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**The Internet Service Provider's Liability in the Case of  
Copyright Infringements in Digital Era**

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# Preface

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Selin Kaledelen  
Lund, 2012

*To my mother, my father....*

*Either you are inside of the circle or outside of it...*

# Summary

Today, Intellectual Property Law is facing challenges. The problems like liability and immunities as well as the difficult relation between Internet and copyright brings up new questions. Internet Service Providers are one of the most important actor in Internet Law which facilitate the dissemination of information and also enable reproduction and distribution. In order to protect the digital rights of right holders, the strict legal framework about the liability of ISPs should be drawn. In EU context Electronic Commerce Directive and Information Society Directive tried to create this framework but it is certain that they are not well scoped enough, especially when it comes to liability of ISPs. This thesis argues that striking balance between the interests of copyright holders and the public and states providing a new perspective is really important. Most of the EU countries, try to treat ISPs as gatekeepers in order to prevent the copyright infringements. The problem is the there is no rigid legislation which states the extent of this gatekeeping. Another issue arises, when the states try to control the Internet in order to prevent the copyright infringements. Since access to Internet is recognized as a human right by various countries, copyright infringements are highly related to human rights. As a fundamental right, freedom of speech becomes more debatable especially in the case of P2P file sharing. The thesis also tries to find the ways to balance between the copyright holders' interest and freedom of speech. The aim of thesis is investigating the scope of liability for ISPs in different aspects and find out the relationship and the role of freedom of speech and fundamental rights in these debates.

Keywords: Copyright, Internet Service Provider's Liability, Freedom of Speech

# Abbreviations

<b>The Berne Convention</b>	Berne Convention for the Protection of Artistic Works
<b>CDPA</b>	Copyright Designs and Patent Act 1998
<b>DMCA</b>	Digital Millenium Copyright Act
<b>DEA</b>	Digital Economy Act
<b>ECHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>E-Commerce Directive</b>	Electronic Commerce Directive
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>InfoSoc</b>	Information Society Directive
<b>IPR</b>	Intellectual Propoerty Rights
<b>ISP</b>	Internet Service Provider Liability
<b>P2P</b>	Peer to Peer File Sharing
<b>SP</b>	Service Provider
<b>UDHR</b>	The Universal Decleration of Human Rights
<b>UGC</b>	User Generted Content
<b>UN</b>	United Nations
<b>WIPO</b>	World Intellectual Property Organisation
<b>WPPT</b>	WIPO Performance and Phonograms Treaty
<b>WTO</b>	World Trade Organisation



# Introduction

The fast development of global telecommunication as networks has given the rise to many hopes and many fears. For instance, the emerge of Internet poses lot of problems. Firstly, on the question of whether the notions of copyright are appropriate to solving the problems raised by digital networks. The digitization seems to leading to a departure from traditional exceptions to exclusive right.

The internet has created new methods of delivering and disseminating creative content online that has had a significant impact on the market in creative works. Just as computer networks created new ways of committing traditional crime, so they provided new ways of infringing copyright. Internet and copyright is the most inflamed issue in current intellectual property<sup>1</sup> and developing uses of medium continue to challenge traditional principles of copyright law.

Individuals are putting copyrighted works on YouTube, to major initiatives such as Google Print Library Project but application of the law of copyright these issues has not always proved to be straightforward and has frequently been controversial. The crucial point in copyright law is the how to balance the respective rights of the creator and under of copyrighted material. In the Preamble of the Information Society Directive, “*a fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject matter must be safeguarded.*”<sup>2</sup>

The concept of copyright is still a necessary one, albeit with a recognition that it may need modification or amendment if it is so to be able respond appropriately to contemporary challenges. Internet is no more likely to lead to a mass breakdown in the copyright system any more than happened when it had to deal with other forms of piracy and illicit copying of easy-copy media such as videos, audiotapes, computer software, etc.<sup>3</sup> There are still reasons to rely on copyright law, it should not to be regarded as a threat to

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<sup>1</sup> WR Cornish and D Llewellyn, Intellectual Property, 6th edn,2007,London: Sweet and Maxwell,p 842.)

<sup>2</sup> Directive 2001/29 EC of the European Parliament and the Council on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Recital 31.

<sup>3</sup> Peter Schoning. ‘*Internet and the applicable copyright law: A Scandinavian perspective*’[1999] EIPR 45.)

the internet society, and that an appropriate balance between competing interests was possible. A concept that had been developed over decades should be adjusted to fit the new circumstances rather than abolished the question is not so much whether copyright can adapt all but rather than how it should adapt.

But it always has been the case that there is a wider public interest, not only in the creation of copyright works, but also such works being available for the use and enjoyment of citizens at large. Intellectual property protection in general, and of copyright in particular, is to provide an incentive for creativity by ensuring that creators are justly rewarded for their creativity and that a remedy is available in cases of infringement. The law of copyright law seeks balance the rights of the user and the rights of the creator. The distinction between users and creators has been blurred. Materials in a whole host of formats; text, audio, video etc.- can now be distributed and copied “ *with extraordinary ease and accuracy*”.<sup>4</sup>

Copyright applies to any original work of authorship, fixed in a tangible medium of expression. Copyright gives exclusive rights to its creator such as; right to prepare derivative works on the copyrighted work (adaptation right), distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending (distribution right), perform the copyrighted work (public performance right) and display the copyrighted work publicly (public display right). Copyright law must balance incentives to authors and protection of author’s creations against legitimate public interest. Copyright law can prohibit such activities as distributing the copies of music, writing plays based on novels, performing songs in the concert.

The benefits conferred by copyright come with costs. Costs can include transaction costs (hiring the lawyer, negotiating for permission to use works, locating authors, and asking permission), rent seeking (the use of copyright to get revenue from non-protected elements), dead-weight losses (uses of works that do not take place because of copyright, such as where an author writes a book because of inability to get the necessary permission from certain copyright holders) and distorted incentives (channeling resources toward copyrighted works).<sup>5</sup>

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<sup>4</sup> Cornish and Llewelyn, op cit, p 842.

<sup>5</sup> McJhon, S., § Intellectual Property Examples and Explanations” (2009)

Since copyright applies to any creative work as soon as it is fixed in a tangible form, including the works that are created without incentive of copyright, such as personal letters or school projects. There are two approaches lead to different views about copyright law. For instance, fair use allows the use of copyrighted works without permission for such uses as education, criticism, research and the creation of other works. (Create theory). According to property theory the copyright owner should decide how the work is used. And generally it brings broader copyright protection which would be dangerous for the public interest in terms of fair balance.

Some argue that the copyright must not to exist or at least it should be limited in its application. The ‘*open source*’<sup>6</sup> or ‘*copy-left*’<sup>7</sup> also have an important role when it comes to justification of copyrights.

In any event copyright does not protect ideas as such. The Courts have developed the so called ‘*idea/expression dichotomy*’ to help to set boundaries between public domain and copyrighted work. So copyright is said to only protect the expression of ideas, not ideas themselves. Copyright should protect any independent skill and effort (originality) by an author in creating their works. There are different point of views between different legal systems. For instance, in UK, justification for copyright protection is cited by the court is the unjust enrichment argument. In *Designers Guild Ltd v Russell*<sup>8</sup> case the Court stated that ‘... *the law of copyright rests on a really clear principle: that anyone who by his or her own skill and labor creates an original work of whatever character shall, for a limited period and enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has shown...*’<sup>9</sup>

In contrast, Germany and France protect the works of authors on the basis of they embody of the author’s personality. (*droit d’auteur*).The author’s intellectual creation is entitled to copyright protection. The standard of

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<sup>6</sup> In production and development, *open source* is a philosophy, or pragmatic methodology that promotes free redistribution and access to an end product's design and implementation details. Before the phrase *open source* became widely adopted, developers and producers used a variety of phrases to describe the concept; *open source* gained hold with the rise of the Internet, and the attendant need for massive retooling of the computing source code.

<sup>7</sup>*Copy-left* is a play on the word of copyright to describe the practice of using copyright law to offer the right to distribute copies and modified versions of a work and requiring that the same rights be preserved in modified versions of the work. In other words, copy-left is a general method for making a program (or other work) free, and requiring all modified and extended versions of the program to be free as well.

<sup>8</sup> *Designer Guild Limited v. Russell Williams (Textiles) Limited (Trading As Washington Dc)* [2000] UKHL 58; [2001] . All ER 700; [2000] 1 WLR 2416 (23rd November, 2000)

<sup>9</sup> 2418 (Lord Bingham of Cornhill)

originality appears in continental systems such as France and Germany especially in the case of software, databases and photographs.

Copyright also can be supported by philosophical theories such as personality and natural right theories. According to personality there is a linkage between the author's personality and his creation. Anyone who uses author's work affects his personality indirectly. Authors should have the control of uses and should be able to prevent destruction or distortion of their work. In this theory copyright protection must be interpreted broadly in order to protect author and his personality.

Under the natural rights approach, an author has a natural right to what he has created through his labor. But for instance in creation, the author could reduce the resources available to others, and relies on elements created by others. So author's rights should also let others to use of what he was created.

The relationship between law and technology often focuses on one single aspect: emerging technologies are challenging the existing legal regime, creating a need for legal reform. The interrelationship between law and technology is, however, dialectic. The law does not merely respond to new technologies. It also shapes them and may affect their design. The issue of third party liability for infringing materials distributed by users provides a example of this dynamic interaction.

The liability of Internet Service Providers (ISPs) for injurious content posted by their subscribers was highly controversial during the early days of the Internet.<sup>12</sup> The term ISP refers to a wide range of online intermediaries that facilitate access to the online environment.<sup>13</sup> ISPs were high on the list of copyright owners as potential defendants in online infringement lawsuits.

ISP's liabilities can be discussed in vary different dimensions. And determination of liability of ISPs also has an economical impact as well as The ISPs' ownership of the equipment that stores, makes, and transmits copies of copyright material, their control of such ownership may be enough to make ISPs directly liable as copyright infringers with or without a finding of liability against the user. And the relationship between an ISP and its customers may be close enough to make the ISP vicariously liable. An ISP might face contributory liability if it knowingly provides Internet service to a subscriber who is committing copyright infringement.

<sup>10</sup>See British Library digitization project available online at [www.bl.uk/abouts/stratoulprog/digi/digitisation/index.html](http://www.bl.uk/abouts/stratoulprog/digi/digitisation/index.html)

<sup>11</sup> Mille., A., " Copyright and the information society in Europe: *A matter of timing as well as content*" ( 1997) 34 CMLR 1197,1208.)

By contrast, the argument against such liability claims that ISPs are not responsible for their subscribers' behavior. Internet Service does not necessarily imply copyright infringement; therefore, the decision to use the Internet this way and any legal responsibility properly rests with the subscriber. Moreover, the extension of ISP liability would give ISPs powerful incentives to protect their economic interests by removing subscribers' material from the Internet, even when a good case for copyright infringement does not exist.

Copyright owners were looking for gatekeepers that would help them keep the Internet clear of infringing materials. Big and well-established ISPs were obvious targets and located within national borders and controlling gateways to the online environment. Targeting ISPs for copyright infringements was not just cost effective, but also promised to engage them more actively in the campaign against piracy.

The issue of ISP liability has faded from the public agenda in recent years. This was partly due to the digital copyright regime established by the Electronic Commerce (E-Commerce) Directive and Information Society (InfoSoc) Directive. The Directive regime provided ISPs with a shield that mostly kept them out of copyright wars. Under this regime, ISPs were exempted from some liability at a cost. That cost was the implementation of copyright enforcement duties, such as terminating repeat infringers and removing allegedly infringing materials.

Emerging peer-to-peer (P2P) networks, ISPs liability became more and more important and debatable. Peer-to-peer networks facilitate direct exchange of files among individual users. While infringing materials distributed on the web involve identifiable websites, the distribution of infringing materials on peer-to-peer networks is difficult to control. Data is replicated by multiple peers and can be located by peers without relying on a central index server. The distributed architecture of peer-to-peer networks makes it difficult to identify the source of infringing materials and to locate the infringers.

# Supplement A

## DEFINITIONS

**Internet Service Providers (ISPs):** Internet Service Providers offer a wide spectrum of information processing services such as search services, chats, forums, hosting, storage, payments, marketing, and design services. This distinction has been blurred in recent years due to the increasing convergence of communication and content in digital markets. Since the purpose of this Thesis is to examine the interconnection between various players in the information environment, the term “ISP” is used to describe all sorts of online intermediaries that facilitate Internet communication, such as traditional telephone companies, mobile phone companies, backbone providers, and cable companies.

**Search Engine:** They are the web sites which contain extensive indexes of the contents of other web pages. Users ask search engine to display a summary of all web pages within its index which contain words specified by the user.<sup>14</sup> Google and Yahoo could be counted as examples of search engine.

**Content Provider** Content providers manage access to a structured set of data. They encapsulate the data, and provide mechanisms for defining data security. Content providers are the standard interface that connects data in one process with code running in another process. Content providers (the ones who put the online material on the Internet) are primary responsible for the infringement.

**Transformative uses:** Transformative uses take place when the user creates a new work incorporating an earlier one into it. For instance, derivative works, such as caricatures, parodies as well as uses such as quotations for teaching, criticism and scientific research.<sup>15</sup>

**Non-transformative uses:** It includes activities such as reading, watching, listening and copying for purposes of entertainment, private study, information and communication.<sup>16</sup>

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<sup>14</sup>Collins.,M., ‘*The Law of Defamation and the Internet*’ (2001)

<sup>15</sup> Mazziotti., G., ‘*EU Digital Copyright Law and the End-User*’ (2007)

<sup>16</sup> *Ibid.*

**Digital copy** is a marketing term for a commercially distributed computer file containing a media product such as a film or music album. The term contrasts the computer file with the physical copy (typically a DVD or Blu-ray Disc) with which the digital copy is usually offered as part of a bundle.<sup>17</sup>

**Peer to peer (P2P) Networks** is a software protocol whereby individual computers are able to connect and communicate directly with other computers.<sup>18</sup> This protocol allows for the distribution of information stored in digital form. P2P technology infrastructure ranges from completely centralized to completely decentralized. The first generation P2P file sharing technology was based on a client server model which uses a centralized server to search and index files of users. It is obvious here, that contributory liability could easily be established as it would be difficult for the P2P file sharing service provider to claim ignorance of the activities going on its platform.<sup>19</sup>

**BitTorrent** was developed in the United States and released for the first time in 2001. It is a free standard maintained by BitTorrent Incorporated, explaining a technical protocol for information sharing via Internet. Its model is of the peer to peer type, differentiated from the user generated type. The main difference between these types is that the information sharing is a flow directly between the users (the peers), rather than through central storage.<sup>20</sup>

## 1.2. Scope and Methodology

### 1.2.1. Delimitation

The scope of this thesis is to take a look at the new technologies on the exercise, protection and enforcement of copyrights and copyrighted works in international and domestic legislation context by investigating ISPs liability in the sense of copyright infringements in EU context. This thesis aims to find out the different liability and immunity types for the ISPs and the legal framework based on various international and domestic legislations. By doing so, it tries to define the role of fundamental

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<sup>17</sup> [http://en.wikipedia.org/wiki/Digital\\_copy](http://en.wikipedia.org/wiki/Digital_copy)

<sup>18</sup> Staff Report of the Federal Trade Commission on Peer-to-Peer File sharing Technology: Consumer Protection Issues [Majoras' Report] (June 2005)

<sup>19</sup> See *A&M Records v. Napster* 239 F. 3d 1004 (9th Cir. 2001) where the defendant Napster was held liable for contributory infr

<sup>20</sup> Kristoffer, S., National Developments in the Intersection of Law IPR and Competition: From Maglite to Pirate Bay, Vol.3 (2008)

rights in this copyright debates.

The first chapter provides a brief introduction and background to the work. The second chapter examines the types of service provider and liability through EU primary and secondary legislation. Chapter three deals with the liability for P2P softwares and related issues such as private copying. And lastly, chapter four briefly considers the interaction between copyright and freedom of speech problematic. Although this work based on EU law, when it is necessary, U.S. law will be also taken into consideration.

### **1.2.2. Research Question**

The research question in this thesis is to what extent ISPs could be liable for copyright infringements and for the content provided by third party and whether freedom of speech does have a role in these copyright debates.

### **1.2.3. Methodology**

The materials that will be used are international conventions and agreements, national and regional (EU) legislation, case law, preparatory works and legal textbooks, journals and reports. The research will however be based on European national laws. Relevant international insights and relevant EU legislation give a chance to understand and analyse intellectual property and related rights. Since there is no total harmonization in copyright law and protection in EU context, there is a need to make a comparison between the leading European legal systems in the matter of copyright protection. Therefore comparisons with *English*, *German* and *French* legal systems will be examined on relevant issue.

Practical and analytical examination will be made during the research. State of law and relevant legal sources will be evaluated according to jurisprudence and traditional sources and as mentioned also EU regulations will be addressed in the project. In order to study freedom of speech, international conventions and Member State's constitutions will be reviewed and in the case of copyright infringements and traditional international legal resources will be used and again, in the light of German, English and French laws. They will be examined in case of limitations and exemptions. The empirical questioning is necessary to ensure the limits of genuine boundaries.



## CHAPTER 1

This chapter aims to give brief information on copyright legislation in international context.

### 1. INTERNATIONAL LEGISLATION (primary Legislation)

#### 1.1. Berne Convention:

Berne Convention, or to use its formal title “ Berne Convention for the Protection for Literary and Artistic Works” is an international agreement which sets out harmonise the way that copyright is regulated at international level. It has been the subject of a number of revisions and the revision of PARIS on July 24, 1971 is ‘ *incorporated*’ by TRIPS.

In Article 2(1) of Berne Convention ‘artistic works’ are defined as;

*“The expression “literary and artistic works” shall include every production in the literary, artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic and musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”*

Berne Convention requires Member States to offer the same protection to authors from the other Member States that it provides to its own nationals. It also sets out a common framework of protection and, specifies minimum protection levels that are required. The Berne Convention has three basic principles: (three step test)

- (i) National Treatment. Works originating in one of the Contracting States must be given the same protection in each of the other Contracting States as the latter grants to works of its own nationals.
- (ii) Automatic Protection. Such protection must not be conditional with any formality. It means copyright protection does not depend on registration.
- (iii) Independence of Protection. Such protection is independent of the existence of protection in the country of origin of the work. However, a Contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.<sup>1</sup>

## **1.2. Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)**

The TRIPS Agreement, which came into effect on January 1, 1995, is to date the most comprehensive agreement on intellectual property. Member countries of the WTO are obliged to implement the major provisions of the Berne Convention. The areas of intellectual property which covers are: Copyright and related rights (i.e. the rights of performers, producers and sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants, the layout- designs of integrated circuits; and undisclosed information including trade secrets and test data. TRIPS Agreement contains certain ‘Berne-plus’ features’ as regards various aspects of copyright. Moreover TRIPS requires that all limitations and exceptions must satisfy the three step test.<sup>2</sup>

The Agreement has three characteristics, such as;

- (i) Standards. The Agreement sets out minimum standards of the protection to be provided by each Member State.

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<sup>1</sup> [www.wipo.int](http://www.wipo.int)

<sup>2</sup> TRIPS Art.13. For consideration of the relationship between Art.13 and EC law, particularly Art.82 EC, See Microsoft vs Commission, Case T-201/04 (2007) 5 CMLR (11) 846

- (ii) Enforcement. The Agreement contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies must be available so that right holders can effectively enforce their rights.
- (iii) Dispute Settlement. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.<sup>3</sup>

According to Article 9(2) of TRIPS, there is *Ideas and Expressions* principle that the copyright protection does not extend to ideas but to expressions only. Article 10 refers extension of copyrightable material is expressly extended to cover computer programs and compilations of data.

### **1.3. WIPO Copyright Treaty (WCT)**

WIPO Copyright Treaty was adopted on December 20, 1996 in Geneva and entered into force on March 6, 2002. This agreement is a special agreement within the meaning of Article 20 of the Berne Convention as regards Contracting Parties which are countries of the EU established by the Convention.<sup>4</sup>

WCT deals with protection for authors of literary artistic works, such as writings and computer programs; original databases; musical works; audio-visual works; works of fine art and photographs. WCT also embodies three provisions that reflect so called 'digital agenda'.<sup>5</sup> Treaty handles to subject matters which are protected by copyright;

- (i) computer programs, whatever may be the mode or form of their expression, and

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<sup>3</sup> [http://1/www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://1/www.wto.org/english/tratop_e/trips_e/intel2_e.htm)

<sup>4</sup> Article 1

<sup>5</sup> The Preamble recognizes " the profound impact of the development and convergence of information and communication Technologies on the creation and use of literary and artistic Works." The Agreed Statement concerning Art. 1(4) which defines reproduction to include the storage of a work in digital form in an electronic medium

- (ii) compilations of data or other material ('databases'), any form, which by of the selection or arrangement of their contents constitute intellectual creations.

And Treaty mentions three author rights;

- (i) the right of distribution, which grants the copyright holder the exclusive right to make a work available to the public by sale, lease, rental or lending. This right allows the copyright holder to prevent the distribution of unauthorized copies of a work. The right allows the copyright holder to control the first distribution of a particular authorized copy.
- (ii) The right of rental, which grants authorization commercial rental to the public of the original and copies of the three kinds of works, namely computer programs, cinematographic works and embodied in phonograms, and
- (iii) The right to communicate to the public, which grants authorization of any communication to public, by wire or wireless means.

## **2. EU LEGISLATION (secondary legislation)**

### **2.1.The Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (InfoSoc Directive)**

InfoSoc Directive (2002/29/EC) or as known as "*Copyright Directive*" is to adopt legislation on copyright related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the WIPO in December 1996.

The main of the Directive, as stated in its recital no.4, was to foster creativity and growth of European creative industries:

*“ A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased*

*competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.”*

This Directive has its origin in the Green Paper, copyright in the information society and the Follow Up. The Directive aimed to implement the two WIPO Treaties agreed in Geneva in 1996. The Directive harmonizes the reproduction right and distribution rights and attempts to limit the number and scope of the exceptions that a national regime can operate.<sup>6</sup> Directive includes narrow exemption to the exclusive rights of the right holder as well as protection for ‘ *technological measures*’<sup>7</sup> This meant that more actions were criminalized and that the copyright regulations around Europe generally expanded and became stronger.

The Preamble of the InfoSoc Directive refers “ a fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users protected subject matter must be safeguarded.”<sup>8</sup> Directive provides EU law with a horizontal regulation of copyright which goes far beyond the framework of digital settings, and involves all dimensions of artistic and literary property.

## **2.2. The Objectives of the 1995 Green Paper**

1995 Green Paper on Copyright in the information society<sup>9</sup> the European Commission originally identified some legislative adjustments that would have served the aim of creating legal framework described in the Preamble have served the aim of creating legal framework described in the preamble of the 2001 Directive. In the Green Paper, the Commission argued that, for such a framework to be realized, Community law should have dealt with;

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<sup>6</sup> Art.5(2)

<sup>7</sup> Art.6

<sup>8</sup> See Information Society Directive, Recital 31.

<sup>9</sup> See Comission of the European Communities, Green Paper. Copyright and Related Rights in the Information Society, Brussels, July 19,1995,COM (95) 382 final,49

- (i) International private law criteria to identify the law applicable to the contracts and copyright infringements taking place on the Internet;
- (ii) The re-definition at Community level of the subject matter and extension of economic and moral rights on creative works; and
- (iii) An effective harmonization of provisions regarding collective rights management and technological protection of digital works.

### **2.3. Electronic Commerce Directive (E-Commerce Directive)**

The Directive was intended to enable and thereby increase cross-border commerce. It established harmonized rules on issues such as the minimum transparency and information requirements for online SPs, commercial communications, electronic contracts and limitations of liability of intermediary SPs.

E-Commerce Directive was adopted in 2000 and sets up an internal market framework for electronic commerce which provides legal certainty for business and consumers alike. Directive refers that the ones who put the material on the Internet, the so called “ *content providers*” are primary responsible for copyright infringement.<sup>10</sup> As a prime actor, ISPs have a high level of liability and at the same time there are some exemptions in order to ‘ *get away*’ from the liability. Article 14 of the E-Commerce refers that the intermediaries are not liable for hosting infringing material unless they have had actual or constructive knowledge about the material and have not acted expeditiously to remove it after gaining such knowledge.<sup>11</sup> Moreover, hosting in the case of caching or acting as mere conduit could be considered as exemptions/ immunities for ISPs liabilities.

### **3. EU COPYRIGHT UNDERSTANDING**

In Europe, copyright owners seem far more reluctant to seek copyright enforcement measures against individuals under civil proceedings. The framework may be subject to change in the light of the most recent legislative. The scope of copyright holders’ rights determine the types of activity which unless done with copyright owner’s

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<sup>10</sup> Wu., Tim, “Copyright’s Communication Policy” (1993)

<sup>11</sup> Larusdottir., S.L.,” Liability of Intermediaries for Copyright Infringement in the Case of Hosting on Internet”, Stockholm Law Institute for Scandinavian Law 1957-2010

consent, amount to an infringement of the owners' copyright. Right holders's exclusive rights are;

- (i)     Reproduction right
- (ii)    Distribution right
- (iii)   Rental or lending right
- (iv)    Public performance right
- (v)     Public communication right

Anyone who breaches those rights above, is liable for primary infringement.( this issue will be discussed in next chapters) .Primary infringement means being liable for assisting in the making or distribution of infringing copies or the giving of infringing performances. Primary infringement is concerned with people who are directly involved in the reproduction, performance etc. of the copyrighted work.<sup>12</sup> But secondary infringement deals with people who either deal the infringing copies, facilitate such copying or facilitate the public performance or display.

In order to take measures against the breach the determination of the infringement type is really important.

### **3.1.Copyright Holder's Economical Rights**

#### **3.1.1. Reproduction Right**

The reproduction right is the right to copy, duplicate, transcribe or imitate the work in fixed form.<sup>13</sup> This right also as known as right to copy the work which is the oldest one provided for copyright holders. Infringement takes place whether the copy is incidental, permanent, transient or temporary. Scanning a copyrighted work for use a web site is an exercise of the copyright owners' reproduction right. The ECJ stated that on order to infringe reproduction right the derived work must be '*objectively similar*' to the copyrighted work.<sup>14</sup> The objective similarity means the

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<sup>12</sup> See Bently,L., Sherman., B., Intellectual Property Law ( 2009)

<sup>13</sup> See McDunn., R., White., B., ” Analyzing E-Commerce and Internet Law” (2001)

<sup>14</sup> Francis Day Hunter v. Bron (1963) Ch 587, 623

relevant part of the derived work must be a copy or representation of the whole or part of the copyrighted work. If the work is photocopied, the copyright in literary work will be infringed.

### **3.1.2. Distribution Right**

The distribution is the right to distribute copies of the work to public by sale, rental, lease or lending. Printing copies of a copyrighted work from a web site for distribution is an exercise of the distribution right. The distribution right is a right to put each tangible copy into commercial circulation.<sup>15</sup>

In Peek& Cloppenburg<sup>16</sup> case, it was referred by a German Court to ECJ, that distribution 'by sale or otherwise' could be interpreted to encompass display in a shop of an article for use by customers as well as display in a shop window. The German Courts view was rejected but the court which took position that distribution required to transfer of ownership of the object embodying the work. In addition distribution includes the import sale and gratuitous transfer of any tangible article embodying the work.

Once tangible copies have been placed on the EU market a copyright owner cannot use national rights to prevent further circulation within the EU.<sup>17</sup>

### **3.1.3. Rental and Lending Rights**

Lending means making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage through an establishment which is accessible to the public.

Lending does not become rental, at least as regards loans between the establishments accessible to the public, where payment does not go beyond what is necessary to cover the operating costs of establishment. The owner of the copyrighted work does

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<sup>15</sup> Information Society Directive Art.4(1)

<sup>16</sup> See Peek&Cloppenburg v. Cassina spa, C-456/06 (2008)

<sup>17</sup> InfoSoc Directive, Art.4 (2)

have the right to control rental or lending work. Rental and lending both involve the making the original or a copy of a work available for use on terms that it will or may be returned.

#### **3.1.4. The Right to Communication to the Public**

This right arises with respect to literary, dramatic, musical and artistic works. The right was introduced to implement the InfoSoc Directive is distinguished from public performance or playing or showing in the public by the fact that the public is not present at the place where the communication originates.<sup>18</sup>

In relation to Internet, the right does not include the right to ‘*electronically transmit*’ such as e-mailing Brittany Spears’ new soundtrack but also to ‘*make available online*’ which would include simply having your computer on a file sharing system such as Pirate Bay ( will be discussed in details later on) and allowing other to access that track from your hard drive.

#### **3.1.5. Public Performance Right**

This right is the right to recite, play, dance, act, or show the work at the public place or transmit it to the public. According to Article of the Berne Convention, the right of performance and communication to the public of a performance referred as;

- (i) Authors or dramatic, dramatic- musical and musical works shall enjoy the exclusive right of authorizing
- (ii) The public performance of their works, including such public performance by any means or process

.....

### **3.2. Copyright Holder’s Moral Rights**

Besides author’s economical rights, one of the which is the right of reproduction, an author enjoys moral rights, which are intended to protect his personality as expressed

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<sup>18</sup> InfoSoc Directive Recital 23

through his work. It can be said that moral rights are recognized to all intents and purposes in all countries of the world. Especially they are enshrined in Article 6 bis of the Berne Convention;

*(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.*

...

The first is the right of disclosure, the author's right to decide whether or not he will disclose his work to public. The next is the right of authorship, which is the author's right to demand that his name to be mentioned. But the problem arises whether the author of an artistic work that is networked will experience difficulty in having his moral rights respected in such a case. The networking of a work does not only involve its digitization. It should be deemed with interactivity. This means that the end user of the work will be able to manipulate or transform the original work at will.<sup>19</sup>

While moral rights have received a considerable amount of support especially from creators, they have also been subject to degree of criticism.<sup>20</sup> The criticism about moral rights is that they focus on what is perceived as their foreign or alien nature.<sup>21</sup> Moral rights have their origin in national copyright system and cannot be implemented into international system. Also moral rights prioritize the author's rights and prevent the fair balance between public interest and author's legitimate interests. Moral rights issue is not harmonized yet in the international context. As mentioned before only international legal text for us to lead is the Berne Convention.

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<sup>19</sup> See "Perspectives On Intellectual Property in the Internet and Author's Rights", Queen Mary Intellectual Property Research Institute., Vol.5.,(1999)

<sup>20</sup> Dworkin, "Moral Rights and the Common Law Countries" (1994)

<sup>21</sup> See, Stamatoudii, I, "Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators" (1997)

## CHAPTER 2

This chapter discussed online intermediaries and their structure; types and functions. In order to understand infringements and their structure infringing acts also will be examined. The liability of ISPs and related case law will be examined.

### 4. ONLINE INTERMEDIARIES AND SERVICE PROVIDERS

The Internet offers publishers a new way of reaching customers and offers users a new way of finding sources. Users are no longer have to physically go to library when the library is open. The online era has not only witnessed the replacement of many traditional intermediaries by online intermediaries but also the emergence of new intermediaries such as search engines or networking sites. Intermediaries are also has a crucial role from the regulatory perspective since they are indispensable regulatory tool and target.

Before explain the ISPs it is necessary and very crucial to touch upon what is SP and search engine issue.

Search engines are now recognized as “*essential sources of vital information for individuals, governments, non-profits and businesses who seek to locate information.*”<sup>22</sup>

Links create the vast web of information that is the World Wide Web (WWW), search engines enable that web to be navigated more purposefully and, of course, they also rely on link technology to connect search engine users with the results of their searches. For this reason, some of the same issues arise in these cases as those on linking, such as whether freely available content can be both be linked to and retrieved by search engines impunity.<sup>23</sup>

Aside from e-mail, search engines are most commonly used application on the Internet and they have been described as “*managers of information, organizing and categorizing content in a coherent, accessible manner thereby shaping the Internet user’s*

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<sup>22</sup> See Perfect 10 Google 416 F Supp 2d 828,849 (CD Cal 2006)

<sup>23</sup> See the discussion in Eszter Hargittai, “The social, politic, economic and cultural dimesions for search engines: An introduction” (2007) 12 Journal of Computer-Mediated Communication 769.

*experience.*”<sup>24</sup> Search engines basically rely on three processes: (i) trawling the Internet or www by means of an automated program (variously referred as ‘*spider*’ or ‘*robot*’ or ‘*crawler*’)(ii) analyzing and prioritizing the information returned; and then (iii) compiling a list of the information of the user.<sup>25</sup> The extent of information that they are able to make available by use of a variety of search technologies, they have also posed some questions for the application of copyright.

Service provider, SP, generally means any organization that provides goods, facilitates services to the public whether paid for or free, no matter how large or small organization is. SPs in IT industry are usually entities that provide web services but can also include organizations providing communications, storage or processing services. Since there are different types of SPs such as application service provider (ASP)<sup>26</sup>, network service provider (NSP)<sup>27</sup> or telecommunications service provider (TSP)<sup>28</sup>

Internet intermediaries come in all shapes and sizes, and these varying roles are frequently impact on the level of their liabilities. In order to define liability it is necessary to investigate those shapes and sizes.

There are two major groups of online intermediary operating in the online environment. The first on is the Internet Service Provider, ISP. ISP is a company that provides access to Internet for a monthly fee, the service provider gives a software package, username, password and access phone number. ISPs are large companies, providing a direct connection from the company’s networks to Internet. ISPs themselves are connected to one another through NAPs. ISP service generally consists of e-mail, hosting a web page, and the ability of surf on the Internet. In some cases, ISPs may provide subscribers with additional services such as web page authoring or assistance with business conducted over the Internet. Other SPs may provide customers with more limited services, like the simple uploading and downloading the files. The observations made about potential copyright liability of ISPs may in many cases be applicable to those not offering basic

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<sup>24</sup> Emily B Laidlaw, “Private power, Public interest: An examination of search engine accountability” (2009) 17 ELIT 113

<sup>25</sup> See Allgrove and Ganley op cit, and descriptions in the relevant case law, eg, *Field v Google* 412 F Supp 2d 1109, 1110 Off; *Perfect 10 v Google*

<sup>26</sup> It is as business that provides computer based services to customers over a network

<sup>27</sup> It is a business or organization that sells bandwidth or network Access by providing direct backbone access to the Internet and usually Access to its network Access points.

<sup>28</sup> It is a type of communication service provider that has traditionally provided telephone and similar services.

service, but that is neither always nor necessarily the case. Much depends on the relationship between provider and subscriber and what the provider knows about its subscribers.

The second group of ISP comprises those who do not provide basic access to the Internet, but nevertheless provide certain online services, whether on payment of subscription fee or free to the end user.<sup>29</sup> They can be e-mail providers such as Yahoo Mail/ Hotmail or discussion forums and companies who provide online storage space for user-uploaded content such as Dropbox or Rapidshare.

Generally ISPs offer their services through DSL, cable modem or wireless. And also ISPs have small categories in themselves and could be categorized as follows;

- (i) *Connectivity*. There are those intermediaries that provide access to Internet, both in terms of providing and hosting the Internet. This group includes mobile telephone companies, Internet service or access providers including hosting companies and universities, wi-fi operators, such as cafes and restaurants.
- (ii) *Navigation*. This type of intermediaries facilitate navigation around the web, by indexing online content and making it accessible to users, such as search engines, or networking sites. And also illegal downloading of music, film, game and software sites fall into this category such as Pirate Bay.
- (iii) *Commercial and social networking*. This group provides the content of which may be generated by users or consists of connecting users with each other. From the commercial perspective, e Bay, Amazon could be counted as examples and it connects buyer with seller. In social networking context Facebook, Myspace, Twitter or Skype or sites the content of which is generated by users, such as Youtube, Wikipedia or blogs also belong to this category.
- (iv) *Traditional commercial intermediaries and facilitators*. There are also those intermediaries that are exactly the same as traditional commercial intermediaries such as retailers, financial institutions such as Paypal or credit card providers.

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<sup>29</sup> Reed, C., Angel J. "Computer Law: The law and the regulation of information technology" (2007)

The discussion on intermediary is now heavily focused on navigation and networking intermediaries on terms of liability and immunity. The main concern regarding all of them is the extent of liability and immunity and particularly the liability for the illegal activities of others.

But before types and extent of liability we should work on infringing acts and their types and correlation between liability.

## **5. INFRINGING ACTS**

Since types of infringing acts are mostly related to national laws this section will provide the brief explanation for infringing act concepts based on EU and US Law. Primary and secondary infringements could be considered as EU law concepts and direct, contributory and vicarious infringements are US Law concepts.

### **5.1. Primary Infringements**

The typical primary infringement takes place when two users illicitly share copyrighted material between themselves. Primary infringement is the activities those involved in infringing the copyright owner's exclusive rights which is the right of distribution, reproduction, rental and lending rights, communication to public and public performance.

These actions are most likely both illicitly copying the work and making it available to the public. Since the users on the Internet are strangers to each other and sharing is typically done in an open environment, the criteria of making the work available to the public is easily fulfilled.

In Pirate Bay case, primary infringers were not heard in the case, being only known by their IP addresses. This also could lead us to another problem which is Data protection problem that could be a subject for a new thesis. No one contested the charge that these nameless individuals had illicitly made copyrighted material available to the public. The users who made work available largely were not located in Sweden at the time of

making the material available. The court deemed the infringement have taken place in Sweden because the recipients of the work made available could be located in Sweden.

Making an illicit copy of the work has come via an open file sharing network is an infringement.

## **5.2.Secondary Infringement**

All the intermediaries such as, search engines, hosting services are facilitating users' copyright infringements and fulfilling the objective component. If it is the case, it is not required that the facilitation to be necessary requirement for the primary infringement.

Secondary infringement is concerned with the people in a commercial context who either deal with infringing copies, facilitate such copying or facilitate public performance. In secondary infringement liability is dependent on the defendant knowing or having reason to believe that the activities in question are wrongful.<sup>30</sup>

According to UK law there are two types of infringement. First, those who distribute or deal with infringing copies one they have been made. Liability of secondary infringement by import remains important in the cases of import from a Member State to another. However, this right is subject to the principle of exhaustion.<sup>31</sup>

Second, those who facilitate copying by providing equipment or means that enable the copying take place According to article 24 of the CDPA, a person is liable for an infringement where they supply an article that is specifically designed or adapted for making copies of the copyrighted work.

## **6. INTERNET SERVICE PROVIDER'S LIABILITY BASED ON US AND EU LAW**

This section will be discussed based on current US law.

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<sup>30</sup> CDPAart.22

<sup>31</sup> CDPA 27(5)

## **6.1. Standards of Liability according to US law**

### **6.1.1. Direct Infringement**

This occurs when an infringer directly breaches the exclusive right granted by the copyright owner. Direct liability is a strict liability offense, and thus does not require the infringer to know that he or she is infringing. If direct infringement applies, an ISP would be liable even if a user uploads a copyrighted work that is subsequently downloaded or viewed by others.

### **6.1.2. Contributory Infringement**

This occurs when a party is aware of an infringing activity substantially participates in the activity. Under E-Commerce and US Digital Millennium Act as known as DMCA <sup>32</sup> an ISP will escape liability for hosting an illegal content only if it has no knowledge of the infringing activity.<sup>33</sup> Case laws on this type of copyright liability usually suggest some form of notice based standard. The standard here is “*actual knowledge of the infringement or awareness of facts or circumstances from which the infringing activity is apparent.*”<sup>34</sup> Hence, once an ISP receives proper notification of an infringement required to take down this content, the “red flag test” of this standard is presumed to have to be satisfied. In the recent Pirate Bay decision, the owners of the Pirate Bay, P2P file sharing service were prosecuted on a charge of criminal copyright infringement. The court have found out that all four of them guilty under this charge as been accessories to the crime. This decision relied primarily on the fact *that the business model of Pirate Bay was designed to encourage piracy.*

### **6.1.3. Vicarious Infringement**

This occurs where an ISP is in a position to monitor and supervise the activities of a direct infringer and also benefits financially from the infringing activity. In the US’s case, file

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<sup>32</sup> Digital Millennium Act is a United States copyright law that implements two 1996 treaties of the (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as digital rights management or DRM) that control access to copyrighted works

<sup>33</sup> See, Electronic Commerce Directive Art.14

<sup>34</sup> *Ibid.*

sharing was sued by A&M Records and several other recording companies for contributory and vicarious copyright infringement under the DMCA. The ninth circuit has found that Napster<sup>35</sup> ( this case will be discussed in the following chapters) was capable of commercially significant non-infringing uses, it nevertheless affirmed the decision of the lower trial court which had earlier found that Napster liable for copyright infringement.

## **7. TYPES OF LIABILITY BASED ON EU LAW**

The common factor that link all services is that they involve dealing with other persons and dealing with wide range of content which is provided by third parties. This part is concerned with legal liabilities which will be investigated under EU and UK law.

### **7.1. Contractual Liability**

Basically, ISPs are the glue that connect the Internet together via their supply of services which allow third parties to communicate. To facilitate such information, these intermediaries will provide services to one or more of parties. Where the basic or additional services are found to be defective, liability will normally based on established legal principles of contract and tort.

### **7.2. Liability for Third Party Provided Content**

The problems are when it comes to consider the potential liability of ISPs in relation to content which passes across or is stored on their services. ISPs generally operate using software which processes information automatically. They usually transfer the information without obtaining, or seeking to obtain, knowledge of either its content or the nature of the transaction.

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<sup>35</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001), was a landmark intellectual property case in which the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the United States District Court for the Northern District of California, holding that defendant, peer-to-peer (P2P) file-sharing service Napster, could be held liable for contributory infringement and vicarious infringement of the plaintiffs' copyrights. This was the first major case to address the application of copyright laws to peer-to-peer file-sharing

### **7.3. General Liability and immunities according to Electronic Commerce Directive and UK Law and the Information Society Services Problematic**

In order to understand the systematic of liabilities and immunities of EU law it is important to understand what is information society in the first place. The intermediary provisions are formulated under E-Commerce directive and incorporated into UK law by the Technical Standards and Regulations Directive<sup>36</sup> (“Regulations”) apply to anyone operating as service provider.<sup>37</sup> An information society service is given the same definition in the Regulations as that in article 1(2) as follows;

‘service’; any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition;

- (i) ‘at a distance’ means that this service is provided without the parties being simultaneously present,
- (ii) ‘by electronic means’ refers service is sent initially and received at its destination by means of electronic equipment for the processing and storage data, and entirely transmitted, conveyed and received by wire, radio, optical means or other electromagnetic means.
- (iii) ‘at the individual request of a recipient of services’ refers the service is provided through the transmission of data on individual request.

Providers of information services play a crucial role in the process of information society, and by the extension of the rationale of the E-Commerce Directive. For instance, Google became invaluable for consumers and companies alike, as well as providing a valuable tool for academic research. Member States’ legislation and case law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-

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<sup>36</sup> [Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure](#). Official Journal of the European Communities. July 21, 1998. Accessed 2009-04-27

<sup>37</sup> A service provider is defined as any person providing any information society service.

border services and producing distortions of competition.<sup>38</sup> It is really important to draw a predictable framework that allows for the safeguarded development of information society services unhampered by the fear of unpredictable legal repercussions.<sup>39</sup> Especially it requires a safe harbor for service providers that act as intermediaries.

## **8. ISP IMMUNITIES ACCORDING TO E-COMMERCE DIRECTIVE**

The first two immunities under E-Commerce Directive apply to those providers of information society services ( as discussed above) that are involved in the business of ‘**mere conduit**’ or ‘**caching**’ of data.

Section 4 of E-Commerce Directive contains provisions to limit liability of intermediary service providers for the information conducted or hosted for their customers. Article 12 and 13 detail the situation where a service provider is a mere conduit, a simple transmission of the information of its users with no traces of conduit. ISPs who simply furnish their users with an access to Internet fall within this category. Temporary information storage, lasting no longer than what is not a hosting service but may require pieces of information to be temporarily cached (stored) for technical efficiency, the purpose of this transient storage is to provide a transmission of information.

### **8.1.Mere Conduit Services**

Where the intermediary does not host exchanged subject matter itself but simply transmits or merely provides the access to communication network in which the matter is exchanged, the service is considered as mere conduit.

Article 12 of E-Commerce Directive refers;

*Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:*

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<sup>38</sup> See, Recital 40 of the Technical Standards and Regulations Directive ( 98/84/EC)

<sup>39</sup> *Ibid* Recital 60

*(i) does not initiate the transmission;*

*(ii) does not select the receiver of the transmission; and*

*(iii) does not select or modify the information contained in the transmission.*

*The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.*

*This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

Article 12 deals with mere conduits involved either in the transmission of information provided by a recipient of their service. (for instance, an e-mail sent by a subscriber) or the provision of access of to a communication network. Such conduits are immune from any liability as long as they neither initiate the transmission nor select the receiver of the transmission, nor select or modify the information contained in the transmission. So as long as the conduit does not get involved in the message, either its substance or the communicating parties, the provider is not liable for the damages. This immunity is subject to proviso that at the national level intermediary may be required block or otherwise place certain limitations upon particular subscriber account, although as it would be done the subject to court order and would include actual and official notification to specific breaches of law, the situation will be very different to liability being imposed upon an intermediary in respect of unlawful content over which it

exercised no control and of which it cannot be expected to have been aware.<sup>40</sup> This issue will be discussed in Chapter 4.

## 8.2. Caching Services

Article 13 of the E-Commerce Directive is concerned with third party provided content stored in a cache on an intermediary's servers. Caching is defined as automatic, intermediate and temporary storage.<sup>41</sup> The longer term storage will, under the E-commerce Directive and the national law enacting it, be categorized not as caching but hosting and additionally, subject to greater risk of liability arising for the ISPs. Article 13 of E-Commerce Directive refers;

*1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:*

*(a) the provider does not modify the information;*

*(b) the provider complies with conditions on access to the information;*

*(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;*

*(d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and*

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<sup>40</sup> Reed., C., "The Computer Law: The Law and Regulation of Information Technology" (2007)

<sup>41</sup> See, art.13 (1) of Electronic Commerce Directive

*(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.*

3. *This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

The availability of Article 13 immunity from liability depends on the absence of actual knowledge of the unlawful nature of cached information received, the intermediary is obliged to remove or delete the information. At the national level, the E-Commerce Directive allows that a national court may order an intermediary to cooperate in the termination or removal of specific unlawful material, such as that cached originating from identified IP addressed. Identification of those ID is subject to Data Protection issue and it is not in the scope of this study.

An intermediary forgoes its immunity if either interferes in any way with the cached data or had knowledge of its removal at its source and fails to remove it expeditiously from the cached source. There is not any definition available for what is expeditiously and since there is no case law based on solely this issue it is difficult to investigate and apply into problems.

### **8.3. Hosting Services**

The third and most controversial of the immunities section under the E-Commerce Directive is Article 14, which deals with hosts of online material. It provides for limited liability for those information society services that provide their users with some form of information storage. Article 14 refers;

1. *Where an information society service is provided that consists of the*

*storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*

*(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*

*(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

*2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider:*

*3. This Article shall not affect the possibility for a 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*

User Generated Content ( as known as UGC) could be the definition of hosting services includes many of internet services that engage in the business. For instance all kinds of web-hotel services, portal services, such as MSN and Myspace, forums for chat and media-sharing sites such as Youtube.

A common element for all services is the ISP's control of the digital storage space on which the information being stored. This requires physical control of computer servers, or the contractual control of computer servers provided by a third party.<sup>42</sup>

According to article 14 (1) (a) that is not necessary for SP should have the actual knowledge of illegal activity or information must be understood to indicate user activity taking place or information stored on this controlled digital space.

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<sup>42</sup> Kristoffer., S., "National Developments in the Intersection of Law IPR and Competition: From Maglite to Pirate Bay". Vol.3 (2008)

This article imposes a notice and take down duty that requires that the host acts expeditiously upon obtaining the relevant knowledge but this condition is given rise uncertainty. How long is expeditious? Does it allow time for investigating the legitimacy of the take down request?

Article 14 also distinguishes what amounts to notice in respect of criminal and civil claims: the former entailing actual knowledge of the illegal activities; awareness of the facts from which the illegal activity is apparent. Bu in either case, it is unclear whether the intermediary must have the knowledge or awareness of the illegal nature of the activity. Here, SP shall be deemed to have actual knowledge. When a competent body has declared that the information is unlawful or ordered that it be removed or that access to it disabled.

Such interpretation of actual knowledge makes sense in that, prior to such a declaration by a competent body, there cannot be any certainty that the activity is illegal. It means that providers need not second guess the illegality or otherwise of the hosted content, and neither do they need to act extremely cautiously in removing the illegal content. For instance, according to UK law, intermediaries are forced to remove any material upon any requests by the injured parties, legitimate or otherwise.

Regarding to notice and take down duty under US law, Google stated that 57% of notices sent to it and demanding removal of links in the index were sent by competing businesses.<sup>43</sup>

Knowledge and awareness requirement is especially apparent in defamation, where unless the intermediary is aware or related to facts other than the statement itself, there will often be no indications as to its defamatory nature. For example, in *Godfrey and Demon*<sup>44</sup>, there was no reason other than misspelling of the claimant's name, to suspect

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<sup>43</sup> Urban., J., and Quilter, "Efficient Process or 'Chilling Effects'?" Take down notices under section 512 of the Digital Millennium Copyright Act : Summary Report. Berkley (2005)

<sup>44</sup> Laurence Godfrey, a physics lecturer, learned that someone had posted a message to the Usenet discussion group *soc.culture.thai*. That message, sent by an unknown source, had been forged to appear to have been sent by Dr. Godfrey. On January 17, 1997, Godfrey contacted Demon Internet one of the major Internet Service Providers in Great Britain to inform them of the forged message and ask that it be deleted from Demon Internet's Usenet news server. Demon Internet declined to remove the message, which remained on its servers for ten additional days, at which time it was automatically deleted along with all other old messages. Godfrey sued for libel, citing Demon's failure to remove the forged message at the time of his initial complaint. (1999) 4 All ER 342.

that a racist posting attributed to the claimant was in fact made by someone else, and therefore defamatory. Media lawyers have described the case's resultant restriction on freedom of expression as disproportionate and suggested that it may not survive a challenge under the human rights.

#### **8.4. No General Obligation to a Monitor**

Article 15 of the E-Commerce Directive refers;

*1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*

*2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.*

The article clarifies that intermediaries should not be given the burden of conduct general monitoring regarding the information flows through or via their services, since Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature. However, this does not concern monitoring obligations in specific cases.<sup>45</sup> It is also clearly provided that a national government may put in place a legal duty to inform relevant authorities when either notice of unlawful material is received or such content itself is discovered on servers. The Directive also leaves to Member States' discretion any introduction of an obligation to hand over details identifying individual subscribers to their servers who have been implicated in dealing with unlawful content. This is a matter of Data Protection and it is not in the

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<sup>45</sup> See E-Commerce Directive, Recital 47

scope of this thesis.

## 9. ANALYSIS OF TORRENT FORUMS AND SEARCH ENGINES

The service provided by torrent and link sharing sites such as Pirate Bay is to be a forum for internet users to upload their links to information, and through this uploading be able to link up with other users interested in that particular information.<sup>46</sup>

The limitations on the liability of such SPs are found in articles 12-14 of the E-Commerce Directive corresponding to articles 16-19 of the Swedish implementation. The Pirate Bay includes among other issues make space available on the servers for the users to upload, label and torrent links on. The services are entailing the storing of such links do not commonly include the storing of the information linked to. The Pirate Bay case this was, this certainly not something that service offered since it was a pure collection of torrent links. The act for which a SP could be liable as an intermediary is the copyright infringement taking place when a recipient of the service unlawfully makes a copyrighted work available to the public. Since the infringed works that are basis of liability are at no point stored on the server space provided by the torrent site. Article 14 which describes hosting services, is the least appropriate label for this kind of service.<sup>47</sup>

The transmission of the information among the users has a transient role. The information provided by the recipient without actually ever stored and service provider does not have any control over any storage space.

It is really hard to place search engines within the categories given by E-Commerce Directive. The only lead provided by article 12 for the search engines is mere conduit. The Recital 18 concerns services that “*those providing tools allowing for search, access and retrieval of data*” but in any case it is really difficult to fit. For the search engines, it

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<sup>46</sup> Kristoffer., S., “ National Developments in the Intersection of Law IPR and Competition: From Maglite to Pirate Bay”. Vol.3 (2008)

<sup>47</sup>The Pirate Bay judgment to come to this conclusion at paragraph 7. There are clear indications that this matter was not fully understood, such as claim in paragraph 69 that “ *It suffices that the defendants were aware of the fact that copyrighted matter had occurred on the website.*”

is not the case that, transmission of information provided by the recipient of service. The content is selected by the search engine, something is contrary to the provisions of the mere conduit category of intermediaries.<sup>48</sup>

The key provisions on liability of intermediary SPs are to be found in the E-Commerce Directive, under Section 4. This section comprises four key articles which place certain limitations upon the level of liability which may be faced by an online intermediary in relation to content provided by third parties. Three different categories of dealing with the material set out.

The first category of dealing with information is set out in Article 12 of the E-Commerce Directive.

### **CHAPTER 3**

In this chapter, the actions against ISPs and P2P services will be debated and related EU and US case law will be examined.

#### **10. ACTIONS AGAINST ISPs :**

The rights of copyright holders have not only perused distributors of file-sharing applications, but have also initiated actions against both ISPs that perceived to allow to access file sharing applications via their networks and individual file sharers. ISPs have been a popular target for those wishing to gain some recompense for violation of their sights in situations in which they cannot identify or cannot locate the offending parties, or in which there are other problems in bringing suit. There are some very different approaches to the question of the extent the liability of ISPs for copyright infringement which depends on whether they are acting merely as a communication carrier, providing the means of transmission between provider and the user or whether they have, or are capable of having some input and control over at least some of the material to which they provide access.

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<sup>48</sup> Allgrove.,B.,and Ganley, “Search Engines, Data Aagregators and UK Copyright Law: A proposal” (2007)

EU and US provisions purport to provide ISPs immunity from suit. (safe harbor) provided that they are not acting as a content provider and have no involvement with the actual information transmitted via their networks that is, that they are acting as a edge of the infringement. The provisions of DMCA and EU directives provide immunity from liability not only for transient and temporary copies but also for actual hosting material that is breach of copyright, provided that where there is knowledge of infringing material, that material removed expeditiously. In EU substantive provisions relating to ISPs are found in E-Commerce Directive art.8/3 of the Copyright Directive requires Member States to ensure that injunctions are available against intermediaries whose services are used by a third party to infringe copyright.

### **10.1.SABAM and Promusicae Cases**

SABAM v Tiscali (Scarlet)<sup>49</sup> was reference for a preliminary ruling under Article 267 TFEU<sup>50</sup> from the cour d'appel de Bruxelles (Belgium), made by decision of 28 January 2010, received at the Court on 5 February 2010, in the proceedings. The reference has been made in proceedings between Scarlet Extended SA ('Scarlet') and the Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) ('SABAM') concerning Scarlet's refusal to install a system for filtering electronic communications which use file-sharing software ('peer-to-peer'), with a view to preventing file sharing which infringes copyright.

Case refers a Belgian society of authors, composers and publishers against an ISP (Scarlet) for allowing the sharing of infringing music files via, its service, even though the E-Commerce Directive had not been yet transposed into Belgian law.

In course of 2004, SABAM concluded that internet users using Scarlet's services were downloading works in SABAM's catalogue from the internet, without authorization and

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<sup>49</sup> See C-70/10

<sup>50</sup> Article 267 of the Treaty On the Functioning of the European Union refers; The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning; (a) interpretation of the Treaties,(b) the validity and the interpretation of the acts of the institutions, bodies, offices or agencies of the Union; where such a question is raised before any court or tribunal of the Member State, that court or tribunal may, if considers that a decision on a question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where a such question is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law that court or tribunal shall bring the matter before the Court. If a such question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

without paying royalties, by means of P2P networks, which constitute a transparent method of file sharing which is independent, decentralized and features advanced search and download functions. Referring court stated that before ascertaining whether a mechanism for filtering P2P files existed and could be effective, it had to be satisfied that the obligations liable to be imposed on Scarlet were in accordance with EU law.

The case came to full trial in 2007 and the Court, have taken technical advice ordered by Tiscali Belgium to install filtering software to prevent users from the expert evidence provided that it would not to be disproportionately to do so.<sup>51</sup> The appeal against the decision has led to two questions. The first concern was the scope of the ability both to issue an injunction against ISPs whose services are used to infringe copyright and to require filtering as a preventive measure. If such orders are permissible, the second question asks further application of the principle of the proportionality when deciding on the effectiveness and dissuasive effect of the measure sought. The balance should be drawn between the right to uphold copyright on the one hand, and on the other hand, the individual user's right to privacy. E-Commerce Directive art.12 and 15 were the focus points. And ECJ concluded that ***“In the light of the foregoing, the answer to the questions submitted is that 2000/31 ( E-Commerce Directive, 2001/29/EC read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an internet service provider which requires it to install a system for filtering.”***

ECJ also has pointed out that in adopting the injunction requiring the ISP to install the contested filtering system, national court concerned would not be respecting the requirement that a fair balance be struck 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.

Promusicae<sup>52</sup> ( i.e.Productores de Música de España (Promusicae) was a reference for a preliminary ruling under Article 234 EC by the Juzgado de lo Mercantil N° 5 de Madrid (Spain), made by decision of 13 June 2006, received at the Court on 26 June 2006, in the proceedings .This reference for a preliminary ruling concerns the interpretation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on

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<sup>51</sup> See also Roadshow Films Pty Ltd v iiNet Ltd (2009) FCA 332.

<sup>52</sup> See the judgment of The court of the European Union case number C-275/06

certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Promusicae is a non-profit making association seeking to uphold the intellectual property rights of its members was contesting the refusal of ISP, Telefonica, to disclose names of its customers. Promusicae was in possession of known IP addresses, data and patterns of use that suggested file sharing using Kazaa, but did not have specific names and contact details. The questions are referred to ECJ from the court of Madrid, concerning the clash between the required balance of, intellectual property rights, copyrights, and the right to privacy in the form of data protection rights. At the centre of all of those discussions, the question is whether data can be acquired without consent if it is needed to trace an intellectual property violation.

According to Advocate Kokkott, the rights of privacy were fundamental, the protection of copyright was also an interest of society the importance of which had been emphasized that, even the interests of rights holders are private rather than public. They can still be categorized as fundamental interest of society. However the Advocate General Kokkot was not certain that private file sharing threatened copyright protection to extent that it should take precedence over data protection. There is not any guidance how to provide the balance between right to privacy and intellectual property rights. AG and the Court found that the combination of the respective provisions did not require personal data to be divulged when the illegal act being pursued not to attract criminal sanction in the home state. Court seems to consider that file sharers should not able to use privacy rights to prevent or inhibit them from being pursued for copyright infringement.

## **11. THE LIABILITY IN PEER TO PEER (P2P) FILE SHARING**

### **11.1. End-User Liability**

Peer to peer (P2P) file sharing services have continued to be implicated in copyright infringement activities and internet piracy.<sup>53</sup> The technology which underlines this system has enhanced the user's ability to locate, download and upload digital content usually in breach of copyright laws.<sup>54</sup> File sharing is often used as a tool for finding

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<sup>53</sup> William.,A., "Liability of P2P File-Sharing Systems For Copyright Infringement by Their Users", Progress on Point, ( 7 March 2004)

<sup>54</sup> *Ibid.*

works which would otherwise would be unavailable, finding out new genres, carrying out personalized compilations as well as for posting creative remixes and new interpretations of existing works.<sup>55</sup>

P2P software enables to computers to communicate directly with each other. Generally term refers to software which enables a computer to locate a content file on another networked computer to copy the encoded data onto its own hardware.<sup>56</sup> With P2P software, people are enable to share and disseminate music, movie, software without the consent of the right holder. Recording companies, movie studios have lobbied since 2000s for enhanced enforcement mechanisms against unauthorized file sharers. File sharing has opened new discussions and has become a crucial tool for cultural, scientific and technical collaboration. This is the main feature of the so called “Web 2.0” networks, also as known as user generated content (UGC) services, which are generally associated with internet applications that facilitate information sharing.

When a work is shared on a P2P platform it implicates the copyright owner’s rights of communication within the meaning of article 3 of the InfoSoc Directive, in particular subsection subsection 1 which reads;

*“Member States shall provide authors with the exclusive right to authorize 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.”*

Until 2004, P2P file sharing had been ignored by EU, when there was a series of cases in Netherlands and France. France introduced “ global license” which is a scheme to legalise unauthorized file sharing of copyrighted works on P2P platforms by the use of a mechanism of financial compensation. Global license was proposed by High Council of Literary and Artistic Poperty<sup>57</sup>, is one of the administrative bodies. The proposal was rejected by the Commission because it would have provided to weak response to the online copyright enforcement problem.<sup>58</sup> The proposal was about the creation of

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<sup>55</sup> Natanel, “ Impose a Non-commercial Use Levy to Allow Free Peer to Peer File Sharing”, University of Texas School of Law, Law and Economics Working Paper No.009 (2009)

<sup>56</sup> Mazziotti., “ EU Digital Copyright Law and the End User” (2007)

<sup>57</sup> Conseil supérieur de la propriété littéraire et artistique

<sup>58</sup> Sirinelli, “Droit d’auteur et droits voisins-chronique”

remuneration system for acts of file sharing on the basis of mandatory contractual license to be combined with a statutory license. Even if direct infringers were legally sued as criminals, such unlawful acts would not cease.

## **11.2. P2P Downloads Under The Exception of Private Copying**

Under EU copyright exception of private copying, the scope of distribution right referred by article 4(2) of the InfoSoc Directive<sup>59</sup> and is confined to the distribution of tangible copies of copyrighted works. According to the InfoSoc Directive, the first thing that court had to resolve was whether unauthorized P2P downloads could be described as permissible personal copies.

Article 5(2)(b)<sup>60</sup> of the InfoSoc Directive refers to copying “*by a natural person and for ends that are neither directly or indirectly commercial*”. Directive gives the definition of private copying. If it is the case, legality depends on the absence of direct or indirect commercial end by the copier, whether he uses the copy personally or disseminates. From the wording, it is obvious that there is no single element to define copying. In addition the courts can freely apply their national laws when it comes to draw exception framework on unauthorized use. For instance French and Italian laws make private copying subject to a rigid condition of non-public destination of the copy, in such way that no person beyond the original user is protected by the exception.<sup>61</sup>

For example Dutch Court delivered a decision states that mere download of an unauthorized movies reproduced on Cd-roms. Those materials were no longer on user’s hard drive and as a result, were not shared with others. The court stated that copier’s reproductions meet with the requirements of the private copying exceptions provided by

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<sup>59</sup>“The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.”

<sup>60</sup> “Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: b) 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, on condition that the right holders receive fair compensation which takes *account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.*”

<sup>61</sup> See, Article 122-5 of the French Intellectual Property Cod, which outlaws collective use of personal reproductions; and Article 71 of the Italian Copyright Act, which forbids third parties from making lawful reproductions for someone else’s copy.

French Intellectual Property Code because there was no evidence that reproductions were used for personal purposes such as home viewing.<sup>62</sup>

The **three step test** which binds national courts after the transposition of InfoSoc Directive, seem to prohibit the judiciary from excusing acts of unauthorized downloading under the private copying exception. As already discussed, three step test aims to make sure that even when an exception is provided for a special case (first step), the exception does not conflict with normal exploitation of the work (second step), and does not unreasonably prejudice the legitimate interests of the right holder( third step).<sup>63</sup>

### **11.3. Peer to Peer Software Provider's Liability**

The question of whether the design and supply of P2P software may be a cause of liability for indirect infringement under EU law. Today's most successful P2P platforms enable perfectly decentralized communication in a way that software suppliers provide no material contribution to the user's direct infringement. It means when reviewing indirect liability whether direct infringements occur independently of the software provider's activity or not must be carefully considered. Civil and criminal proceedings in the EU may be meant to create indirect liability upon P2P software providers must also taken into account.

The first and very remarkable case where direct infringement liability by the provider of P2P software was the Kazaa<sup>64</sup> case in Netherlands.<sup>65</sup>

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<sup>62</sup> Article 122-5 of the French Intellectual Property Code refers as follows: " Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire..Les copies ou reproductions strictement reserves à l'usage privé du copiste et non destinées à une utilisation collective.."

<sup>63</sup> See Berne Convention Article 9, "1. Generally; 2. Possible exceptions; 3. Sound and visual recordings - (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) 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. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

<sup>64</sup> Kazaa Media Desktop was commonly used to exchange MP3 music files and other file types, such as videos, applications, and documents over the Internet. The Kazaa Media Desktop client could be downloaded free of charge; however, it was bundled with adware and for a period there were "No spyware" warnings found on Kazaa's website. During the past few years, Sharman Networks and its business partners and associates were the target of copyright-related lawsuits, related to the copyright of content distributed via Kazaa Media Desktop on the FastTrack protocol

<sup>65</sup> See BUMA&STEMRA v. Kazaa, Supreme Court of the Netherlands, The Hague, First Chamber, Order of 19 December 2003, C-02/186

Consumer Empowerment was sued in Netherlands in 2001 by the Dutch music publishing body, Buma/ Stemra. The court ordered Kazaa's owners to take steps to prevent its users from violating copyrights or else pay a heavy fine. In October 2001, a lawsuit was filed against Consumer Empowerment sold the Kazaa application to Sharman Networks, headquartered in Australia and incorporated in Vanuatu. In late March 2002, a Dutch court of appeal reserved an earlier judgment and stated that Kazaa was not responsible for the actions of its users. Buma/ Stemra lost its appeal before the Dutch Supreme Court in December 2003.

The court upheld a decision of the Amsterdam Court of Appeal which found that the producer and supplier of P2P software identical to that of Kazaa was not directly liable for the copyright infringement of third parties using its technology.<sup>66</sup> Due to the preliminary injunction proceedings the Supreme Court's review did not address the merits of the case in their entirety. The Court upheld the Appellate Court's decision and rejected the claim that Kazaa should have been compelled to adapt its software in order to reduce infringing files.

The Dutch Supreme Court's decision left unanswered the most crucial claim that had been referred by the Dutch copyright collecting society Buma/ Stemra, whether Kazaa could be liable of contributory infringement by having provided people using the same file sharing network with the tool to copy and disseminate copyrighted works on the internet.

None of the forms of direct and indirect liability specifically foreseen by EU directives dealing with copyright in the electronic environment fitted the case of Kazaa's software. Additionally, there was no activity by Kazaa which could be found to infringe copyright either directly or indirectly.

#### CHAPTER 4

In this chapter, the relationship between copyright and fundamental rights will be investigated and especially the relation between freedom of speech and copyright will be examined.

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<sup>66</sup> See BUMA&STEMRA v. Kazaa, Amsterdam Court of Appeal, 28 March 2002

## 12. FUNDAMENTAL RIGHTS AND COPYRIGHT

Freedom of expression is strongly protected by most of the countries' constitutions and international conventions. It is also protected in article 11 of the European Charter of Fundamental Rights ("Charter")<sup>67</sup>, European Convention of Human Rights<sup>68</sup> ("ECHR") article 10, International Covenant on Civil and Political Rights<sup>69</sup> ("ICCPR") article 19 and the Universal Declaration of Human Rights<sup>70</sup> ("UDHR") article 19. The significance of freedom of speech has been stressed several times by the European Court of Human Rights, ECJ and national courts.

In Europe, the copyright is defined as a fundamental right by the national constitutions and courts.<sup>71</sup> In UDHR and the Charter, copyright and IPRs are recognized also as human rights. In US law, copyright has been defined as the "engine of expression" by granting the authors exclusive rights for the commercial exploitation of works. But copyright also is able to limit and prevent freedom of expression. Copyright refers upon its owner exclusive right, including the prevention of copying (reproduction right), or even access to protected work. Copyright can be used also restrict the use of existing work and by doing so, it limits freedom of information.

Recently, UN has started to push the states to make internet access is a human right. The right to internet connection has been perceived as acquiring the same relevance as the right to other public goods such as education, healthcare etc.<sup>72</sup> European countries have started to respond to that action which is referred by UN, such as Finland which is the first country recognized and introduced access to internet as a human right in constitutional level.<sup>73</sup> Estonia followed Finland and passed a law which states that

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<sup>67</sup> Charter of Fundamental Rights of European Union 2000/C 364/01

<sup>68</sup> European Convention on Human Rights (The Convention on the Protection of Human Rights and Fundamental Freedoms). The Convention entered into force on 3 September 1953.

<sup>69</sup> International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976

<sup>70</sup> The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly on 10 December 1948

<sup>71</sup> See the Swedish Constitution (Art.19(2)), Portuguese Constitution (Art.42) and Spanish Constitution (Art.20).

<sup>72</sup> Bonadio, E., 'File Sharing, copyright and freedom of Speech' (2011)

<sup>73</sup> As from July 1, 2010 all citizens of Finland have the right to have a broadband Internet connection of at least 1 Megabit per second. And the promise was made to upgrade every citizen to a 100Mbps connection in five years time.

internet access is a human right. Furthermore, Access Directive<sup>74</sup> makes reference to ECHR and stressed the importance of access to internet.<sup>75</sup>

When it comes to P2P file sharing, the issue gets more complicated. As mentioned before P2P networking means that files not stored on a central server instead, certain software which can be installed in individuals' computers as a server for shared files. When the technology is used to share copyright protected materials, such activities are considered as copyright infringement and mostly a violation of the communication to public and making available rights which are protected by international treaties such as WIPO Treaties.

When taking action against the primary infringers, right holders often chase secondary infringers which are the big companies who allow or provide a background for the access to those kind of files or networks. These companies could be ISPs which generally act as gatekeepers and make possible the individuals' file sharing of copyrighted material.

Liability is not limited with the people who personally infringe copyright i.e. who uploads or makes the copyrighted work available and also person who facilitates and encourages, helps or benefits from this infringement is also liable. Moreover, for several legislation liability for copyright infringements is also related to primary infringers such as copy shops or ISPs which offer users the technical means to share and make available infringing files<sup>76</sup>.

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Art.3bis Directive 2009/140 amending Directive 2002/19/EC of the European Parliament And of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities and Directive 2002/20 on the authorisation of electronic communications networks and service.<sup>74</sup>

<sup>75</sup>This provision states that: “ *Measures taken by Member States regarding end-user's 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 European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community Law. Any of these regarding end-users' 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 European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, the only be taken with due respect for the principle of the presumption of innocence and the right to be heard of the person or persons concerned, subject to need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.*”

<sup>76</sup>Allen., Dixon., ‘ Liability of users and third parties for copyright infringements on the Internet: overview of international developments’ in Peer-to-Peer Sharing and Secondary Liability in Copyright Law, (2009)’

## 12.1. Actions against the file sharers: Disconnection file sharers

Some legislations provide that the internet connection of persistent file sharers can be terminated provided certain conditions are met. We will investigate some French and UK law examples.

### 12.1.1. French Perspective: Hadopi Law

In May 2009, the first version of Hadopi Law was adopted. Hadopi aims at controlling and regulating internet access a means to encourage compliance with copyright provisions. This law also has created an ad hoc administrative agency, called *Hauté autorité de diffusion des oeuvres et de protection de droits sur Internet* which had been given the task to control that;

*“Internet subscribers screen their Internet connections in order to prevent the exchange of copyrighted material without prior agreement from the copyright holders”<sup>77</sup>*

The law refers that subscribers must be sure that their accounts are access and used to reproduce or make available works without the authorization of the right holder.<sup>78</sup> It is scrutinized by the French Constitutional Court, which was in June 2009. The court found the Hadopi law unconstitutional. According to the court, any decision considering internet disconnection should be taken by a court not by an administrative body and also interests should be balanced between the copyright protection and freedom of speech.

*“In the current state of means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services .”*

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<sup>77</sup> See Art.336-3 of French Intellectual Property Code.

<sup>78</sup> It provides so called “*three-strikes rule*” also labeled as the ‘*graduated response*’: if the subscribers fail to properly supervise their account within the year following the receipt of the first recommendation, administrative agency could either suspend Internet access for between two months and a year or order subscribers to implement security measures aimed at preventing other unauthorized downloads or uploads with penalty fees for non-compliance.

Court stated that burden of proof is also on internet subscribers which meant that subscribers had to prove that they were not liable for the alleged infringement.

In September 2009, French Parliament passed Hadopi 2, which was intended to remedy the enforcement gap left by the Constitutional Court's decision. The biggest difference between Hadopi 1 and Hadopi 2 is that sanctions applied by against infringer will be decided by a court not by an agency.

### **12.1.2. British Perspective: Digital Economy Act**

In June 2010, Digital Economy Act was adopted and it is expected to come into effect soon and it deals with ISPs to send notifications to their subscribers to inform them of allegations that their accounts have been used for copyright infringement.<sup>79</sup> This would be useful for the right holders, who would then be able to take legal action against the infringers. Article 12 of the Digital Economy Act refers as follows;

*“The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright.”*

This provision grants and gives Secretary of State, to disconnect people's access or slow down their connections if they ignore the warnings in cases of alleged infringement. But the difference between Hadopi 1 is the Digital Economy Act grants such disconnection is to be decided by a judicial authority.<sup>80</sup>

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<sup>79</sup> The process is similar to Hadopi three strike stage process for ISPs to inform subscribers of copyright infringements and provides that subscribers which have received two notifications within a year may be included in a list requested by copyright owner

<sup>80</sup> See Art.17(5) of Digital Economy Act states: *The regulations must provide that, in determining whether to grant an injunction, the court must take account of— (a) any evidence presented of steps taken by the service provider, or by an operator of the location, to prevent infringement of copyright in the qualifying material, (b) any evidence presented of steps taken by the copyright owner, or by a licensee of copyright in the qualifying material, to facilitate lawful access to the qualifying material, (c) any representations made by a Minister of the Crown, (d) whether the injunction would be likely to have a disproportionate effect on any person's legitimate interests, and (e) the importance of freedom of expression.*

### 12.1.3. The EU Perspective

In the adoption and negotiation process of Telecom Package<sup>81</sup> internet disconnection and online copyright infringements had also been debated at the EU Parliament. During the negotiations two positions had been emerged. On the one hand, some groups said that internet disconnection should be decided exclusively by the courts not by administrative bodies. These groups were giving the reference to French Constitutional Court's ruling in Hadopi 1. On the other hand, some groups referred the EU Council and related organizations supported "three strikes" rule managed by an administrative authority, a proposal similar to Hadopi1 law. After, EU Parliament introduced the *Amendment 138 (renumbered amendment 46)* which sought to prevent EU Member States from adopting legislation allowing internet disconnection of persistent file sharers without a previous authorization of a court.<sup>82</sup>

In April 2009, civil organizations drew attention to potential dropping of Amendment 46 to the EU Telecoms Package, which was the first approved as Amendment 138. by the EU Parliament in the first reading on 24 September 2008. This latter amendment is different from amendment 138 and it no longer requires that only judicial authorities be allowed to cut off internet access of persistent file sharers. It just says that any measures aimed at disconnecting internet access may only be adopted as a result *of a prior, fair and impartial procedure*.<sup>83</sup>

The word judicial has been removed from the amendment and this means that the right to judicial review is guaranteed on appeal, but the first instance ruling can still be issued by a non judicial authority.

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<sup>81</sup> Telecom Package is a law of the European Union, aimed at updating the EU Telecoms Rules of 2002 and unifying Europe's tele-communications market for all 27 EU member states. It was presented in Strasbourg 13 November 2007. After several amendments it was passed into law on 24 November 2009. The law creates a new agency called Body of European Regulators of Electronic Communications (BEREC) overseeing telecom regulation in the member states. It also allows member states to set minimum quality levels for network transmission services, thus partially implementing net neutrality. The law allows member states to disconnect Internet users for illegally downloading copyrighted material, but only if "there has been a prior, fair and impartial procedure and effective and timely judicial review". Consumers gain the right to switch phone operators within one day while keeping their number, the right to sign 12 months contracts, and the right to be notified of certain data privacy breaches. The package entered into force in December 2009, after which member states had 18 months to implement its provisions in national law

<sup>82</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=PV&reference=20080924&secondRef=ITEM-006>

<sup>83</sup> <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IMPRESS&reference=20091105IPR63793>

The tension between the copyright protection in internet and free speech was also stressed in SCARLET v SABAM case. The question was whether a national court can order ISPs to introduce a mechanism for filtering and preventing electronic communication to protect IPRS.

According to A.G. Pedro Cruz, the introduction of a such system restricts free speech contrary to the Charter. He added also that neither the blocking system not the filtering scheme envisaged appropriate guarantees and the safeguards.

## CHAPTER 5

This chapter aims to take a brief look to US legislation in the sense of IPRs' liability and their immunities in relevant US legislation in the light of some cases.

### **13. US Intermediary Liability and Immunities**

The US implemented the anti circumvention protections in the 1996 WIPO treaties through the Digital Millennium Act in 1998. To some extent EU and US perspectives seem similar, it should be noted that US approach is more strict in the sense of protection and more IP protectionist. In order to understand the liability perspective in global context, it is necessary to make a comparison between the US and EU.

In the case of infringements, Napster, Grokster and Kerry v Arriba case will be discussed below. These cases will be examined on the grounds of DMCA.

#### **13.1. Napster Case**

Napster<sup>84</sup> made its proprietary MusicShare software freely available for the internet users to download. Users who obtained Napster's software could share MP3 music files with other users of the Napster Service. Napster service enabled users to exchange MP3 files stored on their computer hard drives directly with other users without payment. Napster managed a file indexing and directory service but did not itself copy or store

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<sup>84</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001) was a landmark intellectual property case in which the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the United States District Court for the Northern District of California, holding that defendant, peer-to-peer (P2P) file-sharing service Napster, could be held liable for contributory infringement and vicarious infringement of the plaintiffs' copyrights. This was the first major case to address the application of copyright laws to peer-to-peer file-sharing.

MP3 files. Napster also provided a software which allowed users to search for request, download and play the MP3 files.

On July 2000, the District Court granted a preliminary injunction to prevent Napster from facilitating copyright infringement by others. In 2001, the Appeal Court upheld the original injunction but ordered the District Court to modify its scope.

Napster claimed that users of Napster were engaged in the wholesale reproduction and distribution copyrighted works. It claimed that the uploading files by the users, is a part of reproduction right. Napster raised various arguments including that its users might use the service sample recordings before deciding to purchase them. The court was not impressed by those arguments.

Appeal Court made clear that Napster would be liable to the extent it had knowledge of specific infringing files available on its server and failed to take down material from the system within the limits of what was technically practicable.

### **13.2. Grokster Case**

The same conclusion was reached also Grokster case.<sup>85</sup> Grokster was distributing software enabling the use of decentralized file sharing. This technology was originally developed by Kazaa. Kazaa had been also subject to similar litigation (as discussed previous chapters). Unlike Napster, Grokster had no control over the file sharing. US Appeal Court tried to make create clear limits for the US copyright law and the need for legislative change. Some principles were revised by the court on the public policy grounds in order to have better protection of the claimants;

*“...We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation...The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interest, whether the new computer, a karaoke machine or MP3 player. Thus, it is prudent for courts to exercise caution before*

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<sup>85</sup> Case 03-55894, Metro Goldwyn Mayer v Grokster, 9th Cir. 19 August 2004

*liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.*<sup>86</sup>

In the US copyright system, the settlement of Grokster, the supplier of use of copyrighted equipment can not be held liable for an indirect infringement and it is shown that the technology is capable of substantial non-infringing uses and is effectively used in this way, as in the case of Grokster. According to relevant US case law, indirect liability by P2P software provider can be infringing materials occurring on the network created by its software, or if the provider's activity shows defective intent by actively inducing direct infringement or benefiting commercially from the infringing activities.

### **13.3. Kelly v Arriba Case**

In Kelly v Arriba case, Kelly is a Professional photographer, had uploaded original photographs to his website. Arriba operated an image search engine based on a database containing images copied from websites. The images first copied at full size and were then converted to low resolution thumbnails for storage and retrieval after which the first copies deleted. The court of Appeals for the Ninth Circuit considered the application of the four fair use factors in the US Copyright Act of 1976.<sup>87</sup>

The fair use factors are; the purpose and character of use; the nature of the copyrighted work; the amount and substantially of the portion used; and the effect on the potential market or value of the copyrighted work. The court found that even though the images were reproduced exactly and entirely, it was for a completely different purpose. And the images were much more smaller, lower resolution images which could not be enlarged to the size of the original without significant loss of clarity.<sup>88</sup>

Arriba was using the images commercially did not automatically negate a finding of fair use; instead as part of the first factor, the court had to consider the extent to question for retransmission of the work in a different form; rather Arriba's use served a different function to that of Kelly. Arriba's use of the thumbnails was neither for artistic purposes, nor did it supplant the need for the originals' and in addition, it also served the

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<sup>86</sup> Case 11746-47

<sup>87</sup> 17 USC 107

<sup>88</sup> 336 F 3d 811,818 ( 9th Cir 2003)

purpose of “*enhancing information gathering techniques on the internet.*” There was no evidence that it was a fair use.

## 14. CONCLUDING REMARKS

The quantity of user-generated content on the internet on sites such as YouTube, social networking sites, and blogs includes the whole spectrum from content generated by the individuals themselves, which they make available for free copyrighted material or modified copyright material, which is made available in breach of copyright performing rights etc. This situation puts ISPs in very important position in order to police and monitor copyright infringements.

E-Commerce Directive does not prevent standard copyright principles being applied to activities on the internet. Both of these have provided ISPs with immunity from liability for copyright infringement, but there is no evidence that opinion is turning on the wisdom of blanket immunity.<sup>89</sup>

Another debatable issue is the actual knowledge of the ISPs in the sense of illegal material. This issue was discussed in Yahoo France case and after in other legislative context. Since the term of actual knowledge has no limits and is not defined in any directives and it creates an uncertainty which causes big damages for the ISPs. Also there are some limitations and fitting problems when it comes to immunities. For instance, as discussed before article 14 refers hosting services under immunities, there is a fitting problem for search engines. The E-Commerce did not foresee the three main categories. Within a forum site, at least, infringing work does not pass via intermediary itself, but instead circulates within the network created by users. By the wording of article 12, is the most fitting category for forum sites where users exchange torrent links that link to the users' own PC or that of another user. This puts sites such as these in the same category as Internet Access Providers who do not themselves host the material. E-Commerce Directive states that liability limitation will not affect the possibility of a court or administrative body requiring the SP to block or terminate particular infringement.

We can see blocking in most of the countries' legislations. For instance in Hadopi Law and Digital Economy Act, there is big pressure on the SPs to block or take down the material on their services. Moreover, in some cases the administrative bodies act as

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<sup>89</sup>Cornish and Llewelyn, *op cit*, p 842

court to disconnect the internet. Since most of the countries introduced the internet as a human right, it is really difficult to answer which right should prevail. A copyright law grants copyright holder's exclusive rights in expression and provides for only private censorship. To what extent these administrative bodies could interfere and block the access to internet in order to provide IP rights?

It is important to define the extent of discretion which was given to Member States to establish the administrative bodies and interpretation of immunities for the ISP liability. Because in the end freedom of speech and access to information, which are the fundamental rights recognized by the Charter, is highly related to this filtering systems. On the other hand, it is not reasonable to put so many burden on the ISPs shoulders , just because they are providing information and related services. The balance should be established between the interests. The liability for ISPs should be drawn explicitly by considering the technological developments and the balance between the interests.

E-Commerce Directive needs a modification and renovation in the case of liabilities and each service should be taken into consideration. For instance for P2P services or search engines. Because the definitions in the E-Commerce Directive are not enough to solve the copyright infringement problems for these specific server and service types. It is also important to note and discuss the relationship between copyright and freedom of speech in order to understand why it is really crucial to determine the liability for ISPs.

In the last fifteen years, with an emerging of real debate on the relationship between the intellectual property law and human right law. Obviously it should be considered that the different characteristics of IPRs and human rights. This cannot be done without fundamentally reshaping IP law as it stands today, which requires an interference from WIPO and WTO.

Digitization and network connection enable the copyright works to be easily copied and distributed in very limited time. Today, anyone with an access to a computer and internet could edit, transform media products and them make creative appropriations available all around the world. This empowerment has brought delight to millions of internet users and big concern to many copyright holders.

As the technology evolves, the more vast works can be speeded on the internet and it causes big losses for the copyright holders. Some are arguing that alternative ways to protect public domain of knowledge and creativity should be developed and to assure many artists and entrepreneurs a fair income for their labor.

The EU copyright regime looks riotously restrictive in terms of limitations and exemptions. Copyright accords exclusive rights that in many ways operate like property rights copyright law is fundamentally an instrument of media and communications policy and an integral part of our system of free expression.<sup>90</sup> But the question could be to what extent whether copyright impedes freedom of expression and information.

Whereas copyright grants to owners a limited monopoly with respect to the communication of their works, freedom of expression and information, guaranteed under article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms warrants the “*freedom to hold opinions and to receive and impart information and ideas...*”<sup>91</sup> Assuming that every copyrighted work consists, at least in part, of information and ideas<sup>92</sup> a potential conflict between the copyright and freedom of expression is apparent.<sup>93</sup>

Copyright- free speech embrace has unrevealed in recent decades. In many ways, copyright now stands for private censorship, not public liberty. Copyright once helped a free authors and the press from servile not affect dependency on royal and church patronage; it now gives media conglomerated control over the images, sounds and texts that are the very language of our culture. Copyright once made it possible for authors to disseminate their message to a broad audience; it now makes outlaws of millions of individuals who post their digital remixes and mashups of copyrighted expression on Myspace or Youtube.<sup>94</sup>

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<sup>90</sup> See Wu, T., “*Copyright’s Communication Policy*”(2003)

<sup>91</sup> See the Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>92</sup> P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989 (discussing ‘informational’ nature of work of authorship)

<sup>93</sup> See for the United States: Melville B. Nimmer, ‘Copyright vs. the First Amendment’, 17 *Bulletin of the Copyright Society* 255 (1970); Lionel S. Sobel, ‘Copyright and the First Amendment: a gathering storm?’, 19 *ASCAP Copyright Law Symposium* 43 (1971). For more recent discussion, see Neil Weinstock Netanel, ‘Asserting Copyright’s Democratic Principles in the Global Arena’, 51 *Vanderbilt Law Review* 217 (1998); Stephen Fraser, ‘The Conflict between the First Amendment and Copyright Law and its Impact on the Internet’, 16 *Cardozo Arts & Ent. Law J.* 1

<sup>94</sup> Natanel, N., “*Copyright’s Paradox : Is the Copyright ‘ The Engine of Free Expression?’*” (2008)

Copyright holders are generally free to withhold permission from using their works as they wish. Holders do not frequently exercise that discretion to suppress a speaker's use of copyright protected expression. In some cases, in the closest core of what we generally think of as censorship, the holder suppresses speech to avoid criticism, to prevent the disclosure of embarrassing information or to push down the speaker's political or cultural message. For instance, media firms generally block the speech which they suspect could impair the market value of a work in their business models or challenge the dominance over the market for distributing cultural expression.<sup>95</sup>

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<sup>95</sup> Tushnet, R., "Copy This Essay : How Fair Use Doctrine Harms Free Speech and How Copying Serves It", (2004)



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