

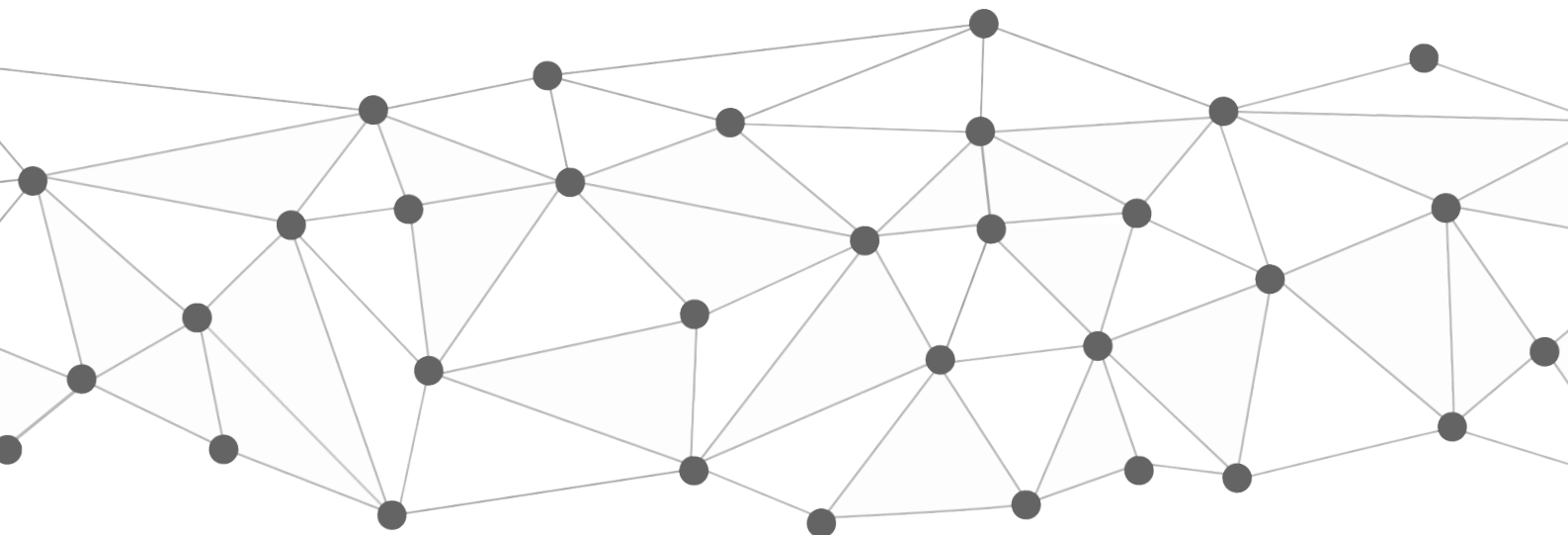
# On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market

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# Key Findings

- ▶ The current wording of the provisions of the Commission's new Proposal for a Directive on Copyright in the Digital Single Market (COM(2016) 593 final) which are relevant 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' is **incompatible with existing EU directives, as well as with the Charter of Fundamental Rights of the EU, as interpreted by the CJEU.**
- ▶ In particular, Recital 38 of the Proposal **misinterprets EU copyright and related rights law** by implying that these providers by definition go beyond the mere provision of physical facilities and perform an **act of communication to the public**. This is not an issue that has to date been addressed by EU copyright law, as that has been formulated by the Infosoc Directive and the interpretative case law of the CJEU. Acts of facilitation of third party copyright infringement are instead the rightful domain, not of primary, but of *accessory liability*, an area of copyright and related rights law that has not yet been harmonised at the EU level.
- ▶ In addition, Recital 38 of the Proposal also suggests that such providers will **lose the protection of the hosting safe harbour** of Article 14 of the E-Commerce Directive, where they play an active role, including by optimising the presentation of or promoting the uploaded works or subject matter, irrespective of the nature of the means used therefor. This substantially **misrepresents the relevant case law of the CJEU**, as well as Recital 42 of the E-Commerce Directive, which underpins this case law. Both of these indicate the need for the relevant hosts to have knowledge and control over specific unlawful data before immunity can be denied.
- ▶ Finally, Article 13(1) and Recital 39 of the Proposal suggest, as an example of measures that may be imposed on such providers for the enforcement of copyright and related rights, the use of **'effective content recognition technologies'**. Given that such technologies require the monitoring of the behaviour of all of a providers' end-users, the adoption of such a requirement would **go against the prohibition of general monitoring obligations** introduced by Article 15(1) of the E-Commerce Directive. As the case law of the CJEU has made clear, it would also **violate the principle of a 'fair balance' between competing fundamental rights**, recognised by that Court as essential in this area, by imposing a disproportionate burden on intermediaries' freedom to conduct their business (Article 16 of the Charter), as well as end-users' right to the protection of their personal data (Article 9 of the Charter) and to their freedom of expression (Article 11 of the Charter). It should be noted that the fact that such technologies are currently voluntarily used by some providers is immaterial in this regard: the law of fundamental rights binds State authorities, not private actors.
- ▶ In addition, the **ambiguous wording** surrounding these proposals, the first two of which are only mentioned in a Recital and the last of which is only given as an example, would inhibit, rather than improve legal certainty in the EU on the liability of the relevant providers for the copyright infringements of their users. As a result, it is likely to undermine the establishment of a Digital Single Market in Europe, as different Member States experiment with different interpretations in the transposition of the Proposal into national law.
- ▶ The **lack of consistency in the wording** of the Recitals, the Explanatory Memorandum, the Impact Assessment and the main text of the Proposal, all of which talk of obligations, but each of which describes these obligations in different terms, is also problematic in this regard.
- ▶ **The relevant provisions should accordingly be deleted or significantly amended.**
- ▶ **Recommendations for amendments** could be limited to the mere removal and/or rewording of the most problematic aspects of the provisions. This option however would likely render these provisions toothless.
- ▶ To avoid this outcome, more constructive options are proposed in the form of further amendments for either the introduction of a **notice-and-action system** or a duty of care for intermediaries to remove notified content where certain requirements are met.
- ▶ Alternatively, the **harmonisation of accessory liability** for the infringement of copyright or related rights should be considered, as well as the introduction of an Alternative Compensation System (ACS) for right-holders covering non-commercial direct copyright and related rights infringement committed online by end-users.

## Abstract

Upon request of MEP Julia Reda, this study evaluates the provisions of the European Commission's Proposal of 14 September 2016 for a Directive on Copyright in the Digital Single Market that are relevant 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'. It concludes that key elements of these provisions are incompatible with existing EU law, including the Charter of Fundamental Rights of the European Union. The provisions ought therefore to be withdrawn or amended. For the purposes of the latter option, the study provides a series of recommendations.

## About the author

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Her research interests primarily lie in copyright law, with a particular focus on intermediary liability. Her PhD thesis at the Institute for Information Law (IViR) of the University of Amsterdam examined the European harmonisation of the liability of online intermediaries for the copyright infringements of third parties.



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## List of Abbreviations

BGB	Bürgerliches Gesetzbuch (the German Civil Code)
BGH	Bundesgerichtshof (the German Federal Court of Justice)
CDPA	(The UK's) Copyright Designs and Patents Act 1988
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (former European Court of Justice (ECJ))
CPI	Code de la propriété intellectuelle (the French copyright act)
DMCA	(The US's) Digital Millennium Copyright Act 1998
DSM	Digital Single Market
ECD	E-Commerce Directive (Directive 2000/31/EC)
ECHR	European Convention on Human Rights
EM	Explanatory Memorandum
EU	European Union
IFPI	International Federation of the Phonographic Industry
OLG	Oberlandesgericht (a German higher regional court)
TGI	Tribunal de grande instance (a French regional court)
UK	United Kingdom of Great Britain and Northern Ireland
WIPO	World Intellectual Property Organisation

# 1. Introduction

On 14 September 2016, the European Commission released its **new Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market**.<sup>1</sup> Article 13 of this, in combination with Recitals 37, 38 and 39, introduces provisions targeted at what the Proposal identifies as 'information society service providers that store and provide access to large amounts of works and other subject-matter uploaded by their users'. The proposed rules are intended to address what has come to be known as the '**value gap**', i.e. the idea that a misalignment exists between the volume of creative content accessed globally by users through the services of the targeted providers and the revenue that this access generates for the holders of copyright in that content.

This study contains a **critical legal evaluation of Article 13 of the Proposal, as well as of the Recitals that accompany it**. In this context, the study will cover the following research questions:

1. Are Article 13 and Recitals 37, 38 and 39 of the new Proposal for a Directive in the Digital Single Market **compatible with existing EU law**, particularly the E-Commerce Directive (Directive 2000/31/EC)<sup>2</sup> the Infosoc Directive (2001/29/EC)<sup>3</sup> and the Charter of Fundamental Rights of the European Union?<sup>4</sup>
2. Would the adoption of the Proposal lead to more or less **fragmentation of the Digital Single Market**?
3. If the Proposal is not compatible with existing EU law, **how could it be brought into line with that law, while also promoting the completion of the Digital Single Market**?

The study shall focus entirely on the legal issues surrounding the relevant provisions and shall in particular not examine the question of whether or not a 'value gap' that must be addressed by law in fact exists.

The structure of the study will be as follows: following on from this Section 1 introduction, Section 2 will give a brief description of the 'value gap' problem which the proposed Article 13 and Recitals 37, 38 and 39 are intended to address. Section 3 will move on to a consideration of the solution those provisions currently put forth. Section 4 will then outline the existing EU legal framework, while Section 5 will evaluate the compatibility of the Proposal with that framework, as well as the suitability of the Proposal for the promotion of a harmonised Digital Single Market. On the basis this sets up, Section 6 will formulate a set of recommendations on ways in which the Proposal can be improved moving forward. Finally, Section 7 will summarise and conclude.

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels 14 September 2016, COM(2016) 593 final (hereafter: 'Proposal').

<sup>2</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 (Directive on Electronic Commerce) [2000] OJ L 178/1 (hereafter: E-Commerce Directive or ECD).

<sup>3</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] OJ L167/10 (hereafter: Infosoc Directive).

<sup>4</sup> Charter of Fundamental Rights of the European Union, opened for signature 7 December 2000, [2000] OJ C 364/01 (entered into force 1 December 2009) (hereafter: the Charter).

## 2. Problem Definition

What is the objective of Article 13 and Recitals 37, 38 and 39 of the new Proposal? What is the problem these provisions set out to correct?

According to the Explanatory Memorandum (EM) to the proposed directive, the reasoning behind these provisions can be found in the evolution of digital technologies. This has led to the emergence of the internet as the main marketplace for the distribution of copyright-protected content. The development of Web 2.0 technologies, in particular, has meant that a considerable part of that distribution occurs through online content-sharing platforms, such as YouTube, Dailymotion, MySpace or Vimeo. These enable end-users to upload large amounts of material, including copyright-protected works, to the internet, often infringing rights in the relevant content. This development has been particularly significant in view of the rise of 'streaming', i.e. the recent shift from ownership to access-based models of content consumption.<sup>5</sup>

As both the EM and the Communication on a fair, efficient and competitive European copyright-based economy in the Digital Single Market<sup>6</sup> (which was released in parallel to the Proposal) underline, in this new technological landscape, right-holders face difficulties when seeking to authorise and be fairly remunerated for the online use of their works. As a result, concern has arisen about the equitable sharing of the value generated by some new forms of online content distribution – the problem of, as it has come to be termed, the 'value gap' in the online exploitation of copyright-protected works.<sup>7</sup>

The Impact Assessment that accompanies the Proposal<sup>8</sup> gives further insight into the Commission's thinking on this matter. This asserts that the relevant providers use copyright-protected content to increase the value of their services and thereby attract and retain users to their websites. As it explains, access to content on such platforms is generally free-of-charge for users. Instead, these providers draw revenues, directly or indirectly, from two main sources: advertising and user data.

According to the Impact Assessment, despite the fact that some of these platforms have become major actors in online content distribution, right-holders are not necessarily able to enter into agreements with them for the use of their content. For one thing, according to reports by right-holders, some of the relevant providers refuse to negotiate such agreements. In parallel, where providers have offered right-holders a share of their ad-generated revenue, the right-holders argue that, due to the absence of a legal requirement obliging the platforms to properly engage with them, these agreements are unfair. The main target of criticism in this regard is Article 14 of the E-Commerce Directive (ECD), i.e. the so-called 'hosting safe harbour' that provides conditional immunity to host service providers. According to its critics, this was not initially intended to exempt the relevant platforms and its misapplication to protect them allows them to 'effectively circumvent the normal rules of music licensing.'<sup>9</sup> As a result, right-holders are often faced with a 'take it or leave it' approach by the platforms, whereby they are obliged

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5 International Federation of the Phonographic Industry (IFPI), Global Music Report, 'State of the Industry Overview 2016', available at: [www.ifpi.org/downloads/GMR2016.pdf](http://www.ifpi.org/downloads/GMR2016.pdf) (hereafter: 'IFPI Global Music Report 2016'). See pp. 15-17.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' COM(2016) 592 final, Brussels, 14 September 2016.

7 See Proposal, p. 3 and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' COM(2016) 592 final, Brussels, 14 September 2016, p. 7.

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

9 See, for example, IFPI Global Music Report 2016, p. 8, 23-24. See also IFPI Digital Music Report 2015, 'Charting the Path to Sustainable Growth', available at: [ifpi.org/downloads/Digital-Music-Report-2015.pdf](http://ifpi.org/downloads/Digital-Music-Report-2015.pdf) (hereinafter: 'IFPI Digital Music Report 2015', pp. 5 and 23. See also M Husovec & R Leenes, 'Study on the Role of Online Intermediaries – Summary of the Public Consultation', study prepared for the European Commission, SMART number 2015/0084/, p. 23.



to either accept what they claim are artificially low rates or continue to send notifications for each individual infringement committed by end-users.<sup>10</sup>

The result, right-holders maintain, is a distorted distribution of revenue. In this regard, the Impact Assessment cites figures provided by IFPI's Digital Music Report 2016.<sup>11</sup> According to this, in 2015, advertising-supported platforms had an estimated user-base of more than 900 million, but generated revenues for the global music industry amounting to only US\$634 million, i.e. approximately 4% of global music revenues and just over US\$1 per user. Right-holders argue that such revenues are insignificant compared to the US\$2 billion they receive from subscription services (equivalent to an estimated US\$18 per user), despite the fact that these reach only 68 million users.

It should be noted that, according to the Impact Assessment, the 'value gap' described above is disadvantageous not only to right-holders, but also to subscription-financed online service providers, such as Spotify or Deezer. Such providers have not adopted the Web 2.0 business model that relies on user-created content, but instead retain full control over their content offerings. As a result, they are faced with content-acquisition costs that put them at a competitive disadvantage to ad-financed platforms.

On the other side of the debate, content-sharing platforms emphasise that they are not under a legal requirement to negotiate with copyright-holders. Instead, they argue, they enter into monetisation agreements with right-holders on a purely voluntary basis. They observe that, where such agreements are not reached, right-holders are, under the current legal regime, given the possibility of notifying the providers of the existence of infringing content on their platforms. In such cases, providers are placed under an obligation to remove that content by the provisions of the E-Commerce Directive.

The platforms also stress that, while the law does not require that they go further than this, they often proactively do, by implementing voluntary measures intended to help right-holders to identify and/or to monetise the use of their content on the platforms' services, including through content recognition technologies. They further note that, the accurate identification of infringements remains challenging, even with such specially developed technologies. This will be especially true of transformative content that differs significantly from the original material. Adding complications, content identification technologies often also lead to 'false positives', i.e. the erroneous flagging of content that is not unlawful.<sup>12</sup> This causes concerns from a freedom of expression perspective. Finally, some platforms argue that the divide between the revenues generated by content-sharing platforms and subscription services is in any case closing. Indicatively, according to data released by YouTube in 2015 that service alone contributed over \$1 billion to the music industry, with the trend suggesting future increases.<sup>13</sup>

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10 See Impact Assessment, pp. 137-144; IFPI Global Music Report 2016, pp. 5, 8, 22-24 and M Husovec & R Leenes, 'Study on the Role of Online Intermediaries – Summary of the Public Consultation', study prepared for the European Commission, SMART number 2015/0084/, pp. 15 and 23.

11 IFPI Global Music Report 2016, p. 4-8, 22-24. See also See J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 7.

12 Impact Assessment, pp. 140-141.

13 See YouTube Official Blog, 'A Billion Reasons to Celebrate Music', 6 December 2016, available at: <https://youtube.googleblog.com/2016/12/a-billion-reasons-to-celebrate-music-on.html>.

### 3. The Proposed Solution

Against this backdrop, Article 13 of the Proposal and the Recitals that underpin it seek to introduce measures aimed at improving the position of right-holders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.<sup>14</sup> The provision is targeted at what the Proposal describes as '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'.

#### 3.1. The Text of the Proposal

The text of Article 13 is as follows:

##### Article 13

##### **Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users**

1. 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 shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.
3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

Article 13 is supported by three recitals in the Preamble to the Proposal: Recitals 37, 38 and 39. These provide guidance for the interpretation of Article 13 and set out the intended relationship between that provision and the existing legal framework.

**Recital 37** of the Proposal notes that, over the last years, online services providing access to copyright protected content uploaded by their users without the involvement of right-holders have become main sources of access to content online. According to the Recital, this affects the ability of right-holders' to control the use of the subject matter they own and to receive an appropriate remuneration for such use.

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<sup>14</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' COM(2016) 592 final, Brussels, 14 September 2016, p. 8.

**Recital 38** follows on from this by stating that, 'where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders'. According to the Recital, this obligation is negated if the provider is eligible for the hosting safe harbour of Article 14 of the E-Commerce Directive. Recital 38 suggests that in order to ascertain whether the safe harbour applies or not, it is necessary to verify whether the service provider plays an active role, 'including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.'

On this basis, the Recital confirms what is stated in Article 13, by noting that, in order to ensure the functioning of any licensing agreement, the relevant providers should take 'appropriate and proportionate measures' to protect copyright and related rights, such as through the implementation of 'effective technologies'. These technologies remain undefined: contrary to Article 13 and Recital 39, Recital 38 does not explicitly mention content recognition technologies. The Recital closes by indicating that the obligation to take measures should also apply where the provider enjoys the protection of the hosting safe harbour.

Finally, **Recital 39** of the Proposal emphasises the importance, for the success of the Proposal's solution, of collaboration between the relevant providers and the holders of copyright and related rights. As it notes, such collaboration is necessary for the functioning of the content recognition technologies mentioned in Article 13. To this end, Recital 39 states that right-holders should provide the necessary data to allow the providers to identify the content they allege is copyright-protected. For their part, the service providers should also be transparent towards right-holders with regard to the technologies that they deploy for the purposes of copyright enforcement. This transparency is intended to allow the assessment of the appropriateness of these technologies. According to Recital 39, the providers should in particular provide right-holders with information on the type of technologies used, the way these are operated and their success rate for the recognition of right-holders' content. These technologies should also enable right-holders to acquire information from the providers on the use of their content that is covered by an agreement with the provider.

## 3.2. The Policy Context

Before moving on to an assessment of the legality of these proposals, it is useful to first consider the policy context within which they are positioned. This has been helpfully outlined in a series of Communications released by the Commission over the past two years. The lead was taken by the Communication of May 2015 on the Digital Single Market (DSM) Strategy, the Commission's flagship policy initiative to foster a cross-border European digital economy.<sup>15</sup> In this, the Commission called, among other things, for the establishment of both a modern, more European copyright framework and a 'fit for purpose' regulatory environment for intermediaries.

To these ends, the Communication noted that the EU needs a **more harmonised copyright regime** that provides incentives to create and invest, while also permitting the transmission and consumption of content across borders. It observed the need, in view of the growing involvement of intermediaries in content distribution, to **clarify the rules on the activities of intermediaries in relation to copyright-related content**, as well as to adopt measures to safeguard the **fair remuneration** of creators, so as to encourage the future generation of content. Pertinently for this study, the Communication raised concerns regarding the **growing market power of some platforms**, including their strong bargaining position compared to their clients, the promotion of their own services to the disadvantage of competitors and the lack of transparency on how they use the information they acquire and on their pricing policies. At the same time, it emphasised that **the safe harbours have underpinned the development of the internet in Europe**. It stated that, when illegal content (including copyright-infringing content) is identified, intermediaries should take **effective action** to remove it. The Communication noted the conflicting problems presented by the fact that, on the one hand, procedures for the removal of such content or the disabling of access to it can be **slow and complicated**, while, on the other, they

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<sup>15</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A Digital Single Market Strategy for Europe' COM(2015) 192 final, Brussels, 6 May 2015.

often lead to the **erroneous take-down** of lawful content. It also emphasised the lack of clarity in the current law on **what intermediaries can do with the content that they transmit, store or host before losing safe harbour protection**.

On the basis of this analysis, the Digital Single Market Communication suggested possible policy options. Specifically, it spoke of the modernisation of the enforcement of intellectual property rights by focusing on commercial-scale infringements through the adoption of a **'follow-the-money' approach**. It further indicated the need for new solutions that tackle illegal activity, while also respecting fundamental rights, such as **rigorous procedures for removing illegal content that take care to avoid the take down of legal content**. Additionally, the Communication mentioned the possibility of introducing a **duty of care** for intermediaries, that would require them to exercise greater responsibility and due diligence in the way they manage their networks and systems.

The Digital Single Market Communication was followed, in December 2015, by a different Communication entitled **'Towards a Modern, More European Copyright Framework'**.<sup>16</sup> Here, the Commission identified, as a key element in pursuing the DSM strategy, the targeted modernisation of EU copyright rules that takes full account of fundamental rights.<sup>17</sup> Significantly, the Communication explicitly focused on the fair sharing of the value generated by some new forms of online distribution. It noted that this is required by the Digital Single Market's ambition to deliver opportunities for all and recognise the value of content. The Communication observed that not just market-related, but also legal reasons currently undermine such fair sharing. In this regard, it heavily emphasised the lack of clarity concerning the definition of the rights of communication to the public and making available in EU copyright law, as well as the uncertainty regarding the scope of the ECD's hosting safe harbour. On this basis, the Communication questioned whether the current set of exclusive rights recognised under EU copyright law is sufficient and well-designed and indicated the possible need for **a new EU definition of the communication and making available rights**.

In addition, this Communication reiterated the Commission's commitment to the **'follow-the-money' approach** that focuses on commercial-scale infringement. It clarified that this should emphasise the involvement of different types of intermediary service providers, particularly in a **self-regulatory manner**. It also indicated a potential need for the clarification of the rules for **identifying infringers**, the application of **provisional and precautionary measures and injunctions** and **the calculation and allocation of damages and legal costs**. The Communication repeated that the measures for the removal of illegal content by hosting providers must be effective and transparent and must not result in legal content being accidentally taken down. In this regard, it mentioned the possible introduction of an EU **'notice-and-action'** mechanism, including with possible **'notice-and-stay-down'** effect.

In May 2016, a new Communication on **'Online Platforms and the Digital Single Market'**<sup>18</sup> underlined the key role played by online platforms in the creation of digital value, while also acknowledging that the fast-changing nature of platform ecosystems raises regulatory challenges. On this basis, the Communication emphasised the importance of the right regulatory framework and bluntly declared that, self-evidently, there cannot be 28 different sets of rules for online platforms in a single market. The Communication confirmed that the existing intermediary liability regime will be maintained, but noted that targeted action is necessary so as to render it sustainable. In this regard, it again raised the issue of the fair allocation of value between distributors and right-holders and suggested as a remedy a possible move towards a **'sector-specific' regulation of intermediaries** that differentiates between the type of intermediary targeted. The Communication repeated the Commission's previous conclusions regarding the need, in line with the 'follow-the-money' approach against commercial infringement, for coordinated EU-wide **self- and co-regulatory** initiatives, including 'appropriate monitoring

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<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Modern, More European Copyright Framework' COM(2015) 626 final, Brussels, 9 December 2015.

<sup>17</sup> See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' COM(2016) 592 final, Brussels, 14 September 2016, p. 2.

<sup>18</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe' COM(2016) 288/2, Brussels 25 May 2016.

mechanisms'. Returning to the legal uncertainty as to when intermediaries lose safe harbour protection, the Communication raised the possibility of releasing **guidance on the liability of intermediaries that undertake voluntary, good-faith measures to address online illegality**. In addition, it repeated its previous reference to the possible introduction of a formal European **'notice-and-action'** procedure.

Finally, the responsible voluntary behaviour of providers was further emphasised in June 2016, by the **'Communication on a European Agenda for the Collaborative Economy'**.<sup>19</sup> This again noted that 'maintaining the existing intermediary liability regime is crucial for the further development of the digital economy in the EU'. It stressed that responsible behaviour should be encouraged and stated, more firmly this time, that **voluntary action should not automatically be taken to mean that the platform is no longer eligible for safe harbour protection**. It also emphasised that whether or not a collaborative platform can benefit from a liability exception must be established on a **case-by-case basis**, depending on the level of **knowledge and control** that the platform has on the information it hosts. It acknowledged that **general monitoring obligations may not be imposed on providers**.

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<sup>19</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A European Agenda for the Collaborative Economy' COM(2016) 356 final, Brussels, 2 June 2016.

## 4. The Current EU Legal Context

The consideration of the policy objectives behind the current push for the reform of the legal framework governing internet intermediaries raises an obvious question: what is that current legal framework? What are the limits this imposes on future reform and what are its weaknesses that should be improved? These shall be the questions explored in the present Section.

It is important from the onset to note that the rules governing intermediary liability have not currently been comprehensively harmonised at the EU level. Although a certain level of harmonisation does exist, often the modalities through which liability is imposed on internet intermediaries – including those affected by the Proposal – as well as the conditions required for such liability, remain fragmented across the European Union.<sup>20</sup> As a result, two tiers can be distinguished to the relevant rules: an EU tier and a national tier. It should be noted that, arguably, this fragmentation does pose a significant challenge to the establishment of a Digital Single Market.

Below, each of these tiers shall be examined in turn. Sections 4.1-4.3. shall begin with the analysis of the EU legal framework. In particular, Section 4.1. shall concentrate on the hosting safe harbour of the E-Commerce Directive, Section 4.2. on the Charter of Fundamental Rights and Section 4.3. on EU copyright law. Subsequently, Section 4.4 shall move on to a consideration of the relevant national rules.

### 4.1. The Hosting Safe Harbour

The heart of the current EU intermediary liability framework can be found in the E-Commerce Directive. In Section 4 of this, 'to eliminate the existing legal uncertainty and to bring coherence to the different approaches that are emerging at Member State level',<sup>21</sup> the European legislator has introduced a cluster of conditional exemptions from liability for internet intermediaries: the famous 'safe harbours'. Essentially, these act as defences, granting immunity to intermediaries as regards claims for damages from all liability incurred in the provision of certain services.

As has already been indicated by the analysis above, for the purposes of this report the most important of the safe harbours is that of Article 14 of the E-Commerce Directive. This extends protection to the providers of 'an information society service' that consists of 'the storage of information provided by a recipient on the service'. In order to enjoy the safe harbour such hosting providers must:

- (a) not have actual knowledge of the illegality of that content and, as regards claims for damages, awareness of facts or circumstances from which the illegality is apparent; or
- (b) upon obtaining such knowledge, act expeditiously to remove or to disable access to the content.<sup>22</sup>

Complementing Article 14, Article 15(1) ECD prohibits Member States from imposing on providers protected by a safe harbour general obligations to monitor the information which they transmit or store or general obligations actively to seek facts or circumstances indicating illegal activity.

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<sup>20</sup> On this, see C Angelopoulos, 'Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe' (2013) 3 Intellectual Property Quarterly 253.

<sup>21</sup> Commission Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, 18 November 1998, COM (1998) 586 final.

<sup>22</sup> To benefit from the safe harbour, the host must additionally not have had authority or control over the end-user in the posting of the contested information (Article 14(2) ECD).

As these provisions make apparent, the hosting safe harbour relies heavily on the now popular concept of 'notice-and-takedown': while notice will not necessarily be the only way of obtaining actual knowledge or awareness,<sup>23</sup> the ban against general monitoring obligations of Article 15 ECD will certainly make it the most common one. Admittedly, the E-Commerce Directive fails to provide a detailed procedure guiding the application of its notice-and-takedown system. This can be contrasted to, e.g., the situation in the United States, where the Digital Millennium Copyright Act (DMCA) outlines elaborate rules on notice-and-takedown.<sup>24</sup> It is worth noting however that the ECD's current provisions need not necessarily be taken as the final European answer on the topic. Article 21 ECD foresees the possibility of a future introduction of a complete notice-and-takedown procedure at the European level.

In the following sections the reach of the hosting immunity will be analysed in detail. First, what kind of providers might enjoy it (Section 4.1.1.) and then the scope of the protection it grants to them (Section 4.1.2.) shall be investigated.<sup>25</sup>

#### 4.1.1. Beneficiaries of the Hosting Safe Harbour

The text of Article 14 ECD limits its reach to the 'providers of information society services that consist of the storage of information provided by a recipient of the service'. What precisely does this mean? The definition is important, as it can indicate whether claims that the Web 2.0 platforms targeted by the Proposal should not be understood as enjoying safe harbour protection are based on a correct interpretation of the current law.<sup>26</sup>

The E-Commerce Directive defines the notion of 'service provider' in Article 2(b) as 'any natural or legal person providing an information society service'. The notion of an 'information society service' in turn is defined by referring back, in Article 2(a) ECD, to Article 1(2) of Directive 98/48/EC.<sup>27</sup> According to this, an information society service' is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. The article goes on to declare that, for the purpose of this definition, 'at a distance' means that the service is provided without the parties being simultaneously present; 'by electronic means' means that the service is 'sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data and is entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means'; and 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request. Under Article 2(d) of the E-Commerce Directive, the 'recipient of the service' is defined as 'any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible'.

With regard to the requirement that the service should be 'normally provided for remuneration', Recital 18 of the E-Commerce Directive clarifies that the service may be offered for free to the recipient, as long as it represents an 'economic activity'. This solution mirrors a broader rule: Article 57 of the Treaty on European Union (TEU) also declares that 'services' within the meaning of the Treaties must be 'normally provided for remuneration', while the

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23 In *L'Oréal v eBay*, the CJEU also mentions the possibility of 'investigations undertaken on the intermediary's own initiative'. See CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para 122.

24 See Digital Millennium Copyright Act (17 U.S.C., adopted 28 October 1998), section 512(c)(1)(C) and 512(c)(3).

25 In the interests of space, the two conditions of knowledge or awareness and of expeditious take-down shall not be considered, as they are not relevant to the assessment of the Proposal. For an analysis of these, see C Angelopoulos, 'European Intermediary Liability in Copyright' (Kluwer Law International 2016) 81-94.

26 For example, the IFPI Digital Music Report 2015 suggests that, 'for a content platform such as DailyMotion or YouTube to claim the status of a neutral hosting service is not justified, undermines the negotiating position of right holders and creates unfair competition between individual services.' The IFPI Global Music Report 2016 states that, '[a]t the heart of the value gap is the misapplication of legislative 'safe harbour' rules that allow some services, including user upload services such as YouTube, effectively to circumvent the normal rules of music licensing and use copyrighted music content to build their business without fairly remunerating rights holders.'

27 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L217/18. This has now been replaced by Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) [2015] OJ L241/1.

CJEU has found that this does not mean that the service has to be paid for by those for whom it is performed.<sup>28</sup> In 2014, in *Papasavvas*, this interpretation was confirmed as specifically applicable to 'information society services' as well.<sup>29</sup> Given that one of the dominant successful models of e-business consists of providing a service at no charge, with a view to making returns in lateral ways, in particular through advertising, voluntary donations or by application of the so-called 'freemium' business model,<sup>30</sup> a restrictive interpretation would in any case make little sense: as long as the provider is making economic gains through the activity, that should be sufficient, while any type of consideration for an economic activity should be allowed to qualify as 'remuneration'. So, for example, even non-profit providers, such as Wikipedia, should be considered to be included: the service they provide would definitely be 'normally provider for remuneration', even if the particular provider relies on donations and volunteers.<sup>31</sup>

As this analysis indicates, although the Directive was adopted long before the emergence of the current generation of Web 2.0 services, nothing in its provisions would seem to screen them out from the concept of 'information society service providers'.

The question that remains is whether the services they provide can also be said to qualify them for the protection of Article 14 specifically. As noted above, this is dedicated to services that 'consist of the storage of information provided by a recipient of the service'. On this matter, the Directive itself is entirely silent. Certainly, as right-holders suggest, the state of the art at the time of its adoption could be taken to indicate that interactive platforms were not explicitly on the legislators' minds. However, legal texts are not usually applied only to technologies in existence at the time of their drafting and the term 'storage' is broad enough to comfortably encompass Web 2.0 platforms. Absent other indications in the text, arbitrary restrictions on the natural meaning of the term appear inappropriate.<sup>32</sup>

This conclusion has been confirmed by the case law of the CJEU. In 2010, in *Google France*,<sup>33</sup> the Court accepted that the well-known search engine's advertising service 'Adwords' not only features all of the elements of an 'information society service' provider, but also constitutes a provider of a service that 'consists of the storage of information provided by a recipient of the service'.<sup>34</sup> It is therefore, in principle, eligible for Article 14 ECD's protection. Subsequently, in *L'Oréal v eBay*, the Court reached the same conclusion with regard to the provider of an online marketplace.<sup>35</sup> Finally – and most importantly for the purposes of this study – in *Netlog*, the Court explicitly stated that a social networking site, i.e. a Web 2.0 provider of the kind considered in the new Proposal, was 'a hosting service provider within the meaning of Article 14' ECD.<sup>36</sup> Indeed, Article 13 of the Proposal itself seems to accept that the providers it targets qualify as hosting providers, by defining them as 'information society service providers' that, *inter alia*, 'store' the relevant data.

The above being said, whether these providers abide by the conditions imposed for the enjoyment of the safe harbour is a different question. A limitation in this regard is introduced by the title of Section 4 of the Directive.<sup>37</sup> This makes clear that the immunities the Section introduces are intended to apply, not to all 'information society

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28 See also C-352/85, *Bond van Adverteerders v The Netherlands State*, 26 April 1988, referring to Article 60 of the Treaty establishing the European Economic Community (EEC Treaty), now Article 57 of the current Treaty on the European Union.

29 CJEU, C-291/13, *Papasavvas v O Fileleftheros Dimosia Etairia*, 11 September 2014.

30 According to this model, the majority of users are offered free access to the service, while a small minority are relied on to pay a premium for additional services. The first ensure the necessary popularity of the service and the second provide the actual financing. See Wikipedia entry on 'freemium', available at: <https://en.wikipedia.org/wiki/Freemium>.

31 See: L Edwards, 'Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights' WIPO Study (2011) and DLA Piper, 'EU Study on the Legal Analysis of a Single Market for the Information Society – New Rules for a New Age?', November 2009, available at: [http://ec.europa.eu/information\\_society/newsroom/cf/itemdetail.cfm?item\\_id=7022](http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7022).

32 M Peguera, 'The DMCA Safe Harbors and their European Counterparts: A Comparative Analysis of some Common Problems' (2009) *Columbia Journal of Law & the Arts* 481, at 496. See also J Ginsburg, 'Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs' (2008) *50(2) Arizona Law Review* 577, at 594.

33 CJEU, joined cases C-236/08 and C-237/08 *Google France v Louis Vuitton et al*, 23 March 2010.

34 CJEU, joined cases C-236/08 and C-237/08 *Google France v Louis Vuitton et al*, 23 March 2010, para. 110-111.

35 CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para. 109-110.

36 CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 27.

37 See CJEU, C-291/13, *Papasavvas v O Fileleftheros Dimosia Etairia*, 11 September 2014, para. 39.



service providers', but specifically to 'intermediary service providers'. In *Google France*, the CJEU interpreted the notion of an 'intermediary' by linking it to a notion of 'neutrality'.<sup>38</sup> For this purpose, the Court relied on Recital 42 of the E-Commerce Directive to suggest that, in order to qualify for protection, a provider's activity must be 'of a mere technical, automatic and passive nature', such that the provider 'has neither knowledge of nor control over the information which is transmitted or stored.' The Court saw this condition as a necessary prerequisite for cases of hosting, as much as of caching and mere conduit services.

It should be noted that this interpretation is controversial. So, for example, AG Jääskinen expressed vehement opposition to this reading in his later Opinion on *L'Oréal*, going as far as to describe it as seriously endangering the objectives of the E-Commerce Directive.<sup>39</sup> The AG supported the view that sees Recitals 42 to 44 as limited to only mere conduit and caching providers. Instead, he claimed that it is Recital 46, which explicitly mentions the providers of services 'consisting of the storage of information' and confirms the requirement of expeditious take-down, that is intended to apply to hosts. According to the AG, "neutrality" does not appear to be quite the right test' for host service providers. He voiced his criticism in strong terms: 'I would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users.'<sup>40</sup> Commentators have mostly agreed with the AG, noting that hosting providers will almost necessarily have some degree of involvement in the information stored, at least in the form of making available tools for its uploading, categorisation and display, while any other interpretation would result in a so-called 'Good Samaritan paradox', whereby a hosting intermediary would be disincentivised from taking precautions against infringement for fear of losing safe harbour protection.<sup>41</sup>

The issue is a tricky one. The wording of the Directive's recitals don't offer concrete guidance: Recital 42 does indeed talk vaguely of 'the exemptions from liability established in this Directive', as does Recital 45. This can be contrasted to e.g. Recitals 43 and 44, which explicitly refer to mere conduit and caching, and Recital 46, which openly limits itself to hosting. This could suggest that Court's interpretation might indeed have been the one intended by the EU legislator. Regardless, in its case law, the CJEU sidestepped the pitfalls envisioned by the AG by loosening the definition of neutrality in order to allow hosts the necessary breathing space. So, according to *Google France*, the role played by a provider in the drafting of a commercial message or in the establishment or selection of keywords is relevant is assessing 'neutrality'. On the other hand however, the mere facts that the service is subject to payment, that the provider sets the payment terms or that it provides general information to its clients cannot have the effect of depriving the provider of safe harbour protection. It would thus seem that, claims according to which providers who monetise content or build their business on it lose safe harbour protection<sup>42</sup> do not appear to be accurate. Similarly, in *L'Oréal*, it was declared that 'the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability'. Instead, in order to be deemed non-neutral, the host would have to engage in activities such as 'optimising the presentation of the offers for sale in question or promoting those offers'.<sup>43</sup>

Should such optimisation and promotion be interpreted as including the use technical means, as the AG feared? Importantly, in *L'Oréal*, the CJEU observed that eBay provides assistance intended to optimise the presentation of or promote certain offers for sale 'in some cases'. In the UK referring judgement, eBay is indeed described as providing two broad types of user-support relevant to content optimisation and promotion: both generic support available to all, in the form of help pages, tutorials, templates and tools, and enhanced support given exclusively to its most successful users. This second category included such assistance as the provision of 'personal account manager, personal phone support, fast priority email support, final value fee discounts and access to a dedicated

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38 CJEU, joined cases C-236/08 and C-237/08 *Google France v Louis Vuitton et al*, 23 March 2010, para. 112-114. See also CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para. 111-113 and CJEU, C-291/13, *Papasavvas v O Filelitheros Dimosia Etairia*, 11 September 2014, para. 39, 41 and 45.

39 CJEU, Opinion of Advocate General Jääskinen, case C129/14 PPU, *Zoran Spasic*, 2 May 2014, para. 139 et seq.

40 CJEU, Opinion of Advocate General Jääskinen, case C-324/09, *L'Oréal v eBay International*, 9 December 2010, para. 146.

41 See, for example, P van Eecke, 'Online Service Providers and Liability: A Plea for a Balanced Approach' (2011) 48 Common Market Law Review 1455.

42 See, for example, IFPI Global Music Report 2016, p. 8 and 23.

43 CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para. 115 and 116.

PowerSeller board.' Given the specification of 'in some cases' and the fact that the CJEU stated that it was up to the national court to examine whether or not the site played a non-neutral role in the particular case before it, it must be presumed that the first category of generic and automated help open to all is not relevant in to a finding of 'neutrality'. On the other hand, it indeed seems fair that immunity should not be granted where a provider gives tailored advice to a specific user.<sup>44</sup>

This interpretation is also in line with Recital 42 ECD's emphasis on the provider's 'knowledge of and control over the information': arguably, providing abstract advice or pre-configuring algorithms capable of organising content cannot comfortably be said to furnish a platform with knowledge of the existence of that content, except in the most general way. Yet, surely, all host service providers know that they are storing content in general? Something more should therefore be required before they can be deemed to be 'non-neutral'. Similarly, proper control over the data uploaded by users without knowledge of that data is not possible.<sup>45</sup> The linking of 'neutrality' with the notion of 'intermediation' in the CJEU's case law, further supports this approach.

What would make a provider non-neutral? The *Papasavvas* case provides indications. This concerned the obvious case of a newspaper publishing company operating a website on which an online version of the paper is posted. According to the Court, such a company has, in principle, knowledge of the information which it posts and exercises control over that information. It cannot therefore be considered to be a neutral 'intermediary service provider'.

In conclusion, according to existing indications, neutrality does not seem to demand the complete passivity from storage providers.<sup>46</sup> While the borderline that turns a neutral host into an active content provider therefore remains a fuzzy one, it appears that Web 2.0 providers cannot *per se* be excluded. Instead, the case law would indicate that, as long as they don't contribute to the creation of the relevant content or provide assistance geared at optimising the presentation of or promoting that content then they are sufficiently neutral. Certainly, this appears to be the approach most commonly endorsed by the national courts of the Member States.<sup>47</sup>

Ultimately, perhaps the connection of neutrality, under CJEU case law, with the function of intermediation and its dependence on the notions of knowledge and control would suggest that what the Court is in fact attempting through its introduction is a differentiation between 'true intermediaries', which remain uninvolved in the third party wrong despite the use of their services for the commission of that wrong (and which therefore should enjoy immunity) and service providers which, to a greater or lesser extent, are involved in the wrong in such a way that it might be understood to be their own (which therefore do not deserve protection). Seen under this lens, the CJEU's bid for neutrality is probably best interpreted as an attempt to depend liability on the mental attitude of the intermediary towards the primary wrong. The description of neutrality as the status of being 'of a mere technical, automatic and passive nature' suggests that what is important is, not so much what the intermediary does, but the way in which it goes about doing it: passively, through an automatic technical process set in place prior to the infringement, offered to all indiscriminately and exploited by the direct infringer, or as a result of a conscious decision to take part in somebody else's wrongdoing. It is worth noting that, as shall be seen below, the national rules on accessory liability confirm the relevance of the mental element to the diagnosis of liability-carrying participation.

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44 P van Eecke, 'Online Service Providers and Liability: A Plea for a Balanced Approach' (2011) 48 *Common Market Law Review* 1455, p. 1472 and 1483.

45 P van Eecke, 'Online Service Providers and Liability: A Plea for a Balanced Approach' (2011) 48 *Common Market Law Review* 1455, p. 1472 and 1483.

46 T-E Synodinou, 'Intermediaries' Liability for Online Copyright Infringement in the EU: Evolutions and Confusions' (2015) 31 *Computer Law & Security Review* 57.

47 See, for example, in Germany: OLG Hamburg, 1 July 2015, 5 U 87/12; OLG München, 17 November 2011, 29 U 3496/11 (all on YouTube); OLG München, 28 January 2016, 29 U 2798/15. In France, see: *TF1 et autres c. Dailymotion*, Cour d'appel de Paris, 2 December 2014; *TF1 et autres c. YouTube*, Tribunal de grande instance de Paris, 29 May 2012; *Sté Nord-Ouest c. Dailymotion* (09-67.896), Cour de cassation, 17 February 2011. It is, in particular, worth noting that, in 2012, the French Cour de cassation, in *La société eBay Inc. c. la société Parfums Christian Dior* (11-10.508), 3 May 2012, while denying eBay protection under the hosting safe harbour as playing an 'active role' that gave it knowledge and control over the information it hosted, substantiated this decision on the provision by eBay of facilities that enable sellers to optimise their sales and of assistance in the definition and description of items for sale, including through the offer of the creation of a personalised marketplace or support by sales assistants.

### 4.1.2. Scope of the Hosting Safe Harbour

Importantly, even if a platform enjoys safe harbour protection, this will not necessarily mean that it is entirely out of reach of State-imposed regulation. Regardless of who they apply to, the safe harbours are not constructed to protect from liability of all kinds. Specific qualifications limiting the reach of the protection they afford are incorporated within the ECD itself.

For one thing, the reach of the safe harbours – including the hosting safe harbour of Article 14 ECD – is limited only to liability in the strict sense of the word, i.e. only for monetary compensation. This is made clear by the final paragraphs of all three safe harbours, which contain express permissions regarding the imposition of any kind of injunctive order on the providers of information society services by ‘courts and administrative authorities’ to ‘terminate or prevent an infringement’.<sup>48</sup> As a result, injunctions are, as a general rule, left to the discretion of national law.

Specifically in the area of copyright, EU law goes one step further. According to Recital 59 of the Infosoc Directive intermediaries are, in many cases, best placed to bring infringing activities occurring on their digital premises to an end. On this basis, Article 8(3) of the Infosoc Directive explicitly instructs Member States to ‘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’. The 2004 Enforcement Directive<sup>49</sup> reinforces this obligation in Article 11 *in fine*, which refers to the Infosoc Directive and repeats the order. Thus, while host service providers might – if they abide by the conditions of Article 14 ECD – be shielded from liability for damages, EU law requires that, at least in copyright law, they be exposed to enforcement obligations by means of court orders. At the same time, having made this vague demand, the EU legislator then retreats back into the shadows of subsidiarity: according to Recital 59 of the Infosoc Directive, the conditions and modalities relating to such injunctions should be left to the national law of each individual Member State.

In addition to injunctions, a second limitation to the reach of the hosting safe harbour can also be found in the E-Commerce Directive. According to Recital 48 ECD, the Directive should not be interpreted as prohibiting Member States from requiring ‘service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.’ Thus, not only injunctions, but duties of care might also serve to require that intermediaries take measures against the infringement of copyright and related rights.

It should be noted that how liability for failure to abide by a duty of care would in practice differ from liability for third party infringement is not entirely clear. The problem arises in view of the fact that, as shall be seen below (Section 4.4), a number of Member States take a negligence-based approach to accessory liability. Confusingly, this rests precisely on the imposition of duties of care on intermediaries to take action against copyright infringement by third parties. Indeed, given that the purpose of duties of care is to extract liability from those who violate them, how their imposition can be compatible with an immunity against liability is not entirely clear. Additional complications also arise. Edwards observes that the extension of the permission granted by Recital 48 beyond mere removal and disabling duties to potential obligations to *ex ante* ‘prevent’ illegality is particularly questionable, as it would ‘drive a coach and horses through the “notice and take down” limited liability paradigm’.<sup>50</sup> The uneasy relationship between preventive obligations and Article 15’s prohibition on ‘general obligations actively to seek facts or circumstances indicating illegal activity’ is further cause for concern.<sup>51</sup> Bagshaw explains

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48 Article 12(3), 13(2), 14(3) E-Commerce Directive. See also Recital 45 ECD. Article 18 also requires that Member States ‘ensure that court actions available under national law concerning information society services’ activities allow for the rapid adoption of measures, including interim injunctions, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.’

49 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L 157/45 (Enforcement Directive).

50 L Edwards, ‘The Fall and Rise of Intermediary Liability Online’ in L Edwards and C Waelde (eds.), *Law and the Internet* (3rd ed, Hart Publishing 2009) 65.

51 Commission Staff Working Paper, ‘Online Services, Including E-Commerce, in the Single Market’, SEC(2011) 1641 final, 11 January 2012, p. 47. See also Submission of the Electronic Frontier Foundation on the Consultation on the EU E-Commerce Directive (2000/31/EC), p. 8, available at: [www.eff.org](http://www.eff.org).

this well: 'a duty to detect illegality makes little sense unless it *precedes* awareness of facts which already make illegality apparent', while 'it is difficult to understand a duty to detect which is not a duty to seek facts.'<sup>52</sup>

Precisely for this reason it has been argued that the duties of care of Recital 48 on should be read as extending only to public law, e.g. in aid of crime prevention or national security. This would leave private law, including copyright law, out of their reach.<sup>53</sup> A laxer interpretation might alternatively see the provision as limited only to duties to take measures only tangentially relevant to the content stored and that respect Article 15. In other words, while Member States should be free to impose duties of care of any kind on intermediaries, as long as the conditions of Article 14 have been abided by, no liability can result for information stored *per se*, even if the intermediary can be held liable for e.g. not informing the competent authorities of an infringement brought to their attention.<sup>54</sup>

In any case, while the two limitations in favour of injunctions and duties of care do weaken platforms' defences against enforcement obligations, it is important to understand that neither all injunctive orders nor all duties of care are fair game: a significant limitation on the permissible scope of both is imposed by Article 15 of the E-Commerce Directive and the prohibition on general obligations that this establishes. The key term in this regard can be found in the word 'general'. Recital 47 of the E-Commerce Directive provides interpretative hints on this point by contrasting 'general monitoring obligation' with monitoring obligations imposed in a 'specific case' that are issued 'by national authorities in accordance with national legislation'. Further than this, clarification has been left with the courts.

The CJEU has addressed the matter in three successive judgements: *L'Oréal v eBay* and the twin cases of *SABAM v Scarlet* and *SABAM v Netlog*. In all three judgements, the Court's analysis was short, but succinct. In *L'Oréal*, the Court, in broadly outlining what kind of measures may be imposed on a provider for the prevention of future infringements, limited itself to simply stating that the active monitoring of all the data of each of an intermediary's customers in order to prevent a future infringement of copyright via that provider's website is excluded by dint of Article 15 of the E-Commerce Directive.<sup>55</sup> *Scarlet* and *Netlog* built up on this edict. Both cases concerned injunctive orders imposing filtering obligations on intermediaries for the purposes of copyright enforcement. In both, the requested filtering system was an exceptionally broad one, which would apply for all the intermediary's customers, *in abstracto* and as a preventive measure, exclusively at the cost of that intermediary and for an unlimited period of time. While *Scarlet* concerned an internet access provider, *Netlog* involved a host. Here, the Court observed that the filtering in question would oblige the provider to identify, within all files stored on its systems by its users, those like to contain infringements. On this basis, it concluded that the requested measure would involve the active observation of almost all the information stored using the provider's services by almost all of the provider's users. It would thus involve active monitoring of all the data related to all users, making it – in line with the principle set out in *L'Oréal* – a violation of the general monitoring prohibition.

It is worth noting that in all three cases, the Court found additional confirmation for its conclusions in Article 3 of the Enforcement Directive, according to which measures taken for the enforcement of intellectual property rights must be fair, proportionate and not excessively costly.

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52 R Bagshaw, 'Downloading Torts: An English Introduction to On-Line Torts' in H Snijders and S Weatherill, *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003) 72.

53 L Edwards, 'The Problem of Intermediary Service Provider Liability' in L Edwards, *The New Legal Framework for e-Commerce in Europe* (Hart Publishing 2005), pp. 114-115. See also: R Bagshaw, 'Downloading Torts: An English Introduction to On-Line Torts' in H Snijders and S Weatherill, *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003) 72; L Edwards, 'The Fall and Rise of Intermediary Liability Online' in L Edwards and C Waelde (eds.), *Law and the Internet* (3rd ed, Hart Publishing 2009) 65.

54 On this, see Article 15(2) of the E-Commerce Directive.

55 CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para. 139.

## 4.2. Striking a 'Fair Balance' between Fundamental Rights

Does Article 15 ECD mean that filtering obligations are out of bounds for all intermediaries? Significantly, obligations imposed on intermediaries when offering services other than those identified in Articles 12-14 are not affected by the general monitoring order prohibition of Article 15 of the E-Commerce Directive. Yet, this does not mean that the imposition of obligations on intermediaries that do not enjoy immunity (either because they offer services not covered by the safe harbours, such as search services, or because they do not satisfy the conditions of the corresponding safe harbour) is compatible with EU law. As subsequent CJEU case law has demonstrated, beyond the secondary law of the directives, far stronger limitations on the measures that national law may impose on intermediaries may also arise directly from primary EU law and in particular the Charter of Fundamental Rights of the European Union.

The leading CJEU judgement in the area is the 2008 one of *Promusicae*.<sup>56</sup> Here, the CJEU was called upon to clarify whether EU law requires that Member States impose a duty on internet access providers to retain and communicate, in the context of civil proceedings, the personal data of their users in order to ensure an effective protection of copyright. The Court found that, in principle, no such obligation exists. In view of the paucity of guidance on this topic in the directives,<sup>57</sup> the CJEU then turned to the only tool available in its interpretative arsenal: the law of fundamental rights. For this purpose, it interpreted the circumstances of the case as an instance of a clash between fundamental rights. The Court then stated that, in transposing the directives and implementing the transposing measures, 'the Member States must [...] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order'.<sup>58</sup>

In follow-up case law, the CJEU has confirmed this 'fair balance' approach. As a general rule, in cases of intermediary liability the CJEU sets up a tripartite dynamic. This distinguishes between the fundamental rights of copyright holders, intermediaries and internet users. For the first, (a) the right to intellectual property (Article 17(2) Charter) is at stake, occasionally bolstered by (b) the right to effective judicial protection (Article 47 Charter). Depending on the particular circumstances of the case, these may collide with (c) the intermediaries' freedom to conduct a business (Article 16 Charter). The rights of end-users to (d) the protection of their personal data (Article 8 Charter), (e) their private life (Article 7 Charter) and (f) their freedom to receive and impart information (Article 11 Charter) must also be taken into account. This deconstruction has proved productive. On its basis, the principle of 'fair balance' has subsequently been applied to a series of intellectual property cases where Article 15 of the E-Commerce Directive would arguably have sufficed. While the application of the 'fair balance' approach in *Promusicae* yielded no concrete guidance, the rulings that followed have increasingly offered useful insights.

The trend is firstly evident with *L'Oréal v eBay*, a trademark case and the earliest CJEU judgement on injunctions obliging a host service provider to take action against infringement. Here, the Court confirmed that such injunctions may be imposed on providers, regardless of any liability of their own. It then repeated its 'fair balance' instruction, noting that measures that do not successfully strike it may not be required. As with *Promusicae*, no guidance on how to achieve the 'fair balance' was given. At the same time, the Court did provide two examples of measures that would fit the bill: (a) the suspension of the primary perpetrator, so as to prevent future infringements of the same trademark by the same user; and (b) measures that make it easier to identify the intermediary's end-users, as long as these persons are operating in the course of trade and not in a private matter.<sup>59</sup> Both of these were, in this way, established as measures compatible with EU law that may be imposed on intermediaries, at least through the vehicle of court orders.

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<sup>56</sup> CJEU, Case C-275/06, *Promusicae v Telefónica de España*, 29 January 2008.

<sup>57</sup> Aside from the E-Commerce, Copyright and Enforcement Directives, the CJEU examined the relevant provisions in the E-Privacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37) and the Data Protection Directive (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] OJ L281/31).

<sup>58</sup> See CJEU, Case C-275/06, *Promusicae v Telefónica de España*, 29 January 2008, para 68.

<sup>59</sup> See CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, para. 109-110, para. 135-144.

The notion of a 'fair balance' was also revisited in the *Sabam* cases on filtering. As seen earlier, in both these cases the Court first found that filtering would violate Article 15 ECD. The Court then, however, went on to note that such a burdensome request would also be incapable of striking a 'fair balance' between all relevant fundamental rights. The CJEU observed that, in view of its expansive nature, the system at issue would impose too complex, costly and permanent burdens on the intermediary's business model, thereby violating Article 16 of the Charter.<sup>60</sup> In addition, it would require the identification, systematic analysis and processing information concerning of all users, including non-infringing ones. Given that that information allows for the identification of those users and therefore constitutes protected personal data, the measure would also infringe Article 8 of the Charter.<sup>61</sup> Finally, it would run the risk of not distinguishing adequately between lawful and unlawful content, thus potentially leading to the blocking of lawful communications and therefore bringing it out of line with Article 11 of the Charter. In this regard, the Court emphasised the complicated and fragmented nature of European copyright law that makes the accurate identification of infringements difficult.<sup>62</sup> As a result, the Court rejected the contested measure as incompatible with the Charter.

Finally, in *UPC Telekabel Wien*,<sup>63</sup> the CJEU considered the imposition of an injunction ordering an internet access provider to block access to copyright infringing content. Moving along by now well-trodden paths, the Luxembourg Court held that blocking injunctions imposed on an intermediary in the enforcement of copyright will strike a 'fair balance' with that intermediary's freedom to conduct its business, provided that the intermediary is given the right to choose the measure it will apply and is able to avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable measures.<sup>64</sup> The measures taken must, according to the CJEU, also take users' rights to freedom of expression into account. To this end, they must be 'strictly targeted, in the sense that they must serve to bring an end to a third party's infringement, without thereby affecting internet users from accessing lawful information'.<sup>65</sup> In order to ensure this 'fair balance', the measures adopted must:

- (i) [...] not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) [...] have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.<sup>66</sup>

Satisfying all these goals simultaneously will obviously require delicate legal navigation. At the same time, by introducing a bullet-point list of requirements, the CJEU has in *Telekabel* provided some tangible guidance on how to achieve the coveted 'fair balance'. National courts now have at least one set of balancing benchmarks, however mutable and dependent on the facts of the particular case those might be.

Indeed, a clear line of case law appears to be emerging in this regard: in the recent case of *McFadden*, this time concentrating on open Wi-Fi providers, the Court applied the same criteria-driven analysis of 'fair balance'.<sup>67</sup> In that case, the Court found that, although an obligation to terminate the network or examine all communications passing through it would not be possible,<sup>68</sup> requiring that the provider password-protect its network would strike a 'fair balance', as long as end-users are obliged to reveal their identity in order to obtain the password.<sup>69</sup> Indeed,

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60 See CJEU, Case C-70/10, *Scarlet Extended v SABAM*, 24 November 2011, para. 46-49 and CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 44-46.

61 See CJEU, Case C-70/10, *Scarlet Extended v SABAM*, 24 November 2011, para. 50-51 and CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 48-49.

62 See CJEU, Case C-70/10, *Scarlet Extended v SABAM*, 24 November 2011, para. 50 and 52 and CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 48 and 50.

63 CJEU, Case C-314/12 *UPC Telekabel Wien*, 27 March 2014.

64 CJEU, Case C-314/12 *UPC Telekabel Wien*, 27 March 2014, para. 48-54.

65 CJEU, Case C-314/12 *UPC Telekabel Wien*, 27 March 2014, para. 56.

66 CJEU, Case C-314/12 *UPC Telekabel Wien*, 27 March 2014, para. 64.

67 CJEU, C-484/14, *McFadden*, 15 September 2016, para. 95.

68 CJEU, C-484/14, *McFadden*, 15 September 2016, para. 87-89.

69 CJEU, C-484/14, *McFadden*, 15 September 2016, para. 96.

according to the Court, such an approach would preserve the 'essence' of both the freedom to conduct a business and the freedom of expression. It should be noted that, although both *Telekabel* and *McFadden* concerned internet access providers and not hosting providers, through the analysis they provide they nevertheless provide useful insights into how copyright can be fairly balanced against competing fundamental rights.<sup>70</sup>

### 4.3. The EU Rules on Copyright Infringement

Having now sketched out the existing EU rules on intermediary liability, it is necessary to turn to the rules on copyright infringement. This is because, regardless of the scope of the protection they convey, the safe harbours of the E-Commerce Directive apply only in a negative fashion, i.e. only instruct Member States as to when liability cannot be imposed on intermediaries. Their provisions offer no information about when such liability *should* be applied. As such they only partly regulate the liability of internet intermediaries for the copyright infringements of their users in the EU: where the immunities do not apply, before an intermediary can be held liable, it is necessary to examine whether it has in fact infringed or participated in the infringement of an exclusive right of the holder of copyright or related rights.

The first step in this exercise will be the harmonised EU rules on copyright and related rights. A series of 10 different EU directives apply to the area. The most significant of these is the so-called 'Copyright' or 'Infosoc' Directive, i.e. Directive 2001/29/EC. This harmonises some – although not all of – the exclusive rights that the owners of copyright and related rights enjoy. Among these can be found the rights of 'communication to the public' and 'making available'. A distinction is worth making here between the areas of copyright and related rights. According to Article 3(1) of the Infosoc Directive, authors of copyright-protected works enjoy the exclusive right to authorise or prohibit any 'communication to the public of their works, by wire or wireless means'. As the provision makes clear, this right should be understood as also including the 'making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'. By contrast, for the holders of related rights, protection under the Infosoc Directive is more circumscribed: Article 3(2) of the Directive bypasses the broader notion of 'communication to the public' and limits itself only to the provision of a right of 'making available to the public'. This being said, related rights' owners do benefit from the right of communication to the public, as this has been codified in Article 8 of the Rental Right Directive.<sup>71</sup>

The rights of communication to the public and making available to the public are two of the exclusive rights of the owners of copyright and related rights' that are most pertinent in cases of uploading by end-users of copyright-protected works onto online platforms.<sup>72</sup> They are moreover the rights explicitly mentioned by the new Proposal as relevant for the legal qualification of the actions of the online platforms this targets.<sup>73</sup> For the purposes of this study, their meaning is therefore worth carefully dissecting.

It should be noted that commentators had for a while worried that the notions of communication to the public as applicable to copyright owners and related right owners may diverge in meaning.<sup>74</sup> However in its recent *GS Media* case, the CJEU confirmed that the two should be interpreted as having the same scope.<sup>75</sup> With this in

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70 For more on the notion of a 'fair balance' as it applies to internet intermediaries, see C Angelopoulos & S Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) *Journal of Media Law* 266.

71 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property (codified version) [2006] OJ L376/28. See also Article 4 of Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission [1993] OJ L248/ 15.

72 The reproduction right is also relevant. However, this is not mentioned in the text of the Proposal and will therefore not be touched upon in this study.

73 See Recital 38 of the Proposal.

74 S Bechtold in T Dreier & P B Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2016) 445.

75 CJEU, C-160/14, *GS Media*, 8 September 2016, para. 33.

mind, the paragraphs below shall approach 'communication to the public' and 'making available' as unitary notions, on the basis of case law related to both types of rights. As 'communication to the public' is the broader of the two rights, the analysis shall concentrate primarily on this. First, the analysis shall examine the legislative texts (Section 4.3.1.) and then it will move on to the case law of the CJEU (Section 4.3.2.).

### 4.3.1. 'Communication to the Public' in the Directives

What constitutes an act of 'communication to the public' for the purposes of EU copyright law? Neither Article 3(1) of the Infosoc Directive nor Article 8 of the Rental Right Directive provide a clear definition. Nevertheless, indications as to the correct interpretation of the right can be gleaned from elsewhere in the Infosoc Directive's text.

Pertinent information in this regard is first offered by Recital 23 of the Directive. This confirms that the right of communication to the public should be understood in a broad sense, as covering all communications to the public not present at the place where the communication originates, including any such transmissions and retransmissions by wire or wireless means. As the *quasi-acquis*<sup>76</sup> of the international treaties confirms, the decisive factor here is whether the public to which the communication is transmitted is located in a place different from the place where the communication originates. As such, it will exclude any local communications, such as public performances, recitations and displays. On the other hand, it will include broadcasting, cable and – of course – online transmissions. According to Bechtold, even a transmission of a public performance via technical means to an audience in an adjacent room may qualify.<sup>77</sup>

Importantly, this broad definition is circumscribed somewhat by Recital 27 of the Infosoc Directive. According to this, the 'mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.' The provision finds its origins in the 'Agreed Statement concerning Article 8' of the WIPO Copyright Treaty which uses almost identical wording.

It is worth noting that exactly what kind of act would qualify as a 'mere provision of physical facilities' has given rise to discussion. A literal interpretation would suggest a limitation only to the provision of hardware, as opposed to acts of installation of the physical facilities or of the provision of services that use them. This would exclude from the limitation of Recital 27 transmission services that enable the 'pumping' of a signal through a network. Nevertheless, Koelman and Hugenholtz had, in the early days of the debate, suggested that the phrase was intended to encompass the services of internet intermediaries as well.<sup>78</sup> As we shall see below, subsequently, the case law of the CJEU seems to have opted for a narrower interpretation.

In any case, as the wording of Article 3(1) of the Infosoc Directive makes clear, the right of communication to the public includes the right of making available to the public. Making available differs from other types of communication to the public in that it enables, once it is completed, members of the public to access the work from a place and at a time individually chosen by them, i.e. on demand.<sup>79</sup> Thus, the right of communication to the public covers both so-called 'linear' and 'non-linear' services, while simultaneously distinguishing between the two. The first are those that, along a more traditional paradigm, 'push' content to a user that is not granted individual control over when and where to access the work. This might take the form of, for example, regular television and radio transmissions, as well as their more modern equivalents of webcasting and internet radio services. Non-linear services, by contrast, refer to user-initiated modes of communication, such as offers to download a work from a public website or online streaming services that allow the consumer to 'pull' content at her convenience. It

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76 M van Eechoud *et al.*, 'The Recasting of Copyright and Related Rights for the Knowledge Economy', final report, Institute for Information Law (iVir), University of Amsterdam, November 2006, p. 31.

77 S Bechtold in T Dreier & P B Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2016) 442.

78 K Koelman & P B Hugenholtz, 'Online Service Provider Liability for Copyright Infringement', Workshop on Service Provider Liability, Geneva, 9 and 10 December 1999.

79 CJEU, C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, 15 March 2012. See also case C-279/13, *C More Entertainment*, 26 March 2015.



is thus clear that the uploading of music or video files onto Web 2.0 sharing websites is covered by the right. At the same time, pertinently for the purposes of this study, whether it is only the user that posts such content who can be understood as engaging in the relevant act or whether the intermediary which provides the services that enable that posting is also 'making available to the public' remains, in the directives, undefined.

Further than the information provided above, not much can be divined from the text of Directive on the definition of the notion of a 'communication to the public'. Instead, the autonomous and uniform EU understanding of the notion has been unveiled gradually through a series of cases handed down by the CJEU.<sup>80</sup> In undertaking this exercise, the CJEU has had regard to the context of each case, as well as the objectives pursued by the Directive.<sup>81</sup> In this regard, it has placed especial emphasis on Recitals 9 and 10 of the Infosoc Directive, according to which a high level of protection must be afforded to right-holders, allowing them to obtain an appropriate reward for the use of their content. In addition, as Recitals 3 and 10 of the Directive make clear and as the Court has recently noted in *GS Media*, the notion of a 'fair balance' is again here relevant. As a result, in addition to the interests of right-holders, the protection of both the general interest and the interests and fundamental rights of end-users, in particular their freedom of expression and of information, must also be taken into account.<sup>82</sup>

#### 4.3.2. The Interpretative Case Law of the CJEU

The seminal CJEU judgement in the area of 'communication to the public' is *SGAE v Rafael Hoteles*.<sup>83</sup> This was a case concerning the use of television sets and the playing of ambient music by a hotelier within individual hotel rooms. In its ruling, the CJEU concluded that an act of communication to the public requires an act of intervention: the hotel, it was decreed, was an 'organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers' – in other words, as the Court has later confirmed, its intervention was a 'deliberate' and 'indispensable' one.<sup>84</sup> The Court accepted that under Recital 27 of the Infosoc Directive the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication. This could cover, besides the hotel, companies specialising in the sale or hire of television sets. In the Court's view however, the installation of such facilities is a different matter. As a result, if, by means of television sets installed, a hotel distributes a signal to customers staying in its rooms, then communication to the public must be found to have taken place, irrespective of the technique used to transmit that signal. In this way, as noted above, the CJEU has indicated that the notion of 'provision of physical facilities' should be interpreted literally.

It is worth recalling that the Opinion delivered by AG Sharpston on the case had reached the opposite conclusion,<sup>85</sup> while the Court's approach has been heavily criticised. In a joint declaration, leading European copyright scholars described it as a 'logical mistake', that converts one of the characteristics of the act of communication to the public into a redefinition of its meaning; if every intervention that gave access to a work were to be characterised as a communication, the right of communication to the public would be transformed into an 'access right', covering such acts as the running of a bookshop or a newsagent that allows members of the public onto its premises.<sup>86</sup> As an alternative, the scholars puts forth the concept of a 'transmission' as a better substitute. This interpretation has the support of both Recital 23 of the Infosoc Directive and the *travaux préparatoires* for the WIPO Internet Treaties, where it is stated that a communication always involves a

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80 CJEU, C-306/05, *SGAE v Rafael Hoteles*, 7 December 2006, para. 31.

81 CJEU, C-306/05, *SGAE v Rafael Hoteles*, 7 December 2006, para. 34; CJEU, C-160/14, *GS Media*, 8 September 2016, para. 29.

82 CJEU, C-160/15, *GS Media*, 8 September 2016, para. 31.

83 CJEU, C-306/05, *SGAE v Rafael Hoteles*, 7 December 2006.

84 CJEU, C-162/10, *Phonographic Performance (Ireland)*, 15 March 2012, para. 40.

85 CJEU, Opinion of Advocate General Sharpston, case C-306/05, *SGAE v Rafael Hoteles*, 13 July 2006, para. 29.

86 European Copyright Society, 'Opinion on the Reference to the CJEU in case C-466/12 *Svensson*', University of Cambridge Legal Studies Research Paper Series No. 6/2013, 15 February 2013, p. 6.

transmission, so that the two terms can be regarded as synonymous and interchangeable.<sup>87</sup> The national laws of the Member States have also generally understood 'communication to the public' to mean 'transmission' in their transpositions of the Infosoc Directive.<sup>88</sup>

In any case, having accepted the existence of a 'communication', *Rafael Hoteles* focuses instead heavily on the notion of 'the public'. The Infosoc Directive itself includes no indication of how many persons are necessary to compose a 'public' or what type of relationship may exist between them. However, drawing on its previous case law,<sup>89</sup> as well as interpretative WIPO documents, the CJEU concluded that the term refers to an 'indeterminate number' of users. On this basis, it held that the large number of successive viewers in hotel rooms, as well as of those who are present in the common areas of the hotel, suffice to form a 'public' within the meaning of the Directive. 'It matters little', stated the Court, 'that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.' Instead, the crucial factor was whether the persons to whom the work is communicated were considered by their author when authorising the broadcast, thereby comprising a 'new public': 'if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme [...] no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public [that] falls within the scope of the author's exclusive authorisation right.'

In a series of later cases the CJEU confirmed the *Rafael Hoteles* 'new public' doctrine. So, in *Football Association Premier League (FAPL)*,<sup>90</sup> *Divani Akropolis*<sup>91</sup> and *Airfield*<sup>92</sup> the Court re-asserted its opinion that, in order for there to be a 'communication to the public' within the meaning of Article 3(1) of the Infosoc Directive, it is necessary for the work broadcast to be transmitted to a 'new public'. It defined this as a public which was not taken into account by the authors of the protected works when they authorised the use of the work by communication to the public. Subsequent case law has also provided greater insight into the term 'public' more generally. So, in *Del Corso*<sup>93</sup> and *Phonographic Performance (Ireland)*,<sup>94</sup> the Court, referencing *SGAE*, noted that the term refers to an indeterminate number of potential users, thereby excluding 'specific individuals belonging to a private group'. A 'public' must also consist of a 'fairly large number of people'. This means that the notion encompasses a certain *de minimis* threshold, so that groups of persons which are too small or insignificant should not be understood as sufficient. On the other hand, as *SGAE* already indicated, in order to determine whether the public is large enough, account must be taken of the cumulative effects of making the content available potential audiences. As a result, it isn't just sufficient to know only how many persons have access to the same work at the same time, but also how many of them have access to it in succession.

As an additional aside, *FAPL* also acknowledged that it is not irrelevant to the finding of a 'communication to the public' that the 'communication' is of a profit-making nature.<sup>95</sup>

Interestingly, in *ITV Broadcasting and Others*,<sup>96</sup> the 'new public' doctrine appeared to reach its limits. Here, clarification was requested from the CJEU as to whether right-holders can prohibit the retransmission of a terrestrial television broadcast over the internet though live online streaming. The defendant, TVCatchup, had contended that no 'new public' was introduced, as the recipients of the retransmission were already legally entitled to follow the televised broadcast by virtue of their television license. The Court disagreed. It held that,

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87 Records of the Diplomatic Conference on Certain Copyright and Neighbouring Right Questions, Geneva 1996, Vol 1, (Geneva: WIPO, 1999) 206.

88 European Copyright Society, 'Opinion on the Reference to the CJEU in case C-466/12 *Svensson*', University of Cambridge Legal Studies Research Paper Series No. 6/2013, 15 February 2013, pp. 9-10.

89 CJEU, C-89/04, *Mediakabel*, 2 June 2005, para. 30 and case C-192/04 *Lagardère Active Broadcast*, 14 July 2005, para. 31.

90 CJEU, joined cases C-403/08 and C-429/08, *Football Association Premier League v Karen Murphy*, 4 October 2011, para 197.

91 CJEU, C-136/09, *Organismos Sillogikis Diacheirisis Dimiourgou Theatrikou kai Optikoakoustikon Ergon v Divani Akropolis*, 18 March 2010, para. 38.

92 CJEU, joined cases C-431/09 and C-432/09, *Airfield*, 13 October 2011, para. 72.

93 CJEU, C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso*, 15 March 2012, para. 83-87.

94 CJEU, C-162/10, *Phonographic Performance (Ireland)*, 15 March 2012, para. 33-35.

95 CJEU, joined cases C-403/08 and C-429/08, *Football Association Premier League v Karen Murphy*, 4 October 2011, para. 204.

96 CJEU, C-607/11, *ITV Broadcasting and Others*, 7 March 2013.

given that the providers of the streams used technical means different from those of the original communication, the communication right had in fact been breached, even though the subscribers to the streaming services were within the area of reception of that terrestrial television broadcast and could lawfully receive the broadcast on a television receiver. Instead, according to the Court, as a result of the different technical means employed, there was no longer any need to examine the requirement that there be a 'new public', as each of the two transmissions had to be authorised individually.<sup>97</sup> In this way, a dual system for identifying acts of 'communication' was set up: to infringe the communication to the public right, a communication has to either reach a 'new public' or use 'other technical means' from the original communication undertaken by the right-holder.

The Court's most recent case law on the right of communication to the public is on the legality of providing hyperlinks. The first decision handed down in the area was the *Svensson* case from 2014.<sup>98</sup> In its judgement, the Court summarised its previous findings by noting that 'the concept of communication to the public includes two cumulative criteria, namely, an "act of communication" of a work and the communication of that work to a "public"'. With regard to the first of these, the Court found that the act of communication must be construed broadly. The Court noted that 'the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works.' On this basis, it concluded that such linking must be considered to be making available and therefore constitute an act of communication.

What foiled the finding of an infringement of the right of communication to the public in *Svensson* was instead the second criterion of a 'new public'. On the basis of its previous rulings, the Court emphasised that such a public must be one that was 'not taken into account by the copyright holders when they authorised the initial communication to the public'. It concluded that making a work available by means of a clickable link to works freely available on another website cannot be viewed as a communication to a 'new public', as long as the public targeted by the initial communication consists of all potential visitors to the site concerned. The Court also stated that this outcome would by no means be altered if the link were instead an embedded one that gave the impression that the work was appearing on the site on which it was found, while in fact it came from another site. The legality of such 'inline linking' was later confirmed again in *Bestwater*.<sup>99</sup>

What would make a difference, according to *Svensson*, to the legal qualification of hyperlinking would be whether or not the link makes it possible for the users of the site on which it appears to circumvent any restrictions put in place by the site on which the protected content is posted, in order to restrict public access to that work to that site's subscribers only. Where that is the case, the link will constitute an intervention without which those users would not have been able to access the works transmitted. As a result, its users are transformed into a 'new public', communication to which requires authorisation. Intriguingly, according to the Court, the same would hold true even if the work were simply no longer available to the public on the site on which it was initially communicated or if new restrictions were to be introduced to that site, after it had already been made accessible through linking at another location without the right-holder's authorisation. This adds some uncertainty to the matter, as it suggests that the legality of linking hangs on the right-holder's future actions, placing linkers who haven't obtained explicit authorisation in a precarious legal position.

It should be noted that the CJEU's analysis of hyperlinking is highly controversial and has been heavily criticised. The European Copyright Society in its opinion on the case argued that hyperlinking should not be encased within the right of communication to the public, regardless of whether or not the public is a new one, as hyperlinks fail to communicate the work as such. Instead, they merely provide the viewer with information as to the location of a page that the user can then choose to access or not.<sup>100</sup> As such, hyperlinks are more akin to mere citations of a work, such as one would find in a footnote.<sup>101</sup> In any case, the ruling was confirmed in September 2016, by the

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97 See also CJEU, C-466/12, *Svensson and Others*, 13 February 2014, para. 24.

98 CJEU, C-466/12, *Svensson and Others*, 13 February 2014.

99 CJEU, C-348/13, *Bestwater*, 21 October 2014.

100 European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*', University of Cambridge Legal Studies Research Paper Series No. 6/2013, 15 February 2013. For additional criticism of *Svensson*, see E Arezzo, 'Hyperlinks and Making Available in the European Union – What Future for the Internet after *Svensson*?' (2014) 45(5) *International Review of Intellectual Property and Competition Law* (IIC) 524.

101 T Aplin, *Copyright Law in the Digital Society* (Hart Publishing 2005) 151.

most recent CJEU 'communication to the public' case, *GS Media*.<sup>102</sup> While *Svensson* concerned itself with hyperlinks to works that have been made freely available online with the consent of the right-holder, *GS Media* moved on to the consideration of hyperlinks to works placed online without right-holder permission.

The Court began its analysis of the case by noting the importance of hyperlinks to the sound operation of the internet, as well as the importance of the internet to freedom of expression and information. It observed that, as a general rule, individuals who post such links do not know and cannot reasonably know whether a work has been published on the internet with or without the consent of the copyright holder. As a result, they cannot be said to have 'intervened in full knowledge of the consequences of their conduct in order to give customers access to a work illegally posted on the internet', as the Court's case law demands.

In a significant twist however, the Court then went on to declare that the situation will be entirely different where the poster knows or ought to know that the hyperlink she posted provides access to a work illegally placed on the internet. That could be the case, for example, where the poster was notified to that effect by the copyright holder. Moreover, according to the Court, when the posting of hyperlinks is carried out for profit, it can be expected that the poster carries out the necessary checks to ensure that the work concerned has not been illegally published on the website to which those hyperlinks lead. As a result, a rebuttable presumption of knowledge is created for profit-seeking hyperlinkers, so that, unless they can prove otherwise, it is taken as given that any links they post to infringing material are unlawful. It's worth noting that the judgement has caused an amount of confusion among copyright experts, given the traditional understanding of copyright as being a knowledge-independent strict liability tort.<sup>103</sup>

What does the above analysis tell us about the notion of 'communication to the public'? Through its case law in the area the CJEU is ponderously – and perhaps somewhat haphazardly – pulling together a harmonised European notion of a communication to the public for copyright. What the ultimate conclusion on what that notion looks like might be is still somewhat blurry. A picture is however emerging.

What is first of all clear from the case law is that the concept of 'communication to the public' includes two cumulative elements, namely, an 'act of communication' of a work and the communication of that work to a 'public'. With regard to the first, the 'indispensable role' played by the user through a "deliberate intervention" is relevant: the user must have intervened, in full knowledge of the consequences of her action, to give access to a protected work to persons who would not otherwise have been able to enjoy it. With regard to the second, the existence of a group of people of an indeterminate number (i.e. not a private group) that is of a certain, not insignificant size should be ascertained. Whether or not the members of this group are provided with access to the work at the same time or in succession of each other is immaterial. What is instead important is that either this 'public' be a 'new' one, i.e. one that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work, or that the communication take place through different technical means than those which they used. Finally, whether or not the 'communication' is of a profit-making nature should also be taken into account. In the case of hyperlinking, it can in fact be used to substantiate a finding of knowledge, a new requirement for infringement – but whether or not such knowledge is relevant beyond that limited area remains uncertain. Notably, all of these criteria are best seen as operating in a mutually supportive manner: as the Court observed in *Del Corso*, they should be approached as 'several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.'<sup>104</sup> As a result, an 'individual assessment' of the circumstances of each case of a communication to the public is necessary.<sup>105</sup>

Before moving on, it is worth mentioning that, according to Recital 32 of the Infoc Directive, the possible exceptions and limitations to the right of communication to the public are exhaustively enumerated in that text.

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102 CJEU, C-160/15, *GS Media*, 8 September 2016.

103 B Hanuz, 'Linking to unauthorized content after the CJEU *GS Media* decision' (2016) 11(12) *JIPLP* 879.

104 CJEU, C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso*, 15 March 2012, para. 79.

105 CJEU, C-162/10, *Phonographic Performance (Ireland)*, 15 March 2012, para. 29; CJEU, C-160/15, *GS Media*, 8 September 2016, para. 33.

These can be found in Article 5 of the Directive. This being said, the only mandatory defence introduced by the Directive is that of Article 5(1) on temporary and transient acts of reproduction. Due to the significant latitude left to the Member States with regard to the remaining exceptions, the extent of the harmonisation achieved in this manner is questionable.<sup>106</sup>

#### 4.4. National Approaches to Intermediary Liability in Copyright

Significantly, as the CJEU itself has emphasised, the EU contours of the notion of 'communication to the public' will be those applicable on the national level as well: Member States may not provide for a concept of communication to the public that includes a wider range of activities than those referred to in Article 3(1) of the Infosoc Directive.<sup>107</sup> The harmonisation of the notion of 'communication to the public' is thus 'full', meaning that if an act does not constitute a communication at EU level, national law cannot designate it one.<sup>108</sup> This being said, given the considerable uncertainty surrounding the notion in EU law, it is worth considering the interpretation it has received on the national level as well. This is particularly true with regard to intermediary liability: currently no indication on whether hosting providers are communicating the works uploaded by their users to the public has been given on the EU level.<sup>109</sup> In its stead, in the following, the approaches taken in three national jurisdictions shall briefly be examined: those of the UK (Section 4.4.1), France (Section 4.4.2) and Germany (Section 4.4.3).

In all three jurisdictions, two levels of liability are relevant: on the one hand, whether the platforms in question can be said to have communicated works to the public themselves ('direct liability') shall be analysed. On the other hand, whether other legal tools for holding them liable for the infringements of their users ('secondary' or 'accessory liability') exist shall also be considered. It should be noted that, as opposed to the 'full' harmonisation of primary liability, accessory liability in copyright remains entirely unharmonised on the EU level.

##### 4.4.1. The United Kingdom

Is a hosting service provider to be understood as communicating to the public works uploaded onto its platform by its users? Traditionally, the UK, in examining the liability of intermediaries for copyright infringements committed by its users, has side-stepped the 'direct liability' approach and instead focused primarily on the legal tools of 'accessory liability'. In England & Wales, those take two main forms: authorisation and joint tortfeasance. The case law on analogue providers of support in infringement has generally emphasised that a distinction must be made between these two concepts and that of 'mere facilitation': simply assisting another to commit an infringement cannot lead to a finding of accessory liability.<sup>110</sup>

Modern technological advancements have put pressures on this neat approach. Thus, whether a hosting service provider can be held liable for copyright infringements committed by its users using its services was considered in the pivotal *Newzbin (No. 1)* case.<sup>111</sup> This involved the liability of a Usenet indexer for locating, categorising and reassembling for download binary files containing copies of protected films. The High Court tackled the issue on three different fronts: whether *Newzbin* had communicated the infringed works itself to the public, whether it had authorised the end-users' infringements and whether it was a joint tortfeasor in those infringements. The court found against the defendants on all three counts. Particularly notable in the judgement is the finding of a direct infringement of the right of communication to the public. To achieve this effect, the High Court relied heavily on the CJEU's *SGAE* ruling to conclude that the defendant 'intervened in a highly material way to make the

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106 S Bechtold in T Dreier & P B Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2016) 453-454.

107 CJEU, C-466/12, *Svensson and Others*, 13 February 2014, para. 40-41.

108 S Bechtold in T Dreier & P B Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2016) 444-445.

109 Impact Assessment, p. 143-144.

110 *CBS Songs v. Amstrad* [1988] UKHL 15 (12 May 1988).

111 *Twentieth Century Fox Film Corporation v Newzbin* [2010] EWHC 608 (Ch) (29 March 2010).

claimant's films available to a new audience'. In this regard, the provision of what was described as a 'sophisticated technical and editorial system' to the provider's premium members was heavily emphasised, as was the fact that this system was offered upon payment of a weekly subscription free and in full knowledge of its consequences.<sup>112</sup>

Despite this positive outcome for right-holders, subsequent litigation in the UK has primarily bypassed the question of liability for damages and instead focused on the more expeditious route of injunctions against internet access providers. The relevant provision in this regard is s. 97A of the Copyright, Designs and Patents Act (CDPA), which implements Article 8(3) of the Infosoc Directive. On this basis, there has, in recent years, been an onslaught of orders issued by the High Court against such providers requiring that they block access for their customers to 'target websites' involved in copyright infringement.<sup>113</sup> According to the relevant case law, four conditions must apply before such orders may be issued: (a) the defendants must be service providers; (b) the defendants' users must have infringed the claimants' copyright; (c) the users must be using the defendants' services to do that; and (d) the defendants must have had actual knowledge of this.<sup>114</sup> As a result of condition (b), the courts have had the opportunity to rule on whether or not a series of different 'target websites' are infringing copyright.

The relevant case law has not to date had occasion to examine host service providers. Instead, it has primarily focused on two different types of websites: Bit-Torrent websites and streaming websites. In *Dramatico*, the first of these rulings and one that concerned of the famous file-sharing platform 'The Pirate Bay', somewhat surprisingly, the High Court did not address the possibility of direct infringement on the part of that platform at all. Instead, it declared that it was the site's users that were directly infringing both the copyright owners' reproduction right and their right of communication to the public. The Pirate Bay itself was found liable only for authorisation and joint tortfeasance – i.e. as an 'accessory' to its users' infringements.<sup>115</sup> In any case, this approach was abandoned in subsequent court orders targeting other BitTorrent sites, all of which found that these websites, in addition to having performed acts of authorisation and joint tortfeasance, had communicated to the public works shared by their users using their services.<sup>116</sup>

The same conclusions have also been reached in cases against streaming websites. Notably, these rulings have generally emphasised the active role played by the providers in the infringements. So, for example, in a case concerning the sports streaming website FirstRow1.eu, the High Court observed that that site employed moderators who vet and index the submissions made by third party streamers.<sup>117</sup> Moreover, whilst it gave the impression, by way of a 'submit your video' link, that it was open to the submission of streams by any member of the public, according to the court, in reality its submissions were instead sourced from a number of existing, trusted streamers. Similarly, in a case on streaming sites SolarMovie and Tube+, the court explained that the first used moderators to approve links to content that are supplied by registered users, while it was not clear to what extent links on the second were provided by users and to what extent by the operators of the website. Both sites were described as 'ensuring that the content is comprehensively categorised, referenced, moderated and searchable'.<sup>118</sup> Finally, in a third streaming case, the court noted that the target websites ('Viooz'; 'Megashare.info'; 'Zmovie.tw'; and 'Watch32.com') did not host the content themselves, but instead 'categorise, reference, moderate

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112 *Twentieth Century Fox Film Corporation v Newzbin* [2010] EWHC 608 (Ch) (29 March 2010), para. 125.

113 *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 1152 (Ch) (2 May 2012) (*Dramatico v Sky* (No.2)); *EMI Records v British Sky Broadcasting* [2013] EWHC 379 (Ch) (28 February 2013) (*EMI v Sky*), para. 21; *The Football Association Premier League v British Sky Broadcasting* [2013] EWHC 2058 (Ch) (16 July 2013) (*FAPL v Sky*), para. 24; *Paramount Home Entertainment International v British Sky Broadcasting* [2013] EWHC 3479 (Ch) (13 November 2013) (*Paramount v Sky* (No. 1)), para. 8; *Paramount Home Entertainment v British Sky Broadcasting* [2014] EWHC 937 (Ch) (18 February 2014) (*Paramount v Sky* (No. 2)), para. 12; *1967 v British Sky Broadcasting* [2014] EWHC 3444 (Ch) (23 October 2014) (*1967 v Sky*), para. 9; *Twentieth Century Fox Film Corporation v Sky UK* [2015] EWHC 1082 (Ch) (28 April 2015) (*Popcorn Time*), para. 25.

114 *Dramatico v Sky* (No.2), para. 4.

115 *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268 (Ch) (20 February 2012) (*Dramatico v Sky* (No.1)), para. 72-83.

116 See *EMI v Sky* and *1967 v Sky*.

117 *FAPL v Sky*, para. 15.

118 *Paramount v Sky* (No. 1), para. 5.

or otherwise provide editorial oversight' over it.<sup>119</sup> In all instances, in parallel to liability for communication to the public, liability for authorisation and joint tortfeasance was also established.

By contrast to these rulings, most recently, the High Court has refused to find that the operators of a series of websites that make BitTorrent application Popcorn Time available for download communicate works to the public. Authorisation was also denied in that case, although joint tortfeasance was established.<sup>120</sup>

It should be emphasised that the normative force of the above judgements is limited, at least for the purposes of this study. The decisions were issued by a first instance court and, more importantly, only examined the question of liability incidentally, as a requirement for issuing blocking orders against other persons. The fact that three cumulative layers of liability were generally established is also relevant in this regard: the judgements tended to emphasise that, even if they were incorrect in their conclusions on communication to the public, a finding of authorisation and joint tortfeasance would provide sufficient support for issuing a blocking order, that being the main objective of the rulings.<sup>121</sup> Moreover, whether the conclusions reached on BitTorrent and streaming sites can confidently be transplanted onto host service providers is questionable. Setting aside the fact that the technology involved is different, the fact that, for example, the streaming judgements all concerned websites that provided editorial support is highly pertinent to the findings of both direct and accessory liability. In the same way, the findings against the BitTorrent websites are unsurprising, given the staunch pro-piracy mentality that generally typifies the operators of such websites.

To date, no copyright case law exists in the UK on the liability of more mainstream providers. That being the case, it's worth noting that, in an earlier trademark case, the High Court had refused to find the much more sympathetic eBay liable, even as a mere joint tortfeasor in the infringements of its users. According to the judge, while eBay arguably facilitate the infringement of third parties' trademarks by sellers, know in a general sense that such infringements have occurred and are likely to continue to occur and make profit from such infringements, those circumstances are not on their own enough to substantiate a finding of accessory liability.<sup>122</sup>

#### 4.4.2. France

As opposed to that of the UK, French copyright law does not, on its face, seem to recognise any concept of 'accessory' copyright infringement. Instead, the general provisions of the French intellectual property code (*Code de la propriété intellectuelle* – CPI) have long been interpreted by the courts as applying, not just to the material acts of infringement themselves, but also to the provision of means for their commission.<sup>123</sup> As a result, what in the UK would be classified as separate acts of 'direct' and 'accessory' infringement and handled accordingly, in France may well receive identical legal treatment.<sup>124</sup>

In combination with the strict nature of copyright law, this approach creates considerable legal difficulty for internet intermediaries. It is worth noting that this has been heavily criticised by French copyright experts.<sup>125</sup> So, for example, Lucas and Lucas observe that 'the autonomy of copyright is not such as to justify a self-standing notion of infringement and a fault-independent tort which evades (both dangerously and pointlessly) the general

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119 *Paramount v Sky* (No. 2), para. 17.

120 *Popcorn Time* [2015] EWHC 1082 (Ch), para. 31-56.

121 See e.g. *EMI v Sky*, para. 46 or *FAPL v Sky*, para. 43.

122 *L'Oréal v eBay International* [2009] EWHC 1094 (Ch) (22 May 2009), para. 365-382.

123 J Ginsburg & Y Gaubiac, 'Contrefaçon, fourniture de moyens et faute: perspectives dans les systèmes de *common law* et civilistes à la suite des arrêts *Grokster et Kazaa*' (2006) 228 *Revue Internationale du Droit d'Auteur* 3, p. 48.

124 To give an analogue example, in a 1984 case, the *Cour de cassation* held a copy-shop directly liable for reproductions created by its customers using its photocopiers. See *Ranou-Graphie* (82-17016), *Cour de cassation*, 7 March 1984. See also J Ginsburg & Y Gaubiac, 'Contrefaçon, fourniture de moyens et faute: perspectives dans les systèmes de *common law* et civilistes à la suite des arrêts *Grokster et Kazaa*' (2006) 228 *Revue Internationale du Droit d'Auteur* 3, p. 50.

125 A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 893.

rules of civil liability'.<sup>126</sup> Azzi agrees, noting that it is one thing to say that a platform has contributed to the development of a *contrefaçon* (infringement) and another to assimilate them with *contrefacteurs* (infringers) themselves:<sup>127</sup> while for the primary offender a rule of strict liability appears quite reasonable, it becomes less easy to accept in the case of other parties involved in the distribution of a work,<sup>128</sup> particularly the multiple actors participating in the digital dissemination of works who do not directly contribute to an infringement and whose fault is harder to take as given.<sup>129</sup>

What does the above mean for hosting websites? As a result of its expansive interpretation of infringement, the French case law on intermediary liability has instead concentrated heavily on the conditions of the safe harbours.<sup>130</sup> Initially, the courts were strikingly demanding in this regard. So, for example, in June 2007 in *Lafesse v. MySpace*, the High Court of Paris (*Tribunal de grande instance (TGI) de Paris*) refused to allow the online social networking site MySpace the protection of Article 6-I-5 LCEN.<sup>131</sup> The court relied on the website's imposition of a pre-designed page set-up for users' personal accounts, in combination with the revenue-generating ads exhibited upon each visit, to establish MySpace not as a host (*hébergeur*), but as a publisher of content – an *éditeur*. A series of similar decisions were issued across the country around the same time.<sup>132</sup> As Section 4.1.1. has already indicated, this approach is contrary to the EU interpretation of the beneficiaries of the hosting safe harbour. Eventually, the *Cour de cassation*, under the influence of the CJEU's judgement in the *Google France* case, accordingly put an end to it.<sup>133</sup> In *Nord-Ouest v Dailymotion*,<sup>134</sup> that court acknowledging the irrelevance, for safe harbour purposes, of the both commercial exploitation and the provision of presentation frames and tools for the classification of content. Dailymotion was thus designated a host service provider eligible for immunity.

As a result, debate in France subsequently shifted to the conditions of the hosting safe harbour. Beginning in 2007, the lower courts began imposing obligations on host service providers requiring the monitoring of new publications, indexing or uploads or material previously notified as unlawful. For example, in *Tranquility Bay*<sup>135</sup> the Paris TGI held that, once a host provider had been informed of the existence of infringing copies of the film, it is under an obligation to implement any means necessary to avoid future dissemination of the same works as well. According to that judgement, speedy blocking of access to unlawful content upon first notification may exonerate hosts under the safe harbour on that single count, but failure to block subsequent uploading will disqualify them from safe harbour protection. In January 2011, the Paris Court of Appeal confirmed this line of thinking in a set of judgements that held Google Video liable for copyright infringement committed by users.<sup>136</sup> Article 15 ECD's prohibition on general monitoring obligations was deemed inoperable in that case, as the obligation was seen as specific to the contested content and notice as to its copyright status had already been given. In this way, the

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126 A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 901 (translation by the author).

127 T Azzi, 'La responsabilité des nouvelles plates-formes: éditeurs, hébergeurs ou autre voie?' in Colloque de l'IPRI, *Contrefaçon sur internet: les enjeux du droit d'auteur sur le WEB 2.0* (Litec 2009) 59-75.

128 A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 903.

129 A Lucas & H-J Lucas, *Traité de la Propriété Littéraire et Artistique* (2nd ed, Litec 2001) 606 et seq.

130 In France, these have been transposed as part of Article 6 of the *Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique* (Act No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy).

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

132 See also: *Tiscali Media c. Dargaud Lombard*, Lucky Comics, Cour d'appel de Paris, 7 June 2006.

Although from the field of trademarks, the Google Adwords cases, ultimately leading to the CJEU judgement by the same name, are good examples. See: *Louis Vuitton Malletier c. Google*, Tribunal de Grande Instance de Paris, 4 February 2005 and Cour d'appel de Paris, 28 June 2006; *GIFAM c. Google*, Tribunal de grande instance de Paris, 12 July 2006 and Cour d'appel de Paris, 1 February 2008; *Viatium et Luteciel c. Google*, Tribunal de grande instance de Nanterre, 13 October 2003 and Cour d'appel de Versailles, 10 March 2005; *CNRRH, Pierre Alexis T. c. Google*, Tribunal de grande instance de Nanterre, 14 December 2004 and Cour d'appel de Versailles, 23 March 2006.

133 Thus, the jurisprudence is often divided into two stages: "avant Google" and "après Google", see C Castets-Renaud, "Le renouveau de la responsabilité délictuelle des intermédiaires de l'internet" (2012) *Recueil Dalloz* 827.

134 *Sté Nord-Ouest c. Dailymotion* (09-67.896), Cour de cassation, 17 February 2011.

135 *SARL Zadig Productions, Jean-Robert Viallet et Mathieu Verboud c/ Sté Google et AFA*, Tribunal de grande instance de Paris, 19 October 2007.

136 *Google Inc. c/ Compagnie des phares et balises*, Cour d'appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011; *Google Inc. c/ Bac Films, The Factory*, Cour d'appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011; *Google Inc. c/ Bac Films, The Factory, Canal+*, Cour d'appel de Paris (Pôle 5, chambre 2) Arrêt du 14 janvier; *Google Inc. c/ Les Films de la Croisade, Goatworks Films*, Cour d'appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011.



'notice-and-take-down' system sketched out in Article 14 ECD was, at least for a time, was transformed in France into a judge-made 'notice-and-stay-down' regime, with an obligation to monitor derived directly from the Article 14's requirement of expeditious removal or disabling of access to allegedly infringing information upon obtaining knowledge or awareness.

The *Cour de cassation* finally rejected this extended liability regime with two rulings on '*L'affaire Clearstream*' and '*Les dissimulateurs*' on 12 July 2012.<sup>137</sup> According to that court, the judge-made 'stay-down' obligation cannot be observed by online providers without conducting prohibited general monitoring. Copyright holders must therefore monitor the content of websites themselves and notify intermediaries for each new infringement of protected content. Indeed, a duty to avoid future infringement is difficult to navigate around a ban on general monitoring by the intermediary. Although the multiple postings of identical content by the same or different users arguably renders the monitoring obligation specific, under such a scheme, if host service providers wish to avoid liability they are obliged, after receiving notification, to hunt down each and every remaining or reposted unauthorised copy. This however, can only be achieved by screening all (even non-infringing) content passing through its servers for infringing copies, i.e. practicing general monitoring. In fact, as notifications are likely to accumulate at a fast rate, the only practical way to achieve this would necessitate the use of fingerprinting or similar automatic filtering technology. The *prima facie* specificity of the obligation is therefore negated by the broad reach of the practical implications, which would affect the liability of all hosting services for all works for which a notification has been sent as to a single infringing copy.

In the meantime, the lower courts turned towards more convincing analyses. So, in May 2012, the TGI Paris rejected the liability of YouTube for the infringement of the rights of broadcaster TF1.<sup>138</sup> The court in that case found that YouTube, although undoubtedly a host, could not qualify for the hosting safe harbour, as it had only removed notified videos five days after their notification, a period of time not deemed sufficiently 'expeditious'. Nevertheless, no liability was ultimately found, as YouTube did not impose an entrance fee for access to its website. Given the payment of such a fee is a condition for protection of the related rights of broadcasting organisations, on which the claims were based under Article L.216-1 of the CPI, this meant that no infringement could be made out. It should be noted that the requirement is a curious one, given that no such limitation exists under EU law. Three months later a similar decision was handed down in *TF1 v Dailymotion*, but with a drastically different outcome.<sup>139</sup> Again, the court found that lack of expeditious removal disqualified Dailymotion from safe harbour protection. This time however, the court made no mention of fees and simply found that liability was established. The ruling was confirmed in 2014 by the Court of Appeal.<sup>140</sup>

It should be noted that the concept of accessory liability is not altogether absent from French law. If a case cannot be made out on the basis of the CPI, it may be possible to establish a fault of the intermediary on a different legal basis.<sup>141</sup> The most obvious option in this regard will usually be to apply the basic tort principles of Articles 1382 and 1383 of the *Code civil*, the French civil code. If an intermediary can be found to have violated a duty of care owed to the claimant on the basis of the general obligation these provisions entail, liability will arise. Interestingly, prior to the introduction of the safe harbours, this was in fact found to be the case in a number of non-copyright cases.<sup>142</sup>

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137 *La société Google France c/ La société Bach films*, Cour de cassation (Première chambre civile), Arrêt n° 831 du 12 juillet 2012; *La société Google France c/ La société Bac films*, Cour de cassation (Première chambre civile), Arrêt n° 828 du 12 juillet 2012.

138 *TF1 et autres c. YouTube*, Tribunal de grande instance de Paris, 29 May 2012.

139 *TF1 et autres c. Dailymotion*, Tribunal de grande instance de Paris, 13 September 2012.

140 *TF1 et autres c. Dailymotion*, Cour d'appel de Paris, 2 December 2014.

141 J Ginsburg & Y Gaubiac, 'Contrefaçon, fourniture de moyens et faute: perspectives dans les systèmes de *common law* et civilistes à la suite des arrêts *Grokster et Kazaa*' (2006) 228 *Revue Internationale du Droit d'Auteur* 3, p. 60.

142 *Madame L. c. les sociétés Multimania*, Tribunal de Grande Instance de Nanterre, 8 December 1999. For an analysis see A Lepage, *Libertés et droits fondamentaux à l'épreuve de l'internet* (Litec 2003) 283-286; *Estelle H. c. Valentin L. et Daniel*, Tribunal de grande instance de Paris, 9 June 1998.

Finally, as in the UK, in France as well, the avenue of injunctions has also been put to great use. Again, the main recipients of injunctive orders have been internet access providers, although orders have been issued against Google as well, with regard to its auto-complete function.<sup>143</sup>

#### 4.4.3. Germany

As opposed to France and even more so than in the UK, in Germany a finding of direct liability against an online host is very difficult to substantiate. So, for example, in a 2015 decision, the Court of Appeal of Hamburg found that YouTube could not be held directly liable for copyright infringements on its website.<sup>144</sup> As the court explained, the relevant act of making available to the public was committed, not by the platform, but by its users. The court further confirmed that the notion of 'neutrality' introduced by the CJEU in *L'Oréal* is relevant only to the applicability of the safe harbour, not to the substantiation of liability *per se*. A notion of 'adoption' ('*Zu-Eigen-Machen*') of third party content does exist in German law, following the German *Bundesgerichtshof's* (BGH) decision in *marions-kochbuch.de*.<sup>145</sup> In that case however, such 'adoption' was found to have occurred in view of the fact that the defendant website: (a) editorially checked and approved its contents; (b) tagged posted photos with its logo; and (c) required contributing users to grant extensive use rights to the site; while (d) the contents in question constituted the core value of the website.<sup>146</sup> In the case of YouTube, the Hamburg court make clear that the mere automatic structuring of content into categories through algorithms was not sufficient to substantiate any finding of 'adoption'.

Instead, in Germany, intermediary liability in copyright has been dealt with primarily through the idiosyncratic legal tool of *Störerhaftung*. This doctrine, often translated into English as 'disturber' or 'interferer' liability, allows for the issue of injunctive orders against intermediaries to take measures against infringement. Thus, importantly, it is not possible to claim against a *Störer* (interferer) for damages. In order to substantiate a finding of *Störerhaftung*, two main conditions need to be satisfied: the defendant must: (a) have adequately contributed to that infringement through; (b) the violation of a reasonable duty to review (*Prüfpflicht*).<sup>147</sup>

A duty to review is considered to be unreasonable if it would unduly impair the business of the alleged disturber.<sup>148</sup> On this basis, in its *Internetversteigerung* trademark trilogy,<sup>149</sup> the BGH established that an online auction platform does not have to examine each and every listing for trademark infringement prior to allowing its publication on its website, because such an obligation would jeopardise the site's entire business model. At the same time, it should be stressed that, under the so-called '*Kerntheorie*', the duty to review is not limited only to identical copies or copies offered by the same person, but extends to all other infringements similar in their core (*Kern*), i.e. all other easily recognisable future infringements of an essentially similar nature.<sup>150</sup> Thus, while the relevance of notice-and-take-down regimes are confined in Germany to cases where there has not previously been any similar infringement on the same platform, once the operator has been alerted to an infringement, as long as its business operations are not unreasonably impaired, it is expected to proceed with blocking obvious

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143 *Syndicat national de l'édition phonographique c. la société Google France* (11-20.358), Cour de cassation, 12 July 2012; *La société civile des producteurs phonographiques (SCPP) c. la société Orange*, Tribunal de grande instance de Paris, 4 December 2014; *Association des producteurs de cinema (APC) et autres c. Auchan Telecom et autres*, Tribunal de Grande Instance de, 28 November 2013.

144 OLG Hamburg, 1 July 2015, 5 U 87/12. For another case on YouTube as a *Störer* see: OLG München, 17 November 2011, 29 U 3496/11.

145 BGH, *marions-kochbuch.de*, 12 November 2009, I ZR 166/07.

146 J Becher, 'Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA' (2010) master thesis, Bucerius Law School/WHU Otto Beisheim School of Management.

147 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 MJ Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

148 T Hoeren & V Bensinger, *Haftung im Internet – Die Neue Rechtslage* (De Gruyter 2014) 366.

149 BGH, *Internetversteigerung I*, 11 March 2004, I ZR 304/01; BGH, *Internetversteigerung II*, 19 April 2007, I ZR 35/04; BGH, *Internetversteigerung III*, 30 April 2008, I ZR 73/05.

150 J Bornkamm, 'E-Commerce Directive vs. IP Rights Enforcement – Legal Balance Achieved?' (2007) GRUR Int 642.

re-occurrences without waiting for right-holder notification.<sup>151</sup> Essentially therefore, the doctrine amounts to the same – if not a slightly broader – result as the French judge-made ‘notice-and-stay-down’ regime.

This expansive interpretation has had serious consequences for hosting providers in the area of copyright. This is most evident in the BGH’s *Rapidshare* line of case law. In early rulings, a Düsseldorf court had concluded that, as Rapidshare had established a notice-and-take-down system, it had taken all reasonable measures to avoid infringement. Automatic filters were not required in view of the danger of over-blocking.<sup>152</sup> That being said, in 2012, the tide changed, when a Hamburg court ordered Rapidshare to carry out active monitoring of any content appropriately notified as unlawful so as to identify and remove any future hyperlinks in its system leading to infringing files.<sup>153</sup> Rapidshare was also obliged by the court to perform regular web searches for infringing links. Explaining its ruling, the court emphasised the fact that Rapidshare’s business plan had previously incorporated a system of incentives offering financial rewards to users who uploaded popular files. Although Rapidshare had since changed this practice, the court nonetheless found that users were still likely to associate the service with illegal content.

When the issue came before the *Bundesgerichtshof* (the German Federal Court of Justice – BGH), it preferred the latter approach. So, in *Rapidshare (Alone in the Dark)*,<sup>154</sup> the BGH confirmed the neutrality and usefulness of the Rapidshare service, but nevertheless found Rapidshare to be a *Störer*. As such, upon receiving notification of an infringement, the platform could not simply rest at deleting existing infringing files, but had to go further and perform searches for future infringements of the notified content. For this purpose, the Court suggested automatic word filters, as well as manual controls. The next year, in *Rapidshare (The Reader)*,<sup>155</sup> the BGH went one step further. Here, the court found that Rapidshare had an obligation to extensively and regularly monitor its service for preventive purposes. Again word filters and manual examination were recommended, as was the use of search engines for the identification of links to infringements on its platform.

The lower courts have continued along the path carved by the BGH. So, for example, in the above-mentioned YouTube case, the Court of Appeal of Hamburg found that the platform was required to undertake automated filtering of its platform, so as to uncover any future infringement of content whose previous infringement had already been brought to its attention. For this purpose, it was obliged to use its Content ID software itself, instead of expecting the right-holder to do so, as was its usual practice. As Content ID would only block identical audio recordings, YouTube was also obliged to install a word-based filter designed to check the title of the video and the artist concerned.

It should be noted that, although these rulings’ compatibility with current EU law is very questionable, unlike the Commission’s new Proposal, they do at least stop short of imposing a proactive duty on platforms that arises without a court order.

Finally, it is also worth noting that, much like French law, German law also allows for ‘accessory liability’ to arise on the basis of the general principles of tort law. According to Article 830§1 of the German civil code (*Bürgerliches Gesetzbuch* – BGB), if more than one person has caused damage by a jointly committed tort, then each of them is responsible for the damage. Under Article 830§2 BGB, instigators and accessories also face the same liability. At least contingent intent is necessary for a finding of liability under this heading, i.e. the participant must have seriously considered the risk of infringement and approvingly accepted it.<sup>156</sup> Knowledge of the objective circumstances that form the main offence and awareness of their unlawfulness are accordingly required.<sup>157</sup> This

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151 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 Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

152 OLG Düsseldorf, *Rapidshare I*, 27 April 2010, I-20 U 166/09 and OLG Düsseldorf, *Rapidshare III*, 21 December 2010, I-20 U 59/10.

153 OLG Hamburg, *Rapidshare II*, 14 March 2012, 5 U 87/09.

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

155 BGH, *Rapidshare III*, 15 August 2013, I ZR 80/12.

156 J Becher, ‘Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA’ (2010) master thesis, Bucerius Law School/WHU Otto Beisheim School of Management.

157 H Schack, ‘Täter und Störer: Zur Erweiterung und Begrenzung der Verantwortlichkeit durch Verkehrspflichten im Wettbewerbs- und Immaterialgüterrecht’ in *Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010* (De Gruyter 2010), 1167.

condition is not usually met by online intermediaries. At the same time, the defendant may also be held liable if she consistently violated duties of care over a longer period of time.<sup>158</sup> Such gross and insistent breaches of the obligation to examine have been accepted, for example, where service providers ignored specific notices of unlawful activities and failed to prevent further infringements.<sup>159</sup> This kind of conduct is considered to constitute infringement by forbearance.<sup>160</sup>

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158 BGH, *Internet-Versteigerung I*, 11 March 2004, I ZR 304/01; JB Nordemann, 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach' (2011) 2(1) JIPITEC 37.

159 OLG München, 2006 MMR 332.

160 T Hoeren & S Yankova, 'The Liability of Internet Intermediaries – The German Perspective' (2012) IIC 501.

## 5. Compatibility of the Proposed Article 13 with the Existing Legal Framework

The current underlying legal framework at EU and national level having above been set out, whether the proposed Article 13 and its supporting Recitals respect it must now be examined. As a careful consideration of the relevant rules makes clear, problems arise on four different fronts: a) the Proposal's compatibility with EU copyright law; b) and the Proposal's compatibility with Article 14 of the E-Commerce Directive; c) the Proposal's compatibility with Article 15 of the Directive; and d) the Proposal's compatibility with the Charter of Fundamental Rights of the EU. In Sections 5.1.-5.4 below, each of these incompatibilities shall be detailed in turn.

It should from the onset be noted that, the listed incompatibilities present a considerable challenge for the stated objective of the Proposal, i.e. the fostering of a Digital Single Market for copyright and related rights. In the face of conflicting provisions of EU law, the legislatures and courts of individual Member States are likely to diverge in their interpretation, transposition and application. Clarity is an essential requirement of an effective harmonising EU framework.

### 5.1. Compatibility with EU Copyright Law

The first incompatibility that arises between the Proposal and the existing legal framework that is relevant for the purposes of this study is that with current EU copyright law. The issue centres primarily on paragraph 1 of Recital 38 of the Proposal. As seen above, this declares that, where information society service providers store and provide access to the public to copyright-protected works or other subject matter uploaded by their users, 'thereby going beyond the mere provision of physical facilities and performing an act of communication to the public', as long as they are not protected by the hosting safe harbour, they are obliged to enter into licensing agreements with right-holders. This wording heavily implies that such providers, by the definition of the services they provide, are directly violating copyright owners' communication right. For a nonchalant statement hidden in a recital, this represents a dramatic development of EU copyright law.

That this is the case is made clear by the analysis engaged in above (see Section 4.3.1.) on the notion of 'communication to the public'. As this indicates, it is by no means self-evident that an EU definition of the concept would encompass the provision of hosting services to third parties. To the contrary, the Infosoc Directive provides very little relevant information on the matter. While the case law of the CJEU has, in recent years, increased our understanding of what 'communication to the public' involves, no judgement to date has examined whether or not hosting providers may, on its basis, be said to be directly infringing copyright and related rights themselves. This interpretative void is particularly significant given that the CJEU has made clear is that an 'individual assessment' of each case is necessary.<sup>161</sup>

With this in mind, what the CJEU would be likely to conclude on the issue is very hard, at this point, to divine. Certainly, in cases where protected works, which had not previously been made freely available on the internet, are posted on a hosting platform without the authorisation of the right-holder, a 'new public' can be said to be reached. But has there been a 'deliberate intervention' by the platform itself, as opposed to by its users? The most informative decision to date in this regard is probably *GS Media*. Although this concerned the creation of hyperlinks, it might provide intimations relevant to hosting providers as well, as an 'indirect' involvement of a provider with a third party's infringement is in both areas at issue: while hosts store content uploaded by others onto their platforms, hyperlinkers indicate the location of such content elsewhere on the internet.

The *GS Media* judgment indicated that, when a hyperlink is created for profit, it can be expected that the person who posted it carries out the necessary checks to ensure that the work concerned is not illegally published on

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<sup>161</sup> See, among others, CJEU, C-160/14, *GS Media*, 8 September 2016 para. 33.

the website to which those hyperlinks lead. As a result, in such cases, a rebuttable presumption is created that the hyperlinker had the necessary knowledge and that, therefore, an infringement has occurred. Could this principle be stretched beyond the context of hyperlinks? If so, potentially, a broader EU notion of accessory liability could be developed, albeit one folded into the notion of direct infringement. Although it is premature to declare that that is currently the case, in such an eventuality, it could perhaps be argued that a rebuttable presumption of the necessary knowledge will always exist for profit-seeking companies involved in any capacity in third party infringements. Yet, even this sweeping approach would still leave the need for the finding of an 'intervention' unaddressed. Arguably, as opposed to what is the case for hyperlinks, with hosting, it is not the provider itself that intervenes to communicate the work to the public, but the user who took advantage of the provider's services. The platform itself is, at worst, merely providing the means used by somebody else to achieve a communication to the public.

Indeed, even in cases where hosts create, as part of the support they provide to users, automatically generated hyperlinks to content stored on their services by their users (e.g. as results to search queries) and for which *GS Media* is therefore directly relevant, although an intervention might be said to exist, this cannot easily be described as being 'deliberate'. The presumption of knowledge that case established is only a rebuttable one. It should be recalled that *GS Media* concerned a website whose human editors made an explicit and repeated decision to post links to the contested content. Extrapolating from that to find that automatically generated links are infringing would, accordingly, involve an exceptionally expansive interpretation.<sup>162</sup>

Finally, it should be kept in mind that not every communication to the public of subject matter protected by copyright and related rights that occurs on a hosting website will violate those rights. Due account must also be taken of exceptions and limitations. In this regard, it is not only Recital 38, but also Recital 37 of the Proposal that presents problems: according to this, the uploading by users of copyright protected content without the involvement of right-holders affects the possibilities available to those right-holders to determine whether, and under which conditions, their work and other subject-matter is used, as well as their possibilities to receive an appropriate remuneration for it. While this is certainly true, it does not automatically follow that, in all such cases, the right-holders are entitled to such possibilities. Clarification of the text to make clear that the rights are only applicable where a defence is not relevant under Article 5 of the Infosoc Directive is therefore necessary.<sup>163</sup>

What about the situation on the national level? This is not much more helpful to the Proposal, presenting as it does an inconclusive patchwork of interpretations. So, for example, in the UK, the Usenet indexing website Newzbin was found to have communicated works to the public, but only because it had 'intervened in a highly material way to make the claimants' films available to a new audience. A direct claim against a hosting provider has not been brought before the UK courts since, although the issue has arisen in the context of blocking orders against UK ISPs. While these decisions have found that streaming and BitTorrent websites do communicate works to the public, whether the conclusions drawn in those rulings are translatable to hosts is currently unclear. The emphasis placed in those cases on the editorial involvement of the relevant websites indicates that such a transferral might not be a smooth one.

In France, the finding of a direct infringement is considerably easier, although this approach has attracted great criticism by French copyright experts. In any case, as a result of the permissive French interpretation of 'communication to the public', the French courts have concentrated heavily on the analysis of the conditions of the hosting safe harbour. This is to be contrasted with the UK and Germany, whose courts tend to favour solutions incorporated into the substantive law. Notably, French case law has, after a few false starts eventually struck down by the *Cour de cassation*, held application-level hosting websites as qualifying, in principle, for the safe harbour. Thus, whether the French approach would be sustainable if it were to be accepted that such providers are too 'active' for Article 14 ECD remains an open question: the heavy French reliance on the immunities suggests that they apply necessary breaks that are otherwise absent in national copyright doctrine.

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<sup>162</sup> It is worth noting that the Proposal appears anyway to disapprove of the CJEU's hyperlinking conclusions: according to Recital 33 of the Proposal, hyperlinking does not constitute an act of communication to the public.

<sup>163</sup> On this see also Communia, 'Position Paper: Use of Protected Content by Information Society Service Providers' (January 2017), available at: [www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering](http://www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering).

Finally, the German courts have been very negative towards the idea of a broad communication to the public right, consistently rejecting the possibility of its direct application to hosting platforms. The German case law has instead concentrated almost exclusively on the imposition of injunctions on host service providers that seek to oblige them to take action against the infringements (including communications to the public) committed by their users on their platforms.

Where direct liability cannot be established, an alternative way to hold an intermediary liable for copyright infringements committed through its services is by means of what can broadly be termed 'secondary' or 'accessory liability'. This is the paradigm under which intermediary liability in the national law of many EU Member States is examined. But the rules governing accessory copyright liability are: (a) unharmonised in the EU and (b) dependent on highly demanding conditions. So, for example, in the UK, for accessory liability to be found, it is necessary that the intermediary have either authorised those infringements or qualify as a joint tortfeasor. Both of these options require a mental involvement of some kind.<sup>164</sup> That was, for example, what was found to be the case in the aforementioned *Pirate Bay* decision, while hosts have not yet been tested under these doctrines. In Germany, Article 830 BGB governs the issue. For this to apply, a third party must have knowingly and intentionally combined with the primary wrongdoer to bring about the infringement, induced them to infringe or helped them in their infringement. The general consensus is that host service providers do not qualify, as they lack the essential mental element. Although France, due to its permissive interpretation to 'communication to the public' tends not to follow this approach in copyright, it too has crafted a kind of 'accessory liability' regime in other areas on the basis of its general tort principles.

In conclusion, the legal conditions for holding an intermediary liable for its users' infringements are unestablished on the EU level and conflicting on the national one. This reality appears to be completely discounted in the facile approach taken by the new Proposal. Certainly, the Commission appears to have doubts regarding the current definition in Europe of the notion of communication to the public, as is indicated by its 2015 Communication on a Modern, more European Copyright Framework. However, if the EU is to harmonise the substantive rules on the liability of internet intermediaries – arguably a sensible idea – it should do so in the main text of a legal instrument, not in its recitals. Moreover, if such a harmonisation is to in fact take place, comparative law would indicate that the best approach would be, not direct liability through an expansive interpretation of the communication right, but the creation of an EU accessory liability regime in copyright, dependent on the mental participation of the accessory in the infringements of third parties.<sup>165</sup> Arguably, this would set the correct legal standard for, among others, intermediaries of all kinds, including hosting providers: As Yen observes, it "is one thing to distribute technology that could be used to infringe in the hope that others will use it legitimately. It is something else to distribute the same technology in the hope that others will use it to infringe."<sup>166</sup>

Interestingly, this is precisely the direction in which the CJEU's existing case law appears to have been heading. The introduction of the requirement of 'neutrality' as a condition for safe harbour protection, in *Google France* and *L'Oréal*, and the dependence of this on knowledge and control speaks precisely to the relevance of the intermediary's mental participation to a finding of its liability. The more recent *GS Media* case also heads in the same direction, through its novel introduction of a new element of subjectivity to the notion of communication to the public in the indirect liability issue of hyperlinking. As copyright has traditionally been approached as strict liability tort, arguably this could indicate the Court's interest in building a harmonised regime for accessory liability on the basis of the existing rules of primary liability. If that is the case, an opening is created for legislative action capable of placing these attempts on more secure legal footing.

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164 For more on this see C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Inspired Approach* (Kluwer Law International 2016), section 3.1.3.

165 An expansion of the right of communication to the public would risk obscuring the distinction between infringers and non-infringers, thereby necessitating – as the example of French copyright law has shown – the safe harbours to *ex post* negate their broad reach. By contrast, an 'accessory liability' approach, along what is found in both the UK and Germany, as well as in France outside of the area of copyright, would allow for the introduction of a separate regime adjusted to the peculiarities of those supporting third party infringements. In this way, direct infringers can receive different treatment to indirect infringers, overexpansion is avoided and indirect infringers can be held liable only where appropriate. For more on this see C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Inspired Approach* (Kluwer Law International 2016), Chapter 5.

166 A Yen, "Third Party Copyright after *Grokster*" (2007) 16(3) *Information & Communications Technology Law* 233.

## 5.2. Compatibility with Article 14 of the E-Commerce Directive

Issues of compatibility with current EU law do not arise solely with regard to EU copyright law. Incompatibilities also exist with regard to Article 14 of the E-Commerce Directive. In this case, the problems emerge from two sources: a) Paragraphs 1 and 2 of Recital 38 of the Proposal; and b) Article 13 of the Proposal itself.

As a preliminary point, it should be noted that these incompatibilities are not addressed by Article 1(2) of the Proposal, which includes a list of existing directives the Proposal is intended to leave intact, as that list fails to mention the E-Commerce Directive.

In terms of the compatibility of the Proposal with Article 14 ECD, it is necessary first to note that 'information society service providers that store and provide access to the public to large amounts of works or other subject matter uploaded by their users' must be understood as hosting providers within the meaning of Article 14 of the E-Commerce Directive. This is the case as the definition of the latter – 'providers of an information society service that consists of the storage of information provided by a recipient of the service' – is broader than that of the former. In particular, the Proposal only targets providers of 'large amounts' of material, as well as providers that in addition to storing the material also 'provide public access to' it. While it is unclear that either of these qualifications mean (how much is a 'large amount'? What is the meaning of 'provide public access to?'), they can only serve to narrow the focus within a group that is in its whole covered by Article 14 ECD. As is clear from the text of that provision and the interpretative case law of the CJEU, the only thing that will disqualify a hosting provider from immunity will be acquiring knowledge or awareness, but failing to expeditiously take the content down and lack of the necessary 'neutrality'. No reference in the safe harbour is made to either the quantity of the content hosted or whether or not the hosts allows the public to access that content.

As a result, it must be concluded that the Proposal's new category of providers will, as long as they abide by the conditions of Article 14 of the E-Commerce Directive and the 'neutrality' requirement introduced by the CJEU, benefit from the protection of the safe harbour.

With this in mind, the first incompatibility created between the Proposal and Article 14 ECD concerns the interpretation of the notion of 'neutrality'. Paragraph 2 of Recital 38 of the Proposal suggests that hosting providers will lose safe harbour protection where they play an 'active role, including by optimising the presentation of the uploaded works or subject matter or promoting them, irrespective of the means used therefor'. This is clearly an attempt to integrate into the Proposal the CJEU case law on the notion of 'neutrality' – yet it is an attempt that misses the mark by misinterpreting that case law. The phrase 'irrespective of the means used therefor' is particularly problematic in this regard.

As noted above (Section 4.1.2.), the CJEU based its concept of 'neutrality' on Recital 42 ECD. As a result, 'neutrality' should be taken to exist where the host offers services 'of a mere technical, automatic and passive nature', such that it has 'neither knowledge of nor control over the information which is transmitted or stored'. In *L'Oréal v eBay*, the Court gave, as an example of activities that would deprive a host of 'neutrality', the optimisation of the presentation of the content or its promotion. Yet, as explained above, the surrounding circumstances of the case indicate that only bespoke support would achieve this effect, as opposed to mere generic or automated assistance. Indeed, this makes sense in view of Recital 42's focus on knowledge and control: offering generic and automated support to all users does not provide knowledge and, without knowledge, real control is excluded. Consequently, contrary to what is stated by Recital 38 of the Proposal, 'the nature of the means used' is in fact crucial to deciding whether or not a service is 'neutral'. The inclusion of this new qualification of neutrality thus brings the Proposal into conflict both with Recital 42 ECD and the explanatory case law of the CJEU.

The second problem created in terms of Article 14 of the E-Commerce Directive relates to Article 13 itself. As seen above, Article 13 proposes the imposition of a duo of alternative obligations on the relevant intermediaries: a) to take measures to ensure the functioning of agreements concluded with right-holders for the use of their works or other subject-matter; or b) to take measures to prevent the availability on their services of works or other subject-matter identified by right-holders through the cooperation with the service providers.



Certainly, as indicated by Recital 48 of the E-Commerce Directive, the enjoyment of safe harbour protection will not mean that duties of care may not be imposed on a provider to detect and prevent certain types of illegal activities. Yet, as seen above (Sections 4.1.2.), limits to this option do exist. In particular, as the wording of Recital 48 indicates, such duties must be reasonable and specified in law and may only focus on the detection and prevention of illegal activities. With this in mind, question marks arise with regard to the proposed wording of Article 13: while the second listed obligation does indeed appear to concern itself with the precise objective mentioned by Recital 48 ECD, it is unclear exactly first obligation involving 'measures to ensure the functioning of agreements concluded with right-holders for the use of subject matter' would involve.

Unhelpful in this regard is the fact that different parts of the Proposal use different language to describe the relevant obligation. So, Article 13 itself talks of 'measures to ensure the functioning of agreements concluded with rightholders for the use of subject matter'. Yet, paragraph 1 of Recital 38 mentions an obligation to 'conclude licensing agreements with rightholders'. It is unclear if these two sentences are referring to the same obligation.

One possible interpretation is that Recital 38 merely intends to state the obvious in an explanatory way: only providers that communicate works to the public are obliged to conclude licensing agreements. This statement can then be interpreted as the legislative basis of the obligation introduced by Article 13: Only providers that have an obligation to conclude licensing agreements have an obligation to take measures to ensure the functioning of those agreements. Yet, this seems strange too, as a correct interpretation of copyright law would conclude that, where providers are communicating works to the public without authorisation, the consequence will be that they can be held liable for their infringements. No obligation to enter into licensing agreements *per se* is created.

Complicating matters further, paragraph 3 of Recital 38 talks about an obligation to 'ensure the protection of works or other subject matter'. In comparison with the wording of paragraph 1 of Recital 38, one can much more easily square this wording with that of Article 13 by assuming that it would be through 'ensuring the protection of works or other subject matter' that a provider would 'ensure the functioning of agreements concluded with rightholders for the use of subject matter'. Alternatively, perhaps it would be through Article 13's second obligation to 'prevent the availability on their services of works or other subject-matter' that the protection of such subject matter may be 'ensured'. Again, however, the wording of the two provisions is slightly different and it is not clear why.

Finally, the Explanatory Memorandum to the Proposal suggests that Article 13 'fosters the conclusion of agreements with rightholders'. Once more, a divergent wording is used, this time returning to the meaning suggested by paragraph 1 of Recital 38. Yet, in the same paragraph, the EM also suggests that the mechanism adopted in the Proposal is that which was labelled 'Option 2' in the Impact Assessment. This is also puzzling, as, under that heading, the Impact Assessment only talks of the imposition of a much milder obligation 'to put in place appropriate and proportionate technologies and to increase transparency vis-à-vis rights holders'.

In conclusion, the Proposal appears to swing erratically between two possible types of duty for hosting platforms: one in line with the ECD and one not. Without any real clarity as to what the first obligation proposed by Article 13 entails, it is impossible to assess, in any real way, its compatibility with Article 14 of the E-Commerce Directive. If it only involves measures to detect and prevent illegality, as permitted by Recital 48 of the E-Commerce Directive, compatibility can probably be salvaged. If, however, it entails an obligation to sign licensing agreements problems arise: if a host service provider is protected by Article 14 and therefore not liable for the infringements committed using its services by its users, why would it sign a licensing agreement with right-holders? On the other hand, if what is meant is instead merely an obligation to prevent infringements in line with Recital 48 ECD, what is the difference between the that obligation and the second alternative obligation introduced by Article 13? Further clarity on all of these points would be welcome.

### 5.3. Compatibility with Article 15 of the E-Commerce Directive

The biggest incompatibilities presented by the current version of the Proposal are the two final ones: those which arise with Article 15 of the E-Commerce Directive and, more problematically yet, the Charter of Fundamental

Rights itself. In both cases, the issue centres again around the two obligations which the proposed Article 13 suggests that the targeted providers should take.

In introducing these obligations, Article 13(1) of the proposed directive gives a perfunctory nod to the need for due respect of the counterbalancing interests of other parties, by warning that any measures adopted must be 'appropriate and proportionate'. Recital 38 of the Proposal repeats this requirement. Notably, the language used in these provisions, although much briefer, is reminiscent of that of Article 3 of the Enforcement Directive. Unfortunately, the text of Article 13(1) undermines these efforts by instead suggesting that the relevant measures may include 'effective content recognition technologies'. The same reference is also made by Recital 39. The use of this example brings the provision immediately out of line with both Article 15 of the E-Commerce Directive, as well as the EU Charter. This Section shall focus on Article 15 ECD.

Again, as was the case with the previous section, the incompatibilities of the Proposal with Article 15 ECD are not solved by Article 1(2) of the Proposal, which does not mention the E-Commerce Directive among the directives intended to remain unaffected by its text.

As noted in detail above, Article 15 ECD prohibits Member States from imposing, on providers which enjoy the protection of a safe harbour, general obligations to monitor the information which they transmit or store, as well as general obligations actively to seek facts or circumstances indicating illegal activity. This presents a problem for the Proposal, as 'effective content recognition technologies' will, by definition, require precisely such monitoring: after all, how can infringing content be 'effectively recognised' on a platform by means of a technological tool without the oversight of the totality of the content on that platform? The chaff cannot be separated from the grain without the thrashing of all the harvested wheat. In order to 'recognise' unwanted content within a collection of content, one must, logically, examine each piece of content in that collection.

Indeed, this reality is made clear by Annex 12A of the Impact Assessment supporting the Proposal on 'General Information on and Examples of Content Identification Technologies'.<sup>167</sup> As this explains, there two are the main types of content recognition technologies: 'fingerprinting' and 'watermarking'. 'Fingerprinting' relies on the creation of a unique digital representation of each piece of protected content (a 'fingerprint' of that content) and the compilation of those representations into a reference database (a 'fingerprinting database'). This database is then used to check each piece of content that an end-user attempts to upload onto the service. If a match is detected, the content is removed or access to it is blocked. 'Watermarking' refers to the reverse: the invisible tattooing operation that allows the identification of imprinted – and therefore authenticated – copies. With watermarking, content is only allowed to pass muster if a watermark is found. In both cases, in order to be effective, the technology must be applied to infringing and non-infringing content alike: obviously, if content has already been identified as non-infringing, content recognition technology becomes redundant. Indeed, commonly, the technology is applied to the totality of the content on the intermediary's platform or, at least, to all new content. The Annex gives the example illustrating this in the form of YouTube's well-known Content ID system. As it indicates, this software is run by YouTube for each and every new video is uploaded onto its platform. As a result the totality of content uploaded since the adoption of the system is affected.<sup>168</sup>

This reality makes clear why, in the *Netlog* case, the CJEU concluded that the imposition of an injunction on the hosting service provider requiring it to install a filtering (i.e. content recognition) system would involve the active monitoring of almost all of the data relating to all of its service users and therefore be incompatible with Article 15 of the E-Commerce Directive: such monitoring is an essential part of 'content recognition'. It is precisely that monitoring that allows the content that must be removed to be recognised among a sea of lawfully uploaded material.

It should be noted that arguments have been made according to which content recognition technologies are not incompatible with Article 15 of the E-Commerce Directive in view of the concession made by Recital 47 of the directive to 'monitoring obligations in a specific case'. Examples are to be found in Germany's *Störerhaftung* case

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<sup>167</sup> Impact Assessment, p. 164-165.

<sup>168</sup> For more on filtering see J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 57-62.

law. As was noted above, the German courts have concluded that, as long as the content which the filtering is intended to uncover is specific, the monitoring obligation will be so as well. So, in *Rapidshare III*,<sup>169</sup> the BGH stated that its *Störerhaftung* principles are compatible with EU law, as 'the defendant can be subjected not to a general but rather an incident-related monitoring obligation to trace an infringement already made and prevent further infringements.'

Certainly, the difference between 'general' and 'specific' monitoring is not made explicitly clear by the text of the directive itself. The fact that the *Netlog* ruling concerned a particularly broad filtering mechanism (one that would require the monitoring of most of the information stored on the platform's servers, for all its customers, *in abstracto* and as a preventative measure, at its own cost and for an unlimited period) does appear to leave open the possibility that a less demanding order might have been deemed permissible.<sup>170</sup> Yet notably, in its ruling, the CJEU ignored the broadness of the injunction in terms of e.g. the length of time for which it was to be applied or the content which it sought to protect and focused exclusively on the breadth of the material being monitored. This makes clear that it is the broadness of the object of the monitoring which represents the pertinent difference between general and specific monitoring. Notably, such a broad base would be required by even the most modest 'content recognition technology', including those filtering measures imposed by the German courts: filtering away infringements of just one piece of copyright protected content from a platform still requires examining all the content on that platform in order to uncover those infringements. It is thus very difficult to see how the German interpretation could be compatible with the *Netlog* emphasis on whose content is being monitored. The issue at stake is whether or not all users' content is subject to monitoring measures, not whether the objective of the monitoring is the prevention of the infringement of a specific work.

From this perspective, it becomes clear that Recital 47's reference to 'monitoring in specific cases' should be interpreted quite literally: the monitoring of e.g. the activity of a specific individual or group of pre-identified users on a platform is what is permissible.

In any case, it is worth noting that, although the German judgements' compatibility with current EU law is questionable, unlike the Commission's new Proposal, they do stop short of imposing a proactive duty on platforms that arises absent a court order. The new Proposal is thus also incompatible with the permissive German interpretation of Article 15 ECD, as it omits even this procedural safeguard.

It should be noted that the above analysis is not affected if the general monitoring is aimed not at blocking content, but at 'ensuring with functioning of agreements with right-holders for the use of works', as per the first obligation introduced by the proposed Article 13. The objective of the monitoring does not change its general nature. The fact that many providers already use such technology on a voluntary basis is also irrelevant: Article 15 ECD is addressed at 'Member States' not private actors.

As a final aside, it is worth observing that the Proposal appears to intend to protect small and medium-sized businesses from the implementation of 'effective content recognition technologies' by limiting its reach only to hosts of 'large amounts' of content. Whether this tactic is appropriate is questionable. For one thing, the distinction between 'large' and 'non-large' amounts of content is unclear: no indication is given in the Proposal of where the barrier should lie. Secondly, considerable concern has been documented on the part of smaller providers that the implementation of filtering systems by bigger players puts them at a competitive disadvantage.<sup>171</sup> It's worth recalling that most large hosts already implement such technologies. Moreover, they tend to put them to creative uses: YouTube's Content ID, for example, allows right-holders to choose between either blocking the content, allowing it to be freely viewed while viewing statistics are gathered and monetising it by allowing the use of advertisements.<sup>172</sup> In this way, the prospect of data collection and monetisation allows YouTube to keep content on its platform that smaller providers would, under the force of notice-and-take-down regimes, be obliged to remove. In addition, the introduction of a requirement that binds only 'large' platforms

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169 BGH, *Rapidshare III*, 15 August 2013, I ZR 80/12.

170 S Kulk & F Borgesius, 'Filtering for Copyright Enforcement in Europe after the Sabam Cases' (2012) 34(11) EIPR 791.

171 J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 64-65.

172 Impact Assessment, p. 164-165.

means that an investment roadblock is immediately placed before the smaller players: as soon as these parties grow enough to compete with their larger counterparts, they will be faced with an expensive obligation to develop complicated technology their competitors were allowed to create on their own stream and on a level-playing field. It has thus been suggested that the push for the normalisation of content recognition technologies, far from a way to protect smaller businesses, represents a consolidation of the market power of the larger providers.<sup>173</sup> Finally, it should also be considered that a number of 'large' Web 2.0 hosting platforms, such as Wikipedia do not run for profit and are therefore not in a financial position to support the in-house development or outside purchase of content recognition technology.<sup>174</sup> It is relevant in this regard that, although the Proposal is clearly geared at preventing the online infringement of audio and video content and this is what the Impact Assessment focused on, its wording extends to all kinds protected material, thus risking unanticipated consequences in other areas.

#### 5.4. Compatibility with the Charter of Fundamental Rights of the EU

Of course, the incompatibility of the Proposal with Article 15 ECD could be addressed through appropriate legislative action. For example, it would be possible for the EU legislator to amend the E-Commerce Directive or attempt to override it, by stating in the new Proposal that the hosting safe harbour does not apply to platforms hosting 'large amounts' of content in a public available way. Nevertheless, even in that case a greater obstacle would still need to be addressed: the introduction of 'effective content recognition technologies' would also be incompatible with the Charter of Fundamental Rights of the EU.

It should be recalled that, in *Netlog*, the imposition of a filtering obligation was seen as incompatible not only with Article 15 ECD, but also with the notion of a 'fair balance' between opposing fundamental rights. In reaching this conclusion, the CJEU saw the protection of copyright under Article 17(2) of the Charter as conflicting with three fundamental rights of other involved stakeholders: the freedom of the intermediaries themselves to conduct their business (Article 16 of the Charter) and the rights of the users of the intermediary to both their freedom of expression and information (Article 11 of the Charter) and to the protection of their personal data (Article 8 of the Charter).

Of course, the existence of a conflict with other fundamental rights does not automatically negate the normative force of copyright. As *McFadden* suggests, what is necessary is instead that the 'essence' of all involved rights is not undermined. In this regard, it should be noted that, arguably, the impact of the obligation to adopt 'effective content recognition technologies' on intermediaries' freedom to conduct a business will indeed be somewhat mitigated by the confinement, as the proposed Article 13 demands, of that obligation only to subject matter identified by right-holders. This limitation will mean that the relevant providers need not investigate their platforms for infringements of all protected works in existence. While this limitation (as seen above) makes no difference in terms of general monitoring under Article 15 ECD, it would – assuming the relevant technology is available for the type of content hosted on the intermediary and at an approachable price – certainly limit the intermediaries' task merely to the implementation of the relevant technologies, without the need to decide on which works to enter into the system. As a result, it would considerably alleviate the burden placed upon them and thus positively impact their freedom to conduct their business.<sup>175</sup> The Impact Assessment further argues that the problems that Article 13 poses for the freedom to conduct a business are addressed by the open wording of the provision, which leaves to providers the choice of the precise technologies they are to deploy, thus allowing them to best

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173 J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 75.

174 On the costs of filtering see J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 64 and M Husovec & R Leenes, 'Study on the Role of Online Intermediaries – Summary of the Public Consultation', study prepared for the European Commission, SMART number 2015/0084/, pp. 47-48.

175 On this see M Husovec & R Leenes, 'Study on the Role of Online Intermediaries – Summary of the Public Consultation', prepared for the European Commission DG Communications Networks, Content & Technology (2016), SMART number 2015/0084, p 49. See also M Husovec, 'Accountable, not Liable: Injunctions against Intermediaries' (2 May 2016) TILEC Discussion Paper No. 2016-012, p. 36.

take account of the size and nature of their service.<sup>176</sup> Indeed, this is an interpretation that has been endorsed by the CJEU's *Telekabel* judgement, much as this has been criticised by commentators.<sup>177</sup>

Yet even in this case, the problems raised for users' rights remain: for one thing, the danger of inadequate distinctions between lawful and unlawful content that could result from mistakes made by the relevant technologies would persist. As has been mentioned above, in *Netlog* this possibility was deemed incompatible with end-users' Article 11 right to freedom of expression and information. It should be noted that Annex 12A of the Impact Assessment suggests that the level of accuracy of content identification technologies 'can be very high, allowing for the tracking of almost any content'. Even if this is to be taken as given however, all it suggests is that 'false negatives' (i.e. cases where copyrighted content fails to be identified by the system) are few. The Impact Assessment itself confirms that 'false positives' (cases where content is wrongly identified as infringing and removed) continue to be common.<sup>178</sup> The erroneous take-down of lawful content that the Communication on a Digital Single Market Strategy for Europe worried about is thus not addressed. As the IM acknowledges, this problem will be particularly acute for transformative content. This highlights the problems which content recognition technology presents for the copyright exceptions in favour of e.g. caricature, parody and pastiche or quotation for the purposes of criticism or review.<sup>179</sup> Arguably, automated systems are not well-suited for such complex legal decision-making.<sup>180</sup> Indeed, as the CJEU noted in *Netlog*, false positives are a particularly acute problem in the area of copyright, where exceptions and limitations vary considerably from one Member State to another, so that certain works may fall within the public domain or may be posted online free of charge by the authors concerned.<sup>181</sup>

The Impact Assessment contends that this problem can be addressed through procedural safeguards for users. In line with this suggestion, Article 13(2) of the Proposal states that Member States must ensure that the targeted providers 'put in place complaints and redress mechanisms that are available to users in case of disputes' over the filtering outcomes. Yet this vague prescription does not provide sufficient procedural detail. This is important, as studies indicate that, improperly crafted, such mechanisms, though helpful, do not address the 'chilling effect' that the incorrect blocking or removal of content exerts on end-users.<sup>182</sup>

In addition to the above, the Impact Assessment also misses the mark when it indicates that the problems for freedom of expression created by the imposition of an obligation to implement content recognition technology will not be significant, given that the major user-uploaded content services already use such measures. This statement fundamentally misconceives the nature of fundamental rights, an area of law that, as a general rule, does not bind private parties, but whose duty-bearers are State authorities.<sup>183</sup> The argument was recently repeated in a briefing of the European Parliament on Proposal.<sup>184</sup> It is disconcerting to see official documents of the European Institutions so fundamentally misconstrue the objective of such basic law.

Finally, in line with the case law of the CJEU, in imposing copyright enforcement measures on hosting providers, account must also be taken of end-users' right to the protection of their personal data under Article 8 of the Charter. This requirement too raises significant problems for the Proposal: the 'identification, systematic analysis and processing of information connected with the profiles of end-users' that created issues under Article 8 in

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176 Impact Assessment, p. 154.

177 C Angelopoulos, 'Are Blocking Injunctions against ISPs Allowed in Europe? Copyright Enforcement in the Post-Telekabel EU Legal Landscape' (2014) 9(10) *Journal of Intellectual Property Law & Practice* 812.

178 Impact Assessment, p. 141.

179 See Article 5(3)(d) and 5(3)(k) of the Infosoc Directive. On this see also Communia, 'Position Paper: Use of Protected Content by Information Society Service Providers' (January 2017), available at: [www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering](http://www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering).

180 J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 35 and 96-97.

181 CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 49-50.

182 J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 44-46.

183 T McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?' in O Andreotti (ed.), *Journalism at risk: Threats, challenges and perspectives*, (Council of Europe Publishing 2015), p. 9-35.

184 European Parliamentary Research Service, 'Briefing on Copyright in the Digital Single Market' (November 2016), p. 7.

*Netlog* constitutes an integral function of the content recognition technologies that it suggests imposing on providers. The same issue that exists with regard to Article 15 ECD is relevant also here: content recognition technologies by definition require the 'identification, systematic analysis and processing' of all content uploaded by users onto their profiles on a platform, if they are to effectively stop the uploading of protected content onto that platform. This would include non-infringing content, such as genuinely user-created content, potentially even featuring the user themselves. As with Article 15 ECD, if the objective of the processing is instead to 'ensure the functioning of agreements', through e.g. monetisation schemes, this reality is not affected.

Notably, while (as shown above) attempts can be said to have been made to take Articles 16 and 11 into account when drafting the Proposal, its incompatibility with Article 8 remains entirely unaddressed in the text. For one thing, this is not a problem that can be solved through the complaints and redress mechanisms of Article 13(2) of the Proposal. For another, it is also not an issue that can be affected by the limitation of the filtering obligations only to platforms that 'provide public access' to content. This is made clear by the fact that *Netlog* itself involved a social networking site that attracted the ire of copyright-holders precisely because of the public nature of the information uploaded onto it.<sup>185</sup> Where profiles are private, no need to monitor them exists, as no copyright infringement will have taken place. Even the Impact Assessment, in its analysis of the fundamental rights implications of the proposed Article 13 makes no mention at all of the protection of personal data. It thus seems that Article 8 was not considered at all in the drafting of the Proposal. This omission, while egregious, probably explains the current situation. As with Article 15 ECD, content recognition technologies are by their very nature incompatible with Article 8: if Article 8 had been properly considered, they would not have been inserted into the Proposal.

In this regard, it should also be considered that the Proposal's issues in view of Article 8 of the Charter do not operate independently, as a connection exists between the protection of users' personal data and the overall robustness of freedom of expression within a society: arguably the knowledge that one's online activities are being monitored can have an inhibitory effect on the exercise of freedom of expression, thereby incentivising over-compliance by non-infringers that wish to avoid attention.<sup>186</sup> As a result, the Proposal's Article 8 issues threaten to compound its already existing Article 11 issues as well.

Apparently unperturbed by these shortcomings, Recital 45 of the Proposal doggedly maintains that it 'respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.' It notes that its provisions should be interpreted and applied in accordance with those rights and principles. Recital 46 further warns that any processing of personal data under the proposed directive should respect the right to respect for private and family life and the right to the protection of personal data under Article 7 and 8 of the Charter. Certainly, Article 13(2) of the Proposal guarantees 'complaints and redress mechanisms' that should be made available to users in case of disputes over the application of the new obligations. Yet this represents a complete reversal of the current position and therefore a diminishment of users' rights: according to the CJEU, end-users' freedom of expression and the protection of their personal data require that filtering obligations not be imposed on intermediaries, not that users be given a right *ex post* to object to content removal. Indeed, such systems would do nothing to avoid the State-imposed general monitoring to which users' content would be subjected or the chilling effects on freedom of expression this would create. If end-users' rights were truly to be considered, under the EU court's own case law, the mention of 'content recognition technologies' in Article 13(1) should be completely removed.

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<sup>185</sup> The judgement describes *Netlog* as follows: 'Netlog runs an online social networking platform where every person who registers acquires a personal space known as a 'profile' which the user can complete himself and which becomes available globally.' See CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 16.

<sup>186</sup> A chilling effect occurs when an individual chooses to self-censor due to fear of punishment created by law. For more information see G McCord, *What You Need to Know about Privacy Law* (Libraries Unlimited 2013) 42; K D Kumayama, "A Right to Pseudonymity" (2009) 51 *Arizona Law Review* 427.

## 6. Recommendations for Improvement

The sections above described the problem which the new Proposal purports to address (Section 2), the current solution this puts forth (Section 3), the existing legal framework (Section 4) and the compatibility of the Proposal with that framework (Section 5). This section shall now venture to consider ways with which the European legislator can move forward from this point. Two are the obvious routes that can be envisioned:

- a) the current Proposal is deleted and other solutions are pursued in new instruments, after a more careful assessment of the issues at stake; or
- b) the current Proposal is retained and substantially improved to bring it into line with existing EU law.

Given the deep incompatibilities that divide the current Proposal from existing EU law, the author's preference would lie with the first solution. Options for the second are however also worth exploring. In order of magnitude of departure from the existing text, three possible solutions of this type are put forth in the sections below:

- a) the Proposal is minimally amended to remove elements that are incompatible with current EU law;
- b) the Proposal is reformulated to introduce a notice-and-action system and/or a duty of care for intermediaries to remove notified content where certain requirements are met;
- c) the Proposal is reformulated into a substantively harmonised European general accessory liability regime in copyright or at least a substantively harmonised European accessory liability regime in copyright applicable only to host service providers. For optimum results, this could also be combined with an Alternative Compensation Mechanism for right-holders.

Each of these options shall be examined in turn in Sections 6.1.—6.4 below.

### 6.1. Recommendation 1: Minimal Amendments for Achieving Compatibility

In view of its incompatibilities with pre-existing directives and the higher norms of the Charter, is there a way to salvage the Proposal? An obvious starting point can be found in the simple deletion or rewording of its most problematic aspects, as these have been identified in Section 5. Such a move would need to involve the following:

- a) First and foremost, Article 1 para. 2 of the Proposal would have to be amended to make it clear that the E-Commerce Directive is not to be affected by the new provisions. This can very easily be done by including it among the Directives listed as not in any way affected by the new Proposal. Indeed, given the continued support expressed by the Commission for the E-Commerce Directive in the Communications released in the run-up to the Proposal,<sup>187</sup> the absence of that Directive from that list is notable.

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<sup>187</sup> See in particular, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A Digital Single Market Strategy for Europe' COM(2015) 192 final, Brussels, 6 May 2015; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe' COM(2016) 288/2, Brussels 25 May 2016 and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A European Agenda for the Collaborative Economy' COM(2016) 356 final, Brussels, 2 June 2016.

- b) In addition, Paragraph 1 of Recital 38 would have to be reworded so as to make clear that information society service providers that store and provide access to the public to copyright protected works or other subject-matter uploaded by their users cannot automatically be considered to be performing an act of communication to the public and are in any case under no obligation to conclude licensing agreements with right-holders. It is recommended that the word 'thereby' for this purpose be removed. It is also recommended that the phrase 'provide access to the public to copyright protected works' be deleted, as it is foreign to EU copyright law and its meaning is unclear. A possible re-wording of paragraph 1 of Recital 38 could be as follows:

*'Where information society service providers that store copyright protected works or other subject-matter uploaded by their users go beyond the mere provision of physical facilities and perform an act of communication to the public, they are infringing an exclusive right protected under Article 3 of Directive 2001/29/EC of the European Parliament and the Council and may be held liable for this infringement, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.'*

Paragraph 2 of Recital 38 should also be adjusted to provide an accurate reflection of the current state of the CJEU's case law on the concept of 'neutrality'. To this end, the phrase 'irrespective of the nature of the means used therefor' should be deleted. It should also be made clear that optimisation of the protection of content and the promotion of content only deprive providers of neutrality when undertaken in a manner that targets specific content.

To eliminate all confusion, the title of Chapter 2 (currently 'Certain uses of protected content by online services') should also be changed to 'Certain uses of protected content by the users of online services'. Likewise, the title of Article 13 (currently 'Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded their users') should be changed to 'Use of protected content by users of information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users'.

- c) Paragraph 1 of Article 13 would have to be reworded so as to remove reference to the use of content recognition technologies, the imposition of an obligation to implement these being incompatible with both Article 15 ECD (as concerns providers protected by the safe harbours) and the Charter (for all providers). An additional amendment could involve the consolidation of the two alternative obligations mentioned in the current version into a single obligation with a clear and coherent meaning. The simplest option for such a rewording would involve the deletion of the first proposed obligation, while retaining the second one. The limitation of the provision only to hosts of 'large amounts' of protected subject-matter should also be abandoned, as it introduces a significant source of legal uncertainty, while doing little to protect smaller businesses.

On this basis, a possible wording of the relevant parts of Article 13 is suggested in the following:

*'Information society service providers that store works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to prevent the availability on their services of works or other subject-matter identified by rightholders. Those measures shall be appropriate and proportionate.'*

Having said this, it should be noted that such an amendment also presents risks in terms of legal uncertainty: what kind of measures can be deemed sufficient for this preventive purpose? A better solution might be to indicate specific measures that providers must adopt. These could include, for example, the posting of warnings for users against committing infringement using the platform's services or (as suggested by the CJEU in *L'Oréal*) the suspension of repeat infringers. Such measures could be inserted as examples of 'appropriate and proportionate measures' in the text of the Article, taking the place of the current reference to 'effective content recognition technologies'. In this case, the wording of the relevant parts of Article 13 could be adjusted as so:



*'Information society service providers that store works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to prevent the availability on their services of works or other subject-matter identified by rightholders. Those measures, such as the issue of general warnings to end-users against the use of their services for the purposes of the infringement of copyright or related rights or the suspension of the accounts of repeat infringers brought to their attention by rightholders, shall be appropriate and proportionate.'*

It should be noted that the references in the current wording of Article 13 to obligations for service providers to provide rightholders with adequate information on the functioning and the deployment of the measures they take for the enforcement of copyright and related rights, including information on the recognition and use of the works and other subject-matter, are not in themselves incompatible with either the Infosoc Directive and E-Commerce Directive or the case law of the CJEU. They may therefore be maintained in the Proposal. It should be recalled in this regard that the adoption of general monitoring obligations – and therefore of content recognition technologies that make use of them – may be done voluntarily by providers, although it cannot be imposed on them by State authorities. With this in mind, it indeed does not appear unreasonable to require that such providers supply right-holders with information on their copyright and related rights enforcing activities.<sup>188</sup>

- d) If the above-mentioned substantive obligations to prevent the appearance of copyright and related rights infringing material on their websites are imposed on host service providers, it becomes imperative to guarantee their continued qualification for safe harbour protection where they abide by these obligations. Intermediaries must not be found to have lost immunity they would otherwise be entitled to on the basis of action they take in fulfilment of their legal obligations. To fail to provide such a legal guarantee would amount to the imposition of conflicting imperatives on intermediaries that both require that they refrain from action in order to enjoy protection and require that they take action in order to avoid liability. In recognition of this paradox and in line with the recommendations already made by the Commission in its Communications on Online Platforms in the Digital Single Market and on a European Agenda for the Collaborative Economy, a 'Good Samaritan' clause that makes clear that measures taken in line with Article 13(1) should not deprive the intermediary from safe harbour protection should be adopted. This could be added as an additional paragraph of Article 13 (e.g. as Article 13(4)).
- e) Finally, Recital 39 would also have to be reworded. The amended wording should be chosen to reflect the wording of Article 13. In all cases, reference to the use of content recognition technologies should be removed.<sup>189</sup>

## 6.2. Recommendation 2: Introduction of a Notice-and-Action Framework

The solutions recommended under Section 6.1. would go a long way towards bringing the Proposal into line with existing EU law. At the same time, it is arguable that the potential for real impact is missing. With this in mind, a more ambitious rewording could also be considered. One obvious option could be to introduce a notice-and-action procedure. As with the suggestions for warning systems and the suspension of repeat offenders, this could be achieved through its insertion in Article 13 in replacement of the current mention of 'effective content recognition technologies'. Indeed, given the multiple references to this possibility in the Communications leading up to the Proposal, it is surprising that the Commission itself did not take the opportunity to do this. It is worth noting that this suggestion, far from being in conflict with the ECD, would build upon it and address one of the

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<sup>188</sup> On this see J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 44-46.

<sup>189</sup> On this see J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 140.

main criticisms addressed against it.<sup>190</sup> Indeed, as noted above, sixteen years ago Article 21 ECD already foresaw the possibility of a future introduction of a complete notice-and-takedown procedure at the European level. Notably, the Commission had floated a draft directive on notice-and-action in 2013. This, according to a leaked version, proposed a horizontal notice-and-action procedure for hosting providers based on Article 14 of the E-Commerce Directive that intended to combine a binding instrument with guidance from the European Commission.<sup>191</sup> While that proposal was withdrawn unpublished,<sup>192</sup> given the current renewed drive for further EU legislation in intermediary liability, the reconsideration of the idea is arguably now advisable.<sup>193</sup>

If the current Proposal is to be amended to pursue this possibility, as multiple authors have suggested, the relevant provisions should be carefully crafted.<sup>194</sup> In particular, it is important that it be made clear that notifications sent by right-holders provide sufficiently precise and adequately substantiated indications that content uploaded onto a provider's platform by its users has infringed copyright or related rights and that no exception or limitation applies. The exact location of the content should also be clearly indicated. Moreover, should this solution be adopted, guarantees for the protection of end-users should also be inserted. The existing paragraph 2 of Article 13, that guarantees complaints and redress mechanisms for users, provides a solid starting point in this regard. In order to provide greater legal certainty, this text could be further developed. For example, it could be amended to make clear that users should be informed of the removal or disabling of access to content which they uploaded and that they should be given the possibility to contest the removal or disabling of access to content they have uploaded within a reasonable time-frame by means of counter-notification. Where such counter-notification provides reasonable grounds to consider that the content is not illegal, the text should also indicate that the provider should reinstate the contested material or cease disabling access to it. Finally, a 'Good Samaritan' protection for providers that take down or remove content in this way would again be necessary under this option.

It should be noted that, naturally, as a supplement to the above options, the possibility of injunctive relief against intermediaries always exists as an additional measure available to right-holders. Therefore, if a right-holder continues to be convinced, following counter-notification from the user, that the material is infringing, he can always turn to the courts for relief. It should be noted in this regard that judicial authorities are the natural arbiters of legal disputes. Although certainly action before the court carries the disadvantage of lengthy and expensive proceedings, these drawbacks have always applied in the offline world. There, measures have been put in place (including summary judgements and temporary injunctions) to counteract some of the downsides. There is no reason why these should not be considered sufficient for the online world as well.<sup>195</sup> Potentially EU legislation could explore such possibilities as well.

Finally, before moving on it should be noted that, while this notice-and-action-inspired recommendation could be approached as a simple delineation of the procedure to be followed by intermediaries wishing to abide by the requirements set by Article 14 ECD for the enjoyment of the hosting safe harbour, a more decisive reinterpretation of this system can also be envisioned. This could involve the introduction of a positively-stated

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190 M Husovec & R Leenes, 'Study on the Role of Online Intermediaries – Summary of the Public Consultation', study prepared for the European Commission, SMART number 2015/0084/, p. 31.

191 Leaked draft Proposal for a Directive of the European Parliament and of the Council on procedures for notifying and acting on illegal content hosted by online intermediary service providers ("Directive on notice-and-action procedures") [...] (2013) XXX draft.

192 See letter by nine MEPs to European Commissioner for Internal Market and Services Michel Barnier on the matter, 3 July 2013, available at: [https://ameliaandersdotter.eu/sites/default/files/letter\\_commissioner\\_barnier\\_notice\\_and\\_takedown.pdf](https://ameliaandersdotter.eu/sites/default/files/letter_commissioner_barnier_notice_and_takedown.pdf).

193 Experimentation with other types of notice-based regimes might also be considered, such as, for example, notice-and-notice, which has met with considerable success in Canada. See C Angelopoulos & S Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) *Journal of Media Law*, 266.

194 See J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 44-46; G R Hagen, 'Modernizing' ISP Copyright Liability' in M Geist (ed.), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law 2010) 385; C Ahlert, C Marsden & C Yung, 'How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation', available at: <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>; J Urban & L Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22(4) *Santa Clara Computer & High Technology Law Journal* 621; L Edwards, 'Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights', WIPO Study (2011) 11.

195 Swiss Institute of Comparative Law, 'Blocking, Filtering and Take-Down of Illegal Internet Content', 20 December 2015, available at [www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet](http://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet), p. 798.

obligation for intermediaries to remove infringing content about which they have received notification. Under such a construction, where providers do not block or remove notified and infringing content, they will not only lose safe harbour protection, but in addition be held liable for third party copyright infringement in question. In other words, the negative obligation imposed through Article 14 ECD could be turned into a positive one: a duty of care that mirrors the safe harbour by requiring the takedown of notified content, as long as certain guarantees are met. In this way, far more than a mere notice-based procedure, a real, substantive harmonisation of at least this tiny corner of European intermediary liability law could be achieved. This possibility is in fact, arguably, the one that – once this is stripped of all elements that contravene existing EU law – is in reality presented by the current version of the Proposal. After all, the imposition of an obligation on content-sharing platforms to take appropriate and proportionate measures to prevent the availability on their services of copyright-infringing material would, in essence, amount to the imposition of a duty to take down content about which a notice has been received, as that would, in most cases, be the most effective method of achieving this result that would not amount to a violation of Article 15 ECD and the Charter. Obviously, as with the adoption of a notice-and-action procedure, under this option as well, guarantees for the protection of end-users and for the accurate substantiation of infringements and identification of their location should also be provided.

### **6.3. Recommendation 3: Introduction of a Substantive Intermediary Liability Regime and Alternative Compensation Mechanism for Non-Commercial Use**

Certainly, the introduction of a harmonised European notice-and-action procedure would be a welcome change that has long been demanded by stakeholders.<sup>196</sup> It would additionally improve legal certainty and streamline processes across the Digital Single Market. A duty of care for hosts to take down notified content, assuming sufficient guarantees exist, could also be helpful, by opening up the discussion on the adoption of a substantive European regime for intermediary liability. Despite the advantages of both of these options however, the reality remains that, by and large, most providers already implement notice-and-action mechanisms, under the force of the ECD and the international strength of the US's DMCA procedure.<sup>197</sup> As a result, if a real solution to the so-called 'value gap' is to be envisioned – indeed, a real solution to online copyright infringement in general – more drastic legislative action is necessary.

In this regard, two potential mechanisms are worth considering. These would be complementary and intended to support each other through their parallel implementation. They are the following: a) the adoption of a truly harmonised EU framework for accessory liability for third party copyright and related rights infringement, capable of determining, among others, when an intermediary – including a host service provider – should be held liable for its users' infringements; and b) the introduction of Alternative Compensation Systems (ACS) for right-holders covering non-commercial direct copyright and related rights infringement committed by end-users online.

The first of these would serve to approximate the disparate national laws governing accessory liability. This would, first and foremost, help complete the harmonisation of European copyright law by plugging one of the most prominent remaining gaps in its edifice. Once adopted, these rules could be applied, among others, to internet intermediaries of all sorts, thus clarifying their liability on a uniform European level. As an added advantage, the introduction of a harmonised accessory liability regime in copyright would also help achieve greater clarity with regard to the European rules of primary liability in copyright as well, by alleviating the pressures for their over-expansive interpretation.

Naturally, the harmonisation of intermediary liability would not offer a complete solution to the problem of online infringement. The reality is that internet intermediaries will not always meet the conditions for the imposition of liability on them for the infringements of their users. This has been made clear by the national case law on intermediary accessory copyright liability. If online infringement, including infringement by users of content-

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<sup>196</sup> Commission Staff Working Paper, 'Online Services, Including E-Commerce, in the Single Market', SEC(2011) 1641 final, 11 January 2012, p. 25 and 43-46.

<sup>197</sup> On this see J Urban, J Karaganis & B Schofield, 'Notice and Takedown in Everyday Practice' (March 2016) UC Berkeley Public Law Research Paper No. 2755628, available at SSRN: [ssrn.com/abstract=2755628](https://ssrn.com/abstract=2755628), p. 21-23.

sharing platforms, is to be properly addressed, more novel solutions will be necessary. In view of the difficulty in bringing individual end-users who have committed infringements to justice, a solution could be found in introduction of Alternative Compensation Systems. Inspired by continental European private copying schemes, such a system could see the introduction of a new levy-financed statutory licence for non-commercial online acts of reproduction and communication to the public, on condition that right-holders receive fair compensation.

The exact modalities of both these options would require careful consideration by the European legislator. While their analysis goes beyond the scope of this study, it is worth noting that recent academic work in the EU has been dedicated to the exploration of precisely such mechanisms.<sup>198</sup>

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<sup>198</sup> For the first, see in particular C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Inspired Approach* (Kluwer Law International 2016), Chapter 5 and, for the second, J-P Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Copyright Law* (Kluwer Law International, forthcoming 2017), Chapter 6.

## 7. Conclusion

**In conclusion, as the above study has made clear, the current wording of the provisions of the Commission's new Proposal for a Directive on Copyright in the Digital Single Market is incompatible with existing EU directives, as well as with the Charter of Fundamental Rights of the EU, as interpreted by the CJEU.**

In particular, Recital 38 of the Proposal misinterprets EU copyright and related rights law by implying that these providers by definition go beyond the mere provision of physical facilities and perform an act of communication to the public. This is not an issue that has to date been addressed by EU copyright law, as that has been formulated by the Infosoc Directive and the interpretative case law of the CJEU. Acts of facilitation of third party copyright infringement are instead the rightful domain, not of primary, but of accessory liability, an area of copyright and related rights law that has not yet been harmonised at the EU level.

In addition, Recital 38 of the Proposal also suggests that such providers will lose the protection of the hosting safe harbour of Article 14 of the E-Commerce Directive, where they play an active role, including by optimising the presentation of or promoting the uploaded works or subject matter, irrespective of the nature of the means used therefor. This substantially misrepresents the relevant case law of the CJEU, as well as Recital 42 of the E-Commerce Directive, which underpins this case law. Both of these indicate the need for the relevant hosts to have knowledge and control over specific unlawful data before immunity can be denied.

Finally, Article 13(1) and Recital 39 of the Proposal suggest, as an example of measures that may be imposed on such providers for the enforcement of copyright and related rights, the use of 'effective content recognition technologies'. Given that such technologies require the monitoring of the behaviour of all of a providers' end-users, the adoption of such a requirement would go against the prohibition of general monitoring obligations introduced by Article 15(1) of the E-Commerce Directive. As the case law of the CJEU has made clear, it would also violate the principle of a 'fair balance' between competing fundamental rights, recognised by that Court as essential in this area, by imposing a disproportionate burden on intermediaries' freedom to conduct their business (Article 16 of the Charter), as well as end-users' right to the protection of their personal data (Article 9 of the Charter) and to their freedom of expression (Article 11 of the Charter). It should be noted that the fact that such technologies are currently voluntarily used by some providers is immaterial in this regard: the law of fundamental rights binds State authorities, not private actors.

In addition to these incompatibilities, the **ambiguous wording** surrounding these proposals, the first two of which are only mentioned in a Recital and the last of which is only given as an example, **would inhibit, rather than improve legal certainty** in the EU on the liability of the relevant providers for the copyright infringements of their users. As a result, it is **likely to undermine the establishment of a Digital Single Market in Europe**, as different Member States experiment with different interpretations in the transposition of the Proposal into national law. The lack of consistency in the wording of the Recitals, the Explanatory Memorandum, the Impact Assessment and the main text of the Proposal, all of which talk of obligations, but each of which describes these obligations in different terms, is also problematic in this regard.

**As a result of these shortcomings, the relevant provisions should be deleted or significantly amended.**

Recommendations for amendments could be limited to the mere removal and/or rewording of the most problematic aspects of the provisions. This option however would likely render these provisions toothless.

To avoid this outcome, more constructive options are proposed in the form of amendments to the text in favour of either the **introduction of a notice-and-action system** or a **duty of care for intermediaries to remove notified content** where certain requirements are met. Alternatively, the **harmonisation of accessory liability** for the infringement of copyright or related rights should be considered, as well as the introduction of an **Alternative Compensation System (ACS)** for right-holders covering non-commercial direct copyright and related rights infringement committed online by end-users.