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

JAMM05 Master Thesis
International Human Rights Law and Intellectual Property Rights
30 higher education credits

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Term: Spring 2014
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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 In addition these provisions are outdated and rigid in order to be applicable to the rapid technological changes and the variety of available internet services.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.
Acknowledgements

I want to express my gratitude to my supervisor Peter Gottschalk for his support and guidance in order to find inspiration for this thesis.

I am also thankful to Lund University and the Raoul Wallenberg Institute for this enlightening journey of two years in the master programme that greatly contributed to my personal growth.

Last and not least, I thank my family and friends for their love, support and encouragement throughout my studies.
# Abbreviations

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

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\(^3\) 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 Works\(^6\), and the TRIPS Agreement\(^7\), 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

\(^7\) Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Morocco on 15 April 1994.
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 (‘ECHR’) 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. 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

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the ‘blooming’ illegal online file sharing\textsuperscript{10}, which includes books, music, films and software that are all protected under copyright.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13} ACTA \textit{inter alia} requires ISP to disclose personal information sufficient to identify users who have infringed IP rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Court\textsuperscript{17}, but also against the preceding P2P software developers such as Grokster\textsuperscript{18} 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

\textsuperscript{11} Article 2(1) of Berne Convention which defines protected “literary and artistic works” as \textit{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.
\textsuperscript{13} Preamble of Anti-Counterfeiting Trade Agreement, signed in Tokyo on 1 October 2011.
\textsuperscript{14} Article 27 (4) of ACTA.
\textsuperscript{16} ECtHR, \textit{Neij and Sunde Kolmisoppi v. Sweden}, 40397/12, Fifth Section, decision, 19 February 2013. More on this case see further Chapter 3.3.2.
\textsuperscript{17} Roger Parloff, “Megaupload and the Twilight of Copyright”, 166 Fortune (2012), 130–140.
\textsuperscript{18} United States Supreme Court, \textit{MGM Studios Inc v. Grokster Ltd}, 545 U.S. 913 (2005), 27 June 2005.
rights online: several judgements in Europe, including Spain\textsuperscript{19} and Germany\textsuperscript{20}, 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.\textsuperscript{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.\textsuperscript{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 internet\textsuperscript{23} and promotion of the interests of the citizens by promoting the ability of end users to access and distribute information\textsuperscript{24}, 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.\textsuperscript{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 disconnection\textsuperscript{26} after the French Constitutional Council equated the access

\begin{itemize}
  \item \textsuperscript{19} Madrid Commercial Court, \textit{YouTube v. Telecinco}, 289/2010, 23 September 2010.
  \item \textsuperscript{20} Hamburg District Court, \textit{GEMA v. YouTube}, 310 0 461/10, 20 April 2012.
  \item \textsuperscript{21} Zeno-Zencovich, 353.
  \item \textsuperscript{22} Natali Helberger, Bernt Hugenholtz, “No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law”, 22 \textit{Berkeley Technology Law Journal} (2007), 1061–1098, 1066.
  \item \textsuperscript{23} \textit{Supra} note 2, COM(2011) 222.
  \item \textsuperscript{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.
  \item \textsuperscript{26} Siraj Datoo, “France Drops Controversial ‘Hadopi Law’ After Spending Millions”, \textit{The Guardian}, 9 July 2013. Available at: \texttt{<http://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>}
\end{itemize}
to the internet to the freedom of expression and communication, hence declared it to be a human right.\textsuperscript{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 author\textsuperscript{28}, whilst ISP representatives highlight \textit{inter alia} the possible negative impact on innovation if any “substantial modification of the liability regime” follows.\textsuperscript{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.\textsuperscript{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.

\begin{footnotesize}
\begin{enumerate}
\item French Constitutional Council, Decision 2009-580 DC, Act Furthering the diffusion and protection of creation on the Internet, 10 June 2009, para. 12.
\item Trajce Cvetkovski, \textit{Copyright and popular media: liberal villains and technological change} (Basingstoke: Palgrave Macmillan, 2013), 69f.
\end{enumerate}
\end{footnotesize}
2. The liability of internet intermediaries for copyright infringements online

2.1. General liability exemption


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 hosting\(^{34}\), 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

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\(^{34}\) 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. 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. 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.” 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.

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”.

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/EC, an ‘information society service’ is defined as “any

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.
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 met, 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.” 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.

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 services, however it did not do so in the case of ‘free’ service providers, including search engines. According to the opinion of Advocate General

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.
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.\textsuperscript{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.\textsuperscript{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.

\textbf{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 activity\textsuperscript{52}, 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”.\textsuperscript{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.\textsuperscript{54}

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

\textsuperscript{50} L’Oreal v eBay, para. 111.
\textsuperscript{51} ibid, para. 114, 116.
\textsuperscript{52} E-Commerce Directive article 15.
\textsuperscript{53} L’Oreal v eBay, para. 122.
\textsuperscript{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-infso/index_en.htm>
The Info Soc Directive is aimed at securing the implementation of the WIPO Copyright Treaty\textsuperscript{57} and the WIPO Performances and Phonograms Treaty\textsuperscript{58}, dealing respectively with the protection of authors and the performers and phonogram producers. These Treaties \textit{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.\textsuperscript{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) \textit{temporary} acts of reproduction, which are \textit{transient or incidental} [and] an \textit{integral and essential part of a technological process} and whose sole purpose is to \textit{enable a transmission in a network} between third parties by an intermediary, \textit{or the lawful use} of such a work, and which have \textit{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.\textsuperscript{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.

\textbf{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 \textit{Infopaq I}\textsuperscript{61} and \textit{Infopaq II}\textsuperscript{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

\begin{footnotes}
\footnote{57} WIPO Copyright Treaty, adopted on 20 December 1996, entered into force on 6 March 2002.
\footnote{59} Info Soc Directive, recital 15.
\footnote{60} ECJ, \textit{Infopaq International A/S v Danske Dagblades Forening, (Infopaq II)}, C-302/10, Third Chamber, Order, 17 January 2012, para. 25.
\footnote{62} See supra note 60.
\end{footnotes}
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. 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. 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

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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). 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). 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.

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.

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.”
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 activity 74, 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

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69 ECJ, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriver 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.
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 ISP\(^78\), 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.
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 profile\(^{79}\), 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 that 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 upon\(^{82}\), 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 language\(^{85}\) 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.\(^{86}\)

\(^{79}\) 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. 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*. 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. 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. 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”. 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. 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

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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.
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.”

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. 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

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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

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

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.
International Covenant on Civil and Political Rights (‘ICCPR’)

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. However, it is noteworthy to bear in mind that human rights after all protect humans, not technology.

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

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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. The EU acceded to the ECHR with the adoption of the Lisbon Treaty 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.

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

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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

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105 Mendis, 29. Neij and Sunde Kolmisoppi v. Sweden, section D.
106 ECtHR, Melnychuk v. Ukraine, 28743/03, Chamber, decision, 5 July 2005.
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.
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.
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. 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-Zencovich, 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_ 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”. 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”. ‘Foreseeability criteria’ means that the rule has to be formulated

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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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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 effect\textsuperscript{128}, and produced arbitrary effects.\textsuperscript{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.\textsuperscript{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,
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 Albuquerque 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. In addition, the restrictive measure has to be both rationally connected to its end and suitable for leading to this end. 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. 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 Yldirim v. Turkey.
132 See ECtHR, Chatovy and Others v. France, 64915/01, Second Section, judgment, 29
June 2004, para. 65.
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 unpredictable 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.

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 Directive\(^{138}\) 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-user’ 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

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\(^{139}\) 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.\textsuperscript{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.\textsuperscript{141} According to the applicants, all revenues are used to maintain the website and the website itself is not economically profitable.\textsuperscript{142} The website also received some voluntary donations from its users.\textsuperscript{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 \textit{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.\textsuperscript{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

\textsuperscript{140} \textsuperscript{Supra} note 16.

\textsuperscript{141} The Local, “Pirate Bay earned millions from advertising”, 30 September 2010. Available at: <http://www.thelocal.se/20100930/29334>

\textsuperscript{142} Ibid; see also TPB official website ‘About’ section available at: <http://thepiratebay.se/about>

\textsuperscript{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/>

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*. 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”. Furthermore, the photographs were distributed for commercial purposes, and thus could not enjoy the whole range of the protection guaranteed by Article 10. In addition, the photographs in
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

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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.\footnote{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>\footnotemark[152]}

Hence, how commercial is the speech of TBP 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’.\footnote{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>\footnotemark[153]}

In addition, it is doubtful that TBP 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 TBP where the e-mails and notifications of right holders are published online with the responses to them which clearly mock the right holders.\footnote{TPB official website, ‘Legal Threats’ section available at: <http://thepiratebay.se/legal>\footnotemark[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.

\section*{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
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”\textsuperscript{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.

\textsuperscript{155} ECtHR, \textit{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 enscribed 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.\(^\text{156}\) 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.\(^\text{157}\) 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.\(^\text{158}\) 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.\(^\text{159}\) The Statute was aimed at promoting the public’s interest in enhanced access to books and abolition of monopoly imposed by printing press.\(^\text{160}\)

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.”\(^\text{161}\) 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.


\(^{161}\) 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. 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.

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.

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 Anne, to lifelong + 70 years after death term according to current harmonisation in Europe. 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. 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

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162 Fischman-Afori, 250.
163 ibid, 254.
167 Gurak, 335.
work, 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. 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”. As a result, in Neil Natanel’s words, “a film that is supposed to be a documentary contains a bit of calculated untruth.”

Obviously, expression that is exclusively protected by copyright, conflicts with the freedom of individuals to express themselves however they see to fit.

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”. 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” 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.

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. Second of all, there is simply no offline equivalent to ISP in the first place, however the equivalent of outcome of the regulation of ISP

169 Zweig, 1562.
171 ibid.
172 Zweig, 1553.
175 ibid, 479–493, 486–487.
176 Capel, 57.
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 commercial; in respect of specific acts of reproduction made by

178 Reed, 252.
publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; or in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons. 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 research; reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics; quotations for purposes such as criticism or review; incidental inclusion of a work or other subject-matter in other material; use for the purpose of caricature, parody or pastiche; use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses.

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 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 optional the member states are free to pick and choose from.

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” 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

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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.
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

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. 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.

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 countries, 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. 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. These stakeholders are most likely to secure their own business interests and often overlook the large public while developing these codes of conduct.

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 state-centered, public enforcement to decentered, private enforcement. 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. 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.
200 ibid.
was removed from Amazon servers on the basis of copyright infringement.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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 services\textsuperscript{207}, 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,
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.\textsuperscript{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.\textsuperscript{215}

\textbf{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.\textsuperscript{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):

\begin{quote}
“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”.
\end{quote}

Since then, it has been incorporated into TRIPS Agreement in its Article 13\textsuperscript{217} 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.\textsuperscript{218} The way the three-step test is used has also been argued to restrict any possible further introduction of exceptions even

\textsuperscript{214} Mendis, 71–72.

\textsuperscript{215} Geiger, 126.

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

\textsuperscript{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.”

\textsuperscript{218} Carter, 326.
if it is in public interest as long as it diminishes the economic interests of the authors.\textsuperscript{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.\textsuperscript{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 absolute\textsuperscript{221} 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.\textsuperscript{222}

On international level the first interpretation of the case was given in the decision of the WTO Panel on \textit{United States – Section 110(5) of the US Copyright Act} (‘US Copyright Act dispute’).\textsuperscript{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 test\textsuperscript{224}, as it was \textit{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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

\textsuperscript{220} Geiger et al, 490.
\textsuperscript{224} Fischman-Afori, 253. Zweig, 1580.
\textsuperscript{225} US – Section 110(5) Copyright Act, para. 6.133.
\textsuperscript{226} \textit{Ibid}, para. 6.97.
\textsuperscript{227} \textit{Ibid}, para. 6.109.
establishments are covered by the exemption”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 copyright\textsuperscript{233}, 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

\textsuperscript{228} ibid, para. 6.133.
\textsuperscript{229} ibid, para. 6.143.
\textsuperscript{230} ibid, para. 6.167.
\textsuperscript{231} ibid, para. 6.183.
\textsuperscript{232} ibid, para. 6.182.
\textsuperscript{233} Lu, 480.
in order to be incompatible with the step ‘three’ of the test.\textsuperscript{234} Such wording indicates that certain level of prejudice to legitimate interests of right holder is acceptable and justified.\textsuperscript{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.\textsuperscript{236} However, because this economic approach in the Panel’s words is an “incomplete and thus conservative”\textsuperscript{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.\textsuperscript{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 interests\textsuperscript{239}. 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”\textsuperscript{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.\textsuperscript{241}

\textsuperscript{234} US – Section 110(5) Copyright Act, para. 6.225.
\textsuperscript{236} US – Section 110(5) Copyright Act, para. 6.227.
\textsuperscript{237} ibid.
\textsuperscript{238} Wright, 612.
\textsuperscript{239} New reading of the test starting from the step “three” has been argued for in Geiger, 122–123.
\textsuperscript{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. 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.

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’. 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. The test should also be reversed to the possible effect of the use and not the nature of such use. 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. ‘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. Edward

242 Langus et al, 37, 73.
243 ibid, 69.
244 Gervais (2005), 15.
245 ibid, 29.
246 ibid, 33.
247 Mendis, 32.
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

249 Carter, 336.
250 ibid, 325.
251 Zweig, 1571.
252 ibid, 1585.
253 Tang, 93.
255 Wright, 618.
A single open-ended right is claimed to better handle new technological developments, including the technological neutrality in legal language. Technological neutrality is defined as the principle that “copyright law should apply in an equal manner to different technologies that express the same work”, 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. 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.

However, while law is catching up with the changing reality, new business models should be in place. 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. 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 costumised 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.

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 ibid, 79.
261 ibid, 80.
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 using,270 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.
268 Schovsbo, 400.
269 Schovsbo, 405.
270 Gervais (2009), 843.
271 See European Commission website, Licenses for Europe > Working Groups. Available at: <https://ec.europa.eu/oxences-for-europe-dialogue/en/content/user-generated-content-working-group-wg2>
started in the European Commission in 2008.\textsuperscript{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.

\textsuperscript{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

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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.
Bibliography

Books and articles:


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


Meale, Darren. “(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.


O’Beirne, Mark. “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>

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


Stalla-Bourdillon, Sophie. “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.


**International agreements**


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


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.


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

**EU directives**


Other EU legal acts


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.

UN documents


Online sources
The Local, “Pirate Bay earned millions from advertising”, 30 September 2010. Available at: <http://www.thelocal.se/20100930/29334>


PPI official website. Available at: <http://www.pp-international.net/>

TPB official website. Available at: <http://thepiratebay.se>
## Table of cases

### European Court of Human Rights


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


**Chauvy and Others v. France**, 64915/01, Second Section, judgment, 29 June 2004.

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


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


**Melnnychuk v. Ukraine**, 28743/03, Chamber, decision, 5 July 2005.

**Neij and Sunde Kolmisoppi v. Sweden**, 40397/12, Fifth Section, decision, 19 February 2013.


**Sunday Times v. The United Kingdom (No.1)**, 6538/74, judgment, Plenary, 26 April 1979.

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

### European Court of Justice

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

**British American Tobacco (Investments) and Imperial Tobacco**, C-491/01, judgment, 10 December 2002.
Eva-Maria Painer v Standard VerlagsGmbH & al, C-145/10, Third Chamber, judgment, 1 December 2011

Google France and Google v Louis Vuitton, C-236/08, Grand Chamber, judgment, 23 March 2010.


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

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

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

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

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

Advocate General opinion

Advocate General Jääskinen in Case C-131/12, Google Spain v. AEPD, delivered on 25 June 2013.

WTO Dispute Settlement Reports


National Courts

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

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