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THE LIABILITY OF INTERNET INTERMEDIARIES IN ONLINE COPYRIGHT LAW ENFORCEMENT: EVOLUTION AND COMPARISON OF THE EU'S AND THE USA'S APPROACH

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AUTHOR'S DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this thesis. All the used materials, references to the literature and the work of others have been referred to. This thesis has not been presented for examination anywhere else.

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ABSTRACT

The paper aims to examine the current role of intermediaries in the digital space copyright law by assessing the efficiency of modern solutions and mechanisms employed in copyright regulation. The analysis focuses on a comparative assessment of the United States (USA) and European Union (EU) jurisdictions, evaluating their perspective approaches to intermediary liability and copyright enforcement. The paper provides insights into the challenges and opportunities associated with intermediary involvement in copyright protection. Additionally, the study proposes future actions and recommendations to enhance the regulatory frameworks governing intermediaries in the digital copyright landscape.

The paper assesses the problem of modern copyright law and legal mechanisms that support its implementation are evaluated in this paper. Additionally, this thesis aims to demonstrate the extent of liability assumed by intermediaries in both the USA and the EU.

The thesis asserts in the first part of it (Chapter 1) that internet intermediaries have a crucial responsibility in ensuring compliance with copyright law, and this hypothesis is supported through an analysis of diverse legal opinions presented in the paper. It argues that internet intermediaries must implement specific measures to prevent and detect online copyright law violations, given their unique position in copyright enforcement. However, the implementation of these measures varies across countries, leading to an unbalanced landscape. Approach of the EU legislative framework will be given in Chapter 3, whereas American approach will be discussed in Chapter 4. Chapter 5 provides a comparison of both systems, demonstrating the differences among the systems. This paper critically discusses the problem of copyright enforcement in digital sphere, providing a comprehensive exploration of the challenges and opportunities surrounding the measures that can be employed by intermediaries for effective copyright enforcement in Chapter 6. However, the whole picture of measures that could be used by

intermediaries is not yet balanced through all of the countries. The paper will thoroughly discuss this problem respectively.

In the last part of this work, the paper suggests that the copyright law legislation must be updated and needs specific amendments to be proposed. Therefore, some suggestions will also be included in the last part of thesis in order to offer theoretical solutions to the existing copyright law problems in the light of digital sphere.

The methodology for the research is a combination of theoretical approaches that involves qualitative methodology. This research paper adopts qualitative methods to analyze the involvement of internet intermediaries in copyright enforcement within EU and the US.

This thesis is written in English and is 46 pages long, including 7 Chapters.

Keywords: Directive on Copyright in the Digital Single Market, Directive on e-Commerce, Intellectual property rights, Safe harbour, Copyright mechanisms.

LIST OF ABBREVIATIONS

DSA	Digital Service Act
DSM	Digital Single Market
DMCA	Digital Millenium Copyright Act
ECD	The E-Commerce Directive
EC	European Commission
e-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
CJEU	Court of Justice of the European Union
CDA	Communication Decency Act
Copyright Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
EU	European Union
ISP	Internet Service Provider

INTRODUCTION

Online intermediaries have become key players in copyright law by facilitating a significant portion of content online. As a result, ISPs became even a major part of people's everyday life. Initially, only text materials could be posted on hosting services, but advancements in online technology have enabled users to upload larger files, including music, games, software, movies, books, and images, to ISP's platforms. Unfortunately, this has also led to an increase in internet piracy. Internet piracy is the occasion when the content posted on ISP's platforms had not obtained the license or prior authorization to be posted. In consequence, there has been a rise in copyright law infringement cases involving internet users. Despite the urgency of the issue, this research the continued challenge of effectively enforcing copyright law across jurisdictions.

The existing legislative measures demonstrate inherent flaws as they struggle to keep pace with the rapid advancements in technology, resulting in a lag in the drafting and enforcement of new rules and rights for copyright owners and users in the digital realm. Through the examination of various jurisdictions' experiences with online law enforcement mechanisms, it has become evident that amendments to copyright law are necessary. The ineffectiveness of copyright law in the online sphere can be attributed to the absence of a cohesive and clearly defined legal framework that adequately addresses the role of intermediaries. This paper's analysis will shed light on the deficiencies within the online copyright regulatory framework, emphasizing the need for improvements and reforms.

The current issue surrounding copyright enforcement centres on the question of who should be held responsible for online infringements. Since the creative content is often posted and could be accessed online, it is crucial to protect intellectual property rights as fundamental right to property. The topic is highly contested and must be addressed to safeguard this fundamental humans right. While it is unpopular and inefficient opinion that internet users shall held liability for online infringements, the research aims to identify solutions to the issues of the internet intermediary's liability scope and the

applicable mechanisms they use to minimize copyright law violations' impact. Internet service providers also recognize the legal risks they face in their pursuit of commercial success. Therefore, it is essential to analyse the liability of the Internet intermediaries first.

This paper analyses the copyright laws in both the USA and the EU jurisdictions. The evaluation includes an assessment of the various systems and measures that they utilize. A comparative overview of both systems will be given. It will be discussed that the systems had the similar views regarding the copyright law 30 years ago, but nowadays the situation changed rapidly with the recent enforcement of ECD legislation, one of the most controversial pieces in the European Union history, mainly, Articles 15 and 17.

This research has two objectives. First, it pursues to assess the legal rules in two legal systems. More generally, it defines the principles underlying the EU's and US's approach. Second, the research examines the major copyright mechanisms.

The primary question guiding this thesis is: Are intermediaries liable for copyright violations? The second question is: What are the primary and most effective copyright law mechanisms utilized in the European Union and the United States?

Hence, this thesis is divided into two parts: the first one describes the juridical approaches of the USA and EU systems. The first part outlines the evolution of copyright law from the historical perspective, bringing both the similarities and differences of the approaches the EU and US tend to apply. It is an introductory part that establishes the specific research questions and explores the background of copyright legislation in the chosen geographical areas.

The second part then deals with more practical analysis of different mechanisms using in the legal frameworks in order. This investigation of measures that are applied in the juridical systems in question will help to compare approaches of them in more practical way. Some critical arguments found in academic literature and investigations of the legislation will be discussed. The critics will strengthen the hypothesis that the modern internet liability law have a different weak point.

The last Chapter of this work suggests the creation of a specific forum for copyright law that will help to reduce the impact of the current problems of this area and may help to improve the whole picture. The main conclusion that may be drawn from the perspective analysis is that the balance of users' and intermediaries' rights have to be reached. In the Chapter the couple of solutions that may solve this issue are discussed.

1. COPYRIGHT LAW

To begin, the provision of a concise overview of the underlying principles and objectives encompassed within copyright law will be discussed. Copyrights could be considered as a species of intellectual property, and the purpose of copyright law is to establish a legal framework that protects the rights of both internet users and copyright holders. One common legal issue faced by copyright owners is the unauthorized uploading of their copyrighted materials onto various hosting platforms. Lawsuits arising from such cases often seek to determine whether internet service providers are responsible for these violations or what kind of responsibilities should be imposed on them respectively. On the other hand, users who post infringing content can also be liable, but this scenario is much more unpopular to be used due to the anonymous nature of the Internet. It is impossible to identify the users who posted infringing materials. That was the main reason why copyright owners started to turn to ISPs in order to claim their responsibility for posting of infringing content.

Traditionally, logics of copyright law is related to droit d' auteur or the civil law system (adopted in countries like Germany and France), and the common law or copyright system respectively and are rooted in the natural rights theory and the utilitarian theory.1 Within each system, individual countries have adapted copyright law to their own legal frameworks, resulting in variations even within the same tradition.

Due to the fragmented nature of copyright law, the US and EU national laws have a different purpose to approach. The first response to technology and information society was made by the copyright law.2

However, the general purpose of copyright law is to promote the creation of new works. Copyright law seeks to achieve this goal by granting the exclusive rights in their creations for a set period.[3]

[1] Quintela Ribeiro Neves Ramalho, A.B. (2014). The competence of the European Union in copyright lawmaking: A normative perspective of EU powers for copyright harmonization.
[2] Bell, T. W. (2007). *Copyright as Intellectual Property Privelege*. Syracuse Law Review, Vol. 508, 523-46.
[3] Mitchell, L. (2021). *Rethinking copyright and the internet: a new model for user's rights*. University of Sussex.

There is an argument that copyright law rights are closely related to the fundamental human rights. It could also be asserted that intellectual property is a subsection of the fundamental right to property4 with a pointing out that "fundamental right to property, which includes intellectual property rights such as copyright and the fundamental right to effective judicial protection constitute general principles of Community law.[5]

However, some academics brought arguments against this notion. For example, Tom Bell compared the traditional rights that are granted under copyright law to the rights of traditional property, we may reach a conclusion that copyright functions have the same functions as a right of property. The rights of property are: Rights of Exclusion, Use, Alienation, Acquisition, Preservation, and Compensation. He argues that these rights does not represent the actual property, but rather the «the privilege».[6]

Intermediary liability regime was introduced two decades ago.[7] The basic principle underlying the liability were that OPs do not have to monitor the information they posted and seek circumstances or facts of illegal activity.[8] Indeed, monitoring obligations can lead to a legal presumption of knowledge on platforms. By monitoring, platforms may be deemed to have knowledge of any infringing materials on their networks, and therefore may be held liable if such availability persists. This is because monitoring implies that platforms should be aware of the infringing content, regardless of whether they actually know about it or not. If infringing remains accessible on the platform despite monitoring efforts, there is a possibility that the taken measures were inadequate, and the platform could face liability. The safe harbor exception is widely accepted principle in copyright law. This exception limits the legal liability of platforms under certain circumstances. To benefit from this exception, platforms need to demonstrate that they were unaware of the presence of illegal content in order to qualify for the safe harbor protection.

[4] Article 17 (2) Charter of Fundamental Rights.
[5] Ruse-Khan, H. G. (2013). *Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights*. Max Planck Institute for Intellectual Property & Competition Law Research, 13-18.
[6] Bell, T. W. (2007). *Copyright as Intellectual Property Privilege*. Syracuse Law Review, Vol. 508, 523-46.
[7] Frosio, G. (2018). *To Filter, or not to Filter*? Vol. 36:2, Cardozo Arts & Etertainment
[8] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1, 13, art. 15

The safe harbor provisions that require online service providers to remain passive and act reactively can lead to a concept known as «willful blindness». Willful blindness persists to the conscious choice made by OSPs to deliberately remain unaware or uninformed about infringing activities occurring on their platforms. Despite being in a prime position to actively monitor and filter out infringing content, OSPs may opt not to do so. Hence, OSPs may deliberately ignore infringing activities in order to protect themselves from liability, by arguing that actively monitoring or filtering content would require significant resources, impede freedom of expression, and potentially lead to false positives or censorship. By adopting this passive approach, OSPs exploit a loophole that enables them to profit from infringing content without assuming any accountability.

2. INTERNET INTERMEDIARIES

The aim of this section is to elucidate the features and definition of internet (online) intermediaries, as well as explore the divergent perspectives on their liability. It is crucial to grasp the concept of internet intermediaries and identify their distinctive attributes in order to effectively examine the issue of their legal responsibility.

As it was affirmed by J. Riordan, it could be argued that offline and online intermediaries have three common features:

1. They bring a negative impact and harm third parties in an insufficient way;
2. The prima facie liability of both online and offline intermediaries is not determined by universal principles of secondary responsibility;
3. Their presumptive liability is limited by public.[9]

It is important to emphasize that the definition of internet intermediary definition should be confined to «pure intermediaries», while excluding service providers who «give access to, host, transmit or index content or services that they themselves originate». Therefore, internet publishers, broadcasting providers and media that host their own produced content are not to be considered as intermediaries.[10]

In brief, internet intermediaries are entities that enable others to access content created by third parties through the provision of internet-related services.

There are three key conditions associated with internet intermediaries:

[9] Riordan, J. (2016). *The Liability of Internet Intermediaries*. Oxford University Press.
[10] Rebecca MacKinnon, E. (2014). Fostering freedom online: the role of Internet intermediaries. UNESCO Digital Library.

the actor must (a) provide services related to the internet; that (b) involve content produced by somebody else; and (c) are used by third parties.[11]

The legal literature presents various rationales concerning intermediaries' liability. According to one viewpoint, in order to hold intermediaries accountable for any potential harm arising from their platforms, it is argued that they should actively monitor all uploaded and hosted content.[12] On the other hand, the continuous involvement of intermediaries in copyright law could heighten the potential for an imbalanced economic burden and have adverse effects on the dynamism of e-commerce.[13]

European legislator established two different liability regimes that tend to apply for «neutral» and «non-neutral» intermediaries.[14] «Innocent» intermediaries are not implicated in the third party infringement, and «guilty» ones are. If a neutral intermediary satisfies certain criteria, it may be subject to injunctive orders, whereas non-neutral intermediary should be held accountable for both monetary and injunctive relief.[15]

Previously, the conventional approach to the issue of Internet intermediaries liability dictated that hosts and carriers were expected to adopt a passive stance until they receive notification of copyright infringements on their networks.[16] The obligation to take action only arose after receiving a notification.

What is more, in the past, when the Internet was considered as a «no man's land», the prevailing argument was that Internet intermediaries were not held liable for any copyright infringements, and their role was seen as passive.[17]

[11] Farano, B. M. (2012). *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S.* Approaches. TTLF Working Paper No 14.
[12] Edwards, L., Waede, C. (2008). *Online Intermediaries and Copyright Liability*. WIPO Workshop Keynote Paper.
[13] Jougleux, P. (2017). *The Role of Internet Intermediaries in Copyright Law Online Enforcement*. Springer International Publishing.
[14] Galka, K. (2016). I*ntermediary Liability in the European Union: Is There a Way Forward?* Journal of Intellectual Propertym Information Technology and Electronic Commerce Law.
[15] Angelopoulos, C. (2016). *European intermediary liability in copyright: A tort-based analysis*. Universiteit van Amsterdam.
[16] Fagiolino, M. (2015). *Liability for Copyright Infringement: What Role in Fighting Piracy?* European Journal of Law and Technology
[17] Macaulay, T. (2010). *Upstream Intelligence: A New Layer of Cybersecurity*. IANewsletter, The Newsletter for information assurance technology professionals, vol. 13, no. 3.

In recent times, the role of intermediaries has shifted towards an active position, allowing them the right to actively monitor and manage the content that is downloaded or posted on their networks. While though safe harbors provisions may provide immunity from copyright infringements' liability, the boundaries of these provisions are constantly evolving.[18] Even though a context in which safe harbor could be applied may vary from country to country, the general principles that are contained in most statutes are similar. Moreover, the passive role of intermediaries is not a condition for immunity. Intermediaries possess various technical capabilities that can be utilized for the purpose of infringing activities and profit extraction. They do also have the ability to control and monitor the content posted the users post on their platforms. Consequently, intermediaries have the potential to contribute to the transformation of the application of online copyright rules. This shift has primarily occurred due to the pressure exerted by rights holders on legislators, urging them to impose some obligations on intermediaries.[19]

It can be argued that internet intermediaries have frequently hosted content without obtaining prior consent from the copyright owners. However, the posting of internet content is nowadays territorially fragmented, so intermediaries may avoid liability due to the disharmonized censorship regimes across the different jurisdictions.[20]

[18] Senftleben, M. (2018). *Intermediary Liability and the EU Copyright Reform - Caught Between Safe Harbours and Regulating the Platform Economy*. International Review of Intellectual Property and Competition Law.
[19] Beer, J. D. (2009). *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?* Jurimetrics, Vol. 49, No. 4.
[20] Stromdale, C. (2007). *Regulating Online Content: A Global View*. Computer and Telecommunications Law Review.

3. EUROPEAN COPYRIGHT LAW

The EU copyright framework's primary objective is the protection of the intermediaries that carry content rather than content generators or supporters.[21]

The legislation within the EU recognizes the exclusive rights of authors, encompassing both economic rights for controlling the use of their works and moral rights. Thus, it can be established that copyright law is an economic tool that maintains rightsholders to control their creations.

The centrepiece of the modern EU intermediary liability legislation is based on ECM and DSM Directives. The E-Commerce Directive provisions are not only limited to copyright law, but also include trademark and other electronic commerce areas.[22] Also, the eCommerce Directive established a horizontal liability limitation through a fit for purpose regulatory environment applicable for both platforms and intermediaries.[23]

In the mid-1990s, a decision was made to grant online intermediaries exemptions from liability for copyright infringements committed by users. This movement towards providing «safe harbours» closely followed the introduction of similar provisions in the USA's safe harbour's introduction in 1996. The first safe harbour provision in the EU was established under Article 12 of Electronic Commerce Directive (ECM). The EU legislation implemented three safe harbours, drawing inspiration from the US copyright law, which offer immunity from monetary compensation claims and other forms of liability. These safe harbours provisions are categorized based on the types of services provided, namely mere conduit, caching, and hosting.[24]

ECM introduced a comprehensive approach that encompasses all categories of works. Each safe harbor provision within the directive sets out specific conditions that

[21] Ramalho, A. Q. (2014). *The competence of the European Union in copyright lawmaking: A normative perspective of EU powers for copyright harmonization*. International Journal of Law and Information Technology, 24(4), 285-314.
[22] Peguera, M. (2009). *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*. The Columbia Journal of Law & the Arts.
[23] Commission of the European Communities, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, §3.3, COM (2015).
[24] Delle Piane, G. (2018). *The liability of Internet intermediaries for copyright infringement: a comparative perspective.* International Journal of Law and Information Technology, 26(2), 122-155.

intermediaries must meet in order quality for the exemption. Article 15 of the E-Commerce Directive explicitly prohibits intermediaries from being subject to a general obligation to monitor the information they transmit or store, and also prohibits general obligation to actively seek out facts indicating illegal activity. In order to qualify for the exemption, the intermediary must not a) Initiate the transmission, b) select the receiver of the transmission, c) select or modify the information contained in the transmission.[25]

The European legal landscape is a plural one with the extension of safe harbour to every civil law issues. The European legal landscape the interrelationship between national and supranational is a referential one.[26]

The foundation of EU copyright law is rooted in the notion of natural rights, which asserts that authors possess inherent rights to control the utilization and exploitations of their creations.[27] European legislation aims to safeguard the interests of authors[28], placing significant emphasis on the protection of their moral rights.[29] For instance, some authors within European legal framework are granted exclusive rights to uphold the integrity of their works and prevent any alterations that could potentially damage their reputation. Unlike the American system, the European perspective on copyright law in the EU encompasses a broader range of objectives, incorporating various social considerations alongside the protection of authors' rights.

Safe introduction of harbor principles within the EU were has led to a lack of clarity and ambiguit in their interpretation. Currently, experts and scholars generally maintain a sceptical stance regarding the necessity of reforming the European legislative framework governing safe harbors under the ECD. Simultaneously, there is a growing trend among

[25] The Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, 18 November 1998

[26] Koopmans, T. (1991). *The Birth of European Law at the Cross Roads of Legal Traditions.* The American Journal of Comparative Law.

[27] Ibid.

[28] Geiger, C. (2013). *The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law*. Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 13-06.

[29] Senftleben, M. (2004*). Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law*. Instituut voor informatierecht.

legal experts advocating for increased responsibility on the part of internet intermediaries in addressing intellectual property infringements in the digital era.

The further step in the sense of copyright regime updating was made in 2015 with creation of copyright reform, specifically Article 17 of the DSM (Digital Single Market), aimed to diminish the extent of protection granted to internet service providers (ISPs) under the safe harbor provision, and mandated them to take proactive measures. The objective of Article 17 was to address the «value-gap» in the legislation. As per the 2016 DSM Communication, the term «value gap» refers to the inequitable distribution of revenues derived from the online use of copyrighted works among various industry stakeholders.[30]

The European stance has become increasingly strict when it comes to the liability of intermediaries. Recent provisions now necessitate intermediaries to incorporate filtering tools, and hold them directly accountable for online infringements, thereby forfeiting the protection previously afforded by the safe harbor. Previously, intermediaries were tasked with taking necessary measures to prevent the violation of others' rights in order to evade liability.

Subsequently, the Cour de Cassation determined that the overarching duty, which resulted in establishment of a judicially enforced notice and stay-down system, was inconsistent with the prohibition of general monitoring under EU law, as referring to «Scarlet v Sabam» case. Therefore, copyright holders are now required to independently monitor content of websites themselves and individually notify intermediaries of each new infringement of protected content.[31]

As regarding willful blindness concept in the EU, Article 14(1)(a) of E-commerce Directive imposes a duty on OSPs to act promptly upon obtaining knowledge of awareness of illegal activity or information. If an OSP becomes aware of facts or circumstances that suggest illegal activity, they are expected to take measures to remove or disable access to the illegal content.

[30] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: promoting a fair, efficient and competitive European copyright based economy in the Digital Single Market

[31] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 12, 2012, Bull. Civ. I, No. 100831 (Fr.)

Online content-sharing are subject to strict liability for user infringements. EU Member States are actively working to minimize the occurrence and severity of online copyright infringements. In 2017 Communication clarified the liability of hosting providers who take proactive measures, commonly referred to as so-called «Good Samaritan» actions. The European Commission argues that implementing voluntary proactive measures does not automatically result in the forfeiture of the liability exemption provided under Article 14 of the E-Commerce Directive. The concept of protecting «Good Samaritans» has its origins in the US's Communications Decency Act (CDA) Section 230 (c) (2), which grants immunity to online service providers for taking in good faith actions to restrict access to objectionable material, even if such material is constitutionally protected. However, the interpretation of Good Samaritans principle by the EC does not align with the protection offered by Section 230 (c) (2) of the CDA. The CDA protects intermediaries not only when they take voluntary measures to restrict content but also when they fail to detect and remove such content entirely.

EC's approach lays in the prescription that hosting providers falling under article 14 of the ECD will not be punished if they take proactive steps to detect, remove or disable access to illegal content, in other words, taking Good Samaritan actions. There were calls to include this clause into EU's legislative framework. The Article prescribes to use filtering technologies as such Content ID and also to negotiate for licenses. In case the license is obtained, any strict rule will not be applicable to an online platform. Automated filtering technology, which uses content recognition tools, is receiving significant attention and is likely to become the new industry norm.

Both, filtering technologies and licenses solution are under the criticism from legal experts. Thus, filtering requirement turn to be in controversy with knowledge-and-take-down, negligence-based liability system and seems to be illegal according to Directive 2000/31/EC and to Scarlet v Sabam and Sabam v Netlog case. Moreover, it has been discussed that introduction of compulsory filtering technology de facto imposes a general monitoring obligation.[32] In SABAM and L'Oreal cases (Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) and L'Oreal v. Ebay case, the ECJ has evaluated the appropriateness and proportionality of injunctions issued under

[32] Frosio, G. (2018). To Filter or Not to Filter? That Is the Question in the EU Copyright Reform. Cardozo Arts & Entertainment Law Journal, p. 131.

the Enforcement Directive and concluded that conflicting measures cannot be taken under other intellectual property legislation, as limited by the eCommerce Directive. The Court also addressed the matter with respect to hosting providers in the Netlog case (Sabam v. Netlog), and its decision is applicable to the proposed Article 13. The Court ruled that European law prohibits requiring a hosting provider to install a filtering system that indiscriminately applies to all of its service users, as a preventative measure, exclusively at its own expense, for an unlimited period, and capable of identifying electronic files containing musical, cinematographic or audio-visual works. The CJEU has interpreted the EU legal framework to allow for extremely limited proactive monitoring obligations. In L'Oreal v. Ebay, the Court did not address whether knowledge of a current infringement would require the hosting provider to prevent future infringements. Instead, the Court held that any measure imposed on a hosting provider must meet certain criteria, including being effective, dissuasive, fair, proportionate, and no excessively costly, and must not create barriers to legitimate trade. Above all, the Court emphasized that such measures must not amount to a general monitoring obligation. The ECJ therefore appears to suggest that all of these criteria will only be met in very specific satiations when it comes to an injunction to prevent future infringements.

The requirement to obtain licenses from each copyright work owner is not a realistic approach to be followed in practice as well. Another critical point claims that the tools discussed above have lack of clarity on how these technologies should be working, and in combination with lack of procedural safeguards and risk of over enforcement there is also a risk of over enforcement and taking down too much content, including the legal one. Despite that fact, EU tends to continue pressing publishers in order they be assured EU legislators create new rights to control online uses of contents.

In recent case law intermediaries have been subject to proactive monitor obligations for copyright infringement. For instance, Cour d'Appel Paris imposed on search engines obligations to remove links to the illegal movie streaming website Allostreaming and affiliated enterprises.[33] In another case, Youtube was found to have a proactive monitoring obligation and a strict liability standard for infringing Dafra's copyright in a commercial dubbed by an anonymous user with comments tarnishing Dafra's

[33] [CA][regional court of appeal] Paris, Nov. 28, 2013, APC et al v. Google, Microsoft, Yahoo!, Bouygues et Al

reputation.[34] Gema v. RapidShare case found that host providers are ineligible for the liability privilege under the TMA if their business model is primarily based on copyright infringement.

At the same time, the position that there is no place for general proactive monitoring and filtering mechanisms under EU law has been repeatedly reinforced by the European Court of Justice. This was emphasized in the case of Scarlet Extended SA v. Societe belge des auteurs, compositeurs et editeurs, where the court clearly stated this position.[35]

As for other scope of obligations that can be imposed on online intermediaries, it can be noted that in UPC Telekabel Wien the CJEU ruled that an internet service provider could be ordered, based on a court injunction, to block its customers' access to a website hosting copyright-infringing materials. In Eva Glawischnig-Piesczek v Facebook Ireland, the CJEU clarified that a social network platform operator can be ordered to find and delete identical and equivalent comments to an illegal defamatory comment made by a user. However, implementing such an approach without entailing a general monitoring obligation would be challenging.

These rules indicate that while general monitoring and filtering obligations are not permitted under the E-commerce Directive, narrower obligations can be imposed based on court injunctions or specific instances of infringement.

[34] R.J.T., Ap. Civ. No. 1306157, 24.03.2014

[35] Case C-70/10, Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs

4. USA'S COPYRIGHT LAW

It is essential to understand the general principles under which US's copyright law operates. Americans preferred a sectoral approach, and the application of safe harbours took place for copyright issues only.[36] The theory of American copyright law is utilitarian. This justification has played a significant role in shaping its approach to moral rights. Moral rights are commonly recognized in European countries. Overall, the difference in approach between the US and EU regarding moral rights reflects their perspective legal traditions, cultural perspectives, and underlying philosophical foundations of copyright law. The USA's legislation mostly seeks to protect not the creators, but the society from the valuable materials.[37] The justification of such approach lays in incentive to invest in the creation and distribution of original works to the public. It means that work creators have to be granted with exclusive rights to control, reproduce and distribute their works.[38] Hence, the main purpose of copyright is the conception of enriching and enlighten of works to the public, establishing the promotion of the scientific and technological progress.

The utilitarian justification resists to recognize the moral rights of authors. Utilitarian justification, developed by Jeremy Bentham and John Stuart Mill, focuses on promoting social welfare. According to this perspective, copyright serves the purpose of incentivizing creative endeavours and facilitating the dissemination of intellectual works to the public. Utilitarians perceive copyright as a positive right established by the legislature to advance societal goals. This doctrine is commonly used in the European member states, too.

In 1996 Americans were the first who introduced safe harbour approach to the speech the intermediary carries.[39] After that, in 1998, the Digital Millennium Copyright Act introduced more stringent requirements for safe harbours.[40] DMCA is a centrepiece of American copyright legislation regarding to copyright law.

[36] Fromer, J., C. (2014). *An Information Theory of Copyright Law*. Emory Law Journal, Volume 64, Issue 1.
[37] Ibid.
[38] Berne Convention for the Protection of Literary and Artistic Works, Article 9(1)
[39] See Communications Decency Act of 1996, 47 USC § 230
[40] See the Digital Millennium Copyright Act of 1998, 17 USC § 512 (DMCA)

Basically, DCM provides safe harbours in four situations that would be discussed further.

The DCM 512 (a) provides safe harbour for «conduit», that offers Internet access service to transmit information on the Internet. For this ISP the exemption would apply if the following prerequisite are met: (1) the transmission of the material is initiated by a third party; (2) the whole process of transmission is carried out automatically and without selection and modification of the material by the ISP; (3) the ISP does not select the recipients; (4) no copy is maintained on its system longer than necessary and can not be accessed by others than the targeted recipients.[41] The main used mechanism to achieve the goal of efficient copyright system is notice-and-takedown procedure. Providers also have not to receive an economic benefit occurred in relation to copyright infringing, if the service provider had the right to control such activity.[42]

In the USA, the doctrine of wilful blindness has been applied in various legal contexts, including copyright infringement cases. The Hard Rock Café case illustrates the application of this doctrine in the context of trademark infringement.[43] The court held that a defendant could be deemed to have knowledge of the infringement if they had a reasonable suspicion of wrongdoing and deliberately failed to investigated. Additionally, under the DMCA's safe harbor provisions (17 USC §512(c)(A)(ii)), OSPs are required to respond to «red flags» or instances where they have actual knowledge or awareness of infringing activity. If an OSP becomes aware of specific aware of specific facts or circumstances that indicate the presence of infringing content, they are expected to take appropriate action, such as removing or disabling access to the infringing material. These facts or circumstances serves as a trigger for OSPs to exercise due diligence and take action when they become aware of potential infringements. Failure to do so may result in the loss of safe harbor protection and potential liability for copyright infringement.

Second safe harbor relates to the «caching» kind of storage and the conditions for the exemption are the same that in the first safe harbor.

[41] DMCA, Sec. 512 (a)
[42] DCMA, §512 (c)(1)(B)
[43] Case C-70/10, Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs

The third safe harbor should be applied for «host» that offers Internet storage space for its users to upload the materials.[44] The conditions for the exemption here are that the ISP does not have knowledge that the materials hosted on the system is unlawful, or upon obtaining such knowledge removes the material from the system.[45]

The fourth category of ISPs that may enjoy safe harbour «online directories and hyperlinks».[46]

In the USA, besides the fact that DCMA does not impose a requirement to monitor infringing material, monitoring measure is required to be eligible for exemption.[47]

The model of American copyright law includes built-in flexibility norms. The fair use doctrine is one of the most important doctrines included in copyrighted work protection. The principle of this doctrine is the permission to use a limited share of a protected copyrighted work.[48] As such, the doctrine gives the right to use copyrighted work under specific conditions and there is no permission of the owner needs to be asked for.[49] That is a flexible and open-ended principle that aims to strike a balance between the rights of copyright holders and the rights of users.

This open-ended nature can lead to uncertainty and inconsistencies in its application. Fair use in the USA has been developed primary through case law, which means that its interpretation and application have evolved over time through court decisions. As a result, outcomes can vary from case to case. Furthermore, reliance on case-by-case analysis leads to the consequences of unclear guidance for individuals seeking to use copyrighted material in user generated content scenarios. There are some case laws, as Penguin Books, Bridgeport Music, and Axanar Productions that have limited the scope of fair use and taken a stricter approach to copyright infringement.[46] According to these cases, the need for permission or licensing when using copyright material is existing, particularly in cases

[44] Sec. 512 (c)(1), DCMA
[45] Sec. 512 (c)(1)(A), DCMA
[46] 17 USC 512 (b) (1), DCMA
[47] Lital Helman, G., P. (2011). The Best Available Technology Standard. Columbia Law Review.
[48] Section 107 of the U.S. Copyright Act of 1976
[49] Is has to be noted that fair use is not an absolute rights and requires a case-by-case analysis of four factors to determine whether a particular use of copyrighted material qualifies as fair use.
[46] Penguin Books Ltd. V India Book Distributors and Others, Bridgepot Music Inc. v. Dimension Films, Axanar Prods. Inc. v. Paramount Pictures Inc.

where the use is considered commercial or directly competes with the original work. As a result, there is ongoing debate and uncertainty regarding whether most forms of user generated content can be considered fair use without explicit permission or a «no action» policy from the copyright holder.

Besides, American based companies have much more economic power than EU based ones. The American system is relatively stable in the sense of preferred copyright mechanism. Americans support already existing notice-and-takedown regime. The Digital Millennium Copyright Act (DMCA) introduced the notice and takedown system as a means to address copyright infringement of the internet. Moreover, the biggest online platforms based in US adopted and continuedly implementing the takedown request rules. Under this system, copyright owners can send a notification to online service providers to request the removal of infringing content. The service provider, upon receiving a notice, is required to remove or disable access to the infringing material. This system was intended to strike a balance between protecting the rights of copyright holders and preserving the ability of online platforms to operate without being held directly responsible for user-generated content. This system has become a widely adopted practice in the online ecosystem globally. This tendency may lead to the rejection to implement European Article 17-rules specifically in the US. New liability rule under this article is in contrast with pragmatic, tech-friendly and utilitarian American approach.[50]

[50] Samuelson, P. (2020). *Regulating Technology Trhough Copyright Law: A Comparative Perspective*. 42 European Intellectual Property Review.

5. COMPARATIVE ANALYSIS

This Chapter will analyse the differences and similarities of both the EU's and the USA's systems.

It may be affirmed that over the past couple of decades the both systems had the same copyright rules underlined, mainly in regards to copyright law. The evolution of copyright law within digital frames began in the 1980s and 1990s, when both US and EU systems expanded the copyright protection to computer programs.[51] The copyright rules in these jurisdictions were similar.

Another legal framework that both jurisdictions supported is WIPO conference with the following WCT rules (WIPO Copyright Treaty) that apply to programs, databases and give copyright owners right to control copies of work distributing and communicating to the public. In both jurisdictions, ISPs may benefit from the liability exemption if the promptly remove infringing materials from their platforms upon copyright owner notification given to them.

Nevertheless, the recent DSM Directive that was adopted in the EU highlights the distinctions made from the general trend. Some EU lawmakers supposed that the US approach has to be changed and adopted in accordance with the recent European legislative developments. It may be claimed to be an impossible solution due to the strong differences of the systems in normative justifications, regulatory approaches and attitudes to copyright law.

The primary distinction of jurisdictions lies in their fundamental contrast in premises. The legislation of European nations tends to prioritize principles of justice and personal rights for copyright holders. The whole European system places greater emphasis on the strengthening of right holders' rights, and the US tends to rely more on economic and cultural rationales in its copyright framework.

[51] Samuelson, P. (2020). Regulating Technology Through Copyright Law: A Comparative Perspective. 42 European Intellectual Property Review

The EU's and US's jurisdictions introduced the safe harbours rules into their copyright law. The safe harbour rule justification lays in idea that the private sector should not born the burden of control.[52]

In both juridical frameworks there are the same requirements to enjoy the exemption – ISPs should not know the infringement in question, or prior knowing the infringement, should remove the infringing materials.[53] If an intermediary failed to block access to the unlawful content, then this content renders it liable. So, to be eligible to enjoy the safe harbour provisions, the intermediary has to remain passive or act reactively, which may lead to wilful blindness.[54]

It can be stated that the past approach of both systems is more and less the same. Over the last years the intellectual property rules of both systems were on convergent paths.[55]

However, in the modern approach a lot of differences may be found when we compare the rules applicable in both legal families. The main difference here is the notice-and-takedown procedure codification. In the USA notion-and-takedown provisions are codified in DMCA Act, whereas the E-Commerce does not impose the obligation on member states to implement it.[56] The European legislators was worried that this procedure may bring a negative influence on the freedom of expression and, therefore, it is for national laws to decide about the procedure's frames.[57]

What is more, US's system tends to apply copyright provisions only in the cases relating to copyright law, while the EU's copyright provisions are not limited to copyright law only. Another difference could be found in the approaches to intermediary liability – the EU applies a horizontal approach and the US solution is a vertical one, when different liability regime regulates the certain type of content.[58] In the EU, the safe harbor

[52] Jougleux, P. (2017*). The Role of Internet Intermediaries in Copyright Law Online Enforcement*. EU Internet Law.
[53] DMCA (n1), Sec. 512 (c) (1) (A); E-commerce Directive (n1), Art. 14, 1.
[54] In re Aimster Copyright Litigation 334 F.3d 643, 650 (C.A.7 (Ill.),2003) ("Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant should have known of the direct infringement").
[55] Samuelson, P. (2020). *Regulating technology through copyright law: a comparative perspective*. University of California.
[56] DMCA (n1), Sec. 512 c (3) and g; E-commerce Directive (n1), Recital 40.
[57] Pacewicz, K. (2020). *Copyright Kaw in the Digital Environment: An EU-US Comparative Analysis*, 9 Int. J. Entrepreneurship and Small Bus.
[58] Ibid.

provisions apply to various types of content and liability, including copyright infringement, defamation and privacy violations. In the US, the approach is more vertical, with different legal regimes governing different types of content and liability.

Both systems seem to be in agreement that a legal person is liable if the wrong doing was initiated by his own or by a person who acted on his behalf.

At the same time, neither ECD or DSA establishes the general liability scheme for social media intermediaries. Social media intermediaries fall under the sector-specific rules or of national legislation in what situation the liability had to be arisen. More specifically, Article 14 ECD and Art 5 DSA generally provide that social media intermediary will not be liable as long as they comply with the reasonable standard of care.[59]

[59] Ibid.

6. MECHANISMS OF COPYRIGHT LAW

6.1. Notice-and-takedown and notice and stay-down procedures

Notice-and-takedown procedure is often used in the American jurisdictions[57], while European member states have to decide by their own how to insert this measure in national legislation.[58] It is still the primary mechanism that assert the protection of rightsholders in copyright law. The safe harbour rule will apply if the notice and take down system was complying.

Traditionally, intermediaries were obligated to take all necessary measures to prevent infringement in order to avoid liability, this duty led to the development of a judicially made notice and stay-down system, where intermediaries were required to proactively monitor and remove infringing content. Later, Cour de Cassation in France found that this general duty that involved monitoring all content, was not compliant with the prohibition of general monitoring under EU law, resulting in copyright holders' responsibility to monitor websites themselves and notifying intermediaries of each new instance of infringement, as Cour de cassation 1e civ., July 12, 2012, Bull. Civ. I, No. 100831 referred to. The decision in this case marked a shift in the burden of monitoring and enforcement from intermediaries to copyright holders themselves.

The content owners would be provided with a notice in connection with infringing material that is stored on their platforms, so the requirement to remove the illegal content or block access to it arises.

[57] U.S.C. §512 Directive.
[58] 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.7.2000

The 2011 Communication that was followed with a consultation indicated the need for quicker take-down procedure of illegal content.[59] The Commission showed its intention to introduce a horizontal framework for notice-and-action procedure.[60] This system is designed to balance the interests of rightsholders with the need to protect the rights of OSPs and internet users. It allows rightsholders to notify OSPs of infringing content and request its removal, while also providing a mechanism for users to contest the removal if they believe it was unjustified.

Under this system, copyright holders or their representatives can submit a notice to the OSP, identifying specific infringing material hosted on the platform. If the notice complies with the requirements, such as including a good faith belief that the material is infringing, the OSP is obliged to promptly remove or disable access to the identified content.

After two decades of use, lawmakers now have the opportunity to evaluate the effectiveness of the takedown system. There is a lot of criticism about the procedure which states that success of the mechanism is disputable. The Recording Industry Association of America, for example, has referred to it as an «an endless game of whack-a-mole». It is believed that when the materials had been removed from one place it would appear in another platform.[61] Additionally, due to the potential for copies to be cached, it may be difficult for claimants to locate all instances of their material. While the system aims to promote good faith behavior, there is no oversight from the judicial system, which has led to the measure being frequently misused and abused. In particular, there are three different ways of the procedure's abuse. First, notices can be sent by the persons who are not the owners of the materials; second, the notifications sent may be used for censoring free speech; third, the procedure does not take in account the basic aspects of copyright law, such as fair use.

[59] See European Commission, "Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC

[60] Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "A Coherent Framework for Building Trust in the Digital Single Market for E-Commerce and Online Services" COM(2011) 942 final/2, 6 February 2012

[61] Kravets, D. (2020). *Forget DMCA Takedowns – RIAA Wants Isps to Filter for Pirated Content*. Ars Technica.

Inefficiency of the procedure can be based on the often out-of copyright content takedown request.[62] The effectiveness of the takedown procedure has been called into question due to concerns about its accuracy and efficient, particularly in relation to out-of-copyright materials.

For instance, a 2014 investigation by Multatuli project[63] ('Multatuli project') had been created to remove out-of-copyright materials and analyzed the reaction of internet intermediaries. Multatuli project found that seven out of ten intermediaries removed lawful material without verifying the complaint's validity, one ignored the complained and two refused to remove the content. Another study took place in 2017[64] and 1800 takedown requests out of 108 million provided by Lumen in 2013 were analysed. As a key findings showed, 98.9% were automated, in one twenty-five requests the work posted did not fall under infringing material term, 13.3% requests was difficult to locate the allegedly infringing material, one third of the requests contained doubtless about their validity. As a conclusion, the system lacks of accuracy and efficiency in addressing of copyright infringement issue.

Another strong argument about the inefficiency of the procedure is the large number of request the intermediary can receive. Google received over 200 million requests in 2016 during 3 months.[65] That made the system overwhelmed, and this number of requests could not be dealt with.

Indeed, this system played a significant role in enabling the development and growth of valuable online services. The most used and popular platforms, like Facebook, Google, YouTube have a chance to enjoy the legal protection under the safe harbor provided by notice and takedown system. Without such protections, these platforms bear significant legal risks and liabilities that have hindered their creation and growth.

[62] Christian, A. C. M. (2004). How Liberty Disappeared from Cyberspace: Ehe Mystery Shopper Tests Internet Content Self-Regulation.
[63] Nas, S. (2014). *The Multatuli Project. ISP Notice & take down*.
[64] Karaganis, J. (2017). *Notice and Takedown in Everyday Practice*. UC Berkely Public Law Research Paper No. 2755628.
[65] Spangler, T. (2016). *Google Copyright-Removal Requests Dobuled in Q1 as Piracy Fight Balloons.*

6.2. Filtering software

This measure occurred in 1998 and started to be developing since this year. The utilization of digital fingerprinting software has become more widespread in online anti-piracy endeavors. With the filtering software mechanism, the notice and take down procedure became automated, and the location of unlawful material is detected in quick way in order to takedown it from the website. Filtering is a combination of monitoring measures that aims to block or remove unlawful content.[66]

In the EU, the legislation regarding the use of copyright filter had been passed in 2019[67] EU Commissioner declared that this mechanism may be necessary despite rewording of Article 13.[68] Currently, a promotion of automated filtering on mandatory and voluntary basis is a main goal on the EU policy agenda.

This technology started to replace the notice and takedown system that may fail to detect the copies of protected work posted unlawfully. The system allows to determinate each piece of posted contents to its compliance accordingly even before the work is posted. Nowadays, the intermediaries have to implement filtering tools to be competitive in digital focusing era.

The problem with these mechanisms is that it was found to be incompatible with Article 15 of ECD and with principles of fair balance, as it was established by Sabam, Scarlet, and Netlog case law. The rulings prescribed the exceptionally board filtering mechanisms must be installed, that would cover all electronic communications for all the intermediary's customers at the cost of the provider during the unspecified period. The lack of compliance between the rulings and fair balance doctrine made the CJEU disallowed the rulings' prescriptions. The filtering obligations that may be order have to be based on a narrower manner.[69]

[66] McGonagle, T. (2015). *Study of Fundamental Rights Limitations for Onilne Enforcement through Self-Regulation*. Institute for Information Law IViR.
[67] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
[68] EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13. (2020). Dechdirt.
[69] Borgesius, S. K. (2012). *Filtering for Copyright Enforcement in Europe after the Sabam Cases*. Oxford University Press.

Similarly, in Scarlet Extended, a Belgian court ordered an internet service provider (Scarlet Extended SA) to prevent its customers from sending or receiving files containing copyrights musical works. The court required to install a filtering and blocking system to achieve this.

As L'Oreal case demonstrated, the specific filtering measures were implemented, targeting the application of filtering technology solely to a particular user or IP address that had been determined in a previous illegal activity.[70] However, some recent case laws have imposed proactive monitor obligations on OPs. For instance, R.J.T., Ap. Civ. No. 1306157, 24.03.2014, imposing a proactive monitoring obligation and a strict liability on YouTube; Zhong Qin Wen v. Baidu, 2014 Beijing Higher People's Court ruled that Baidu had a responsibility to monitor and control the legality of uploaded work if it has been viewed more than certain times; Delfi AS v. Estonia No 64569/09, ECtHR, June 16, 2015, found that news web portal had to monitor the defamatory users' comments, and the court found that this obligation was compliant with the European Convention of Human Rights (ECHR). The last case recognizes that monitoring obligations, such as notice-and-takedown system, a filtering system to automatically remove certain obscene words, and occasional proactive removal of comments by human. Agents, in certain circumstances are necessary to protect the right and reputation of individuals.

These examples illustrate the growing trend of imposing monitoring and filtering obligations on intermediaries in various jurisdictions, as part of efforts to combat copyright infringement and protect intellectual property rights.

One more argumentation against is that the tool is expensive, so only big players that have financial power may afford to use the service. For instance, Youtube invested over 100 millions USD to the development and using of such a tool.[71] There is a risk that small companies could not have access to this tool. Therefore, the possibility that infringing materials will be posting on small-sized OP's is likely to occur. The unintended consequence is that big companies will obtain a competitive advantage over the small ones, leading to pushing the smaller players out of corporate area or even result in

[70] Synodinou, T. (2015). *Intermediaries' Liability for online copyright infringement in the EU: Evolutions and Confusions.* Computer Law & Security Review 31.
[71] Spoerri, T. (2019). *On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market.*

preventing them even to enter the business sphere. Another possible consequence may be that not all the companies will be required to use filter tools, and that is unfair situation too.

Another obstacle in using this tool lays in the workload on the tools. To give an example, every single minute YouTube received 500 hours of video material uploading in 2019.[72] Moreover, in the case of Viacom International v. Youtube, Inc., it was found that a significant portion of the most viewed, discussed, top favorites, and top-rated videos on Youtube contained copyrights material. The specific claim was that «over 70%» of these videos infringed on copyrights owned by Viacom. This case raised questions about the responsibility of YouTube as an online service provider in addressing copyright infringement on its platform. This workload may decrease the efficiency of the tool, so the service may not manage to filter all the content downloaded. Consequently, the filter has to be updated and created in the manner that allow to check the massive amount of content.

Another point of criticism is connected to the errors occurring in the service application. This notion refers to a situation when the tool blocked copyright-free work, in other words false positives content may be over blocked. As an example, the test from a German music professor was created. He uploaded the piece of mysic by Bartok, Puccini, Schubert and Wagner, that had been recorded before 1963 and are under the public domain under German law. The service blocked all of the music pieces, so professor had to send manual takedown requests.[73]

The arguments presented above stipulate that the filtering services are still in a rudimentary stage and are not able to filter the content accurately.

6.3. Gatekeeping software

The use of gatekeeping software as a means of copyright enforcement online has both practical and ethical concerns. Gatekeeping software relies on digital fingerprinting technology to compare uploaded content with copyrighted works in a database. While it

[72] Dogtiev, A. (2019). Business of Apps, Youtube Revenue and Usage Statistic of 2018.
[73] Bode, K. (2018). *This Music Theory Professor Just Showed How Stupid and Broken Copyright Filters Are.*

aims to detect reproductions of audio and visual files, its accuracy is questionable, leading to potential false positives and false negatives.

One of the example of such a software is Content ID[74], that serves as an enforcement tool for identifying infringements and managing licensing agreements with content owners. However, similar to notice and takedown systems, gatekeeping software faces various issues. It often fails to recognize fair use, tolerated use, or licensed use of copyrighted works, struggling with accurately identifying works, and its licensing scheme lacks the ability to split revenue between content owners and user-creators.

Additionally, it lacks of accountability and transparency in the review process of gatekeeping software.[75] Decisions this software can made may not adequately consider the intricacies of copyright law or properly verify the ownership of copyrights.

Furthermore, gatekeeping software places a significant burden on internet service providers or hosting platforms to promptly address all takedown requests. Due to the potential ramifications of non-compliance, recipients often comply with takedown requests without conducting comprehensive assessments, essentially transferring the responsibility of gatekeeping to the senders of the notices. It is a proactive solution that helps to prevent unauthorized use of copyrighted works and minimizes the economic losses faced by rights holders.

While gatekeeping software represents an attempt to automate copyright enforcement online, it suffers from inaccuracies, a lack of consideration for fair use and licensing, accountability issues, and a negative impact on creativity and cultural exchange. The implementation of this mechanism raises concerns regarding the freedom of expression. As being an automated solution, the use of this mechanism may result in the false positives.

[74] Longan, M. (2020). *Rethinking Copyright and The Internet: A New Model for Users' Rights*, Ph.D. Thesis, University of Sussex.
[75] Kleinschmidt, B. (2010). *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*. International Journal of Law and Information Technology, 18, 332-347.

6. PROPOSALS FOR THE FUTURE ACTIONS

As the above stated analysis acknowledged, there is lack of a modern efficient mechanisms to combat the illegal materials posted online. There is a need for a shift in perspective regarding the treatment of copyrighted works in the digital world. The current gatekeeping philosophy that focusing on control and enforcement is not the most efficient approach for content owners and users. The first step to be done should deal with philosophical understanding of modern copyright principles and aims it have pursued. There has to be created a new way of how to treat the copyright works as such. The modern copyright law should be less assessed as a piece of property. Access and balance rights are waiting to be prevailed by economic rights instead. Prioritizing access to copyrighted works and balancing it with economic rights can lead to a more utilitarian solution. The coherent answer to the questions relating to online copyright legislation may be found in using the legislation to bolster the legislation to monetisation schemes, so to assure that all parties' rights are balanced. The practical solution that steps out from the concept of control-based protection principles to rather achieve the same goal through the economic compensation mechanisms, for instance, by the creation of new revenue streams through fair licensing schemes.

The recent case law regarding licensing agreements with copyright holders from the CJEU, such as GSMedia, Ziggo, Filmspeler,[74] has grappled with the concept of communication to the public in the digital environment. These cases have exposed inconsistencies between the traditional knowledge-and-takedown approach based on intermediary liability and the introduction of filtering and monitoring obligations.

In order to implement licensing agreements, intermediaries shall be more involved in interactions with that they have to deal. The level of they care must be increased. If the intermediary is aware that there is a general trend of copyright infringement on its website, it may reasonably act to post any king of warnings on the website or its terms and conditions. Intermediary has to act in the way that all competing interest are balanced. Duty to remove every piece of illegal content is to be imposed on the intermediaries.

[74] GS MEDIA V SANOMA, STICHTING BREIN V. ZIGGO BV, BREIN V. FILMSPELER

According to the assertions made by right holders, they are unable to profit from the sharing of copyrighted material on user-generated content platforms due to the safe harbor rule, notice and takedown system, and the restriction on content monitoring. The suggestions here, that OPs may delete the illegal content upon notice or implement voluntary filtering measures. The subscription-based platforms will sell content to the users who will agree to pay less in licensing fees.[75] Therefore, rather than imposing obligations that are against EU law and fundamental rights, the monetization agreements may be concluded.

As legal practice in the European member state countries moving forward to injunctions as appropriate remedies for intermediary liability. One of the best examples here is a German Störerhaftung-approach that is rooted not only from private law, but copyright itself. The doctrine is embedded in BGB §1004 and limits the applicable measures to the liable intermediaries in the context of their negligence to injunctive relief. Störerhaftung is an alternative to joint tort feasance for which German Störerhaftung system leaves a monetary compensation to be enforced only to the parties who acted with an intent[76]. Under this concept, if a person or entity provides the means or enables others to commit copyright infringement, they can be held responsible for their actions. However, critics of this concept claim that this measure potentially may impose excessive liability on intermediaries.

Another popular tool in European Union that was created in order to combat online copyright and trademark infringement is blocking order. As it has been validated under EU law by the CJEU in the Telekabel decision, these kinds of orders require intermediaries to prevent their users from accessing infringing content. Blocking orders aim to restrict the dissemination of tortious information by preventing individual computers from retrieving it. This remedy is particularly useful when the harm lies in the consumption or reproduction of the material rather than its mere existence. This mechanism is often implemented as a complementary measure to notice-and-takedown procedures. The risks that are related to this mechanism are over blocking or under

[75] Husovec, M. (2016). *EC Proposes licensing fees in order to remain competitive with UGC platforms*. HUTKO'S TECH. L. BLOG

[76] Kleinschmidt, B. (2010). *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*. International Journal of Law and Information Technology, 18, 332-347.

blocking and ineffectiveness of this measure. There is a risk of circumvention, as determined users may find ways to bypass the blocks and access the prohibited content.

CONCLUSION

Online service providers shape our daily life. The question of their liability regarding the users' activities is a main factor in determination of the basic human rights enforcement. The topic became a pervasive issue on the governmental and academical levels. Internet intermediaries are the main players in copyright law infringements as it was established through the comparative analysis of the different legal systems approach. Both US's and EU's legislative frameworks impose obligations on intermediaries to deal with the issue of harmful content that automatically makes them liable for posting harmful content that is stored on their web space, but the scope of these provisions is different. The suggestions that have to be made in conclusion is that a proposal for a newly framed system of liability rules has to be made, that aimed at providing more efficient way to deal with the copyright law infringements.

Overall, the legislative and judicial approach in both the EU and the US aims to balance the protection of copyright with the practical considerations and limitations faced by OSPs in monitoring and filtering content on their platforms. By identifying the shortcomings and limitation of the current legal framework, this study proposes theoretical solutions to address the existing problems and improve copyright law's efficacy in the digital space. The purpose of these rules has to be aimed at promotion of innovation, creativity, and access to information.

By analysing the current role of intermediaries in digital copyright law and comparing the approaches of the USA and EU jurisdictions, this paper provides a comprehensive understanding of the efficiency of modern solutions and mechanisms. Creatives are no longer enjoy their rights in the full scope. Basically, both jurisdictions held intermediaries liable for copyright violation if they knowingly facilitate or participated in the infringement. The liability regime in the EU has been undergoing reform, and the liability of ISPs have been updated. In the EU new obligation and responsibilities have been introduced, as Article 17 places more responsibility on intermediaries. Simultaneously, the USA offer more space for ISPs to operate and does not put intermediaries under the stricter pressure. While both provide «safe harbor» provisions for intermediaries, the EU approach places more responsibility on copyright owners to monitor and report infringing content. US approach places more responsibility on intermediaries to monitor and remove

infringing content. In the USA, online intermediaries are subject to the DMCA and its Safe Harbor provisions. The American mechanisms are effective in promoting innovation and growth in the online industry while also protecting the rights of copyright owners.

Piracy and other copyright law violations are hard to detect, the costs of measures applicable is high and the number of notifications that intermediaries receive could not be dealt on time. The diverse of national laws also precludes the formation of one well-harmonized legal framework. The property-based model of copyright law protection that had been used during a long period of time is not able to address the modern copyright issues properly. The evolution of technology was faster than the adoption of new legal frameworks.

As it has been discussed, the European and USA's have differences in the sense of copyright protection. From the analysis above it could be concluded that currently means and approaches of US and EU that may be applying are contradictable. EU is introducing a strict liability for OSPs by claiming that proactive measures have to be applied by them. By doing this, EU legislation framework aims to ensure that rightholders are adequately compensated or the use of their works. At the same time, US gives much more freedom to the intermediaries. The systems goals and rationalise are different too. While EU is enforcing monitoring obligations for ISPs, US continue to apply notice and take down tool. As a matter of fact, there is still no a single perfect solution that may deal with numerous copyright infringements.

The paper goes under the evaluation of different mechanisms and proposes the potentially better option to use filtering services on a voluntary basis in the combination of manual human re-checking. The notice and take down regime have to be introduced into EU's legal framework, so the materials would be removed after the notice, there will be manual evaluation of the materials against its illegality, and also number false positive cases will be decreased. In both systems, internet intermediaries can also use technology such as content filtering and automated takedown tools. However, these tools are often criticized by scholars for the over-removal risks of non-infringing content. The ongoing discussion proposes future actions to be aimed to foster a balanced and harmonized framework that supports innovation and ensures adequate protection for copyright holders and used by promoting of a fair and sustainable digital ecosystem. Currently, the most common

mechanism used by online intermediaries in the EU and the USA is the notice-and-takedown system.

In the modern days the EU exploring other mechanisms, such as content filtering and licensing agreement. However, this mechanism still lacks of proper guide on how to use it. Potential future actions could be focused on strengthening the notice-and-takedown system and providing clearer guidelines for intermediaries on how to assess whether content is infringing. For this assessment, the intermediaries should invest in better technology that would be able to detect and remove infringing content before receiving any notice from a copyright owner.

There is still need to improve the situation in both jurisdictions in the areas of detection of infringing content, handling of notice and creation of a more balanced copyright regimes. Both regimes can work towards creating more robust and efficient copyright regimes that protect the rights of creators and ensure accessible digital environment for users. As the examination above demonstrates, no single mechanism can offer a proper solution to the problems of copyright law by addressing of all its aspects. A combination of legal frameworks, technological solutions, licensing mechanisms and international cooperation is necessary to effectively protect copyrights and promote a balanced approach to intellectual property rights.

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