. § 512(d) in the U.S. regime. This has resulted in divergent legal treatment of search engines and OSPs dealing with hyperlinks across EU Member States. Some legal commentators have taken the view that EU policymakers contemplated that the safe harbor for hosting platforms in Article 14 of the ECD would apply to search engines.<sup>271</sup> Despite the absence of an explicit safe harbor in the ECD, several Member States have chosen to create safe harbors for OSPs that deal with links in their national transpositions of the ECD, but have taken differing approaches to how they should be treated.<sup>272</sup>

Third, like the DMCA, the ECD’s hosting safe harbor is conditioned on OSPs not having disqualifying actual or constructive knowledge.<sup>273</sup> Exemption from civil and criminal liability is

---

<sup>268</sup> 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, 2000 O.J. (L 178) [hereinafter ECD], section 4, arts. 12–14.

<sup>269</sup> ECD, art. 15.

<sup>270</sup> ECD, Recital (47).

<sup>271</sup> See EDWARDS, *supra* note 20; Joris van Hoboken, *Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU*, 13 INT’L J. COMM. LAW & POLICY 1. (2009) (arguing that Recital (18) of the ECD indicates that search engines were contemplated to be within the ECD framework).

<sup>272</sup> Austria, Hungary, Portugal, and Spain, and EEA member, Liechtenstein. Austria, Hungary, Spain, and Portugal have created national safe harbors for search engines based on the hosting safe harbor of ECD Article 14; Liechtenstein provides a safe harbor for search engines based on the conduit safe harbor of ECD Article 12. The Commission Staff Working Document indicates that Austria, Spain, and Portugal provide a safe harbor in respect of hyperlinks based on the hosting safe harbor of ECD Article 14. See *European Commission Staff Working Document—Online Service, including e-Commerce in the Single Market, Accompanying the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions*, section 3.4.2.1 at 26–27, SEC (2011) 1641 final (Jan. 11, 2012); *European Commission, Report of the Commission to the European Parliament, the Council, and the European Economic and Social Committee: First Report on the Application of 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*, COM (2003) 0702 final; see also Peguera, *The DMCA Safe Harbors*, *supra* note 2.

<sup>273</sup> The exemption for mere conduit ISSPs in Article 12 does not explicitly require absence of knowledge.

conditioned on absence of actual knowledge of unlawful material.<sup>274</sup> Exemption from monetary damages is conditioned on absence of actual knowledge or awareness of facts or circumstances from which illegal activity or information is apparent.<sup>275</sup> Like the DMCA, upon obtaining such knowledge or awareness, an OSP that seeks the statutory regime's protections is required to act expeditiously to remove or disable access to the infringing material.<sup>276</sup> Unlike the DMCA, the ECD does not prescribe a detailed notice and takedown process, and does not specify a process for restoring content that has been removed, nor does it provide mechanisms to deter misuse such as 17 U.S.C. § 512(f).<sup>277</sup> While some EU member states have implemented the framework via a notice and takedown system, OSPs operating in the EU face greater uncertainty in determining whether they have disqualifying knowledge because of the disparities across countries in what is considered to be disqualifying knowledge.<sup>278</sup> Fourth, in contrast to the U.S. DMCA regime, the EU statutory framework does not contain a threshold condition explicitly requiring OSPs to adopt a policy to terminate accounts of repeat infringers in order to benefit from the statutory limitation on liability.<sup>279</sup> Fifth, and most importantly, the EU framework allows for broader injunctions to be issued against OSPs that qualify for the EU safe harbor regime to stop or prevent copyright infringement than is the case for ISPs that qualify for safe harbor protection under the U.S. DMCA regime. Because these are the primary means by which European national

---

<sup>274</sup> ECD, art. 14(1)(a).

<sup>275</sup> See Peguera, *The DMCA Safe Harbors*, *supra* note 2, and ANGELOPOULOS, *supra* note 2, at 82–92 (noting that what constitutes actual or constructive knowledge and the scope of the post-knowledge obligation is less clear.)

<sup>276</sup> ECD, art 14 (1)(b).

<sup>277</sup> See ANGELOPOULOS, *supra* note 2, at 82–92 (noting that Recital 40 of the ECD encouraged the creation of voluntary codes of conduct by the industry, with the encouragement of EU member states; that Article 21 of the ECD foresaw the possibility of the creation of EU-level harmonized rules on notice and takedown or “notice and action,” which could be incorporated as a future amendment to the ECD; and noting the withdrawal of the Commission’s 2013 draft directive on “notice and action,” and the announcement in the 2015 Commission Communication on the Digital Single Market that the Commission was intending to recommence consultations on the latter).

<sup>278</sup> *Commission Staff Working Document on Online Services, including e-Commerce, in the Single Market*, at 32–38, SEC (2011) 1641 final (Jan. 11, 2012), [http://ec.europa.eu/internal\\_market/e-commerce/docs/communication2012/SEC2011\\_1641\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf), accompanying *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on A Coherent Framework to Boost Confidence in the Digital Single Market of e-Commerce and Other Online Services*, COM (2011) 942 final, SEC (2011) 1640 final; see also Thibault Verbiest, Gerald Spindler, Givoanni Maria Riccio, and Aurelie Van der Perre, *STUDY ON THE LIABILITY OF INTERNET INTERMEDIARIES* (2007), at 10–22 (on file with author; previously available at [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf); abstract available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2575069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575069)); NICOLO ZINGALES, *INTERNET INTERMEDIARY LIABILITY: IDENTIFYING BEST PRACTICES FOR AFRICA*, Research Commissioned by the Association for Progressive Communications (Nov. 2013), 17, [https://www.apc.org/sites/default/files/APCInternetIntermediaryLiability\\_BestPracticesAfrica\\_20131125.pdf](https://www.apc.org/sites/default/files/APCInternetIntermediaryLiability_BestPracticesAfrica_20131125.pdf).

<sup>279</sup> However, the Commission has recommended that OSPs adopt measures similar to the DMCA requirement as a matter of best practice. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Tackling Illegal Content Online—Towards an Enhanced Responsibility of Online Platforms*, COM (2017) 555 final, Sept. 28, 2017 at 18, [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=47383](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=47383) (“Online platforms should take measures which dissuade users from repeatedly uploading illegal content of the same nature and aim to effectively disrupt the dissemination of such illegal content.” “This should also apply where the infringer is the same and the substance of the content in question is of the same nature and, where justified, the user has been promptly notified about the notice(s) received against him/her and about the forthcoming suspension or termination.”).

courts have imposed monitoring obligations on OSPs, the scope of injunctions that may be issued against EU OSPs is considered in greater detail below.

### 5.3.2.2 Eligibility for the EU Safe Harbors—Active, Passive, and Neutral Intermediaries

The ECD safe harbor framework applies to “Information Society Service Providers,” defined by reference as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”<sup>280</sup> This includes services that are offered for free but “represent economic activity,” such as services offered on a Freemium basis.<sup>281</sup> The definition includes Web 2.0 service providers and platforms.<sup>282</sup>

A set of rulings from the CJEU has created a separate limitation or basis for disqualification from the EU statutory safe harbor regime protections, which has come to be known as the “active/neutral intermediary” doctrine. This effectively infers disqualifying knowledge based on the level of activity of the intermediary. The CJEU’s judicial doctrine is based on its reading of recital 42 of the ECD, which provides that the ECD’s exemptions from liability were intended to apply to situations where the activity of an ISSP was “limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient” and exemption was premised on the activity being of a “mere technical, automatic, and passive nature.” Based on this text, the CJEU has found that the ECD requires neutrality as a precondition for safe harbor protection, and interpreted neutrality to require that the intermediary’s activity must be of a “mere technical, automatic, or passive nature” in order to obtain immunity from liability. The CJEU’s judicial doctrine has come to play a significant role in European member states’ national courts’ decisions, leading to narrow interpretations of the availability and scope of the EU statutory safe harbor regime.<sup>283</sup>

The CJEU articulated this limitation in two trademark decisions. In *Google France SARL et al. v. Louis Vuitton Malletier SA*, the CJEU held that in order to qualify for the hosting safe harbor in Article 14 of the ECD, an intermediary must play a *neutral role*, to avoid an imputation of ‘knowledge [or] control over the information which is transmitted or stored.’<sup>284</sup> In its subsequent decision in *L’Oreal v. eBay*, in interpreting when the operator of an online marketplace would be disqualified from relying on the hosting provider safe harbor, the CJEU held that the operator must *not play an active role* allowing it to have knowledge or control of

---

<sup>280</sup> ECD, art. 2(a), which incorporates by reference the definition of “Information Society Service” in Directive 98/48/EC, art. 1(2).

<sup>281</sup> ECD, Recital 18.

<sup>282</sup> ANGELOPOULOS, *supra* note 2, at 70–71.

<sup>283</sup> See, e.g., FERNANDEZ-DIAZ, *supra* note 20 (discussing Spanish and Italian courts’ application of this doctrine) and Christina Angelopoulos, *Beyond the Safe Harbours*, *supra* note 28, at 253–74.

<sup>284</sup> Cases C-236/08-238/08, *Google France SARL et al. v. LVMH SA*, Judgment of the Court of Justice of the EU (Grand Chamber) (Mar. 23, 2010) at ¶¶ 113–114, 2010 E.C.R. I-2417, EU:C:2010:159.

the data stored. It held that an operator plays such a role “when it provides assistance which entails, . . . optimising the presentation of the offers for sale in question or promoting them.”<sup>285</sup>

The CJEU has interpreted this requirement as applying not just to Internet access providers (in the sense of mere conduits), but also to hosting service providers.<sup>286</sup> EU legal scholars have argued that the CJEU’s reliance on neutrality in this context should be understood as an attempt to limit safe harbor coverage to ISSPs that do not play a *conscious* role in the wrongful activity of a user of their services. On this view, disqualification should be seen as depending on the mental attitude of the ISSP toward the primary wrongful act, as manifested in the ISSP’s conduct. An ISSP would not be disqualified if the ISSP acted passively, through an automated process that is set in place prior to the infringement and is offered indiscriminately to all users of its service, as distinguished from an ISSP that provides tailored advice to one or more wrongdoers.<sup>287</sup> Based on prior CJEU rulings, EU scholars contend that neutrality does not require complete passivity from hosting providers, and that Web 2.0 user-generated content hosting platforms are not per se excluded from the EU statutory hosting safe harbor.<sup>288</sup> However, this would no longer be the case if Article 17 (previously Article 13) of the EU Digital Single Market Copyright Directive is adopted in its current form.

### 5.3.2.3 Scope of Hosting Safe Harbor—National Duties of Care

Under the EU harmonized statutory framework, ISSPs that are eligible for one of the three safe harbors receive immunity from claims for damages. However, ISSPs that qualify for the EU statutory safe harbor protections remain subject to two forms of European member state national government regulation. First, they may be subject to injunctions and court orders issued by European national courts, which are expressly excluded by the terms of Articles 12–14 of the ECD. These are discussed in the following section. Second, hosting ISSPs may be subject to duties of care created by member states’ national authorities, under Recital 48 of the ECD.

Recital 48 of the ECD contemplates the possibility for Member States to require service providers who host information provided by recipients of their service to apply duties of care that (i) “can be reasonably expected from them”; (ii) are specified by national law; and (iii) that are directed at detection and prevention of certain types of illegal activities. Some European legal scholars have expressed doubt about whether such a duty of care could extend beyond removal or disabling access to particular types of harmful content, to a broader ex-ante preventative duty, because that would appear to be inconsistent with the requirement to remove or disable access to notified content in Articles 12–14 of the ECD, and the prohibition on imposition of general monitoring obligations in Article 15 of the ECD.<sup>289</sup>

---

<sup>285</sup> Case C-324/09, *L’Oreal SA & Ors v. eBay International AG*, Judgment of the Court of Justice of the EU (Grand Chamber) (July 12, 2011) at ¶ 123, EU:C:2011:474 (*L’Oreal*).

<sup>286</sup> See ANGELOPOULOS, *supra* note 2, at 73, citing opposition expressed by CJEU Advocate General Jaaskinen, CJEU, Opinion of Advocate General Jaaskinen, case C-234/09, *L’Oreal v. eBay International* (Dec. 9, 2010), ¶ 146, and ECD, recital (46).

<sup>287</sup> ANGELOPOULOS, *supra* note 2, at 75; Christina Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, Jan. 2017, 14 [hereinafter *On Online Platforms*].

<sup>288</sup> Angelopoulos, *On Online Platforms*, *supra* note 287, at 12.

<sup>289</sup> *Id.* citing Lilian Edwards, *The Fall and Rise of Intermediary Liability Online*, in *LAW AND THE INTERNET* (L. Edwards & C. Waelde eds., 3d ed. 2009) 65.

### 5.3.3 EU Copyright Injunctions

The key differences between the U.S. and EU statutory limitation of liability regimes are (a) the broader scope of injunctions that can be issued against EU ISSPs that qualify for one of the EU statutory safe harbors; and (b) the fact that injunctions are not conditioned on, and do not require a finding of liability by the intermediary. Injunctions can therefore be issued against EU OSPs even where an OSP has neither liability nor knowledge of infringement.<sup>290</sup>

EU Member States are required to make available to copyright holders the possibility of obtaining broad injunctions against ISSPs to stop copyright infringement under Article 8(3) of the Information Society Directive (2001/29/EC) (the Information Society Directive).<sup>291</sup> In addition, Article 11 of the Intellectual Property Rights Enforcement Directive (2004/48/EC) (the IPR Enforcement Directive) requires EU member states' laws to make available to copyright holders injunctions against intermediaries whose services are used by third parties to infringe any intellectual property right.<sup>292</sup> Finally, Article 9 of the IPR Enforcement Directive requires EU Member States to make available pre-suit provisional injunctions.<sup>293</sup> The CJEU has clarified that injunctions may be issued to prevent recurrence of infringements of the same kind that have occurred previously, and not just to stop infringement.<sup>294</sup> Recital 59 of the Information Society Directive explains EU policymakers' rationale for allowing copyright holders to obtain such

---

<sup>290</sup> Lukas Feiler, *Website Blocking Injunctions under EU and U.S. Copyright Law—Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?* (Stanford-Vienna Transatlantic Technology Law Forum, TTLF Working Paper No. 13, 2012), n.63, [https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/203758/doc/slspublic/feiler\\_wp13.pdf](https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/203758/doc/slspublic/feiler_wp13.pdf) and Nordemann, *Intellectual Property Liability of Consumers*, *infra* note 324, at 49, n.65 (both citing *Commission Staff Working Document: Analysis of the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004*, at 16, SEC (2010) 1589 (final) (Dec. 12, 2010), stating that “neither Article 11 (third sentence) of [Directive 2004/48], nor Article 8(3) of Directive 2001/29 link injunctions with the liability of an intermediary.”).

<sup>291</sup> 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, 2001 O.J. (L 167/10) [hereinafter Information Society Directive] art. 8(3) (providing that “Member States shall ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”). In addition, the IPR Enforcement Directive, *infra* note 292, art. 9(1) provides that Member States may make available to copyright holders provisional or interlocutory injunctions directed against intermediaries to prevent infringement of intellectual property. (“[A]n interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC.”)

<sup>292</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights 2004 O.J. (L 157/45 of Apr. 30, 2004), as corrected and republished in 2004 O.J. (L 195/16) [hereinafter IPR Enforcement Directive], art. 11 (providing that “Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive [2001/29].”)

<sup>293</sup> IPR Enforcement Directive, *supra* note 292, art 9(1); *see also* Jörg Reinbothe, *The EU Enforcement Directive 2004/48/EC as a Tool for Copyright Enforcement* in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irina A. Stamatoudi ed., 2010) at 18.

<sup>294</sup> CJEU *L’Oreal*, at ¶ 14 (interpreting art. 11 of Directive EC/2004/48 to require EU Member States to make available injunctions to prevent recurrence of future infringements of the same kind).

broad injunctions against intermediaries—that, in many cases it is intermediaries that are best placed to bring infringement to an end.<sup>295</sup> The broad scope of the EU injunctive relief provisions is most noticeable in recent efforts to have Internet intermediaries block websites alleged to facilitate copyright infringement, in response to the changing means of accessing copyrighted movies and musical content through unauthorized streaming and one-click download sites, rather than by file-sharing on peer-to-peer networks.<sup>296</sup>

As noted above, the legal source for these injunction powers lies outside of the ECD and the ECD’s limitation of liability regime expressly carves out the possibility of injunctions being issued by national courts. As a result of this statutory structure, ISSPs that qualify for the ECD’s statutory limitation on liability remain subject to injunctions issued under European member states’ national transpositions of Art 8(3) of the Information Society Directive and the IPR Enforcement Directive.<sup>297</sup>

This structure has produced three significant consequences for intermediaries operating under EU law. First, EU injunctions operate as freestanding obligations on intermediaries, independent of any assessment of the culpability or liability of the OSP. The ability to impose binding (and often costly) obligations on OSPs—even in the absence of complicity in wrongdoing—has noticeable effects on the behavior and practices of ISSPs.<sup>298</sup>

Second, the scope of protection that the EU safe harbor regime affords to qualifying intermediaries is necessarily narrower than that provided by the U.S. DMCA regime. In contrast, the U.S. DMCA regime provides for injunctions that are more limited in several respects, as noted in the previous section. Unlike the EU regime, before an injunction can be issued against an OSP that qualifies for the DMCA safe harbors it must meet four conditions, which were intended to ensure that injunctions would be proportionate in their impacts on qualifying OSPs and on Internet users.<sup>299</sup>

Third, the structure of the EU statutory framework has led to fragmentation in the scope of the safe harbors across EU member states and produced a high degree of legal uncertainty for OSPs operating in the EU. The ECD was intended to create a harmonized EU-wide framework and to demarcate a zone where intermediaries would be immune from monetary damages. Despite this, fragmentation has resulted because the value of the safe harbor scheme’s protection depends on the breadth and scope of injunctions that can be issued against qualifying intermediaries in each Member State.

---

<sup>295</sup> 2001/29/EC, recital 59.

<sup>296</sup> See section 5.4, *infra*.

<sup>297</sup> Each of the three safe harbor provisions in Articles 12–14 of the ECD expressly provide that they do not affect the “possibility for a [national] court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement” and in relation to hosting providers, the creation of national “procedures governing the removal or disabling of access to information.” In addition, Recital 45 of the ECD provides that “[t]he limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.”

<sup>298</sup> HUSOVEC, *supra* note 2.

<sup>299</sup> 17 U.S.C. § 512(j).

### 5.3.4 Limitations on Monitoring Obligations Imposed Through Injunctions

EU law is harmonized as to the requirement that Member States must make available these type of injunctions to copyright holders, but it leaves the modalities and conditions under which they can be issued to EU member states' national laws. However, EU law sets several limitations on the availability and scope of these injunctions. Limitations arise from several sources: Article 15(1) of the ECD; Article 3 of the EU IPR Enforcement Directive and general principles of European Union law; general principles of injunctive relief as an equitable remedy; and European fundamental rights law.<sup>300</sup>

#### 5.3.4.1 Limitations in Article 3 of the 2004 IPR Enforcement Directive

Article 3 of the EU IPR Enforcement Directive sets out general limits on remedies that can be issued by EU member states' courts, while Article 15 of the ECD operates as a more specific limitation on the scope of permissible injunctions and duties of care that can be imposed on qualified ISSPs that engage in activities that are protected under one of the three statutory safe harbors in Articles 12–14 of the ECD.<sup>301</sup> Taken together, these provisions can be viewed as creating a ceiling and a floor for the range of permissible injunctions.<sup>302</sup>

Article 3(1) of the IPR Enforcement Directive provides that any “measures, procedures, and remedies necessary to ensure the enforcement of intellectual property rights” must be “fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” Article 3(2) further provides that measures must be “effective, proportionate, and dissuasive” and must be implemented in domestic law in a way that does not create barriers to legitimate trade.<sup>303</sup> In devising measures, national courts must also ensure that measures, procedures and remedies include safeguards against misuse.<sup>304</sup> EU scholars have interpreted Article 3 as providing national courts with instructions on how to frame injunctions that comply with the overarching general principles of EU law including necessity, subsidiarity, proportionality, and territoriality.<sup>305</sup>

#### 5.3.4.2 No General Obligation to Monitor

In relation to injunctions and other legal measures that can be used against qualified ISSPs protected by the EU statutory safe harbor regime, Article 15(1) of the ECD prohibits EU member states from imposing general obligations on ISSPs to monitor information which they transmit or store, or to actively seek facts or circumstances indicating that illegal activity is taking place on their services. However, the ECD permits EU member states to impose monitoring obligations in specific cases, and Article 15(1) does not affect orders issued by EU

---

<sup>300</sup> JAANI RIORDAN, *THE LIABILITY OF INTERNET INTERMEDIARIES* Ch. 13 (2015).

<sup>301</sup> ANGELOPOULOS, *supra* note 2, at 99–100.

<sup>302</sup> Martin Husovec, *Injunctions Against Innocent Third Parties: The Case of Website Blocking*, 4(2) *J. INTELL. PROP., INFORMATION TECH. & ELECTRONIC COMMERCE LAW* 116 (2013).

<sup>303</sup> 2004/48/EC, art. 3(1).

<sup>304</sup> 2004/48/EC, art. 3(2).

<sup>305</sup> Martin Husovec & Miquel Peguera, *Much Ado About Little: Privately Litigated Internet Disconnection Injunctions*, 46(1) *INTL. REV. OF INTELL. PROP. AND COMP. LAW* 10 (2015); *see also* RIORDAN, *supra* note 300 (on requirements for injunctions to comply with general principles of EU Law).

member states' national authorities issued in accordance with national legislation.<sup>306</sup> Determining where the line is between prohibited general monitoring obligations and permitted obligations in “specific cases” is highly contested. The CJEU has considered the scope of permissible obligations under Article 15 of the ECD in a series of three cases. In *L’Oreal v. eBay*, a trademark case, the CJEU concluded that a national court injunction could impose an obligation on an ISSP to prevent future anticipated IP infringement, but only in limited circumstances, in order to prevent further infringements of the same kind, by the same person, in regard to the same right.<sup>307</sup>

The two other rulings of the CJEU considered the scope of filtering injunctions that may be issued by national courts against Internet service providers, in *Scarlet v. SABAM*,<sup>308</sup> and against social media platforms, in *SABAM v. Netlog NV*.<sup>309</sup> In both cases, the CJEU found that the injunction issued against the intermediaries violated EU law because it constituted a “general obligation to monitor communications” prohibited under Article 15 of the ECD, and also violated the principles of EU fundamental rights law, as discussed in the next section.

In the *Scarlet v. SABAM* decision, the CJEU ruled that a 2007 injunction issued by a Belgian national court against Scarlet, a large Internet service provider, at the request of collective management organization SABAM, violated EU law. The injunction required Scarlet to install an acoustic fingerprint filtering technology (Audible Magic) to detect and block the transfer of any copyrighted material moving across its network. Scarlet argued that the injunction amounted to a general obligation to monitor all communications on its network, in violation of the Belgian national law that implemented the prohibition in Article 15 of the ECD. The CJEU found that the injunction would oblige Scarlet “to actively monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual-property rights” because the injunction applied to all communications passing through its network (and not just to communications between those using peer to peer software); it applied to all of its users indiscriminately; it applied preventively because it was intended to protect not only existing works, but also future works that had not yet been created at the time when the filter was required to be introduced; and it applied for an unlimited time period. As a result, the injunction would require ISP Scarlet to carry out general monitoring, in violation of Article 15 of the ECD.

In the subsequent *SABAM v. Netlog* judgment,<sup>310</sup> the CJEU ruled that the injunction that SABAM had obtained from a Belgian court requiring social media platform Netlog to install similarly broad filtering technology would also constitute a general monitoring obligation, prohibited under Article 15(1) of the ECD. The CJEU considered Netlog to be a hosting service provider within the scope of Article 14 of the ECD. The filtering order would have required Netlog to: (1) identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual property rights claim to hold rights; (2) determine which of those files are being stored and made available to the

---

<sup>306</sup> ECD, Recital (47).

<sup>307</sup> CJEU, *L’Oreal*.

<sup>308</sup> Case C-70/10, *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Scarlet Extended S.A.*, CJEU (Third Chamber) (Nov. 24, 2011), 2011 E.C.R. I-11959 (*Scarlet*).

<sup>309</sup> Case C-360/10, *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Netlog NV*, CJEU (Third Chamber) (Feb. 16, 2012), EU:C:2012:85 (*Netlog*).

<sup>310</sup> *Id.*

public unlawfully; and (3) prevent files that it considers to be unlawful from being made available. The CJEU held that preventative monitoring of this kind would require Netlog to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual property rights, and therefore would require Netlog to carry out general monitoring, in violation of Article 15 of the ECD.<sup>311</sup>

### 5.3.5 Other Structural Limitations on Monitoring Obligations—EU Fundamental Rights Law

In a series of judgments from 2008, the CJEU has found that EU Member States' domestic measures must be designed so as to achieve the core objectives of the EU Directives that mandate their existence.<sup>312</sup> In doing so, they need to strike a “fair balance” between the various fundamental rights guaranteed under the EU Charter and broader human rights law, including the right of legitimate companies to carry on business, the right of copyright owners to protection of their intellectual property, and the rights of Internet users to freedom of expression, and to protection of their privacy and personal data.<sup>313</sup> The obligation to strike a fair balance operates as a further more general limitation on the monitoring obligations that may be imposed on OSPs.<sup>314</sup> Although this operates as a more general limitation than the no-monitoring

---

<sup>311</sup> CJEU, *Netlog*, ¶¶ 36–38.

<sup>312</sup> CJEU, *L'Oreal*.

<sup>313</sup> Case C-275/06, *Productores de Música de España (Promusicae) v. Telefonica*, Judgment of the Court of Justice of the EU (Grand Chamber) (Jan. 28, 2008), 2008 E.C.R. I-00271 (*Promusicae*); CJEU, *Scarlet*; CJEU, *Netlog*; Case No. C-314/12, CJEU (Fourth Chamber), *UPC Telekabel Wien v. Constantin Film Verleih GmbH*, (Mar. 27, 2014), EU:C:2014:192 (*Telekabel*); RIORDAN, *supra* note 300, at ¶ 13.96.

<sup>314</sup> EU member states' legal power to regulate EU online service providers' behavior is also subject to a second level of “external” balancing forces, arising from EU human rights law. Two parallel fundamental rights regimes operate in Europe. First, the EU Charter of Fundamental Rights and Freedoms creates the framework for the protection of various fundamental rights within the 28 member states of the European Union. A second parallel regime operates under the European Convention on Human Rights, to which 47 countries are signatories, for which the European Court of Human Rights is the authoritative interpreter. A 2013 decision of the European Court of Human Rights interpreting the European Convention on Human Rights appeared to create a new basis for liability for website operators that host third parties' defamatory and hate speech, which created significant legal uncertainty for hosting platforms operating in Europe for several years. In *Delfi v. Estonia*, the Court of Human Rights found that the operators of a news portal had a duty to avoid causing harm to another, where harm via publication of third-party comments was arguably foreseeable. It concluded that the news portal was directly liable for the harm caused by the comments posted by its users, even though it did not have actual knowledge of the relevant comments, removed the comments upon receiving a legal complaint, and had taken measures to avoid harm occurring in the first place, including using a notice and takedown system, and human moderators to identify and remove harmful comments. The *Delfi* ruling was affirmed in 2015 by the Court's appellate body, the Grand Chamber. See Application No. 64569/09, European Court of Human Rights, Grand Chamber, *Delfi AS v. Estonia* (June 16, 2015), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-155105%22%5D%7D>, affirming European Court of Human Rights, Judgment of First Section (Oct. 10, 2013), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126635>. However, a subsequent decision of the European Court of Human Rights came to the opposing conclusion regarding liability of a different news portal. See Application No. 22497/13, European Court of Human Rights, Judgment of Fourth Section (Feb. 2, 2016), *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (MTE v. Hungary)*, <http://www.bailii.org/eu/cases/ECHR/2016/135.html> (finding that imposition of liability on a news portal for hate speech posted by anonymous users violated the portal's rights under Article 10 of the European Convention on Human Rights); *but see* Christina Angelopoulos, *MTE v. Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression*, KLUWER COPYRIGHT BLOG (Mar. 5, 2016), <http://copyrightblog.kluweriplaw.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/> (contending that legal uncertainty persists).

obligation of Article 15 of the ECD, it applies to a broader range of activities, including to situations not involving an injunction issued against a qualified ISSP relying on one of statutory safe harbors in the ECD.<sup>315</sup>

The CJEU first articulated the notion of fair balance in the intellectual property context in the 2008 *Promusicae v. Telefonica* judgment. That case concerned a facial conflict between protection of intellectual property rights and protection of citizens' personal data, involving the scope of ISPs' obligations to provide copyright owners with identity information about alleged copyright infringers under the "right to information" provision of the 2004 EU IPR Enforcement Directive. The CJEU was asked to rule on whether the Spanish law implementing the right to information violated EU law by not requiring intermediaries to disclose this data to copyright holders in prospective civil litigation, and only in criminal cases. The CJEU found that the text of the various conflicting directives did not resolve this issue and turned to EU fundamental rights law to develop a balancing test.<sup>316</sup> The CJEU characterized the issues in the case as implicating four fundamental rights protected under the EU Charter of Fundamental Rights and Freedoms. On the one hand, the rightsholders' right to protection of their copyright, as part of the right to property under Article 17(2) of the Charter, and their right to effective judicial process under Article 47; and on the other hand, Internet users' right to protection of their personal data under Article 8, and the right to a personal life under Article 7 of the Charter. The CJEU held that protection of intellectual property, as enshrined in Article 17 of the Charter, is not an absolute right, and concluded that in implementing their various obligations under EU directives, member states must strive to strike a "fair balance" between the various fundamental rights protected in EU community law.<sup>317</sup>

The CJEU has since used the *fair balance* principle to identify limits on the scope of permissible filtering injunctions that national courts can issue against ISPs and social media platforms in the two SABAM judgments, discussed above. In the *SABAM v. Scarlet* decision it ruled that an injunction that required an Internet service provider to install an acoustic fingerprint filtering technology to detect and block the transfer of any copyrighted material moving across its network was incompatible with Member States' obligations to strike a fair balance in the protection of the right to intellectual property (as enshrined in Article 17(2) of the Charter of Fundamental Rights of the EU) and the protection of other fundamental rights under the EU Charter.<sup>318</sup> In issuing injunctions, national courts must strike a fair balance between protection of three sets of rights—copyright owners' right to protection of intellectual property, the fundamental rights of individuals who are affected by such measures, and the right of ISPs to conduct a legitimate business, as enshrined in the Charter. The CJEU concluded that the broad filtering injunction at issue in the case constituted a serious infringement of the ISP's freedom to conduct its business because it would require the ISP to install a complicated, costly, permanent

---

<sup>315</sup> ANGELOPOULOS, *supra* note 2, at 108–13.

<sup>316</sup> *Id.*

<sup>317</sup> CJEU, *Promusicae*, at ¶ 68 (holding that "Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.").

<sup>318</sup> CJEU, *Scarlet*.

computer system at its own expense, in violation of Article 3(1) of the IPR Enforcement Directive. It also held that the injunction would infringe the fundamental rights of ISP Scarlet’s customers to receive and impart information, and to protection of their personal data, enshrined respectively in Articles 8 and 11 of the EU Charter. In the following *SABAM v. Netlog* decision, the CJEU ruled that a similar broad filtering obligation imposed upon a social media platform violated the obligation to provide a fair balance in the protection of the same set of fundamental rights under the EU Charter.<sup>319</sup>

The CJEU has also used the fair balance principle to assess when website-blocking injunctions directed at ISPs may be upheld. In *UPC v. Telekabel*, the CJEU held that a website-blocking injunction would strike a fair balance with the OSP’s freedom to conduct its business where it gave the OSP the right to decide on the particular measure to use to implement the blocking obligation, and the OSP could avoid coercive penalties for breach of the injunction by showing it had taken reasonable measures. In order to strike a fair balance, the measures would have to take account of users’ freedom of expression. They must be strictly targeted, in the sense that they must be intended to bring an end to the third party’s infringement of copyright, but not prevent Internet users from making lawful uses of copyright work. In protecting the interests of copyright holders, the measures need not be completely effective at preventing infringement, but must have the effect of preventing unauthorized access to copyrighted material; or at least, make infringement difficult to achieve, and operate as a serious discouragement for Internet users to infringe copyright using the intermediary’s services.<sup>320</sup>

### 5.3.6 Conclusion—EU Legal Framework

Although the CJEU’s rulings in the *SABAM v. Scarlet Extended* and *SABAM v. Netlog* judgments established clear limits on the scope of filtering injunctions that EU national courts can issue against ISPs and hosting platforms, European national courts continue to have a wide scope of discretion in issuing copyright injunctions against ISPs and OSPs, as illustrated by the cases highlighted in the following section.

## 5.4 European National Law

### 5.4.1 Overview

The following section highlights injunctions issued by courts in Germany, France, and the United Kingdom. These injunctions have directed hosting platforms to enforce a notice and stay down obligation, filter for potentially infringing material, and search external websites for inbound links to unauthorized copyrighted content stored on their platforms by users. National court injunctions have also directed major U.S.-headquartered global web search engines to delist particular websites alleged to facilitate copyright infringement injunctions.

This section illustrates the range of obligations to which European OSPs are already subject. The selected cases highlight the freestanding nature of the EU copyright injunction mechanism in Article 8(3) of the 2001 Information Society Directive, and its national

---

<sup>319</sup> CJEU, *Netlog*; see also Case C-461/10, *Bonnier Audio AB*, Judgment of the Court of Justice of the EU (Third Chamber) (Apr. 19, 2012); EU:C:2012:219.

<sup>320</sup> CJEU, *Telekabel*, at ¶ 64; RIORDAN, *supra* note 300, at ¶ 13.111; Angelopoulos, *On Online Platforms*, *supra* note 287, at 16.

transpositions. They also highlight the depth and diversity that exists at the European national level in terms of national indirect liability doctrines and injunction practice, all of which lies outside of EU-level harmonized law. In some cases, these injunctions were issued against OSPs on a no-fault basis, without any finding of liability. In some cases, the injunctions were issued against OSPs engaging in an activity protected by one of the statutory safe harbors. In other cases, the injunctions were issued against OSPs that were not considered to be protected by the relevant national safe harbor.

## 5.4.2 Germany

### 5.4.2.1 Overview of National Situation

German courts have imposed monitoring obligations on hosting platforms via injunctions issued under a distinctive German national indirect liability doctrine, and outside of the statutory safe harbor regime.

Germany transposed the EU safe harbor regime in the German Tele Media Law. However, the circumstances in which the statutory limitation of liability framework applies are limited and exclude pre-existing obligations to remove or block unlawful content. As a result, the Tele Media Act only limits the liability of German OSPs in (the relatively rare) cases involving fault-based claims for damages, or under criminal law.<sup>321</sup> In practice, the German implementation of the statutory limitation of liability regime therefore provides little protection to hosting OSPs.

OSP's liability for copyright infringement has largely been dealt with outside of the harmonized EU communication to the public right.<sup>322</sup> Most intermediary copyright liability cases have been brought under the German indirect liability doctrine of *Störerhaftung* or “Disturber Liability.” *Störerhaftung* is not a tort doctrine; it is a form of indirect liability that applies to all who contribute to intellectual property infringement.<sup>323</sup> The *Störerhaftung* doctrine applies only to applications for injunctions (usually directing removal of allegedly infringing content), and not to damages claims. German courts have imposed disturber liability on hosting platforms where two elements are met: (a) a person has “adequately” contributed to a third party’s infringement; and (b) has violated a reasonable duty to review.<sup>324</sup> This turns on whether the “disturber”—even if acting in good faith—had the legal possibility to prevent the third party

---

<sup>321</sup> Thomas Hoeren & Silviya Yankova, *The Liability of Internet Intermediaries—The German Perspective*, IIC 43, Jan. 2012, 501, at 507.

<sup>322</sup> However, as noted in chapter 4, a set of cases referred by the German Federal Court of Justice are currently pending before the CJEU that ask it to rule on whether hosting platforms YouTube and cloud locker service Uploaded have direct liability for communicating copyrighted works to the public in respect of unauthorized copyrighted content uploaded to their platforms by their users.

<sup>323</sup> Hoeren & Yankova, *The Liability of Internet Intermediaries*, *supra* note 321, at 504.

<sup>324</sup> Angelopoulos, *On Online Platforms*, *supra* note 287 at 28; HUSOVEC, *supra* note 2, at 162–63, citing Bundesgerichtshof [BGH], *Mobelklasiker* (1998) I ZR 120/96; Jan Bernd Nordemann, *Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Germany*, in *INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES* (Christopher Heath & Anselm Kamperman Sanders eds., 2012), citing to Bundesgerichtshof [BGH] [German Federal Supreme Court] July 6, 1954, Case No. 1 ZR 38/53, 1955 GRUR 97, 99 (*Constanze II*).

from acting in disturbance,<sup>325</sup> or where the person could have, but failed to take reasonable measures to prevent the third party's infringement.<sup>326</sup> A duty to review is considered unreasonable if it would unduly disturb the business of the alleged disturber.<sup>327</sup> German courts have distinguished two types of duties to review under the Störerhaftung doctrine: (1) a duty to prevent a specific, clear infringement; and (2) a duty to prevent similar infringements of the same kind.<sup>328</sup> Under this doctrine, once a hosting OSP has been notified of an alleged infringing work, as long as it does not unreasonably impair its business operation, it is expected to proceed with blocking obvious reoccurrences of the same work, without waiting for any additional rightsholder notification.<sup>329</sup> Thus, German courts have essentially created a “notice and stay down” obligation based on receiving a single notification from a rightsholder, which extends beyond the reposting of the identical notified content from the same user, to preventing infringements of a similar kind, even if the infringing content appears only in part, and regardless of who posts additional instances of infringing content.<sup>330</sup>

There is a very sizeable body of German case law in which monitoring obligations have been imposed on hosting platforms and other Internet intermediaries by national injunctions issued under the Störerhaftung doctrine.<sup>331</sup> The German Federal Court of Justice has dealt with over 60 Internet-related cases on this basis since 2000.<sup>332</sup> As Störerhaftung is considered a form of strict liability, there is no requirement to establish knowledge or fault on the part of an Internet intermediary. Courts have sought to limit the scope of liability through the development of criteria for “reasonableness.” What is considered to be “technically and commercially reasonable” measures depends on various factors, including whether the hosting OSP is considered to have an “active” role and the nature of the risk posed by the hosting platform.<sup>333</sup> For instance, the Court of Appeal in Hamburg held that YouTube was required to install word filters in addition to its existing Content ID content identification technology, in order to permit

---

<sup>325</sup> HUSOVEC, *supra* note 2, at 158, citing *Constanze II*.

<sup>326</sup> Nordemann, *supra* note 324.

<sup>327</sup> Angelopoulos, *On Online Platforms*, *supra* note 287 at 28, citing T. Hoeren & V. Bensinger, HAFTUNG IM INTERNET—DIE NEUE RECHTSLAGE (2014), 366.

<sup>328</sup> Bundesgerichtshof [BGH] [German Federal Court of Justice] Apr. 19, 2007, Case No. 1 ZR 35/04, GRUR 2007, 708 n.32—Internet Versteigerung II; Bundesgerichtshof [BGH] [German Federal Court of Justice] Mar. 11, 2004, Case No. 1 ZR 304/01, GRUR 2004, 860—Internet Versteigerung I, cited in Nordemann, *Intellectual Property Liability*, in INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES (Christopher Heath & Anselm Kamperman Sanders eds., 2012), *supra* note 205, Table of German Cases at 228–46; Hoeren & Yankova, *supra* note 321, at 504.

<sup>329</sup> Angelopoulos, *On Online Platforms*, *supra* note 287 at 29, n.151, citing A. Bayer, *Liability 2.0—Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany*, in M. J. ADELMANN ET AL., PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 365 (2009).

<sup>330</sup> HUSOVEC, *supra* note 2, at 170–71, citing Bundesgerichtshof [BGH] *Internetversteigerung I* (2004) I ZR 304/01; BGH (2013) I ZR 79/12, ¶¶ 45,55; BGH *Alone in the Dark* (2012) I ZR 18/11 (Rapidshare I).

<sup>331</sup> See Nordemann, *Intellectual Property Liability*, in INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES, *supra* note 205, Table of German Cases at 228–46.

<sup>332</sup> HUSOVEC, *supra* note 2, Ch. 9, 166–67.

<sup>333</sup> HUSOVEC, *supra* note 2, at 171, citing Bundesgerichtshof [BGH] [German Federal Supreme Court] (2013) I ZR 70/12, ¶ 20.

YouTube to conduct checks for further instances of previously notified works of the same artist, by searching on the title of videos and the name of the artist.<sup>334</sup>

#### 5.4.2.2 *GEMA v. RapidShare* (2013)—German Supreme Court—Duty to Monitor External Sites

The highwater mark of this line of cases is the 2013 *GEMA v. Rapidshare* decision,<sup>335</sup> in which the German Federal Court of Justice, the Bundesgerichtshof (BGH), required hosting platform Rapidshare to search *external* sites (such as online forums and torrent link aggregator sites), to find and block *incoming* links to infringing files stored by users on the Rapidshare platform. The German Federal Court found that Rapidshare’s file hosting business model was not inherently designed to violate copyright law and was therefore not per se infringing. However, the way that Rapidshare promoted use of its service created incentives for its users to use it for infringing purposes, and Rapidshare had liability on this basis. The court found that Rapidshare’s choice to allow its users to use its platform anonymously encouraged users to share infringing content.<sup>336</sup> The German Federal Court found that Rapidshare’s business model contained “an inherent structural danger of large-scale copyright infringements” and that it could no longer be considered to be a “neutral” intermediary in the sense of the CJEU’s *L’Oreal v. eBay* line of decisions. On this basis it was appropriate to impose increased obligations of “due diligence” on Rapidshare, in addition to its duty (under the *Störerhaftung* doctrine) to implement measures to prevent further copyright infringement of notified copyrighted works.<sup>337</sup> An injunction could be issued against Rapidshare, even though it had not directly infringed copyright or participated in its users’ infringement because *Störer* liability requires only that the intermediary contribute intentionally and in “an adequately causal manner” to infringement of others’ intellectual property rights.<sup>338</sup>

The German Federal Court affirmed that Rapidshare was not required to proactively monitor every file uploaded by its users. It acknowledged that imposing such a duty would make Rapidshare’s business impossible. However, it held that where an operator promotes use of its service by users in a way that will lead to violation of the law, this creates additional due diligence obligations for the operator, and an operator will be liable when it fails to satisfy those obligations. It was reasonable to impose an obligation on Rapidshare to monitor *external* sites for incoming links and to block the transmission of infringing files stored on its platform to third parties who had clicked on those links. If Rapidshare was not able to adequately block the

---

<sup>334</sup> OLG Hamburg, July 1, 2015, 5 U 87/12, *GEMA v. YouTube* (2015) (YouTube I).

<sup>335</sup> Bundesgerichtshof [BGH] [German Federal Court of Justice] Aug. 15, 2013, Case No. I ZR 80/12, *GEMA v. Rapidshare* (The Reader) (Rapidshare III) (*Rapidshare*). This followed the ruling of the Hamburg higher court, which had ordered Rapidshare to monitor for and remove future links to previously notified copyright-infringing content, and to conduct regular web searches for external links to infringing files on its platform (OLG Hamburg, Mar. 14, 2012, 5 U 87/09 (Rapidshare II)).

<sup>336</sup> Anette Gärtner & Andreas Jauch, *GEMA v Rapidshare: German Federal Supreme Court Extends Monitoring Obligations for Online File Hosting Providers*, E.I.P.R. 2014, 36 (3), 197–200; Alexander Harguth, *File Hosting in Germany Carries Increased Copyright Policing Duties*, LEXOLOGY, Oct. 31, 2013, <http://www.lexology.com/library/detail.aspx?g=ef2396cc-39e8-493b-a893-bec38f9ef368>; Angelopoulos, *On Online Platforms*, *supra* note 287 at 29.

<sup>337</sup> BGH (2013) *Rapidshare*, ¶ 13.

<sup>338</sup> BGH (2013) *Rapidshare*, ¶ 30.

transmission of files associated with the incoming links, the Supreme Court ordered Rapidshare to disable anonymous use of its service by its users.

### 5.4.2.3 Conclusion—German Law

Under the *Störerhaftung* doctrine as applied by the higher German courts, hosting platforms in Germany now have a duty to engage in monitoring for specific copyrighted works, where they have received a prior notice identifying allegedly infringing works. In addition, hosting platforms with business models similar to Rapidshare and that are accessible to German users may now have a more onerous duty to monitor incoming links from external sites, and to block transmission of infringing hosted files in response. The 2013 BGH ruling arguably takes the German *Störer* doctrine beyond what had been a limited obligation on hosting platforms to take measures to prevent reuploading of specific, previously notified copyrighted works, to a *general* monitoring obligation. This puts hosting platforms in a difficult position: they will not always be able to determine whether a particular hosted file is infringing or authorized but will be incentivized to block transmission of potentially unlawful material in order to avoid possible liability. At the same time, engaging in such nonneutral activity is likely to take qualifying ISSPs outside of the protections of the ECD’s statutory safe harbor regime based on the CJEU’s “active” intermediary doctrine.<sup>339</sup>

## 5.4.3 France

### 5.4.3.1 Overview of National Situation

As in Germany, some French courts have been willing to impose obligations on hosting platforms to prevent the reposting of previously notified content through injunctions. Until 2012, lower French courts effectively created a notice and stay down obligation but on a different underlying legal theory. In France, Internet intermediaries have been held liable on the basis of pre-existing civil law duties that were developed for analogue content publishers. Although France implemented the ECD’s safe harbor regime in 2004,<sup>340</sup> French courts initially interpreted the hosting safe harbor very narrowly, and disqualified entities that engage in activities beyond mere technical hosting of content on behalf of users from relying on the statutory protections.<sup>341</sup>

### 5.4.3.2 Injunctions against Hosting Platforms—Notice and Stay Down

French courts developed a practice of issuing prescriptive injunctions against hosting platforms, which had the effect of creating a “notice and stay down” obligation. This obligation was imposed via the broad injunction measure in the French HADOPI law. Once copyright

---

<sup>339</sup> Angelopoulos, *Beyond the Safe Harbours*, *supra* note 28 (querying whether the 2012 GEMA decision was consistent with the CJEU’s “neutral” intermediary doctrine as articulated in the CJEU’s *L’Oreal* and *LVMH* decisions).

<sup>340</sup> Loi 2004-575 du 24 Juin 2004 pour la confiance dans l’économie numérique [Law 2004-575 of 24 June 2004 on Confidence in the Digital Economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (June 21, 2004), p. 11168, consolidated to March 19, 2014, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164> [hereinafter LCEN].

<sup>341</sup> Sylvie Nerisson, *Intellectual Property Liability of Consumers, Facilitators and Intermediaries—The Position in France*, in INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES (Christopher Heath & Anselm Kamperman Sanders eds., 2012); ANGELOPOULOS, *supra* note 2, at 187–92.

holders had notified a hosting platform about the existence of particular copyrighted content on its platform, the hosting service was required to remove the content and implement technical measures to ensure that it was not reposted by the same user from a different IP address, or by another user.<sup>342</sup> As a result, French hosting services subject to these sorts of injunctions had a duty to monitor their users' activities, and to filter out particular content uploaded by users on their platform, once copyright holders had notified the platform of the existence of infringing copies of particular works.<sup>343</sup>

However, this practice changed abruptly in 2012, when the Cour de Cassation (French Supreme Court) found that hosting services could not be required to implement a “notice and stay down” policy because this practice violated EU law, based on the 2010 CJEU ruling in *Google Ad Words*. The Cour de Cassation was asked to rule on three separate decisions of lower courts of appeals that had been consolidated on appeal.<sup>344</sup> All three cases involved Google, Inc. and Google France. The first two involved injunctions obtained by Bac Films in relation to unauthorized copies of its films made available on Google Videos. The third involved photographs of a singer/actor that had been posted on AuFeminin.com and indexed by Google's image search service. In each case, following the court practice that existed up until that time, the lower Court of Appeal had issued an injunction requiring Google, Inc. (headquartered in the U.S.A.) and Google France to implement preventative measures to ensure that the relevant films were not reposted (in the first two cases), and that sites containing further infringing copies of the photos were not reindexed (in the third case).

On appeal, the Cour de Cassation overturned these rulings, and held that this type of judicially imposed notice and stay down obligation violated the no obligation to monitor prohibition in Article 15 of the ECD, and its national transposition in sections 6.I.2 and 6.I.7 of the LCEN.<sup>345</sup> It found that the prior decisions would have required Google to actively “seek illicit uploads” and to implement a “blocking mechanism with no limitation in time,” which would have been disproportionate to the pursued aim.”<sup>346</sup> In finding that requiring intermediaries

---

<sup>342</sup> Jane Ginsburg, *Host Server Provider Liability for User-Posted Content: A View From the EU*, THE MEDIA INSTITUTE (June 18, 2012), <http://www.mediainstitute.org/IPI/2012/061812.php>; Jane Ginsburg, *Take Down/Stay Down: RIP in France? But Little Solace for Google...*, THE MEDIA INSTITUTE (Aug. 6, 2012), <http://www.mediainstitute.org/IPI/2012/080612.php>

<sup>343</sup> This section attempts to provide a high-level summary for non-European readers of the types of monitoring obligations that have been imposed by French courts over time. In doing so, it necessarily glosses over what is a complex legal environment. For more detailed accounts of the interplay between French special liability doctrines from pre-ECD civil law, the implementation of the ECD in the LCEN, and national court practice, see Nerisson, *supra* note 341, and ANGELOPOULOS, *supra* note 2, at 187–231.

<sup>344</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., July 12, 2012, No. 11-13.669 (Google, Inc. and others v. Bac Films and others), [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/831\\_12\\_23883.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/831_12_23883.html); No. 11-13.666 (Google, Inc. and others v. Bac Films and others), <http://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2012/07/11-13.666.pdf>; and No. 11-15.165 and 11-15.188 (consolidated appeals, Google, Inc. and Aufeminin.com and others v. André Rau, H & K), <http://www.dalloz-actualite.fr/document/civ-1re-12-juill-2012-fs-pbi-n-11-15165>.

<sup>345</sup> Cour de Cassation [Cass.] [supreme court for judicial matters] July 12, 2012, Case No. 11-15165, at 10 (unofficial English translation on file with author).

<sup>346</sup> Anne-Catherine Lorrain, *Google/Monitoring Obligation: Comment on the Google France & Inc. v. Bac Films and Google France & Inc. v. André Rau Decisions of the Supreme Court* (Cour de Cassation) (First Chamber for

to install “a comprehensive and technologically effective filtering mechanism” to prevent reposting of content would create a disproportionate burden on hosting services, the Cour de Cassation seems to have been persuaded by the technological difficulties that would follow for large hosting platforms with a high volume of user created material if they were required to install such filters.

### 5.4.3.3 Injunctions Against Search Engines

French courts have used the French transposition of the copyright injunction power in section Article 8(3) of the 2001 Information Society Directive to direct search engines to undertake conduct that could be regarded as a prospective specific monitoring obligation. Reported cases using this injunction procedure are briefly reviewed below.

#### *SNEP v. Google Inc., and Google France*

In 2010, French music copyright holder collective management organization, Syndicat National de l’édition Phonographique (SNEP) obtained an injunction that required Google to implement keyword filtering in the Google Search engine’s AutoComplete feature, to remove three suggested terms that copyright holders argued would enable searchers to look for tools to commit copyright infringement. The three terms were “torrent” (related to the BitTorrent file-sharing software), “MegaUpload” (the now defunct cyberlocker service) and “RapidShare” (the hosting service discussed above). In the alternative, the injunction would have prohibited Google’s search engine from returning search results that linked those terms to names of performers, songs, or album titles.<sup>347</sup> This decision was appealed through successive courts and in 2012 the Cour de Cassation reversed the lower (intermediate) Court of Appeal decision and reinstated the injunction sought by the plaintiff music copyright holder collective management organization, which required Google to implement keyword filtering in AutoComplete.

The Court of Appeal had held that the websites were not per se unlawful because not all the content that they hosted was infringing, and it was the users’ downloading of the infringing files from those sites that was the infringing behavior. Therefore, Google search engine’s linking to those sites was not automatically infringing. The Court of Appeal had held that Google was not liable for the exchange of unlawful files on those hosting platforms because this was a voluntary action undertaken by Internet users. Finally, the Court of Appeal had held that removing those terms from Google’s search engine (presumably meaning the cache) or from search results that it returned, would not prevent infringement because determined users could still access those sites directly.

In overturning the Court of Appeals’ ruling, the Cour de Cassation held that the Google search engine’s display of search results was a public communication service that systematically directed web users, via displaying keywords, towards websites that contained unauthorized sound recordings and offered users the means to infringe copyright. The Cour de Cassation held that the injunction sought by SNEP was aimed at preventing or terminating such infringement by

---

Civil Matters), July 12, 2012—(Bac Films, two decisions) Cases Nos. 11-13666 and 11-13669; (André Rau) Case No. 11-15165 in 44 IIC 383–384 (2013); DOI 10.1007/s40319-013-0039-0.

<sup>347</sup> Cour de Cassation [Cass.] [supreme court for judicial matters] 1e ch., July 12, 2012, Case No. 11-20358, SNEP v. Google, Inc. and Google France, [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/832\\_12\\_23884.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/832_12_23884.html).

putting an end to the automatic association of these keywords with search results, which would make it more difficult for Internet users to search for the websites that facilitate copyright infringement. It was not necessary that what the measure sought—removal of keywords—would be 100% effective to stop infringement.

*SNEP v. Microsoft Corp. and Google, Inc.*

In 2015, the same French music collective organization, SNEP, sought an injunction from the Tribunal de Grande Instance de Paris directing Google, Inc. and Microsoft Corporation to take measures to prevent the display of search results in their respective search engines in response to search queries that combined the word “torrent” with the name of three particular music artists represented by SNEP. The injunction would have created a prospective obligation, effectively directing the search engine operators to put in place filters to prevent automated delivery of search results in response to these types of search queries for a period of at least 12 months. The Tribunal de Grande Instance of Paris ruled that SNEP’s request was not a valid use of the French injunction power, and that the proposed injunction was not permissible because it would have amounted to a general monitoring obligation, prohibited under Article 15 of the ECD.<sup>348</sup>

*APC v. Microsoft Corp. et al.—“Allostreaming”*

French courts have issued injunctions on two occasions ordering U.S.-headquartered search engines to delist a set of identified video-sharing websites, using the broad French implementation of the EU injunction. The same plaintiffs, French movie and television production copyright owners, L’Association des Producteurs de Cinema (APC, now known as UPC), la Federation Nationale des Distributeurs de Films (FNDF), and le Syndicat de l’Edition Video Numerique (SEVN), brought the injunction applications in each instance.

In the first case, the Paris Tribunal de Grande Instance issued an injunction in November 2013 that ordered French ISPs to block access to 16 video-sharing websites affiliated with the Allostreaming portal, and directed Google, Inc., Yahoo!, and Microsoft Corporation to delist the identified sites and any mirror sites from the search engines’ global search indices (including those at .com) for a period of at least 12 months,<sup>349</sup> in an action that began in 2011.<sup>350</sup> The 2013 injunction also included a prospective obligation, directing the U.S.-headquartered search engines to prevent the same websites, and any mirror websites, from being reindexed or from otherwise appearing in any search results from all of the search engines’ indices for a period of at

---

<sup>348</sup> Tribunal de Grande Instance [TGI] Paris, Jugement en la forme des referes, July 19, 2016, Case No. 16/53589, SNEP v. Microsoft France S.A.R. L. and Microsoft Corporation, <https://cdn2.nextinpact.com/medias/20160708---jugement-tgi-paris-refere-microsoft-snep.PDF>; Ernesto Van der Sar, *Court: Google and Bing Don’t Have to Censor “Torrent” Searches*, TORRENT FREAK BLOG (July 19, 2016), <https://torrentfreak.com/court-google-and-bing-dont-have-to-censor-torrent-searches-160719/>.

<sup>349</sup> Tribunal de Grande Instance [TGI] Paris, Nov. 28, 2013, APC et al v. Google, Inc., Google France, Microsoft Corporation, France Telecom, et al., Telejugement, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3935](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3935); also available at 1709 BLOG, <http://the1709blog.blogspot.com/2013/11/breaking-news-film-producers-and.html>.

<sup>350</sup> DMCA Takedown Notice sent by APC, FNDF and SEVN to Google, Inc., dated Aug. 13, 2011, available at Lumen Database Project, <http://www.lumendatabase.org/notice.cgi?SID=112931>.

least twelve months. U.S. and EU motion picture copyright industry groups heralded the 2013 delisting order as a global precedent.<sup>351</sup>

In 2016, the Paris Court of Appeals dismissed the appeal brought by Microsoft Corporation against the 2013 injunction. The Court of Appeals upheld the broad injunction against the search engines operated by Microsoft Corporation, and Yahoo! to remove links to the 16 video streaming websites on all versions of their search indices.<sup>352</sup> The appeals court also upheld the injunction's proactive monitoring obligation on the U.S.-headquartered search engines to prevent the reindexing of the websites, as well as any mirror websites that may be created, for a period of 12 months. In doing so, the Court of Appeals appears to have created, at the very least, a perception of a prospective notice and stay down obligation for search engines operating in France.

The Court of Appeals rejected the U.S. corporations' arguments that the injunction's extra territorial effect was unlawful, relying on recent decisions of the Court of Justice of the EU, which have adopted a "mere accessibility" test for asserting jurisdiction over foreign online entities.<sup>353</sup> The Court of Appeals found that the order was proportionate because it was territorially limited, as it only required Microsoft to display the delisted version of the search index to Internet searchers in France and the overseas French territories. It cited language from Microsoft's 2015 Privacy Policy about the collection and use of its users' IP addresses and personal data, and concluded that the order was proportional because search engines know where their users are located and can "circumscribe dereferencing of sites" based on the data they have collected about the individual user making a search request.

In August 2017, the French Supreme Court rejected the U.S. corporations' appeal on the issue of who should bear the costs of implementing these delisting and blocking measures. It affirmed that French courts had jurisdiction to issue the injunction because the EU Information Society Directive allows the judiciary to require technical intermediaries to take any necessary measures to stop copyright infringement on the Internet, and as policymakers recognized in Recital 59, technical intermediaries were "best placed to bring such infringements to an end." The Court concluded that it was in the discretion of the courts to decide who should pay for the implementation of measures in EU copyright injunctions because these were governed by EU Member States' national law, and as between the movie production copyright owner plaintiffs and the intermediaries, the technical intermediaries were more resourced and better able to bear the costs of implementation.<sup>354</sup>

---

<sup>351</sup> Chris Marcich, *ISPs and Search Engines Must Play by the Same Rules—French Court Ruling in the "Allostreaming" Case Sets a Precedent*, MPAA BLOG (Dec. 4, 2013), <https://www.mpa.org/press/isps-and-search-engines-must-play-by-the-same-rules-french-court-ruling-in-the-allostreaming-case-sets-a-precedent/>.

<sup>352</sup> Tribunal de Grande Instance [TGI] Paris, Nov. 28, 2013, APC et al. v. Google, Inc., Google France, Microsoft Corporation, France Telecom, et al., Telejugement, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3935](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3935); aff'd by Cour d'Appel, Paris, Mar. 15, 2016, APC et al. v. Microsoft Corp. et al., decision linked from Marc Rees, *Arrêt Allostreaming: FAI et moteurs doivent supporter les coûts du blocage et du déréférencement*, NEXTINPACT BLOG (Mar. 16, 2016), <http://www.nextinpact.com/news/99093-arret-allostreaming-fai-et-moteurs-doivent-supporter-couts-blocage-et-dereferencement.htm> (Google was not party to the 2016 proceedings as it had settled with APC after the 2013 order).

<sup>353</sup> Case No. C-170/12, CJEU (Fourth Chamber), Pinckney v. KDG Mediatech AG (Oct. 3, 2013); Case No. C-441/13, CJEU (Fourth Chamber), Pez Hejduk v. EnergieAgentur NRW GmbH (Jan. 22, 2015).

<sup>354</sup> Mathilde Pavis, *France: Costs of Blocking Injunctions to be Borne by Internet Intermediaries*, IPKAT BLOG (Aug. 1, 2017), <http://ipkitten.blogspot.com/2017/08/france-costs-of-blocking-injunctions-to.html>.

It is noteworthy that the plaintiff copyright industry group in at least one of these cases did not request the search engine defendants to remove links to the relevant video-sharing sites through their regular processes. In light of the French courts' decision to reach beyond the U.S. corporations' local subsidiaries (Microsoft France SARL and Google France in the first instance) to impose monitoring and blocking obligations on the U.S. parent corporations, and the appellate court's reliance on geolocation data collected by intermediaries as a basis for differentiating content displayed to users, these types of injunctions might create incentives for other U.S.-headquartered OSPs to build their services with geo-identification/blocking capability. As the appeal court noted, the major U.S.-based search engines already utilize geo-identification technology, but these types of injunctions might spur other types of U.S.-based OSPs to do so also.

#### 5.4.3.4 Conclusion—French Law

Prior to 2012, French hosting providers effectively had a “notice and stay down” obligation on receiving a notification from a rightsholder. French hosting platforms do not currently have a general obligation to engage in ex-ante monitoring of content stored on their platforms. However, one French court has imposed proactive monitoring (*SNEP v. Google France*)<sup>355</sup> and global delisting obligations on search engines (*APC (UPC) et al. v. Microsoft*)<sup>356</sup> through injunctions issued under the French transposition of Article 8(3) of the Information Society Directive.

#### 5.4.4 U.K. Law—Website Blocking Injunctions

Courts in at least five EU Member States have issued injunctions directing ISPs to block access to foreign websites that contain unauthorized copyrighted material, or that contain links to unauthorized content. The UK High Court of Justice has led the development of the law in this area, through a set of cases that articulated eligibility conditions for website blocking orders directed at UK ISPs, following the legal precedent set in the 2010 *Newzbin I* case.<sup>357</sup> The six major UK ISPs currently block over 1,000 foreign websites pursuant to copyright orders issued by the UK High Court under section 97A of the UK Copyright, Designs, and Patent Act of 1988 (the UK implementation of the mandatory EU copyright injunctions in Art. 8(3) of the EU InfoSoc Directive (2001/29/EC)).<sup>358</sup> The mechanism for issuing website blocking orders is now settled law in the UK. Following ISPs' unsuccessful appeals of early orders in 2012, UK ISPs no longer contest orders for website blocking brought by British entertainment industry copyright groups. They have established a streamlined process for responding to blocking orders, and for blocking additional mirror sites and copycat sites notified to them by British copyright industry groups.<sup>359</sup> This follows the practice established in the early blocking orders, which specified URLs and IP addresses that ISPs were required to block, as well as additional URLs and IP

---

<sup>355</sup> Cour de Cassation [Cass.] 1e ch., July 12, 2012, Case No. 11-20358, *SNEP v. Google, Inc. and Google France*.

<sup>356</sup> Tribunal de Grande Instance [TGI] Paris, Nov. 28, 2013, *APC et al. v. Google, Inc., Google France, Microsoft Corporation, France Telecom*.

<sup>357</sup> *Twentieth Century Fox Film Corp. v. Newzbin Ltd* [2010] FSR 21 [*Newzbin I*].

<sup>358</sup> Ernesto Van der Sar, *UK Pirate Site Blocking Whack-a-Mole Continues*, TORRENT FREAK BLOG (Apr. 29, 2016), <https://torrentfreak.com/uk-pirate-site-blocking-whack-a-mole-continues-160429/>.

<sup>359</sup> RIORDAN, *supra* note 300, Ch. 13.

addresses for mirror and copycat sites subsequently notified to ISPs by the movie and music industry copyright plaintiffs.<sup>360</sup>

Music and movie copyright holders have obtained UK site blocking orders covering a wide range of websites, including unauthorized streaming and one-click download sites,<sup>361</sup> torrent sites, and BitTorrent trackers,<sup>362</sup> private Torrent trackers, search engines that index particular unauthorized content,<sup>363</sup> sites offering streaming apps such as Popcorn Time,<sup>364</sup>

---

<sup>360</sup> The order in *Newzbin 2*, *infra* note 363, and subsequent blocking orders have each included a mechanism for additional IP addresses and URLs to be added to the ISPs' blocklists by subsequent notification by copyright plaintiffs.

<sup>361</sup> *Football Association Premier League Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch); [2014] ECDR 14 (Arnold J.) [*FirstRow*] (injunction directing six main UK ISPs to block First Row portal site, which allowed viewers to watch unauthorized live streams of sporting events; First Row did not itself host content, instead it indexed and aggregated unauthorized streams uploaded to other source websites by third parties); *Paramount Home Entertainment International Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch); [2014] ECDR 7 (Arnold J.) [*Paramount 1*] (injunction directing six main UK ISPs to block access to two unauthorized streaming sites that offered streams and downloads of movies and television programming); *Football Association Premier League Ltd v. British Telecommunications plc* [2017] ECC 17, [2017] EWHC 480 (Ch) (Arnold J.) ("live" blocking injunction directing six UK ISPs to block access to streaming servers during the times of live broadcasts of sporting events).

<sup>362</sup> *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); [2012] 3 CMLR 14 [*Dramatico 1*]; *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [No. 2] [2012] EWHC 1152 (Ch); [2012] 3 CMLR 15 [*Dramatico 2*] (injunction directing six major UK ISPs to block access to BitTorrent tracker site, The Pirate Bay, by blocking specified URLs and IP addresses, as well as additional URLs and IP addresses subsequently notified to ISPs by music industry copyright plaintiffs); *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); [2013] ECDR 8 (injunction directing six major UK ISPs to block access to three torrent tracker sites, Kick-Ass Torrents (KAT), H33T, and Fenopy). In *EMI v. BSKyB*, the UK High Court of Justice held that both users and operators of three BitTorrent indexing websites infringed music copyright owners' communication to the public right. It held that users who uploaded infringing music torrent files to the websites and made them available for download via a clickable link were engaged in infringing acts of making available of copyrighted music that allowed others to download the music at a time and place of their choosing (*EMI v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch) ¶ 38-42). The Court held that website operators had directly infringed copyright by communicating sound recordings uploaded by users to the public. In addition, the operators were secondarily liable for copyright infringement on two bases. First, because they had authorized their users' infringing communications to the public of the sound recordings. Second, they were liable as joint tortfeasors with the websites' user-uploaders because they induced, incited, or persuaded their users to commit infringements of copyright, and the operators and users had acted pursuant to a common design to infringe.

<sup>363</sup> *Twentieth Century Fox Film Corporation v. British Telecommunications plc* [2011] EWHC 2714 (Ch) (Arnold J.) [*Newzbin 2*] (injunction directing BT to block access to Newzbin2, website that indexed Usenet posts containing infringing material, by using BT's CleanFeed technology to block access to specified URLs and IP addresses, as well as additional URLs and IP addresses subsequently notified by movie industry copyright plaintiffs); *Twentieth Century Fox Film Corporation v. British Sky Broadcasting* (Unreported, Dec. 12, 2011, Vos J.) (injunction in similar terms directing BSB to block access); *Twentieth Century Fox Film Corporation v. TalkTalk* (Unreported, Feb. 9, 2012, Arnold J.) (injunction in similar terms directing TalkTalk to block its users' access to specified URLs and IP addresses).

<sup>364</sup> *Twentieth Century Fox Film Corp. v. Sky UK Ltd* [2015] EWHC 1082 (Ch) (Birss J) (injunction directing ISPs to block nine websites, including sites where Popcorn and Popcorn-like apps were available to download; torrent sites/source files; and torrent trackers/index sites).

unauthorized code bases (GitHub), and APIs and user interface elements,<sup>365</sup> and books and other literary works.<sup>366</sup>

## 5.5 Conclusion—European National Court Injunctions

The French and German cases and U.K. court orders surveyed above highlight the limits of the EU safe harbor regime, and the opportunities and potential deficiencies of imposing monitoring and blocking obligations on Internet intermediaries via national liability doctrines and the freestanding EU copyright injunction measure, under which OSPs may be directed to take costly and burdensome monitoring measures without any finding of liability on their part.

---

<sup>365</sup> Ernesto Van der Sar, *Court Orders UK ISPs to Block Popcorn Time Sites*, TORRENT FREAK BLOG (Apr. 25, 2015), <https://torrentfreak.com/court-orders-uk-isps-to-block-popcorn-time-150428/>.

<sup>366</sup> *Bloomsbury Publishing plc v. British Telecommunications plc* (Unreported, May 19, 2015, Mann J.) (injunction directing five largest UK ISPs to block eight websites that were making available for download over 10 million copyrighted books and other literary works without authorization) (discussed in RIORDAN, *supra* note 300, ¶ 14.111; Riordan notes that the copyright publishers had previously requested Google to delist over 1.75 million URLs from its web search indices, and had sent over 1 million takedown requests).

## CHAPTER 6

### STATUTORY SAFE HARBOR REGIME REFORM PROPOSALS

#### 6.1 Introduction

Policy dialogues on reforming the existing OSP statutory limitation of liability regimes took place in both the United States and the European Union over almost a decade. In the United States, in 2013 the U.S. Patent and Trademark Office put forward a proposal for OSPs to voluntarily adopt a notice and stay down obligation. In 2015 the U.S. Copyright Office took up this issue and requested comments from stakeholders about the possibility of making DMCA safe harbor protection conditional on OSP compliance with a notice and stay down obligation.

In Europe, a review of the existing limitation of liability statutory framework in the EU e-Commerce Directive began in 2009. In September 2016, the European Commission published a proposal for a draft EU Digital Single Market Copyright Directive. In February 2019, European policymakers reached agreement on the text of the draft Copyright Directive. This was adopted by European Parliament in March 2019 and is expected to be put before the Council for approval in April 2019. If adopted in the form agreed, Article 17 (previously Article 13) of the proposed EU Copyright Directive would fundamentally alter the existing EU legal framework governing legal liability for user-generated content online hosting service providers that has been in place since 2000 and create a major divergence between the U.S. and EU legal systems.

This chapter reviews the U.S. policy dialogues and then considers the evolution of the text of Article 17 (formerly Article 13) of the EU Copyright Directive from its introduction in September 2016 to February 2019. It does so for two reasons. First, to provide context for the findings from the interviews in chapter 8, which reflect the version of the text that was in existence in 2017–2018. Second, to trace changes in the structure of Article 17 (formerly 13) that occurred during this period, as the obligation for hosting OSPs to adopt content recognition and filtering technology that was the focus of concern in the original Commission proposal became the basis for an exemption from liability in the presumptively final version of the text.

#### 6.2 United States

In 2013, the U.S. Patent and Trademark Office recommended that OSPs adopt a “notice and stay down” obligation as a matter of voluntary agreement in a Green Paper published by the Department of Commerce’s Internet Task Force, *COPYRIGHT POLICY, CREATIVITY, AND INNOVATION*.<sup>367</sup> It reported complaints from major U.S. copyright industry groups about the reappearance of content after it has been taken down by an OSP at one location following a rightsholder notification. Copyright holders claimed that two features of the DMCA legislative framework had resulted in rightsholders having to bear the burden of expensive and potentially unending searches. First, U.S. courts have interpreted § 512(c)’s takedown notice procedure as requiring rightsholders to identify the specific location where alleged infringing content is located. Second (as discussed in the previous chapter), the legislative history of the DMCA and subsequent judicial determinations placed the burden on copyright holders to engage in ongoing

---

<sup>367</sup> DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, *COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY* (July 2013), 56–57, <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

policing of platforms to identify reappearance of content. Rightsholder groups claimed that this division of compliance burdens, combined with the lack of an affirmative duty for Internet intermediaries to monitor communications on their platforms in 17 U.S.C. § 512(m), had created a “whack-a-mole” problem, requiring rightsholders to send successive notices in respect of the same content at different locations. This had resulted in significant additional enforcement costs that were being borne almost exclusively by rightsholders.<sup>368</sup> The Green Paper proposed the creation of best practices for identifying and ensuring that “infringing content once removed does not immediately reappear.”<sup>369</sup>

The U.S. Copyright Office took up this issue in 2015. In framing questions for its consultation on the workability and effectiveness of the section 512 safe harbor regime, the Copyright Office identified several developments that had taken place since the enactment of § 512, which were claimed to have impeded the DMCA regime’s effectiveness for its intended purpose. It highlighted two matters: technical developments and judicial interpretations of the safe harbor regime’s eligibility terms and scope. On the first, it noted that the notice and takedown process had been transformed into a massive and technically driven at-scale removal process for many larger OSPs and rightsholders. This was due to the use of automated copyright infringement detection software offered by third-party service providers working with rightsholders, and automated notice sending systems used by larger rightsholders and third-party service providers working with rightsholders. This, in turn, had led to the development and use of automated notice processing systems by larger OSPs. The Copyright Office noted that these developments had particular implications for smaller copyright owners. They were subject to the same legal requirements as larger rightsholders—to identify all instances of infringement of their copyrighted works and to notify OSPs of them on an instance-by-instance basis. However, they often “lack[ed] access to third-party services and sophisticated tools to monitor for infringing uses, which can be costly, and must instead rely on manual search and notification processes.”<sup>370</sup>

Second, the Copyright Office reiterated copyright holders’ concerns about the “whack-a-mole” problem—the ease with which copyrighted material that had previously been removed could be reposted on a platform. It highlighted prior judicial interpretations of the DMCA regime’s eligibility conditions that had exacerbated this problem, noting that:

Under section 512 as it has been interpreted, [online service] providers are not required to filter out or prevent the reposting of copyrighted content through the use of content identification technologies or other means.<sup>371</sup>

The Copyright Office noted that this had led rightsholders to propose that the DMCA’s notice and takedown procedure should be revised to become a “notice and stay-down” procedure, under which once an OSP had received an effective and uncontested takedown notice for a particular work, the OSP “should be required to make commercially reasonable efforts to

---

<sup>368</sup> *Id.* at 56.

<sup>369</sup> DEPARTMENT OF COMMERCE, COPYRIGHT POLICY, *supra* note 367, at 58, and Appendix A, Summary of Recommendations and Issues for Further Discussion and Comment, Point 3, at 102.

<sup>370</sup> U.S. Copyright Office, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7, Dec. 31, 2015, 80 Fed. Reg. 81862, 81864 [hereinafter USCO Original NOI].

<sup>371</sup> USCO Original NOI, *supra* note 370, at 81865 n.35, citing 17 U.S.C. § 512(m) and UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1024 (9th Cir. 2013).

keep that work from reappearing on its site.” The U.S. Copyright Office sought comments from stakeholders on the proposed notice and stay down obligation.<sup>372</sup>

Rightsholders’ submissions to the Copyright Office’s Section 512 Study highlighted their concerns with the prior judicial interpretations of the DMCA’s requirements, and the disproportionate burden that this had placed on copyright holders. The Motion Picture Association of America stated that:

The inability of notice-and-takedown to combat online infringement effectively is the direct result of erroneous judicial interpretations of section 512’s provisions and the response of service providers to those decisions.<sup>373</sup>

It claimed that judicial interpretations of the scope of the safe harbors and the DMCA’s knowledge standards had shielded from liability OSPs that had willfully blinded themselves to copyright infringement on their platforms.<sup>374</sup> It also claimed that courts’ determinations that copyright holders were required to identify infringing content with specificity and that OSPs were required to remove only the specific file or link in a particular notice and not all instances of the same copyrighted work had placed a disproportionate burden on copyright holders and rendered the notice and takedown process unworkable.<sup>375</sup>

Music industry groups reiterated similar concerns about U.S. courts’ judicial interpretations. In their joint submission to the Copyright Office, they claimed that the notice and takedown system had proven to be an ineffective tool for the volume of unauthorized copyrighted music online. They also claimed that U.S. courts’ interpretations had “expanded the application of the safe harbors well beyond the passive service providers of 1998 to more active distributors of music that compete directly with services that must obtain licenses,” and that “[c]ourts have also given little meaning to key provisions for content owners in the DMCA bargain” including red flag knowledge, repeat infringer policies and representative lists, and the level of specificity with which copyright holders are required to identify alleged infringing works. This had resulted in safe harbor protections for OSPs that “[c]hoose to stick their heads in the sand” and forced content owners to divert resources from “creating content to sending minimally effective take down notices.”<sup>376</sup> The Music Community comments noted that the Recording Industry Association of America had sent more than 175 million takedown notices to web search engines and hosting platforms since 2012, many of which related to works that were taken down on a particular site, “only to see a repeat infringement of the same work appear on

---

<sup>372</sup> USCO Original NOI, *supra* note 370, at 81865.

<sup>373</sup> Motion Picture Association of America, *Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, at 14, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90285&attachmentNumber=1&contentType=pdf>.

<sup>374</sup> *Id.* at 2–3.

<sup>375</sup> *Id.* at 2–4.

<sup>376</sup> *Music Community First Round Comments*, *supra* note 49, at 3.

<sup>376</sup> *Id.*

the same site”<sup>377</sup> and then be indexed by search engines. The submission further noted that “what is expensive and difficult for large copyright owners is an impossible task for small copyright owners seeking to protect the value of their work,” and reported the frustrations of Maria Schneider, a GRAMMY-award winning jazz and classical composer, who stated that:

[T]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an endless whack-a-mole game.<sup>378</sup>

The joint Music Community comments also highlighted a statement from an independent band who decided to stop sending takedown notices altogether because they were frequently ignored and “[i]t was simply an exercise of throwing good money after bad.”<sup>379</sup> The joint Music Community submission contended that courts’ rulings on the DMCA safe harbor regime and the ineffective takedown mechanism had resulted in copyright owners having a Hobbesian choice between licensing their works for less than their commercial worth in order to obtain some revenue, or relying on the ineffective notice and takedown system.<sup>380</sup> Separately, but in similar terms, major music label Universal Music Group commented that:

[T]he reality is that the balance that Congress attempted to strike in drafting Section 512 has not been realized. Instead, the protections of Section 512, as interpreted by the courts, have overwhelmingly favored online service providers, imposed enormous burdens on copyright owners such as UMG, and fundamentally skewed the marketplace for music content.<sup>381</sup>

The Copyright Office issued a Request for Additional Comments in November 2016, which noted that a “heterogeneous picture of ISPs” had emerged from the comments and public roundtables, characterized by “large deviations in terms of functions, size, resources, and business models, as well as the volume of DMCA takedown notices received per year.” It noted that while large OSPs such as Google, Facebook, SoundCloud, and Pinterest had devoted resources to voluntarily implementing automated filtering systems and other tools to remove infringing content at scale, other ISPs were continuing to operate manual DMCA takedown processes for the smaller volume of DMCA notices that they received, and that some commentators had expressed concern that promulgation of new rules for the larger OSPs that already had automated filtering systems in place could place an undue burden on the operations of smaller OSPs.<sup>382</sup> The Copyright Office requested further comments from stakeholders on

---

<sup>377</sup> *Id.* at 4.

<sup>378</sup> *Id.* at 4–5.

<sup>379</sup> Statement of Eric Hilton, founder of the band Thievery Corporation and label ESL Music, *id.* at 5 and Appendix E.

<sup>380</sup> *Id.* at 4.

<sup>381</sup> Universal Music Group, *Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), *Docket 2015-7*, (Apr. 1, 2016), at 2, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90321&attachmentNumber=1&contentType=pdf>.

<sup>382</sup> U.S. Copyright Office, *Notice of Inquiry and Section 512 Study: Request for Additional Comments*, Docket No. 2015-7, Nov. 8, 2016, 81 Fed. Reg. 78636, 78637 [hereinafter USCO Supplementary NOI].

“whether any potential new measures to improve the DMCA safe harbor regime, such as filtering or stay-down should relate to the size of the ISP or volume of material hosted by it.”<sup>383</sup>

In their joint additional comments, the Music Community organizations expressed strong support for both a notice and stay down obligation for OSPs and the approach in the (then proposed) EU Copyright Directive.<sup>384</sup> In contrast, OSPs of all sizes strongly opposed the introduction of any type of mandatory notice and stay down obligation as a condition for obtaining safe harbor protection. Many of the OSPs’ comments noted that a mandatory notice and stay down policy would require OSPs to adopt automated content identification and filtering technology to enforce a “stay down” policy or to employ many more human personnel to engage in the proactive monitoring that this would require. Both options would constitute a significant change in how the DMCA regime operates currently. Both were also costly and beyond the resources of many smaller OSPs; this would have transferred costs of copyright enforcement currently borne by copyright holders on to OSPs.

Google and Facebook noted that they had voluntarily adopted content filtering technology, but strongly opposed modifying the DMCA regime to make eligibility for safe harbor protection conditional upon online service providers implementing a mandatory notice and stay down system. They noted that this would fundamentally change the orientation of the DMCA regime. It would require online service providers to take ex-ante or proactive measures, in contrast to the current situation, where they did not have a legal obligation to remove or disable access to particular content absent notice of infringement or otherwise becoming aware of specific infringing content.

In its comments, Facebook emphasized the legal incompatibility of a notice and stay down obligation with existing law, and the technical difficulties involved in implementing it:

---

<sup>383</sup> USCO Supplementary NOI, *supra* note 382, at 78641.

<sup>384</sup> Jay Rosenthal & Steven Metalitz, Mitchell Silberberg & Knupp LLP, *Additional Comments of the American Federation of Musicians et al Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on Nov. 8, 2016. U.S. Copyright Office, *Section 512 Study: Notice and Request for Additional Comments*, 81 Fed. Reg. 216 (Nov. 8, 2016), Docket 2015-7, at 4-5, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-92433&attachmentNumber=1&contentType=pdf> [hereinafter *Joint Music Community Additional Comments*] (“One possible way to restore balance and proportion to the safe harbors would be to adopt an approach similar to the one recently advanced by the European Commission in its proposal for a directive “on copyright in the Digital Single Market. . . . To clarify the liability of user-uploaded content services, the European Commission recently proposed a new copyright directive that confirms that services that ‘store and provide access to the public to copyright protected works . . . uploaded by their users’ are liable for communicating works to the public and have an obligation to obtain the necessary licenses from copyright owners . . . . It also clarifies, in line with case law of the Court of Justice of the European Union, that services playing an ‘active role’ in relation to users’ uploaded content, for example by optimizing the presentation of the content or promoting it, are ineligible for the hosting safe harbor. This also reflects the stated intention of the EU safe harbors to apply only to ‘technical, automatic and passive’ intermediaries. In addition, the proposed new copyright directive creates a specific obligation on services that ‘store and provide to the public access to large amounts of works . . . uploaded by their users’ to take ‘appropriate and proportionate’ measures, ‘such as the use of effective content recognition technologies,’ to ‘ensure the functioning of agreements concluded with [copyright owners]’ or to ‘prevent the availability on their services of works’ identified by copyright owners in cooperation with the service providers. . . . The inclusion of similar obligations on service providers in the DMCA safe harbors could prove important in allowing copyright owners and creators to more effectively protect the use of their content online while also creating a more balanced playing field for licensing negotiations between copyright owners and service providers.”).

The alternative of requiring service providers to affirmatively prevent the reposting of previously reported material after it has been removed may sound straightforward, but in fact it is inconsistent with settled legal principles, results in a poor user experience, and is technologically difficult to accomplish. Based on Facebook’s experience, implementing a “stay down” policy to screen out identical content on an ongoing basis, without any subsequent reports, would result in potentially large amounts of content being blocked even when that content may be perfectly permissible in another context. A user’s upload of copyrighted content may be infringing in one instance but not in others based on fair use, a licensing arrangement, or a host of other reasons. To impose a “stay down” obligation on intermediaries would automatically eliminate consideration of these factors and could significantly impede free expression, to the detriment of the broader public.

In addition, even for sophisticated services like Facebook, it is technologically difficult, if not impossible, to ensure that the same or similar content, once reported, will stay down indefinitely. Slight variations in the content could result in its reappearance, and users intent on gaming the system likely would find workarounds. Imposing liability under these circumstances could be ruinous and, indeed, could be an insurmountable obstacle for small and/or start-up services. Congress appeared to recognize these realities in enacting section 512(m), which provides that the DMCA’s limitations on liability are not conditioned on a service provider “monitoring its service or affirmatively seeking facts indicating infringing activity.” There is no way to reconcile a “stay down” obligation with section 512(m). On its face, such an obligation would require a service provider to affirmatively identify and block content across its platform on an ongoing basis.<sup>385</sup>

Facebook elaborated on these concerns in its additional comments:

To impose potentially crippling liability on service providers that attempt to keep infringing content off their platforms but fail to do so perfectly would undermine the DMCA’s purpose of providing online platforms with the certainty and flexibility necessary to flourish. [T]o impose “stay-down” obligations on service providers like Facebook would have a severely detrimental effect, as such a legal requirement would inherently create the prospect of liability and thus discourage online platforms from exploring proactive measures.<sup>386</sup>

Google expressed similar concerns in its comments to the Copyright Office:

Such a system would impose an extraordinary burden on OSPs to monitor all content available through their services and would not likely be effective. OSPs

---

<sup>385</sup> Mark Fiore, Facebook, Inc., *Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, at 6, <https://www.regulations.gov/document?D=COLC-2015-0013-90724>.

<sup>386</sup> Mark Fiore, Facebook, Inc., *Additional Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on Nov. 8, 2016. U.S. Copyright Office, *Section 512 Study: Notice and Request for Additional Comments*, 81 Fed. Reg. 216 (Nov. 8, 2016), Docket 2015-7, at 9, <https://www.regulations.gov/document?D=COLC-2015-0013-90724> [hereinafter *Facebook Additional Comments*].

cannot implement a staydown regime, because even when given notice that a particular user was unauthorized to upload a particular work, only the rightsholder knows whether subsequent uploaders may or may not be licensed to upload the content.

Moreover, the feasibility of a “staydown” mechanism depends on a variety of factors that vary across online services. An OSP cannot know for certain whether to remove content that has “reappeared” unless it can answer two difficult questions. First, is it the same material? To answer this question, the OSP must have access to the content itself. While this may be possible for some hosting providers, like YouTube with Content ID, for others this can easily be thwarted by user encryption. For social networks and search engines, only a link or metadata may be available, making it impossible reliably to identify content that had been previously removed.

Second, an OSP must ask whether the content is still infringing when and where it reappears. To answer this question, an OSP would need to know whether the ownership of a specific piece of content has changed or whether the content was licensed for the subsequent use. The OSP would also need to make a legal (and contextual) determination as to whether the posting of allegedly reappearing content was a fair use or covered by another copyright exception. In short, it is both legally and technically difficult to imagine that a “staydown” obligation could feasibly be imposed on all OSPs that are covered by the DMCA safe harbors.<sup>387</sup>

The dialogue on possible reform of the DMCA regime stalled in 2017 in the wake of the polarized views that the Copyright Office received from major copyright industry organizations and technology industry groups.

## **6.3 European Union**

### **6.3.1 European Commission Proposal for a New Copyright Directive**

#### **6.3.1.1 Background and Rationale**

The European Commission released its proposal for a new EU Copyright Directive in September 2016.<sup>388</sup> It was intended to address one of the objectives of the Commission’s 2015 Digital Single Market Strategy,<sup>389</sup> EU-level legislative action to “reduce the differences between

---

<sup>387</sup> Google, Inc., *Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, at 10, <https://www.regulations.gov/document?D=COLC-2015-0013-90806>.

<sup>388</sup> *Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final—2016/0280 (COD), Sept. 14, 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=EN> [hereinafter *Commission Proposal*].

<sup>389</sup> *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 (May 6, 2015).

national copyright regimes and allow for wider online access to [copyrighted] works by users across the EU.”<sup>390</sup> One part of the proposal, Article 13, together with Recitals 37, 38, and 39, proposed new obligations for certain online service providers that hosted user uploaded content to conclude licensing agreements with copyright holders and in addition, to “put in place appropriate technologies.”<sup>391</sup>

The Impact Assessment that accompanied the Commission’s Proposal indicated that Article 13 was intended to address concerns about the so-called “Value Gap” raised by music industry stakeholders in prior consultations. This referred to a perceived disparity between the revenue generated by large advertising-supported hosting platforms such as YouTube, Daily Motion, and Vimeo, which offered access to copyrighted works uploaded by their users, and payments that music copyright holders received from some of these platforms. The Impact Assessment noted that music copyright industry groups identified the EU statutory safe harbor for hosting platforms in Article 14 of the e-Commerce Directive as the root of this problem. Because UGC hosting platforms could rely on the ex-post notice and takedown regime to manage copyright liability while they were building up their services, they did not need to negotiate license agreements with music copyright holders before they launched, unlike subscription-based streaming services, such as Spotify, had done. The Impact Assessment also noted that music copyright industry groups reported that some hosting platforms had refused to enter into license agreements with music copyright holders. While some platforms had entered into agreements with rightsholders to share advertising revenue, music rightsholder groups claimed that these agreements were not fair because the share offered to music rightsholders did not reflect the actual value that the copyrighted music provided to the platform’s service, and music copyright holders were unable to negotiate on equal terms because of the market power held by larger platforms such as YouTube.<sup>392</sup>

---

<sup>390</sup> *Commission Proposal, supra* note 388, Explanatory Memorandum at 2.

<sup>391</sup> *Id.* at 8.

<sup>392</sup> *Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the 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* (COM (2016) 593 and COM (2016) 594, SWD (2016) 301 final, Sept. 14, 2016, Part 1/3, Annex 12A, 137-144 [hereinafter *Impact Assessment*]), citing (at 144) response of Impala to EU Commission 2015 *Public Consultation on Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing, and the Collaborative Economy*; Angelopoulos, *On Online Platforms, supra* note 287, at 2; see also *Music Community First Round Comments, supra* note 49 (citing from Submission of the International Federation of Phonographic Industries (IFPI) to the EU Commission 2015 Consultation on Platforms: “[O]ur member companies, as content producers, are unable to negotiate fair commercial contractual terms with some online platforms specifically those that rely on user-uploaded content (‘UCC’), such as YouTube, Dailymotion and SoundCloud. These services build up a user base off the back of UUC content, relying on the lack of clarity in the legal framework, and then make a ‘take it or leave it’ offer. Music companies can license their content on the terms of offer, or not agree to license, knowing that in such case their content will still be available, and they will have no option other than engaging in notice-and-takedown procedures which are ultimately ineffective in handling the vast volume of UUC. This leads to licenses being concluded at artificially low rates, causing a ‘value gap’ between the income generated by such services from their use of music, and the revenues that are being returned to record companies and artists.”).

### 6.3.1.2 Scope and Obligations

The Commission’s proposal applied to “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users.”<sup>393</sup> It implicitly required them to enter into agreements with rightsholders for the use of copyrighted works uploaded by their users. It directly required them to “take measures to ensure the functioning of agreements concluded with rightsholders” or “to prevent the availability” of these copyrighted works on their online services.<sup>394</sup> Article 13(1) provided that this included measures “such as the use of effective content recognition technologies” and had to be “appropriate and proportionate.”

The Commission’s Proposal did not define what technologies would be considered to be “effective content recognition technologies.” However, the Impact Assessment that accompanied the Commission’s Proposal for the Copyright Directive identified two types of technologies in its discussion of the Article 13 proposal—fingerprinting technologies and watermarking technologies. The Impact Assessment noted that both types of technologies could be used for audio, video, and image content recognition, and both worked in a similar way, requiring comparison of an uploaded file to a database of reference files provided by one of the companies that have developed and sell or license such technology, or by copyright holders.<sup>395</sup> In its discussion of fingerprinting technologies, the Commission referenced the technology offered by Audible Magic, Vobile, and INA (“Signature”) respectively, and the proprietary Content ID content identification and rights management technology developed and used by YouTube.<sup>396</sup>

Outside of the operative provisions of the proposed Copyright Directive, Recital 38 of the Commission’s proposal set out four other elements of the proposal. First, it characterized the activity of hosting platforms that store and provide public access to copyrighted works uploaded by their users as “performing an act of communication to the public.” This implied that the OSP would have direct liability for communicating unauthorized copyrighted content uploaded by their users, although Recital 38 did not state this explicitly. Second, it stated that these OSPs were obliged to conclude agreements with rightsholders, unless they were eligible for the hosting safe harbor in Article 14 of the e-Commerce Directive. Third, it stated that the availability of the hosting safe harbor in Article 14 of the ECD depended on whether the OSP was considered to play an “active” role, implicitly referencing the CJEU’s prior rulings in *L’Oreal v. eBay* and *Google France* (discussed in chapter 5). Fourth, Recital 38 stated that the new obligation to use effective content technologies applied to information society service providers that are eligible for the EU statutory hosting safe harbor.

EU legal scholars criticized the Commission’s proposal as being inconsistent with existing EU law in several respects.<sup>397</sup> EU scholars noted that Recital 38 mischaracterized

---

<sup>393</sup> *Commission Proposal*, *supra* note 388, art. 13(1).

<sup>394</sup> *Id.*

<sup>395</sup> *Impact Assessment*, *supra* note 392, at 164–67.

<sup>396</sup> *Id.* at 165.

<sup>397</sup> First, the new obligation to use effective content recognition technologies that required all uploaded files to be scanned against a database of copyright reference files would be inconsistent with EU fundamental rights law. As the CJEU’s prior ruling in *SABAM v. Netlog* established, a broad filtering system that applies to all uploaded files, was not time limited, and the cost of which is borne wholly by the OSP, would violate the obligation to strike a fair

existing EU case law on the scope of the communication to the public right.<sup>398</sup> Framing user-generated content hosting as an activity that was subject to direct liability and excluded from the EU statutory hosting safe harbor regime was widely viewed as controversial. As one scholar noted, it was particularly curious that a statement that would have amounted to a significant change in EU law was found in a recital, and not the operative text of the proposed Copyright Directive.<sup>399</sup> EU scholars appreciated the significance of this—namely, that the recital text implied that all UGC hosting services would be deemed to have direct liability for all unauthorized copyrighted content uploaded by their users. However, as the interview comments in chapter 8 demonstrate, most commentary on the Commission’s proposal at this time focused on concerns about the proposed new filtering obligation in Article 13(1). Perhaps because it was buried in a recital, there appeared to be less appreciation that the Copyright Directive would impose direct liability for communication to the public on hosting OSPs.

### 6.3.2 European Parliament Text Provisionally Adopted in September 2018

In September 2018, the European Parliament provisionally adopted its own version of a text for Article 13 and the broader draft directive. This followed the rejection by the European Parliament in a July 2018 plenary vote of the previous version of the text produced by the Legal Affairs Committee of the Parliament in June 2018. In response to critiques of the prior version of the text, the European Parliament’s September 2018 text did not contain any *explicit* reference to “effective content recognition technologies.” However, it explicitly imposed direct liability and new obligations on OSPs.

The European Parliament’s version of the text applied to “online content sharing service providers” (OCSSPs) which have two features: (1) “one of the main purposes of which is to store and give access to the public to a significant amount of copyright protected works or other subject matter uploaded by its users”; and (2) the service optimizes and promotes user uploaded content for profit-making purposes.<sup>400</sup> Article 13(1) provided that OCSSPs perform an act of communication to the public, and that *therefore*, they had an obligation to conclude “fair and appropriate licensing agreements with rightsholders,” which covered the “liability for works uploaded by [their] users.”<sup>401</sup> It contained a proactive monitoring obligation. Where rightsholders did not wish to conclude licensing agreements, it required OSPs and rightsholders to “cooperate

---

balance between the various rights protected by the EU Charter. It would also constitute a general monitoring obligation that would be prohibited under Article 15 of the ECD, as discussed in chapter 5. See Christina Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, KLUWER COPYRIGHT BLOG (Oct. 6, 2016), <http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>.

<sup>398</sup> Sophie Stalla-Bourdillon, Eleanora Rosati, Karmen Turk, Christina Angelopoulos, Aleksandra Kuczerawy, Miquel Peguera & Martin Husovec, *A Brief Exegesis of the Proposed Copyright Directive* (Nov. 24, 2016), <https://ssrn.com/abstract=2875296> or <http://dx.doi.org/10.2139/ssrn.2875296>.

<sup>399</sup> *Id.*

<sup>400</sup> Amendments Adopted by the European Parliament on 12 September 2018 on the proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. (COM 593) (2016) (C8-0383) (2016) (COD 0280) (2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+DOC+PDF+V0//EN> [hereinafter European Parliament Text], Amendment 150, art 2(1) point (4b); Amendment 143, Recital (37a).

<sup>401</sup> European Parliament Text, *supra* note 400, arts. 13(1) and 13(2), amendments 156–61.

in good faith” in order to ensure that unauthorized copyrighted works would be unavailable on these platforms.<sup>402</sup> This appeared to create an ex-ante obligation on OSPs to prevent unauthorized copyrighted content uploaded by their users from being publicly accessible on their platforms.

### 6.3.3 Council of European Union Negotiating Mandate Text

In parallel to the negotiations taking place within the European Parliament, the Council of the European Union held negotiations to produce a negotiating mandate text for the purposes of inter-institutional negotiations. The agreed negotiating mandate text of May 25, 2018,<sup>403</sup> contained several of the core elements of the Article 13 text found in the Commission’s Proposal and European Parliament text, but also contained several distinctive elements. In common with the European Parliament’s text, the Council’s text focused squarely on imposition of direct liability. It provided that an OCSSP performs an act of communication to the public, or an act of making available to the public, when it gives the public access to copyrighted content uploaded by its users. On that basis, it required OCSSPs to obtain an authorization from copyright holders for all types of copyrighted works available on its platform. OCSSPs were not eligible for exemption of copyright liability from the EU statutory hosting safe harbor.<sup>404</sup> The Council text also contained explicit monitoring obligations, but for the first time, appeared to frame them as conditions for obtaining a limited exemption from liability.<sup>405</sup>

### 6.3.4 Responses to Proposed Directive

Legal academics were divided on the reform proposal. A group of prominent EU copyright scholars strongly criticized Article 13’s upload filtering technology requirement as being inconsistent with existing EU law and CJEU jurisprudence, and incompatible with the EU

---

<sup>402</sup> *Id.* art. 13(2a), amendments 156–61.

<sup>403</sup> Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market—Agreed Negotiating Mandate*, Interinstitutional File 2016/0280 (COD), Document No. 9134/18 (May 25, 2018), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9134\\_2018\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9134_2018_INIT&from=EN) [hereinafter *Council Text*].

<sup>404</sup> *Id.* art 13(3).

<sup>405</sup> *Council Text*, *supra* note 403, art. 13(5), art. 13(8). Article 13(5) provided a list of factors to be taken into account in determining what measures would be considered “effective and proportionate” and Article 13(8) contemplated that the Commission would issue guidance on the application of “effective and proportionate” measures, on the basis of stakeholder dialogues to define best practices for measures, and consultations with OCSSPs, rightsholders, and other relevant stakeholders Article 13(5) provided a non-exhaustive list of factors to be taken into account, including (a) the nature and size of the OCSSP; (b) the amount and type of works uploaded by users of the service; and (c) the availability and costs of the measures, as well as their effectiveness in light of technological developments in line with best industry practice. The provision for an exemption from liability for OCSSPs that utilize content identification and filtering technology appears to have originated in a document produced by the Presidency of the Council of the European Union on April 12, 2018. *See* Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, Interinstitutional File 2016/0280 (COD), Presidency of Austria, *Presidency Questions Regarding Articles 3a, 11 and 13*, Document No. 7914/18 (Apr. 12, 2018), 3 (reporting that “Presidency understands that most Member States agree to an approach which consists of targeted definition of ‘online content sharing service provider’ in Article 2(5), a clarification under which conditions these services communicate to the public and a liability mitigation mechanism subject to specific conditions.”) and Annex, Document No. 5902/18, Discussion Paper on Article 11 and Article 13, 13).

Charter of Fundamental Rights.<sup>406</sup> Several scholars argued that introducing a proactive filtering requirement would undermine the existing e-Commerce Directive framework and result in a fundamental realignment of the EU intermediary liability regime from a negligence-based scheme to a strict liability regime for hosting platforms.<sup>407</sup> Another scholar disagreed and argued that the proposed Article 13 (as modified by the European Parliament’s JURI Committee) was consistent with the CJEU’s 2017 *Ziggo/Pirate Bay* ruling on the scope of the EU Communication to the Public Right.<sup>408</sup> Other scholars in the European Copyright Society contended that the existing EU copyright *acquis* was adequate to address the underlying policy issue and questioned the need for the new requirement. They warned that “proposed Article 13 would distort competition in the emerging European information market,” and noted that:

The obligation for content platforms to implement “effective content recognition technologies” will privilege large incumbent platforms that have already successfully implemented such measures (such as YouTube), whereas entry to this market for newcomers may become all but impossible. The unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU.<sup>409</sup>

Digital consumer rights groups, human rights organizations, media organizations, and cultural institutions were critical of the proposed filtering requirement in the European Parliament’s version of the text.<sup>410</sup> The U.N. Special Rapporteur on Freedom of Expression issued statements expressing concern about that version, and subsequently about the final version of the Article 13 proposal text after it was adopted by the European institutions in trilogue negotiations.<sup>411</sup>

---

<sup>406</sup> See, e.g., *On Online Platforms*, *supra* note 287; Stalla-Bourdillon et al., *supra* note 398; *Open Letter to the European Commission from 40 EU Legal Academics* (Sept. 30, 2016), <https://peepbeep.files.wordpress.com/2016/10/30-september-2016-openlettercommission-w-s1.pdf>.

<sup>407</sup> Pamela Samuelson, *The EU’s Controversial Digital Single Market Directive—Part I: Why the Proposed Internet Content Filtering Mandate Was So Controversial*, KLUWER COPYRIGHT LAW BLOG (July 10, 2018), <http://copyrightblog.kluweriplaw.com/2018/07/10/eus-controversial-digital-single-market-directive-part-proposed-internet-content-filtering-mandate-controversial/>, Communications of the ACM, Nov. 2018, “Legally Speaking: The EU’s Controversial Digital Single Market Directive” (commenting on the revised text as at that date, and how it would likely change the rules of the road for online platforms operating in the EU, even though the revised proposal did not expressly mandate adoption of content identification and filtering technologies); see also Giancarlo Frosio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe* (Mar. 1, 2017), 12 J. INTEL. PROP. L. & PRACT. 565 (2017), <https://ssrn.com/abstract=2956859> or <http://dx.doi.org/10.2139/ssrn.2956859>

<sup>408</sup> Silke von Lewinski, *Comments on Article 13 and Related Provisions in the JURI Committee Report for a Directive on Copyright in the Digital Single Market*, KLUWER COPYRIGHT LAW BLOG (Sep. 3, 2018), <http://copyrightblog.kluweriplaw.com/2018/09/03/comments-article-13-related-provisions-juri-committee-report-directive-copyright-digital-single-market/>.

<sup>409</sup> EUROPEAN COPYRIGHT SOCIETY, GENERAL OPINION OF THE EU COPYRIGHT REFORM PACKAGE (Jan. 24, 2017), 7, <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>.

<sup>410</sup> *Open Letter to the European Commission from 57 Digital Rights Groups, Journalist Industry Bodies, and Human Rights Organizations* (Oct. 16, 2017), [https://www.eff.org/files/2017/10/16/openletteroncopyrightdirective\\_final.pdf](https://www.eff.org/files/2017/10/16/openletteroncopyrightdirective_final.pdf).

<sup>411</sup> Statement of U.N. Special Rapporteur on Freedom of Expression, David Kaye, *EU Must Align Copyright Reform with International Human Rights Standards, Says Expert* (Mar. 11 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E> (noting that “Europe has a responsibility to modernise its copyright law to address the challenges of the digital age . . . [b]ut this should not be done at the expense of the freedom of expression that Europeans enjoy today. Article 13 of the proposed

The major U.S. technology industry groups expressed strong concern about the Commission’s proposal from its introduction. In 2016 the four major U.S. information technology industry associations sent a joint letter to Secretary of State, John Kerry, U.S. Trade Representative, Michael Froman, and the Secretary of Commerce, Penny Pritzker, expressing strong concerns about the proposed EU filtering mandate in the Commission’s proposal and its potential to undermine existing legal protections for Internet companies.<sup>412</sup> As noted above, in November 2016, the U.S. Copyright Office requested additional comments from stakeholders in its Section 512 Study on approaches taken outside the United States to ISP liability.<sup>413</sup> Facebook noted that the Article 13 proposal would cause ISPs to constantly be fearful of potential liability arising out of imperfect monitoring, and urged that the EU proposal not be emulated in U.S. law because it would be inconsistent with the “no obligation to monitor” prohibition in § 512(m) of the U.S. DMCA regime.<sup>414</sup> Google noted that it, and many other U.S.-headquartered hosting platforms (including Facebook, Tumblr, Twitch, SoundCloud, and Scribd) and Dailymotion in France, already deployed content identification filtering technology as a voluntary measure. However, it emphasized that mandating such technologies as a condition for safe harbor eligibility would have adverse effects on innovation.<sup>415</sup>

In contrast, as noted above, music industry groups expressed strong support for a notice and staydown obligation<sup>416</sup> and for the approach taken in (then) Article 13 of the proposed EU Copyright Directive, restricting safe harbor protection to “neutral, automatic and passive” intermediaries. It endorsed the creation of a specific obligation for online services that store and provide public access to large amounts of copyrighted works uploaded by their users to prevent the availability of copyrighted works through the use of “effective content recognition technologies.”<sup>417</sup>

---

Directive appears destined to drive internet platforms toward monitoring and restriction of user-generated content even at the point of upload. Such sweeping pressure for pre-publication filtering is neither a necessary nor proportionate response to copyright infringement online.” Further noting “Most platforms would not qualify for the exemption and would face legal pressure to install and maintain expensive content filtering infrastructure to comply with the proposed Directive . . . In the long run, this would imperil the future of information diversity and media pluralism in Europe, since only the biggest players will be able to afford these technologies.”).

<sup>412</sup> Letter to U.S. Secretary of State, John Kerry, Secretary of Commerce, Penny Pritzker, and the U.S. Trade Representative, Michael Froman, from the Internet Association, the Computer and Communications Industry Association, the Consumer Technology Association, and the Information Technology Industry Council (Dec. 20, 2016), <https://internetassociation.org/wp-content/uploads/2016/12/EU-Copyright-Proposal-Letter.pdf>.

<sup>413</sup> USCO Supplementary NOI, *supra* note 382.

<sup>414</sup> Facebook Additional Comments, *supra* note 386, at 10–11, <https://www.regulations.gov/document?D=COLC-2015-0013-90724>.

<sup>415</sup> Google, Inc., *Additional Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, published on Nov. 8, 2016. U.S. Copyright Office, *Section 512 Study: Notice and Request for Additional Comments*, 81 Fed. Reg. 216 (Nov. 8, 2016), *Docket 2015-7* (Amended) (Feb. 21, 2017), at 4–5, <https://www.regulations.gov/document?D=COLC-2015-0013-92487> [hereinafter *Google Additional Comments*].

<sup>416</sup> *Joint Music Community Additional Comments*, *supra* note 384.

<sup>417</sup> *Id.* at 4–5 (concluding that “The inclusion of similar obligations on service providers in the DMCA safe harbors could prove important in allowing copyright owners and creators to more effectively protect the use of their content online while also creating a more balanced playing field for licensing negotiations between copyright holders and service providers.”).

Prominent Internet pioneers, engineers, and technologists sent an open letter to European policymakers explaining the technical infeasibility and risks posed by mandating use of upload filtering technologies.<sup>418</sup> The proposed EU filtering mandate was particularly concerning to smaller commercial and noncommercial U.S.-headquartered hosting platforms that do not currently deploy automated upload content identification and filtering technologies.<sup>419</sup> Movie, television and sports broadcasters opposed the inclusion of the liability exemption provision for OCSSPs that use content identification and filtering technology and requested cessation of negotiations unless the exemption was removed, or that the audiovisual sector be formally excluded from the scope of the directive’s text.<sup>420</sup>

Leading legal academics, cultural organizations and digital rights groups raised concerns about the detrimental implications of the proposal for citizens’ freedom of expression and media diversity in the two years preceding its adoption.<sup>421</sup> Larger U.S.-based hosting platforms including Google’s YouTube, Facebook’s Instagram, and Amazon’s Twitch, sought to mobilize users of their platforms to press their concerns with European parliamentarians and policymakers.<sup>422</sup> The draft Copyright Directive generated much debate and resulted in some of the largest political protests of recent decades. Tens of thousands of individuals in over fifty cities in Europe participated in two days of public protests just prior to the European Parliament’s final vote on the directive.<sup>423</sup> More than 5 million individuals signed a petition to the European Parliament started by German activists, requesting that the two controversial clauses of the Copyright Directive be removed from the final text.<sup>424</sup> However, the European Commission

---

<sup>418</sup> *Open Letter to European Parliament on Article 13 From More Than 70 Prominent Internet Pioneers, Engineers, Technologists, and Academics* (June 13, 2018), <https://www.eff.org/files/2018/06/13/article13letter.pdf>.

<sup>419</sup> See, e.g., statement of concerns of user-generated content hosting companies at Don’t Wreck the Net website, <https://dontwreckthe.net/#support>.

<sup>420</sup> Motion Picture Association of Europe et al., *Letter from Audiovisual and Sports Sectors, Proposed Way Forward for the Value Gap Provision: European Commission Proposal or Music-Sector Specific Approach*, Dec. 1, 2018, <https://juliareda.eu/wp-content/uploads/2018/12/Audiovisual-and-Sports-on-Value-Gap.pdf> (noting that “Recent proposals would undermine current case law of the Court of Justice of the European Union (CJEU) which already makes it clear that online content sharing service providers (OCSSPs) communicate to the public and are not eligible for the liability privilege of Article 14 e-Commerce Directive. In addition, the proposal would muddy the waters of jurisprudence in this area in light of the German Federal Court of Justice referral to the CJEU in a case involving YouTube/Google and certain rightsholders, addressing this very issue.”).

<sup>421</sup> See, e.g., Dimitar Dimitrov & Allison Davenport, *Problems Remain with the EU’s Copyright Reform*, WIKIMEDIA FOUNDATION BLOG (Feb. 16, 2019), <https://wikimediafoundation.org/2019/02/07/problems-remain-with-the-eus-copyright-reform>.

<sup>422</sup> Following a blogpost from YouTube’s CEO, YouTube artists created hundreds of meme videos about the potential effects of Article 13. See Susan Wojcicki, *A Final Update on Our Priorities for 2018*, YOUTUBE CREATOR BLOG (Oct. 22, 2018), <https://youtube-creators.googleblog.com/2018/10/a-final-update-on-our-priorities-for.htm>; Instagrammers posted memes about Article 13 on Create.Refresh, a webpage on Facebook-owned Instagram, <https://www.instagram.com/create.refresh/>; see also Emmett Shear, CEO of Amazon-owned Twitch, “From Our CEO: A Letter to Twitch creators about Article 13,” MEDIUM (Dec. 5, 2018), <https://medium.com/@twitchblog2/a-letter-to-our-creators-about-article-13-97efac06fd8c>.

<sup>423</sup> Judith Horchert, *Demos in German Cities: “Let’s Explain the Internet Before You Break It,”* DER SPIEGEL, Mar. 23, 2019 (in German), <https://www.spiegel.de/netzwelt/netzpolitik/artikel-13-und-uploadfilter-zehntausende-protestieren-gegen-urheberrechtsreform-a-1259360.html>.

<sup>424</sup> Petition to European Parliament, hosted at Change.org, <https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet>.

and national politicians sought to delegitimize all opponents of the proposed directive as being misled or directed by large U.S. technology corporations.<sup>425</sup>

### 6.3.5 Final Text of Article 17 (Formerly 13) of the EU Copyright Directive

The EU Digital Single Market Copyright Directive had not been adopted at the time this work was written. A final text of Article 13 was agreed in Trilogue negotiations between the three European institutions in February 2019 and adopted (and renumbered as Article 17) by the European Parliament in March 2019. This text will be put before the Council of Ministers—the final step for legislative approval—in April 2019.<sup>426</sup> European Member States will then have two years to implement the directive’s provisions in their national legal systems.

The final text included several important changes, aimed at addressing some of the criticisms of prior versions of the draft directive. Most importantly, the final version of Article 17 (formerly 13) does not apply to not-for-profit online services. The final text applies to “online content sharing service providers,” which it defines as “providers of an information society service whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works or other protected subject-matter uploaded by its users ***which it organizes and promotes for profit-making purposes.***”<sup>427</sup>

The final text also contains a set of specific exceptions, various procedural safeguards and a mechanism for EU member states to grant exemptions. The final text excludes several types of services from its ambit: (i) providers of services such as not-for-profit online encyclopedias (which would appear to exclude Wikipedia); (ii) not-for-profit educational and scientific repositories; (iii) open source software developing and sharing platforms (which would appear to exclude GitHub); (iv) particular electronic communication service providers;<sup>428</sup> (v) online marketplaces and business-to-business cloud services; and (vi) cloud services that allow users to upload content for their own use.<sup>429</sup> The final text also contains a limited and time-based accommodation for new start-up hosting platforms, providing phased obligations, which is discussed below.

The final text contains four core elements:

---

<sup>425</sup> Ed Targett, *European Commission’s Copyright “Mob” Comment Triggers Outrage, An Apology*, COMPUTER BUSINESS REVIEW (Feb. 18, 2019), <https://www.cbronline.com/news/european-commission-mob>; European Commission, *The Copyright Directive: How the Mob Was Told to Save the Dragon and Slay the Knight*, MEDIUM (Feb. 14, 2019), <https://medium.com/@EuropeanCommission/the-copyright-directive-how-the-mob-was-told-to-save-the-dragon-and-slay-the-knight-b35876008f16> (via the Internet Archive, <https://web.archive.org/web/20190216094123/https://medium.com/@EuropeanCommission/the-copyright-directive-how-the-mob-was-told-to-save-the-dragon-and-slay-the-knight-b35876008f16>).

<sup>426</sup> Pending EU Copyright Directive, *supra* note 8; *see also* text adopted in Trilogue negotiations on February 13, 2019, and agreed in COREPER on February 20, 2019, COUNCIL OF EUROPEAN UNION DOC. 6637/19, [http://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/JURI/DV/2019/02-26/Copyright-AnnextoCOREPERletter\\_EN.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2019/02-26/Copyright-AnnextoCOREPERletter_EN.pdf).

<sup>427</sup> Pending EU Copyright Directive, *supra* note 8, art. 2(6) (emphasis added).

<sup>428</sup> *Id.* art. 2(6), Electronic communication service providers as defined in Directive 2018/1972 establishing the European Communications Code.

<sup>429</sup> *Id.* art. 2(5).

- (i) Hosting platforms covered by the Copyright Directive would have direct copyright liability for hosting and providing access to copyrighted content uploaded by their users, which the final text characterizes as an act of communication to the public or an act of making available to the public;<sup>430</sup>
- (ii) A requirement that affected UGC hosting platforms obtain authorization, for instance, in the form of licensing agreements, from the copyright owners of all types of works uploaded on to their platforms by their users. The licensing agreements would have to cover acts carried out by users of the UGC hosting platform’s service when they are not acting on a commercial basis or their activity does not generate significant revenues;<sup>431</sup>
- (iii) Affected UGC hosting platforms would be excluded from the EU statutory hosting safe harbor for copyright liability arising from their acts of communication to the public and/or making available copyrighted works through providing public access to hosted content;<sup>432</sup> and
- (iv) The text contains a limited “no liability” proviso where UGC hosting OSPs are not able to obtain authorization from all relevant copyright holders. They would be liable for unauthorized acts of communication of copyrighted works to the public unless an OSP is able to satisfy three conditions:
  - a. First, it can show that it has made best efforts to obtain authorization from all copyright holders of works hosted on its platform;
  - b. Second, it can demonstrate that it made best efforts to ensure the unavailability of specific copyrighted works “in accordance with high industry standards of professional diligence”; and
  - c. Third, it acts expeditiously to remove or disable access to particular copyrighted works upon receiving a substantiated notice from a copyright holder, and can demonstrate that it has made best efforts to prevent future uploads of these copyrighted works, in accordance with paragraph b.<sup>433</sup>

The fourth element creates an exemption from liability. OSPs that are not able to obtain comprehensive authorization from copyright holders could qualify for an exemption from liability if they satisfy the three conditions listed above. The second condition—a best efforts obligation to ensure the unavailability of copyrighted works included in a copyright reference database—and the reference to “high industry standards of professional diligence” was understood as a requirement to implement content identification filtering technology.<sup>434</sup> The

---

<sup>430</sup> *Id.* art. 17(1).

<sup>431</sup> *Id.* arts. 17(1) and 17(2).

<sup>432</sup> *Id.* art. 17(3).

<sup>433</sup> *Id.* art. 17(4).

<sup>434</sup> See Timothy B. Lee, *European Governments Approve Controversial New Copyright Law—Copyright Overhaul Could Effectively Mandate Automated Content Filtering*, ARS TECHNICA BLOG (Feb. 21, 2019),

reference to “in accordance with paragraph (b)” in the third condition—the notice and staydown obligation—would also require an OSP to implement content identification and filtering technology.

The final text contains a further paragraph that appears to provide some flexibility to EU member states in how strictly they may choose to enforce the exemption conditions. Paragraph (5) provides that in determining whether an OSP has complied with the three obligations required for exemption from liability, and in light of the (overarching) principle of proportionality, the following matters must be taken into account:<sup>435</sup> (1) the type, the audience and the size of the service and type of works or other subject matter uploaded by users; and (2) the availability of “suitable and effective means” and their cost for service providers.

This suggests that European member states’ legislatures and/or courts might have some flexibility to determine that an exemption from liability could be granted where no effective filtering technology currently exists for particular classes of works hosted by OSPs, such as software and 3D objects. It might also permit national legislators, regulators, or courts to approve exceptions based on the features of a particular service. This raises the possibility that there will be variations in the approaches taken across European member states, which may result in further fragmentation of the EU intermediary liability framework.

The final text also provides a limited accommodation for new start-up and small hosting services, which are subject to phased obligations. Hosting platforms that have been publicly available in the EU for less than three years *and* have an annual turnover below 10 million euros would still be directly liable for unauthorized works uploaded by their users and excluded from relying on the EU statutory hosting safe harbor in regard to copyright liability. They would also be required to obtain authorization from copyright holders for all types of work available on their platform, but would be able to qualify for the “no liability” proviso for up to three years if they are able to demonstrate that they made best efforts to obtain authorization via licenses, and if they expeditiously take down or disable access to specified content on receiving a “sufficiently substantiated notice” from a copyright holder. In other words, they would be exempted from liability for up to three years without having to install content identification and filtering technology and would not be required to enforce a notice and *staydown* policy. However, once the average number of unique visitors to the new hosting OSP’s site exceeds 5 million per month, calculated on the basis of the last calendar year, then they would be subject to the more onerous requirement of enforcing a notice and staydown policy. They would be required to demonstrate that they have made best efforts to prevent further uploads of “notified works.”<sup>436</sup>

The final text also includes several provisions intended to provide procedural remedies to users of platforms, and to safeguard freedom of expression.<sup>437</sup> The final impact of the Copyright

---

<https://arstechnica.com/tech-policy/2019/02/european-governments-approve-controversial-new-copyright-law/>; Glyn Moody, *German Government Confirms that Article 13 Does Mean Upload Filters, Destroying Claims to the Contrary Once and For All*, TECHDIRT BLOG (Mar. 13, 2019), <https://www.techdirt.com/articles/20190313/08371241788/german-government-confirms-that-article-13-does-mean-upload-filters-destroying-claims-to-contrary-once-all.shtml>.

<sup>435</sup> *Council Text*, *supra* note 403, included a similar set of factors but in a slightly differently worded provision.

<sup>436</sup> Pending EU Copyright Directive, *supra* note 8, art. 17(6).

<sup>437</sup> Pending EU Copyright Directive, *supra* note 8, arts. 17(7), (8) and (9). These include an acknowledgment that the directive is not intended to interfere with use of copyrighted materials permitted under national copyright law

Directive will depend on how these safeguards are transposed in the national legal systems of the twenty-eight EU member states.

## 6.4 Conclusion

If adopted in its final form, Article 17 (formerly 13) would create a major divergence between the U.S. and EU Internet intermediary liability frameworks. Under the final version of Article 17, all for-profit UGC hosting OSPs that have had a presence in the EU for greater than three years, and are not categorically excluded, would be subject to direct liability under EU law for communication to the public, or making available copyrighted works to the public, for unauthorized copyrighted content uploaded by their users. All UGC hosting services would be excluded from obtaining immunity from copyright liability under the EU hosting statutory safe harbor. However, some larger OSPs may be able to qualify for the limited exemption from liability that is contained in the final text, because they would appear to be in a position to satisfy the three required conditions. Currently only larger UGC hosting OSPs that have developed or acquired content identification and filtering technology would be able to qualify for the liability exemption. The OSPs that reportedly have filtering technology capable of enforcing a notice and staydown obligation are YouTube (using its proprietary Content ID content identification and rights management technology), Facebook (using its proprietary Rights Manager technology, in conjunction with third-party acoustic filtering software, Audible Magic), SoundCloud, Vimeo, Tumblr, and Scribd in the United States, and Daily Motion in France.<sup>438</sup> The implications of this are considered in chapter 9.

---

exceptions, and affirmation that OSPs do not have a general monitoring obligation. In addition, EU member states must require OSPs to provide effective and expeditious complaint and redress mechanisms and are required to ensure that out-of-court redress mechanisms are available to settle disputes. Member States are required to ensure that users have access to a court or relevant judicial authority to assert use of an exception or limitation to copyright rules. Many of these procedural rights would be stronger than the rights currently available to platform users under their terms of service and existing law. If implemented in a meaningful way, these could mitigate some of the concerns expressed about Article 13.

<sup>438</sup> *Google Additional Comments*, *supra* note 415, at 4 (noting that Facebook, Tumblr, Twitch, SoundCloud, Daily Motion and Scribd had stated in their respective first-round submissions to the U.S. Copyright Office's Section 512 Study that their platforms had voluntarily adopted content identification and filtering technology); *see also Music Community First Round Comments*, *supra* note 49, at 29 (noting that YouTube, Tumblr, SoundCloud, 4shared, and others had voluntarily adopted content matching technologies).

## CHAPTER 7

### METHODOLOGY

#### 7.1 Background Framing Analysis

In order to frame questions for the in-depth semi-structured interviews described below, comparative doctrinal analysis was undertaken to investigate the scope and sources of divergences that have recently emerged between U.S. and EU copyright law in three areas that were anticipated to have a bearing on OSPs that operate globally accessible online services:

- (a) Direct copyright liability for infringement of copyright holders' right to communicate copyrighted works to the public in regard to hyperlinking;
- (b) The scope and eligibility conditions of the respective U.S. and EU statutory limitation of liability regimes, and pending proposals that would alter the scope and structure of the EU statutory safe harbor regime and create a divergence between the U.S. and EU statutory regimes; and
- (c) The types of injunctions that copyright holders can obtain against online service providers in each jurisdiction, to enlist their cooperation to stop or prevent copyright infringement.

To situate the law on the books account within the prior literature documenting the global shift toward proactive monitoring obligations and to investigate copyright law's regulatory effects on OSPs as online gatekeepers, this analysis focused on identifying mechanisms in each legal system through which obligations were being imposed on OSPs to monitor for copyright-infringing behavior of users of their networks and platforms. The comparative analysis was original research, comprising review of legal commentaries, statutes, and judicial decisions. This analysis is set out in chapters 3, 4, 5 and 6.

#### 7.2 Qualitative Data Analysis

##### 7.2.1 Interview Objectives

To explore how OSPs perceive and navigate across differences in national copyright legal systems, and whether divergences between national laws have a normative impact on online service providers' decisions about product design and location, interviews were conducted with legal and policy staff at OSPs that operate in both the U.S. and EU markets.

The goals of the interview were: (i) to understand the perspectives of those working within OSPs on whether they encounter differences between national copyright legal systems in their work; (ii) to understand how they are navigating differences in practice, through questions seeking their perspectives on the divergences in legal standards and remedies between U.S. and EU law analyzed in chapters 3 to 6; (iii) to understand whether there are differential impacts on OSPs based on their size and resources or other characteristics; (iv) to explore how OSPs' interpretation of the differences might affect their decisions regarding product design and location of services, and technical infrastructure; and (v) to obtain data about how copyright law is operationalized within OSPs, to understand whether copyright law has created governance impacts. Chapter 8 includes data from interviews with fifteen current and former legal and policy

staff at eleven OSPs that operate services accessible in both the United States and the European Union.

### **7.2.2 Data Sampling**

Interview subjects were identified through purposive sampling, based on several selection criteria. First, a list of potential interview subjects was constructed from organizations that had participated in topic-specific policy dialogues, including the U.S. Copyright Office's study regarding section 512 of the U.S. Copyright statute, and engaged publicly on the legislative copyright reform proposals from the European Commission, European Parliament, and Council of the European Union regarding the Digital Single Market Copyright Directive. Second, other potential interview subjects with expertise and in-house experience in dealing with both U.S. and EU copyright law were identified through the researcher's network of industry, academic, and civil society contacts. These were supplemented by recommendations from interviewees through a process of snowball sampling.

To investigate whether there may be differential impacts among online service providers based on their size, resources, or other characteristics, interviews were conducted with employees of OSPs of various sizes, with differing geographical presence and exposure, and different types of services including OSPs that deal with links (to analyze sensitivity to potential EU copyright liability for linking), technical infrastructure and content delivery services and hosting platforms (to analyze sensitivity to the EU proposals imposing direct liability and new monitoring obligations on platforms that host user-generated content). Most, but not all, of those interviewed had been trained in U.S. law; others had deep backgrounds in Internet policy and technical backgrounds. Most of the organizations had headquarters or offices in the United States, but they had heterogenous geographic exposure profiles. Several were formed outside of the United States but had an office in the United States. Several had a physical presence in both the United States and the European Union—either because of staff, and/or an office in the European Union.

### **7.2.3 Data Collection and Analysis**

Interviews were conducted in an in-depth semi-structured style, using a common set of topics and questions. Interviews were conducted in person, by telephone, and by Internet communication technology. The semi-structured interview format was chosen over a survey because it allowed respondents to talk more freely about their experiences and perspectives about the topics and provided opportunities to seek more specific information on particular topics where respondents were comfortable elaborating. The research was confirmed as exempt by the U.C. Berkeley Committee to Protect Human Subjects on the basis of the confidentiality and data security protections set out in the research protocol approved by the U.C. Berkeley Committee to Protect Human Subjects. Interviews were conducted in accordance with that protocol and data was collected on a coded basis.<sup>439</sup>

Questions probed the following matters: (i) aspects of U.S. and EU copyright liability standards where divergences are apparent (linking liability, monitoring obligations, safe harbor frameworks); (ii) impact of different types of potential legal sanctions in each regime on

---

<sup>439</sup> See COMM. FOR PROT. OF HUM. SUBJECTS, UC BERKELEY, CPHS PROTOCOL NO. 2015-12-8217, issued April 17, 2017.

intermediaries' thought processes (statutory damage awards under U.S. law, and no-fault injunctions under EU law); (iii) awareness of recent developments in litigation, policy, and legislative proposals that raised the potential for copyright liability under foreign law for the OSP's operations; and (iv) awareness of the way in which other OSPs in the same industry have handled particular types of liability risks.

Interviews were recorded either through use of an encrypted recording device or detailed notes. Written transcripts were produced and empirical data from the interviews were manually sorted into thematic data clusters.

#### **7.2.4 Limitations of the Data and Qualitative Approach**

The data reflect the strengths and limits of the selection methods used. To try to get a broad perspective on how copyright law affects OSPs, interviews were sought with respondents at OSPs of varying sizes and resource levels. However, in order to identify individuals with the relevant knowledge/expertise in U.S. and EU copyright law and in-house experience in navigating that in practice, a process of modified snowball sampling was used. Interviewees and network connections forwarded interview requests and made introductions to experts with the relevant knowledge or who knew others with the relevant knowledge. Because snowball sampling relies on social networks, it is a useful method for identifying individuals in a relatively small group of experts who possess the relevant expertise and in-house experience that is the subject of investigation. This is particularly true for identifying experts in sensitive policy areas such as copyright, where experts' work is intentionally not public, and where many experts seek to keep as low a profile as possible because of the prior history of decades of litigation between major entertainment copyright owners and technology companies.

Snowball sampling is particularly useful because it can help to identify well-connected "key informants" in the relevant field,<sup>440</sup> who may be well positioned to identify other nonvisible experts. At the same time, modified snowball sampling does not produce a random sample, and thus the data sample obtained in this process is not statistically representative of all OSPs in the sector and the findings presented in chapter 8 cannot be used to support generalized findings that would be valid across the entire diverse OSP sector. While the number of OSPs in the data sample was relatively small, the sample includes data collected from a reasonably diverse set of OSPs, of different types, sizes, commercial orientations, and geographical exposure profiles, and the comments provided by the respondents—particularly on process and risk assessment calculus issues—provide meaningful insight.<sup>441</sup>

Finally, the data set has a number of limits. Many identified experts were extremely reluctant to speak with me about any copyright-related issue because of the history of intense litigation over many aspects of online service providers' liability for copyright infringement, and sensitivity about the pending EU copyright legislative proposals released by the European Commission, European Parliament, and the Council of the European Union during the time

---

<sup>440</sup> BAMBERGER & MULLIGAN, *supra* note 67, at 42–43, citing LEWIS ANTHONY DEXTER, ELITE AND SPECIALIZED INTERVIEWING (ECPR Press reprint ed. 2006), and Robert A. Kagan, "How Much Do National Styles of Law Matter?," Chapter 1, 19, in REGULATORY ENCOUNTERS—MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds., 2000).

<sup>441</sup> Mario Luis Small, "How Many Cases Do I Need?": *On Science and the Logic of Case Selection in Field-Based Research*, 10(1) ETHNOGRAPHY, 10–11 (2009).

period in which these interviews were conducted. Extensive confidentiality undertakings and strong data storage safeguards were necessary to obtain respondents' agreement to participate in interviews.<sup>442</sup> This included assurances of confidentiality regarding respondents' identity, the identity of the organizations where they worked, and as to the level of detail in descriptions of OSPs' services. Requests for interviews were made to many additional identified experts and OSPs with the relevant characteristics, both through trusted intermediaries, and direct outreach. Despite the confidentiality undertakings and data security protections in place, many potential interview subjects declined to participate. Several explicitly voiced concerns based on the prior litigation in the field.

Because of these concerns, and based on the confidentiality undertakings, data from the interviews are reported in chapter 8 on an unattributed basis, and in generalized terms in places. Apart from the interview findings reported in chapter 8, this project also draws on published data, publicly available information including submissions of various OSPs, and news reports concerning OSPs' practices, as a basis for observations and other findings. To avoid confusion, it is emphasized that references to practices of particular OSPs that are based on publicly available information do not indicate that the OSP's staff participated in interviews for this project.

The data set is limited in two other respects. Interviews were conducted with mostly U.S.-based personnel at OSPs that were largely, but not exclusively, based in the United States. Interviews were sought on the basis of the expertise of the respondent. It is possible that interviews with respondents in similar positions at purely EU-based OSPs might have yielded different responses. Interviews were conducted in 2017–2018, and reflect the law, judicial rulings, and legislative proposals that were in existence during that time period.

Finally, qualitative interviews have well-understood limitations as a research methodology. First, interview questions may inadvertently create a response effect in interview subjects, preventing collection of accurate information and skewing the analysis. Second, interviewing people with specialized knowledge—"elites"—as was the case in this project, has a particular set of challenges for obtaining accurate and unbiased data. In order to obtain access to interview elites, an interviewer must rely on entrées from other members of the elite or be part of the broader social network of the elite. As a researcher, I was able to obtain access to interview elites because of my reputation and connections to the elite network from my prior role as a lawyer and policy counsel. Although I did not personally know many of the respondents I interviewed, my role and position in the broader network likely affected who I was able to speak with, and the responses I received from respondents. As with any interview with elites, questions may arise about the motives of those willing to participate in a research project, and whether the interview subject may consciously or unconsciously skew responses in one direction, or seek to take control of an interview in order to use a researcher to advance an elite's position or agenda.<sup>443</sup> This is a valid concern, given that some of the interview questions sought to elicit responses about respondents' thought processes, which are inherently subjective in nature. I attempted to mitigate the impact of this by using a standard set of interview questions and

---

<sup>442</sup> The interviews were conducted within the constraints of the JSD program and in accordance with the research protocol approved by the U.C. Berkeley Committee for the Protection of Human Subjects, which required use of a password-protected encrypted recording device, deletion of sound recordings upon transcription, use of alphanumeric codes in place of any names of individuals and organizations in interview transcripts and notes, and storage of interview notes and transcripts on a password-protected encrypted USB drive.

<sup>443</sup> See BAMBERGER & MULLIGAN, *supra* note 67, at 43; DEXTER, *supra* note 440.

probing further on any responses that had the appearance of “well-practiced narratives.”<sup>444</sup> I also sought to triangulate interview data with public sources of data, where possible.

Third, qualitative interviews cannot produce causal inferences. While they can provide insights on current practices, they cannot causally prove a particular outcome will follow. To mitigate the impact of this limitation, I relied on insights from the framing comparative analysis to show connections between legal rules and likely effects when drawing conclusions.<sup>445</sup> Where possible, I sought to triangulate the empirical data collected through in-depth interviews against data obtained from other published sources.

---

<sup>444</sup> BAMBERGER & MULLIGAN, *supra* note 67, at 43, citing DEXTER, *supra* note 440.

<sup>445</sup> See Gerhard Danneman, *Comparative Law: Study of Similarities or Differences?* in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006), 384, 396–99, “Linking Rules to Effects.” (“Comparative law has long been used to show the effects which certain legal institutions or rules produce.” (at 396); discussing the methodological basis of establishing causal links through a process of elimination based on comparing similarities and differences (at 397–99)).

## CHAPTER 8

### INTERVIEW DATA AND FINDINGS

#### 8.1 Overview

This chapter presents a descriptive account of how those working within U.S.-based globally accessible OSPs view the role of copyright law and the Digital Millennium Copyright Act’s statutory safe harbor regime in their operations, based on data gathered from in-depth semi-structured interviews with current and former staff at OSPs, as described in the Methodology section. It also documents how they report that they encounter and navigate other jurisdictions’ copyright laws in their work, and the extent to which they take account of aspects of other jurisdictions’ copyright laws in their practices. For ease of reference, persons interviewed are identified as “respondents” in this chapter.

#### 8.2 Research Questions

The key questions this project sought to understand through interviews with OSP staff were:

- (a) How does copyright law shape the practices of OSPs that operate globally accessible platforms? Does it operate directly, or indirectly by producing governance impacts, or does it have multi-tiered effects?
- (b) How do U.S.-based globally accessible OSPs encounter and navigate differences between national copyright legal systems? To what extent do they take account of differences between national copyright legal systems in their operations?

#### 8.3 Findings

*OSP’s level of resources affects how they navigate differences between national copyright laws and copyright law has differentiated impacts on OSPs depending on their level of resources*

##### 8.3.1 Awareness of Differences in U.S. and EU Copyright Liability Standards in Regard to Linking Liability

Many of the respondents were aware of the differences that have recently emerged between U.S. and EU law in regard to OSPs’ liability for using and hosting links posted by their users, but there were variations in the depth of knowledge, depending on the level of resources of the OSP. Many respondents expressed concern about the recent developments in EU jurisprudence; some also expressed concern about the pending EU copyright reform proposals that implicated linking activities.

Several respondents stated that European law’s recognition of linking liability for OSPs was likely to have a noticeable negative impact on their operations in the *future*. None of the respondents explicitly acknowledged that differences in linking liability were *currently* affecting their OSP’s operations. Some respondents explained that they were not concerned about the potential impact on current operations because they were able to rely on the U.S. DMCA’s explicit safe harbor for linking activities in 17 U.S.C. § 512(d). One respondent explained it in these terms:

There is a key threshold question: . . . [D]o you have a policy of removing links on complaints, or not? If you do, you never get to the issue of how different EU law might be from U.S. law. If you are willing to remove links, it is less likely that you get . . . to a point of noticing differences in liability standards.

Some respondents expressed concern about the potential implications of the CJEU's broad legal interpretations on their limited resources. Several respondents noted that they did not have resources to manually investigate what content was linked to by their users, or what embedded linked content the OSP was hosting, and did not see an easy way to establish a clearance policy. These respondents worked at OSPs that in some cases had significant numbers of users, but respondents framed their responses in terms of internal resource constraints. These OSPs are referred to as "less-resourced" or "resource-constrained" in the findings.

Several respondents at OSPs that permitted subscribers to post links saw the CJEU's broad legal interpretations as a "big deal" and a looming issue that they would be required to deal with in the future and which might lead to changes in their practices. Respondents identified triggers that might require them to undertake jurisdictional analysis and consider whether they would need to make changes to their existing practices. These included further expansion of their European user base, and if they were to consider opening a physical office and "putting boots on the ground" in Europe.

Several respondents connected the recent CJEU hyperlinking judgments expanding the EU communication to the public right with policy concerns about the shift toward imposing monitoring obligations on hosting platforms in the then-pending EU copyright reform proposals. One respondent voiced concern that pursuing the logic of the CJEU's approach to its end point would increase pressure on OSPs to monitor for and block users' ability to post or embed links and noted that for many OSPs that change might affect whether they could operate their services in the European Union in the longer term. Another respondent commented that it was something that definitely had to be taken into account because most of the OSP's products are going to be available in Europe, so if there was going to be liability for linking in Europe, then they would have to come up with a way of managing that liability.

In contrasting U.S. and EU law on this issue, several respondents commented on the clear guidance that the "server test" articulated by the Ninth Circuit Court of Appeals in the *Perfect 10 v. Amazon* judgment had provided to technology developers in the United States and expressed concerns about the murky multifactor tests that had emerged from the recent CJEU judgments. Another respondent remarked on various issues that were contributing to the high level of legal uncertainty in the EU currently and highlighted the absence of an explicit safe harbor for OSPs that deal with links in the EU statutory safe harbor framework; there was no equivalent of § 512(d) in the U.S. safe harbor regime.

Respondents that were working in copyright-specific roles within their OSPs demonstrated deep knowledge of the European law in this area. Several respondents referenced the factors identified in recent CJEU jurisprudence and subsequent European national court judgments that had interpreted the CJEU's "for-profit" criteria, including the German Federal Court of Justice ruling that had held that Google's commercially operated search engine could not be presumed to have knowledge of unauthorized content on webpages that were indexed in automatically generated search indices.

***Differences between the U.S. and EU statutory safe harbor regimes had little effect on operations because OSPs' operations were standardized around U.S. law***

**8.3.2 Experience with Differences Between U.S. and EU Statutory Safe Harbor Regimes**

Respondents from OSPs with varying resource levels were aware of differences between the U.S. and EU statutory safe harbor regimes as to scope and eligibility conditions, but all reported that differences between the statutory safe harbor regimes did not have any bearing on copyright infringement notice processing practices because their OSPs' operations were standardized around the DMCA's procedures and standards.

Respondents at almost all OSPs reported that their OSP processed all copyright removal requests received using primarily the DMCA's notice and takedown procedure and statutory information requirements, regardless of where the complainant or identified copyrighted material was located. A number of respondents reported that their respective OSPs request copyright removal notices to be submitted in DMCA format, but their OSPs also accepted copyright removal requests that were submitted in other formats and these were reviewed on a case-by-case basis.

Respondents offered a variety of justifications for their OSPs' use of the DMCA notice and takedown process to handle all copyright infringement claims they received.

Some referred to legal certainty. One respondent explained that the OSP processes all copyright claims through the DMCA process, regardless of where they're coming from, as "we feel comfortable operating under the DMCA because we know we have a safe harbor." Another respondent framed it in terms of legal certainty and costs. The OSP received few copyright removal requests based on non-U.S. law. Most copyright complainants were happy to use the DMCA process, and it would not be cost effective to consult foreign lawyers on foreign national law.

Some respondents viewed it as a consequence of standardizing the OSP's processes around U.S. law and operationalizing the DMCA's very specific processes in their internal systems and outward-facing interfaces. As one respondent put it, "[t]he U.S. process is so entrenched at [our OSP] and is so prescriptive, that everyone just funnels into that." As a result, as several respondents independently noted, the DMCA has become the "global takedown law."

Several respondents framed the issue in terms of business logic. For OSPs that receive a high volume of DMCA notices and have had to develop streamlined data flows and in some cases, automated processing systems, to handle the workload generated by processing them, it is simply not scalable to have different policies for different regions. The respondent summed it up this way: "It has to be scalable for our engineers and implementable in each market." Similarly, another respondent noted that for companies that offer many different products, it was simply not scalable to have different policies for different products.

Another respondent explained this in terms of the DMCA copyright notice webform it made available on its website as part of the process of standardization of data flows that had taken place as the company was becoming more professionalized, and in response to receiving steadily increasing volumes of notices. The OSP looked for ways to streamline the gathering of the information required under the DMCA provisions, in order to minimize the burden on their

limited resources and increase the speed of notice processing. Using a webform facilitated gathering all the data required by the DMCA and allowed it to standardize reports and streamline data flows. Because data is gathered through the web form, the same details are gathered for all copyright removal notices received, regardless of where the copyright removal request comes from.

Several respondents provided nuanced explanations of use of the DMCA process justified by reference to the reciprocal rights accorded under international copyright treaties. One respondent explained that OSPs that have operationalized the DMCA notice and takedown process avoid foreign conflicts analysis on a “structural basis” in these terms:

If [the copyright complainant is] from abroad, they typically send the request in the form of a DMCA [notice], and because of U.S. copyright law and our various international treaties, they are the holder of a U.S. copyright [interest] in whatever their foreign copyrighted work is as well, in almost all cases, and therefore we just review it as a DMCA request and either find that it is in compliance with the law in the U.S. or it is not, and grant or reject the DMCA [removal request] accordingly.

Some respondents reported being aware of instances where copyright complainants had made removal requests that referenced non-U.S. copyright law. They stated that in each case they had seen, the requirements for removal under the non-U.S. copyright law were lower than the DMCA regime’s fairly prescriptive requirements. Thus, compliance with the DMCA process was, in practical terms, sufficient for compliance with the requirements in the complainant’s jurisdiction.

Respondents reported that most copyright complainants are using the DMCA process to make removal requests and that it is now not common to receive removal requests that refer to other jurisdictions’ copyright law, except from foreign law firms, which sometimes frame requests under their national copyright law. Several respondents commented that individuals have been content to use the DMCA notice and takedown process to seek removal of particular content because it provides a fast and effective form of redress, is easy to use (particularly where OSPs provide a webform which requests all the information that is required by the DMCA), and because the DMCA’s requirements are generally seen as fair and not particularly burdensome.

One respondent noted that it was previously more common to see copyright removal requests that referenced a foreign local copyright law. However, copyright complainants outside of the United States were incentivized to use the DMCA notice and takedown process for two reasons. First, it provided faster redress because the DMCA was the default process in U.S.-based OSPs; OSPs processed DMCA takedown requests much faster than a removal request made under the complainant’s local copyright law, which would require the OSP’s staff to consider the relevant foreign law and would often involve several exchanges of information between the copyright complainant or its legal representative and one of the OSP’s lawyers. Second, the DMCA process offered more effective redress, because at most U.S.-based OSPs it usually resulted in a global takedown of the infringing material, in contrast to removal requests processed under the complainant’s local copyright law, which might result in a takedown in only the relevant local jurisdiction.

Several respondents framed the global application of the DMCA process and information standards in terms of instantiation within the OSPs’ technological infrastructure and the broader

policy goals of copyright law. They opined that in most cases, compliance with the U.S. DMCA procedures for copyright infringement claims will be sufficient to comply with EU copyright law. Thus, because they had operationalized the DMCA notice and takedown process within their systems, most U.S. OSPs were probably compliant with EU copyright law and the other cases could be dealt with on a one-on-one basis. While there were differences between the United States and European Union legal systems in terms of copyright liability standards and OSPs' statutory safe harbor regimes, the copyright legal regimes were largely consistent for infringement issues.

### **8.3.3 Role of Copyright Law in OSP Staff's Work**

Although there was variation in respondents' responses on some of these issues, reflecting the heterogeneous sample, the point of commonality was operationalization of the DMCA safe harbor process. When asked about the role of copyright in their work, most respondents described how their OSP had operationalized the notice and takedown process required by the DMCA safe harbor regime. Some respondents described other aspects of their work where they encountered copyright issues (including foreign copyright law issues outside of copyright infringement claims), such as licensing arrangements. However, for some OSPs, given the nature of their service, the implementation of the DMCA notice and takedown process and the processing of copyright infringement notices in accordance with its requirements had become the primary point of interaction with copyright law within the OSP.

### **8.3.4 Recognition and Accommodation of Other Jurisdictions' Copyright Laws in DMCA Notice Processing**

Respondents at all OSPs reported that differences between the statutory safe harbor regimes did not have any bearing on notice processing practices because their OSPs' operations were standardized around the DMCA's procedures and standards. However, some OSPs took account of elements of other jurisdictions' substantive national copyright law that were not harmonized in the international copyright framework in assessing copyright infringement claims.

OSP might take into account differences in the scope of copyrightable subject matter or term of another jurisdiction's copyright law, or the scope and nature of national copyright rights (e.g., the existence of EU design rights) and the public domain status of a work, where a removal request identified a work that might be subject to copyright protection in the jurisdiction in which it was created, but not necessarily under U.S. copyright law. Several OSP respondents discussed complexities surrounding cross-jurisdiction recognition of copyright in photographs and furniture as particular cases where differences across national copyright laws made it difficult to ascertain the copyright status of these works and added complexity for platforms that hosted content uploaded by users in multiple jurisdictions. One respondent described the OSP's analysis process in these circumstances in these terms:

When we get copyright claims from other jurisdictions, we make an assessment—is there a colorable claim to fair use here? Would the claimed matter still be under copyright term there versus in the United States? Is there a difference in the scope of subject matter that is eligible for copyright protection in that jurisdiction compared to the United States?

Several respondents noted that the location of the copyright complainant generally does not factor into the decision about how to process a copyright infringement claim. However, it might make a difference if the complainant was located in a jurisdiction where the national copyright law recognizes a different scope of copyrightable subject matter compared to U.S. copyright law. For instance, one respondent noted that if the OSP received a copyright infringement claim related to a particular work that was hosted on the OSP's site that was protected by copyright or design rights in the European Union, and the complainant was based in the European Union, the OSP would be more likely to process it. However, where a copyright complainant was based in the United States and made a removal request for hosted content that was not within the scope of U.S. copyright law, the OSP would raise this with the complainant in the process of review and would be less likely to remove the content if it was outside the scope of protectable matter under U.S. law.

Another respondent reported that in the areas where copyright law is harmonized at the international level, the OSP uses the DMCA process to handle copyright infringement claims, relying on the international copyright framework on the basis that a complainant from a country that is a signatory to the Berne Convention would have a U.S. copyright interest. The respondent noted that the OSP encountered issues for its operations in areas where national copyright laws are not harmonized, including the scope of copyrightable subject matter, the nature of rights that some European countries' copyright laws grant to some creators, such as design rights, and the European panorama right, which affects the ability to display certain photographs. Several respondents reported that they encountered difficulties due to differing copyright terms for copyrighted works in different countries and identifying what is in the public domain across different jurisdictions.

The interviews also revealed variations in OSPs' ability to undertake this sort of individualized assessment based on OSPs' level of resources. Some OSPs with lesser resources appeared to be relying primarily on having operationalized the DMCA safe harbor's notice and takedown process to handle infringement claims. One respondent noted that:

I don't spend a lot of time trying to work out the differences between the U.S. and EU legal systems . . . It does not come up for us in practice. We try to standardize our processes under the DMCA. That seems to work pretty universally for copyright infringement claims.

### **8.3.5 Operationalization of DMCA Notice and Takedown Process**

#### **8.3.5.1 Differences in OSPs' Notice Processing Practices Based on Resources and Volume of Notices Received**

Outside of data obtained via interviews, transparency reports published by various OSPs highlight the huge spectrum that exists in the volume of notices that OSPs are receiving, from a handful of notices per year for some OSPs, to the over 3 billion URLs that Google has removed from its Google Web Search index on copyright-related grounds over the last decade. In 2017 alone, Google received requests to remove over 882 million URLs from over 586,000 unique domains, and removed over 95% of those webpages after reviewing and processing the DMCA claims.<sup>446</sup> While the DMCA sets out a single regulatory framework that applies to all OSPs that

---

<sup>446</sup> *How Google Fights Piracy*, *supra* note 50, at 38.

meet its eligibility conditions, and does not make distinctions between OSPs on the basis of size or resources, the disparity in the volume of notices received across OSPs and the need to efficiently process mass volumes of notices and manage content removal at scale has produced significant differences across OSPs in the way that they have implemented the DMCA notice and takedown process.

All respondents reported that their OSP applied the DMCA's notice and takedown standards to process copyright infringement claims received by their OSP. However, consistent with the findings of prior empirical studies on the operation of the DMCA Notice and Takedown process,<sup>447</sup> the interviews revealed significant variation in the complexity and details of notice processing practices across OSPs. This was driven, at least in part, by the volume of notices received, which had a bearing on whether notices were able to be reviewed manually or via automated notice processing systems. Some OSPs reported receiving a small and fairly steady volume of notices that were being reviewed manually; some received a significant volume of copyright removal requests and had moved to direct reporting mechanisms such as APIs and automated processing systems. Also consistent with the prior empirical study, some OSPs reported receiving an increasing number of notices that had led to some automation of processing but was straining current resources.

Interview questions did not seek to obtain data about automated notice processing or content filtering systems as this was not within the scope of this project. However, this explanation is provided to provide context for the findings in subsequent sections, which report observations from respondents about how OSPs are operating under the DMCA's ex-post notice processing system. Those observations were based on information gained through manual review of DMCA copyright removal requests, either in the process of original review, or after being channeled to supplemental human review via an automated notice processing system.

### **8.3.5.2 Processing of International Copyright Infringement Claims Through The DMCA**

For all OSPs, the first level of notice processing involved verification that a notice contained all the pieces of information required by the statute. Several respondents reported that a proportion of the incomplete notices that they receive were submitted by non-U.S. copyright complainants. When asked about how incomplete and noncompliant copyright infringement claims were handled, respondents at OSPs that reviewed notices manually stated that the person or team processing the notice would contact the sender, draw their attention to the DMCA's requirements, and request that the sender provide the relevant missing information. Thus, copyright infringement claims were assessed in accordance with the standards of the DMCA regime's statutory requirements. This applied regardless of the format in which the complaint was received, whether as data collected via a webform or a back-end API, by email (as was the case for several OSPs) or by fax, and wherever the complainant or identified copyrighted material was created or located.

Most respondents reported that they were not aware of instances where a complainant had declined to provide the missing information required under the DMCA statutory notice requirements on the grounds that the complainant was located in another jurisdiction. However,

---

<sup>447</sup> URBAN ET AL., *supra* note 3, at 28–29.

some respondents reported seeing a few instances where complainants responded by clarifying their claim of infringement based on the scope of copyrightable material under their local copyright law, where it differed from that of U.S. copyright law. Several respondents recalled claims made in regard to furniture or other items that would appear to be protected by European countries' copyright law or design rights but would fall outside of the scope of copyrightable subject matter in U.S. copyright law. Respondents noted that European copyright complainants were content to use the DMCA's procedural takedown process to obtain removal, even where they articulated their claim based on the different standards in their local copyright law. More generally, respondents reported that most complainants—even those clearly located outside of the United States—were content to have their removal request assessed and processed under the DMCA's procedural standards.

### **8.3.5.3 Instantiation of DMCA Safe Harbor in Infrastructure and Staffing Structures**

Many respondents described how the DMCA's procedural requirements had constitutive effects on the staffing structures, and technical infrastructure within their OSPs. Several respondents commented on particular aspects of the notice and takedown process that had been instantiated technologically in the workflow of their OSP.

Some OSPs that were receiving relatively small and steady volumes of copyright removal requests asked complainants to submit DMCA copyright removal notices via email. Many OSPs reported that they had established a public-facing webform for DMCA takedown requests, to ensure that all information required by the DMCA statutory requirements was gathered from complainants, and to standardize reporting, and streamline processing of data flows. Many reported that this was put in place several years previously in response to an uptick in the volume of claims received, and/or as the OSP became more professionalized over time. Webforms played a key role in streamlining data flows within organizations. Some OSPs with multiple products had established webforms for each product that gathered the data required by the DMCA, and at the backend, directed that data to the relevant processing team within the OSP.

Many respondents emphasized that although the nature of the legal obligation appeared to be the same for different types of OSP activity under subsections 512(b)–(d), the removal of content identified in a DMCA notice was often a very technical issue and the work involved in making content nonvisible varied greatly across different types of products and services. At one end of the spectrum, it was relatively straightforward as a technical matter to remove a particular URL from a search engine index. At the other end of the spectrum, it was a far more technically complex task to ensure removal of particular content at less-resourced OSPs that operated hosting platforms that relied on external Content Distribution Network (CDN) services to operate their service with user-friendly speed and low latency. Several respondents commented on the work involved in “removal”—it was not just a matter of disabling visibility of the particular webpage on the hosting platform where the content was visible but might also involve the more technologically complex task of identifying and disabling access to all instances of the piece of content—each with their own URL—on the CDN's services. At the same time, the technical complexity of modern hosting platforms and the hierarchy of contractual services involved in delivering content made it more challenging for hosting platforms with less resources to provide room to accommodate fair use in the day-to-day operation of the DMCA takedown process. This was because a copyright complainant—whether pursuing a legitimate copyright complaint or someone seeking to misuse the DMCA process to remove political speech—could send a

takedown notice directly to a CDN requesting blocking of particular content, or to a hosting platform's upstream provider, which could result in the entire service being taken offline.

The interviews also highlighted how the DMCA's notice and takedown process has produced a common distinctive staffing structure within OSPs, but also highlighted disparities in OSPs' practices. In most OSPs, DMCA notices are being reviewed and processed manually by Trust and Safety teams or legal operations teams, which work under guidelines provided by their in-house counsel, and in many cases have received specialized training. In some OSPs, notices are being reviewed by lawyers, where OSPs are receiving a relatively small volume of notices, permitting manual review. In most OSPs with lesser resources, Trust and Safety and/or Legal Operations teams are reviewing all types of complaints that are received at the OSP, not just DMCA copyright claims. This includes claims related to defamation, hate speech, and fraud. In contrast, at more well-resourced hosting OSPs that are receiving a greater volume of notices, separate teams have been established to review DMCA copyright notices, requests for removals on other legal bases, and user-reported violations of community guidelines. Questions about incomplete, noncompliant, or nonstandard copyright notices, such as sufficiency of information and copyrightable subject matter, are escalated to a separate team of specialist copyright lawyers for analysis and determination. The quantity of people working on copyright-related removal requests, and on copyright issues more generally varied greatly across OSPs, with more-resourced OSPs having several orders of magnitude more personnel working on copyright issues than was the case at OSPs that had resource constraints.

### **8.3.6 Role of U.S. and EU Safe Harbor in OSPs' Operations and OSPs' Differing Capacities to Analyze Jurisdictional Risk**

All respondents stated that their organization complied with the DMCA and stressed the importance of the DMCA's safe harbors to their ability to operate. The primary concern expressed by many OSPs was uncertainty about whether their OSP's activities were covered by the statutory safe harbor regimes in the United States; or for some, in both the United States and the European Union.

Many respondents praised the legal certainty and clarity provided by the DMCA regime's eligibility conditions. Those who spoke of the role of the DMCA regime in their activities framed their comments in terms of "compliance" with the DMCA's requirements. Several commented on recent U.S. court interpretations that appeared to tighten DMCA eligibility conditions (including the *BMG v. Cox*<sup>448</sup> and *Mavrix v. LiveJournal*<sup>449</sup> judgments referenced in chapter 5), but most seemed to view setting up the DMCA process as a once-off exercise. For those that mentioned uncertainty about the DMCA's coverage, it was a question about scope based on dual activities, not doubt about their OSP's eligibility as a threshold matter.

In contrast, several respondents expressed concern about the lack of certainty about whether their OSPs' services might be covered under the EU safe harbor regime. Respondents who discussed their approach to evaluating coverage under the EU safe harbor framework appeared to view it from the perspective of risk management. They highlighted particular areas

---

<sup>448</sup> *BMG Rights Management (US) LLC and Round Music LP v. Cox Communications, Inc.*, 881 F.3d 293, 305 (4th Cir. 2018) (finding that "Cox failed to qualify for the DMCA safe harbor because it failed to implement its policy in any consistent and meaningful way—leaving it essentially with no policy.").

<sup>449</sup> *Mavrix Photographs LLC v. LiveJournal, Inc.*, 853 F.3d 1020 (9th Cir. 2017).

of uncertainty including the vague standards-based approach that had evolved from CJEU rulings that had found OSPs were disqualified from the EU safe harbor if they were considered to be “active” intermediaries. In practice, this necessitated a fresh evaluation every time a feature was added or changed on a product. In addition, it created uncertainty about ongoing availability of coverage under the EU safe harbor regime because it was always possible that a rightsholder could initiate a lawsuit and a court in one of the EU member states might conclude that a feature of one of the OSPs’ products transformed the OSP into an “active,” rather than passive or neutral, service provider, and thus disqualified it from the EU safe harbor’s protections.

Another respondent highlighted the importance of the U.S. safe harbor regime in providing protection from liability and a clear and predictable basis for OSPs to create innovative new products and services. In contrast, it would not be possible, or good for innovation, for OSPs to try to build products based on the ebb and flow of the CJEU’s recent hyperlinking cases, for instance. For global businesses it was not always feasible to focus on differing jurisdictional standards, or to identify these in advance, so OSPs also had to consider providing tools that would allow both copyright rightsholders and users to remove or restore access to content to manage risk around potential liability and meet customers’ needs.

The interviews revealed that there were varying capacities across OSPs to take account of multiple and differing jurisdictional legal requirements. All OSPs were building their products to comply with the U.S. safe harbor, and with U.S. law more generally. Some OSPs were building their products to comply with U.S. law, and launching them globally, and then were making modifications to particular features of products where a potential concern was identified in a particular jurisdiction. Some OSPs were building their products to comply with U.S. law and launching them in jurisdictions where they had concluded, on the basis of jurisdictional analysis, that the product would also have protection under the local safe harbor regime. While products are usually made available globally, a particular feature of a product might not be made available in a jurisdiction if there was doubt about whether it would have safe harbor protection or potential liability under national law standards. Some OSPs appeared to have the capacity to undertake broader jurisdictional risk analysis, and to design and build products that comply with multiple jurisdictions’ laws, designed with the capacity to display or interact with copyrighted content on a country-by-country basis.

### **8.3.7 Role of Copyright in Launch Strategy**

The interviews revealed variations across OSPs in their approach as to whether copyright is a factor taken into account in OSPs’ launch strategies, and how OSPs viewed the regulatory weight of copyright relative to other types of laws. However, given the small sample size, these results should not be considered as robust or generalizable across all OSPs.

Four main approaches were articulated in the interviews. These were not mutually exclusive. In some cases, the same entity utilized different approaches for different products.

First, some respondents strongly favored the strategy of launching globally, or at least without efforts to target particular countries, and then subsequently adopting measures (such as geoblocking or geofencing) to restrict access to services to address copyright concerns if needed. Respondents at several OSPs indicated that global (or at least unrestricted) launch was now the norm. One respondent noted that for start-up companies, the strategy is to launch “anywhere and everywhere.” The respondent noted that it is not usual to launch targeting particular markets; the

strategy is market-based, and less about avoiding jurisdiction in particular countries. It makes more sense to launch on an unrestricted basis in order to see where users might engage, and markets could develop. The respondent concluded that only large established companies might consider jurisdictional analysis if they were rolling out a new product or feature. Several respondents noted that for commercial start-ups, copyright considerations do not usually play a large role in launch strategy. One commented that it is driven primarily by payment and consumer protection issues. To the extent that content policy is taken into account, right of publicity, trademark, defamation, and obscenity were more influential. Another respondent reported that volume of users and taxation law played a greater role in jurisdictional analysis than copyright law when formally launching into a new market. That respondent concluded that copyright law was not a primary consideration because many areas of copyright law were internationally harmonized.

Second, some respondents at more established OSPs indicated that copyright liability analysis and/or licensing arrangements played a large role in launch strategy and determined in which countries, or in which order, products and services were rolled out. This appeared to be driven by the nature of the service and functional features; whether the service was subscription-based or supported by advertising revenue; the class/es of copyrighted works that interact with the service; and the perceived litigiousness of the rightsholder representatives and collective management organizations that license rights in the relevant classes of copyrighted works. Music was mentioned several times in this context.

Third, some OSPs—established medium- and larger-sized OSPs—employed both strategies—that is, global launches and geographically targeted releases. Some respondents reported that products were generally launched globally, without a jurisdictional risk analysis, but product features had been modified post-launch to take account of potential concerns in particular jurisdictions. Some noted that even where the service was to be launched globally, it was becoming more common for it to be done in stages—often rolling out to particular types of account holders, rather than on the basis of geographic location. Tiered launches were viewed as the best way to test the product’s feature sets or usability with the most highly engaged users. Although not usually motivated by copyright concerns, tiered launches could sometimes help to identify and address any unanticipated potential copyright concerns before a full global launch. Where services were launched in stages, factoring in geographic location, often this was not driven by copyright concerns but rather by factors such as technical feasibility, bandwidth, or accessibility concerns; or based on perceptions of sensitivities about some types of content and comparative speech values.

Fourth, some OSPs appeared to favor global (or at least non-market-targeted) launches but took copyright considerations into account. Larger and better-resourced OSPs and some smaller and medium-sized OSPs appeared to follow this approach. Products appeared to be built to comply with U.S. law, and services were operationalized around the DMCA safe harbor standards. In contrast to startups and other smaller OSPs, OSPs following this strategy appeared to have the capacity to analyze jurisdictional liability post-launch and to remove or modify features accordingly. Some OSPs reported having considered copyright considerations in website interface design from inception. Some appeared to have the ability to limit access to particular classes of users through access measures and credentialing; some appeared to have technical capabilities to minimize potential copyright liability on a jurisdictional basis. Others described making frequent modifications to website interfaces related to optimization and presentation of hosted content.

## **8.4 Injunctions and Other Sanctions That Can Be Issued Against OSPs**

### **8.4.1 Experience with Foreign Injunctions**

Respondents at many of the OSPs reported that their OSP had been the subject of a court order or injunction from at least one non-U.S. court; many had received court orders from multiple foreign jurisdictions, and several were engaged in ongoing litigation outside of the United States on non-copyright grounds. A number of respondents reported that their OSPs' services had been blocked in other jurisdictions, mostly on non-copyright grounds, with one exception.

Several OSPs reported receiving a removal order from a foreign court directing removal of content for which the copyright status was contested, which had led to litigation. Most reported that foreign orders directing their OSP to take action to remove hosted content were based on grounds other than copyright—including defamation, harassment, trademark violation, terrorist content, and alleged violations of other jurisdictions' public morality laws. Several respondents commented that they thought the availability of the DMCA takedown process to non-U.S. copyright complainants was the reason their OSP had not received a copyright-related order from a foreign jurisdiction.

The interviews revealed that cross-border copyright injunctions from EU member states' courts under the national transposition of Article 8(3) of the 2001 Copyright Directive, 2001/29/EC were not widespread amongst the OSPs. Respondents did not mention Article 8(3) injunctions other than those that had previously been publicly reported. The interviews revealed that relatively few OSPs had received injunctions from foreign courts that were extraterritorial, in the sense that they explicitly directed the OSP to take action on a global basis. Several OSPs had seen extraterritorial orders in the trademark context. Others reported having received requests from foreign lawyers framed in "notice and staydown" terms in the defamation context.

### **8.4.2 Experience with U.S. and Foreign Nonparty Injunctions**

In contrast, a number of interviewees reported having received nonparty injunctions—injunctions issued by courts as a result of litigation brought against third-party infringers, to which the online service provider was not a party. In these instances, a copyright holder had sent the injunction to the OSP with a request for the OSP to remove links to, or block access to infringing content. In some cases, the injunction explicitly directed the OSP by name to take or refrain from particular action, even though the OSP was not party to the litigation and was previously unaware of its existence. These injunctions were often issued by U.S. courts, but some respondents reported receiving nonparty injunctions from jurisdictions outside of the United States.

Respondents were not able to determine if the use of nonparty injunctions was an increasing trend because many did not have internal systems set up to track this. Several noted anecdotally that this was not a new practice, and that they had seen such injunctions issued by U.S. courts more than a decade previously, particularly in the trademark context. Some reported having practices that suggest this may be an increasing trend, or at least has reached a level justifying resource expenditure on streamlining of processing.

### **8.4.3 Impact of Injunctions and Statutory Damages on OSPs' Decision-Making Processes**

There was a high level of consistency in how the potential for statutory damages awards in the United States figured in OSPs' decision-making processes. All OSPs reported that the potential for statutory damages awards in the United States was a constant and persistent factor in their decision-making. Several noted that getting fair use analysis wrong could result in a statutory damages award that would bankrupt their company. This required careful consideration—no one wanted to risk “dangling the company on an unknown user.”

Several OSPs with lesser resources noted that as entities with small budgets, they sought to avoid both injunctions and statutory damages awards. Statutory damages were a major concern. They also sought to avoid the costs involved in litigation over injunctions, which could have a major impact on their OSPs. OSPs with more resources and global offices and operations noted that statutory damage awards were a broader concern for companies based in the United States. Companies that also operate outside of the United States were concerned about potential injunctions from foreign courts and foreign government regulatory action that might block access to an entire market.

The interviews revealed variation in OSPs' views on injunctions. Respondents at many OSPs did not express concern about having a court direct their activities in regard to copyright claims. Many noted that they were willing to respond to court orders based on adjudicated claims of infringement, so long as they arose out of a procedure that incorporated due process.

Several respondents noted that any injunction issued to their OSP would likely direct the OSP to remove particular contested content, based on the nature of their service. Respondents at several OSPs with lesser resources noted that courts were better placed to make determinations of infringement than the OSP, particular in a user-to-user context. They appreciated receiving the clear guidance provided by orders arising out of adjudicated claims. One respondent noted that they would actually welcome more copyright injunctions in the context of takedown requests, but only so long as they had a safe harbor, because otherwise they would be worried about damages claims.

At the same time, some expressed caution, depending on the type of order or injunction involved. Several respondents noted that they would be more inclined to resist if an order directed them to engage in ongoing monitoring to prevent the reappearance of particular content. Some respondents reported having received foreign orders and requests from lawyers that had requested this in the defamation context, but they had not received a copyright “staydown” order.

Other respondents at OSPs that had more global exposure, and OSPs that were well-resourced, noted that they were not opposed to blocking access to copyright-infringing sites on policy or philosophical grounds, but expressed concerns about creating global precedents based on copyright injunctions, and the potential implications of similar injunctions being sought to direct OSP behavior for reasons other than copyright, such as privacy, or to silence political speech. One respondent noted that if a court in one country applies its injunction extraterritorially and the OSP were seen to comply with that, there would be a concern that other countries might then seek to have their courts apply their injunctions globally, perhaps in order to silence political speech that would be lawful in the United States. That broader policy concern had led the OSP to take a more holistic approach to injunctions that purport to operate

extraterritorially in all areas, and where possible to seek to implement injunctions within the jurisdiction of the court that issued it.

A number of OSPs reported that they were attempting to monitor developments in cross-border orders directed to OSPs on all legal bases because they had policy concerns about a court or government agency using a single country's laws and injunctions to regulate content and behavior on the Internet and to direct OSPs to remove or block access to content that was lawful in other jurisdictions. Many respondents reported that they had been following the *Equustek* case, in which a Canadian court had ordered Google, Inc. to delist allegedly infringing URLs globally, and the subsequent judgment from a U.S. court that declined to enforce the Canadian order against Google. Several were following delisting orders directing OSPs to remove links to content under the European Right to Be Forgotten, and the ongoing litigation between Google and the French data protection authority, CNIL, on the geographic scope of search engines' delisting obligation. Several expressed particular concern about global delisting orders in areas where global standards or harmonization does not exist, such as the Right To Be Forgotten, and where rights were inherently territorial in scope, such as trademark law.

Some respondents were monitoring developments regarding EU copyright injunctions issued under the national transpositions of Article 8(3) of the 2001 EU Copyright Directive and mentioned the *Allostreaming* litigation brought by French industry group APC against U.S.-headquartered search engines (Google, Microsoft Corporation, and Yahoo!) and the global delisting order issued by the Tribunal de Grande Instance in Paris (discussed in chapter 5). No respondents referred to additional Article 8(3) injunction lawsuits. However, some larger OSPs appeared reluctant to discuss numbers or details about these types of injunctions.

In regard to nonparty injunctions, several respondents expressed concerns about recent U.S. court injunctions issued against OSPs in default judgments against operators of infringing websites located outside of the United States, but applied to OSPs that were nonparties to the litigation against the direct infringer. Respondents expressed concerns about overbreadth (removal of entire domains versus particular URLs), the scope and means for implementation, and the due process deficiencies with such nonparty injunctions. Some OSPs had received these types of orders from both U.S. and non-U.S. courts.

#### **8.4.4 Technical Responses to Injunctions**

The interviews revealed differences in OSPs' capacity and inclination to use technological measures to implement cross-border copyright injunctions. This appeared to vary with OSPs' level of resources, the nature of their service, and the cultural and commercial orientation of the OSP. Several respondents from OSPs with lesser resources reported that in prior situations where their entire service was being blocked or threatened with being blocked in a particular jurisdiction, they had opted to use geoblocking to restrict access to particular content hosted on their platform where it was illegal in the other jurisdiction. However, those OSPs noted that those measures were not used in regard to potential copyright liability. Another OSP noted it has used IP blocking in a previous context not involving copyright. A number of OSPs reported that they had not previously used geoblocking in relation to copyright claims, but if they had to implement a valid cross-border copyright-related injunction they might consider using jurisdiction-specific geoblocking as one possible option for implementation. However, several respondents noted that a decision to use geoblocking to enforce territorial copyright restrictions would involve a high-level discussion within their OSPs.

Respondents highlighted various factors that they would consider in this process, including whether a court in the other jurisdiction had adjudicated the targeted content to be infringing, and whether the OSP had a significant number of users in that jurisdiction that would be affected. One respondent noted that in the case of copyright, they would likely comply if the order was directing them to remove particular content, on the basis that if there was liability under EU law, it was likely that there might be liability under U.S. law given the internationally harmonized copyright framework.

Respondents noted that there were technical and engineering resource implications depending on the nature of the service. Some UGC hosting services have been built with an eye to blocking access to pieces of content on a granular basis; but once a geoblock has been put in place it still requires resources to maintain that because blocking techniques can become obsolescent over time. Some online services were not built with geoblocking in mind; some services might be more amenable than others to adding geoblocking functionality retroactively, but for smaller OSPs with resources constraints, engineering resources would have to be found to do so. Another respondent noted that when they received adjudicated orders from foreign courts, there would always be an internal discussion about how to implement them, including whether and where content might need to be made inaccessible. In that context, it was not a question of applying different standards to different territories. It was a technical matter, because different services have different technical capabilities to show, or to remove, particular content.

Some smaller more commercially oriented OSPs reported that they would use geoblocking as their primary implementation strategy. Other respondents identified other mitigation measures they might consider, based on the nature of their services and the terms of the foreign injunction, such as blocking access to credit card processing or advertising revenue from the particular jurisdiction. Others reported that they would not use geoblocking to restrict access on copyright grounds but would instead wait and see if their site was blocked in the other jurisdiction. Several smaller OSPs also queried whether geoblocking would be effective to take account of potential liability arising out of differences between jurisdictions' liability standards or statutory safe harbor regimes.

## **8.5 Jurisdiction, Enforcement, and Uncertainty about Applicable Law**

Many respondents perceived that assertions of jurisdiction by foreign courts and governments had expanded in recent years. A number of respondents reported that they thought their OSP could be subject to jurisdiction “everywhere” or “literally anywhere.” Others framed their comments in terms of the traditional criteria for jurisdiction analysis. They perceived that their OSP could be subject to jurisdiction in countries where the OSP maintained an office, had physical assets such as servers, had employees, did substantial business, or had a large number of users. Several stated that they assumed their OSP would be subject to jurisdiction in EU courts because they have significant users in the European Union, even though they did not have an office or staff there. Several noted that non-U.S. courts, in France and elsewhere, had been asserting jurisdiction for several years on the basis of broader and less tangible factors beyond the “purposeful availment” and “targeting” approaches articulated by U.S. courts, such as use of language on a website. Another noted that it was no longer safe to assume that not having an office in a particular jurisdiction was sufficient to avoid an assertion of jurisdiction by a foreign court if the OSP’s website was accessible in that jurisdiction.

While OSPs appeared to agree that assertions of jurisdiction by foreign courts and governments had broadened, most did not seem to be concerned by this because they viewed the ability for foreign court orders to be enforced in U.S. courts as limited. As noted above, a number of OSPs, of various resource levels, reported that they had closely followed the *Equustek* case, where a Canadian court had ordered Google to remove links in its search engine indices on all domains globally, and the subsequent permanent injunction obtained by Google from a U.S. district court to block enforcement of the Canadian court order against Google in the United States. U.S.-based OSPs with resource constraints and less global assets appeared to be factoring in the relatively low prospect of enforcement of a foreign court order in U.S. courts into their risk assessments. One respondent commented that there was often no practical power to enforce a foreign court order against a company that was based in the United States, and did not have people or assets elsewhere, if the foreign judgment was out of line with U.S. law, and most complainants did not pursue it that far in any event. In contrast, some OSPs that had a significant user base or physical presence in the European Union considered that they would be subject to jurisdiction in EU courts and would comply with any valid order they received. Larger OSPs with a bigger geographic footprint appeared to assume that they were at risk for assertions of jurisdiction and viewed the prospect of foreign lawsuits as “very real.”

***Widespread awareness of and concern about the filtering mandate in Article 13 (now Article 17) of the proposed EU Copyright Directive and the narrowing scope of the EU hosting safe harbor***

### **8.5.1 EU Copyright Directive Proposal**

Respondents at all OSPs were aware of the proposed EU Copyright Directive proposal that was being negotiated at the time these interviews were conducted. All but one independently identified the filtering mandate in Article 13 (Article 17 in the version adopted by European Parliament)<sup>450</sup> as a matter that they were monitoring closely.

Respondents’ concerns about Article 13 (now 17) focused on the text of the European Commission’s proposal and its requirement for hosting OSPs to adopt “effective content recognition technology.” Interestingly, respondents did not frame their concerns around hosting OSPs being held to be directly liable for communicating to the public unauthorized copyrighted works uploaded by users of their platforms, which moved into the fore in the operative part of the text in the subsequent texts published by the Council of the European Union (May 2018) and the text provisionally approved by the European Parliament (September 2018). In other words, respondents appeared to be focused on the increased compliance costs in the original version, and not the imposition of direct liability on hosting OSPs in the two later versions of the text, which would appear to be the more significant impact of the Directive. However, this reflects the timing of many of the interviews, which took place while the Commission’s text was the primary text, and before the texts from the Council and the Parliament had been released. As explored in chapter 6, the text of the Copyright Directive changed significantly over the course of time. Respondents’ comments should be understood in the context of the content of the Commission’s proposal, which was the primary text for most of the interview period.

---

<sup>450</sup> Pending EU Copyright Directive, *supra* note 8.

Respondents at many of the OSPs with lesser resources revealed that they had participated in efforts to explain to EU policymakers how the proposed mandate would negatively impact their operations and reduce services to EU users. Across the board, all respondents expressed concerns about the lack of clarity about what the then-proposal required of OSPs, and the technological infeasibility of mandating filtering technology for all types of content.

Several respondents expressed concern that if EU policymakers decided to require hosting platforms to implement mandatory filtering technology, they might have to consider withdrawing from the European Union, despite the fact that they had a significant user base there. One respondent at an OSP that had a significant number of existing EU users, and viewed the European Union as their largest market after the United States, indicated that if the European Union were to adopt a notice and staydown obligation, this would be a significant change to the current legal framework under which OSPs are operating, and would have to be taken into account in any future decision about whether to expand and have a physical presence in Europe. The respondent noted that copyright liability under national law was not usually a primary factor in this analysis for their OSP, but it would be here because it would be a significant change to the legal framework for operations.

Many respondents from both less-resourced and more-resourced OSPs voiced concern about the broader competition and innovation impacts of the EU proposal. They noted that imposing a new filtering mandate would result in entrenchment of the large U.S.-headquartered OSPs that currently have filtering technology in place, and force smaller entities that compete in niche online services out of the market—perhaps both in Europe and elsewhere. One respondent commented that:

Amongst both small and medium U.S. platforms' General Counsels and in the EU, there is an appreciation that the proposed directive requirements will likely cement the dominant positions of Google and Facebook—the incumbents—because they are the only ones which have the resources to implement it, while the home-grown start-ups in the EU realize that they are likely to be squashed by it.

Another respondent expressed concern that the European Commission staff did not seem to understand that the costs involved in this would be prohibitive for start-ups and smaller tier OSPs. The respondent elaborated that:

If this becomes law in the EU, companies that already deploy filtering technology stand to gain for several reasons. First, they'll be able to comply and continue operating in those markets. Second, they, or the engineers that created the tech for their platform, could spin out into an intermediary filtering service company. . . . It would be different for smaller companies, like us. We would need to consider what would be compliant and then . . . get a quote for a third-party filtering service, and based on the costs of that, we would have to consider limiting or shutting down part of our service in the EU.

Another respondent highlighted the costs and policy implications of the proposal. The respondent stated that:

We think that a proactive monitoring requirement would likely be inaccurate. It would have a lot of false positives. It would have a really negative effect on freedom of expression. The proposal does not take into account different business sizes. Large commercial businesses can do that. It cost YouTube something like \$60 million to develop Content ID, and they are spending several million dollars annually to hire people to maintain it and do reviews.

The respondent noted that their OSP did not have the resources to develop a product like that and expressed concern about what this would mean for smaller OSPs, and the Internet ecosystem more generally. One respondent noted:

[I]f the EU does place some kind of proactive monitoring requirement for all content into their copyright law, that would be a serious problem. It would actually have the effect—not of protecting copyright owners—but instead, of keeping small businesses off of the Internet generally. It would make it the domain of only very large companies who could afford to do something like that.

Many respondents from OSPs with varying levels of resources expressed a profound sense of bewilderment that the people involved in drafting the legislation did not seem to understand how filtering technology worked and the technical impossibility of what they seemed to be asking hosting platforms to do. Some noted that they had reached out to try to explain this but felt that policymakers were not interested in gaining a better understanding of filtering technology, because this had become a political issue, and technical and policy arguments were not being heard in the midst of lobbying.

Finally, a number of OSPs offered opinions on whether the EU proposals, should they be adopted, would have effects outside of Europe. One respondent noted that if European policymakers were to adopt a technical filtering mandate, it would have a significant impact on OSPs' ability to operate in the future in several ways: first, by changing the legal requirements for operating in Europe; second, by potentially forcing OSPs to have to make decisions about choice of law—which countries' laws it would follow or not follow—because U.S.-based OSPs would no longer be able to rely on operating in compliance with the U.S. DMCA regime, as many did currently.

In regard to the changing positions of U.S. and EU courts on the assertion of jurisdiction, this has not affected our operations in regard to copyright. Copyright law is less influential on this front than EU data protection law. But, if there is something like a proactive monitoring requirement coming out of the EU in the next few years, that might change a lot, and we might have to make some decisions about whose law we choose to comply with, and whose we don't.

### **8.5.2 Comparisons with Implementation Strategy for the EU General Data Protection Regulation**

A number of respondents contrasted the potential effects of the Article 13 proposal with implementation of the GDPR. One respondent argued that the incentives of OSPs actually pulled against global implementation of the EU Digital Single Market Copyright Directive, toward an EU-specific implementation. At that time the draft European Commission proposal contained an express mandate for hosting platforms to use automated copyright identification and filtering technology. The respondent noted that mandating use of content identification and filtering

technology was likely to exacerbate the problems that copyright holders and Internet users already experience with the operation of Content ID on YouTube, including false positives in takedowns, the lack of accommodation for fair use, which has had a detrimental impact on freedom of expression, and fraudulent misuse and gaming of the payment system; all of which, the respondent noted, had undermined the core goals of copyright law.

That respondent noted that there was no one single answer to the question as to when an OSP should make a national or regional standard into a global standard that is applied across all of its operations. Each OSP might approach this differently. Their OSP had taken the view that there would be benefits for both users and the OSP in implementing the EU GDPR globally. But taking the same approach to all different types of content regulation would be a challenge. For smaller platforms, there was much inertia toward fragmentary implementation, and having a different solution in each place, generally speaking. In the case of the GDPR, that respondent's perception was that most companies were choosing to raise the bar, by implementing it globally. While the EU Digital Single Market Copyright Directive proposal's content upload filtering requirement presented a similar implementation challenge, it was not identical to the GDPR.

[T]here would be more harm in implementing the EU filtering requirements as a global standard. This is not because we have a philosophical objection to the proposals, but instead because of the problems that we have seen in the U.S. There are limits to automating the removal of content. We've already seen the risk of too much content being removed because the technology cannot make a contextual analysis. For us, since fair use is deeply intertwined in our platform, I could not see that it would be a benefit to us, or anyone, to implement the EU regional upload filtering requirement globally. . . . Our experience in the U.S. DMCA context suggests that filtering does not meet the core goals of copyright.

Another respondent framed it this way:

There is a great deal of uncertainty about the GDPR right now. While there is ambiguity in some parts of copyright, there are systems and understandings that are more mature. There are huge areas of copyright-related things where you can have a reasonably high degree of confidence that you are doing it correctly. And if you are not, you can really weigh the costs and benefits of doing it the way that you are doing it. But for GDPR, there is a huge level of ambiguity. . . . It will take a couple of years to find out if we are totally fine, or we made some small error that is easy to correct, or we made some catastrophic error, albeit unintentionally—that will take some time to become visible.

In contrast, the EU copyright proposals involve more fundamental uncertainty:

If Article 13 passes, it will be much more disruptive and problematic for us than GDPR compliance. . . . If Article 13 passes, it is unclear to me how to run a website at scale that allows for user generated content. There will be a great shake-out. But if the cost of operating in Europe is to manually filter every file that is uploaded, to check for some type of copyright violation, and to give an unknown entity that represents rightsholders access into the back-end of our systems, to all private user files, that may just not be a version of our business that is sustainable.

## **8.6 Governance Practices—Comparing Copyright and Privacy**

### **8.6.1 Technical Infrastructure**

Like privacy law, copyright law had produced distinctive impacts on OSPs' technical infrastructure, but interview data did not distinguish clearly between front-end and back-end modifications. Several respondents declined to clarify whether their OSP used geoblocking proactively, or only reactively. Respondents at OSPs of all sizes reported having requested technical modifications to deal with potential copyright liability concerns, but it was not always clear if this involved back-end infrastructure or external-facing website design.

### **8.6.2 Training**

At many OSPs, training to sensitize staff to potential privacy-related issues was in place and mandatory for all staff, including engineers. Respondents described how they advised engineers to think of their users' personal information—and particularly personally identifiable information—as being radioactive. Several respondents described the importance of thinking through technical architectural decisions concerning transmission and storage of users' personal data from the very earliest stages of infrastructure development in terms of latent defects. Training to sensitize staff—and particularly engineers—to personal data protection issues was a priority because it was harder (and sometimes impossible) to fix problems with transmission and storage of personal data after the fact.

The situation was more differentiated in regard to copyright training. Respondents at OSPs that were less established and/or faced resource constraints, reported that copyright training was often provided on the job to the members of the teams that were reviewing and processing copyright takedown notices. That training often focused on identifying common scenarios within the company's particular service where a colorable claim to fair use might exist, and then teaching reviewers how to apply and weigh up the four fair use factors in light of prior judgments. Respondents at several OSPs where the business model was based on subscription fees (rather than advertising revenue) noted that fair use played a core role in the communities using their particular services. Processing of copyright infringement claims on their services usually involved a detailed fair use assessment, and fair use was particularly important in mediating disputes between users on the platform. These OSPs had invested heavily in copyright and fair use training for staff. One respondent described how the OSP had developed fair use flow charts, which were used by the staff reviewing takedown notices to ensure that fair use was taken into account in the processing of copyright takedown notices.

While privacy training was viewed as essential at OSPs of all resource levels, copyright training seemed to be more closely correlated to the OSPs' resource levels and stage in the growth cycle. Several respondents reported that more systematic copyright training had been developed or was in the process of being planned for a broader range of employees, as the OSP had become more established and acquired more resources.

### **8.6.3 Staffing**

Across all OSPs, the resources expended on privacy-related staffing dwarfed copyright staffing. At smaller OSPs with only a single in-house counsel, respondents reported that privacy law concerns occupied a greater percentage of their time than copyright. More engineer hours

were dedicated to privacy-related issues than copyright. Respondents at more established and well-resourced OSPs also reported that privacy-related resources greatly outstripped copyright resources. Both privacy and copyright issues were staffed through a distributed staffing structure, with product counsel embedded in product development teams tasked with identifying potential privacy and copyright-related liability issues throughout all stages of development, supported by central teams of copyright and privacy experts, respectively. However, the number of staff members—legal and engineering—working on privacy issues was greater than those working on copyright issues. Several respondents noted that this reflected the dual role played by privacy lawyers—both inward-facing counseling in development and also the external-facing part of privacy lawyers’ role in interfacing publicly with government regulators.

#### **8.6.4 Role of Copyright in Design and Development Process**

Legal staff respondents at OSPs of all resource levels who addressed this reported that they sought to meet with product teams as early as possible in the design phase to identify potential copyright issues and address them. The way that this was achieved varied across OSPs according to their resources. At OSPs with lesser resources, respondents reported having regular meetings with design teams and scheduling additional daily meetings during key phases of the design process. At more-resourced OSPs, product counsel were embedded in product teams, and were responsible for identifying potential copyright-related issues from the earliest stages of design and development. More-resourced OSPs had also established central teams of copyright experts to support product counsel within product teams. In some more-resourced OSPs, more formalized management structures appeared to be in place to ensure that copyright-related issues were identified and taken into account in product design and development; but unlike privacy, a separate pre-launch copyright review might not be required.

#### **8.6.5 Regulatory Traction**

Respondents identified several reasons why privacy issues commanded more resources and attention than copyright-related ones. First, differences in legal enforcement mechanisms. Privacy law is enforced by government regulators, and now by private right of action by citizens in Europe. In contrast, copyright issues “bubble up” more slowly, via litigation, providing more time for OSPs to address potential issues. Second, not being compliant with the EU GDPR carried the prospect of a fine of up to 4% of an OSP’s annual worldwide turnover. At the time that interviews were being conducted, in the lead up to the EU GDPR going into force on May 25, 2018, the potential for being subject to such a significant fine appeared to have been a significant driver in OSPs’ efforts to restructure their infrastructure and consent documentation to comply with the GDPR’s new standards.

Aside from the potential fine, several respondents at small- and medium-sized OSPs also commented that in the field of copyright law, OSPs that had operationalized the DMCA’s notice and takedown process were likely in compliance with, or at least 90% in compliance with, the requirements of EU law in regard to their potential obligations concerning copyright infringement, and any delta cases could be handled on a case-by-case basis. However, the situation was different for EU data protection legal compliance, where many resource-constrained OSPs did not have prior processes and procedures to build upon and faced greater exposure to liability.

## CHAPTER 9

### ANALYSIS

This chapter considers how copyright law regulates OSPs based on the interview findings in chapter 8 and the developments in chapters 3 to 6.

#### 9.1 A Tale of Two Legal Systems—How Copyright Law Regulates According to the Law on the Books

As chapters 4 to 6 illustrate, there are a variety of mechanisms in copyright law systems that can shape the behavior, decision-making processes and internal structures of OSPs, and these vary across national copyright systems. Even though copyright law is partially harmonized at the international level, the scope of copyright holders' rights and the corresponding scope of direct liability for OSPs varies across legal systems, as chapter 4 demonstrates. Indirect or "secondary" liability for copyright infringement is not harmonized in the international copyright framework and as prior scholars have shown, it covers a broad spectrum of doctrines.<sup>451</sup> Beyond imposition of direct and secondary liability under national substantive liability doctrines, OSPs' practices are arguably more pervasively shaped by the conditions under which they have immunity from liability under national statutory safe harbor regimes, as interpreted by courts, or what prior scholars have termed "negative liability."<sup>452</sup>

As chapter 5 demonstrates, legislators and courts in the United States have generally declined to adopt interpretations of the DMCA statutory safe harbor framework that would have put OSPs into the role of technological gatekeepers tasked with preventing or restraining copyright-infringing activities of users of their platforms in the absence of knowledge of specific infringing behavior or participation in the wrongdoing. In contrast, the EU Internet intermediary liability framework, both in its current form, and in regard to the pending legislative reform, appears to align more closely with a third-party enforcement model that regards OSPs as technological gatekeepers.<sup>453</sup> This can be seen in several aspects of the EU legal framework. First, in regard to judicial determinations of the scope of OSPs' direct liability for communication to the public of unauthorized copyrighted works uploaded by their users, as reflected in recent CJEU jurisprudence. Second, in several of the structural features of the EU intermediary liability statutory framework, including the EU no-fault copyright injunction mechanism, which has been used by European national courts to impose both proactive monitoring and notice and staydown obligations on hosting OSPs and search engines, as reviewed in chapter 5. In addition, because of the horizontal nature of the EU statutory safe harbor regime, policy developments and legislative proposals intended to target non-copyright-related content indirectly shape the rules governing OSP liability for copyright infringement. Third, in European Commission policy documents, which have explicitly justified imposition of

---

<sup>451</sup> Graeme B. Dinwoodie, Rochelle C. Dreyfuss & Annette Kur, *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.L. U. J. INT'L L. & POL. 201 (2009).

<sup>452</sup> Dinwoodie, *A Comparative Analysis*, *supra* note 16.

<sup>453</sup> See *supra* discussion in chapter 2; Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006).

new obligations on OSPs on the basis that they are technological gatekeepers.<sup>454</sup> Fourth, in the proposed legislative reform of the EU intermediary liability framework, where Article 17 (previously 13) of the EU Copyright Directive would impose direct liability on UGC-hosting platforms for communication to the public of unauthorized copyrighted works uploaded by users of their platforms and exclude these OSPs from the scope of the EU statutory hosting safe harbor, as discussed in chapter 6 and below.

## **9.2 Law in Action—Executive Summary of Interview Findings on How Copyright Law Affects OSP Practices and Decision-Making**

There are several main findings from the interviews:

- (1) Copyright law has both direct effects and indirect impacts on OSPs. Apart from visible effects such as territorially based licensing agreements, it has direct effects on the design and modifications of products and services. Copyright law can also be observed to have indirect impacts via the governance structures of OSPs. Implementing the DMCA’s notice and takedown system and eligibility conditions has had constitutive effects on OSPs’ practices.
- (2) Differences between national copyright liability standards and sanctions have differential effects on OSPs, depending on the level of resources of the OSP.
- (3) The DMCA statutory safe harbor regime plays a key role in all OSPs’ operations by shielding them from potentially crippling statutory damages awards and injunctions in the United States. Some OSPs are relying on the DMCA to manage potential foreign copyright liability risk.
- (4) A key unexpected finding was the extent of the role played by international harmonization in copyright governance, and how it appears to be mitigating what might otherwise be fragmentary effects of territorial copyright laws. The DMCA and EU statutory safe harbor regimes are not part of the harmonized international copyright law framework. Despite this, respondents at OSPs with various resource levels appeared to be comfortable relying on the DMCA safe harbor regime to manage potential foreign copyright liability risk because they viewed the DMCA regime as being interoperable, or substantially compliant with, the EU statutory safe harbor. Some also appeared to view use of the DMCA takedown procedure to process copyright infringement claims from non-U.S. copyright holders as a means to afford them national treatment under the principles of the internationally harmonized copyright framework. In doing so, OSPs appear to have reduced transaction costs and

---

<sup>454</sup> *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on Tackling Illegal Content Online: Towards an Enhanced Responsibility of Online Platforms*, at 20, COM (2017) 555 final (Sept. 28, 2017), <https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms> (“[T]he constantly rising influence of online platforms in society, which flows from their role as gatekeepers to content and information, increases their responsibilities towards their users and society at large. They should therefore be proactive in weeding out illegal content, preventing its reappearance, put effective notice-and-action procedures in place, and establish well-functioning interfaces with third parties.”).

limited the potential fragmentary impacts of territorial copyright law in online communications.

The interview findings highlight a range of current OSP practices facilitated by the DMCA safe harbor regime that could be curtailed by Article 17 (formerly 13) of the EU Copyright Directive. The interview findings also suggest that Article 17 would have differential impacts on OSPs with differing resource levels, as discussed below.

### **9.3 Copyright Law Has Both Direct and Indirect Impacts on OSPs but OSPs Experience Copyright Law Differently Depending on Their Resource Level**

#### **9.3.1 Differentiated Experiences**

The interview data revealed differences in the experiences of more-resourced OSPs and less-resourced OSPs in several dimensions: (1) their ability to deal with potential liability differences arising from other jurisdictions' copyright laws; (2) their capacity to analyze jurisdictional risk and design and build for compliance in multiple jurisdictions; (3) the existence of governance impacts; and (4) sensitivity to penalties and sanctions.

It is important to note that the interview findings did *not* reveal a neat divide between “large” or well-resourced OSPs and “small” or resource-constrained OSPs. Instead, they revealed that all OSPs shared some common experiences, and that there was a spectrum of experiences, rather than a binary grouping based on large/small status. At the same time, there are some clear observable differences in the practices and decision-making processes between well-resourced OSPs and OSPs operating with less resources or resource constraints. One important consequence that flows from this is that the new EU Copyright Directive may have differential impacts on hosting OSPs with different resource levels, as discussed in section 4.2 below. This section begins by providing a brief overview of some observed differences based on resource levels, and then considers each dimension in more detail.

##### **9.3.1.1 Less-Resourced OSPs**

Less-resourced OSPs appeared to be highly dependent on the DMCA safe harbor regime to manage copyright liability risk. These OSPs had standardized their operations around U.S. law and were using the DMCA takedown process as the primary basis for processing copyright infringement notices they received. In regard to EU copyright law, all OSPs were aware of the recent judgments finding direct liability for linking and hosting links. Many understood the potential policy consequence (creation of a monitoring duty to inspect linked content) and the potential impact on their limited resources (having to find resources to inspect and/or monitor and remove links to apparently infringing content). However, these OSPs often did not appear to have the capacity to undertake analysis of the liability risk or to develop strategies for compliance or mitigation of liability under foreign copyright law. In practice, they appeared to be handling copyright liability risk by relying robustly on the DMCA safe harbor regime's ex-post takedown process, supported by two beliefs: (a) that compliance with the DMCA safe harbor regime was sufficient for compliance with EU law (or “90% compliant” as several respondents noted); and (b) an assessment that there was a low risk that a U.S. court would enforce a foreign copyright liability judgment against their OSP.

These OSPs regarded the DMCA as providing legal certainty and a zone of comfort in regard to possible conflict of laws issues. Many respondents stated that they had far more concern about foreign court injunctions and legal claims based on grounds other than copyright law, in areas where there were no internationally harmonized standards. They viewed copyright law as the easy case because of the existence of internationally harmonized standards and because they had implemented the DMCA's notice and takedown process to handle any copyright removal requests they received.

### **9.3.1.2 More-Resourced OSPs**

These OSPs also relied on the DMCA safe harbor to manage copyright liability but not exclusively so. These OSPs demonstrated greater familiarity with copyright liability standards at both the level of EU law and national member states' laws, and with the standards and contours of the EU statutory safe harbor regime. They had the capacity to analyze jurisdictional copyright liability risk. They had created staffing structures and organizational practices that allowed them to design and build products and services capable of complying with multiple jurisdictions' copyright laws. Outside of data gathered in the interviews, some larger hosting OSPs have created DMCA-plus private ordering systems backed by content filtering technology and rights management systems, discussed below, which control display of unauthorized copyrighted content uploaded by users, or enable the removal of unauthorized content by copyright holders on a jurisdiction-by-jurisdiction basis.

## **9.3.2 Observed Differences Between OSPs with Different Resource Levels**

### **9.3.2.1 Ability to Take Account of Varying National Copyright Law Standards**

The interviews revealed that better-resourced OSPs are better able to handle the additional cost and complexities of navigating varying national copyright law standards than OSPs with resource constraints. This was consistent with the regulatory literature discussed in chapter 2, which contends that firms with greater resources are more capable of absorbing additional regulatory burdens and utilizing regulatory complexity for competitive advantage.

The data revealed that all OSP respondents were aware of emerging differences between U.S. and EU law in regard to potential liability for linking to copyrighted works, or hosting their users' embedded links to copyrighted works, and appeared to be concerned about the potential implications for their products and services. There were noticeable differences in the level of knowledge between OSPs based on their level of resources. Less-resourced OSPs were aware of the existence of differing liability standards between U.S. and EU copyright law (the law on the books) but did not appear to have the capacity to consider potential implications or mitigation strategies or were deferring expending resources on doing so until the OSPs had a physical presence in the European Union or larger EU user base, which might result in it being subject to EU courts' jurisdiction.

OSP of varying resource levels that employed copyright experts working in specialized roles demonstrated an in-depth knowledge of CJEU judgments on hyperlinking and emerging differences between U.S. and EU copyright law in regard to the scope of the communication to the public right more broadly. They also appeared to understand the potential implications for their products and services and framed their comments in terms of risk management. Interview

questions were intentionally framed as open-ended questions about differences in liability between legal systems and did not include references to particular judgments. However, these respondents discussed the evolution of the legal principles articulated in the recent series of CJEU judgements, referencing the cases by name. Some also mentioned subsequent national court rulings that have interpreted the factors articulated by the CJEU, such as the rebuttable presumption of knowledge for for-profit linking activity from the 2016 *GS Media* case.

### 9.3.2.2 Capacity to Assess and Build for Jurisdictional Risk

More-resourced OSPs had the capacity to analyze jurisdictional copyright liability risk, and to design and build products and services that comply with other jurisdictions' national copyright liability standards, or to modify them to do so. Less-resourced U.S.-based OSPs did not appear to have this capacity and appeared to have standardized their operations around U.S. law. They were using U.S. legal standards to set global policies for their products and services, without regard to where their users were located.

Some less-resourced OSPs appeared to be less concerned about being found to be subject to foreign jurisdiction. They appeared to be managing copyright liability risk by relying on the DMCA safe harbors (§§ 512(c) and 512(d) (in relation to their users' hosted links)) and the DMCA's ex-post takedown process, together with their assessment of the low likelihood of enforcement against their OSP. Their assessment seemed to be based, at least in part, on the *Equustek v. Google* litigation, where a Canadian court had ordered Google to remove links in its search engine indices from all the domains in which it operates, and the permanent injunction that Google obtained in December 2017 from a U.S. district court, which blocked enforcement of the Canadian order against Google in the United States.<sup>455</sup>

More established, well-resourced OSPs also stated that their operations were standardized around U.S. law. Well-resourced OSPs with more geographic exposure and localized products had invested resources in acquiring deep and broad in-house copyright expertise and had the capacity to understand and analyze copyright risk on a jurisdictional basis. Some OSPs appeared to be building their products and services based on U.S. legal standards, and then launching them in markets where they believe that they would also have protection under the local safe harbor, based on their jurisdictional analysis. Some were generally launching products globally but made decisions to not offer particular features of products in jurisdictions where their analysis suggested that the feature might raise potential liability concerns under national law. Some OSPs appeared to have the ability to take account of jurisdictional differences from the outset of the design process and were seeking to build products and services that comply with multiple jurisdictional requirements and/or have granular capacity to interact with copyrighted content on a jurisdictional basis. More well-resourced OSPs had established distributed staffing structures and reporting mechanisms that facilitated this, as discussed below.

---

<sup>455</sup> See *Google LLC v. Equustek Solutions et al.* (N.D. Cal. Case No. 5:17-cv-04207-EJD, Dec. 14, 2017) (order granting permanent injunctive relief); *Google, Inc. v. Equustek Solutions, Inc.* [2017] 1 SCR 824; 2017 SCC 34 (Sup. Ct. Can), *aff'g* *Equustek Solutions, Inc. v. Google, Inc.* [2015] CCA 265 (Ct. App. Brit. Columbia), *aff'g* *Equustek Solutions Inc. et al. v. Morgan Jack et al.*, 2014 BCSC 1063 (Sup. Ct. British Columbia, June 13, 2014).

### 9.3.2.3 Governance Impacts

Like privacy law, copyright law could be seen to have created governance impacts in well-resourced OSPs, but not to the same degree in less-resourced OSPs. While all OSPs had adopted distinctive staffing structures to handle review and processing of DMCA notices, more well-resourced OSPs had also adopted additional structural responses to enable them to manage copyright liability and utilize copyright expertise as a competitive advantage.

Organizational theory scholarship has identified that use of distributed or decentralized staffing structures, where staff with the relevant expertise are embedded in business units throughout the firm, has several benefits. First, it ensures that relevant subject-matter expertise is taken into account at all critical stages of decision-making; and second, it promotes consistency in the way that legal norms are addressed across the firm.<sup>456</sup>

The interviews revealed that more established and well-resourced OSPs had adopted this distributed staffing structure for copyright issues. At these OSPs, product counsel were embedded in product development teams to ensure that copyright issues arising in the development of products and services were identified and addressed at the earliest possible stage of development. The decentralized product counsel were supported by specialist teams of copyright law experts. This structure allowed larger OSPs to maintain consistency in their approach to copyright across all of the OSP's products and services. It also ensured that copyright expertise was integrated into all stages of decision making about technical integration in design choices. It further ensured that specialist knowledge about particular jurisdictions' copyright standards could be incorporated into product design and modification decisions. The organizational theory and regulatory arbitrage literature discussed in chapter 2 suggests that this structure enables OSPs to use their capacity to analyze jurisdictional risk as a competitive advantage over less-resourced OSPs and new market entrants.

### 9.3.2.4 Sensitivity to Statutory Damages, Injunctions, and Penalties

OSP of all resource levels reported that the potential for statutory damages awards under U.S. law was a constant and persistent factor in their decision-making. Respondents at several OSPs noted that getting fair use analysis wrong could result in a statutory damages award that would bankrupt their company.

However, in regard to injunctions, there were clear differences in views between OSPs with different resource levels. Smaller and less-resourced OSPs had received a smaller number of foreign court copyright-based orders. Several respondents theorized that this was due to the fact that foreign copyright complainants can use the DMCA takedown system to request removal of unauthorized content. In contrast, based on public reports (discussed in chapters 2 and 5), larger OSPs with more geographic exposure have been the target of more cross-border copyright orders. These OSPs expressed more nuanced views about how they would respond to cross-border copyright injunctions. Like less-resourced OSPs, they were not opposed in principle to responding to adjudicated orders arising out of processes that accorded due process. However,

---

<sup>456</sup> Gunningham et al., *supra* note 94, at 325; Kenneth A. Bamberger & Deirdre K. Mulligan, *PIA Requirements and Privacy Decision-Making in U.S. Government Agencies*, in *PRIVACY IMPACT ASSESSMENT, Law, Government and Technology Series* (D. Wright & P. De Hert eds., 2012), 245 & 248; BAMBERGER & MULLIGAN, *supra* note 67, at 30 (citing LAWRENCE & LORSCH, *supra* note 94).

they voiced concern about potential collateral effects if such injunctions were sought in respect of issues other than copyright.

As the analysis in chapter 5 demonstrates, EU copyright injunctions, issued by EU member states' courts under the national transpositions of Article 8(3) of the 2001/29/EC directive, have been an important driver in EU intermediary liability developments in recent years, and the focus of much recent European legal scholarship.<sup>457</sup> The interview data indicate that their use amongst smaller and less-resourced U.S.-based OSPs may not be as widespread as might have been expected. Respondents did not report being aware of other Article 8(3) injunction lawsuits that had been brought against other OSPs, apart from those that had been publicly reported previously.

This suggests that the prior French injunction lawsuits may have been targeted at larger OSPs that have the resources and policy motivation to litigate these issues, with the goal of obtaining legal precedents that would create support for broader policy changes in EU law, including requirements for more proactive monitoring by OSPs. Several facts suggest that these lawsuits may have been brought strategically to build support for policy changes that are partly incorporated in the new EU Copyright Directive. All the reported cases of cross-border EU copyright injunctions have been brought by two sets of copyright industry plaintiffs and involved an unusual procedural aspect—plaintiffs did not use the regular reporting channels to request removal of the specified links prior to commencing litigation. In addition, rightsholders' public statements indicate that these were viewed as precedential rulings.<sup>458</sup> This could explain why smaller OSPs did not report receiving similar injunctions. It also suggests that it would be less likely that these types of injunctions would be sought against smaller OSPs, because these OSPs might not have resources to engage in litigation and may be more inclined to immediately remove contested content to avoid liability. However, it is not possible to draw robust conclusions on the quantity and distribution of these types of injunctions due to the limited sample in this study and because larger OSPs were reluctant to discuss the number of injunctions received. Finally, these findings do not diminish the central role that copyright injunctions have played in shaping intermediary liability developments on the ground in the European Union in recent years.

At the same time, the prior injunction lawsuits highlight the broader indirect regulatory effects of copyright on larger OSPs. Recent privacy law scholarship has highlighted the important role played by “activist” government regulators in shaping the internal governance practices of regulated organizations.<sup>459</sup> While copyright law is private law and is not usually enforced by a government regulator, the dynamic and multi-jurisdictional litigation environment that surrounds larger OSPs produces legal uncertainty, which may be leading larger firms to invest in in-house copyright expertise and the creation of central expert teams (as discussed in the previous section on governance impacts).

---

<sup>457</sup> HUSOVEC, *supra* note 2.

<sup>458</sup> Chris Marcich, *ISPs and Search Engines Must Play by the Same Rules—French Court Ruling in the “Allostreaming” Case Sets a Precedent*, MPAA BLOG (Dec. 4, 2013), <https://www.mpa.org/press/isps-and-search-engines-must-play-by-the-same-rules-french-court-ruling-in-the-allostreaming-case-sets-a-precedent/>.

<sup>459</sup> See BAMBERGER & MULLIGAN, *supra* note 67.

The interviews revealed interesting differences in how OSPs of different resource levels viewed the role of fines in driving technological design decisions, in observations about the relative regulatory weight of data protection law (the EU General Data Protection Regulation (GDPR)) and copyright law. The interviews suggest that forces external to private copyright law, such as regulatory fines, may currently be a greater driving force in the practices and decisions of OSPs with limited resources. At the time that interviews were conducted, many OSPs were in the process of implementing large-scale changes to their technological infrastructure and legal consent documentation in order to be in compliance before the GDPR came into operation on May 25, 2018. A number of smaller OSPs with limited resources reported that this was a pressing concern in decisions regarding use of legal resources and engineering time because failure to be in compliance put OSPs at risk for fines of up to 4% of their annual worldwide turnover. In contrast, potential copyright liability was viewed as less of a driving force for resource allocation decisions within smaller OSPs because there was a perception that copyright liability would arise through litigation, become apparent more slowly, and perhaps carry less financial consequences than data protection liability, which was enforced by EU government regulators and by citizens through a private right of action. As noted above, many smaller OSPs appeared to have formed this perception because they had not been subject to copyright-related injunctions from foreign courts. They appeared to be relying on the DMCA's ex-post takedown process to manage copyright liability risk and seemed to have assessed that there was a low likelihood of copyright risk that could not be handled via removal of identified copyrighted content. However, this calculus may change if the EU Copyright Directive is adopted in its current form, as noted below.

#### **9.4 Standardization Around U.S. Law and Global Application of DMCA Safe Harbors**

OSPs of all resource levels have established policies modeled on the standards and procedural requirements of the DMCA's takedown process and are using these to review and process all copyright removal requests they receive, irrespective of the location of the complainant or identified copyrighted material. The interviews revealed that standardization of global policies around the DMCA's standards and procedural requirements is driven by several factors, including the legal certainty provided by the U.S. safe harbor; cost; scalability; efficiency; and ease of technical integration.

While this could be attributed to the fact that many of the OSPs in the data sample were based in the United States and subject to U.S. law, there are several other reasons why OSPs may have adopted this practice. First, on closer analysis, it appears that part of the reason why OSPs have felt comfortable relying on the DMCA safe harbors to manage copyright liability risk is because they believe that the DMCA's ex-post takedown process is substantially or "90% compliant" with EU law, and that using the DMCA process affords national treatment to foreign copyright holders. Second, OSPs appear to be using the DMCA's detailed takedown process as a means to "signal compliance" to government regulators, courts, copyright holders and users of their services. These points are discussed below.

##### **9.4.1 The Role of International Harmonization in Copyright Governance and Its Relationship to the DMCA Safe Harbor Regime**

The interviews revealed a striking number of references from respondents at OSPs of all resource levels to the internationally harmonized nature of copyright rights. Many respondents referred to it in their responses as to why their OSP used the DMCA takedown process and

information standards to process copyright infringement claims wherever they originated, using terms such as “international treaty obligations” and “U.S. copyright interest.” Several referred to two of the three exceptions to the national treatment provision in the Berne Convention in discussing situations where they might flexibly process a copyright infringement claim originating outside of the United States.<sup>460</sup> Several referred to it as part of their analysis as to how they had responded or would respond to non-U.S. court injunctions. Their responses suggested that they were thinking of the national treatment principle in the Berne Convention and the broader provision in the TRIPs Agreement, although respondents did not use that term.<sup>461</sup> It appeared that at least some of them were viewing the processing of foreign copyright complainants’ infringement claims under the DMCA process as a means of affording national treatment to foreign rightsholders; or that at least, the DMCA procedure was substantially in compliance with the EU e-Commerce Directive.

This was interesting because the statutory safe harbor regimes that exist in the United States and Europe and in various other jurisdictions are not requirements of any of the existing multilateral copyright treaties. The statutory regimes are not harmonized as a matter of law. In addition, as the prior chapters demonstrate, there is no formal international harmonization of the secondary liability doctrines from which the statutory regimes were intended to provide protection. As chapter 5 and prior scholarship has demonstrated, there are significant differences between the statutory safe harbor regimes that operate in various countries.<sup>462</sup> However, there is also a significant degree of de facto harmonization across the regimes at the higher level, in the sense that they operate as conditional liability exemptions subject to complying with an ex-post takedown obligation.<sup>463</sup> The de facto harmonization exists, in large part, because the United States has successfully exported the DMCA model to the legal systems of its major trading partners through free trade agreements, as discussed in section 7 below.

It appears to be an open question as to whether the national treatment provision of the Berne Convention and the broader provision in the TRIPs Agreement would apply to these regimes.<sup>464</sup> The footnote to the national treatment provision of Article 3(1) of TRIPs clarifies that it applies to all matters related to use and enforcement of intellectual property protected under the TRIPs Agreement, which arguably could extend to processing of non-U.S. copyright owners’ infringement claims. In any event, as a matter of actual practice, the interviews revealed that staff at U.S.-based OSPs are using the DMCA’s particular ex-post process to manage potential foreign

---

<sup>460</sup> Berne Convention, 1971 Paris Text, art. 14ter(2); *see also* PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 101 (2013).

<sup>461</sup> Berne Convention, 1971 Paris Text, art. 5(1); TRIPs Agreement, art. 3(1).

<sup>462</sup> *See* Peguera, *The DMCA Safe Harbors*, *supra* note 2; Dinwoodie (ed.), *supra* note 109.

<sup>463</sup> DeBeer & Clemmer, *supra* note 4, at 378–403.

<sup>464</sup> Prior to the enactment of the DMCA safe harbor regime, Jane Ginsburg noted that the assimilation of foreign authors to domestic copyright owners through the Berne Convention’s minimum standards and national treatment obligations meant that foreign copyright holders would have a U.S. copyright interest, and a French one (and so on). The multiplicity of copyright interests would create potential conflict of law issues because infringement would be analyzed under the law of every country where an authorized public performance of a song was received. She noted that this would be problematic where there were substantive differences between potentially applicable national laws, including in regard to the existence and scope of liability of online services for either direct or indirect infringements. *See* Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC’Y U.S.A. 318 (1995).

copyright liability as the foundation for launching and maintaining their globally accessible online services. Even if there is no de jure international harmonization, these OSPs may be comfortable having globally accessible services because they believed that the DMCA regime was interoperable with the EU statutory safe harbor regime, and by operationalizing the DMCA process they were compliant (or substantially compliant) with EU law. OSPs' practices in this regard appear to have had the consequence of mitigating what might otherwise be a fragmentary impact of territorial copyright laws.

This suggests that, paradoxically, a feature of the international copyright landscape that is not formally harmonized and operates entirely outside of the existing international copyright treaty framework, is playing a crucial role in the development and expansion of online services. Contrary to the assumed fragmentary impact of national copyright laws, OSPs appear to be using the U.S. statutory safe harbor regime's takedown process to mediate complex conflict of law issues, reduce transaction costs for copyright holders, and mitigate the potential fragmentary effects of national copyright laws for users of online services. However, as noted below, this would no longer be the case if Article 17 (formerly 13) of the EU Copyright Directive were to be adopted in its current form.

#### 9.4.2 The DMCA's Role in "Signaling Compliance"

There is a second reason to believe that OSPs' use of the DMCA standards to handle all copyright removal requests received is not merely an artifact of many of the OSPs having started operations in the United States. Organizational theory suggests that in the face of legal uncertainty and in environments where they may be subject to liability, organizations will seek to signal compliance and legitimacy through adopting visible practices and structures.<sup>465</sup> The DMCA's very detailed notice and takedown process and the associated visible indicia (webforms, specific instructions, and transparency reports published by OSPs) allows OSPs to signal compliance and legitimacy to regulators, copyright holders and users of their platforms. The finding that all OSPs were relying on the DMCA's very particular notice and takedown process and information standards to manage all copyright infringement claims (wherever originating) is the expected organizational response to uncertainty in OSPs' legal environment.

As a recent high-profile U.S. legal case has highlighted, falling outside of the DMCA safe harbor regime can expose an OSP to a statutory damages award of millions of dollars.<sup>466</sup> As a result, it is vitally important to OSPs to be able to signal that they understand their obligations under U.S. copyright law, and are "in compliance" with the requirements of the DMCA safe harbor regime. The DMCA's proscriptive notice and takedown process gives OSPs the ability to

---

<sup>465</sup> Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1534 (1992); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields*, 48(2) AM. SOCIOLOG. REV. 147, 150 (1983).

<sup>466</sup> Joe Mullin, *Cox Must Pay \$8M in Fees on Top of \$25M Jury Verdict for Violating DMCA*, ARS TECHNICA BLOG (Feb. 17, 2017), <https://arstechnica.com/tech-policy/2017/02/cox-must-pay-8m-in-fees-on-top-of-25m-jury-verdict-for-violating-dmca/>; *BMG Rights Management (US) LLC and Round Hill Music LP v. Cox Communications, Inc.*, 149 F. Supp. 3d 634 (E.D. Va. 2015); *BMG Rights Management (US) LLC and Round Hill Music LP v. Cox Communications, Inc et al.*, 881 F.3d 293 (4th Cir. 2018); Annemarie Bridy, *BMG v. Cox: The High Cost of Losing Safe Harbor*, STANFORD CENTER FOR INTERNET AND SOCIETY BLOG (Dec. 5, 2015), <https://cyberlaw.stanford.edu/blog/2015/12/bmg-v-cox-high-cost-losing-safe-harbor>.

signal compliance to copyright holders, potential regulators and courts, with relatively low cost (at least for most OSPs).

OSPs' publicly reported practices appear to support this understanding. Google has used its transparency reports and other materials<sup>467</sup> to signal legitimacy to regulators by documenting the significant costs that it is having to bear to process notices, in order to retain the statutory safe harbor protections. This could be seen during the polarized debate around possible reforms to the DMCA regime in the U.S. Copyright Office's Section 512 Study, discussed in chapter 6. Copyright holders claimed that U.S. courts' interpretation of the DMCA eligibility conditions that required them to identify infringing content had placed an unsustainable cost burden exclusively on to copyright holders. Google was able to use its transparency reports to document the vast numbers of notices that it had been receiving from copyright holders and automated notice sending services. This allowed it to signal legitimacy to the U.S. Copyright Office by emphasizing the significant costs borne by it, and not just by copyright holders. In addition, underscoring the importance of the statutory safe harbor in 17 U.S.C. § 512(d) to Google's search engine operations, and the value of the DMCA's ability to signal bad behavior by copyright holders, Google disclosed in 2018 that it has been prophylactically banning millions of computer-generated URLs listed in DMCA takedown notices from particular copyright holders from its search engine index—even though the URLs did not exist in the search engine's index at the time that the notices were received because Google bots had never crawled the webpages at the identified URLs.<sup>468</sup>

The DMCA's signaling value to OSPs can also be seen in Google's efforts to signal compliance to non-U.S. government regulators, such as the UK Intellectual Property Office, which oversees the Voluntary Code of Practice for Search Engines entered into between Google and Microsoft and copyright trade groups in 2017. Google has been able to use information in its transparency reports and other documents to signal legitimacy by highlighting that it has demoted 65,000 websites in its global search results since 2017, based on valid DMCA notices it has received.<sup>469</sup>

The interviews highlighted that the ability to use the DMCA to signal compliance is particularly important for less-resourced OSPs. In contrast to their potential exposure to liability under EU data protection law, these OSPs reported feeling less concerned about the possibility of copyright liability under EU law because they were able to rely on the DMCA's ex-post takedown notice system to manage liability risk and felt that it was substantially compliant with EU legal standards. Respondents who commented on this felt more concern about EU data

---

<sup>467</sup> *How Google Fights Piracy*, *supra* note 50.

<sup>468</sup> *How Google Fights Piracy*, *supra* note 50, at 41; Ernesto Van der Sar, *Google Blocks Pirate Search Results Prophylactically*, TORRENT FREAK BLOG (Jan. 3, 2018), <https://torrentfreak.com/google-blocks-pirated-search-results-prophylactically-180103/>; Ernesto Van der Sar, *Google Blacklists Millions of Pirate URLs Even Before They Are Indexed*, TORRENT FREAK BLOG (Jun. 9, 2018), <https://torrentfreak.com/google-blacklists-millions-of-pirate-urls-before-theyre-indexed-180609/> (reporting that Google has “prophylactically” blocked millions of URLs from its search index, and had made a change to the Google Transparency Report format to publicly identify the number of URLs in each takedown notice it processes have not yet been indexed by its search engine, and the identity of those sending takedown notices for non-indexed URLs, citing as an example the Mexican branch of the APDIF anti-piracy group).

<sup>469</sup> *How Google Fights Piracy*, *supra* note 50, at 39.

protection liability because these OSPs did not have an existing mechanism for signaling compliance with those standards.

## 9.5 The Emergence of DMCA-Plus Private Ordering Systems Backed by Content Filtering Technologies and Rights Management Systems

As prior scholars have noted, traditional copyright law has been transformed and displaced in recent years by the voluntary development of DMCA-Plus content identification and filtering technology by some of the largest online hosting services.<sup>470</sup> Although this was not the original focus of the interviews, many respondents commented on various business and policy issues raised by content identification and filtering technology in their comments on Article 13 of the proposed EU Copyright Directive.

Apart from the potential future regulatory impacts of the new EU Copyright Directive discussed in the following section, some respondents from commercial OSPs were clearly aware that there were differences in the level of functionality between commercially available content filtering technologies that they might have to consider licensing from a third-party vendor, such as Audible Magic’s acoustic fingerprinting technology, and proprietary systems such as Content ID on YouTube,<sup>471</sup> which combines content identification and filtering technology with a back-end rights management system.

These systems have largely displaced the operation of traditional national copyright law for copyright clearance on the platforms on which they operate. These systems scan files that users upload to platforms for copyrighted content, and handle copyright authorization transactions algorithmically, through business rules provided by rightsholders.<sup>472</sup> These systems are “DMCA-Plus” in the sense that they are not a requirement to obtain the benefits of the statutory safe harbor regime, and U.S. courts have consistently rejected interpretations of the DMCA regime’s eligibility conditions that would require use of such technologies. However, they operate under the umbrella of the DMCA safe harbors, and copyright holders can still send a DMCA notice to request YouTube or Facebook to remove particular copyrighted content posted by a user. On YouTube, the vast majority of copyright-related transactions are handled through Content ID and the other DMCA-plus tools that YouTube operates, rather than by DMCA takedown notices.<sup>473</sup> They are private ordering systems backed by filtering technology and rights management systems, and effectively run as parallel systems to both traditional national copyright laws, and to the DMCA takedown regime.

---

<sup>470</sup> Annemarie Bridy, *Copyright’s Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (John A. Rothchild ed., 2016); Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499 (2017)

<sup>471</sup> As noted *supra* in chapter 2, Facebook reports that it is using a combination of technologies—its proprietary Rights Manager system for video matching and surfacing to registered partner copyright owners, and use of third-party Audible Magic acoustic fingerprint technology to screen and block uploaded audio files containing copyrighted music.

<sup>472</sup> See *supra* chapter 2.

<sup>473</sup> *How Google Fights Piracy*, *supra* note 50, at 14 (reporting that 98% of copyright issues on YouTube in 2017 were handled through Content ID); *id.* at 30 (reporting in relation to the remaining 2% that in 2017 YouTube received over 2.5 million DMCA takedown requests from over 300,000 copyright complainants, requesting the removal of more than 7 million video URLs.)

The initial impetus to build these DMCA-plus systems was likely the desire to mitigate and control the risk of liability for falling outside of the safe harbor. Although the safe harbors exist, there is much uncertainty around the boundaries of where they apply, as several of the interview respondents noted. One of the sources interviewed for the prior 2016 empirical study of DMCA processes appears to confirm this explanation:

If you are hosting [music or video] content, I don't see how you can deal with that risk without having some sort of content filtering long term. It is not a requirement under the DMCA, but there is too much uncertainty in the DMCA, and there is too much risk; it is potentially catastrophic. [Adopting filtering technology] is a reflection of the fact that we don't think that how the DMCA is written and interpreted [offers enough protection from liability].<sup>474</sup>

However, even if the initial motivation for developing these systems can be understood as a response to control or mitigate uncertainty, for Google and Facebook, the motivation for using such systems now goes beyond this and is driven by business goals.

The differences between the more sophisticated proprietary systems and the filtering technologies available to be licensed from third-party vendors have clear consequences for competition policy. OSPs that do not currently have the resources to develop their own proprietary solutions and have, or are considering licensing from a third-party vendor, are at a competitive disadvantage to the larger and better-resourced OSPs that have developed proprietary systems in their ability to attract both major copyright holder collective management organizations and independent creators to make their content available on their platforms.

Unlike many of the platforms that are relying on third-party vendor Audible Magic's hash-based acoustic fingerprinting technology, Google and Facebook have each spent considerable financial and personnel resources developing their respective proprietary content filtering and rights management systems.<sup>475</sup> Operating Content ID on YouTube has facilitated the development of a significant stream of monetization through advertising displayed alongside user-uploaded video content. As of November 2018, Google reported that it had spent over \$100 million developing, maintaining, and expanding Content ID,<sup>476</sup> and had paid over \$6 billion in advertising revenue to the music industry for content viewed on YouTube.<sup>477</sup>

In creating DMCA-Plus private ordering systems that are enforced with content identification and filtering technology and backed by rights management systems, well-resourced OSPs can be seen to have internalized the adjudicative function of courts in making determinations about which content should be removed on copyright grounds and extended contractual rights of takedown to copyright holders in order to obtain systemic structural

---

<sup>474</sup> URBAN ET AL., *supra* note 3.

<sup>475</sup> Both Google and Facebook have acquired in-house international copyright expertise and multi-jurisdiction copyright management technological platforms: RightsFlow (acquired by Google in 2014) and Source3 (acquired by Facebook in 2017). Source3 was founded by the same team that created RightsFlow (Patrick Sullivan, Benjamin Cockerham, and Scott Sellwood); see Josh Constine, *Facebook Acquires Source3 to Get Content Creators Paid*, TECHCRUNCH BLOG (July 24, 2017), <https://techcrunch.com/2017/07/24/facebook-source3/>.

<sup>476</sup> *How Google Fights Piracy*, *supra* note 50, at 13.

<sup>477</sup> *Id.*

advantages.<sup>478</sup> The complex private ordering regimes created by Google’s YouTube and Facebook can be viewed as mechanisms to guarantee more control over ongoing access and use of the copyrighted content on which their platforms depend, and through the network effects of aggregating viewers on their platforms, leverage over the price that they pay for that access.<sup>479</sup>

The competitive advantage created by these combined proprietary systems is only likely to grow over time with network effects, as more content comes to be hosted on the two largest incumbent platforms that have the audience, advertising agreements, and technical infrastructure to share advertising revenue with content uploaders. In turn, this may lead to increased centralization of content hosting and “silo-ing” of content on the more-resourced hosting platforms, resulting in a reduction of the quantity and diversity of user-upload platforms and the online communities that have flourished over the last decade.

The centrality of these DMCA-plus filtering systems to the Internet ecosystem is likely to be further expanded and possibly entrenched by the newly adopted EU Copyright Directive because hosting OSPs will be incentivized to adopt filtering technology of some sort to obtain a limited exemption from direct liability. As a corollary, the role of traditional national copyright law is likely to be further diminished in the future online environment, at least in regard to the major centralized hosting and communication platforms.

## **9.6 The Fundamental Role of the DMCA Safe Harbor for All OSPs**

The findings of chapter 8 highlight several important but underappreciated roles played by the DMCA safe harbor regime in the day-to-day operations of U.S.-based OSPs.

### **9.6.1 Accommodation of Other Jurisdictions’ Copyright Laws in the Notice and Takedown Process**

The fact that many U.S.-based OSPs are applying the particular standards and procedural requirements of the DMCA to process copyright removal requests that they receive from outside of the United States has been reported previously. However, what does not appear to be widely appreciated is that some OSPs are making case-by-case decisions that extend the takedown procedural remedy to EU copyright complainants, by taking account of the differing scope of copyrightable subject matter protected under EU law (but not under U.S. law).

U.S.-based OSPs that have implemented the DMCA safe harbor’s takedown process in their operations are able to flexibly take account of other jurisdictions’ differing copyright laws—particularly in regard to aspects of European copyright law that reflect national cultural sensitivities like design rights. Through this process they can pragmatically avoid direct conflicts of law that might otherwise occur and avoid transaction costs and friction for both platforms and complainants.

---

<sup>478</sup> Galanter, *supra* note 104; Edelman & Suchman, *supra* note 105.

<sup>479</sup> For the music industry’s view on the competition law aspects of this, see Ron Knox, *The Copyright Killer*, GLOBAL COMPETITION REVIEW, Jan. 11, 2019.

## **9.6.2 Accommodation of Fair Use in Assessing Copyright Infringement Removal Requests**

In *Lenz v. Universal Music Corp.*<sup>480</sup> the Court of Appeals for the Ninth Circuit affirmed that copyright holders have a duty to consider whether use of copyrighted material might be non-infringing fair use before sending a DMCA takedown notice. However, while that requires consideration in good faith, the Appeals Court found that that test could be satisfied by a subjective belief that may not be reasonable. As a result, some U.S.-based OSPs have been independently considering whether uses of copyrighted identified in DMCA takedown notices might involve a colorable claim to fair use in their review process. The interviews confirmed that the ex-post nature of the DMCA's takedown process enables OSPs to take account of fair use in processing DMCA copyright removal requests, at least for the many less-resourced OSPs that conduct manual review of notices they receive. Respondents who reported that fair use was central to the functioning of the communities on their online services viewed this as an important safeguard enabled by the DMCA's ex-post takedown system.

## **9.6.3 The DMCA Safe Harbor's Role in Launch Strategies**

Start-ups and some resource-constrained OSPs appear to be relying on the DMCA safe harbor's ex-post takedown system to underpin their launch strategies. The DMCA safe harbor regime's takedown process appears to play an important role in the "launch everywhere" strategy favored by start-ups because it provides a mechanism for mitigating copyright liability risk at a time when most start-ups do not have the resources to hire lawyers to engage in jurisdictional risk analysis.

Start-ups and some resource-constrained OSPs that choose to make their services available on a nontargeted basis did not appear to view potential foreign copyright liability as a primary factor in launch strategies. This appeared to be due to several factors: views about the scope of international harmonization of copyright law; reliance on the DMCA safe harbors to respond to copyright infringement claims and mitigate liability; and in some cases, on their ability to implement geoblocking or other technical measures post-launch if needed.<sup>481</sup> However, as noted previously, given the data sample limits, these results cannot be treated as generalizable.

## **9.7 Article 17 (Formerly Article 13) of the EU Copyright Directive**

### **9.7.1 Concerns About Draft Article 13/17 Proposal**

As prior scholarship<sup>482</sup> and chapters 4 to 6 demonstrate, there has been a noticeable trend in recent years in both the United States and the European Union to require OSPs to adopt proactive monitoring for potential copyright-infringing content on their platforms and networks,

---

<sup>480</sup> *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

<sup>481</sup> The data also indicate that some larger OSPs launch products and services globally, but in contrast to smaller OSPs, these OSPs have more capacity to conduct jurisdictional analysis. Although larger OSPs' capacity to design and build appears to reflect jurisdictional risk analysis capacity, there appeared to be less direct alignment with launch strategies. It may be that launch strategy also reflects relative risk tolerances and cultural orientations across OSPs, perceptions of being regulatory targets or the possibility of being found to be subject to jurisdiction in foreign courts because of some OSPs' existing physical presence in certain jurisdictions.

<sup>482</sup> DeBeer & Clemmer, *supra* note 4; Van Eecke, *supra* note 4.

and to adopt a “notice and stay down” obligation, which would likely require use of filtering technology to enforce. The various efforts share the common theoretical underpinning of gatekeeper liability. They seek to put pressure on OSPs to withdraw technical support for third-party wrongdoing, even where the OSPs would not be considered culpable or liable under national liability standards. The most recent of these efforts, Article 17 (formerly Article 13) of the EU Copyright Directive, would impose direct liability upon hosting platforms for communicating to the public unauthorized copyrighted works uploaded by their users.

Respondents from OSPs of all resource levels identified the then-proposed reforms to the EU legal framework in Article 13 (now 17) of the draft EU Digital Single Market Copyright Directive as their chief concern during interviews. This was notable because the interview questions did not mention the draft EU Copyright Directive and respondents were informed that their views were not being sought on pending litigation and legislative proposals.

The interviews highlight that smaller and less-resourced OSPs view the DMCA safe harbors as fundamental to their ability to operate, and perceived that if adopted, then-draft Article 13 would have undermined their ability to rely on the DMCA safe harbors as they currently did. The fact that respondents from several smaller OSPs with limited resources had traveled to Brussels to meet with policymakers was noteworthy. Contrary to the mainstream media’s reporting on the lobbying around the EU copyright proposal as a battle between “big tech” and the large music and media industries, the level of awareness and engagement of smaller entities (many of whom compete directly with the larger platforms in niche user markets) illustrated that the vocal opposition to the filtering proposal during 2018–2019 was not simply the result of a campaign carefully orchestrated by better-resourced Internet companies and their trade groups.<sup>483</sup>

### **9.7.2 Potential Impact of Article 17 on Existing OSP Practices**

The EU Digital Single Market Copyright Directive had not been adopted at the time of writing this work. A purportedly final text of Article 17 (formerly 13) was provisionally adopted by the European Parliament in late March 2019.<sup>484</sup>

As analyzed in chapter 6, the final text of Article 17 (formerly Article 13) includes several important changes, aimed at addressing some of the criticisms of prior versions of the draft directive. Most importantly, the final version of Article 17 does not apply to not-for-profit online hosting services. The final text applies to “online content sharing service providers,” which it defines as “providers of an information society service whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works or

---

<sup>483</sup> See, e.g., Michael Birnbaum, *Europe’s Controversial New Copyright Law Unsettles U.S. Tech Giants*, WASHINGTON POST (Mar. 26, 2019), [https://www.washingtonpost.com/world/europe/europes-controversial-new-copyright-law-unsettles-us-tech-giants/2019/03/26/f8457b7a-4fd2-11e9-bdb7-44f948cc0605\\_story.html?utm\\_term=.cd17c7b2e76d](https://www.washingtonpost.com/world/europe/europes-controversial-new-copyright-law-unsettles-us-tech-giants/2019/03/26/f8457b7a-4fd2-11e9-bdb7-44f948cc0605_story.html?utm_term=.cd17c7b2e76d); Ryan Browne, *EU Lawmakers Approve Copyright Reforms That Could Have a Big Impact on Google, Facebook*, CNBC (Mar. 26, 2019), <https://www.cnbc.com/2019/03/26/eu-parliament-passes-copyright-ruling-that-will-hit-google-facebook.html> Paul Resnikoff, *After Two Years of EU Deliberations, Article 13 is Finalized—and Headed for a Vote*, DIGITAL MUSIC NEWS (Feb. 13, 2019), <https://www.digitalmusicnews.com/2019/02/13/eu-article-13-copyright-directive/>

<sup>484</sup> Pending EU Copyright Directive, *supra* note 8.

other protected subject-matter uploaded by its users *which it organises and promotes for profit-making purposes.*<sup>485</sup>

Although not in the operative part of the directive’s text, Recital 62 provides additional clarification for EU member states about the entities to which EU legislators intended the new legal regime to apply. It provides that the directive was intended to target “only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.” It also emphasizes that the directive was intended to cover commercial services, in particular those “the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorizing it and using targeted promotion within it.”<sup>486</sup>

In addition to the general exclusion of not-for-profit hosting services, the final text excludes several types of services from its ambit: (i) providers of services such as not-for-profit online encyclopedias (which would appear to exclude Wikipedia, although not other projects of the Wikimedia Foundation); (ii) not-for-profit educational and scientific repositories; (iii) open source software developing and sharing platforms (which would appear to exclude GitHub in respect of open source development); (iv) particular electronic communication service providers;<sup>487</sup> (v) online marketplaces and business-to-business cloud services; and (vi) cloud services which allow users to upload content for their own use (such as Dropbox).<sup>488</sup> The final text also contains a limited and time-based accommodation for new start-up hosting platforms that have been accessible in the EU for less than three years, providing for phased obligations, as discussed in chapter 6.<sup>489</sup>

The final text also contains various procedural safeguards<sup>490</sup> and a mechanism for EU member states to exercise discretion in granting exemptions (discussed below). The procedural safeguards indicate that EU legislators appear to have understood and taken account of the criticisms leveled at the Directive regarding incentivizing overbroad removal of content. The final text incorporates mechanisms to minimize the potential harm to innovation, education, and culture, posed by the Directive’s incentives for “cooperation” between rightsholders and OSPs. As prior literature has made clear, not all filtering technologies are equivalent. Some more limited hash-based matching systems would appear to be sufficient to meet the new notice and stay down obligation that is a condition for obtaining a limited exemption from liability. However, they would likely not be sufficient to meet the broader ex-ante obligation to monitor

---

<sup>485</sup> *Id.* art. 2(6).

<sup>486</sup> *Id.* recital (62).

<sup>487</sup> Pending EU Copyright Directive, *supra* note 8, art. 2(6), Electronic communication service providers as defined in Directive 2018/1972 establishing the European Communications Code.

<sup>488</sup> *Id.* art. 2(5).

<sup>489</sup> *Id.* art. 17(6).

<sup>490</sup> Pending EU Copyright Directive, *supra* note 8, arts. 17(7) & (9) (providing that cooperation between OSPs and rightsholders shall not result in prevention of availability of non-infringing uses of copyrighted works permitted under national law exceptions and limitations, including existing exceptions for quotation, criticism, and parody); art. 17(8) (prohibition of general monitoring obligation); *id.* art. 17(9) (requiring effective and expeditious complaint and redress mechanisms to be put in place).

for and prevent the display of copyrighted content. Whether any of the procedural safeguards will have any effect in practice will depend on the nature of the content identification and filtering technologies that are endorsed by the Commission, and how they are deployed by OSPs.<sup>491</sup> However, the limitations and safeguards may provide bases for challenging the use of particular technologies and create opportunities for judicial clarification by EU courts on the scope of the new obligations and how EU member states and platforms must accommodate non-infringing uses. This suggests that the directive will likely lead to increased legal uncertainty in the short term, as these matters are settled through litigation in EU courts.

The final text contains four core elements:

- (1) Hosting platforms covered by the directive would have direct copyright liability for hosting and providing access to copyrighted content uploaded by their users, which the final text characterizes as an act of communication to the public or an act of making available to the public;<sup>492</sup>
- (2) A requirement that affected UGC hosting platforms obtain authorization (for instance, in the form of licensing agreements) from the copyright owners of all types of works uploaded on to their platforms by their users.<sup>493</sup> The licensing agreements would have to cover acts carried out by users of the UGC hosting platform's service when they are not acting on a commercial basis or their activity does not generate significant revenues;<sup>494</sup>
- (3) Affected UGC hosting platforms would be excluded from the EU statutory hosting safe harbor for copyright liability arising from their acts of communication to the public and/or making available copyrighted works through providing public access to hosted content;<sup>495</sup> and
- (4) A provision providing for an exemption from liability where UGC hosting OSPs are not able to obtain authorization from all relevant copyright holders, if an OSP is able to satisfy three conditions:
  - a. First, it can show that it has made best efforts to obtain authorization from all copyright holders of works hosted on its platform;
  - b. Second, it can demonstrate that it made best efforts to ensure the unavailability of specific copyrighted works "in accordance with high industry standards of professional diligence"; and, *in any event*

---

<sup>491</sup> See EVAN ENGSTROM & NICK FEAMSTER, THE LIMITS OF FILTERING: A LOOK AT THE FUNCTIONALITY AND SHORTCOMINGS OF CONTENT DETECTION TOOLS, ENGINE REPORT, March 2017, <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>.

<sup>492</sup> Pending EU Copyright Directive, *supra* note 8, art. 17(1).

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* art. 17(2).

<sup>495</sup> *Id.* art. 17(3).

- c. Third, it acts expeditiously to disable access to or remove from their websites, particular copyrighted works upon receiving a sufficiently substantiated notice from a copyright holder, and can demonstrate that it has made best efforts to prevent future uploads of these copyrighted works, in accordance with paragraph b.<sup>496</sup>

Finally, the Copyright Directive also contemplates that the European Commission will convene stakeholder dialogues as a basis for issuing guidance on best practices for the cooperation between OSPs and rightsholders required by Article 17.<sup>497</sup> The directive also creates several new transparency obligations for OSPs. OSPs are required to provide “adequate information” about the functioning of OSPs’ practices in regard to cooperation with rightsholders on preventing availability of notified copyrighted content—namely, the functioning of the content identification and filtering systems being used by OSPs—to rightsholders<sup>498</sup> and also to users’ organizations, as part of the Commission’s stakeholder dialogue process.<sup>499</sup>

### 9.7.3 Implications

If Article 17 were to be adopted in this form, it would bring about a fundamental change to the EU legal framework under which OSPs have operated for almost two decades and create a major divergence between the U.S. and EU legal systems, for the reasons set out in chapter 5. It would have several effects, discussed below.

#### 9.7.3.1 Displacement of DMCA’s Knowledge-Based Legal Rule as Global Paradigm

First, it would likely displace the DMCA’s knowledge-based legal rule and its ex-post conditional liability structure as the global legal paradigm for intermediary liability regulation. The DMCA has become the globally dominant legal model for several reasons. First, it shaped the structural orientation and broad contours of the EU e-Commerce Directive which followed it shortly afterwards.<sup>500</sup> Second, because the United States has actively sought to have other countries adopt the DMCA legal framework as a core plank of its foreign trade policy agenda. Since 2003, more than ten U.S. free trade agreements have required the U.S.’s major trading partners to adopt laws limiting liability of OSPs that are modeled on the DMCA’s detailed information standards and procedures. As a result of this practice, statutory safe harbor regimes that provide conditional immunity subject to ex-post notification obligations are now part of national law in Asia, the Middle East and North Africa, and Central and South America.<sup>501</sup>

---

<sup>496</sup> *Id.* art. 17(4).

<sup>497</sup> *Id.* art. 17(10).

<sup>498</sup> *Id.* art. 17(8).

<sup>499</sup> *Id.* art. 17(10).

<sup>500</sup> Seth Ericsson, *The Commodification of Internet Intermediary Safe Harbors: Avoiding Premature Harmonization Around a Sub-Optimal Standard*, in *TRIPS PLUS 20: FROM TRADING RULES TO MARKET PRINCIPLES* (Hanns Ullrich, Reto M. Hilty, Matthias Lamping & Josef Drexler eds., 2016); Max Planck Institute for Innovation and Competition Research Paper No. 16-05.

<sup>501</sup> Numerous U.S. free trade agreements have included obligations for U.S. trading partners to adopt legal measures limiting the liability of OSPs modeled on the U.S. DMCA statutory safe harbor regime in 17 U.S.C. § 512. *See, e.g.*,

However, despite its widespread adoption as a legal model, there is no guarantee that the DMCA's safe harbor regime will continue to be the globally dominant paradigm if the EU elects to adopt Article 17 in its current form. For many U.S.-based OSPs, the EU is one of their largest markets. Because many OSPs may be unwilling to forgo the EU market, those that can afford to do so may make the pragmatic decision to acquire or license filtering technology in order to meet the conditions to obtain an exemption under the DSM Copyright Directive, namely adopting an ex-ante monitoring obligation and notice and stay down obligation. In addition, as the EU also often requires its trading partners to adopt laws based on the core EU-level directives, it is likely that EU trading partners will be pressed to adopt key aspects of the EU DSM Copyright Directive's framework. This, in turn, would create disharmony of legal obligations amongst a broader set of national legal systems beyond U.S. and EU law, and increase political pressure on Congress to amend the DMCA to bring it in line with the EU's new legal framework, to restore Transatlantic harmonization. If this were to happen, it could lead to a permanent reorientation of the current intermediary liability legal framework.

For hosting OSPs, the calculus would likely be similar to that involved in implementation of the EU General Data Protection Regulation's technological requirements. OSPs would have to consider whether it is feasible and cost effective to install content identification and filtering technology on a global or regional EU-only basis. OSPs' decisions would depend on what technologies the European Commission considers sufficient for compliance in its best practices guidance. In the meantime, the EU Copyright Directive appears likely to create legal uncertainty for some time, which well-resourced OSPs might be in a better position to address through compliance structures. Regulatory theory and political economy scholarship suggest that this is likely to benefit larger and more-resourced OSPs, which are able to absorb additional compliance costs and might also welcome imposition of new regulatory requirements as a way to secure a competitive advantage over their competitors.<sup>502</sup>

---

U.S.–Singapore Free Trade Agreement, art. 16.9(22), May 6, 2003 (in force from 2003); U.S.–Chile Free Trade Agreement, art. 17.11(23), June 6, 2003 (in force from 2004); U.S.–Australia Free Trade Agreement, art. 17.11(29), May 18, 2004 (in force from 2005); U.S.–Central America–Dominican Republic Free Trade Agreement, art. 15.11(27), Aug. 5, 2004–Dec. 1, 2006 (in force from 2006–2009, depending on country); U.S.–Bahrain Free Trade Agreement, art. 14.10(29) and Side Letter (on written notice and counternotice requirements), Sept. 14, 2004 (in force from 2006); U.S.–Morocco Free Trade Agreement, art. 15.11(28) and Side Letter, June 15, 2004 (in force from 2006); U.S.–Oman Free Trade Agreement, art. 15.10(29) and Side Letter, Jan. 19, 2006 (in force from 2009); U.S.–Peru Trade Promotion Agreement, art. 16.11(29) and Side Letter, Apr. 12, 2006–June 25, 2007 (in force from 2009); U.S.–Colombia Trade Promotion Agreement, art. 16.11 (29) and Side Letter, Nov. 22, 2006 (in force from 2012); U.S.–Panama Trade Promotion Agreement, art. 15.11(27), June 28, 2007 (in force from 2012); and U.S.–Korea Free Trade Agreement, art. 18.10(30) and Side Letter (requiring Korea to adopt legal measures providing for written notification by copyright holders of claimed copyright-infringing material, and procedures for written counter-notification to ISPs by persons who have had content removed based on a copyright infringement claim), June 30, 2007 (in force from 2012); all available at <https://ustr.gov/trade-agreements/free-trade-agreements>. The proposed Anti-Counterfeiting Trade Agreement (2010) also included provisions concerning Internet intermediary copyright liability; see Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559–78 (2011), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1708&context=auilr>.

<sup>502</sup> See VOGEL, *supra* note 59; Mike Isaac, *Mark Zuckerberg's Call to Regulate Facebook, Explained*, N.Y. TIMES, Mar. 30, 2019, <https://www.nytimes.com/2019/03/30/technology/mark-zuckerberg-facebook-regulation-explained.html>; HENRY FARRELL & ABRAHAM L. NEWMAN, OF PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY (2019).

### 9.7.3.2 Increased Compliance Costs and Differential Impacts on Hosting OSPs

Second, Article 17 would effectively turn affected UGC-hosting OSPs into “gatekeepers” by imposing direct liability upon them for communicating unauthorized copyrighted works uploaded by their users to the public and require them to obtain authorizations from all copyright holders in respect of all types of works available on their platforms. All UGC-hosting platforms that are accessible in the European Union would either face direct liability for communicating unauthorized copyrighted material, or increased compliance costs for obtaining licensing agreements or deploying content filtering technology as a condition for obtaining an exemption from liability. Hosting of user-generated content was an activity previously covered by the EU statutory hosting safe harbor,<sup>503</sup> but would now require payment of reasonable licensing fees. Although the wording of the final text does not explicitly mention “upload filters,” European policymakers have acknowledged that filtering technology would be necessary in order for any UGC-hosting OSP operating at scale to comply with the ex-ante obligation to ensure unavailability of copyrighted content and to implement a notice and staydown obligation to prevent future uploads of notified content.<sup>504</sup>

The interview findings suggest that Article 17 would have a differential and more detrimental impact on smaller and less-resourced OSPs than on better-resourced hosting OSPs. Article 17 would impose liability on most UGC hosting OSPs, including smaller and less-resourced ones that have been in operation for at least three years (other than those expressly exempted.) However, well-resourced hosting OSPs like YouTube and Facebook might be able to qualify for the exemption from liability because they appear to meet the three required conditions. These OSPs have licensing agreements with collective management organizations representing copyright holders for major classes of works on their platforms.<sup>505</sup> But if those agreements did not constitute a complete authorization, these OSPs have implemented content filtering systems that would enable them to satisfy the new ex-ante obligation to ensure unavailability of copyrighted works, and the new notice and stay down obligation.

In contrast, most less-resourced OSPs do not appear to have licensing arrangements in place for all classes of copyrighted material that users may upload to their platforms. Moreover, many smaller OSPs would likely not be able to qualify for an exemption from liability because they may not have the resources to develop or license a content identification and filtering system to meet the new ex-ante and notice and stay down obligation. In some cases, no filtering technology currently exists for the types of works available. As a result, these OSPs would have direct liability for unauthorized acts of communication to the public and/or making available of copyrighted works uploaded by their users, while the most-resourced UGC hosting OSPs might qualify for an exemption.

---

<sup>503</sup> The CJEU’s ruling in *SABAM v. Netlog*, discussed *supra* in chapter 5, confirmed that hosting of UGC was an activity that was within the scope of the EU statutory safe harbor for hosting in Article 14 of the ECD.

<sup>504</sup> Mike Masnick, *EU Commissioner Gunther Oettinger Admits: Sites Need Filters to Comply with Article 13*, TECHDIRT BLOG (Apr. 3, 2019), <https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml> (commenting on quote from Commissioner Oettinger reported in article in SPIEGEL ONLINE (Mar. 29, 2019), <http://www.spiegel.de/netzwelt/web/uploadfilter-sind-laut-cdu-politikern-nicht-zu-verhindern-a-1260279.html>).

<sup>505</sup> See *supra* licensing agreements listed in chapter 2.

In practice, this would appear to have the effect of creating a barrier to entry to the EU market for smaller and less-resourced for-profit OSPs that could not obtain licensing agreements (whether due to cost constraints or lack of availability of a viable licensing mechanism) and which could not afford to license filtering technology in order to qualify for an exemption from direct liability.

### **9.7.3.3 Geographic Segmentation of Online Services and Entrenchment of Incumbent Hosting Platforms**

Finally, the findings in chapter 8 highlight the range of OSPs' current practices that might no longer be possible following implementation of Article 17.

First, less-resourced OSPs would no longer be able to rely on the DMCA safe harbor regime's ex-post takedown process to manage copyright liability risk as it appears many currently do. This could have several potential effects. Smaller U.S. OSPs might be incentivized to proactively geoblock users with European IP addresses in order to minimize liability exposure, following the approach taken by some U.S. news services and websites to limit their potential liability under the EU GDPR.<sup>506</sup> Unlike the situation under the GDPR, the EU Copyright Directive does not create a regulator with power to issue fines for noncompliance, so the response of OSPs based outside of the EU would depend on each OSP's assessment of enforcement potential and level of risk tolerance. The interviews revealed a diversity amongst OSPs in capacity and normative position on whether they would consider geoblocking in this situation. The interviews also revealed differences in opinions about whether geoblocking could be retrofitted to OSPs and as to whether the use of geofencing or geoblocking would be sufficient to avoid potential EU copyright liability under Article 13 (now 17).

Alternatively, smaller OSPs might now become more vulnerable to EU copyright injunctions because removing particular identified copyrighted material would not be effective to limit the scope of liability under EU law. An EU member state national court might agree to issue an EU copyright injunction against a U.S.-based hosting OSP, under the national transposition of Article 8(3) of the 2001 Copyright Directive directing a U.S.-based OSP to use geo-identification technology to block access to any user within the territory of the EU, following the approach in the French court's *Allotstreaming* orders (discussed in chapter 5).

Second, smaller and less-resourced OSPs would no longer be able to rely on the DMCA to handle conflict of law issues. They would be forced to formalize choice of law determinations. This is likely to increase Internet users' experience of fragmentation of online services because, as the interviews revealed, the DMCA safe harbors have previously played an important role in minimizing the fragmentary effect of national copyright laws. In contrast, incumbent OSPs that operate private ordering systems backed by content filtering and automated rights management systems already have the ability to manage conflict of laws issues through jurisdiction-specific removals or filtering of copyrighted content.

Adoption of Article 17 in its current form may lead to further fragmentation of the online ecosystem on two dimensions. First, between OSPs with different level of resources, some of

---

<sup>506</sup> Alex Hern & Martin Belam, *LA Times Among US-Based News Sites Blocking EU Users due to GDPR*, THE GUARDIAN (May 25, 2018), <https://www.theguardian.com/technology/2018/may/25/gdpr-us-based-news-websites-eu-internet-users-la-times>.

which might qualify for a liability exemption. Second, it could exacerbate geographic segmentation of online services on the global Internet. Many smaller tier UGC hosting OSPs—both American and European—would no longer be able to operate in the EU or might become inaccessible to Internet users within EU territories. Article 17 may also preclude new OSPs from entering the market in the European Union. Even though the final text contains an accommodation with phased obligations for start-up services that have been in existence for less than three years, start-up OSPs may be reticent to enter the market in the European Union for fear that they could suddenly find themselves liable if they had not implemented content identification and filtering technology at the time that the Copyright Directive’s accommodation’s income or viewership threshold condition is triggered. Article 17 could have the effect of entrenching larger hosting OSPs in the global Internet, because only the incumbent hosting OSPs that already have licensing arrangements and ex-ante filtering technology in place could qualify for the liability exemption that would permit them to continue to operate as a host of UGC content in the EU.

#### 9.7.3.4 Possible Countervailing Effects

It is possible that the differential impact on OSPs with differing resources might be mitigated to some degree by language in the final text that appears to provide EU member states with flexibility in how strictly they may choose to enforce the exemption conditions. It requires member states, when enforcing exemption determinations, to take account of (1) the type of service, (2) the audience, (3) the size of the service and type of works uploaded by users, and (4) the availability of “suitable and effective means” and (5) their cost for service providers. This suggests that European member states’ legislatures and/or courts might have some discretion to determine that an exemption from liability could be granted where, for instance, no effective filtering technology currently exists for particular classes of works hosted by OSPs, such as software and 3D objects. It might also permit national legislators, regulators, or courts to approve exceptions based on the features of a particular service.

In addition, the new transparency obligations requiring affected OSPs to provide users’ organizations with access to adequate information about the OSPs’ practices (and presumably use of technological measures) for preventing availability of copyrighted works on their platforms in the contemplated Commission stakeholder dialogue process, may create an opportunity for user organizations and other external stakeholders to engage with both OSPs and rightsholders’ organizations to develop new copyright-specific content moderation review structures and practices that are more protective of platform users’ expressive rights than the current practices. The insights from prior empirical privacy law and organizational theory scholarship suggest that mandatory transparency obligations can benefit both regulated firms and external stakeholder communities, by allowing external stakeholders to engage more meaningfully with expert personnel within firms about developing responsible practices, which, in turn, can empower expert personnel within firms to develop new structures and practices, and expand the social legitimacy of regulated companies.<sup>507</sup>

---

<sup>507</sup> BAMBERGER & MULLIGAN, *supra* note 67, at 35; GUNNINGHAM, KAGAN & THORNTON, *supra* note 95.

## CHAPTER 10

### CONCLUSION

#### 10.1 Significance of Findings in Broader Context

Based on the interview data presented in chapter 8 and the analysis in chapter 9, I conclude that copyright law has both direct effects on online service providers' design decisions and indirect impacts on the governance structures of online service providers. I conclude that the DMCA safe harbor regime plays a vital role in the operations of all OSPs, and that implementing its notice and takedown process and other eligibility conditions has had constitutive effects on OSPs' practices and perceptions of risk. I also conclude that differences between national copyright laws' liability standards and sanctions have effects on OSPs' decisions about product features, location of services, and perception of risk, but the effects are differential, depending on the level of resources and degree of geographic exposure of the OSP.

This is significant because the observed divergence between well-resourced OSPs and resource-constrained OSPs in the capacity to engage in jurisdictional copyright risk analysis, and to design, build, and modify existing products and services to minimize potential copyright liability, appears to give larger well-resourced OSPs a persistent and possibly insurmountable competitive advantage over smaller and resource-constrained OSPs, independent of the potential impact of Article 17 of the new EU Copyright Directive. This has implications for both competition and innovation.

Only the better-resourced OSPs have the in-house expertise to be able to assess legal risk on a country-by-country basis and the ability to bear the extra costs in building products and services to satisfy the legal requirements in multiple markets. As the body of EU law grows in volume and complexity over time, in the future only well-resourced OSPs might have the ability to navigate this successfully. This may be further exacerbated by the new EU Copyright Directive. EU member states may elect to use the flexibility provided to them in transposing Article 17 into their national laws to grant additional exemptions from liability to UGC-hosting OSPs. As a result, even if smaller hosting OSPs are not forced to leave the EU market due to direct liability exposure, they would face increased complexity because they would have to navigate across varying legal requirements in twenty-seven or twenty-eight member states. In contrast to better-resourced OSPs, resource-constrained OSPs will be less likely to have built their products and services with EU law in mind. They may therefore be at greater risk of potential copyright liability. Even if their products and services can be technologically modified to accommodate EU member states' legal requirements, these OSPs would appear to be at a competitive disadvantage to better-resourced OSPs that have built their services to accommodate EU member states' national legal requirements from the outset.

The increasing complexity of EU intermediary liability law may therefore constitute an effective barrier to entry for less-resourced OSPs and new market entrants and operate to entrench better-resourced incumbent OSPs. This may impede diversity and development of online services in the EU market, independent of the potential impacts of Article 17 of the new EU Copyright Directive.

The interview findings also suggest that we should refine our understanding of jurisdiction and conflict of laws on the Internet in regard to the operation of copyright law. The

larger communication platforms have internalized and mediated conflicts of laws through the creation of copyright management systems that permit granular country-by-country display and removal of copyrighted content. The fact that we have seen less litigation about international conflicts of law than expected does not show that jurisdiction and choice of law conflicts are not problematic on the Internet, as some scholars have suggested.<sup>508</sup> On the contrary, larger OSPs have been incentivized to build their architectures with county-by-country granular controls, precisely because large OSPs feel that they are subject to jurisdiction and potential injunctions worldwide. This suggests that territorially based copyright laws are a fragmentary force, but we do not experience them that way because conflicts of law have been technologically mediated on large hosting platforms and up until now, smaller OSPs have been able to rely on the DMCA safe harbor's takedown process to mediate potential conflicts of law.

## 10.2. Limits of Data and Areas for Further Research

As noted in chapter 7, given the relatively small data sample analyzed in this project, the findings cannot be used to support generalized conclusions for the entire diverse OSP sector. Further interviews with a broader range of OSPs would be needed to determine whether the observed differential effects, decision-making processes and perceptions of risk of well-resourced and less-resourced OSPs are representative of the OSP sector as a whole. In addition, interviews with EU-based OSPs would be needed to test the conclusions reached in chapter 9 about the particular value and role played by the DMCA safe harbor regime in the operations of OSPs. Future research should also explore the types of injunctions that OSPs are receiving on noncopyright grounds, to understand how these are shaping OSPs' decision-making processes and organizational practices and whether similar distribution patterns exist between OSPs with different resource levels, in order to determine whether the regulatory effects of copyright law are distinctive.

Finally, the findings in chapter 8 highlight significant potential trade-offs between copyright enforcement (embodied in Article 17 of the new EU Copyright Directive) and competition and innovation policy. It seems likely that Article 17 may have the potential effect of entrenching larger incumbent platforms that have the resources to develop or license content filtering technology and to build systems that combine filtering technology with copyright management systems. The new EU Copyright Directive was prompted in large part by competition concerns. It was adopted on the promise of increasing payments to copyright holders who currently are not able to negotiate licenses with larger platforms for the full market value of their works. However, even if it is successful in achieving that objective, it seems likely to impose significant social costs on a wider group of stakeholders, by increasing pressures for concentration and centralization of content hosting on larger platforms, while creating a potential barrier to entry for less-resourced hosting platforms. Future research could explore these trade-offs more systematically. It could also consider possible policy interventions or oversight mechanisms that EU competition regulators could adopt to monitor for and address concerns identified in the future Commission stakeholder consultations contemplated by the new Directive.

---

<sup>508</sup> See, e.g., CHRISTIE, *supra* note 37, and *supra* sources in notes 33–37.

As recent empirical studies have highlighted, the major communication platforms have created new ways for a vast range of artists and creators to make a living.<sup>509</sup> Given their role in facilitating this new creative economy, future research could analyze the economic impacts of the constraints on platform design created by the new EU Copyright Directive and other recent EU initiatives, and consider whether impact assessments for modifications to existing regulatory frameworks should take into account the impacts of regulatory measures on the economic interests and expression rights of users of platforms. Future research could measure the longer-term impacts of the EU Copyright Directive on media diversity and freedom of expression online, by conducting longitudinal analysis of content availability and community interactions on noncommercial and on regulated hosting platforms that are accessible in the European Union at successive intervals after the Directive has been implemented in EU member states' national laws. Finally, in light of the potential impacts on platform users, future research could explore mechanisms that would support a balanced allocation of costs and benefits as the Directive is implemented in EU member states' national laws, such as independent audits, which could provide an objective empirical basis for future policy modifications that would benefit all the diverse set of stakeholders that are part of the Internet economy. It could also explore various regulatory models and measures that might protect third party users of platforms, and whether consideration should be given to regulating private platforms as quasi common carriers.

### **10.3. Concluding Thoughts**

OSP liability is a constantly evolving legal concept, as the prior chapters have illustrated. This work presents a snapshot of copyright liability standards in U.S. and EU law and the practices that U.S.-based globally accessible OSPs have adopted to manage the risk of copyright liability and legal uncertainty at a particular point in time. Although the findings and practices documented in the prior chapters are necessarily impermanent, the snapshot captures OSPs' practices and organizational responses at a particularly important point in time—just prior to the adoption of the EU Digital Single Market Copyright Directive, when the U.S. and EU intermediary liability legal frameworks shared a common high-level orientation.

While much remains uncertain at the time of writing, it is clear that the high-level consensus that has existed for almost twenty years between the U.S. and EU legal systems in regard to legislatively mandated limitations on copyright liability for for-profit hosting OSPs has come to an end. The final impact of Article 17 of the new Copyright Directive will depend on how its provisions are transposed in EU member states' national laws. Although Article 17 creates a major divergence between the U.S. and EU legal systems, it is possible that its impact on the broader Internet ecosystem may be more limited in practice than first anticipated because of its exemption of not-for-profit online services, the discretion afforded to member states in regard to granting of exemptions, and its mandatory procedural protections.

---

<sup>509</sup> ROBERT SHAPIRO & SIDDHARTHA ANEJA, TAKING ROOT: THE GROWTH OF AMERICA'S NEW CREATIVE ECONOMY, re:create coalition (Feb. 11, 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf> (finding that almost 17 million Americans earned \$6.8 billion in personal income from posting their creations online using nine mainstream platforms in 2017, including Amazon Publishing and WordPress, eBay, Etsy, Shapeways, YouTube, Instagram, Tumblr, and Twitch).

Given the long history of transatlantic cross-harmonization in copyright law,<sup>510</sup> it is likely that adoption of the EU Digital Single Market Copyright Directive will lead to calls for U.S. legislators to amend the DMCA regime to align U.S. law with the new EU framework, justified by the argument that failure to do so would put U.S. industries at a competitive disadvantage to their European competitors. Historically, Congress has found this to be a particularly persuasive argument. In recent years, the term of U.S. copyright law was extended to harmonize U.S. legal standards with those of the European Union, in response to the EU's prior twenty-year copyright term extension.<sup>511</sup> Given this background and the broader political costs to the United States of ceding its global policy dominance in regulation of OSPs' copyright liability to the European Union, U.S. policymakers will likely feel considerable pressure to harmonize the U.S. safe harbor standards with the European Union's new standards. The U.S. Copyright Office has signaled its interest in considering this by convening a public roundtable in its long-running Section 512 Study to request stakeholder comments on recent global legal developments in intermediary liability regulation, including the EU Digital Single Market Copyright Directive, with the stated aim of updating the record prior to issuing the Copyright Office's highly anticipated Report and potential recommendations for legislative reform of the U.S. statutory safe harbor regime.<sup>512</sup>

However, in this instance, the policy arguments for harmonization with the EU framework would appear to be more finely balanced than on previous occasions. Failure to harmonize might be perceived to put U.S. creative industries at a disadvantage because they would not have equivalent levels of legal protection to their European counterparts. U.S.-based OSPs might have more divided views on the need for harmonization. Larger incumbent commercial U.S.-based hosting platforms are likely to implement the EU's new requirements on a global basis because they already have content identification and filtering systems in place that allow them to do so. As a result, those OSPs might welcome harmonization of U.S. law in the future, as a way to ensure that their competitors are subject to the same regulatory burdens and to press their competitive advantage over smaller OSPs that cannot afford the increased compliance costs this would entail. However, as the interview findings in this dissertation make clear, harmonization of the U.S. safe harbor regime with the new EU legal framework would cause substantial hardship for lesser-resourced U.S.-based hosting OSPs, which would likely not be able to continue to operate without the DMCA safe harbors to underpin their operations. It could also bring about irreversible changes to the broader Internet ecosystem by further entrenching the well-resourced incumbent platforms and reducing the quantity and diversity of hosting services available to Internet users.

---

<sup>510</sup> See, e.g., PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (2014).

<sup>511</sup> S. REP. NO. 104-315, at 3 (July 10, 1996), accompanying S.483, the Copyright Term Extension Act of 1996 (stating that the rationale for the twenty-year term extension was to "provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works.")

<sup>512</sup> U.S. Copyright Office, Section 512 Study, Notice of Public Roundtable, published in 84 Fed. Reg. 1233-34 (Feb. 1, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00573.pdf>.

## BIBLIOGRAPHY

### TREATIES, LEGISLATION, LEGISLATIVE REPORTS AND POLICY REPORTS

#### Multilateral Treaties

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. 43 (1986), 828 U.N.T.S. 221.

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, Vol. 31, 33 I.L.M. 81 (1994) (amended Jan. 23, 2017).

WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997),  
[http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf)

WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17, (1997); 36 I.L.M. 76 (1997),  
[http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf)

Basic Proposal for the Substantive Provisions of the Treaty On Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996),  
[http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn\\_dc\\_4.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_4.pdf)

#### International Bilateral and Plurilateral Agreements

United States–Singapore free trade agreement, signed May 6, 2003.

United States–Chile free trade agreement, signed June 6, 2003.

United States–Australia free trade agreement, signed May 18, 2004.

United States–Morocco free trade agreement, signed June 15, 2004.

Dominican Republic–Central America–United States free trade agreement, signed Aug. 5, 2004–Dec. 1, 2006.

United States–Bahrain agreement on establishment of free trade zone, signed Sept. 14, 2004.

United States–Oman free trade agreement, signed Jan. 19, 2006.

United States–Colombia trade promotion agreement, signed Nov. 22, 2006.

United States–Peru trade promotion agreement, signed Apr. 12, 2006–June 25, 2007.

United States–Panama trade promotion agreement, signed June 28, 2007.

United States–Korea free trade agreement, signed June 30, 2007.

## European Union

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, 2000 O.J. (L 178).

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, 2001 O.J. (L 167/10).

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (O.J. L 157/45 of 30.4.2004, as corrected and republished in 2004 O.J. (L 195/16)).

*Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final—COD (2016) 0280, Sept. 14, 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=EN>.

Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. (COM 593) (2016) (C8-0383) (2016) (COD 0280) (2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+DOC+PDF+V0//EN>.

Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market—Agreed Negotiating Mandate*, Interinstitutional File 2016/0280 (COD), Document No. 9134/18 (May 25, 2018), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9134\\_2018\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9134_2018_INIT&from=EN).

Copyright in the Digital Single Market—European Parliament Legislative Resolution of 26 March 2019 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. P8\_TA-PROV 0231 (2019) (COM 0593) (2016) (C8-0383) (2016) (COD 0280) (2016), accompanying Position of the European Parliament Adopted at First Reading on 26 March 2019 with a View to the Adoption of Directive (EU) 2019 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, EUR. PARL. DOC. P8-TC1 (COD 0280) (2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0231+0+DOC+PDF+V0//EN>.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281), 23/11/1995 P. 0031-0050.

Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46, 2016 O.J. (L 119) 1 and corrigendum, 2018 O.J. (L 127) 2.

## France

Loi 2004-575 du 24 Juin 2004 pour la confiance dans l'économie numérique [Law 2004-575 of 24 June 2004 on Confidence in the Digital Economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] June 21, 2004, consolidated to Mar. 19, 2014, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164> (LCEN).

## Germany

Tele Media Law, arts 7(2)(1)–(2) & 8–10 (Article 7(2)(1) transposed 2000/31/EC, art. 15).

German Civil Code (Bürgerliches Gesetzbuch), § 823(1) and § 1004.

## United States

The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Title II, codified as 17 U.S.C. § 512 (2006).

Remedies for Infringement: Injunctions, Pub. L. 94-553, 90 Stat. 2584 (Oct. 19, 1976). Title I, codified as 17 U.S.C. § 502 (2006).

H.R. REP. NO. 105-551, pt. 1 (1998) and H.R. REP. NO. 105-551, Pt. 2 (1998).

S. REP. No. 105-190 (1998).

S. REP. No. 104-315 (1996).

## GOVERNMENT POLICY REPORTS AND SUBMISSIONS

### European Union

*Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the 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*, COM (2016) 593 and COM (2016) 594, SWD (2016) 301 final (Sept. 14, 2016), Parts 1/3 and 3/3.

*Commission Staff Working Document on Online Services, Including e-Commerce, in the Single Market*, SEC (2011) 1641 final (Jan. 11, 2012), accompanying *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on a Coherent Framework to Boost Confidence in the Digital Single Market of e-Commerce and Other Online Services*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011SC1641&from=EN>

*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 (May 6, 2015).

*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Tackling Illegal Content*

*Online—Towards an Enhanced Responsibility of Online Platforms*, COM (2017) 555 final (Sept. 28, 2017), [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=47383](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=47383).

## **United States**

U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998—COPYRIGHT OFFICE SUMMARY (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>.

INTERNET POLICY TASK FORCE, U.S. DEPARTMENT OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (July 2013), <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

U.S. Copyright Office, Notice of Inquiry, Study on the Right of Making Available: Notice and Request for Public Comments and Notice of Public Roundtable, Docket No. 2014-2, Feb. 25, 2014, 79 Fed. Reg. 10571.

U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES—A REPORT OF THE REGISTER OF COPYRIGHTS (Feb. 2016), [https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf).

U.S. Copyright Office, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7, Dec. 31, 2015, 80 Fed. Reg. 81862.

U.S. Copyright Office, Notice of Inquiry, Section 512 Study: Notice and Request for Additional Comments, Docket No. 2015-7, Nov. 8, 2016, 81 Fed. Reg. 78636.

## **BOOKS, LAW REVIEW ARTICLES, REPORTS AND INTERNET COMMENTARY**

Jay Rosenthal & Steven Metalitz, Mitchell Silberberg & Knupp LLP, *First Round Comments of the American Association of Independent Musicians et al., Submitted in Response to Notice of Inquiry Regarding Section 512 Study, Published on December 31, 2015. U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, (Apr. 1, 2016), https://www.regulations.gov/document?D=COLC-2015-0013-89806*.

Jay Rosenthal & Steven Metalitz, Mitchell Silberberg & Knupp LLP, *Additional Comments of American Federation of Musicians et al. to the U.S. Copyright Office, Section 512 Study: Notice and Request for Additional Comments, 81 Fed. Reg. 216 (Nov. 8, 2016), Docket 2015-7, https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-92433&attachmentNumber=1&contentType=pdf*.

AM. LAW INST., INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008).

ASSOCIATION LITTERAIRE ET ARTISTIQUE INTERNATIONALE, REPORT AND OPINION ON THE MAKING AVAILABLE AND COMMUNICATION TO THE PUBLIC IN THE INTERNET ENVIRONMENT – FOCUS ON LINKING TECHNIQUES ON THE INTERNET, adopted unanimously by the Executive Committee, Sept. 16, 2013, <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>.

CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS (2017).

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

Christina Angelopoulos, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, KLUWER COPYRIGHT BLOG (June 30, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>.

Christina Angelopoulos, *AG Szpunar in Stichting Brein v. Ziggo: An Indirect Harmonisation of Indirect Liability*, KLUWER COPYRIGHT BLOG (Mar. 23, 2017), <http://copyrightblog.kluweriplaw.com/2017/03/23/ag-szpunar-stichting-brein-v-ziggo-indirect-harmonisation-indirect-liability/>.

Christina Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, KLUWER COPYRIGHT BLOG (Oct. 6, 2016), <http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>.

Christina Angelopoulos, *MTE v. Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression*, KLUWER COPYRIGHT BLOG (Mar. 5, 2016), <http://copyrightblog.kluweriplaw.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/>.

Christina Angelopoulos, *Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe* (Nov. 28, 2013), 2013-3 INTELLECT. PROP. Q. 253 (2013); Amsterdam Law School Research Paper No. 2013-72; Institute for Information Law Research Paper No. 2013-11.

Christina Angelopoulos, *Filtering the Internet for Copyrighted Content in the EU*, Iris Plus, Legal Observations of the European Audiovisual Observatory, Issue 2009-4.

Tanya Aplin, *United Kingdom*, in COPYRIGHT IN THE INFORMATION SOCIETY: A GUIDE TO NATIONAL IMPLEMENTATION OF THE EUROPEAN DIRECTIVE (Brigitte Lindner & Ted Shapiro eds. 2011).

Pedro A. De Miguel Asensio, *Internet Intermediaries and the Law Applicable to Intellectual Property Infringements*, 3 J. INTEL. PROP. INFO. TECH. & ELEC. COM. L. 350 (2012).

IAN AYERS & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE (2014).

KENNETH BAMBERGER & DEIRDRE MULLIGAN, PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE (2015).

Kenneth. A. Bamberger & Deirdre .K. Mulligan, *PIA Requirements and Privacy Decision-Making in US Government Agencies*, in PRIVACY IMPACT ASSESSMENT—LAW, GOVERNANCE AND TECHNOLOGY (D. Wright & P. De Hert eds. 2012).

Kenneth Bamberger & Deirdre Mulligan, *Privacy on the Books and On the Ground*, 63 STAN. L. REV. 247 (2010).

Stefan Bechtold, *Commentary on Information Society Directive*, in CONCISE EUROPEAN LAW 360 (2006).

MARK BEVIR, GOVERNANCE: A VERY SHORT INTRODUCTION (2012).

Michael Birnbaum, *Europe's Controversial New Copyright Law Unsettles U.S. Tech Giants*, WASHINGTON POST (Mar. 26, 2019), [https://www.washingtonpost.com/world/europe/europes-controversial-new-copyright-law-unsettles-us-tech-giants/2019/03/26/f8457b7a-4fd2-11e9-bdb7-44f948cc0605\\_story.html?utm\\_term=.cd17c7b2e76d](https://www.washingtonpost.com/world/europe/europes-controversial-new-copyright-law-unsettles-us-tech-giants/2019/03/26/f8457b7a-4fd2-11e9-bdb7-44f948cc0605_story.html?utm_term=.cd17c7b2e76d)

Jonathan Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Liability to Internet Platforms*, 23 CARDOZO L. REV. 1821 (2013).

Sophie Stalla-Bourdillon, Eleanora Rosati, Karmen Turk, Christina Angelopoulos, Aleksandra Kuczerawy, Miquel Peguera & Martin Husovec, *A Brief Exegesis of the Proposed Copyright Directive* (Nov. 24, 2016), <https://ssrn.com/abstract=2875296> or <http://dx.doi.org/10.2139/ssrn.2875296>.

Anu Bradford, *The Brussels Effect*, 107 NW. U. LAW REV. 1 (2012).

Annemarie Bridy, *Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (John A. Rothchild ed. 2016).

Annemarie Bridy, *BMG v. Cox: The High Cost of Losing Safe Harbor*, STANFORD CENTER FOR INTERNET AND SOCIETY BLOG (Dec. 5, 2015), <https://cyberlaw.stanford.edu/blog/2015/12/bmg-v-cox-high-cost-losing-safe-harbor>.

Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010).

Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559 (2011).

Ryan Browne, *EU Lawmakers Approve Copyright Reforms That Could Have a Big Impact on Google, Facebook*, CNBC (Mar. 26, 2019), <https://www.cnn.com/2019/03/26/eu-parliament-passes-copyright-ruling-that-will-hit-google-facebook.html>

A. CHRISTIE, PRIVATE INTERNATIONAL LAW ISSUES IN ONLINE INTELLECTUAL PROPERTY INFRINGEMENT DISPUTES WITH CROSS-BORDER ELEMENTS: AN ANALYSIS OF NATIONAL APPROACHES (Sept. 2015), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_rep\\_rfip\\_2015\\_1.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_rep_rfip_2015_1.pdf).

CLICQZ, STUDY: GOOGLE IS THE BIGGEST BENEFICIARY OF THE GDPR, Oct.10, 2018, <https://cliqz.com/en/magazine/study-google-is-the-biggest-beneficiary-of-the-gdpr>.

Neville Cordell & Beverley Potts, *Communication to the Public or Accessory Liability? Is the CJEU Using Communication to the Public to Harmonise Accessory Liability Across the EU?* 40 E.I. P.R. 289 (2018).

NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS, Report Prepared for Small Business Administration, Office of Advocacy (Sept. 2010), [https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\)\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf)

Josh Constine, *Facebook Acquires Source3 to Get Content Creators Paid*, TECHCRUNCH BLOG (July 24, 2017), <https://techcrunch.com/2017/07/24/facebook-source3/>.

Gerhard Danneman, *Comparative Law: Study of Similarities or Differences?* in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds. 2006).

Jeremy DeBeer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?* 49(4) JURIMETRICS J. 375 (2009).

SARI DEPREEUW, THE VARIABLE SCOPE OF THE EXCLUSIVE ECONOMIC RIGHTS IN COPYRIGHT (2014).

LEWIS ANTHONY DEXTER, ELITE AND SPECIALIZED INTERVIEWING (ECPR Press reprint ed. 2006).

Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields*, 48(2) AM. SOCIOLOGICAL REV. 147 (1983).

Dimitar Dimitrov & Allison Davenport, *Problems Remain with the EU's Copyright Reform*, WIKIMEDIA FOUNDATION BLOG (Feb. 16, 2019), <https://wikimediafoundation.org/2019/02/07/problems-remain-with-the-eus-copyright-reform>.

Graeme B. Dinwoodie, *A Comparative Analysis of the Secondary Liability of Online Service Providers*, in SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS (G. B. Dinwoodie ed. 2017).

Graeme B. Dinwoodie, Rochelle C. Dreyfuss & Annette Kur, *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.L. U. J. INT'L L. & POL. 201 (2009).

Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990).

Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999).

LILIAN EDWARDS, ROLE AND RESPONSIBILITY OF INTERNET INTERMEDIARIES IN THE FIELD OF COPYRIGHT (2011), [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf).

Kristina Ehle & Stephan Kress, *Time to Hit Pause: Copyright Infringement on User Generated Platforms—When Is the Platform Provider Liable for Damages?*, Morrison Foerster Client Alert, Jan. 24, 2019, <https://www.mofo.com/resources/publications/190122-copyright-infringement.html>.

Niva Elkin-Koren, *After Twenty Years: Revisiting Copyright Liability of Online Intermediaries*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* (Susy Frankel & Daniel J. Gervais eds. 2015).

Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools* (Mar. 2017), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>.

Seth Ericsson, *The Commodification of Internet Intermediary Safe Harbors: Avoiding Premature Harmonization Around a Sub-Optimal Standard*, in *TRIPS PLUS 20: FROM TRADING RULES TO MARKET PRINCIPLES* (Hanns Ullrich, Reto M. Hilty, Matthias Lamping & Josef Drexel eds. 2016); Max Planck Institute for Innovation and Competition Research Paper No. 16-05.

Christina Etteldorf, *Germany—BGH Refers Questions to ECJ Concerning YouTube’s Liability for Copyright Breaches*, IRIS Bulletin IRIS 2018-9:1/10, <https://merlin.obs.coe.int/iris/2018/9/article10.en.html>.

Christina Etteldorf, *Germany—Federal Supreme Court Refers “Uploaded” to ECJ*, IRIS Bulletin 2018-10:1/9, <https://merlin.obs.coe.int/iris/2018/10/article9.en.html>.

EUROPEAN COPYRIGHT SOCIETY, *GENERAL OPINION OF THE EU COPYRIGHT REFORM PACKAGE* (Jan. 24, 2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>.

EUROPEAN COPYRIGHT SOCIETY, *OPINION ON THE REFERENCE TO THE CJEU IN CASE C-466/12 SVENSSON*, University of Cambridge, Faculty of Law, Legal Studies Research Paper Series, Paper No. 6/2013 (Feb. 2013), [http://www.ivir.nl/news/European\\_Copyright\\_Society\\_Opinion\\_on\\_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf).

Mark Fiore, Facebook, Inc., *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, Published on December 31, 2015. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7, <https://www.regulations.gov/document?D=COLC-2015-0013-90724>.

Mark Fiore, Facebook, Inc., *Additional Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study*, Published on Nov. 8, 2016. U.S. Copyright Office, *Section 512 Study: Notice and Request for Additional Comments*, 81 Fed. Reg. 216 (Nov. 8, 2016), Docket 2015-7, <https://www.regulations.gov/document?D=COLC-2015-0013-90724>.

BEATRICE MARTINET FARANO, *LIABILITY OF INTERNET INTERMEDIARIES IN RELATION TO TRADEMARK AND COPYRIGHT INFRINGEMENTS: A COMPARATIVE ANALYSIS OF THE EU AND U.S. LEGAL FRAMEWORKS* (Stanford-Vienna Transatlantic Technology Law Forum, TTLF Working Paper No. 14, 2012), [http://www.law.stanford.edu/sites/default/files/publication/300252/doc/slspublic/farano\\_wp14-4.pdf](http://www.law.stanford.edu/sites/default/files/publication/300252/doc/slspublic/farano_wp14-4.pdf).

HENRY FARRELL & ABRAHAM L. NEWMAN, *OF PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY* (2019).

LUKAS FEILER, WEBSITE BLOCKING INJUNCTIONS UNDER EU AND U.S. COPYRIGHT LAW—SLOW DEATH OF THE GLOBAL INTERNET OR EMERGENCE OF THE RULE OF NATIONAL COPYRIGHT LAW? (Stanford-Vienna Transatlantic Technology Law Forum, TTLF Working Paper No. 13, 2012), <http://www.law.stanford.edu/program/centers/ttlf/>.

IGNACIO GARROTE FERNANDEZ-DIAZ, COMPARATIVE ANALYSIS ON NATIONAL APPROACHES TO THE LIABILITY OF INTERNET INTERMEDIARIES FOR COPYRIGHT AND RELATED RIGHTS (2013), [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries\\_garrote.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf)

MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION (2002).

Jody Freeman, *The Private Role in Public Governance*, 75 N. Y. U. L. Rev. 543 (2000).

Anita B. Frohlich, *Copyright Infringement in the Internet Age—Primetime for Harmonized Conflict-of-Laws Rules?* 24 BERKELEY TECH. L.J. 851 (2009).

Giancarlo Frosio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe* 12 J. INTEL. PROP. LAW & PRACT. 565 (2017), <https://ssrn.com/abstract=2956859>

Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

Lauren G. Gallo, Note, *The (Im)possibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J.L. & ARTS 283 (2011).

Eriq Gardner, *Appeals Court Won’t Take Up Copyright Decision that Raised Alarm About Embedding, Linking*, THE HOLLYWOOD REPORTER ESQ. BLOG (July 17, 2018), <https://www.hollywoodreporter.com/thr-esq/appeals-court-wont-take-up-copyright-decision-raised-alarm-embedding-linking-1127852>

Eriq Gardner, *MPAA Testing the Limits of Pirate Site Blocking in MovieTube Lawsuit*, THE HOLLYWOOD REPORTER ESQ. BLOG (July 30, 2015), <https://www.hollywoodreporter.com/thr-esq/mpaa-testing-limits-pirate-site-812126>.

Anette Gärtner & Andreas Jauch, *GEMA v RapidShare: German Federal Supreme Court Extends Monitoring Obligations for Online File Hosting Providers*, 36(3) E.I.P.R.197-200 (2014).

Christine Gateau & Christelle Coslin, Hogan and Lovells, *French Supreme Court Invalidates “Take Down and Stay Down” Rule*, Global Media and Communications Quarterly 26 (Spring 2013).

MICHAEL GEIST, THE UNINTENDED EQUUSTEK EFFECT: HOW ONE CASE SET A PRECEDENT FOR CANADIAN COURTS’ GROWING JURISDICTION OVER INTERNET ACTIVITIES, Center for International Governance Innovation (Feb. 28, 2019), <https://www.cigionline.org/articles/unintended-equustek-effect>.

Michael Geist, *Is There a There There? Towards Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001).

REBECCA GIBLIN, *CODE WARS: 10 YEARS OF P2P SOFTWARE LITIGATION* (2011).

Jane C. Ginsburg, *The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. Filmspeler [C-527/15] (2017) and Brein v. Ziggo [C-610/15] (2017)* (Aug. 22, 2017). Forthcoming (in French) in 2016/5-6 *Auteurs et Médias* 401 (Belgium); Columbia Law and Economics Working Paper No. 572; Columbia Public Law & Legal Theory Paper No. 14-557, [https://scholarship.law.columbia.edu/faculty\\_scholarship/2053](https://scholarship.law.columbia.edu/faculty_scholarship/2053)

Jane Ginsburg, *Hyperlinking and “Making Available,”* 34 *E.I.P.R.* 147 (2014).

Jane Ginsburg, *Comments to U.S. Copyright Office Study on the Right of Making Available, Docket No. 2014-2* (Apr. 7, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Jane\\_Ginsburg.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Jane_Ginsburg.pdf)

Jane Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors’ Rights in a Networked World*, 15 *SANTA CLARA HIGH TECH. L.J.* 347 (1999).

Jane Ginsburg, *Putting Cars on the Information Superhighway: Authors, Exploiters, and Copyright in Cyberspace*, 95 *COLUM. L. REV.* 1466 (1995).

Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 *J. COPYRIGHT SOC’Y U.S.A.* 318 (1995).

JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?—ILLUSIONS OF A BORDERLESS WORLD* (2008).

PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT—PRINCIPLES, LAW AND PRACTICE* (3d ed. 2013).

Google, Inc., *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study, Published on December 31, 2015. U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment*, 80 *Fed. Reg.* 81862 (Dec. 31, 2015), *Docket 2015-7*, <https://www.regulations.gov/document?D=COLC-2015-0013-90806>.

Google, Inc., *Additional Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study, Published on Nov. 8, 2016. U.S. Copyright Office, Section 512 Study: Notice and Request for Additional Comments*, 81 *Fed. Reg.* 216 (Nov. 8, 2016), *Docket 2015-7* (amended) (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92487>.

Google, Inc., *How Google Fights Piracy* (Nov. 2018), [https://www.blog.google/documents/27/How\\_Google\\_Fights\\_Piracy\\_2018.pdf](https://www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf)

Robert Gulotty, *Regulatory Protectionism, MNC Profits and the Limits of International Cooperation* (Mar. 26, 2015) (unpublished manuscript, on file with author).

NEIL GUNNINGHAM, ROBERT A. KAGAN & DOROTHY THORNTON, *SHADES OF GREEN—BUSINESS, REGULATION AND ENVIRONMENT* (2003).

Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 *LAW & SOC. INQUIRY* 307 (2004).

Alexander Harguth, *File Hosting in Germany Carries Increased Copyright Policing Duties*, LEXOLOGY (Oct. 31, 2013), <http://www.lexology.com/library/detail.aspx?g=ef2396cc-39e8-493b-a893-bec38f9ef368>

Alex Hern & Martin Belam, *LA Times Among US-Based News Sites Blocking EU Users due to GDPR*, THE GUARDIAN (May 25, 2018), <https://www.theguardian.com/technology/2018/may/25/gdpr-us-based-news-websites-eu-internet-users-la-times>.

Thomas Hoeren & Silviya Yankova, *The Liability of Internet Intermediaries—The German Perspective*, 43(5) IIC 501 (2012).

Thomas Hoeren, *German Law on Internet Liability of Intermediaries*, paper presented at LIDC Conference, University of Oxford (2011), <http://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=31684>

Judith Horchert, *Demos in German Cities: “Let’s Explain the Internet Before You Break It,”* DER SPIEGEL (Mar. 23, 2019) (in German), <https://www.spiegel.de/netzwelt/netzpolitik/artikel-13-und-uploadfilter-zehntausende-protestieren-gegen-urheberrechtsreform-a-1259360.html>.

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

Martin Husovec, *What Does BestWater Decision Mean for Future of Embedding?*, HUTKO’S TECHNOLOGY LAW BLOG (Nov. 1, 2014), <http://www.husovec.eu/2014/11/what-does-bestwater-decision-mean-for.html>.

Martin Husovec, *Injunctions Against Innocent Third Parties: The Case of Website Blocking*, 4(2) J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 116 (2013).

Martin Husovec & Miquel Peguera, *Much Ado About Little: Privately Litigated Internet Disconnection Injunctions*, 46(1) INT’L. REV. INTELL. PROP. & COMPETITION L. 10 (2015).

INFORMATION INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE* (Sept. 1995), <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

Internet Association, the Computer and Communications Industry Association, the Consumer Technology Association, and the Information Technology Industry Council, *Letter to U.S. Secretary of State. John Kerry, Secretary of Commerce, Penny Pritzker, and the U.S. Trade Representative, Michael Froman*, (Dec. 20, 2016), <https://internetassociation.org/wp-content/uploads/2016/12/EU-Copyright-Proposal-Letter.pdf>.

Mike Isaac, *Mark Zuckerberg’s Call to Regulate Facebook, Explained*, N.Y. TIMES, Mar. 30, 2019, <https://www.nytimes.com/2019/03/30/technology/mark-zuckerberg-facebook-regulation-explained.html>.

Jian Jia, Ginger Zhe Jin, & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Nov. 5, 2018).

David R. Johnson & David C. Post, *The Rise of Law on the Global Network*, in BORDERS IN CYBERSPACE—INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles Nesson eds. 1998).

Robert A. Kagan, *How Much Do National Styles of Law Matter?* in REGULATORY ENCOUNTERS—MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds. 2000).

David Kaye, U.N. Special Rapporteur on Freedom of Expression Statement, *EU Must Align Copyright Reform with International Human Rights Standards, Says Expert* (Mar. 11 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>.

Analisa Tamayo Keef & Lior Ben-Kereth, *Introducing Rights Manager*, FACEBOOK BLOG (Apr. 12, 2016) <https://www.facebook.com/facebookmedia/blog/introducing-rights-manager>.

Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

UTA KOHL, JURISDICTION AND THE INTERNET (2007).

Toshiyuki Kono & Paulius Jurcys, *Applicable Law to Infringement of IP Disputes*, in INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: COMPARATIVE PERSPECTIVES (Toshkyuki Kono ed. 2012).

Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

Aleksandra Kuczerawy, *EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime* (Dec. 2018) in FUNDAMENTAL RIGHTS PROTECTION ONLINE: THE FUTURE REGULATION OF INTERMEDIARIES (Bilyana Petkova & Tuomas Ojanen eds. forthcoming 2019).

Aleksandra Kuczerawy, *From “Notice and Take Down” to “Notice and Stay Down”: Risks and Safeguards for Freedom of Expression* (Dec. 19, 2018), in THE OXFORD HANDBOOK OF INTERMEDIARY LIABILITY ONLINE (Giancarlo Frosio ed. forthcoming 2019), <https://ssrn.com/abstract=3305153>.

William M. Landes & Douglas Gary Lichtman, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395 (2003).

Timothy B. Lee, *European Governments Approve Controversial New Copyright Law—Copyright Overhaul Could Effectively Mandate Automated Content Filtering*, ARS TECHNICA BLOG (Feb. 21, 2019), <https://arstechnica.com/tech-policy/2019/02/european-governments-approve-controversial-new-copyright-law/>

Matthias Leistner, *Structural Aspects of Secondary (Provider) Liability in Europe*, 9 J. INTELL. PROP. L. & PRACT. 75 (2014).

MATTHEW LE MERLE, RAJU SARMA, TASHFEEN AHMED & CHRISTOPHER PENCVEL, BOOZ & CO., THE IMPACT OF US INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT—A QUANTITATIVE STUDY (2011).

LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999).

Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998).

JACQUELINE LIPTON, *RETHINKING CYBERLAW: A NEW VISION FOR INTERNET LAW* (2015).

JESSICA LITMAN, *DIGITAL COPYRIGHT* (Maize Books reprint ed. 2017).

Anne-Catherine Lorrain, *Google/Monitoring Obligation, Comment on the Google France & Inc. v. Bac Films and Google France & Inc. v. André Rau decisions of the Supreme Court (Cour de cassation) (First Chamber for Civil Matters) 12 July 2012—(Bac Films, two decisions) Cases Nos. 11-13666 and 11-13669; (André Rau) Case No. 11-15165 in 44 IIC 383* (2013).

Mike Masnick, *An Explanation For Why UMG May Be Right That It Can Pull Down MegaUpload's Video*, TECHDIRT BLOG (Dec. 16, 2011), <https://www.techdirt.com/articles/20111216/01463417102/explanation-why-umg-may-be-right-that-it-can-pull-down-megauploads-video.shtml>.

Rita Matulionyte & Sylvie Nerisson, *The French Route to an ISP Safe Harbour, Compared to German and US Ways*, 42 IIC 55 (2011).

MAX-PLANCK GROUP FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *PRINCIPLES FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY* (2011), [https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/the\\_draft-clip-principles-25-03-20117.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/the_draft-clip-principles-25-03-20117.pdf).

Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1 (2011).

Peter Menell, *Comments to U.S. Copyright Office Study on the Right of Making Available, Docket No. 2014-2* (Apr. 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Peter\\_Menell.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Peter_Menell.pdf).

Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE. L.J. 950 (1979).

Glyn Moody, *German Government Confirms that Article 13 Does Mean Upload Filters, Destroying Claims to the Contrary Once and For All*, TECHDIRT BLOG (Mar. 13, 2019), <https://www.techdirt.com/articles/20190313/08371241788/german-government-confirms-that-article-13-does-mean-upload-filters-destroying-claims-to-contrary-once-all.shtml>.

Motion Picture Association of America, *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study, Published on December 31, 2015. U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90285&attachmentNumber=1&contentType=pdf>.

Motion Picture Association of Europe et al., *Letter from Audiovisual and Sports Sectors, Proposed Way Forward for the Value Gap Provision: European Commission Proposal or*

*Music-Sector Specific Approach* (Dec. 1, 2018), <https://juliareda.eu/wp-content/uploads/2018/12/Audiovisual-and-Sports-on-Value-Gap.pdf>.

Joe Mullin, *Cox Must Pay \$8M in Fees on Top of \$25M Jury Verdict for Violating DMCA*, ARS TECHNICA BLOG (Feb. 17, 2017), <https://arstechnica.com/tech-policy/2017/02/cox-must-pay-8m-in-fees-on-top-of-25m-jury-verdict-for-violating-dmca/>.

Sylvie Nerisson, *Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in France*, in INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES (Christopher Heath & Anselm Kamperman Sanders eds. 2012).

Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT (Matthew Bender, Rev. Ed., 2018).

Jan Bernd Nordemann, *Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Germany*, in INTELLECTUAL PROPERTY LIABILITY OF CONSUMERS, FACILITATORS, AND INTERMEDIARIES (Christopher Heath & Anselm Kamperman Sanders eds. 2012).

*Open Letter to European Parliament on Article 13 From More Than 70 Prominent Internet Pioneers, Engineers, Technologists, and Academics* (June 13, 2018), <https://www.eff.org/files/2018/06/13/article13letter.pdf>.

*Open Letter to the European Commission from 57 Digital Rights Groups, Journalist Industry Bodies, and Human Rights Organizations* (Oct. 16, 2017), [https://www.eff.org/files/2017/10/16/openletteroncopyrightdirective\\_final.pdf](https://www.eff.org/files/2017/10/16/openletteroncopyrightdirective_final.pdf)

*Open Letter to the European Commission from 40 EU Legal Academics* (Sept. 30, 2016), <https://peepbeep.files.wordpress.com/2016/10/30-september-2016-openlettercommission-w-s1.pdf>.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES, OECD Doc. DSTI/ICCP(2010)11/FINAL (2011), <http://www.oecd.org/sti/ieconomy/theroleofinternetintermediariesinadvancingpublicpolicyobjectives.htm>.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES (2010), <http://www.oecd.org/internet/ieconomy/44949023.pdf>.

OXERA, THE ECONOMIC IMPACT OF SAFE HARBOURS ON INTERNET INTERMEDIARY START-UPS (Feb. 2015).

Mathilde Pavis, *France: Costs of Blocking Injunctions to be Borne by Internet Intermediaries*, IPKAT BLOG (Aug. 1, 2017), <http://ipkitten.blogspot.com/2017/08/france-costs-of-blocking-injunctions-to.html>.

William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383 (2000).

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

JEFFREY PFEIFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* (2003).

Roscoe Pound, *Law in Books and Law in Action*, 44 AM L. REV. 12 (1910).

João Pedro Quintais, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public Right*, 21 J. WORLD INTELLECT. PROP. 385 (Nov. 2018).

H. Rao, L. Q. Yue & P. Ingram, *Laws of Attraction: Regulatory Arbitrage in the Face of Right-to-Work States*, 76 AM. SOCIOLOG. REV. 365 (2011).

Jörg Reinbothe, *The EU Enforcement Directive 2004/48/EC as a Tool for Copyright Enforcement*, in *COPYRIGHT ENFORCEMENT AND THE INTERNET* (Irina A. Stamatoudi ed. 2010).

JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996* (2002).

Paul Resnikoff, *After Two Years of EU Deliberations, Article 13 is Finalized—and Headed for a Vote*, DIGITAL MUSIC NEWS (Feb. 13, 2019), <https://www.digitalmusicnews.com/2019/02/13/eu-article-13-copyright-directive/>

SAM RICKETSON & JANE GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2d ed. 2006).

JAANI RIORDAN, *THE LIABILITY OF INTERNET INTERMEDIARIES* (2015).

Eleonora Rosati, *Facebook Found Liable for Hosting Links to Unauthorized Content*, IPKAT BLOG (Feb. 19, 2019), <http://ipkitten.blogspot.com/2019/02/facebook-found-liable-for-hosting-links.html>.

Eleanora Rosati, *Another German Decision Warns Against Broad Application of GS Media Presumption for For-Profit Link Providers*, 1709 BLOG (Oct. 23, 2017), <https://the1709blog.blogspot.com/2017/10/another-german-decision-warns-against.html>.

Eleanora Rosati, *German Federal Court of Justice Rules that GS Media Presumption of Knowledge Does Not Apply to Google Images*, IPKAT BLOG (Sept. 22, 2017), <http://ipkitten.blogspot.co.uk/2017/09/german-federal-court-of-justice-rules.html>.

Eleanora Rosati, with summary report by Juraj Vivoda, *After Sweden and Germany, GS Media Finds Its Application in the Czech Republic*, IPKAT BLOG (Feb. 6, 2017), <https://ipkitten.blogspot.com/2017/02/after-sweden-and-germany-gs-media-finds.html>.

Eleanora Rosati, with summary reported by Sascha Abrar, *GS Media Finds Its First Application in Germany*, IPKAT BLOG (Dec. 16, 2016), <https://ipkitten.blogspot.com/2016/12/gs-media-finds-its-first-application-in.html>.

Eleanora Rosati, *Linking to Unlicensed Content: Swedish Court Applies GS Media*, IPKAT BLOG (Oct. 27, 2016), <http://ipkitten.blogspot.co.uk/2016/10/linking-to-unlicensed-content-swedish.html>

Eleanora Rosati, with unofficial translation by Oliver Loffel, *That BestWater Order: It's Up to the Rightsholders to Monitor Online Use of Their Works*, IPKAT BLOG (Oct. 27, 2014), <http://ipkitten.blogspot.com/2014/10/that-bestwater-order-its-up-to.html>.

Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93(2) NOTRE DAME L. REV. 499 (2017).

Pamela Samuelson, *The EU's Controversial Digital Single Market Directive—Part I: Why the Proposed Internet Content Filtering Mandate Was So Controversial*, KLUWER COPYRIGHT LAW BLOG (July 10, 2018), <http://copyrightblog.kluweriplaw.com/2018/07/10/eus-controversial-digital-single-market-directive-part-proposed-internet-content-filtering-mandate-controversial>.

Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith E. Maskus & Jerome H. Reichman eds. 2005).

Pamela Samuelson, *The U.S. Digital Agenda at the World Intellectual Property Organization*, 37 VA. J. INT'L L. 369 (1997).

Pamela Samuelson, "The Copyright Grab," WIRED, 4(1) (Jan. 1, 1996), <https://www.wired.com/1996/01/white-paper/>.

Michael Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363 (2009).

Martin Schaefer, *Germany*, in COPYRIGHT IN THE INFORMATION SOCIETY: A GUIDE TO NATIONAL IMPLEMENTATION OF THE EUROPEAN DIRECTIVE (Brigitte Lindner & Ted Shapiro eds., 2011).

Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002).

Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799 (2008).

Mark Scott, Laurens Cerulus & Laura Kayali, *Six Months In, Europe's Privacy Revolution Favors Google, Facebook*, POLITICO EU (Nov. 23, 2018), <https://www.politico.eu/article/gdpr-facebook-google-privacy-data-6-months-in-europes-privacy-revolution-favors-google-facebook/>.

Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of the State of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369 (2014).

DANIEL SENG, COMPARATIVE ANALYSIS OF THE NATIONAL APPROACHES TO INTERNET INTERMEDIARY LIABILITY (2011), [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf)

Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1 (2000).

ROBERT SHAPIRO WITH SIDDHARTHA ANEJA, RE:CREATE COALITION, TAKING ROOT: THE GROWTH OF AMERICA'S NEW CREATIVE ECONOMY (Feb. 11, 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf>.

Emmett Shear, Twitch, "From Our CEO: A Letter to Twitch creators about Article 13," MEDIUM (Dec. 5, 2018), <https://medium.com/@twitchblog2/a-letter-to-our-creators-about-article-13-97efac06fd8c>.

Michelle Shumate, Yannick Atouba, Katherine R. Cooper & Andrew Pilny, *Interorganizational Communication*, in THE INTERNATIONAL ENCYCLOPEDIA OF ORGANIZATIONAL COMMUNICATION (Craig R. Scott & Laurie Lewis eds. 2017).

Mario Luis Small, “How Many Cases Do I Need?”: *On Science and the Logic of Case Selection in Field-Based Research*, 10(1) ETHNOGRAPHY 5 (2009).

Alain Strowel & Vicky Hanlon, *Secondary Liability for Copyright Infringement with Regard to Hyperlinks*, in PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW (Alain Strowel ed. 2009).

Alain Strowel & N. Ide, *Liability with Regard to Hyperlinks*, in 24 COLUM.–VLA J.L. & ARTS 403 (2001).

DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2d ed. 2012).

Ed Targett, *European Commission’s Copyright “Mob” Comment Triggers Outrage, An Apology*, COMPUTER BUSINESS REVIEW (Feb. 18, 2019), <https://www.cbronline.com/news/european-commission-mob>.

Félix Tréguer, *French Supreme Court: Important Rulings for Intermediary Liability*, EDRI-GRAM online newsletter (July 18, 2012), <https://edri.org/edrigramnumber10-14french-supreme-court-decisions-intermediaries/>.

Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORD. INT’L PROP. MEDIA & ENT. L.J. 339 (2015).

UK Intellectual Property Office, *Search Engines and Creative Industries Sign Anti-Piracy Agreement*, Press Release (Feb. 20, 2017), <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>.

Universal Music Group, *First Round Comments Submitted in Response to Notice of Inquiry Regarding Section 512 Study, Published on December 31, 2015*. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81862 (Dec. 31, 2015), Docket 2015-7 (Apr. 1, 2016), <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90321&attachmentNumber=1&contentType=pdf>.

Universal Music Group Press Release, *Facebook and Universal Music Group Strike Unprecedented Global Agreement* (Dec. 21, 2017), <https://www.universalmusic.com/facebook-universal-music-group-strike-unprecedented-global-agreement/>.

JENNIFER URBAN, JOE KARAGANIS & BRIANNA SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE, U.C. Berkeley Public Law Research Paper No. 2755628 (Mar. 29, 2016; Version 2: Mar. 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628).

Ernesto Van der Sar, *Tech Giants Protest Looming U.S. Pirate Site Blocking Order*, TORRENT FREAK BLOG (Oct. 13, 2017), <https://torrentfreak.com/tech-giants-protest-looming-us-pirate-site-blocking-order-171013/>.

Ernesto Van der Sar, *U.S. Court Grants ISPs and Search Engine Blockade of Sci-Hub*, TORRENT FREAK BLOG (Nov. 6, 2017), <https://torrentfreak.com/us-court-grants-isps-and-search-engine-blockade-of-sci-hub-171106/>.

Ernesto Van der Sar, *Sci-Hub Loses Domain Names But Remains Resilient*, TORRENT FREAK BLOG (Nov. 22, 2017), <https://torrentfreak.com/sci-hub-loses-domain-names-but-remains-resilient-171122/>.

Ernesto Van der Sar, *UK Pirate Site Blocking Whack-a-Mole Continues*, TORRENT FREAK BLOG (Apr. 29, 2016), <https://torrentfreak.com/uk-pirate-site-blocking-whack-a-mole-continues-160429/>.

Ernesto Van der Sar, *Nearly 4,000 Pirate Sites are Blocked by ISPs Around the World*, TORRENT FREAK BLOG (Feb. 10, 2019), <https://torrentfreak.com/nearly-4000-pirate-sites-are-blocked-by-isps-around-the-world-190210/>.

Ernesto Van der Sar, *Court Orders UK ISPs to Block Popcorn Time Sites*, TORRENT FREAK BLOG (Apr. 25, 2015), <https://torrentfreak.com/court-orders-uk-isps-to-block-popcorn-time-150428/>.

Ernesto Van der Sar, *Google Blocks Pirate Search Results Prophylactically*, TORRENT FREAK BLOG (Jan. 3, 2018), <https://torrentfreak.com/google-blocks-pirated-search-results-prophylactically-180103/>.

Ernesto Van der Sar, *Google Blacklists Millions of Pirate URLs Even Before They Are Indexed*, TORRENT FREAK BLOG (June 9, 2018), <https://torrentfreak.com/google-blacklists-millions-of-pirate-urls-before-theyre-indexed-180609/>.

Patrick Van Eecke, *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48 COMMON MKT. L. REV. 1455 (2011).

Joris van Hoboken, *Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU*, 13 INT'L J. COMM. L. & POLICY 1 (2009).

Jurriaan van Mil, *German BGH—Does YouTube Perform Acts of Communication to the Public*, KLUWER COPYRIGHT BLOG (Jan. 27, 2019), <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>.

Silke von Lewinski, *Comments on Article 13 and Related Provisions in the JURI Committee Report for a Directive on Copyright in the Digital Single Market*, KLUWER COPYRIGHT LAW BLOG (Sept. 3, 2018), <http://copyrightblog.kluweriplaw.com/2018/09/03/comments-article-13-related-provisions-juri-committee-report-directive-copyright-digital-single-market/>.

*Facebook and Sony/ATV Music Publishing Announce Licensing Agreement*, VARIETY (Jan. 8, 2018), <https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/>.

THIBAUT VERBIEST, GERALD SPINDLER, GIVOANNI MARIA RICCIO & AURELIE VAN DER PERRE, *STUDY ON THE LIABILITY OF INTERNET INTERMEDIARIES* (2007) (on file with author; previously available at [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf)).

DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995).

CHARLOTTE WAEDELDE & LILIAN EDWARDS, ONLINE INTERMEDIARIES AND COPYRIGHT LIABILITY (Apr. 2005), World Intellectual Property Organization Workshop Keynote Paper, WIPO Document WIPO/IIS/05/1, <https://ssrn.com/abstract=1159640>.

Kent Walker, *Defending Access to Lawful Information at Europe's Highest Court*, GOOGLE PUBLIC POLICY BLOG (Nov. 15, 2017), <https://www.blog.google/topics/public-policy/topics/google-europe/defending-access-lawful-information-europes-highest-court/>.

Chris Welch, *Facebook Now Has Music Licensing Deals with All Three Major Labels—Warner Music is the Latest to Allow Its Songs in User Videos*, THE VERGE (Mar. 9, 2018), <https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/>.

Susan Wojcicki, *A Final Update on Our Priorities for 2018*, YOUTUBE CREATOR BLOG (Oct. 22, 2018), <https://youtube-creators.googleblog.com/2018/10/a-final-update-on-our-priorities-for.htm>.

Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679 (2003).

Stephen Zimprich and Dr. Sven-Alexander von Normann, *BestWater—ECJ Forces Copyright Owners to Employ Access Restrictions*, FIELD FISHER LLP BLOG (Nov. 3, 2014), <https://www.fieldfisher.com/publications/2014/11/bestwater-ecj-forces-copyright-owners-to-employ-access-restrictions>.

NICOLO ZINGALES, INTERNET INTERMEDIARY LIABILITY: IDENTIFYING BEST PRACTICES FOR AFRICA, Research Commissioned by the Association for Progressive Communications (Nov. 2013), [https://www.apc.org/sites/default/files/APCInternetIntermediaryLiability\\_BestPracticesAfrica\\_20131125.pdf](https://www.apc.org/sites/default/files/APCInternetIntermediaryLiability_BestPracticesAfrica_20131125.pdf).

Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. LAW & TECH. 253 (2006).

## CASES

### Canada

Google, Inc. v. Equustek Solutions, Inc. [2017] 1 SCR 824; 2017 SCC 34 (Sup. Ct. Can), *aff'g* Equustek Solutions, Inc. v. Google, Inc. [2015] CCA 265 (Ct. App. Brit. Columbia), *aff'g* Equustek Solutions Inc. et al. v. Morgan Jack et al., 2014 BCSC 1063 (Sup. Ct. British Columbia, June 13, 2014).

Equustek Solutions, Inc. et al, v. Morgan Jack et al., 2018 BCSC 610, <https://www.courts.gov.bc.ca/jdb-txt/sc/18/06/2018BCSC0610.htm>.

### European Union

Case C-131/12, Google Spain SL and Google, Inc. v. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez, CJEU (Grand Chamber) (May 31, 2014), EU:C:2012:140.

Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés, CJEU (pending).

Case C-170/12, Peter Pinckney v. KDG Mediatech AG, CJEU (Fourth Chamber) (Oct. 3, 2013), EU:C:2013:635.

Case C-441/13, Pez Hejduk v. EnergieAgentur NRW GmbH, CJEU (Fourth Chamber) (Jan. 22, 2015), EU:C:2015:28.

Case C-306/05, Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA, CJEU (Third Chamber) (Dec. 7, 2006), 2006 E.C.R. I-11519, EU:C:2006:764.

Case C-160/15, GS Media BV v. Sanoma Media NL GB, Playboy Enterprises International, Inc., and Britt Geertruida Dekker, CJEU (Second Chamber) (Sept. 8, 2016), EU:C:2016:644.

Case C-682/18, YouTube & Ors, CJEU (pending) (referred from BGH, Sept. 2018).

Case C-683/18, Elsevier & GEMA, CJEU (pending) (referred from BGH, Sept. 2018).

Case C-135-10, Società Consortie Fonografici (SCF), CJEU (Mar. 15, 2012), EU:C:2012:140.

Case C-162/10, Phonographic Performance (Ireland) Ltd, CJEU (Mar. 15, 2012), EU:C:2012:141.

Case C-527/15, Stichting Brein v. Jack Frederik Wullems, CJEU (Second Chamber) (Apr. 26, 2017), EU:C:2017:300.

Case C-610/15, Stichting Brein v. Ziggo BV and XS4 All Internet BV, CJEU (Second Chamber) (June 14, 2017), EU:C:2017:99.

Case C-89/04, Mediakabel BV, CJEU (Third Chamber) (June 2, 2005), 2005 ECR I-4891, EU:C:2005:348.

Case C-192/04, Lagardère Active Broadcast, CJEU (Third Chamber) (July 14, 2005), 2005 ECR I-7199, EU:C:2005:475.

Case C-466/12, Nils Svensson, Sten Sjogren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB, CJEU (Fourth Chamber) (Feb. 13, 2014), EU:C:2014:76.

Case C-348/13, BestWater International GmbH v. Michael Mebes and Stefan Potsch, CJEU (Ninth Chamber) (Oct. 21, 2014), O.J. C 325, 9.11.2013, EU:C:2014:2315.

Case C-136/09, Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon, CJEU (Seventh Chamber) (Mar. 18, 2010), EU:C:2010:151.

Case C-607/11, ITV Broadcasting & Others, CJEU (Fourth Chamber) (Mar. 7, 2013), EU:C:2013:147.

Case C-70/10, Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Scarlet Extended S.A., CJEU (Third Chamber) (Nov. 24, 2011), 2011 E.C.R. I-11959.

Case C-360/10, Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Netlog NV, CJEU (Third Chamber) (Feb. 16, 2012), EU:C:2012:85.

Case C-275/06, Productores de Música de España (Promusicae) v. Telefonica, Judgment of the Court of Justice of the EU (Grand Chamber) (Jan. 28, 2008), 2008 E.C.R. I-00271.

Case C-324/09, L’Oreal SA & Ors v. eBay International AG, Judgment of the Court of Justice of the EU (Grand Chamber) (July 12, 2011), EU:C:2011:474.

Cases C-236/08-238/08, Google France SARL et al. v. LVMH SA, Judgment of the Court of Justice of the EU (Grand Chamber) (Mar. 23, 2010), 2010 E.C.R. I-2417, EU:C:2010:159.

Case No. C-314/12, CJEU (Fourth Chamber), UPC Telekabel Wien v. Constantin Film Verleih GmbH (Mar. 27, 2014), EU:C:2014:192.

Case C-461/10, Bonnier Audio AB, Judgment of the Court of Justice of the EU (Third Chamber) (Apr. 19, 2012); EU:C:2012:219.

### **European Court of Human Rights**

Application No. 64569/09, European Court of Human Rights, Grand Chamber, Delfi AS v. Estonia (June 16, 2015), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-155105%22%7D>, affirming European Court of Human Rights, Judgment of First Section (Oct. 10, 2013), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126635>.

Application No. 22497/13, European Court of Human Rights, Judgment of Fourth Section, (Feb. 2, 2016), Magyar Tartalomszolgaltatok Egyesutete and Index.hu Zrt v. Hungary (MTE v. Hungary), <http://www.bailii.org/eu/cases/ECHR/2016/135.html>.

### **France**

Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., July 12, 2012, Case No. 11-13.669, Google Inc. and Google France and others v. Bac Films and others, [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/831\\_12\\_23883.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/831_12_23883.html).

Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., July 12, 2012, Case Nos. 11-15.165 and 11-15.188 (consolidated appeals), Google Inc. and Aufeminin.com and others v. André Rau, H & K, <http://www.dalloz-actualite.fr/document/civ-1re-12-juill-2012-fs-pbi-n-11-15165>.

Cour de Cassation [Cass.] [supreme court for judicial matters] 1e ch., July 12, 2012, Case No. 11-20358, SNEP v. Google, Inc. and Google France, [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/832\\_12\\_23884.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/832_12_23884.html).

Tribunale de Grande Instance [TGI] Paris, Jugement en la forme des referes, July 19, 2016, Case No. 16/53589, SNEP v. Microsoft France S.A.R. L. and Microsoft Corporation, <https://cdn2.nextinact.com/medias/20160708---jugement-tgi-paris-refere-microsoft-snep.PDF>.

Tribunale de Grande Instance [TGI] Paris, Nov. 28, 2013; APC et al. v. Google, Inc., Google France, Microsoft Corporation, France Telecom, et al., Telejugement, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3935](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3935); also available at 1709 BLOG, <http://the1709blog.blogspot.com/2013/11/breaking-news-film-producers-and.html>; aff’d sub nom. APC et al. v. Microsoft Corp. et al., Court of Appeals of Paris, Mar. 15, 2016, decision linked from <http://www.nextinact.com/news/99093-arret-allostreaming-fai-et-moteurs-doivent-soutenir-couts-blocage-et-dereferencement.htm>.

## **Germany**

Bundesgerichtshof [BGH] [German Federal Court of Justice] Aug. 15, 2013, Case No. I ZR 80/12, GEMA v Rapidshare AG (The Reader) (Rapidshare III).

OLG Hamburg, 5 U 87/09 (Mar. 14, 2012), Rapidshare II.

OLG Hamburg, 5 U 87/12 (July 1, 2015), GEMA v. YouTube (YouTube I).

Bundesgerichtshof [BGH] [German Federal Court of Justice] Sept. 21, 2017, Case No. I ZR 11/16, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=87734d1e17e813d0d6bab25ec216d797&nr=80322&pos=0&anz=1> (Thumbnail III) .

Bundesgerichtshof [BGH] [German Federal Court of Justice] Apr. 19, 2007, Case No. 1 ZR 35/04, GRUR 2007, 708—Internet Versteigerung II.

Bundesgerichtshof [BGH] [German Federal Court of Justice] Mar. 11, 2004, Case No. 1 ZR 304/01, GRUR 2004, 860—Internet Versteigerung I.

## **United Kingdom**

Cartier International AG v. British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch) (Arnold J.)

Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd [2012] EWHC 268 (Ch); [2012] 3 CMLR 14 [Dramatico 1].

Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd [No. 2] [2012] EWHC 1152 (Ch); [2012] 3 CMLR 15 [Dramatico 2].

EMI Records Ltd v. British Sky Broadcasting Ltd [2013] EWHC 379 (Ch); [2013] ECDR 8.

Football Association Premier League Ltd v. British Sky Broadcasting Ltd [2013] EWHC 2058 (Ch); [2014] ECDR 14 (Arnold J.).

Football Association Premier League Ltd v. British Telecommunications plc [2017] ECC 17, [2017] EWHC 480 (Ch) (Arnold J.).

Paramount Home Entertainment International Ltd v. British Sky Broadcasting Ltd [2013] EWHC 3479 (Ch); [2014] ECDR 7 (Arnold J.).

Twentieth Century Fox Film Corp. v. Newzbin Ltd [2010] FSR 21 [Newzbin 1].

Twentieth Century Fox Film Corporation v. British Telecommunications plc [2011] EWHC 2714 (Ch) (Arnold J.) [Newzbin 2].

Twentieth Century Fox Film Corp. v. Sky UK Ltd [2015] EWHC 1082 (Ch) (Birss J.).

## **United States**

A & M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2011).

ACS v. Sci-Hub litigation (American Chemical Society v. Sci-Hub, et al.) (E.D. Va. Civ. No. 1:17cv0726 (LMB)).

ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002).

American Broadcasting Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

Arista Records LLC et al. v. Monica Vaslenko et al., Chambers Order issued by Cooke J. (S.D. Fla. Mar. 23, 2017), Case No. 15-21450-Civ-COOKE/TORRES (MP3skull).

Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278 (D. Conn. 2008).

Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976 (D. Ariz. 2008).

BMG Rights Management (US) LLC and Round Music LP v. Cox Communications, Inc., 881 F.3d 293 (4th Cir. 2018).

BWP Media U.S.A., Inc. v. Hollywood Fan Sites, LLC, 115 F. Supp. 3d 397 (S.D.N.Y. June 30, 2015).

Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 500 (S.D.N.Y. 2013), *aff'd* Capitol Records, LLC et al. v. Vimeo LLC, 826 F.3d 78 (2d Cir. 2016).

Capitol Records, Inc. v. MP3tunes, LLC et al., 821 F. Supp. 2d 627 (S.D.N.Y. 2011) (MP3tunes I) *partially vacated on other grounds* by Capital Records, Inc. et al. v. MP3tunes, LLC et al. 2013 WL 1987225, 2013 Copr.L.Dec. P 30,427, 107 U.S.P.Q.2d 1770 (S.D.N.Y. May 14, 2013) (MP3tunes II), *partially affirmed, partially vacated, partially reversed and remanded by* EMI Christian Music Group, Inc. v. MP3tunes LLC, 844 F.3d 79 (2d Cir. 2016), *superseding and replacing* 840 F.3d 69 (2d Cir. 2016).

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

Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008).

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

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

Costar Grp Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688 (D. Md. 2001).

Diversey v. Schmidly, 738 F.3d 1196 (10th Cir. 2013).

eBay, Inc. v. MercExchange LLC, 547 U.S. 388 (2006).

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

Field v. Google, 412 F. Supp. 2d 1106 (D. Nev. 2006).

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

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

Goldman v. Breitbart News Network, LLC, Time, Inc., Yahoo, Inc., Vox Media, Inc., Gannett Co. Inc., Herald Media, Inc., Boston Globe Media Partners, Inc., and New England Sports Network, Inc., 302 F. Supp. 3d 585 (S.D.N.Y. Feb. 15, 2018).

Google LLC v. Equustek Solutions et al., No. 5:17-cv-04207-EJD (N.D. Cal. Dec. 14, 2017).

Intellectual Reserve Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).

Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002), *withdrawn and replaced by* 336 F.3d 811 (9th Cir. 2003).

London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008).

Mavrix Photographs LLC v. LiveJournal, Inc., 853 F.3d 1020 (9th Cir. 2017).

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

Motown Records Co. v. DiPietro, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. May 16, 2007) *reprinted as amended* on Dec. 10, 2007, 508 F.3d 1146 (9th Cir. 2007).

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

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

The Leader's Institute, LLC v. Jackson, 2017 WL5629514 (N.D. Tex. Nov. 22, 2017).

Twentieth Century Fox Film Corporation; Columbia Pictures Industries, Inc.; Universal City Studios LLC; Universal Studios Home Entertainment LLC; and Disney Enterprises, Inc. v. John Does, Jane Does and /or X/Y/Z Corporations d/b/a MovieTube; and John Does, Jane Does and/or X/Y/Z Corporations 2-100, Civ. No. 15-CV-5819 (PAC) (S.D.N.Y.).

Universal City Studios Productions LLP v. Bigwood, 441 F. Supp. 2d 185 (D. Me. 2006).

UMG Recordings, Inc. v. Alburger, Civ. No. 07-3705, 2009 WL 3152153 (E.C. Pa. Sept. 29, 2009).

UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009), *aff'd sub nom.* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and suspended on rehearing*, 718 F.3d 1006 (9th Cir. 2013).

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

Viacom Int'l Inc. v. YouTube, LLC, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) (Viacom III).

Wolk v. Kodak Imaging Network, Inc. 840 F. Supp. 2d 724 (S.D.N.Y. 2012), *aff'd sub nom.* Wolk v. Photobucket.com, Inc., 569 Fed. Appx. 51 (2d Cir. 2014).