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The Liability of Internet Service
Providers for Copyright Infringements:
exception to copyright protection derived
from freedom of expression

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Contents

SUMMARY	4
ACKNOWLEDGEMENTS	5
ABBREVIATIONS	6
1. INTRODUCTION	7
1.1. Problem statement	7
1.2. The scope and underlying rationale	8
1.3. The purpose	9
1.4. The research question	10
1.5. Delimitations	10
1.6. Method and outline	10
1.7. Background	11
2. THE LIABILITY OF INTERNET INTERMEDIARIES FOR COPYRIGHT INFRINGEMENTS ONLINE	15
2.1. General liability exemption	15
2.1.1. Uncertainty regarding hosting service providers	15
2.1.2. ‘Knowledge’ based exemption	18
2.1.3. Acquiring knowledge of infringement and obligation to monitor	19
2.2 Exemption from liability for copyright infringements	20
2.2.1. Right to reproduction	21
2.2.2. Communication to the public	23
2.2.3. Injunctions against intermediaries	24
2.3. Concluding remarks	28
3. INTERRELATIONSHIP BETWEEN COPYRIGHT AND FREEDOM OF EXPRESSION	30
3.1. Freedom of expression online	30
3.2. The relationship between two Europes: ECJ and ECtHR	31
3.3. Copyright and freedom of expression under ECHR	33
	2

3.3.1.	Blocking measures	35
3.3.2.	The Pirate Bay	40
3.4.	Concluding remarks	43
4.	PUBLIC INTEREST EXCEPTION TO COPYRIGHT PROTECTION	45
4.1.	Public interest of copyright	45
4.2.	Public interest exceptions in Europe	48
4.3.	The need for legislative response to ISP liability	50
4.4.	Possible “new” exception to copyright protection	52
4.4.1.	Info Soc Directive	52
4.4.2.	The three-step test	54
4.5.	Possible ways to overcome the obstacle of ‘three-step test’ towards freedom of expression	57
5.	CONCLUSION	63
	BIBLIOGRAPHY	65
	TABLE OF CASES	73

Summary

The question of secondary liability of internet intermediaries for illegal content online is closely linked to the enjoyment of freedom of expression that has to be guaranteed both online and offline. The provisions concerning internet service providers' liability in Europe include 'notice and take down' procedure, blocking measures and injunctions against intermediaries, which are all well-designed to protect right holders, however these rules do not properly take into consideration the concerns of securing freedom of speech on the internet.

The aim of this thesis is to analyse the current role of fundamental freedom of expression in shaping the rules of ISP liability with the focus on copyright infringements online. The questions to answer are *inter alia* what is the relationship between two European courts when it comes to the interpretation of fundamental rights and freedoms; whether internet service providers can rely on the arguments deriving from freedom of expression in order to defend themselves against claims of copyright infringement, and whether internet intermediaries should be able to rely on these arguments based on their special role of providing access to information and cultural goods in information society.

In order to answer these questions, current thesis concludes that current rules governing internet service providers in the European Union overlook the arguments of freedom of expression and do restrict the enjoyment of this basic right perhaps too much than necessary. In addition these provisions are outdated and rigid in order to be applicable to the rapid technological changes and the variety of available internet services. In order to overcome these shortcomings, current thesis focuses on the possibility to introduce a new exception to copyright protection based on public interest that could include the widest range of internet intermediaries that could be exempted from the liability for third parties' copyright infringements online.

Finally, current thesis concludes that the introduction of new exception is impeded by the adopted harmonising legislation in the European Union, and by the current international interpretation of the three-step test in TRIPS Agreement. However, these obstacles do not mean that the state of law has to stay unchanged.

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Abbreviations

ACTA	Anti-Counterfeiting Agreement
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of European Union
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
Info Soc	information society
IP	intellectual property
IPRED	Directive 2004/48/EC on the enforcement of intellectual property rights
ISP	internet service providers
OHCHR	Office of the High Commissioner for Human Rights
P2P	peer-to-peer file sharing
PPI	Pirate Parties International
TPB	The Pirate Bay
TPM	technological protection measures
TRIPS	Agreement on Trade-Related Aspect of Intellectual Property Rights
UGC	user generated content
UN	United Nations
US	United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1. Introduction

1.1. Problem statement

It is not surprising that in the age of information, the issue of responsibility of internet service providers ('ISP') for the illegal conduct on the internet has become an important question to answer. The World Wide Web is broad, wild and borderless as much as the irresponsibility of its users. Although one could wish for virtual reality to stay of some kind of *terra nullius* for responsibility, issues like piracy, defamation, hate speech, distribution of child pornography are real to combat online as much as offline.

Here comes in the question of who is responsible for the irresponsible, or how it is possible to 'clean' the internet from the illegal content. ISP have a central two-way role to play in this issue: in order to secure the rights of the right holders from ongoing and further infringements of their legitimate rights on one hand, and to protect the rights of the users whose not less fundamental rights might be violated by excessive "witch hunt" of online infringers.

In addition to much discussed concerns over data protection and users' privacy issues that ISP liability rules can threaten, a strict approach of "catch them all" can also pose a threat to the presumption of innocence if automatic sanctions are placed, i.e. when uploader is automatically perceived as infringer.

The question of ISP responsibility does not only include the question whether ISP are responsible for online copyright infringements or not, but the issue is closely linked to the question of what should be done in order to stop or prevent the further infringements online. In this regard, ISP may acquire some additional duties to monitor the conduct of the users of their services, and to block the access to particular websites and to the content therein whatsoever.

As ISP can be any possible online service provider, including broadband providers who solely provide users with internet access, or social network platform who provide content related services, including file-sharing possibilities, as well as the actual file-sharing trackers, the consequences of these additional duties placed on ISP in order to secure the rights of copyright holders may be extensive and no doubt detrimental to the enjoyment of other human rights by the more significant part of population than the solely affected right holders, *inter alia* to the users' human right to seek, receive and impart *information*.

There is no doubt that in the age of information, *information* is a public good. Information has become the most important material for decision-

making process of any kind: economic, social, or political, and the access to such information is an essential part of citizenship.¹

In addition, internet and the information it contains are at the core of the global economy, as internet is not only a public good, but a very precious one.² However, market efficiency cannot be the only value worth of consideration when assessing ISP liability.

It is also problematic to assume that only traditional ‘media’, particularly news making industry (newspapers or television), can be granted a maximum protection that is derived from the public interest. Access to the information is no longer dependent on so much of these classical intermediaries, but is achieved directly from the source instead.³

Based on a broad definition of ISP which includes *any* service provider on the internet, the actual access to different kind of information may depend on the conduct of the provider, as well as from the duties placed on ISP in order to stop and/or prevent illegal conduct online.

Hence, the liability of ISP for the illegal conduct online has an impact to a wider enjoyment of human rights online in general, and the freedom of expression as the right to seek, receive and impart information in particular.

1.2. The scope and underlying rationale

This thesis will focus on the question of ISP liability and its connection to the freedom of expression, and mostly to the freedom to seek, receive and impart information. The focus will be also placed on the copyright infringements, as this intellectual property (‘IP’) is mostly protecting the goods of such information that fall under the right to seek, impart and receive: namely artistic, literary, and scientific works.

Another rationale to choose the relationship between these competing interests is the fact that both freedom of expression and copyright, i.e. under auspice of right to property, are equated in the scale of the fundamental rights and freedoms in Europe under the European Convention on Human Rights (‘ECHR’)⁴, and the Charter of Fundamental Rights of the European

¹ Vincenzo Zeno-Zencovich, “Copyright and Freedom of Expression: An Ambiguous Relationship”, 18 *European Business Law Review* (2007), 351–362, 357f.

² European Commission, “Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: the open internet and net neutrality in Europe”, COM(2011) 222, 19 April 2011.

³ Zeno-Zencovich, 358.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14, and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, signed on 4 November 1950.

Union ('EU Charter')⁵. The United Nations ('UN') instruments, that take a slightly different stand on the relationship between human rights and IP rights, will be used complementarily to European instruments, as the focus will be on European regional legislation.

Another rationale is that both copyright and freedom of expression are not absolute and both are subject to the limitations and exceptions. Hence there is no automatic precedence of any of these rights over each other.

However, if the protection of copyright is considered to be a human right, then the protection itself is not based on any human rights treaties. Thus in order to capture the essence of copyright and its protection, an additional look into the international copyright framework under auspice of the World Intellectual Property Organisation ('WIPO') and the World Trade Organisation ('WTO') treaties, namely the Berne Convention for the Protection of Literary and Artistic Works⁶, and the TRIPS Agreement⁷, must be done, as well as into the regional EU legislation.

In addition, current thesis will focus on possible public interest exception to copyright that could derive from the human right to seek, receive and impart information, i.e. freedom of expression, in the question of ISP responsibility for copyright infringements online. As expressed by Sunimal Mendis, the success of knowledge based society and its order is vitally founded on the ability of its members to freely access information as well as to use and disseminate such information in the public interest, thus on the freedom of expression and the right to information.⁸ Fundamental rights and freedoms, e.g. freedom of expression, must be taken more into consideration while assessing the responsibility of ISP, as the existing list of exceptions of public interest might not take into consideration the rapid changes of technology and the modern means of dissemination of culture and information.

1.3. The purpose

The purpose of this thesis is to analyse whether European legislation is in need of a new exception in addition to the already existing list of exceptions to the copyright protection, in order to strike a balance between two competing interests deriving from the protection of copyright, as well as the

⁵ Charter of Fundamental Rights of the European Union, 2010/C 83/02, 30 March 2010.

⁶ The Berne Convention for the Protection of Literary and Artistic Works, adopted on 9 September 1889, amended on 28 September 1979.

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Morocco on 15 April 1994.

⁸ Sunimal Mendis, *Copyright, the Freedom of Expression and the Right to Information: Exploring a Potential Public Interest Exception to Copyright in Europe* (Baden-Baden: Nomos, 2011), 81.

right to property on one hand, and freedom of expression on the other, based *inter alia* on rapid technological change and development of the internet. In this regard the purpose of the current thesis is first to analyse *lex lata* concerning the liability of ISP whilst stressing the current inclusion or perhaps exclusion of freedom of expression into this question, and secondly to contemplate on possible *lex ferenda* with the link to further broader inclusion of freedom of expression into this debate.

1.4. The research question

The research questions of this thesis is thus whether ISP *can* in practice rely on the arguments deriving from the freedom of expression in order to defend themselves against the claims of copyright infringements, based on the existing state of law in Europe, and whether ISP *should be* able to rely on these arguments, i.e. the possible role of freedom of expression in shaping the liability of ISP for copyright infringements online, including the possibility of wider public interest exception to copyright.

1.5. Delimitations

As already briefly mentioned before, current thesis will focus mainly on European regulations in both fields of copyright, as well as human rights instruments. However, the ongoing debate over ISP responsibility according to the doctrine of fair use that is widely used in the United States ('US') will be assessed only to the extent it is applicable to European context.

1.6. Method and outline

The method used in this thesis is the traditional legal method, i.e. the EU legal method of applying statutory legislation and principles developed by European regional courts to interpret and systemise the existing body of law concerning copyright protection online.

In order to strike the balance between several competing interests deriving from copyright and freedom of expression, the focus of current thesis is on EU directives and other international agreements when it comes to statutory legislation of ISP liability, copyright protection, and human rights. In terms of interpretative authority, the focus will be mostly on the case law delivered by the European Court of Justice ('ECJ') and the European Court of Human Rights ('ECtHR') which is equally binding to the majority of member states in the Council of Europe, however two courts do not bind

each other. This fact may create some disparities in interpretation of the same instruments, namely in interpretation of the ECHR. National judgments are used complementarily for descriptive purposes with the main analytical focus on international courts.

From a structural point of view, the current thesis will start with identifying the existing rules on ISP general liability for online conduct (so-called ‘safe harbours’), as well as specifically for copyright and IP infringements based on attempted harmonisation of this area in EU, including the interpretation by the ECJ in this regard (Chapter 2). This chapter will address the shortcomings of outdated EU legislation and uncertainties therein in order to be successfully applicable to rapid technological changes.

Chapter 3 of the current thesis will address the interrelationship between copyright and freedom of expression based on the ECHR and well-developed case law of the ECtHR concerning freedom of speech on the internet, including the most evident ‘copyright *versus* freedom of expression’ case before the ECtHR, that is The Pirate Bay (‘TPB’) case. This chapter will *inter alia* address the application of principles developed by the ECtHR in order to limit the freedom of expression, including the tests of necessity and proportionality when assessing ISP conduct online.

Finally, Chapter 4 will assert the possibility of introducing a new broader exception to copyright designed for ISP and based on public interest. First this chapter will identify the current state of law concerning exceptions to copyright in the EU, and then the possibility to either widen the scope of existing exceptions, or introduce a completely new one in order to include a wider range of ISP under ‘safe harbour’ principles, based on their importance in the age of information.

1.7. Background

An ISP is a company that provides a gateway to the internet which may include everything from enabling users to establish contact with the network to more particular services as e-mail, storage capacity, search engines, or auction sites etc.⁹ For the purposes of this thesis, an ISP is defined broadly: including not only connecting network providers, but also domain names and hosting service providers. Thus an ISP is defined as the provider of any kind of service on the internet, including social networks and peer-to-peer (‘P2P’) sharing platforms.

Cultural industries that are most often threatened by the means and speed of modern dissemination of culture claim their significant economic loss due to

⁹ Raphael Cohen-Almagor, “Freedom of Expression, Internet Responsibility, and Business Ethics: the Yahoo! Saga and Its Implications”, 106 *Journal of Business Ethics* (2012), 353–365, 353.

the ‘blooming’ illegal online file sharing¹⁰, which includes books, music, films and software that are all protected under copyright.¹¹ ‘War on piracy’ online has taken its toll in both technological, as well as legal measures. From the technological point of view, anti-circumvention provisions such as Digital Rights Management technologies that include access-restricting devices or technological protection measures (‘TPM’) have been used to restrict making of digital copy.¹² From international legislation the most recent instrument on enforcement of IP rights in digital environment, involving ISP action, was the adoption of the controversial and highly debated Anti-Counterfeiting Trade Agreement (‘ACTA’) by the European Parliament in 2010, designed exclusively for enforcing IP rights online, and combatting infringements of copyright and related rights in the digital environment.¹³ ACTA *inter alia* requires ISP to disclose personal information sufficient to identify users who have infringed IP rights.¹⁴ However, due to the unprecedented direct lobbying by thousands of EU citizens in street demonstrations, e-mails and calls to the offices of the European Parliament, as well as the petition signed by 2,8 million citizens worldwide, ACTA was rejected by the European Parliament in July 2012.¹⁵

Legal measures have been also widely used against several ISP, including, for example, several disputes brought against popular torrent-file sharing website The Pirate Bay in several states, leading to the case against Sweden in the ECtHR.¹⁶ Legal cases were brought not only against mass storage websites or “cyberlockers” such as Megaupload, which was largely used for infringing downloads and was finally ordered to be shut down by the US Supreme Court¹⁷, but also against the preceding P2P software developers such as Grokster¹⁸ trying to held software developers liable for the copyright infringements. Video hosting website YouTube has not been overlooked either by copyright holders and their incentive to enforce their economic

¹⁰ Adrienne Muir, “Online Copyright Enforcement by Internet Service Providers”, 39 *Journal of Information Science* (2012), 256–269, 258.

¹¹ Article 2(1) of Berne Convention which defines protected “literary and artistic works” as *inter alia* books, musical compositions with or without words, cinematographic works; and Article 10 (1) of TRIPS Agreement which states that computer programs, whether in source or object code, are protected as literary works under the Berne Convention.

¹² Marcella Favale, “The Right of Access in Digital Copyright: Right of the Owner or Right of the User?”, 15 *The Journal of World Intellectual Property* (2012), 1–25, 1.

¹³ Preamble of Anti-Counterfeiting Trade Agreement, signed in Tokyo on 1 October 2011.

¹⁴ Article 27 (4) of ACTA.

¹⁵ European Parliament press release, “European Parliament rejects ACTA”, 4 July 2012.

Available at: <<http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>>. Accessed 11 May 2014. All subsequent sources accessed 11 May 2014.

¹⁶ ECtHR, *Neij and Sunde Kolmisoppi v. Sweden*, 40397/12, Fifth Section, decision, 19 February 2013. More on this case see further Chapter 3.3.2.

¹⁷ Roger Parloff, “Megaupload and the Twilight of Copyright”, 166 *Fortune* (2012), 130–140.

¹⁸ United States Supreme Court, *MGM Studios Inc v. Grokster Ltd*, 545 U.S. 913 (2005), 27 June 2005.

rights online: several judgements in Europe, including Spain¹⁹ and Germany²⁰, have been made on the question of liability of YouTube for copyright infringements via its services.

The confrontation of copyright holders and larger public has shown an interesting paradox: whilst cultural industries are eager to secure their broad monopolistic control over the cultural goods according to the ‘old’ rules of copyright protection, and desperately trying to restrict ‘copying’ and sharing, internet on the other hand is willing to live according to the new reality where IP rights enforcement mechanisms are rejected and TPM bypassed. As Vincenzo Zeno-Zencovich has put, copyright laws have become the shield and the sword against the rest of the world, instead of remaining solely a defence against unfair competitors.²¹

In this regard, ISP are left in dual position surrounded by two groups with clashing interests: the authors (or to be more precise: legitimate right holders) and the ‘end users’ of the cultural goods, who copy, upload and download, and share in the first place. Furthermore, it is remarkable that ISP have a role to play in this dual position, whereas ‘consumer’ as such is practically invisible in the law of European copyright, where the main actors are the content providers and the intermediaries, such as publishers, libraries and educational institutions.²² Furthermore, due to the mostly anonymous nature of the internet and in the light of ongoing debate on the “net neutrality” which concerns the question of how best to preserve the openness of internet²³ and promotion of the interests of the citizens by promoting the ability of end users to access and distribute information²⁴, the question of end users’ liability is even more controversial and problematic, than the question of ISP responsibility for copyright infringements, already due to the surveillance and privacy issues.²⁵ France’s attempt to enforce anti-piracy law HADOPI by cutting down the internet access of repetitive suspects of piracy failed when French government decided to replace the system with increasing automatic fines to repetitive infringers instead of disconnection²⁶ after the French Constitutional Council equated the access

¹⁹ Madrid Commercial Court, *YouTube v. Telecinco*, 289/2010, 23 September 2010.

²⁰ Hamburg District Court, *GEMA v. YouTube*, 310 0 461/10, 20 April 2012.

²¹ Zeno-Zencovich, 353.

²² Natali Helberger, Bernt Hugenholtz, “No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law”, 22 *Berkeley Technology Law Journal* (2007), 1061–1098, 1066.

²³ *Supra* note 2, COM(2011) 222.

²⁴ See for example Article 8(4)(g) of the Framework Directive (2002/21/EC) of the European Parliament and of the Council of 7 March 2002.

²⁵ Pedro Pina, “Digital Copyright Enforcement: Between Piracy and Privacy” (Chapter 14) in Christina Akriopolou, Athanasios-Efstratios Psygkas (eds), *Personal Data Privacy and Protection in a Surveillance Era: Technologies and Practices* (Hershey: Information Science Reference, 2011), 241–254.

²⁶ Siraj Dato, “France Drops Controversial ‘Hadopi Law’ After Spending Millions”, *The Guardian*, 9 July 2013. Available at:

<<http://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>>

to the internet to the freedom of expression and communication, hence declared it to be a human right.²⁷

On the other hand, when ISP do actually benefit from the illegal content, it is quite problematic to state that an ISP should not bear any responsibility for any conduct of their services users.

Economic advantages should not of course be an obstacle for enjoying the rights both businesses – copyright holders and ISP - are entitled to. However, morally stronger justifications are used by both sides, often in order to secure their business interests. That is, copyright is mostly relying on the protection of the author²⁸, whilst ISP representatives highlight *inter alia* the possible negative impact on innovation if any “substantial modification of the liability regime” follows.²⁹

However, depending on the nature of its provided online services, an ISP could or should benefit from the exceptions deriving from as a beneficiary from the copyrighted material on the same ground as a major media publisher, notwithstanding the significant economic income that all of these intermediaries may acquire, based on a wider non-economic ‘value’ of such services and its impact on the enjoyment of human rights and fundamental freedoms.

The possible new changes to the existing body of law concerning copyright exceptions in Europe have already started by attempts to provide flexibilities concerning so-called user generated content (‘UGC’), such as remixes, mash-ups and other non-economic reuse of existing copyrighted works.³⁰ Hence, these developments could imply that not only the enforcement of IP rights is in need of change, but the whole IP system in general.

²⁷ French Constitutional Council, Decision 2009-580 DC, Act Furthering the diffusion and protection of creation on the Internet, 10 June 2009, para. 12.

²⁸ Trajce Cvetkovski, *Copyright and popular media: liberal villains and technological change* (Basingstoke: Palgrave Macmillan, 2013), 69f.

²⁹ Nikki Tait, “EU Eyes Reform of Intellectual Property Laws”, *Financial Times*, 30 March 2011. Available at: <<http://www.ft.com/cms/s/0/249be6f2-5ad9-11e0-8900-00144feab49a.html>>

³⁰ De Wolf and Partners, “Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the “InfoSoc Directive”)", funded by the European Commission, 2013.

2. The liability of internet intermediaries for copyright infringements online

2.1. General liability exemption

The rules concerning ISP liability for copyright infringements in the European Union can be found mainly in the e-Commerce Directive³¹, the Info Soc Directive³², and the Intellectual Property Rights Enforcement Directive ('IPRED')³³.

The e-Commerce Directive does not exclusively deal with IP issues, hence providing the general rules for ISP liability for the information transmitted via their services. According to Section 4 of the e-Commerce Directive ('Liability of intermediary service providers'), an ISP is not responsible for the information transmitted via its services in three different scopes of circumstances: mere conduit services, caching, and hosting³⁴, so called "safe harbour" principles. First two share the common exception of liability for mere technological automatic and intermediate transmission of information, where transmitted information is not modified by the provider. These exemptions from liability could mainly apply to the internet connection providers.

2.1.1. Uncertainty regarding hosting service providers

Hosting exemption on the other hand can be attributable for more specific service providers than mere internet connection providers. This exemption is based on the absence of knowledge by ISP of illegal activity or information stored, and requires certain actions such as removal or exclusion of the access to illegal content upon obtaining such knowledge or awareness.³⁵

However, recital 42 of the e-Commerce Directive states clearly that the exemptions of liability under this directive cover *only* the cases where the activity of ISP is limited to the technical process of operating and giving more efficient access to a communication network, thus covering the cases of mere automatic, technical and passive nature, which implies that the ISP

³¹ 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'), OJ L 178, 17 July 2000.

³² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001.

³³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30 April 2004.

³⁴ E-Commerce Directive articles 12-15.

³⁵ E-Commerce Directive article 14.

has neither knowledge nor control over the transmitted or stored information. This recital has given some controversy in order to interpret ‘hosting’ provider in the light of recent development and change of ISP variety on the market since the adoption of the e-Commerce Directive in 2000.³⁶ The fact that mere technical passive transmission exemption is highlighted in the separate provisions regarding both ‘mere conduit’ and ‘caching’ being at the same time absent from the ‘hosting’ provision, would imply that recital 42 is only applicable to the former cases. The ECJ did state however that ‘hosting’ exemption does apply to the situations in which that provider has confined itself to a merely technical and automatic processing of data in a trademark related case *L’Oreal v eBay*.³⁷ Yet the ECJ did place emphasis on the ‘actual knowledge’ that is required by the wording of the actual article, and the ‘active role’ of the operator when “it provides assistance which entails, /.../, optimising the presentation of the offers for sale in question or promoting them.”³⁸ The question whether eBay did play such active role in promoting L’Oreal trademark infringing offers, the ECJ left to examine to national courts, but as pointed out by Béatrice Farano there exists a disparity between different national courts in Europe in granting ‘hosting’ provider exemption to certain ‘active’ service providers, such as *inter alia* MySpace, Google or eBay.³⁹

On the other hand, what comes to the copyright case of *SABAM v. Netlog*, the ECJ did not give any further consideration on the question of social network Netlog which provides users with the possibility to display personal photos and publish video clips on their globally available profile, being a hosting service provider within the meaning of Article 14 of the e-Commerce Directive, simply stating that “it is not in dispute that the owner of an online social networking platform stores information provided by the users of that platform relating to their profile, on its servers, and that it is consequently a hosting service provider within the meaning of Article 14 of Directive 2000/31/EC”.⁴⁰

Additional criteria for falling under the e-Commerce Directive exemptions to liability is the evident (already from the title of the Directive) “commercial” nature of the services an ISP is providing. According to the Article 1(2) of the EU Directive on Technical Standards and Information Services 98/34/EC⁴¹, an ‘information society service’ is defined as “any

³⁶ Béatrice Farano, “Internet Intermediaries’ Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches”, (TTLF Working Papers No. 14), *Stanford-Vienna Transatlantic Technology Law Forum*, 2012, 69f.

³⁷ ECJ, *L’Oreal SA et al v. eBay International AG et al*, C-324/09, Grand Chamber, 12 July 2011. Para. 119.

³⁸ *ibid*, para. 116.

³⁹ Farano, 71–76.

⁴⁰ ECJ, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, C-360/10, Third Chamber, judgment, 16 February 2012, para. 27.

⁴¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards

service normally provided *for remuneration*, at a distance, by electronic means and at the individual request of a recipient of services”. Recital 18 of the e-Commerce Directive clarifies that (emphasis added) “information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, *extend to services which are not remunerated by those who receive them*, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data”. In this case, it is not surprising that a free social network such as Netlog is considered to be a hosting provider under the e-Commerce Directive, even though it is not receiving any payments for its services from end users. According to the same recital 18 of the e-Commerce Directive, search engines are not excluded from the scope of the e-Commerce Directive either.

However, despite this explicit reference in the e-Commerce Directive itself, the economic or commercial nature of services provided by an ISP have been shown to be detrimental in order to benefit the ISP from the exemptions provided in Section 4, acknowledging the uncertainty of the e-Commerce Directive in the light of growing diversity of hosting providers, without any actual clarifications made by the ECJ regarding the services not made for remuneration.

In *Google France v Luis Vuitton*, Google’s referencing service AdWord system did fall under Article 14 of the Directive mainly because the criteria listed in Article 1(2) of the Directive 98/34/EC were met⁴², including the fact that AdWord was a paid system. Furthermore, the ECJ went further and clarified that “the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31.”⁴³ The same rationale was reinstated in *L’Oreal v eBay*, where ECJ in addition held that ‘active role’ of ISP goes beyond the mere provision of general information.⁴⁴

It would seem that by clarifying on the commercial nature of services which is not detrimental to the exemptions under the e-Commerce Directive *per se*, the ECJ did end the controversy concerning paid advertising space services⁴⁵, however it did not do so in the case of ‘free’ service providers, including search engines. According to the opinion of Advocate General

and regulations, OJ L 204, 21 July 1998.

⁴² ECJ, *Google France and Google v. Louis Vuitton*, C-236/08, Grand Chamber, judgment, 23 March 2010, para. 110.

⁴³ *Google France v Louis Vuitton*, para. 116.

⁴⁴ *L’Oreal v eBay*, para. 115.

⁴⁵ JF Bretonniere, “Liability for Internet Host Providers in the European Union: time for a reform?”, *IAM Magazine* (2011), 28–31, 30. Also Steven James, “L’Oreal and eBay & the Growing Accountability of e-Operators”, *E-commerce law and policy* (2011), 5–7, 7.

Jääskinen, the fact that the legal position of search engine service providers has not been *expressly* regulated in EU legislation and due to the fact that internet search engine providers like Google do not provide their service in return for remuneration from the internet users, search engine providers appear to fall outside the scope of application of the e-Commerce Directive.⁴⁶

Hence, due to this legal uncertainty, despite considering ‘free’ social network as a hosting provider under the e-Commerce Directive by the ECJ, and explicit reference to the search engines in recital 18 of the same directive, the scope of ‘hosting’ exemption is in need of further clarification, especially in the light of technological development of online service providers, when their ‘active’ and ‘passive’ role is no longer so cut clear whereas ‘mere technical, intermediate and automatic’ being strictly passive and thus exempted from liability as such.

2.1.2. ‘Knowledge’ based exemption

Despite a slightly confusing uncertainty concerning ‘hosting’ providers exemption alongside with recital 42 that concerns ‘mere technical, automatic and passive’ measure, the ECJ has taken a broader interpretation of this exemption in *Google France v Louis Vuitton* by stating that an ISP may benefit from the exemption as long as it has not played an active role of such kind as to give it knowledge of, or control over the data stored.⁴⁷ The ECJ did however link the active role of acquiring knowledge as opposed to the ‘neutral’ activity of ‘mere technical, automatic and passive’ nature.⁴⁸ In other words, according to the ECJ, the necessary knowledge to be held liable for the information stored is lacking when the nature of service is merely technical, automatic and passive. This case was more in favour of Google as a search engine provider (and its AdWord system of sponsored links), when the ECJ stated that “/.../concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server”.⁴⁹

The ECJ had another opportunity to clarify the ‘active role’ in the case of *L’Oreal v eBay*, where the ECJ reached a different conclusion on processing the data inserted by the users concerning the online marketplace eBay. The ECJ did acknowledge that eBay indeed stores the data entered by its customs-sellers, however this fact is not sufficient in itself to state whether

⁴⁶ Opinion of Advocate General Jääskinen in the case of ECJ, C-131/12, *Google Spain v. AEPD*, delivered on 25 June 2013, para. 37.

⁴⁷ Bretonniere, 29.

⁴⁸ *Google France v Louis Vuitton*, para. 114.

⁴⁹ *ibid*, para. 117.

eBay can be exempted from the liability.⁵⁰ The active role which thus gives an ISP the necessary ‘knowledge’ to be held liable is the assistance intended to optimise or promote certain offers for sale.⁵¹

The question is thus whether the knowledge of infringement is an actual knowledge of this infringement at all? And if ISP are not deprived of their rights to conduct business and profit from it, how come purely commercial interest in promotion of certain information can be used as exclusion from the exemptions of liability? On this part the ECJ does not give any further clarifications or guidelines.

2.1.3. Acquiring knowledge of infringement and obligation to monitor

In addition to these exemptions, the ISP provides no general obligation to monitor the information they store or transmit, nor a general obligation to actively seek facts or circumstances indicating illegal activity⁵², to the contrary of the wishes of certain right holders who advocate for stricter rules of conduct for ISP, e.g. implementation of filtering or monitoring technologies.

However, according to Article 14(1)(b), the provider, upon obtaining knowledge or awareness of illegal activity, shall act expeditiously to remove or to disable access to the information.

According to the ECJ, an ISP is denied the ability to rely on ‘safe harbour’ provisions, if it was actually aware of facts or circumstances on the basis of which a *diligent* economic operator should have identified the illegality, and such awareness may be acquired “as the result of an investigation undertaken on its own initiative/.../, as well as a situation in which the operator is notified of the existence of such an activity or such information”.⁵³

The problem of such ‘notice and take down’ system that has also been reinforced by the ECJ, is that it may place an extra heavy burden on more ‘active’ ISP, whose services may account to more than mere technical, automatic and passive nature. It has been feared that trade mark and copyright owners are more likely to over notify the ISP for potential infringements which in the end will lead to a more large scale removal of content from its services in the fear of being held accountable for these infringements.⁵⁴

Furthermore, ISP should not become in any sense some sort of private censors discriminating the information circulating via their services. By

⁵⁰ *L’Oreal v eBay*, para. 111.

⁵¹ *ibid*, para. 114, 116.

⁵² E-Commerce Directive article 15.

⁵³ *L’Oreal v eBay*, para. 122.

⁵⁴ James, 7.

giving such a distinctive ‘active role’ to the processing of data in order to held ISP liable for the infringements of the third parties, the ECJ is actually putting ISP to the ‘active’ position of evaluating the content that is stored on their services that goes beyond the mere technical, automatic and passive nature of ISP that is intended to benefit it from the safe harbour provisions under the e-Commerce Directive. Ironically enough, the ‘notice and take down’ system is encouraging ISP to *acquire knowledge* over the content, and thus if ISP are not acting in favour of right holders and do not restrict the access to the disputed content, the consequences of liability for ISP follow immediately as the necessary knowledge for being held liable is already acquired and data processed.

Furthermore, “an investigation undertaken on its own initiative” that was mentioned by the ECJ in *L’Oreal v eBay* case is not only contradictory to the non-monitoring obligation under Article 15 of the e-Commerce Directive but also to the interpretation of the ECJ itself of the connection between hosting providers exemption with ‘neutrality’ of their services. Again, it seems that the ECJ is encouraging an ISP to overstep its ‘safe harbour’ of mere technical, automatic and passive nature without giving any guidance on the part of in which circumstances the ISP should initiate such independent investigation whilst there is no general obligation to actively seek illegal activity.

While certainly being in place for securing the rights of right holders, this system is putting ISP in a slightly uncomfortable position, while not being in favour of freedom of expression and communication of the end users.

2.2 Exemption from liability for copyright infringements

The main regulation concerning copyright protection in the context of the internet is to be found in the Info Soc Directive 2001/29/EC which main purpose is to adapt legislation on copyright and related rights to reflect technological developments.⁵⁵

In the context of the internet, the main copyright holders’ rights that are mostly under ‘threat’ are the reproduction and distribution rights, as well as the right to make available to the public. The Info Soc Directive highlights the importance of proper support for the dissemination of culture, however stresses that this objective must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of pirated works.⁵⁶

⁵⁵ See information available at European Commission, “Copyright in the Information society”, Directives and Communications, available at:

<http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm>

⁵⁶ Info Soc Directive, recital 22.

The Info Soc Directive is aimed at securing the implementation of the WIPO Copyright Treaty⁵⁷ and the WIPO Performances and Phonograms Treaty⁵⁸, dealing respectively with the protection of authors and the performers and phonogram producers. These Treaties *inter alia* update the international protection for copyright and related rights with regard to the so-called “digital agenda” in order to improve the means to fight piracy world-wide.⁵⁹

In order to achieve the proper balance of rights and interests between different categories of right holders, the directive introduces a set of limitations in its Article 5. With regard to ISP, Article 5 (1)(a) provides that (emphasis added) *temporary* acts of reproduction, which are *transient or incidental* [and] *an integral and essential part of a technological process* and whose sole purpose is to *enable a transmission in a network* between third parties by an intermediary, *or the lawful use* of such a work, and which have *no independent economic significance*, shall be exempted from the exclusive reproduction right. Recital 33 clarifies that this exception includes acts which enable browsing, as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology. Hence the Info Soc Directive follows the line taken in the e-Commerce Directive, where the acts of mere technical, automatic and passive nature are exempted from the liability. Also in order to be able to rely on this exception, the five conditions mentioned in the Article 5 (1)(a) have to be fulfilled cumulatively.⁶⁰

In addition to that, the Info Soc Directive sets a possibility for injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right in Article 8 (3) of the same directive. The possibility for injunctions was also reinforced in Article 11(3) of IPRED.

2.2.1. Right to reproduction

The rules of exception to copyright holders’ exclusive right to reproduction under the Info Soc Directive have been interpreted by the ECJ in *Infopaq I*⁶¹ and *Infopaq II*⁶² cases. According to Article 2 (1)(a) of the Info Soc Directive, member states shall provide the authors of the work for the exclusive right to authorise or prohibit direct or indirect, temporary or

⁵⁷ WIPO Copyright Treaty, adopted on 20 December 1996, entered into force on 6 March 2002.

⁵⁸ WIPO Performances and Phonograms Treaty, adopted in 20 December 1996, entered into force on 20 May 2002.

⁵⁹ Info Soc Directive, recital 15.

⁶⁰ ECJ, *Infopaq International A/S v Danske Dagblades Forening*, (*Infopaq II*), C-302/10, Third Chamber, Order, 17 January 2012, para. 25.

⁶¹ ECJ, *Infopaq International A/S v Danske Dagblades Forening*, (*Infopaq I*), C-5/08, Fourth Chamber, Judgment, 16 July 2009.

⁶² See *supra* note 60.

permanent reproduction by any means and in any form, in whole or in part.

Infopaq case concerned a media monitoring and analysis operator Infopaq whose business consisted primarily in drawing up summaries of Danish newspapers' articles and sending those summaries to the customers by e-mail. The 'data capture' process consisted of scanning the articles manually by the employees of Infopaq and then processing the image files into text files. In addition the extracts of 11 words from the articles were printed out and then transformed into a digital medium. The questions before the ECJ to answer in *Infopaq II* were whether these temporary acts of reproduction such as manual scanning and printing out, i.e. the involvement of the human intervention, can be an "integral and essential part of a technological process" that is exempted from the protection guaranteed in Article 2. The ECJ held that these acts do belong into integral and essential part of a technological process as this process could not function correctly and efficiently without these acts, as well as that these acts were not completed outside of technological process.⁶³ The human involvement into the technological process is thus irrelevant.

It could seem that exceptions provided in the Info Soc Directive might be slightly broader than the ones under the general e-Commerce Directive. The mere technical, automatic and passive nature of the acts conducted by intermediary is expanded to the possible human involvement into the technological process of the 'data capture', and still be considered as the part of an integral and essential technological process. However, in the case of Infopaq, the data monitoring service provider was not enabling the mere transmission of the protected work in a network, which would have been the classic example of ISP, but the technological process the Infopaq was conducting did fall under the lawful use of the work, i.e. the more efficient drafting of summaries of newspaper articles which in itself as a purpose is not restricted by the EU or Danish legislation.⁶⁴ Hence, the ECJ did not consider the reproduction of the works being the act independent from the initial purpose of the process, i.e. making the summaries of the articles.

Due to the specifics of the case, the more general exception concerning the hosting providers as for example P2P platforms, trackers etc, whose services are used to perform the acts that are exclusively granted to the copyright holders, might not be considered as a lawful use of the work, because they might be performed without the authorisation of the copyright holder. The performance of the services can thus fall under the enabling transmission in a network between third parties by an intermediary if the other conditions set in Article 5(1)(a) are cumulatively fulfilled.

In the case of hosting providers, however, the condition "temporary" copy might become tricky in order to fall under the exception provided in Article 5(1). The so-called term "upstream" reproduction which is the copy being

⁶³ *Infopaq II*, para. 30, 35.

⁶⁴ *Infopaq II*, para. 44.

available at users' demand on the hosting server is most likely a permanent one, which is excluded from the exception provided in Article 5 (1).⁶⁵ Hence the scope of exceptions concerning hosting providers under the Info Soc Directive is limited and quite restricted.

2.2.2. Communication to the public

According to Article 3 (1) of the Info Soc Directive, the authors are provided with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The Info Soc Directive sets an exhaustive list of exceptions for this right in its Article 5(3).⁶⁶ These exceptions do not include ISP in the same way as Article 5(1), and apply, for example, for the purpose of teaching and scientific research, for the use by people with disabilities, or making available of published articles on current economic, political or religious topics to the extent justified by the informatory purpose, etc.

In the light of ISP, the right of making available to the public is relevant in the context of 'streaming' media, a popular technology for enabling consumers to access audio and video content over the internet. Streaming is usually contrasted with downloading, the latter being the storage of the copy of the work on the users' hard drive, and thus with possibility to further distribute such copy, while streaming does not leave any trace on the user's computer.⁶⁷

Consequently, by allowing streaming services, an ISP may be held liable for infringing copyright holder's right to communicate their works to the public, if the work placed on the server is unauthorised. However, with the respect of uploaded video by a third party on the host server, the question of ISP liability would be rather assessed under the rules of the e-Commerce Directive, than under exceptions provided in the Info Soc Directive which deals with the direct use of copyrighted material. ISP on the other hand are rather the enhancers than users of such material.⁶⁸

However, in the case of clickable links or 'hyperlinks' provided by ISP, that could also be relevant to the search engines, the ECJ was asked to rule on the question whether the supply of clickable internet links by anyone else

⁶⁵ De Wolf and Partners, 119.

⁶⁶ See recital 32 of Info Soc Directive: "This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public."

⁶⁷ Simon Stokes, *Digital Copyright: Law and Practice* (Oxford: Hart Publishing Ltd, 2014), 177.

⁶⁸ Nenad Gavrilovic, "Using YouTube: Practical Consequences of the Approach Adopted by EU Copyright Law", 18 *Journal of Intellectual Property Rights* (2013), 556–565, 560.

than a copyright holder does constitute communication to the public within the meaning of Article 3 (1) of the Info Soc Directive in the case of *Svensson v Retriever Sverige AB*.⁶⁹ According to the ECJ, the provision of clickable links to protected works must be considered to be ‘making available’ and an ‘act of communication’. The term ‘public’ was also confirmed as that provision requires an ‘indeterminate number of potential recipients and implies a fairly large number of persons.’⁷⁰ However, in *Svensson* case, the authorisation by the copyright holders in order to provide the hyperlinks to the already widely accessible protected works was not required, as the communication to the public by Retriever Sverige was not made to a ‘new public’.⁷¹ Infringing act is therefore when a clickable link constitutes an intervention to the restricted access to the protected work and therefore transmits the work to the ‘new’ users who were not taken into account by the copyright holders when they authorised the initial communication.⁷²

Hence merely facilitating the access to the already published and freely accessed protected works does not constitute a copyright infringement, even if the role of an ISP is more than merely facilitating the transmission in the network and is closer to the actual use of these works.

However, what comes to terrestrial television broadcast through a website streaming service, then according to the ECJ in *ITV Broadcasting Ltd v TV Catchup Ltd*⁷³ case, such streaming service provided by a different service provider than the original broadcaster is to be considered a new communication to the public that requires an authorisation from the right holder, despite the fact that *de facto* there is no new public involved, as the people who can access the disputed live stream through the website have to be residents of the state in which territory the broadcast is available and claim to hold the relevant license in order to access the same broadcast on a television receiver. In this sense, the ECJ had clearly stated that streaming is a copyright infringing activity⁷⁴, even if the works protected are already published and accessible by other technical means.

2.2.3. Injunctions against intermediaries

However, the exceptions provided in the Info Soc Directive do not take into consideration the liability of ISP as they are not in general perceived to be

⁶⁹ ECJ, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB*, C-466/12, Fourth Chamber, judgment, 13 February 2014.

⁷⁰ *Svensson*, para. 20–21.

⁷¹ *Svensson*, para. 30.

⁷² *Svensson*, para. 31.

⁷³ ECJ, *ITV Broadcasting Ltd and Others v TV Catchup Ltd*, C-607/11, Fourth Chamber, judgment, 7 March 2013.

⁷⁴ Jeremy De Beer, Mira Burri, “Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada”, 36 *European Intellectual Property Review* (2014), 95–105, 103.

the main users of copyrighted material and hence cannot generally rely on the existing list of exceptions and limitations to the exclusive rights of copyright holders under Article 5(3) of the Directive.

The only explicit mentioning of ‘intermediary’ is concerning the aforementioned limitation to the right to reproduction, as well as the possibility for injunctions from the copyright holders against intermediary who carries a third party’s infringement of a protected work. According to recital 59 of the Info Soc Directive, intermediaries are best placed to bring copyright infringing activities in the digital environment to an end. Furthermore, such injunctions should be available even where the acts carried out by the intermediary are exempted under Article 5.

The possibility for injunctions is closely linked to the prohibition to monitor under the e-Commerce Directive. The injunction brought against an ISP which provides its customers solely with the internet access without offering any other services, lead to the case of *Scarlet v SABAM*⁷⁵ before the ECJ. In this case SABAM, a management company representing authors and other copyright holders, sought an order requiring the internet access provider Scarlet to bring illegal downloading via P2P networks to an end by blocking, or making it impossible for its customers to receive the files containing an unauthorised musical work using P2P software. Scarlet inter alia claimed that this injunction is contrary to Article 15 of the e-Commerce Directive as it imposes *de facto* a general obligation to monitor communications on its network. Belgian court of appeal referred a question to the ECJ and asked whether the national courts may issue an injunction against intermediaries whose services are used by a third party to infringe a copyright, to order an ISP to install a system of filtering all electronic communications. The answer of the ECJ was ‘no’, despite its previous judgment in *L’Oreal v eBay* where the ECJ did acknowledge that measures against intermediaries must be allowed in order to prevent further infringements.⁷⁶ The ECJ did heavily rely on the economic rationale behind such wide injunction to monitor all the electronic communications made through the network, without any limitation in time, directed to all future infringements of not only existing works, but also future works that have not yet been created. Such broad injunction according to the ECJ is first of all a serious infringement of the freedom of an ISP to conduct its business since it would require the ISP to install a complicated, costly and permanent system at its own expense.⁷⁷ This judgment has been definitely perceived as a win of ISP⁷⁸, especially after following judgment in *SABAM v Netlog*,

⁷⁵ ECJ, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, Third Chamber, judgment, 24 November 2011.

⁷⁶ *L’Oreal v eBay*, para. 131.

⁷⁷ *Scarlet v SABAM*, para. 47–48.

⁷⁸ Evangelia Psychogiopoulou, “(Case Comment) Copyright Enforcement, Human Rights Protection and the Responsibilities of Internet Service Providers After Scarlet”, 38 *European Intellectual Property Review* (2012), 552–555, 555.

where the ECJ applied the same reasoning with regard to hosting provider of social network services against an injunction to block the exchange of copyright infringing files on the users' online profile⁷⁹, however, it is worth mentioning that *SABAM* cases did not rule out the possibility of 'blocking' injunctions against ISP that could be sponsored between ISP and the right holders, or could be temporary.⁸⁰ Another uncertainty is the possibility to order an injunction to block only one website, which is no doubt a lot narrower injunction than the ones outlawed in *SABAM* cases.⁸¹ Especially when the rules of the 'notice and take down' system are not only absent from the EU regulations that are supposed to harmonise the copyright law between the member states, but also explicitly left for the member states to decide upon⁸², including the conditions and modalities relating to the injunctions.⁸³

The absence of clear guidelines from the ECJ does not make it easier for the member states to decide upon these rules either, in particular regarding the absence of clear term of 'acquiring knowledge' and when such knowledge will ship an ISP from its safe harbour, including the uncertainty between prohibition of monitoring and the rules for injunctions of blocking the content online.

While emphasising the economic impact on ISP by not allowing such broad blocking injunctions, the ECJ completely overlooks the arguments deriving from the protection of fundamental rights and freedoms of users. In both *SABAM* cases, the referring courts did question the interpretation of the provisions set in the directives in the light of Articles 8 and 10 of the ECHR. The ECJ briefly touched upon the equivalent rights situated in the EU Charter instead and referred to its own case-law, stating that fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.⁸⁴ Furthermore, when addressing the issue with freedom of information, the ECJ used cautious language⁸⁵ by holding that the injunction in question *could potentially* undermine freedom of information since that system might not distinguish adequately between unlawful and lawful content.⁸⁶ The right

⁷⁹ See *SABAM v Netlog*, *supra* note 40.

⁸⁰ Darren Meale, "(Case Comment) *SABAM v Scarlet*: Of Course Blanket Filtering of the Internet Is Unlawful, But This Isn't the End of the Story", 37 *European Intellectual Property Review* (2012), 429–432, 432.

⁸¹ *ibid.*

⁸² See Article 14(3) of e-Commerce directive (emphasis added): "This Article shall not affect the possibility for court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of *establishing procedures governing the removal or disabling of access to information*".

⁸³ See last sentence of recital 59 of Info Soc directive; and recital 23 of IPRED.

⁸⁴ *Scarlet v SABAM*, para. 44.

⁸⁵ Psychogiopoulou, 555.

⁸⁶ *Scarlet v SABAM*, para. 52.

to privacy did not require even that much of attention.⁸⁷

The aching issue of balance between fundamental rights and the injunctions to block the website with infringing content was finally addressed before the ECJ in *UPC Telekabel v Constantin Film and Wega*.⁸⁸ The case concerned the injunction against an ISP who provides the internet access to block a website which provided the users with a possibility to both download and stream cinematographic works without the right holders' authorisation. The national court decided to refer *inter alia* the question before the ECJ, concerning whether it is compatible with the EU law, in particular with the necessary balance between the parties' fundamental rights, to prohibit *in general terms* an ISP from allowing its customers access to a certain website as long as the material available on that website is provided exclusively or predominantly without the right holder's consent.

First, the ECJ highlighted the existing conflict of interests in the case of such injunction, and stated that all interests at stake, that is i) copyrights and related rights concerning cinematographic works; ii) the freedom of ISP to conduct a business; and iii) the freedom of information of internet users are protected under the EU Charter, hence all of these interests are protected as fundamental rights.⁸⁹ Then the ECJ stated that the injunction that does not impose an ISP to imply any unnecessary costly specific measures does only restrict the freedom to conduct its business, but does not seem to infringe the very substance of such freedom, as the ISP is free to choose the measures which are best adapted to the resources and abilities available to him.⁹⁰ Lastly, the ECJ explicitly held that blocking a website with infringing content "allows its addressee [ISP] to avoid liability by proving that he has taken all reasonable measures".⁹¹ By being so firm in relation to the liability and actions expected to be taken by ISP, the ECJ goes further by obliging an ISP to ensure compliance with the fundamental freedoms of internet users when choosing the measures for achieving the purpose of the injunction.⁹² And lastly the ECJ 'kills' any possibility to use freedom of expression arguments in order to not block the website with infringing content, by stating that (emphasis added) "the fundamental rights recognised by the EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction *does not specify the measures* which that

⁸⁷ ECJ briefly stated in para. 53 as concluding remark that the injunction in question would not respect the requirement of a fair balance between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

⁸⁸ ECJ, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, Fourth Chamber, judgment, 27 March 2014.

⁸⁹ *UPC Telekabel v Constantin Film and Wega*, para. 47.

⁹⁰ *ibid*, para. 51–52.

⁹¹ *ibid*, para. 53.

⁹² *ibid*, para. 55.

access provider must take /.../, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures 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.”⁹³ It is difficult to come up with any other measure than blocking the access to the website with infringing material which would prevent access to the protected works, especially from the standpoint of mere internet access providers who do not have any other control over the content on such websites.

UPC Telekabel v Constantin Film and Wega case shows clearly the priority the ECJ is placing on the protection of copyright holders, and the extremely difficult position it imposes on ISP, whose only option to avoid the liability for copyright infringements is to block the access to the contested website. The obligation to secure the fundamental right of users seems not only burdensome to the private company as ISP who in some way have to take the stand of the public authority, but also quite vague, as first it is not the primary concern of private business to evaluate the best means to ensure the freedom of expression of its customers, and second the internet users are left to assert their fundamental rights before the courts once the ISP have already taken the implementing measures.⁹⁴ Hence the judicial review of the blocking measures is only available after the access to the content is blocked and the rights of copyright holders secured. Consequently, it implies that copyright is taking precedence over the right to information, according to the ECJ.

2.3. Concluding remarks

While definitely harmonising the overbroad protection of copyright holders, both the e-Commerce and the Info Soc directives, as well as their interpretation by the ECJ do not properly address the issue of ISP responsibility. Rules of the e-Commerce Directive are unclear with regard to hosting providers and more ‘active’ ISP whose role in conducting the services is falling outside of mere technical scope. The uncertainty in interpretation of an ISP is in place as it is still unclear whether search engines can be exempted from liability as their services are non-commercial. The rules (or the absence of clear guidelines, to be more precise) of acquiring knowledge and their interpretation by the ECJ of infringement are shown to be in conflict with the general prohibition to

⁹³ *ibid*, para. 64.

⁹⁴ *ibid*, para. 57.

monitor illegal activity conducted via services provided by ISP. In this regard, the ECJ relies on the term of diligent provider who is encouraged to take its own initiative and step outside of its passive role in order to primarily secure the rights of copyright holders, at the expense of the freedom to seek and impart information by the end users. Hence, indirect monitoring is not only allowed according to the ECJ, it is even favoured, leaving ISP no other choice as to react immediately to the claims of copyright holders in order to not be held liable for any possible copyright infringement.

The Info Soc Directive does not bring any relief to the ISP either. First of all, the exceptions to the exclusive rights of copyright holders are designed to benefit the users of the protected works and not the mere facilitators of the use of such works. In regard to ISP, who are mostly enhancers of such use, application of the Info Soc Directive is rather limited and restricted, concerning only the right to reproduction if the copy stored is temporary and constitutes a lawful use of the work. The conduct of third parties who might infringe the exclusive rights of copyright holders via the services proved by ISP is regulated through unregulated right to injunctions against intermediaries. The ECJ is definitely favouring the blocking injunctions while mostly overlooking any arguments deriving from human rights such measures are directly affecting. After all, the blocking of a website is cutting of any seeking or imparting of any information possible. Furthermore, the ECJ is explicitly excluding human rights arguments from the debate if the restriction to the rights of copyright holders is at stake. At the same time the ECJ is placing a burden of balancing different interests, including the proper way to secure the fundamental rights of its end users, to the ISP. Leaving the decision making over fundamental rights and freedoms to the private sector is not necessarily the best way to secure the proper protection of human rights.

Instead of placing wider burden on ISP in order to frantically secure the interests of copyright holders, the system of ISP liability should be reconceptualised in order to focus on striking the proper balance between the rights of copyright holders and the wider public represented by the end users. As has been showed previously, the scale seems to be more heavily in favour of the copyright holders, while as expressed by several commentators, being against users' human rights, e.g. freedom of expression.⁹⁵

⁹⁵ Thomas Capel, "Fighting the File-Sharing War through Notice-and-Takedown Regimes: Plunging a Sword of Copyright through the Heart of Freedom of Expression on the Internet", 51 *Southampton Student Law Review* (2012), 51–76, 64. Sophie Stalla-Bourdillon, "Sometimes One is Not Enough! Securing Freedom of Expression, Encouraging Private Regulation, or Subsidizing Internet Intermediaries or All Three at the Same Time: the Dilemma of Internet Intermediaries' liability", 7 *Journal of International Commercial Law and Technology* (2012), 154–175.

3. Interrelationship between copyright and freedom of expression

3.1. Freedom of expression online

According to Article 10 (1) of the ECHR, everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, this right is not absolute and according to the paragraph 2 of the same article, the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The notion of enjoying the freedom ‘regardless of frontiers’ can imply that individuals in modern times and in the light of technological development must be able to express themselves, as well as seek and impart information online as much as offline. This principle of protection of freedom of expression on the internet has been *inter alia* acknowledged both by the Human Rights Council (‘HRC’) in its Resolution of 29 June 2012 where the HRC affirmed that the freedom of expression must be protected online regardless of the choice of the one’s media⁹⁶, and the Council of Europe who provided that the right to freedom of expression applies to both online and offline activities, regardless of frontiers in the Recommendation of the Committee of Ministers to member states on the protection and promotion of the universality, integrity, and openness of the Internet.⁹⁷

According to the Office of the High Commissioner for Human Rights (‘OHCHR’), a human rights approach views information and communication technologies not only as a means of exchanging and disseminating information, but as a tool to improve the enjoyment of human rights such as *inter alia* freedom of expression.⁹⁸

Furthermore, there is nothing in the wording of Article 19 of the

⁹⁶ HRC, “The promotion, protection and enjoyment of human rights on the Internet”, UN Doc A/HRC/20/L.13, 29 June 2012.

⁹⁷ Committee of Ministers, “Recommendation of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet”, CM/Rec(2011)8, 21 September 2011.

⁹⁸ OHCHR, “Background Note on the Information Society and Human Rights”, UN Doc WSIS/PC-3/CONTR/178-E, 27 October 2003.

International Covenant on Civil and Political Rights ('ICCPR')⁹⁹ either to exclude the protection of freedom of expression online. According to Article 19 (2) of the ICCPR the right to freedom of expression includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, *or through any other media of his choice*.

Due to the fact that the right is construed in general terms regarding the choice of media, the wording of Article 19(2) is flexible enough to support claims that internet is the appropriate medium to benefit from the protection under ICCPR.¹⁰⁰ However, it is noteworthy to bear in mind that human rights after all protect humans, not technology.¹⁰¹

Regarding this in the light of equal protection of freedom of expression both off and online, ISP not only play an important role in ensuring the enjoyment of the freedom of expression, but they also need to benefit from such significant position in the information society. Yes, duties and responsibilities mentioned in Article 10 (2) of the ECHR are attributable to ISP, however these duties cannot exist without the enjoyment of actual right to freedom of expression, i.e. there is no second paragraph without the first one.

3.2. The relationship between two Europes: ECJ and ECtHR

In the light of the 'need' to secure copyright holders' rights online by combatting the piracy and cleansing the internet from illegal content, both e-Commerce and Info Soc directives do have an objective to comply with the fundamental principles of law, especially freedom of expression and the public interest. Furthermore, one of the objectives of the e-Commerce Directive is to ensure the free movement of information society services which according to the preamble of the e-Commerce Directive is the specific reflection of freedom of expression as enshrined in Article 10 (1) of ECHR. The explicit mentioning of Article 10 could thus imply that there is no need to seek for additional external reasons to invoke the reasoning deriving from the freedom of expression, as it is explicitly evident directly from the text of the directives.

Furthermore, the rights enshrined in the ECHR are considered to be the general principles of the EU law that have a higher status in the European

⁹⁹ International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

¹⁰⁰ Molly Land, "Toward an International Law of the Internet", 54 *Harvard International Law Journal* (2013), 393–458, 409.

¹⁰¹ Land, 413.

hierarchy of norms and directives. The ECHR can thus be considered the highest binding source of law within the EC concerning fundamental rights, so that both primary and secondary EC law must be in compliance with the ECHR.¹⁰² The EU acceded to the ECHR with the adoption of the Lisbon Treaty¹⁰³ in 2009 and has included the EU Charter as a foundation of the European Union with the same legal value as the Treaties of EU.¹⁰⁴

Secondly, the freedom of expression is enshrined in the instrument of the EU own legislation, i.e. Article 11 (1) of the EU Charter: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. While asserting the balance between different right holders, including the fundamental rights of end users, the ECJ is referring to the EU Charter instead of the ECHR, as well as referring to its own case law while explicitly being asked to rule on the issues in the light of the ECHR.

As has been shown and discussed in the previous chapter (‘Chapter 2’), the ECJ takes the arguments deriving from freedom of expression rather secondary, simply stating that the balance between the competing interests should be properly made, however, the ECJ is clearly prioritising economic interests of copyright holders when balancing such interests with the fundamental rights of users.

The ECJ is not only reluctant to take any substantial stand on the interpretation of the relationship between securing the trade and economic interests of copyright holders on one hand, and the fundamental freedom of expression and information on the other, by using cautious language and only reinstating the general principles, but also even if the court eventually does take a stand, the protection of freedom of expression of the users seems not to be the first concern. This fact makes the whole need for proper balance declaratory and rhetoric.

The protection of fundamental rights may not be given the weight it deserves in the terms of reasoning and in terms of the possible outcome, when these arguments are seen as just one argument out of many, or clearly stepping aside before the economic interests of copyright holders.

Based on the prevailing nature of the right to freedom of expression being the fundamental right and the basis for democratic society, it is important to bear in mind that this overarching principle should not only be taken into

¹⁰² Cristophe Geiger, “The Constitutional Dimension of Intellectual Property” in P. Torremans (ed.), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Alphen aan den Rijn: Kluwer Law International, 2008), 101–131, 116–117.

¹⁰³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C 306/01, 17 December 2007. See Article 6(2).

¹⁰⁴ Article 6(1) of the Lisbon Treaty.

consideration when balancing different interests, but should also be capable of limiting the far reaching overprotective nature of European copyright protection, as in the ECJ's own words "there is nothing whatsoever in the wording of Article 17(2) of the Charter to suggest that the right to intellectual property is inviolable and must for that reason be absolutely protected."

In this sense there is no possible explanation why the right to property is or should be more protected than the other fundamental rights and freedoms, including the right to seek and impart information. The ECHR and the relevant case law of the ECtHR must be taken into account in order to find the proper balance between two fundamental principles.

3.3. Copyright and freedom of expression under ECHR

As much as the protection of intellectual property is violable and subject to exceptions and limitations, the same could be said about the protection of freedom of expression which could be subject to the limitations as well. The term 'right of others', situated in Article 10 (2) of the ECHR, certainly includes a range of subjective rights protected by copyright that could limit the freedom of expression.¹⁰⁵

Furthermore, even though there is no explicit mentioning of intellectual property in the text of the ECHR, the ECtHR has invoked intellectual property rights protection through right to property under Article 1 of Protocol No. 1 to the ECHR. The ECtHR stated in numerous cases that intellectual property is protected by Article 1 of Protocol No. 1 in regard to both natural¹⁰⁶ and legal persons¹⁰⁷. Already in 1997, the European Commission of Human Rights held that in principle copyright protection constitutes a significant limitation to freedom of speech. However, copyright protection can lawfully restrict freedom of speech as long as it complies with the requirements of Article 10 (2).¹⁰⁸

According to the case law of the ECtHR, the limitations to Article 10 (2) are justified when these restrictions are i) prescribed by law, ii) pursue one of the legitimate aims codified in Article 10 (2), which in the case of copyright might be argued to be the protection of the rights of others, and iii) are necessary in the democratic society. The notion of 'necessary in democratic society' is in turn divided into two conditions that have to be fulfilled: the

¹⁰⁵ Mendis, 29. *Neij and Sunde Kolmisoppi v. Sweden*, section D.

¹⁰⁶ ECtHR, *Melnychuk v. Ukraine*, 28743/03, Chamber, decision, 5 July 2005.

¹⁰⁷ ECtHR, *Anheuser-Busch Inc. v. Portugal*, 73049/01, Grand Chamber, judgment, 11 January 2007.

¹⁰⁸ ECtHR, *Societe Nationale de Programmes France 2 v. France*, 30262/96, Commission, decision, 15 January 1997; see also Enrico Bonadio, "File sharing, copyright and freedom of speech", 33 *European Intellectual Property Review* (2011), 619–631.

restrictive measure has to meet the condition of i) existing ‘pressing social need’; and ii) it has to be ‘proportionate to the aim pursued’.¹⁰⁹

Hence any interference with the internet users’ freedom of expression has to be conducted by the rules established by the ECtHR. The fact that the protection of intellectual property is considered to be a human right does not automatically make it a justified restriction to the freedom of expression *per se*.

In the case of ISP, a progressive reading of the case law of the ECtHR concerning Article 10 should logically imply the importance of technical intermediaries for the enjoyment and the protection of freedom of expression.¹¹⁰ Furthermore, the ECtHR has emphasised with regard to the publishers that in supplying authors with a medium, they participate fully in freedom of expression and thus enjoy the guarantees offered by Article 10.¹¹¹ By analogy, protecting ISP is therefore protecting freedom of expression.¹¹²

In the light of the fact that the guarantees set in Article 10, that is the freedom to receive information, do not extend only to the matters of public concern, but cover in principle also cultural expressions and pure entertainment¹¹³, as well as commercial speech is also protected under Article 10¹¹⁴, it is sufficient to state that in principle the ISP providing access to such information, whether it concerns political debate or commercial information, should be protected under Article 10.

Furthermore, the ECHR protects the transmission of information as much as its content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information”.¹¹⁵ The protection under Article 10 also applies to corporate profit-making bodies¹¹⁶, thus to the legal persons, and is applicable to so called ‘commercial speech’, as for example advertising¹¹⁷. In addition the Article 10 is protecting the matters with no public interest in the first place.¹¹⁸

¹⁰⁹ See *inter alia* ECtHR, *Sunday Times v. The United Kingdom (No.1)*, 6538/74, judgment, Plenary, 26 April 1979, para. 45, 62.

¹¹⁰ Etienne Montero, Quentin van Enis, “Enabling Freedom of Expression in Light of Filtering Measures Imposed on Internet Intermediaries: Squaring the Circle?”, 27 *Computer Law & Security Review* (2011), 21–35, 24.

¹¹¹ Montero, van Enis, 24.

¹¹² *ibid.*

¹¹³ ECtHR, *Khurshid Mustafa and Tarzibachi v Sweden*, 23883/06, Third Section, judgment, 16 December 2008, para.44.

¹¹⁴ ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 10572/83, Plenary, judgment, 20 November 1989, para. 26.

¹¹⁵ ECtHR, *Autronic AG v. Switzerland*, 12726/87, Plenary, judgment, 22 May 1990, para. 47.

¹¹⁶ *ibid.*

¹¹⁷ ECtHR, *Casado Coca v. Spain*, 15450/89, Chamber, judgment, 24 February 1994, para. 35–37.

¹¹⁸ ECtHR, *Jacobowski v. Germany*, 15088/89, Chamber, judgment, 23 June 1994, para. 25.

Deriving from the principles developed by the ECtHR, there is no basis to deny ISP the protection granted from the Article 10, even if the matters of political debate and speech are absent from the services provided by ISP which have been given a certain ‘special’ protection in the ECtHR.¹¹⁹ Indeed, the threshold for protecting political speech is lower than in the matters of other interests, however this does not imply that ‘other’ kind of speech is not worth protection.

Even if there is no direct right to entertainment, as argued by Vincenzo Zeno-Zencovich¹²⁰, the closer look to case law of the ECtHR reveals the opposite view: the access to entertainment may be in public interest and thus covered by the protection of the right to seek and impart information. And this principle could be especially crucial with regard to injunctions ordered to ISP in order to block the access to particular websites.

3.3.1. Blocking measures

*Yildirim v. Turkey*¹²¹ case concerned not copyright infringement but the assault of the memory of Atatürk instead. The applicant published his works and opinions on his website hosted by Google sites. Due to the criminal proceedings against the third party who allegedly assaulted the memory of Atatürk via Google sites services, the injunction against the ISP got ordered. According to that order, the ISP blocked the access to all Google sites whatsoever, including to the non-infringing website of the applicant.

First of all, the ECtHR stated that “whatever its legal basis, such a measure [the injunction to block Google sites] was bound to have an influence on the accessibility of the Internet and, accordingly, engaged the responsibility of the respondent State under Article 10”.¹²² Hence no matter what is the law behind such measure, the blocking of access to the website is considered to be an interference with the enjoyment of the freedom of expression and should be assessed under the principles of Article 10 (2). Basically, there is nothing to deny the analogy of that case to the circumstances where the legal basis for injunctions is a possible infringement of copyright.

The ECtHR proceeded with the test of ‘prescribed by law’ in which the notion of ‘law’ according to the court’s well established jurisprudence has to be “*accessible* to the person concerned, who must moreover be able to *foresee* its consequences, and that it should be *compatible* with the rule of law”.¹²³ ‘Foreseeability criteria’ means that the rule has to be formulated

¹¹⁹ Bernt Hugenholtz, “Copyright and Freedom of Expression in Europe”, in R. Cooper Dreyfuss, H. First, D. Leenheer Zimmerman (eds.), *Innovation Policy in an Information Age* (Oxford: Oxford University Press, 2000), 1–20, 7.

¹²⁰ Vincenzo Zeno-Zencovich, 359.

¹²¹ ECtHR, *Yildirim v. Turkey*, 3111/10, Second Section, judgment, 18 December 2012.

¹²² *Yildirim v. Turkey*, para. 53.

¹²³ *ibid.*, para. 57.

with sufficient precision to enable any individual to regulate his conduct.¹²⁴ The national basis for the injunction did not specify the rules of blocking the wholesale access to Google sites which legality was not in the question. The judicial proceedings concerned the publications made by the third party and did not concern the legality of Google sites nor the whole website maintained by the applicant. Nor was there indicated that Google sites were properly notified of the infringing content, or refused to comply with an interim measure concerning the infringing website in question that could have raised the issue of liability of Google sites under the rules of Turkish law.¹²⁵

Furthermore, according to the court's reasoning Turkish law "conferred extensive powers on an administrative body [the ISP who blocked the access] in the implementation of a blocking order originally issued in relation to a specified site."¹²⁶ The ECtHR stated that such measures applied by ISP have to be based on a legal framework which ensures both tight control over the scope of bans and effective judicial review to prevent any abuse of power. The court stressed that "the judicial review of such a measure, based on a weighing-up of the competing interests at stake and designed to strike a balance between them, is inconceivable without a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression."¹²⁷ The proper weighing up of the various interests at stake is inescapable, as such obligation flows directly from the Convention. Furthermore, such restriction on the rights of the users had a significant collateral effect¹²⁸, and produced arbitrary effects.¹²⁹ In addition, the court held that the judicial-review procedures concerning the blocking of internet sites were insufficient to meet the criteria for avoiding abuse, as domestic law did not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.¹³⁰ Consequently, the ECtHR found a violation of Article 10.

First of all it is noteworthy to comment that according to this reasoning of the court, the wholesale blocking of access to any kind of hosting services might rarely be justified, as such blanket ban is already against the rule of law before even entering the test of necessity in democratic society and proportionality. What comes to often perceived as completely illegal P2P platforms, torrent trackers and other file-sharing websites, then it is scarcely the case when the whole resources of such host provider are used for hosting only infringing material. Hence, the rights of law-obeying internet users,

¹²⁴ *ibid.*, with the relevant case law cited therein.

¹²⁵ *ibid.*, para. 62.

¹²⁶ *ibid.*, para. 63.

¹²⁷ *ibid.*, para. 64.

¹²⁸ *ibid.*, para. 66.

¹²⁹ *ibid.*, para. 68.

¹³⁰ *ibid.*

and the possible significant collateral effect of blocking measures, have to be weighed against the interests of economic loss of copyright holders.

The second issue concerns the rules for injunctions ordered to ISP and ISP's discretion in choosing the 'proper' measure in order to find the needed balance between the competing interests. As highlighted by the ECtHR in *Yildirim*, a legal framework of clear rules and guidelines is needed regarding the application of preventive restrictions on freedom of expression. These rules are directly connected to the ISP liability rules established by the e-Commerce and Info Soc directives which grant national courts the power of injunction against intermediary in order to terminate and prevent the infringement. As stated earlier, the rules of ISP liability do not adequately take into consideration the concerns of fundamental rights and freedoms. This view was also *inter alia* acknowledged in the concurring opinion of judge Pinto de Albuquerque¹³¹ in *Yildirim*, who also provided his view on this point, i.e. the minimum criteria for the ECHR-compatible legislation on internet blocking. These criteria according to the judge Pinto de Albuquerque have to include *inter alia* the observance of the criterions developed by the case law of the ECtHR, i.e. the criterion of proportionality which provides the fair balance between the respect of minimum core of freedom of expression and the competing interests pursued, according to the Article 10 (2); and the criterion of necessity that goes no further than meeting the necessary 'social need'.

While 'pressing social need' to block the access to the infringing content might be justified by the need to combat the piracy or further dissemination of the illegal material, the trickiest criteria for the right holders to extend their interests to the blocking the access to information, is the 'proportionality criterion'. According to the ECtHR, the proportionality test goes hand in hand with the test of 'adequacy' which includes the assessment whether the measures taken are 'relevant and sufficient' to justify the legitimate aim pursued.¹³² In addition, the restrictive measure has to be both rationally connected to its end and suitable for leading to this end.¹³³ Blocking the access is not only ineffective in order to stop the infringement, it is definitely not sufficient in order to protect the exclusive right of copyright holders. Illegal content endlessly returns to the web from one blocked website to another: it is common that after the closure of one website, illegal material is transferred to another address.¹³⁴ Furthermore, legal actions by means of blocking against unauthorised file sharing often has only an immediate effect which typically lasts for six months, as illegal

¹³¹ The concurring opinion of judge Pinto de Albuquerque in *Yildirim v. Turkey*.

¹³² See ECtHR, *Chauvy and Others v. France*, 64915/01, Second Section, judgment, 29 June 2004, para. 65.

¹³³ Pangiota Theodoropoulou, "Internet Surfing in the European Context: Enjoying the Open Sea Whilst Avoiding the Risk of Big Waves: Cyberspace Governance versus Freedom of Expression", 4 *Vienna Online Journal on International Constitutional Law* (2010), 713–777, 723.

¹³⁴ Montero, van Enis, 34.

supply and demand find other places to meet.¹³⁵ Bearing in mind the general prohibition of monitoring the traffic by ISP under the e-Commerce Directive, it is impossible to demand from ISP to follow and track the further transfer of infringing material. Hence the blocking of the whole website would not give any plausible efficient relief for the right holders, at the same time damaging the enjoyment of freedom of expression by both hosting providers and end users. In result the issue of over-blocking arises, as expressed by Adrienne Muir, constituting a “use of hammer to crack a nut”,¹³⁶ when legal activity is impeded by the desperate attempt to conquer the illegal file sharing.

The other minimum criteria for injunctions of blocking for ISP to be compatible with the ECHR that were expressed by the judge Pinto de Albuquerque, were the clear definitions of the “categories of persons and institutions to have their publications blocked”, and the “categories of blocking orders”. In both definitions the judge Pinto de Albuquerque was advocating for including the specific mentioning of different hosting providers: e.g. “websites”, “platforms”, “IP addresses”, “social networks”, “ports” etc. As there is definitely a need for ‘specifying’ the rules for ISP liability, this need does not include specifying the different types of technology that could be liable for any kind of infringements. Due to the unpredicted and rapid change of technology, especially considering the nature of the internet, the terms concerning such technology have to remain as general as possible in order to include the widest range of ISP.

Another important aspect that was established by *Yldirim* case and highlighted by the judge Pinto de Albuquerque is the proper judicial review of every possible restriction on the freedom of expression. The avoidance of ‘private censorship’ and arbitrary abuse of fundamental rights can mostly be achieved by a proper judicial review that is not only *post* but also *prior* to the measures taken. Judge Pinto de Albuquerque expressed the need for clear rules of (emphasis added) “a procedure to be followed for the issuance of that [blocking] order, which includes the examination by *the competent authority* of the case file supporting the request for a blocking order and *the hearing of evidence from the affected person or institution*.” It is definitely a point that is completely absent from the perspective of the ECJ concerning the blocking injunctions and their relationship with freedom of expression in the case of *UPC Telekabel v Constantin Film and Wega*, where the ECJ acknowledged only the need for the possibility to appeal the injunctions by the affected users¹³⁷, but no procedure regarding the implication of the blocking measures. The importance of safeguarding the presumption of innocence and the defence of the accused is completely overlooked by such interpretation by the ECJ.

¹³⁵ Joost Poort et al, “Baywatch: Two Approaches to Measure the Effects of Blocking Access to the Pirate Bay”, 38 *Telecommunications Policy* (2014), 383–392.

¹³⁶ Muir, 265.

¹³⁷ See Chapter 2.2.3. of the current thesis.

Two European courts however agree on the point of proper judicial safeguards regarding already imposed blocking measures for the affected internet users after the ISP has taken the measures.

According to Article 1(3) of the Framework Directive¹³⁸ member states may take measures in their national legal systems to pursue general interest objectives, in particular relating to content regulation and audio-visual policy. However, according to Article 1 (3a) of the same directive:

“Measures taken by Member States regarding end-users’ access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the ECHR and general principles of Community law. Any of these measures regarding end-user’ access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the ECHR and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the ECHR. The right to effective and timely judicial review shall be guaranteed.”

Nevertheless, these safeguards developed by the case law of the ECtHR and inserted into the provision of the Framework Directive do apply only to the information society services that include broadcasting and online telecommunication services, excluding the content *et al* providers as defined in the Info Soc Directive which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.¹³⁹ Hence these safeguards could only apply to the internet access providers such as broadband providers. Even though Article 1(3) of the Framework Directive is designed to regulate the access of end-users to the services through electronic communications, which could imply that the access to all possible content online should be regulated according to the provisions of the ECHR and general principles of EC law, the following Article 2, which sets the definitions of the terms used in the Framework directive, states clearly that ‘electronic communications service’ exclude content providers and more active (i.e. exercising editorial control over content), hosting providers.

Consequently, it may be assumed that the blanket ban of the internet access

¹³⁸ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications and services (‘Framework Directive’), OJ L 108, 24 April 2002.

¹³⁹ Article 2(c) of the Framework Directive

is generally prohibited. However, it could be said that the ban of the particular website may be justified without any substantial procedural or judicial guarantees.

3.3.2. *The Pirate Bay*

The situation seems however to be slightly different with regard to more 'active' hosting service providing ISP who have been convicted on a national level in facilitating the copyright infringements online.

One of the most evident cases of the explicit conflict between copyright and freedom of expression before the ECtHR is the case of *Neij and Sunde Kolmisoppi v. Sweden*.¹⁴⁰

In this case, the applicants were running a popular torrent file sharing website The Pirate Bay, which is claimed to be commercially successful earning its revenues mostly from advertising.¹⁴¹ According to the applicants, all revenues are used to maintain the website and the website itself is not economically profitable.¹⁴² The website also received some voluntary donations from its users.¹⁴³

The applicants were accused before Swedish national courts of violating the Swedish Copyright Act by facilitating other persons' infringement of copyright concerning music, films and computer games by providing others with the opportunity to upload torrent files to the website, as well as providing others with a database linked to a catalogue of torrent files. The applicants *inter alia* argued that by solely receiving and providing information about torrent files, TPB must be regarded as a service provider who cannot be criminally liable for an offence which relates to the content of the information.

The applicants however were convicted before the national courts of complicity to commit crimes in violation of the Copyright Act and were sentenced to imprisonment, in addition to the order to pay damages of 30 million kronor (\$3.6 million) to entertainment companies.¹⁴⁴

The applicants complained under Article 10 of the ECHR before the ECtHR that *their* right to receive and impart information had been violated when they were convicted for other persons' use of TPB. In their view, Article 10

¹⁴⁰ *Supra* note 16.

¹⁴¹ *The Local*, "Pirate Bay earned millions from advertising", 30 September 2010. Available at: <<http://www.thelocal.se/20100930/29334>>

¹⁴² *Ibid*; see also TPB official website 'About' section available at: <<http://thepiratebay.se/about>>

¹⁴³ TPB has published Bitcoin and LiteCoin links for digital money donations on their website. See also *TorrentFreak*, "The Pirate Bay Now Accepts Bitcoin donations", 23 April 2013. Available at: <<https://torrentfreak.com/the-pirate-bay-bitcoin-donations-130423/>>

¹⁴⁴ Louise Nordstrom, "Pirate Bay: 4 Convicted In Sweden's File-Sharing Trial", *The Huffington Post*, 17 April 2009. Available at: <http://www.huffingtonpost.com/2009/04/17/pirate-bay-4-convicted-in_n_188152.html>

protects the right to arrange a service on the internet which can be used for both legal and illegal purposes, without the persons responsible for the service being convicted for acts committed by the people using the service.

The ECtHR found that the conviction of the applicants interfered with their freedom of expression. Such interference, according to the ECtHR, was prescribed by law, as it was based on the relevant national legislation concerning copyright and criminal law. Such conviction was also found to pursue one of the legitimate aims under Article 10 (2), i.e. “protection of the rights of others”: the protection of the plaintiffs’ copyright.

The ECtHR pursued to the necessity test, where it outlined two competing interests in current case: the interest of the applicants to facilitate the sharing of the information on one hand, and the interest in protecting the rights of the copyright holders on the other. In this regard the ECtHR stressed a wide margin of appreciation enjoyed by the state in balancing these two competing interests.

However, the commercial nature of TPB, even though the ECtHR stressed that Article 10 guarantees freedom of expression to ‘everyone’ without any distinction made according to whether the aim pursued is profit-making or not, was detrimental to the applicants in the necessity test. The fact that protection of the ‘information’ the applicants tried to rely on does not amount to the same level as that afforded to political expression and debate, implicates that the state enjoys a particularly wide margin of appreciation in this regard when it comes to balancing two competing interests. Consequently the applicants’ conviction met the pressing social need.

What comes to the proportionality test, the Court simply stated that the imprisonment and the damages the applicants were awarded with were not disproportionate to the aim pursued, without any further elaboration on this point.

The court’s reasoning in this case was in line with its previous case of competing interests deriving from freedom of expression and copyright protection: *Ashby Donald and Others v. France*.¹⁴⁵ In this case the applicants were fashion photographers who published online photographs taken in a fashion show without the authorisation by the fashion houses, and thus infringed the latter’s copyright. The ECtHR stated that the possible infringement of freedom of expression is applicable to the current case, however this right was not found to be violated, as photographs were not related to an issue of general interest and rather concerned a kind of “commercial speech”.¹⁴⁶ Furthermore, the photographs were distributed for commercial purposes, and thus could not enjoy the whole range of the protection guaranteed by Article 10.¹⁴⁷ In addition, the photographs in

¹⁴⁵ ECtHR, *Ashby Donald and others v. France*, 36769/08, Chamber, judgment, 10 January 2013.

¹⁴⁶ *Ashby Donald and others v. France*, para. 39.

¹⁴⁷ Joseph Jones, “Internet Pirates Walk the Plank with Article 10 kept at Bay: Neij and

question were published on the website of a company run by the applicants with the aim of selling them or charging a fee to view them, thus directly profiting from the use of copyrighted material.

According to this logic, it is difficult to justify copyright violations with the arguments of free speech according to the ECtHR, as most of the times the nature of “speech” in those cases before the ECtHR did not amount to the same level of protection that is granted to the political speech or the matters of ‘conventional’ public interest.

Furthermore, according to Joseph Jones, it is possible to perceive file sharing of music and films as a desire to “expand cultural horizons” and that could be placed under the right to access to the culture that file sharing can foster.¹⁴⁸ In this regard, Jones is arguing that the ECtHR, by denying the same level of protection to the material posted on TPB since its nature was not the matter of public interest, overlooked the argument that file sharing fosters access to culture.¹⁴⁹ Second of all, file sharing is not only used for copyright infringements but also for exchanging information, ideas and opinions.¹⁵⁰ Providing platform for that could in principle amount to the ‘transmission of information’ protected under Article 10 according to the case law of the ECtHR.

On the contrary to the *Ashby Donald* case, in the Pirate Bay case, the information shared on the website run by the applicants was freely accessible to the public and the commercial gain earned by the applicants was not directly gained from the content of such information, but advertising.

Definitely it cannot be overlooked that the fact that TPB contained publicly available illegal content might have made this website to be so popular and frequently visited in the first place, thus making TPB an attractive platform for advertising. However, in addition to that it cannot be overlooked either that illegal content was not the only information shared through the website. Easily some additional attention of TPB users was drawn because of the ongoing legal battle between corporate entertainment industry and internet community in the war against piracy.¹⁵¹ The simple approach of the ECtHR relying on the wide margin of appreciation in the cases not concerning the matter of ‘public interests’ in TPB case, perhaps in addition completely overlooked the political activity of the Pirate Party and their politically active stand on the issues *inter alia* concerning copyright regulation, leading

Sunde Kolmisoppi v Sweden”, 35 *European Intellectual Property Review* (2013), 695–700, 698.

¹⁴⁸ Jones, 699.

¹⁴⁹ *ibid.*

¹⁵⁰ Bonadio, 622.

¹⁵¹ By the year 2014, the number of registered users of TPB has increased to over 6,5 million. See also Mark O’Beirne, “Uploads to Pirate Bay Increased By 50% Over Past Year”, *clickonline.com*, 31 December 2013. Available at:

<<http://technology.canoe.ca/News/News/2013/12/31/21366816.html>>

to the so called Pirate Parties International movement with their national equivalents in several European countries.¹⁵² Hence, how commercial is the speech of TPB in the first place?

It is peculiar to note that the sympathy of wider public is clearly directed to the ‘pirates’ and copyright infringers, rather than the victims such as entertainment companies, as the wider public is rather willing to pay the ‘pirates’ to help them with the sanctioned fines for damages caused to the victims of copyright infringements, than to actually pay for intellectual property goods directly to these ‘victims’.¹⁵³

In addition, it is doubtful that TPB could rely on safe harbours provided in the e-Commerce Directive, as not only did the developers of the website receive the notifications from the affected copyright holders, but they also dedicated a whole section of ‘Legal Threats’ on TPB where the e-mails and notifications of right holders are published online with the responses to them which clearly mock the right holders.¹⁵⁴ Doubtfully the owners of TPB can rely on the exception of unaware and ‘clueless’ hosting provider in regard to these copyright infringements under Article 14 of the e-Commerce Directive, where ISP shall act expeditiously to remove or disable access to information upon being notified of the infringement.

3.4. Concluding remarks

TPB case in the ECtHR has re-established some important principles. First of all, the ECtHR has established that conviction based on the complicit copyright infringements amount to the interference to the freedom of expression. That is an important step towards securing the freedom of expression against the claims of copyright infringements online.

However, the ECtHR in regard to ISP is still quite reluctant to see outside of the scope of commercial speech that is in view of the ECtHR both protected in principle, however not so protected in reality.

In this regard, two European courts, as close as they should be, seem to be quite distant from each other. While one, i.e. the ECJ, is prioritising trade

¹⁵² According to Pirate Parties International (‘PPI’), the Pirate Parties advocate on the international level for the promotion of protection of human rights and fundamental freedoms in the digital age, consumer and authors rights-oriented reform of copyright and related rights, support for information privacy, transparency and free access to information, and trying to achieve these goals by the means of the established political system. See PPI official website available at: <<http://www.pp-international.net/about>>

¹⁵³ See Jane McEntegart, “Pirate Bay: No Donations! We’re Not Paying”, *Tom’s Hardware US*, 21 April 2009. Available at: <http://www.tomshardware.com/news/pirate-bay-torrent-download,7582.html#pirate-bay-torrent-download%2C7582.html?&_suid=1394535687798013906110073285277>

¹⁵⁴ TPB official website, ‘Legal Threats’ section available at: <<http://thepiratebay.se/legal>>

and economic value by overlooking fundamental rights and freedoms, the other, i.e. the ECtHR, is justifying the restrictions on free speech by the lack of public interest in profit-making activities. Two courts also do take a slightly different approach in regard to the blocking measures, mainly due to the fact that both courts do emphasise different rationales.

In the case of TPB, it is problematic to state that political activity could justify the illegal activity, however, it is also dangerous to imply criminal sanctions deriving from any indirect liability on politically active persons. Furthermore, when conventional system of protection of copyright is being reassessed and reconceptualised, the views that “shock, offend and disturb the state or any sector of the population”¹⁵⁵, even if they concern the ‘sacred’ protection of copyright, must still be tolerated, or at least be properly assessed when restricted.

The case law of the ECtHR has firmly established the principles of restrictions to freedom of expression, however, the ECJ is overlooking these tests when ruling on IP rights infringements online.

The relationship between copyright, freedom of expression and the role of ISP as the guarantee of the proper balance of these competing interests are still quite unclear and varying from court to court, or even in the same court. The ECHR does provide an elaborated framework of principles and tests to take into consideration when assessing the liability of ISP, however, the case law of the ECtHR seems to not address this issue properly, especially where the legislation is silent.

¹⁵⁵ ECtHR, *Handyside v. the United Kingdom*, 5493/72, Plenary, judgment, 7 December 1976, para. 49.

4. Public interest exception to copyright protection

4.1. Public interest of copyright

In order to understand the importance of public interest allegedly enshrined into copyright protection it is noteworthy to remind ourselves of the ‘roots’ of the modern western copyright system.

The nascency of modern copyright protection dates back to the year 1709 and the Statute of Anne in England which was the product of a new communications technology, the printing press.¹⁵⁶ Hence there is nothing surprising in the view that modern copyright laws have to be regularly modified in order to adapt to the new communications technology.¹⁵⁷ Originally, the response of the legislators by adopting the Statute was to break the monopoly of booksellers and printers and reinforce the role of the author in publishing and printing process.¹⁵⁸ And that was said to benefit the larger public in general by encouraging the authors to publish their works and permit the widest possible dissemination of works to the public at large.¹⁵⁹ The Statute was aimed at promoting the public’s interest in enhanced access to books and abolition of monopoly imposed by printing press.¹⁶⁰

From this historical perspective it is noteworthy to highlight two important points concerning copyright protection: 1) copyright has to change in accordance with technological changes (after all it was ‘born’ due to technology); and 2) the protection of authors has to benefit the society and larger public in general. As Sunimal Mendis expressed, “the scope of the private exclusive right that is accorded to the copyright owner should be defined within the scope of such public interest and that the exclusive rights/.../ should be suitably limited so as to prevent a copyright holder from deriving profit from his creation in a manner adverse to the legitimate interests of public.”¹⁶¹ Hence the ultimate goal of copyright protection and its strongest justification is the social benefit.

However, as the Statute of Anne was the product of its time, heavily relying on the public’s interest, the second biggest landmark in the history of copyright, the adoption of the Berne Convention, was no less the product of its own time as well, that is legislative answer to the need to combat the

¹⁵⁶ Gillian Davies, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2002), 9.

¹⁵⁷ Davies, 9–10.

¹⁵⁸ Davies, 13.

¹⁵⁹ Davies, 16.

¹⁶⁰ Orit Fischman-Afori, “The Evolution of Copyright Law and Inductive Speculations as to its Future”, 19 *Journal of Intellectual Property Law* (2012), 231–259, 246.

¹⁶¹ Mendis, 21–22.

inter-state piracy of copyrighted works during the 19th century, when large exporters of copyrighted material such as Germany, England and France faced a phenomenon of reprinted cheaper works of their citizens being widely distributed in the same language-speaking countries.¹⁶² The creation of the Berne Convention, thus, can teach another historical lesson which is the adoption of internationally stronger rules in order to combat new forms of threats to the economic interests of right holders. Orit Fischman-Afori has called the Berne Convention “the original sin”, the reason behind current ongoing copyright wars in general.¹⁶³

Nevertheless, the reverse purpose of copyright has been widely discussed and commented on, however, it is agreed upon that today the public interest in access to and dissemination of works in order to benefit society seems to have become lost, and that there is a need of a more robust protection of the public interest in access to and dissemination of works in order to bring copyright law back in line with its original purpose.¹⁶⁴

It is also clear than no longer it is enough to rely on the fact that copyright in essence is internally securing freedom of expression by its own rules, e.g. because of the temporary nature of copyright protection, and the notion of public domain, that is the pool of unprotected or no longer protected works free to use and reuse. The length of protection has gradually increased since initial 14 years term in the Statute of Anne¹⁶⁵, to lifelong + 70 years after death term according to current harmonisation in Europe.¹⁶⁶ Due to the prolonging term of protection and expansion of protected works, the public domain is shrinking in favor of commercial ownership at expense of the interests of the end users of the works.¹⁶⁷ In the end, who and what is the author without her public? No doubt the wider and larger dissemination of a cultural work benefits the author by driving the attention and expanding the possible number of consumers of her work which could lead to the subsequent economic benefits and advantages the copyright holders seem to fear and care so about.

Nor does inherent concept of copyright itself, i.e. idea-expression dichotomy, provide any actual relief in the debate of copyright *versus* public interest. Commentators have expressed that it is often quite difficult to distinguish the idea from expression when they overlap, e.g. a photographic

¹⁶² Fischman-Afori, 250.

¹⁶³ *ibid*, 254.

¹⁶⁴ Edward Carter, “Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe about Fair Use and Free Expression”, 30 *University of La Verne Law Review* (2009), 312–345, 321.

¹⁶⁵ Laura Gurak, “Technical Communication, Copyright, and the Shrinking Public Domain”, 14 *Computers and Composition* (1997), 329–342, 334.

¹⁶⁶ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372/12, 27 December 2006. In the light that minimum term of protection according to Berne Convention and TRIPS is 50 years after the death of the author.

¹⁶⁷ Gurak, 335.

work¹⁶⁸, and the fact that there exist some situations when an individual's right to express herself effectively depends on her being allowed to use a particular copyrighted expression.¹⁶⁹ As an illustration to this case are, for example, documentary films that have often been stripped of clips, background shots and music, because of the alleged copyright infringements, although these uses of protected works would have "greatly enhanced poignancy, artistic quality, and historical elucidation of a documentary".¹⁷⁰ As a result, in Neil Natanel's words, "a film that is supposed to be a documentary contains a bit of calculated untruth."¹⁷¹ Obviously, expression that is exclusively protected by copyright, conflicts with the freedom of individuals to express themselves however they see to fit.¹⁷²

It is clear that if copyright indeed did inherently solve the tension between right holders' exclusive rights and public interest, the current 'postmodern' crisis of copyright would not exist, where the Renaissance-like ideas of an *unique* creator are not surviving the time-proof, as contemporary author is not author at all, but "is more deemed a collector, collage-maker, or scripter of our cultural past".¹⁷³ The paradigm and reality have changed, law however not so much.

Commentators seem also to agree that the ultimate consumer of protected works is "neither heard nor heeded"¹⁷⁴ in IP policy which is widely dominated by the interests of 'producer' of these works, and advocating for the change in the system for the greater public good.¹⁷⁵

The ease of reproduction and dissemination of works in the digital age has also produced an argument that right holders should accept that online activities cannot be policed in the same way as their offline equivalents can, i.e. digital copy is substantially different from its CD or DVD analogue which requires a specific knowledge and a costly equipment to produce.¹⁷⁶ Second of all, there is simply no offline equivalent to ISP in the first place¹⁷⁷, however the equivalent of outcome¹⁷⁸ of the regulation of ISP

¹⁶⁸ Jacob Zweig, "Fair Use as Free Speech Fundamental: How Copyright Law Creates a Conflict Between International Intellectual Property and Human Rights Treaties", 64 *Hastings Law Journal* (2013), 1549–1585, 1560.

¹⁶⁹ Zweig, 1562.

¹⁷⁰ Neil Netanel, "From Mein Kampf to Google" in *Copyright's Paradox* (Oxford: Oxford Scholarship Online, 2008), 5.

¹⁷¹ *ibid.*

¹⁷² Zweig, 1553.

¹⁷³ Xiyin Tang, "That Old Thing, Copyright: Reconciling the Postmodern Paradox in the New Digital Age", 39 *American Intellectual Property Law Association Quarterly Journal* (2011), 71–102, 89.

¹⁷⁴ Bingbin Lu, "Reconstructing Copyright From 'Copy-centric' to 'Dissemination-centric' in the Digital Age", 39 *Journal of Information Science* (2013), 485.

¹⁷⁵ *ibid.*, 479–493, 486–487.

¹⁷⁶ Capel, 57.

¹⁷⁷ Chris Reed, "Online and Offline Equivalence: Aspirations and Achievement", 18 *International Journal of Law and Information Technology* (2010), 248–273, 272.

liability should be still taken into consideration, i.e. the achievement of proper balance between the protection of right holders and the protection of public interest, which is the same function of copyright both online and offline.

4.2. Public interest exceptions in Europe

A set of limitations and exceptions to copyright protection is enshrined into the Info Soc Directive. According to recital 14, the Info Soc Directive seeks to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching. In this regard, it seems that the Info Soc Directive is permitting exceptions on the basis of public interest only if such interest is deriving from education and teaching purposes. Furthermore, recital 22 states that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works. From this passage it, however, seems that European legislators acknowledge the importance of the dissemination of culture, but are not willing to sacrifice the strict protection of economic rights of IP rights holders.

Recital 31 starts with the general statement about the need to safeguard a fair balance between different interests, and evolves into the assertion that the existing exceptions and limitations to the rights as set out by the member states have to be reassessed in the light of the new electronic environment, and ends with the acknowledgement that in order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously.

Finally, in recital 34, the Info Soc Directive provides the examples of plausible limitations based on the public interest, i.e. certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings. Recital 38 mentions the exception for private use of audio, visual and audiovisual material accompanied by fair compensation.

Series of limitations are enshrined in Article 5. The right to reproduction can be, for example, restricted in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial¹⁷⁹; in respect of specific acts of reproduction made by

¹⁷⁸ Reed, 252.

¹⁷⁹ Article 5(2)(b) of Info Soc Directive.

publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage¹⁸⁰; or in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons¹⁸¹. In this regard, the use of protected works has to be for non-commercial purposes and, where necessary, provided with fair remuneration for the right holders. Article 5(3) allows for further exceptions of the right to reproduction and the right to making available to the public: e.g. use for the sole purpose of illustration for teaching or scientific research¹⁸²; reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics¹⁸³; quotations for purposes such as criticism or review¹⁸⁴; incidental inclusion of a work or other subject-matter in other material¹⁸⁵; use for the purpose of caricature, parody or pastiche¹⁸⁶; use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses¹⁸⁷.

As it has already been mentioned before in Chapter 2 of current thesis, the only exception explicitly concerning ISP is the exception provided in Article 5(1) concerning temporary acts of reproduction, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary. This exception also happens to be the only mandatory limitation to the right of reproduction, whilst all other limitations are merely optional¹⁸⁸ the member states are free to pick and choose from.¹⁸⁹

Despite the fact that the Info Soc Directive provides numerous cases of allowed exceptions and limitations, the list of these exceptions to the right of reproduction and to the right of communication to the public is exhaustive according to the recital 32. In the case of exceptions with regard to digital world Article 5(3)(o) or the so-called “grandfather clause”¹⁹⁰, explicitly permits the introduction of limitations concerning only the *analogue* use of protected works. What comes to the digital private copying, recital 38 states that this kind of copying “is likely to be more widespread

¹⁸⁰ Article 5(2)(c).

¹⁸¹ Article 5(2)(e).

¹⁸² Article 5(3)(a),

¹⁸³ Article 5(3)(c).

¹⁸⁴ Article 5(3)(d).

¹⁸⁵ Article 5(3)(i).

¹⁸⁶ Article 5(3)(k).

¹⁸⁷ Article 5(3)(o).

¹⁸⁸ Article 5(2) and (3). Mendis, 62.

¹⁸⁹ Lucie Guibault et al, “Study in the Implementation and Effect In Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights In the Information Society: Executive Summary of Final Report”, ETD/2005/IM/D1/91, 2007.

¹⁹⁰ Peter Yu, “An Overview of the EU Information Society Directive”, *GigaLaw.com* (2001), 1–4, 2. Available at: <www.peteryu.com/gigalaw1101.pdf>

and have a greater economic impact”, and therefore a distinction between analogue and digital copies should be made in certain respects. Hence, the Info Soc Directive is clearly making a distinction between digital and non-digital world, whilst expanding the rights of copyright holders to the digital world without much gain for the intermediaries in this respect.

Several commentators have expressed the opinion, that the fact that the Info Soc Directive establishes an *exhaustive* list of no less than 20 *optional* exceptions, many of which are drafted in inflexible technology-specific language not only fails in achieving the harmonization goal it so ambitiously strokes to achieve, but also produces no legal certainty, nor serves the public interest.¹⁹¹

Such close list of exceptions, including the ‘grandfather clause’, forms not only an effective obstacle to the introduction of a broad general exception to copyright deriving from the public interest¹⁹², but is also incompatible with the Agreed Statements concerning the WIPO Copyright Treaty¹⁹³ that permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment.¹⁹⁴ Therefore, the Info Soc Directive assuredly takes the protection of copyright holders much further than originally intended by the international IP treaties that were the base for the Info Soc Directive.

4.3. The need for legislative response to ISP liability

As highlighted above in Chapter 2, the e-Commerce Directive provides with a ‘notice and take down’ system in its Article 14. According to Article 14(3) of the e-Commerce Directive, member states are free to establish procedures governing the removal or disabling of access to information by ISP. The absence of clear guidelines of such procedures, in addition with burdensome interpretation of the ECJ who places upon an intermediary the role of a responsible, diligent and independent investigator with the threat of the court’s blocking injunction without any prior judicial guarantees that might not be disproportionate with the fundamental rights of the end users, puts ISP in a difficult position with the responsibilities of a public authority.

The encouragement in the EU of private actions taken by ISP with an attitude of ‘act now, act later’ is said to have a chilling effect on free expression online as well as on the potential of socially valuable technology

¹⁹¹ Davies, 316. Guibalt et al, 4–5. Mendis, 63. Bernt Hugenholtz, “Why the Copyright Directive is Unimportant, and Possibly Invalid”, 22 *European Intellectual Property Review* (2000), 499–505, 501.

¹⁹² Mendis, 63.

¹⁹³ Agreed Statements concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996.

¹⁹⁴ Agreed statement concerning Article 10 of WIPO Copyright Treaty. Davies, 317.

such as P2P file sharing.¹⁹⁵ In the fear of further sanctions, including the possible following liability for copyright infringements, ISP would rather take down or block the access to the information that allegedly infringes copyright, especially, when there are no rules concerning such notifications or at least the possibility of defence against such claims.¹⁹⁶

Another problematic approach is the self-regulation imposed by ISP in order to prevent and stop illegal activity online, including the rules of the ‘notice and take down’ system. While there are no guidelines on the question of what is a proper notice of copyright infringement in neither the e-Commerce Directive or in the legislation of most of the European countries¹⁹⁷, the procedure is left to ISP to decide and self-regulate upon. Such self-regulatory schemes are said to be flexible and less burdensome than statutory regulation, however they usually lack the procedural fairness and protection for fundamental rights that are ensured by independent judicial and parliamentary scrutiny.¹⁹⁸ Furthermore, in the absence of statutory provisions regarding needed actions taken by ISP in order to prevent or stop illegal activity, ISP often rely on their own codes of conduct which are usually agreed upon between the stakeholders most directly concerned.¹⁹⁹ These stakeholders are most likely to secure their own business interests and often overlook the large public while developing these codes of conduct.²⁰⁰

Furthermore, when even the proper assessment with compatibility with fundamental rights and freedom is left to and encouraged to be regulated by a private actor as ISP, as it *was inter alia* interpreted by the ECJ, regulation of copyright is moving from statecentered, public enforcement to decentered, private enforcement.²⁰¹ Such shift is a favourable ground for private censorship, when copyright claims can be and are used for suppressing freedom of speech and dissemination of unfavourable information, as, for example, in the case of the online host WikiLeaks who hosted sensitive data provided by the whistleblower Bradley Manning, which included military footage of US helicopters shooting civilians.²⁰² After governmental pressure on several ISP, including credit card companies and PayPal to suspend all payments to the WikiLeaks owners, the attempt to host WikiLeaks data on Amazon servers failed, as the content

¹⁹⁵ Capel, 62.

¹⁹⁶ *ibid.*

¹⁹⁷ For example Finland have autonomously legislated procedural rules of notice and take-down; see Bernt Hugenholtz, “Codes of Conduct and Copyright Enforcement in Cyberspace” in Irini Stamatoudi (ed), *Copyright Enforcement and the Internet* (Alphen aan den Rijn: Wolters Kluwer, 2010), 303–320, 312.

¹⁹⁸ Ian Brown, “Internet Self-Regulation and Fundamental Rights”, 1 *Index of Censorship* (2010), 1–8, 1.

¹⁹⁹ Hugenholtz (2010), 307.

²⁰⁰ *ibid.*

²⁰¹ Benjamin Farrand, “Regulatory Capitalism, Decentered Enforcement, and its Legal Consequences for Digital Expression: The Use of Copyright Law to Restrict Freedom of Speech Online”, 10 *Journal of Information Technology & Politics* (2013), 404–422, 413.

²⁰² Farrand, 414–415.

was removed from Amazon servers *on the basis of copyright infringement*.²⁰³

In addition, when it comes to the balancing of fundamental rights and freedoms, the decision making should not be in the hands of self-regulatory private businesses, as there is a trend amongst ISP to quickly shut down an allegedly infringing website, even if such a claim is “completely bogus”.²⁰⁴ Privatised approach to the ‘notice and take down’ rules, as well as a trend towards self-regulation, including ISP entering into private agreements with content providers, magnifies users’ public choice and due process problems, since users have “no voice in the negotiations of private agreements and little to no say in whatever takedown process companies establish”.²⁰⁵

Consequently, according to Pangiota Theodoropoulou, the role of state has to re-established, in order to increase the democratic legitimacy of the restrictive measures by placing restrictive decisions applied by private sector under appropriate scrutiny.²⁰⁶

In the end, it is the state who is the main duty-bearer when it comes to the protection and securement of human rights, and thus it is quite disproportionate to place such a heavy burden of assessing the public interest on the private actor, especially when public interest is already quite disproportionately underrepresented in the copyright system, whilst state is prioritising the protection of property rights and economic interests of right holders.

Second of all, if human rights based approach views information and communication technologies as a tool to improve the enjoyment of human rights such as the freedom of expression by seeking universal access by all to information and services²⁰⁷, it is quite difficult to find justification why primary enhancers of such access such as ISP should be treated differently than other intermediaries who currently benefit from the existing exceptions.

4.4. Possible “new” exception to copyright protection

4.4.1. *Info Soc Directive*

As has already been mentioned in the section 4.2. the list of possible exceptions provided in the Info Soc Directive for member states to choose from is exhaustive, as stated in recital 32 of the Directive. In regard to ISP,

²⁰³ *ibid.*

²⁰⁴ Hugenholtz 2010, 316–317.

²⁰⁵ Margot Kaminski, “Positive Proposals for Treatment of Online Intermediaries”, 28 *American University International Law Review* (2013), 203–222, 211–212.

²⁰⁶ Theodoropoulou, 760.

²⁰⁷ *Supra* note 98.

the only exception that is applicable to them is the one mentioned in Article 5(1) concerning temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process. According to established case law of the ECJ, the conditions provided in this exception which derogate from a general principle established by that directive must be interpreted strictly.²⁰⁸ Hence, there is no possibility to include into this exception a wider scope of ISP whose services are more ‘active’ than merely technical.

The introduction of a completely new exception is, however, restricted due to recital 32. Sunimal Mendis has expressed the view that there exists a possibility to overcome the impediment placed by the Info Soc Directive by making an argument that recital 32 contravenes the basic principle of EC law, i.e. the principle of proportionality.²⁰⁹ According to this principle which is recognised in the EU law, the measures implemented through EC law, as well as derogations to fundamental freedoms have to be appropriate for attaining the objective pursued, and must not go beyond what is necessary to achieve it.²¹⁰

In this regard, deriving from recitals 1, 6, and 7 of the Info Soc Directive, it is apparent that the objectives of the directive are *inter alia*, to remedy the legislative differences and legal uncertainty that exists in relation to copyright protection that has also been noted by the ECJ in *Svensson* case.²¹¹ In that particular case, the ECJ did not allow to interpret the Info Soc Directive to allow adopting a measure that granted wider protection to copyright holders by laying down a wider range of activities to the concept of communication to the public than those referred to in the Info Soc Directive.²¹² The ECJ did not even find such increase of protection to be acceptable, based on Article 20 of the Berne Convention which allows the signatory countries to enter into ‘special agreements’ among themselves with a view to granting copyright holders more extensive rights than those laid down in the Berne Convention.²¹³

Hence, from this argumentation it is sufficient to conclude that harmonisation of EC law is the ultimate purpose of the Info Soc Directive, including the legal certainty deriving from such harmonisation that is not even impeded by other international agreements.

However, as *inter alia* argued by Sunimal Mendis, the exhaustive list of exceptions to copyright protection included in Article 5 does not achieve this goal, especially when the list is not only unable to predict all possible

²⁰⁸ *Infopaq II*, para. 56.

²⁰⁹ Mendis, 69.

²¹⁰ Mendis, 70. Also ECJ, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, judgment, 10 December 2002, para. 122.

²¹¹ *Svensson*, para. 34.

²¹² *Svensson*, para. 37.

²¹³ *ibid.*, para. 38–39.

instances of conflict between copyright and freedom of expression, but also does not achieve any further harmonisation because the exhaustive list in itself is not mandatory.²¹⁴ Hence, the exhaustive list is certainly not necessary to achieve the goal of legal certainty and harmonisation of copyright law in EC, especially at the expense of freedom of expression of both ISP and the wider public.

This approach compliments the view to base the limitations to copyright protection on fundamental rights and freedoms of the users which are of equal value as the exclusive right of copyright holders and not mere interests to be taken into consideration.²¹⁵

4.4.2. *The three-step test*

In order to introduce exceptions to copyright protection under limitations provided in Article 5(3) of the Info Soc Directive member states' discretion is limited by Article 5(5) of the Info Soc Directive, which makes the introduction of the exception subject to three conditions (so-called 'three-step test'), which are, first, that the exception may be applied only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.²¹⁶

Originally the three-step test was introduced in Article 9(2) of the Berne Convention for the possible exceptions to the right to reproduction (emphasis added):

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works *in certain special cases*, provided that such reproduction *does not conflict with a normal exploitation* of the work and *does not unreasonably prejudice the legitimate interests* of the author”.

Since then, it has been incorporated into TRIPS Agreement in its Article 13²¹⁷ that is applicable to all possible limitations or exceptions to exclusive rights, thus going beyond its original intention to limit the right to reproduction in the Berne Convention, and constituting a strong restriction on the ability of states to introduce exceptions to *any* of the exclusive rights of the copyright monopoly.²¹⁸ The way the three-step test is used has also been argued to restrict any possible further introduction of exceptions even

²¹⁴ Mendis, 71–72.

²¹⁵ Geiger, 126.

²¹⁶ See also ECJ, *Eva-Maria Painer v Standard VerlagsGmbH* et al, C-145/10, Third Chamber, judgment, 1 December 2011, para. 110.

²¹⁷ The wording of this article is practically identical to the one in Berne Convention, except 'author' in Berne has been replaced by the 'right holder' in TRIPS: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

²¹⁸ Carter, 326.

if it is in public interest as long as it diminishes the economic interests of the authors.²¹⁹ This strict interpretation and application of the test has been said to fail to take into account the changes in social, cultural or commercial conditions, as well as the developments in technology.²²⁰ However, it is important to bear in mind that the whole existence of the three-step test indicates that the exclusive rights granted by IP legislation are not absolute²²¹ and should not be absolute. Thus the three-step test should not in any case be an ultimate obstacle for the introduction of new exceptions. However, the current existing international interpretation of the test is through the gaze of copyright holder.²²²

On international level the first interpretation of the case was given in the decision of the WTO Panel on *United States – Section 110(5) of the US Copyright Act* ('US Copyright Act dispute').²²³ The dispute concerned section 110(5) of the US Copyright Act which permitted the public performance or display of musical works delivered via a broadcast in certain retail and food or drinking establishments, subject to size and audio-visual equipment limitations, divided into "home style" and "business style" exemptions. This decision has been widely criticised and commented on, however it gives some guidelines to interpret the cornerstone of the current copyright protection. The interpretation of the test has even gone so far that even the cases of the 'fair use' doctrine are said to be incompatible with the test²²⁴, as it was *inter alia* proven in the US Copyright Act dispute, where the WTO Panel found that business exemption to copyright provided in the US legislation was not compatible with Article 13 of TRIPS Agreement.²²⁵

First the three conditions of the test were interpreted by the WTO Panel as cumulative conditions: failure to comply with any one of the three conditions results in the Article 13 exception being disallowed.²²⁶ Secondly, the WTO Panel did heavily emphasise the economic statistics behind the compatibility with the first step of the test, i.e. 'certain special cases' which scope in Panel's words has to be "qualitatively and quantitatively narrow".²²⁷ According to Panel's reasoning the business style exemption was not compatible with Article 13 of TRIPS since it covered "a substantial majority of eating and drinking establishments and close to half of retail

²¹⁹ Cristophe Geiger, Jonathan Griffiths, Reto Hilty, "Towards a Balanced Interpretation of the "Three-step test" in Copyright Law", 30 *European Intellectual Property Review* (2008), 489–496, 489–490.

²²⁰ Geiger et al, 490.

²²¹ Robin Wright, "The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation", 12 *Journal of World Intellectual Property* (2009), 600–621, 600.

²²² Jens Schovsbo, "Integrating Consumer Rights into Copyright Law: From a European Perspective", 31 *Journal of Consumer Policy* (2008), 393–408, 401.

²²³ WTO, Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000.

²²⁴ Fischman-Afori, 253. Zweig, 1580.

²²⁵ *US – Section 110(5) Copyright Act*, para. 6.133.

²²⁶ *ibid*, para. 6.97.

²²⁷ *ibid*, para. 6.109.

establishments are covered by the exemption”.²²⁸ The home style exemption, on the other hand, was in compliance with the test, as from a quantitative perspective the reach of this exemption in respect of potential users is limited to a comparably small percentage of all eating, drinking and retail establishments in the United States.²²⁹ From this purely quantitative point of view in assessing the first step of the test, i.e. ‘certain special cases’, ISP could face some difficulties since the exception that goes beyond ‘the mere technical’ nature of ISP can significantly increase the number of potential users of this exception and thus be incompatible with the notion of ‘certain special cases’.

Step ‘two’ of the test provides that the exception must not be in conflict with a normal exploitation of the work. From this perspective, the Panel has held that the notion “normal” is not equated with full use of all exclusive rights conferred by copyright, and therefore means something less than full use of an exclusive right.²³⁰ However, once again a heavy reliance on the market loss of copyright holders due to the exemption followed in the WTO Panel’s decision. The Panel held that a conflict with a normal exploitation of the work rises if uses exempted under the exception or limitation enter into economic competition with the ways that right holders normally extract economic value from that right to the work.²³¹ At the same time, the WTO Panel acknowledged that not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work.²³² That would imply that the fact that ISP indirectly commercially gain from the protected material distributed and disseminated through their services would not automatically preclude them from benefitting from the exception. However, in the light of the fact that cultural industries have been heavily relying on their economic loss due to the digital file sharing in the debates of ISP liability, and the fact that the right to reproduction or ‘making the copy’ is the essence of copyright²³³, solely on the linguistic basis already, it seems that the new wider exception to copyright protection would be impeded by this kind of reasoning concerning ‘normal’ exploitation of the work based on heavy market driven rationale.

Finally, the third step, i.e. the exception does not unreasonably prejudice the legitimate interests of the right holder, gives a slightly better chance to manoeuvre in order to introduce a new exception based on public interest. In this regard, the WTO Panel stressed that prejudice or “damage, harm or injury” to the interest of right holders has to reach a level beyond reasonable

²²⁸ *ibid.*, para. 6.133.

²²⁹ *ibid.*, para. 6.143.

²³⁰ *ibid.*, para. 6.167.

²³¹ *ibid.*, para. 6.183.

²³² *ibid.*, para. 6.182.

²³³ Lu, 480.

in order to be incompatible with the step ‘three’ of the test.²³⁴ Such wording indicates that certain level of prejudice to legitimate interests of right holder is acceptable and justified.²³⁵ The WTO Panel acknowledged that legitimate interests are not necessarily limited to the economic value of the exclusive rights, but it is one way to estimate such interest.²³⁶ However, because this economic approach in the Panel’s words is an “incomplete and thus conservative”²³⁷ way of looking at legitimate interests, Robert Wright has argued that the Panel did acknowledge the possibility to include a wider social value policy considerations in the interpretation of the third step of the test.²³⁸ In this regard, public interest in the form of access to the information may be used as a wider social value policy in including a wider range of ISP under exemption from liability.

However, because the steps of the test have been interpreted to be cumulative, the fact that ISP exception could be more possible under one step than the other is of little importance, including the arguments concerning the need to reread the test starting from the last step in order to find a proper proportionate balance between different interests²³⁹. Hence, a broader exception that includes a wider range of ISP based on the public interest would most likely be incompatible with the three-step test.

4.5. Possible ways to overcome the obstacle of the ‘three-step test’ towards freedom of expression

It seems that because the impact of freedom of expression is not measurable in euros and market efficiency, its inclusion into copyright debate as interpreted by the WTO and enforced by the TRIPS Agreement which is claimed “to have teeth”²⁴⁰, is quite tricky.

From the economic perspective exceptions and limitations to copyright has been shown to both reduce the market value of the works, as well as address the issue of market failures, and thus be justified by the market needs.²⁴¹

²³⁴ *US – Section 110(5) Copyright Act*, para. 6.225.

²³⁵ Wright, 611. Also Daniel Gervais, “Towards a New Core International Copyright Norm: the Reverse Three-Step Test”, 9 *Marquette Intellectual Property Law Review* (2005), 1–35, 18.

²³⁶ *US – Section 110(5) Copyright Act*, para. 6.227.

²³⁷ *ibid.*

²³⁸ Wright, 612.

²³⁹ New reading of the test starting from the step “three” has been argued for in Geiger, 122–123.

²⁴⁰ Laurence Helfer, “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking”, 29 *Yale Journal of International Law* (2004), 1–84, 2.

²⁴¹ Gregor Langus, Damien Neven, Gareth Shier, “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in EU”, Study by

With respect to technological advances the new means of dissemination and reproduction can justify the need for a new exception when for example the transactional cost for licencing every individual use of the work will be significantly relative to the value of the work itself and then the exception would allow a greater access to the work which could otherwise become lost under the deadweight of the work: i.e. when production cost falls and more creative works are produced.²⁴² Hence, there exists a possibility to justify new exception based on the technological nature of ISP by arguing that the exception would address the market inefficiencies. However, as also argued by Langus et al, the new exception might be unnecessary when the new business models would efficiently address the same issue of market inefficiency and the lower administrative cost, e.g. licencing through collective societies etc.²⁴³

In regard to the three-step test, Daniel Gervais argues that, in essence, the test is the “two-step test” and the issue between new technologies and copyright rises under criteria of ‘normal exploitation’ and ‘prejudice with the legitimate interests of right holders’.²⁴⁴ Gervais is arguing that the internet has changed the notion of ‘normal exploitation’ and thus it is essential to view that criterion as influenced by technological development and consumer behaviour.²⁴⁵ The test should also be reversed to the possible effect of the use and not the nature of such use.²⁴⁶ Hence, the effect that requires stricter protection is significant commercial use. However, such effect-based rereading of the test would potentially benefit only the ‘private use’ exception designed for end users, as it is usually non-commercial and thus automatically does not prejudice the legitimate interests of right holders *per se*. It would not gain much help to the private commercial actors such as ISP and result once again in evaluation of the market situation.

Many commentators advocate for the ‘fair use’-like open norm regulation of exceptions. ‘Fair use’ is a common law doctrine, a judicial tool that applies to any copyright-protected work as an exception and is claimed to provide a necessary flexibility in order to be adaptable to diverse situations.²⁴⁷ ‘Fair use’ is claimed to relieve the tensions between graduated response laws like French HADOPI and the interests of end users if these laws would adopt some elements of ‘fair use’: allowing users to stream music instead of downloading and express their identity by posting protected material on social networks and not considering it as infringing activity.²⁴⁸ Edward

Charles Rivers Associates prepared for DG Markt and European Commission, October 2013, 10.

²⁴² Langus et al, 37, 73.

²⁴³ *ibid*, 69.

²⁴⁴ Gervais (2005), 15.

²⁴⁵ *ibid*, 29.

²⁴⁶ *ibid*, 33.

²⁴⁷ Mendis, 32.

²⁴⁸ Michael Boardman, “Digital Copyright Protection and Graduated Response: A Global Perspective”, 33 *Loyola of Los Angeles International & Comparative Law Review* (2011),

Carter is supporting “common-sense extensions of copyright exceptions” under the three-step test because of technological challenges and new opportunities the internet is giving to both authors and users²⁴⁹, saying that “fair use is a last line of defense against an apparent global-technology driven tendency of copyright law to assign ownership even to public information and ideas”.²⁵⁰ Closed-norm copyright exceptions are claimed to fail to adequately secure the interests deriving from free expression²⁵¹ and flexible fair use exceptions should acquire international acceptance.²⁵² ‘Fair use’ is also said to be one of the best doctrines in order to rethink copyright without changing the basic set of copyrights.²⁵³ ‘Fair use’ exception could approach the issue of search engines to be placed under the e-Commerce rules Europe is facing right now, i.e. in the US, there is no such issue what so ever as copies of work appearing in search results are considered to be ‘fair use’.²⁵⁴

However, because of the attempted harmonisation of copyright law in Europe, the fair use exception will be most likely unable to achieve such goal, as most likely it will not serve the aim of legal certainty. As already previously mentioned, fair use will not always be compatible with the three-step test either.

Human rights based approach is also heavily relied on in the debate of ‘public interest *versus* three-step test’. The inclusion of normative considerations²⁵⁵ and nationally prevailing attitudes²⁵⁶ into interpretation has been said to help to find the proper balance between different interests. Furthermore, even the WTO Appellate Body has acknowledged the fact that the WTO Agreement “is not to be read in clinical isolation from public international law.”²⁵⁷ Despite that acknowledgment, it seems that WTO is exactly doing the opposite: excluding socio-cultural policies from the interpretation of allowed exceptions.

Another approach to face the challenges brought by the internet is rather radical. One of the proposed ways to answer these challenges is to replace a current bundle of rights with the single one: a general right to exploit and

223–245, 242–243.

²⁴⁹ Carter, 336.

²⁵⁰ *ibid.*, 325.

²⁵¹ Zweig, 1571.

²⁵² *ibid.*, 1585.

²⁵³ Tang, 93.

²⁵⁴ Bernt Hugenholtz, “Fair Use in Europe”, 56 *Communications of the ACM* (2013), 1–4, 2.

²⁵⁵ Wright, 618.

²⁵⁶ Sara Marshman, “Giving a Country of Pirates a Chance: Using the Three-Step Test to Accommodate the Shifting of National Attitudes on Copyright Protection”, 43 *George Washington International Law Review* (2011), 703–740, 732.

²⁵⁷ WTO, Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, page 17.

disseminate.²⁵⁸ A single open-ended right is claimed to better handle new technological developments, including the technological neutrality in legal language.²⁵⁹ Technological neutrality is defined as the principle that “copyright law should apply in an equal manner to different technologies that express the same work”²⁶⁰, in the sense that copyright regulation should not discriminate the new technologies both by adding additional liability rules to ISP and end users who access the works through different media.²⁶¹ In any case, some rules need to be in place in order to address online conduct. Even if a single technologically neutral right will reduce the liability of ISP in some cases, the possibility to infringe the right of the authors to exploit on the internet will remain and the rules of ISP liability shall apply.

The combination of technological neutral approach of the courts, and the focus on beneficial results of the activity with the adaptive ‘fair use’ doctrine in order to provide a mechanism for securing digital access to collective culture is also appearing in scholar literature.²⁶²

However, while law is catching up with the changing reality, new business models should be in place.²⁶³ In order to make illegal file sharing or downloading unappealing, the right holders should not just demand ‘sacrifices’ from end users and intermediaries at the cost of their freedom of speech but instead give something up from their side as well. Some of the suggestions for these new market models were already given in 2001 by Shira Perlmutter who suggested digital copies to be sold at a lower cost than their analogues, or placing an additional value to the available legitimate sources such as suggestions to the similar artists, for example, not available through pirate platforms, as well as affordable monthly subscriptions.²⁶⁴ No doubt some of the most successful ‘legitimate’ ways to consume protected material online is streaming services such as Spotify that provides a market model similar to one as suggested by Perlmutter, with their rather low cost monthly subscriptions, possibilities to explore the similar music scene according to the customised taste, and without any actual downloading (read: reproduction of the work). However, there also exists a view that Spotify does not eliminate the problem of ‘right holders *versus* public interest’, as it is securing the existing monopoly of ‘artistic elite’ (or to be more precise, the major labels who are interested in strong control over dissemination of works) when end users are staying solely passive

²⁵⁸ Shira Perlmutter, “Convergence and the Future of Copyright”, 24 *Columbia-VLA Journal of Law and Arts* (2001), 163–176, 172.

²⁵⁹ Kevin Siu, “Technological Neutrality Toward Copyright Convergence in the Digital Age”, 71 *University of Toronto Faculty of Law Review* (2013), 76–112, 106.

²⁶⁰ Siu, 79.

²⁶¹ *ibid.*, 80.

²⁶² Jennifer Jenkins, “In Ambiguous Battle: the Promise (and Pathos) of Public Domain Day”, 12 *Duke Law & Technology Review* (2013), 1–24, 12–13.

²⁶³ Perlmutter, 174f.

²⁶⁴ *ibid.*

consumers of cultural goods without participating in shaping the encompassing cultural society.²⁶⁵

In any case, the question of ISP liability is inherently connected to the existing body of copyright. There is no liability question without the infringement, and no infringement if there is no right or provision to infringe. Hence in order to reconceptualise the law on ISP liability towards the inclusion of freedom of expression concerns, the law of copyright has to be reconceptualised at the same time.

The question of ISP liability might be relieved if already existing exceptions provided under the Info Soc Directive would work in the direction of public interest. However, there exists some controversy over ‘private copying’ exception in the EU copyright law²⁶⁶ and its special significance in the digital world when copies made for private use are still disseminated and made publicly available, thus overstepping the allegedly unreachable for right holders’ economic interests privacy of use. The line between traditional distinction of private, i.e. tolerated, and public, i.e. unauthorised use in copyright system is blurred.²⁶⁷ Whilst copyright has entered into private lives of end users, the private copying limitation has not expanded in reverse.²⁶⁸

Jens Schovsbo is arguing for introduction of equal rights for consumers in copyright framework in order to rebalance copyright system towards “other side”, i.e. more effective inclusion of end users. These rights include reproduction and communication to the public of copyrighted works in order to engage in democratic use, information use, transformative use, personal use, and reasonable commercial use, which should belong to users and be equal with the rights of copyright holders.²⁶⁹

Yet the law *is* moving forward shaped by the technological challenges of Web 2.0 or “participative web” where end users of the internet are able to develop, rate, collaborate and customise the online services they are using²⁷⁰, although with baby steps. The European Commission has created a User-Generated Content Working Group whose purpose is to “identify relevant forms of licencing and how to improve information for end-users”.²⁷¹ The discussions on possible exception for user-created content

²⁶⁵ Philippe Aigrain, *Culture and the Economy in the Internet Age* (Amsterdam: Amsterdam University Press, 2012), 46.

²⁶⁶ Lu, 482. Helberger & Hugenholtz, *supra* note 22.

²⁶⁷ Daniel Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content”, 11 *Vanderbilt Journal of Entertainment and Technology Law* (2009), 841–870, 855–856.

²⁶⁸ Schovsbo, 400.

²⁶⁹ Schovsbo, 405.

²⁷⁰ Gervais (2009), 843.

²⁷¹ See European Commission website, Licences for Europe > Working Groups. Available at: < <https://ec.europa.eu/licences-for-europe-dialogue/en/content/user-generated-content-working-group-wg2>>

started in the European Commission in 2008.²⁷² However, it seems that the current focus in the EU concerning the UGC is rather on the scope of licensing than the actual change in the copyright framework towards new limitations.

²⁷² Schovsbo, 405.

5. Conclusion

The provisions concerning ISP liability for copyright infringements committed by third parties came to existence and were shaped as they are today at the change of millennium with the development of digital world. Since that time Web 1.0 was replaced with 2.0 and soon be replaced by 3.0, however, the courts struggle to apply the law designed for 1.0 and no doubt why: the law simply cannot catch up with the rapid technological change and development when it is rigid, strict and inflexible.

As the liability of ISP is most often secondary in online world when the service itself is legal and clean, the question of ISP liability and its connection to public interest is similarly secondary. First, in order to demand respect for public interest and freedom of expression online from private sector, the legislator should before everything secure that the laws are able to provide such opportunity and in reverse secure the fundamental rights and freedoms of wider public. Based on the current EU legislation concerning copyright protection in the information society, backed up with the 'biting' WTO, the copyright system takes human rights in consideration as long as it serves the economic interests of right holders.

In this regard, ISP can in principle rely on the arguments deriving from their own or public's freedom of expression, however, in practice the success of such claims is limited to the conventionally important political speech which ISP based on their private business-like nature have little to do with.

Although both IP rights and freedom of expression are granted the status of human right which is non-absolute and thus limited, it seems that it is economically profitable to limit the latter than the former simply because the benefits of free speech are not measurable in euros or any other equivalent currency. And yet, copyright owes its creation to public interest and ultimately has to serve it. Positive law can be regarded legitimate as long as its aims are general societal well-being and common good.²⁷³

To state that ISP can benefit from a new expanded exception to copyright protection under the EU directives based on public interest is rather early. Not only does the Info Soc Directive place restrictions on the possible introduction of new exceptions not mentioned in the directive, but new exception will be most likely incompatible with the three-step test under both the Info Soc Directive and the TRIPS Agreement, according to the current interpretation of the test. Nevertheless the rules concerning ISP liability have to be revised based on simple fact that proper balance between private and public interests has to be in the hands of state: self-regulation of the 'notice and take down' system can foster private censorship not in favour of end users and thus, self-regulation must be accompanied with

²⁷³ Thomas Aquinas cited in Geiger, 349.

proper judicial review not only after the restrictive measures are taken by ISP on demands of copyright holders or governmental pressure, but also prior to these measures. The rules of injunctions and proper notifications of the infringement need to be specified and harmonised, as the internet and the services provided therein are nation-neutral and borderless.

It is the time for freedom of expression to step out from the shadow of extensive copyright protection and achieve the proper attention it deserves, especially in the information age where access to that information is crucial. Copyright and its protection have acquired enough attention and there is no need to sacrifice freedom of expression in order to tame the technology.

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