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EU DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET AND ISP LIABILITY: WHAT'S NEXT AT INTERNATIONAL LEVEL?

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The approval of the European Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market has caused a considerable storm. Unlike the original draft, the final text provides for no general monitoring obligation. However, the ISPs will likely be required to implement filtering measures to avoid liability for unauthorized acts of communication to the public of copyright-protected works. The lack of harmonization of the Directive with existing laws in non-EU countries will negatively impact the ISPs. To limit these consequences, this Article proposes the signature of an International Treaty in the framework of WIPO including issues such as the role of the ISPs, the liability of the ISPs and safe harbors. As regards filtering measures, the proposed Treaty gives freedom to States to implement them. Any filtering should be specific, limited, must not impose substantial costs on ISP or substantial burdens and be subject to human review.

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I. INTRODUCTION

"Europe just approved new copyright rules that could change the internet."[1] This was one of the many article titles published by news outlets throughout Europe and the United States in September 2018. These articles announced amendments introduced within the Proposal of Directive on Copyright in the Digital Single Market approved by the European Parliament.[2] The article titles led some to imagine the end of the internet as previously known, with particular negative implications to the U.S. tech giants like Google, Facebook, and Youtube.

The proposed Directive faced strong criticism as soon as it was published.[3] One of the most controversial provisions included was the obligation of the Internet Service Providers (ISPs) to filter the content uploaded by the platform's users to avoid copyright infringements.[4] However, this provision was later removed in the final version of the Directive.[5] Even so, the Directive still assigns an active role in preventing copyright infringement to ISPs—limiting the applicability of safe harbors in case ISPs fail to obtain authorizations from the copyright owners.[6]

It seems clear that with the Directive, the EU has a specific European regime as far as ISPs liability and safe harbors are concerned. This new regime seems to be in contrast with the existing legislation and practice in jurisdictions outside the EU. This lack of harmonization will most likely cause damages to the ISPs operating on a worldwide scale.[7] Indeed, ISPs will have to implement a variety of technical methods and legal strategies to approach these differences. Thus, they will

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[1] Ivana Kottasová, *Europe Just Approved New Copyright Rules that Could Change the Internet,* CNN, (Sep. 12, 2018) https://perma.cc/LDZ7-LGVC; *see also* Hamza Shaban*, The E.U. Just Voted to Advance Digital Copyright Rules That Would Force Google, Facebook and Others to Pay Up,* THE WASHINGTON POST, (Sept. 12, 2018), https://perma.cc/Q3S6-P6NH; *see also* Mark Sweney, *EU Copyright Law May Force Tech Giants to Pay Billions to Publishers*, THE GUARDIAN, (Sept. 12, 2018), https://perma.cc/T7EF-4GA7.

[2] *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market,* COM (2016) 593 final (Sept. 14, 2016).

[3] Kottasová, *supra* note 1.

[4] *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, supra*, note 2 at art. 13.

[5] Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

[6] *Id*. at art. 17.

[7] Especially the tech giants: Facebook, Google, Twitter, and YouTube.

probably be inclined to reduce the number of their investments, abandon ventures, or not commence operations in markets where burdensome obligations are imposed. Consequently, the local and global economy would be harmed.

This Paper proposes that States adopt a Multilateral International Treaty within the World Intellectual Property Organization (WIPO). The Treaty should provide minimum, standard, and reasonable obligations for ISPs concerning the protection of copyright. It should also implement a uniform ISPs liability regime with the same minimum safe harbors for all ISPs, regardless of where they are located.

Part I of this paper provides an overview of the current EU safe harbors applicable to ISPs. It then focuses on ISPs' obligation to get authorizations from the copyright owners and the liability of ISPs in the absence of such authorizations. Moreover, the Paper analyzes ISPs' liability, safe harbors, and filtering obligations in non-EU countries. Finally, Part I suggests that an international harmonized approach is therefore needed to overcome differences in the domestic legislation of EU and non-EU countries. Part II proposes a solution to the problem through the negotiation and adoption of an International Multilateral Treaty. Part III addresses the potential criticisms of the proposal.

II. NEW OBLIGATIONS FOR THE INTERNET SERVICE PROVIDERS (ISP) PROVIDED UNDER THE EU DIRECTIVE ON COPYRIGHT

The Directive aims at modernizing EU copyright rules, achieving a fully functioning Digital Single Market, and closing the so-called "value gap" between internet platforms and copyright holders.[8] The definitive text of the Directive introduces specific obligations for the ISPs as well as a particular liability regime for ISPs in case they do not get the required authorizations from the copyright holders. Part I explains the problems created by the new European provisions from an international perspective.

A. EU Directive on Copyright

The Directive assigns an active role to ISPs as far as prevention and enforcement of copyright infringement are concerned. This perspective seems to be a growing trend at the international level. Since the middle of 2007 entertainment industries, government legislators, and regulatory agencies increasingly have been pressuring ISPs to play a more active role in preventing copyright infringement *ex-*

[8] *See* Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. 19, 26 (2017).

ante. "Well-organized copyright industry associations have effectively lobbied governments worldwide, convincing public authorities that greater enforcement efforts are needed to combat online copyright infringement."[9]

Despite this growing trend, many countries of the world do not grant such an active role to ISPs or provide safe harbors that differ from the EU safe harbors. As highlighted above, the differences among the domestic legislation on ISPs' enforcement police powers, liability, and applicability of safe harbors, create a problem for the ISPs operating at the international level. Therefore, this Paper encourages an international harmonized approach to these issues.

1. Current EU Approach to ISP Safe Harbors

In the EU, safe harbors for ISPs are regulated under the E-commerce Directive[10] and more specifically in the transposing laws in each Member State.[11] Safe harbors prevent ISPs from being liable provided they meet the requirements applicable to each particular safe harbor.[12] In the E-commerce Directive, safe harbors regard ISPs exemption from liability for "mere conduit"[13], "catching",[14] and "hosting."[15]

The Copyright Directive reaffirms the non-applicability of the safe harbor for hosting activities provided under article 14 of E-commerce Directive when "the recipient of the service is acting under the authority or the control of the Article 13 provider."[16] Indeed, section 17.3 of the Copyright Directive provides that the safe

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[9] Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 404 (2009), https://www.jstor.org/stable/pdf/29763019.pdf?ab_segments=0%252Fbasic_SYC-5152%252Ftest&refreqid=excelsior%3A38085fe1f8524393dfeb77e4e73cca45 (referencing WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009).

[10] *See* Council Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J (L 178), 1–16 (EC) (2008), [hereinafter Directive on Electronic Commerce or E-commerce Directive].

[11] Domestic laws of each Member State will not be studied in this Paper.

[12] Council Directive 2000/31, *supra*, note 10 at art. 2 (defining "service provider" as "any natural or legal person providing an information society service," as defined under art. 2 (a)).

[13] *Id*. at art. 12. Exemption applies provided that the ISP "(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission."

[14] *Id*. at art. 13.

[15] *Id*. at art. 14(a)(b).

[16] *Id.* at recital 42, recital 44, recital 46 and art. 14(2).

harbor for hosting will not apply to the situations covered by the article when an ISP performs an act of communication to the public or an act of making available to the public. On the other hand, as it will be discussed below, it can be argued that Article 17.4 provides for a new specific safe harbor with different requirements based on the size of the ISP involved.

2. What the Directive Changes

The proposed Directive obligates Member States to ensure that online content sharing service providers[17] perform either an act of public communication or an act of making available to the public access to copyright-protected works or other protected subject-matter uploaded by its users. Thus, the Directive obliges ISPs to get authorization from the right holders. If no authorization is granted, they will be liable for unauthorized acts of communication to the public, unless they demonstrate having fulfilled the conditions under section 17.4. No general filtering obligations are provided in the approved version of the Directive. These provisions will be further discussed below.

a. Proposed Obligation to Obtain an Authorization from the Right Holders

As highlighted above, under section 17.1 of the Directive, the ISPs' main obligation is to get authorization from the right holders referred to in Article 3(1) and (2) of Directive 2001/29/EC [hereinafter InfoSoc Directive][18] in order to communicate or make available to the public works or other subject matter. They can do that, for instance, by concluding a licensing agreement. Thus, it is expected that ISPs:

> [W]ill negotiate a license rate with major rights holders …to compensate owners for potentially infringing uploads. But for the many other uploads where the rights holder is unknown,

[17] "Online content sharing service provider" is defined under article 2 (6) of the Copyright Directive as "[A] provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes. Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not "online content sharing service providers" within the meaning of this Directive."

[18] Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 2., 2001 O.J. (L 167) 1, 16 (EC).

> service providers will be required to carry out a "best efforts" diligent search for a rights holder to request a license or be liable for infringement.[19]

The difficulties for the implementation of these licenses are clear. This is especially evident in the determination of the price of the license and how to prove that best efforts were used to identify and get the license from the right holder.

Section 17.1 poses another problem concerning the identification of the users whose acts must be included or not in the authorization by providing an undefined criterion. Section 17.1 requires that the authorization covers acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues. The Directive does not define "commercial basis" or "significant revenues". These gaps should, therefore, be filed by each Member State. It may be expected that they will provide different definitions of these concepts, leading to different applicable rules in the EU Member States.

b. Liability of the ISP in Case of Violation to the Obligations Provided Under the Proposed EU Directive on Copyright

The Directive imposes higher standards of liability on ISPs. This conclusion can be reached, first, because they will perform an act of communication to the public or an act of making available to the public when they give public access to copyright-protected works uploaded by its users (section 17.1). Second, if ISPs do not get an authorization from the right holders, that they will liable for unauthorized acts of communication to the public of copyright-protected works and third, because, under section 17.3 of the Directive, the safe harbor for hosting provided under Article 14.1 of the E-commerce Directive will not apply to the situations covered by the Article.

Regarding the liability of ISPs provided under the Directive, some scholars[20] have concluded that the "construction of EU law included in the Proposal would make hosting providers directly liable, rather than secondarily liable" because ISPs will perform an act of communication to the public. At this regard,

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[19] Kris Erickson, *The European Copyright Directive: License First, Ask Questions Later,* MEDIA POLICY PROJECT BLOG (Apr. 2, 2019), https://perma.cc/9SW8-53RS.

[20] *See* Giancarlo Frosio, *To Filter, or Not to Filter? That Is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L.J. 331, 343 (2018).

other scholars have stressed: "the alignment between CJEU case law[21] and policy action on the side of the European Commission, especially with regard to the basic idea that the making available, by a hosting provider, of third-party uploaded copyright content, may fall within the scope of Article 3(1) of the InfoSoc Directive[22] [acts of communication to the public]". In sum, if ISPs do not get the authorizations from the right holders, they will be held primarily liable.

On the other hand, the Directive (probably in an effort to balance the higher liability imposed on the ISPs) introduces a new specific safe harbor. Indeed, under section 17.4, in case the ISPs do not get an authorization from the right holders, in order to avoid liability they will have to demonstrate that they have: (a) made best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information,[23] and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice by the right holders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads under paragraph (b). Additionally, according to section 17.5, the following factors will be considered to determine whether the ISP has complied with these obligations: (a) the type, the audience and the size of services and the type of works or other subject-matter uploaded by the users; (b) the availability of suitable and effective means and their cost for service providers.

Furthermore, the ISPs will have to comply with different conditions in accordance with their importance and volume of visits. Indeed, under section 17.5 some organizations must respect the requirements under section a) and c) of section 17.4 to be exempted from liability.[24] On the other hand, where the average number

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[21] *See* Case C-610/15, Stichting Brein v. Ziggo BV and XS4ALL Internet BV. 2017 ECLI:EU:C:2017:45. In this case, the Court of Justice of the European Union (CJEU) held an ISP directly liable for performing an act of communication to the public, describing the requirements for an act to be considered "communication to the public."

[22] Eleonora Rosati, The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms (July 21, 2017), available at https://ssrn.com/abstract=3006591.

[23] It is unclear how the EU will effectively implement this method of providing information to ISPs.

[24] Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 17, 2019 O.J. (L 130) 92. The first paragraph of Article 17, Subsection 6 reads ""Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission Recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the

of monthly unique visitors of these service providers exceeds 5 million, calculated based on the last calendar year, ISPs will also demonstrate that they have made best efforts to prevent further uploads of the notified works for which the right holders have provided the relevant and necessary information.[25]

c. Filtering Obligations

Unlike the previous versions, the final text of the Directive (section 17.8) clearly states that the application of Article 17 shall not lead to any general monitoring obligation.[26] Despite this, it may be argued that the ISPs will still be forced to implement filtering measures mainly "to ensure the unavailability of specific works … for which the right holders have provided the service providers with the relevant and necessary information" and "to prevent their future uploads in accordance with paragraph (b)" (section 17.4 letters b) and c)) to be able to qualify for the exemption of liability in case they did not get authorizations from the right holders.

Even if the Directive does not provide for mandatory filtering obligations, it is expected that filters will be implemented anyway to comply with the requirements of section 17.4. ISPs will probably introduce algorithmic filters because it will be too difficult to have a human review of huge amounts of content. This measure will probably cause the preventive removal of the content (regardless if it's copyrighted or not) to avoid liability.[27] Finally, it is worth pointing out that the Directive assigns ISPs the role of deciding the applicability of fair uses exceptions, and therefore, in the absence of non-automatic filters, the content will be removed if it is not evident that fair uses exceptions apply. Indeed, users might be affected because the automatic filters that ISPs will surely apply simply "cannot account for fair use and the other limitations on copyright intended to protect freedom of speech".[28]

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compliance with the point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them."

[25] *Id*.

[26] The implementation of a general monitoring obligation (as it was envisaged in the previous versions of the Directive) would have been against art. 15 of the E-commerce Directive and against the CJEU case law. *See, e.g.* Case C-70/10, Scarlet Extended SA v. Soc. Belge des auteurs (SABAM), ECLI:EU:C:2011:771, para. 29.

[27] Kris Erickson*, The European Copyright Directive: License First, Ask Questions Later,* LSE MEDIA (Apr. 2, 2019).

[28] Mitch Stoltz, *Copyright's Safe Harbors Preserve What We Love About the Internet*, ELECTRONIC FRONTIER FOUNDATION (Jan. 17, 2019), https://www.eff.org/it/deeplinks/2019/01/copyrights-safe-

B. The EU Directive Conflicts with ISP Safe Harbors in Other Countries

ISP liability, safe harbors, and the role of ISPs in preventing copyright infringement will be analyzed below in four non-EU countries to show the legal gap that would be created between these countries and the EU countries. ISPs in non-European countries have been held secondarily liable unless they have actual knowledge of the infringing activities of the users or authorize the infringement. Safe harbors were introduced to limit their liability provided they meet some specific requirements. No general obligation of filtering is imposed on ISPs in the countries analyzed. Finally, the analysis below is also relevant to outline the solution proposed under section II

1. United States

In the United States, ISPs have traditionally been held secondarily liable. Cases such as *Playboy Enterprises Inc. v. Frena*[29], *Sega Enterprises v. MAHPHIA*[30], and *Religious Tech. Center v. Netcom On-Line Communication Services, Inc*.[31] prompted the telecom and Internet industry groups to lobby for the enactment of the Online Copyright Infringement Liability Limitation Act (OCILLA), part of the Digital Millennium Copyright Act (DMCA).[32] Section 512 of OCILLA provides four safe harbors for qualified service providers based on (a) "Transitory Digital Network Communications," (b) "System Caching," (c) "Information Residing on Systems or Networks At Direction of Users," and (d) "Information Location Tools." [33]

To qualify for any provision of limited liability under the safe harbors, the defendant must be a "service provider," and fulfill the required conditions of eligibility, including the adoption and reasonable implementation of a "repeat infringer" policy that "provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network."[34]

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[29] Playboy Enterprises v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

[30] Sega Enterprises v. Mahphia, 857 F. Supp. 679 (N.D. Cal. 1994).

[31] Religious Tech. Center v. Netcom On-Line Comm. Serv., 907 F. Supp. 1361 (N.D. Cal. 1995)

[32] DANIEL SENG, COMPARATIVE ANALYSIS OF THE NATIONAL APPROACHES TO THE LIABILITY OF INTERNET INTERMEDIARIES para. 155, at 55 (Nov. 10, 2010), http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf.

[33] 17 U.S.C. §§ 512(a)-(d) (2018); Viacom Int'l, Inc. v. Youtube, Inc., 676 F.3d 19, 27 (2d Cir. 2012).

[34] 17 U.S.C. § 512(i)(1)(A) (2018).

Additionally, the service provider must accommodate "standard technical measures" that are "used by copyright owners to identify or protect copyrighted works."[35] Service providers must also satisfy the requirements of a particular safe harbor. To qualify for the safe harbor under § 512(c), which covers infringement claims that arise "by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,"– the service provider must have neither actual knowledge that the material or an activity using the material on the system or network is infringing nor awareness of facts and circumstances from which infringing activity is apparent.[36] The knowledge or awareness must regard "specific infringing activity."[37] In any case, the provider that gains knowledge or awareness of infringing activity retains safe harbor protection if it "acts expeditiously to remove, or disable access to, the material."[38]

Under American Law, ISPs are required to remove infringing posts through an established "Notice and Take-Down" regime.[39] In other words, they have only the obligation to respond to a "notice" that gives a specific file location, but no obligation to "look for" other infringements of that kind.[40] Finally, it must be pointed out that some ISPs, such as Youtube,[41] have implemented filtering mechanisms allowing the detection and removal of infringing copyrighted content in cooperation with copyright owners.

2. Australia

In Australian case law,[42] ISPs are held secondarily liable for copyright infringement under the doctrine of authorization.[43] Section 112E was added to the

[35] *Id.* at §§ 512(i)(1)(B), (i)(2).

[36] *Id.* at §§ 512(c)(1)(A)(i)-(ii).

[37] *See Viacom Int'l, Inc*., 676 F.3d at 26.

[38] 17 U.S.C. § 512(c)(1)(A)(iii) (2018).

[39] *See* Jennifer L. Hanley, *ISP Liability and Safe Harbor Provisions: Implications of Evolving International Law for the Approach Set Out in Viacom v. Youtube*, 11 J. INT'L BUS. & L. 183, 184 (2012).

[40] Jan Bernd Nordemann, *Internet Copyright Infringement: Remedies Against Intermediaries-the European Perspective on Host and Access Providers*, 59 J. COPYRIGHT SOC'Y U.S.A. 773, 784 (2012).

[41] *Id*. at 784–785.

[42] *See generally* Universal Music Austl. v. Cooper [2006] FCA 78 (Austl.); *see also* Roadshow Films Pty Ltd & Ors v iiNet Ltd [2012] HCA 16 (Austl.).

[43] *See Copyright Act 1968* (Cth) s 36(1) (Austl.) [hereinafter *Australian Copyright Act*]. *See also id.* s 101(1).

Australian Copyright Act[44] to provide the ISP with some specific safe harbors. Moreover, section 116AA of the Australian Copyright Act provides four safe harbors that apply to the "carriage service providers" (CSPs)[45] for copyright infringements that relate to carrying out certain online activities. Section 116AC[46], Section 116AD[47], Section 116AE[48], and Section 116AF[49] define the four categories of safe harbor activities. Under Section 116AH[50], CSPs must satisfy the general conditions as well as the specific and detailed conditions for the particular safe harbor category. In case CSPs satisfy the conditions provided under Section 116AH, the specific limitations under Section 116AG will apply to CSPs.

Australia does not impose an active role to ISPs regarding the prevention and enforcement of copyright. As a general rule, Section 116AH(2) of the Australian Copyright specifically provides that the CSP is not required to monitor its service or to seek evidence of infringing activity.

3. Canada

Canada has traditionally imposed secondary liability to ISPs in the absence of authorization. Authorization of copyright infringement was characterized as direct infringement liability for the ISP.[51] The amendments introduced in 2012 to the Copyright Act[52] created a new kind of liability for enabling copyright infringement over the Internet[53] and it also included some safe harbors[54] and a

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[44] *See id.* s 112E. The provision was added by the Copyright Amendment (Digital Agenda) Act 2000 (Cth) based on the Agreed Statement to Article 8 of the WIPO Copyright Treaty 1996.

[45] *See id.* s 116AA.

[46] *Id*. s 116AC. Category A activity is applicable to CSPs that provide facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or providing connections.

[47] *Id*. Category B activity is applicable to CSPs that cache copyright material through an automatic process.

[48] *Id*. Category C activity is applicable to CSPs that store, at the direction of a user, copyright material on a system or network controlled or operated by or for the CSP.

[49] *Id*. Category D activity is applicable to CSPs that refer users to an online location using information location tools or technology.

[50] *Id*. Section 116AH Item 1 provides that "the carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers."

[51] SENG, *supra* note 32, at 14.

[52] *See generally* Copyright Act, R.S.C., 1985, c. C-42 (Can).

[53] *Id.*

[54] These safe harbors "are not revolutionary considering that Canadian courts have addressed

notice and notice regime. Safe harbors are applicable to ISPs,[55] Internet Catching Services providers[56], Internet Storage Service Providers[57], and Internet Search Engine Providers.[58] Moreover, Copyright Act sections 41.25, 41.26, and 41.27(3) provide for a "notice and notice" regime.[59] ISPs are not compulsorily required to remove the infringing content and they can benefit from the safe harbors independently of whether they comply with the "notice and notice" obligations.[60]

Finally, Canadian Law does not impose general filtering obligations. It may be expected that the country will not introduce such measures also to comply with the United States-Mexico-Canada Agreement (USMCA) signed in September 2018. Indeed, this Treaty specifically states that "monitoring" or "affirmatively

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pretty extensively the liability of Internet intermediaries despite the absence of statutory provisions like the DMCA." David Bensalem, *Comparative Analysis Of Copyright Enforcement In The Cloud Under U.S And Canadian Law: The Liability Of Internet Intermediaries* (2012), https://tspace.library.utoronto.ca/bitstream/1807/33922/3/Bensalem_David_201211_LLM_thesis.pdf

[55] Canadian Copyright Act, Section 31.1 (1) provides: "A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter."

[56] Canadian Copyright Act, Section 31.1 (3) provides: "Subject to subsection (4), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject matter."

[57] Canadian Copyright Act, Section 31.1 (5) provides: "Subject to subsection (6), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter."

[58] Canadian Copyright Act, Section 41.27 (1) provides: "In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication."

[59] By this regime, aggrieved parties can send a notice of infringement to ISPs and the recipient must, as soon as feasible, forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it.

[60] *Online Infringement: Canadian "Notice and Notice" vs U.S. "Notice and Takedown"*, ENTERTAINMENT & MEDIA LAW SIGNAL (June 27, 2012), http://www.entertainmentmedialawsignal.com/online-infringement-canadian-notice-and-notice-vs-us-notice-and-takedown [https://perma.cc/65SD-Y8XU].

seeking facts indicating infringing activity" is not required.[61]

4. China

Under Chinese law, ISPs are secondarily liable on fault-based principles such as negligence[62] or principles of joint or accessory liability.[63] For contributory infringement either for joint or accessory liability to apply, there must be evidence of the defendant intermediary's actual knowledge of the infringement.[64]

The Regulations enacted in 2006[65] provide safe harbors to ISPs. These rules establish which kind of network service providers are eligible for safe harbors and when they are not applicable. The Safe harbors adopted were inspired by § 512 DMCA in the U.S. and the Article 14 E-commerce Directive and are those under section 20-23.[66] It must finally be pointed out that China has enacted no rule preventing the imposition of a monitoring obligation against copyright infringement[67] under the Provisions enacted in 2013.[68]

The following chart summarizes the approaches of the countries studied above as far as ISP liabilities, safe harbors, notice of infringement, and filtering

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[61] Ernesto Van der Sar, *"NAFTA" Replacement Extends Canada's Copyright Term to Life +70 years*, TORRENT FREAK (Oct. 1, 2018), https://torrentfreak.com/nafta-replacement-extends-canadas-copyright-term-to-life-70-years-181001/ [https://perma.cc/4ENY-APKJ].

[62] Zhongguo Yinyue Zhuzuoquanxiehui Su Wangyigongsi, Yidongtongxin Gongsi Qinfan Xinxi Wangluo Chuanbo Quan Jiufenan (中国音乐著作权协会诉网易公司、移动通信公司侵犯信息网络传播权纠纷案) [Music Copyright Soc'y of China v. Netease Commc'ns., Inc. & Mobile Commc'ns Corp.], 2003 SUP. PEOPLE'S CT. GAZ. 5 (Beijing No. 2 Interm. People's Ct. 2002) (China).

[63] Danny Friedmann, *Oscillating from Safe Harbor to Liability: China's IP Regulation and Omniscient Intermediaries*, WORLD INTERMEDIARY LIABILITY MAP, MAPPING INTERMEDIARY LIABILITY TRENDS ONLINE (May 18, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2969807.

[64] Daniel Seng, *Comparative Analysis Of The National Approaches To The Liability Of Internet Intermediaries*, 20 WORLD INTELLECTUAL PROPERTY ORGANIZATION.

[65] Regulation on the Protection of the Right to Communicate Works to the Public Over Information Networks, Order No. 468 (promulgated by the the State Council of the People's Republic of China, May 18, 2006, effective July 1, 2006), CLI.2.76727(EN) (pkulaw).

[66] Friedmann, *supra* note 63.

[67] Xiao Ma, *Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the United States' Approach*, 4 NYU J. INTELL. PROP. & ENT. L. 253, 273–74 (2015).

[68] Supreme People's Court, Dec. 17, 2012, Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks (Ch.) [https://perma.cc/U5ES-J7BV].

obligations are concerned.

	U.S	**Australia**	**Canada**	**China**
ISP liability	Secondary	Secondary	Secondary	Secondary
Safe Harbors (activities included)	Transmission, caching, hosting and hyperlinking	Transmission, caching, hosting and hyperlinking	Transmission, caching and hosting	Transmission, caching and hyperlinking
Notice of Infringement	Notice and takedown procedure	Notice and takedown procedure	Notice-Notice proceeding	Notice and takedown procedure
General Filtering Obligations	No	No	No	No

C. Need for an International Approach to the Issue

The differences in domestic copyright enforcement regimes and, especially the differences in ISPs' liability among EU (after the Directive) and non-EU countries, suggest that an international approach to these issues is desirable to limit a negative impact on ISPs. The certainty of the applicable law for the ISPs can facilitate the expansion and management of the internet business and help to achieve a better protection of copyrights.

1. Lack of Harmonization Poses Difficulties to ISPs

As shown above, domestic legislations around the world have different approaches for the role of the ISPs and their liability and safe harbor provisions. This lack of harmonization will be increased as a consequence of the Directive (especially because each member state may be implementing the Copyright Directive differently) mainly affecting ISPs with a worldwide presence.

> [L]egal changes in one country create global effects. In theory, [ISPs] can apply different policies and use different technologies to meet geographically diverse legal obligations. In practice, though, service providers have to make complex decisions about whether and to what extent they adjust their

> policies and practices to accommodate differing laws…. [it] is economically infeasible to institute different policies outside of Europe. Users of those services will feel the effects worldwide. Other services may choose to simply cease operations in the EU. For those companies capable of differentiating their services (assuming it is possible to comply at all), this represents a step toward a more fragmented internet — a legal wall put up in defiance of the idea of the internet as a borderless space for exchanging information.[69]

In sum, varying national legal systems create substantial uncertainty for Google and all the other "internet giants" as they face different liabilities and safe harbors depending on the applicable law. Thus, they are forced to adopt various technical methods and legal strategies to approach these differences to avoid liability. This may create a slowdown in the internet as well as a negative impact on the global economy.

2. Impact of the EU Directive on Copyright on International ISPs

It might be argued that as a result of the Directive, there will be a big shift as far as ISPs' liability is concerned with negative results at international level. Indeed, the Directive expressly provides that the ISPs will be performing an act of communication to the public, or shall notify the public when it gives the public access to copyright protected works uploaded by its users. These acts will be deemed unauthorized if the ISPs do not get authorization from the right holders. In these cases, the ISPs will be primarily liable rather than secondary liable.

Therefore, it may be argued that in Europe ISPs might be more easily and more seriously held liable under the Directive, unless they can show compliance with the requisites under section 17.4. Moreover, to avoid liability under the Directive, more *ex-ante* and *ex-post* obligations are imposed to them as they will have to use "best efforts" to handle and comply with a variety of important issues such as: 1) obtain an authorization from the right holders; 2) ensure the unavailability of specific works; and, 3) prevent future uploads.

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[69] Stan Adams, *Doing the Wrong Thing for the Wrong Reasons: Article 13 Replaces Safe Harbors with Upload Filters, Won't Help Artists but Will Hurt the Internet*, CDT.ORG (Jan. 18, 2019), https://cdt.org/blog/doing-the-wrong-thing-for-the-wrong-reasons-article-13-replaces-safe-harbors-with-upload-filters-which-wont-help-artists-but-will-hurt-the-internet [https://perma.cc/Q3R4-EZWR].

On the other hand, as the above chart describes, many countries of the world impose secondary liability on ISPs based on the doctrine of authorization or the actual knowledge of the infringement committed by the user of the platform. Therefore, in these cases, it appears less easy to hold ISPs liable. Furthermore, when ISPs discover or are informed about the infringement, in non-EU countries they are traditionally required to remove the infringing content only and are not required to prevent future uploads of infringing materials.

Thus, it appears clear that in the EU, ISPs will have a more active role regarding copyright infringement and an increased liability in case of breach of the obligations under the Directive than in other countries. As highlighted above, it may be expected that they will have to put in place different legal and technical strategies to approach the differences in legislation. Apart from being burdensome, the implementation of these strategies (taking into account also the other unfavorable provisions of the Directive) will involve relevant financial and human resources which may discourage them from promoting innovation.

III. PROPOSING A SOLUTION: SIGNATURE OF A MULTILATERAL INTERNATIONAL TREATY IN THE FRAMEWORK OF WIPO

Part II proposes that the States of the international community sign a Multilateral Treaty in the framework of the WIPO on issues regarding the ISPs. An international instrument of this kind would help to achieve harmonization between the existing legislations of the States with the aim of providing all actors involved in the use of the internet (users, industries, artists and ISPs) with the same applicable rules. A standard set of rules will increase the predictability of the applicable law for ISPs, leading to an expansion of the internet and to a better protection of copyrights.

A. General Guidelines and Text of the Proposed Treaty

The suggested Treaty should be negotiated taking into account the common rules of the Contracting States applied to ISPs, identifying first what these common rules are on the basis of their domestic legislations and case law. Its content should include the role of the ISPs, their liability in case of infringing content uploaded by their users and applicable safe harbors in case of unlawful activity performed by their users.

1. Text of the Proposed WIPO Treaty

The proposed Treaty is generally inspired by existing domestic laws such as the DMCA and the E-commerce Directive. Moreover, it is drafted following the writing style of certain recently adopted International Treaties, such as Chapter 20

of the USMCA[70] on Intellectual Property Rights. The text of the suggested Treaty could be the following:

> ***Measures applied by ISPs to prevent copyright infringement***
>
> *Contracting Parties shall ensure that ISPs, in accordance with high industry standards of professional diligence, do their best efforts to avoid copyright infringement by the users of their platforms by applying minimum, appropriate, proportional and reasonable measures. These measures shall include but are not limited to the obligation of ISPs to provide sufficient visible notice to users warning about the criminal and civil liability involved in uploading infringing contents and having their consent as a prior condition for the publication of the material[71], the implementation of a repeat infringer policy as well as a takedown procedure to ensure that the infringing content is removed expeditiously. Contracting Parties shall ensure that filtering measures potentially applied by ISPs voluntarily or compulsorily are specific, limited, do not impose substantial costs on ISP or substantial burdens on their systems and networks and that they are subject to human review. Contracting Parties shall not impose on ISPs a general obligation to actively seek facts or circumstances indicating infringing activity.*
>
> ***Liability of the ISPs***
>
> *Contracting Parties shall provide that ISPs are not held primarily liable for the infringing content uploaded by the users in their platforms unless they have actual knowledge of the unlawful activity and take no prompt and effective measures to stop the infringement.*
>
> ***Safe Harbors***
>
> *Contracting Parties shall ensure, in their domestic legislations, that ISPs shall have limited liability for the following activities:*

[70] The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., art. 20, agreed to Oct.1, 2018, [hereinafter USMCA] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf [https://perma.cc/BA7X-EGBY]. This Agreement provides an example of open provisions to be tailor-made by the contracting States regarding intellectual property rights.

[71] The notice could be provided by visible pop-ups and/or a header banner.

1) Mere conduit

Mere conduit activities shall include the transmission, routing, provision of access to a communication network and the transient storage of the information transmitted, by using automatic technical processes and for the sole purpose of carrying out the transmission. Contracting Parties, in their domestic legislations, shall provide for specific requirements for the application of this provision, including but not limited to the following: the ISP: (a) does not initiate the transmission; (b) does not select the receiver of the transmission except as an automatic response to the request of another person; (c) does not select or modify the information contained in the transmission; (d) does not store the information for any period longer than is reasonably necessary for the transmission, routing or provision of access.

2) Caching

Caching activities shall include the automatic, intermediate and temporary storage of the information transmitted through the ISP. Contracting Parties, in their domestic legislations, shall provide for specific requirements for the application of this provision, including but not limited to the following: the ISP (a) does not modify the information; (b) complies with conditions on access; (c) complies with rules regarding the updating of store (including refreshing, reloading or other updating of the information) in a manner widely used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry; (e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

3) Hosting

Hosting activities shall include the storage of the information transmitted by a user through an ISP. Contracting Parties, in their domestic legislations, shall provide for specific requirements for the application of this provision, including but not limited to the following: the ISP: a) does not have actual knowledge of the infringing activity, b) acts expeditiously to remove or to disable

access to the information stored upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice of alleged infringement from the copyright holder.

4) Hyperlinking

Hyperlinking activities shall include the referring or linking users to an online location by using information location tools, including hyperlinks and directories. Contracting Parties, in their domestic legislations, shall provide for specific requirements for the application of this provision, including but not limited to the conditions established in the subsection 3 above.

Contracting States shall be free to adopt other safe harbors in addition to the above.

Take down procedure

Contracting Parties shall ensure that an effective takedown procedure is implemented in their domestic legislations on the basis of which the ISPs shall expeditiously remove the infringing content uploaded by their users upon notice. The take down procedure shall include an effective notice of claimed infringement and an effective counter-notice by those whose material is removed or disabled through mistake or misidentification. The notice of claimed infringement must contain sufficient information a) to allow the ISP to identify the work allegedly being infringed and the online location of the alleged infringement and b) to clearly identify the person sending the notice.

Enforcement

Contracting Parties shall provide, in their domestic legislations, for effective enforcement measures of the provisions contained herein, both civil and criminal. In case matters provided under this Treaty involve different jurisdictions, Contracting Parties shall cooperate among them in order to ensure that any judicial or administrative decision issued in one of the Contracting Parties' country is effectively recognized and enforced in another Contracting Parties' country.

2. Explanation of the Treaty Key Provisions

The text of the proposed Treaty was drafted to be attractive for the States to sign in terms of flexibility. Keeping in mind how hard it is to obtain a consensus of the States of the international community, both to start negotiating an International Treaty and then to draft and agree on a common text, the proposed Treaty should be as open and flexible as possible. This is so States have more incentives and can more easily gain the domestic consensus[72] required to sign it. Moreover, to facilitate the adoption of this Treaty by the States, its text should include minimum standards or general principles to be further adopted by all the signatory's States in their domestic legislations.[73] In other words, the States should be free to implement more detailed rules based on the general principles provided under the Treaty.

These minimum standards should also be adopted considering the rules which are commonly applied by the States to the Treaty. These common rules seem to be the exclusion of a general obligation to monitor by ISPs, the secondary liability of ISPs in case of infringing content uploaded by their users and the provision of safe harbors. Moreover, the Treaty should also balance the interests of both the copyright owners and entertainment industries on one side and the ISPs on the other side[74] as well as the users. This to try to achieve a substantial justice and gain the consensus of the States as well as of the public opinion.

a. Role of ISPs

After agreeing on a common definition of ISPs, considering their domestic laws,[75] States should discuss and negotiate whether to assign ISPs an active, passive, or neutral role. As mentioned earlier, there is a growing tendency, complete with lobbyists advocating, to make the ISPs participate in the copyright enforcement as they may have more effective technical tools to detect and remove the infringing content. In case the States agree to assign a certain degree of responsibility of the copyright enforcement to ISPs, the Treaty should also address the measures ISPs should implement for this purpose (which are suggested to be

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[72] Both of the public opinion and of the domestic legislative bodies.

[73] USMCA, *supra* note 70 (providing open rules to be incorporated to the domestic laws of the Contracting States).

[74] This is a critical issue because the U.S approach tends to be more protective ofISPs, whereas the European approach is more protective of copyright owners. *See* Leon Trapman, *American and European Safe Harbors*, KLUWER COPYRIGHT BLOG (Dec. 14, 2016), http://copyrightblog.kluweriplaw.com/2016/12/14/american-european-safe-harbours/ ("Where the United States seems to find for the ISPs, the European Union places emphasis on protection of the right holders").

[75] The definition was not included in the text of the proposed Treaty.

"minimum, appropriate, proportional and reasonable"), including, but not limited to, providing "sufficient visible notice" before uploading the content, the implementation of a "repeat infringer policy" and a "takedown procedure". States should be free to provide for filtering obligations, without imposing a general obligation on ISPs to filter the content uploaded in their platforms. If filtering obligations were to be implemented, the proposed text of the Treaty provides that these must be "specific, limited" and "not impose substantial costs on ISP or substantial burdens on their systems and networks and that they are subject to human review".

b. Liability of ISPs

Many countries of the world seem to share the view that, in principle, ISPs are not held primarily and directly liable for the infringing content uploaded by their users provided that the ISPs do not have actual knowledge of the infringing activities and promptly remove the infringing content. Indeed, the user who published the material violating the protected material is primarily liable for the infringement. However, ISPs are more frequently sued by copyright holders as it is easier for them to do so rather than pursuing individuals who are difficult to serve. These suits often seek injunctions as well as damages. Therefore, the proposed Treaty includes these principles.

c. Safe Harbors

Many countries of the world[76] grant safe harbors for ISPs for activities where ISPs perform only automatic processes and thus do not have active participation in the creation, publication, or modification of the content of the information transmitted, hosted or stored,[77] or actual knowledge of the infringement. In general, mere conduit, caching, and hosting activities are exempted from liability, provided that some requirements are met. Thus, the proposed Treaty could include at least these "traditional" safe harbors and/or provide new safe harbors according to the evolution of technology up to date. However, the text of the proposed Treaty has included only the "traditional" safe harbors in order to more easily get the consensus of the States.

d. Takedown Procedure

Many countries of the world have adopted a takedown procedure or a notice

[76] Including: The United States, Europe, Canada, Australia and China. USMCA, *supra* note 70, at art. 20.88.

[77] *See* L'Oréal SA v. eBay Int'l AG, 2011 E.C.R. I-6011.

and takedown regime; the suggested Treaty proposes to implement a basic common takedown procedure, by which the ISPs remove the infringing content posted in their platforms after notice by the copyright owner. It should also include an effective notice and counter-notice, to be further implemented in detail in their domestic legislation. The Treaty should also include the obligation of the ISP to expeditiously restore the material which was removed or disabled through mistake or misidentification or when there is enough reliable evidence that the allegedly infringing material does not infringe any copyright, including but not limited to a judgment by any judicial or administrative authority.

e. Enforcement Measures

The content of the Treaty must be able to be enforced at the domestic level in order to be effective. This is why it includes a section by which the Contracting Parties undertake to provide in their domestic legislation for effective enforcement of its provisions both at the civil and criminal levels. Contracting States should be free to adopt the remedies they consider appropriate. Civil remedies should include at least injunction proceedings against ISPs in case they authorize or participate in infringing activities, fines in case they do not provide for measures to prevent the infringement (including closing down the website if they do not comply with the national law applying the Treaty), and monetary damages for the benefit of copyright owners and users. Criminal remedies should be provided for serious conducts (to be determined by each Contracting State) and should include imprisonment and/or administrative penalties.

B. Reasons for Adopting the Proposal

The Treaty outlined above would provide great benefits in terms of harmonization, economic utility, and improvement of the copyright system enforcement. The proposal may seem ambitious because it aims at getting the consensus of the States about important and controversial issues. However, the benefits are worth the effort of the States in finding common grounds on which the Treaty may be based.

1. Harmonization

The proposed Treaty would provide common rules that would help to harmonize the existing legislation among the Contracting States in the subject matter of the Treaty. States will later be able to tailor these rules in their domestic legislations according to their specific needs and culture. Therefore, a Treaty of this kind would respect each individual State's culture and needs providing at the same time uniform rules for industries, copyright owners, and ISPs.

The Treaty, by providing the same minimum set of rules to the actors involved in the world of the internet, would increase the predictability of the applicable law. Predictable rules would provide benefits not only for the ISPs but also for the copyright owners who will know, for instance, that in the Member States of the Treaty they will be able to rely on a takedown procedure having the same common principles. In the end, even if the suggested Treaty is mainly addressed on ISPs, all actors involved in the world of the internet, such as industries, copyright owners, and ISPs will benefit from it.

2. Economic Utility

The suggested Treaty would entail positive effects for the economy both at the domestic and international levels for several reasons. First, a positive consequence of having an International Treaty with uniform rules concerning the ISPs is that they will have a strong incentive to expand their business beyond borders. This will lead to an international expansion of internet services. This expansion will benefit the global economy by promoting the creation and use of new technologies as well as by encouraging the creation of new jobs in the States adopting the Treaty. Moreover, the potential international expansion of the ISPs will increase the competition among them, forcing ISPs to provide better and cheaper services. Indirectly, by providing common rules to the ISPs, the consumers will also benefit.

3. Improvement of the Copyright System Enforcement

It seems undeniable that a common set of rules concerning ISPs will improve the protection of copyrights at the international level. First, it will be more difficult for copyright infringers to violate the rights of copyright owners because ISPs will apply the same basic anti-copyright infringement measures in all of the Contracting States. Copyright infringers will be prevented from publishing infringing content in most Countries[78] by using the same minimum measures. Therefore, the Treaty is expected to render it more difficult for copyright infringers to move from one platform to another (platforms which may be located in different places) trying to find a more favorable ISP (that is to say an ISP favorable or indifferent to the publication of infringing content). This is because all ISPs will be forced to apply the same rules and will face the same liability. In the end, it may be expected that the phenomenon of copyright infringement is likely to be reduced in extent and therefore, copyright owners and industries will benefit both from an economic and non-economic standpoint.

[78] It would be quite unrealistic to imagine that all countries of the world will sign the Treaty.

IV. RESPONDING TO POTENTIAL CRITICISMS OF THE PROPOSAL

The main criticisms that the proposal may face are that: A) it is not politically feasible because most countries of the world will not be willing to negotiate an International Treaty on the liability of the ISPs for a variety of reasons; and, B) the proposed Treaty does not balance the interests of the actors involved in the world of the internet (mainly IPSs, copyright owners and internet users). Each of the above criticisms will be discussed hereinbelow.

A. The Proposed International Treaty is not Political Feasible

Many scholars, legal professionals, and people in the public opinion may hold that the International Treaty proposed in this Paper is "unrealistic" and "utopian". They may argue that it is tough to "convince" the States to sit around a table and negotiate a treaty of this kind. The reasons for this expected reluctance may differ among the countries. Some States may think that the topic is not urgent or important and therefore they may decide to commit their own (possibly limited) resources to other issues. Some other States may find it difficult to agree on the proposed subject matter of the treaty and thus may simply consider that it is not worthwhile to participate in the negotiations. Finally, some other States (especially in the cases of underdeveloped countries) may not even believe that the liability of the ISPs is a "hot topic" applicable to them and, therefore, is not worth regulating from a worldwide perspective.

I acknowledge that the proposed International Treaty may be considered "unrealistic" and "utopian". As discussed earlier in this paper, the idea of promoting the signature of an International Treaty, regardless of the topic involved, is not an easy task. States have different, and in most cases opposing, interests. However, in order to make the proposed treaty appealing to the States, it is of essence that the WIPO (as the international body which this Paper suggests it should hold the meetings for the discussion of the Treaty) prepares a detailed working proposal including all the basic information that a State may need to decide to participate in the negotiation. This working proposal should explain in detail why the Treaty is needed and include the starting points for the discussion as well as the benefits that the Treaty is expected to produce.

Once the representatives of the States fully understand the benefits and advantages of the suggested Treaty thanks to the working proposal prepared by WIPO, I believe that they will weigh its pros and cons and decide to join the invitation to negotiate the Treaty. The following steps (negotiations, agreement on the text, and signature of the Treaty) will not be easy, but these complicated procedures are an intrinsic part of the "game" played by sovereign nations in the

international arena.

B. The Suggested Treaty Does Not Balance the Interests of the Actors Involved in the World of Internet

Another potential criticism against the suggested Treaty is that it does not effectively balance the interests of the main actors involved in the world of the internet, including copyright owners, internet users, ISPs, publishing companies, music industries, etc. It may be argued that the Treaty provides too many benefits for the ISPs at the expense of the other actors mentioned. The content of the Treaty proposed above tries to weigh the interests of every "player" in the field so that it may appear to be as balanced and fair as possible for a variety of reasons. First, even if it may seem a "utopian" goal, the suggested Treaty aims at achieving fairness and reasonableness on the grounds that the need to regulate the activities of the ISPs may not necessarily go against the interests of the copyright owners and the internet users. Second, the suggested Treaty needs to be perceived as "fair" by the public in order to gain consensus and public acceptance. Otherwise, the potential criticisms raised by the public may undermine the Treaty's expected benefits. Moreover, States should feel more compelled to negotiate and sign the Treaty if it is perceived as "balanced" by the public opinion of those States. Obviously, for political reasons, no State in the world would be willing to sign a Treaty that is perceived as unfair or unreasonable by their public. In sum, the Treaty should effectively be a win-win opportunity for all players (and should be perceived as such), rather than favor some players over others.

As mentioned earlier, the suggested Treaty aims at regulating the activity of the ISPs in a balanced way by protecting all the actors involved. The Treaty protects the interests of the ISPs by providing *e.g.* that ISPs are required to apply minimum, appropriate, proportional and reasonable measures to prevent copyright infringement, that potential filtering obligations should not impose substantial costs on ISP or substantial burdens on their systems and networks, and that ISPs will not have a general obligation to actively seek facts or circumstances indicating infringing activity. The interests of the copyright owners are also protected by providing that the ISPs will be required to implement a repeat infringer policy as well as a takedown procedure to ensure that the infringing content is removed expeditiously. Moreover, the interests of the internet users are protected by providing a counter-notice procedure in case the material uploaded is removed or disabled by the ISPs through mistake or misidentification.

Lastly, it is worth pointing out that the suggested content of the Treaty should be considered a starting point for the discussion among the States. It is desirable that before and during the negotiations of the Treaty, the WIPO organizes

working meetings among the copyright owners, internet users, ISPs, publishing companies, and music industries both at the national and international levels to discuss and find common grounds and shared solutions which may enrich and enhance the Treaty.

V. CONCLUSION

It may be argued that the EU Copyright Directive has introduced a European regime of ISPs' secondary liability which may appear in contrast with the existing laws in countries outside the EU. This lack of harmonization will have a negative impact on the ISPs and will eventually lead to a slowdown of the internet on a global scale. In order to overcome the effects of the non-harmonized legislations on the ISPs, the signature of an International Treaty in the framework of WIPO is encouraged. This Treaty should include issues such as the role of the ISPs, the liability of the ISPs, and safe harbors for ISPs. The benefits expected from the Treaty are far more significant than the potential criticisms raised against it.