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**COMPLIANCE PROBLEMS FACED BY ONLINE PLATFORMS  
IN PROTECTING INTELLECTUAL PROPERTY RIGHTS IN  
THE EUROPEAN DIGITAL SINGLE MARKET**

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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## ABSTRACT

The aim of the research is to give an overview how the European Union transposed the safe harbor concept from the United States into its legislation and developed it further in the protection of intellectual property rights in the digital age. The research is conducted with qualitative methods where academic literature, legislations from European Union and United States were collected, reviewed and analysed.

The research is providing answers whether the VLOP and gatekeeper definition from DSA and DMA are compatible with OCSSP definition from CDSM and if gatekeepers can comply with CDSM, DSA and DMA simultaneously in the protection of copyrighted works. The hypothesis of the research is that OCSSPs can qualify as gatekeepers and due to unclear requirements for the protection of intellectual property rights that are imposed on gatekeepers from CDSM, DSA and DMA, gatekeepers could be non-compliant with CDSM, DSA and DMA.

The VLOP and gatekeeper definition from DSA and DMA are compatible with OCSSP definition and OCSSP can be a gatekeeper and *vice versa*. The DMA does not cover protection of intellectual property rights on online platforms, but gatekeeper is in dual position and needs to comply with CDSM and DSA for the protection of copyrighted works. Due to unclear requirements for the protection of intellectual property rights that are imposed on gatekeepers from CDSM and DSA, it is not possible for gatekeepers to comply with CDSM and DSA simultaneously in the protection of copyrighted works.

**Keywords:** intellectual property rights, intermediary service providers, IPR protection

## LIST OF ABBREVIATIONS

AICO	American Innovation and Choice Online Act
CALERA	Competition and Antitrust Law Enforcement Reform Act
CDSM	Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
DMCA	Digital Millennium Copyright Act
DSA	Digital Services Act
OCSSP	Online content sharing service provider
VLOP	Very large online platforms
WIPO	World Intellectual Property Organization

## INTRODUCTION

Large intermediary online platform providers (hereinafter intermediary service providers or online platforms) began as any other company, they used to be small, but they had an innovative idea. The innovation and investment in technology has led them to be widely accepted by users. The users have made it possible for some of the online platforms to become very large and powerful. Nevertheless, large online platforms continue investing into innovation and improve their systems to stay relevant and competitive. At the same time, different regulations have entered into force to provide better protection of intellectual property rights of copyrighted works that are uploaded and shared via those online platforms.

The protection of intellectual property has been a topic for decades, but it became more relevant in digital age. Digital age required international uniformity for the protection of intellectual property rights and this started with World Intellectual Property Organization (hereinafter WIPO).<sup>1</sup> United States introduced the Digital Millennium Copyright Act (hereinafter DMCA) that traces back to 1996 WIPO Copyright Treaty.<sup>2</sup> The DMCA took a right direction in the protection of intellectual property and had an influence on the development of the legislation in this field in other countries.<sup>3</sup> Similarly to the United States, the European Union had to implement the obligations from the WIPO Copyright Treaty.<sup>4</sup> The European Commission was inspired by the DMCA while proposing the 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 (hereinafter e-Commerce Directive).<sup>5</sup> The DMCA has not had significant developments in the protection of intellectual property rights compared with the developments happening in the European Union.

The e-Commerce Directive was further developed in the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

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<sup>1</sup> Lipton, J. (2002). Information Wants to Be Property: Legal Commodification of E-Commerce Assets. *International Review of Law, Computers & Technology*, 16(1), 53-66, pp. 54-55.

<sup>2</sup> *Ibid*, p. 59.

<sup>3</sup> *Ibid*, p. 61.

<sup>4</sup> Reinbothe, J. (2000). Proposed EC Directive on Copyright and Related Rights in the Information Society and the Proposal for a Directive on E-Commerce. *International Intellectual Property Law & Policy*, 4, 65-1-65-16, p. 65-2.

<sup>5</sup> *Ibid*, p. 65-8.

(hereinafter CDSM)<sup>6</sup>. Recently, the European Commission has proposed two more regulations that have an influence on the protection of intellectual property rights. Firstly, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (hereinafter DSA)<sup>7</sup> and secondly, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (hereinafter DMA).<sup>8</sup>

Current research tries to identify if there are contradictions between CDSM, DSA and DMA regarding monitoring obligations to protect copyrighted works. CDSM, DSA and DMA use their own terminology, therefore, it is necessary to evaluate whether the definitions used in the regulations are compatible and comparable with each other. Once identified, further evaluations are done to identify if online platforms need to comply with Directive 2019/790, DSA and DMA simultaneously. Furthermore, if the regulations provide clear guidelines for the online platforms to be compliant and ensure the protection of copyrighted works without assuming liability.

The aim of the research is to give an overview on how online platforms had limited liability in infringement of copyrighted works in the United States. United States introduced a concept of safe harbor and European Union introduced remarkably similar concept for online platforms in the e-Commerce Directive. After the e-Commerce Directive, several regulations have been entered into force to regulate online platforms in the protection of intellectual property rights. Those regulations are CDSM, DSA and DMA. The research will evaluate if online platforms who are identifies as gatekeepers, would need to comply with CDSM, DSA and DMA simultaneously and are there any compliance problems. In the end, the research will discuss how the developments in regulation in the protection of copyrighted works in the European Union could influence the legislation in the United States.

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<sup>6</sup> 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. OJ L 130, 17.5.2019, p. 92–125.

<sup>7</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). OJ L 277, 27.10.2022, p. 1–102.

<sup>8</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). OJ L 265, 12.10.2022, p. 1–66.

The research has established two main questions for analysis:

1. How is very large online platform (hereinafter VLOP) and gatekeeper definition from DSA and DMA compatible with online content sharing service provider (hereinafter OCSSP) definition from CDSM?
2. How can gatekeepers comply with CDSM, DSA and DMA simultaneously in the protection of copyrighted works?

Following the research questions, the hypothesis of the research is that OCSSPs can qualify as gatekeepers. The CDSM imposes unclear requirements on OCSSP to monitor content uploaded by its users to the platform for the purpose to protect copyrighted works. In the developments to protect copyrighted works under the DSA and DMA, the problems from CDSM have not been resolved. This could result that gatekeepers could be non-compliant with CDSM, DSA and DMA due to unclear expectations from the regulation.

The research is conducted with qualitative methods. Academic literature was collected and analysed. Several regulations from European Union and United States were reviewed together with supportive materials such as legislative guidelines and court cases to support the analysis of the applicable regulations.

As the United States was the first one to introduce legislation to regulate the protection of intellectual property rights in the digital age and influenced the legislation in the European Union, the Chapter I of this research gives an overview about the copyright protection in the United States. In the United States were several copyright protection court cases that opened the discussion about the liability of intermediary service providers in the infringement of copyrighted works by its users. As Internet was new at that time, the safe harbor concept for intermediary service providers were introduced to exempt their liability in infringement of copyrighted works to support innovation. Chapter II gives an overview about the developments in protecting copyrighted works in European Union. The e-Commerce Directive in the European Union introduced similar exempt for the online platforms as was the safe harbor in the United States. The safe harbor concept in the European Union is further developed in the CDSM that had to redefine the liability of online platforms. CDSM introduced primary and secondary liability in infringement of copyrighted works of intermediary service providers. The new liability regime opened a discussion about general monitoring obligation by the intermediary service providers. Chapter III gives an overview whether the problems in the CDSM were resolved in the DSA and DMA. It is further analysed if



the definitions for intermediary service provider in the CDSM, DSA and DMA are compatible with each other, if the regulations are applicable simultaneously and whether this could introduce compliance problems for the online platforms. Chapter IV focuses on the effect of the CDSM, DSA and DMA for future implications and how the developments in European Union could influence the legislative developments in the United States. The research will be concluded in the final chapter by answering the research questions.

# 1. Liability of online platforms in United States in infringing intellectual property rights

## 1.1. Liability of online platforms prior to safe harbor

Intellectual property has the potential to generate revenue and due to its value, it needs to be protected. The Internet has made it possible to access more easily copyrighted content, but at the same time, introduced new challenges for law to protect intellectual property.<sup>9</sup> Copyrighted works can be uploaded and shared via intermediary digital platforms, but if content is shared without consent, what would be the liability of the intermediary digital platform in the infringement?

The users upload content to online platform. If there is any infringement of copyrighted works, the user would have primary liability due to the direct wrongdoing. The online platform would have secondary liability as it does not commit the legal wrong directly, but would be responsible due to encouraging, facilitating or profiting from the infringing content upload. The Copyright Act from the United States did not provide any provisions for the copyright holder to impose secondary liability on online platforms. Secondary liability for the infringement of copyrighted works is purely developed by the judges, namely contributory infringement and vicarious liability.<sup>10</sup> There were several cases about copyright protection that opened the discussion about the liability of online platforms in the infringement of copyrighted works by its users.

### 1.1.1. A&M Records v. Napster

Napster<sup>11</sup> was a landmark intellectual property case in the United States that stopped the understanding that intermediary service providers cannot be held liable in contributory and vicarious copyright infringement.<sup>12</sup>

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<sup>9</sup> Jaybhaye, A., Barkha, D. (2021). Copyright Piracy in the Digital Age with Special Reference to Napster's Case. *International Journal of Law Management & Humanities*, 4(5), 2137-2148, pp. 2139-2141.

<sup>10</sup> Boyle, J., Jenkins, J. (2021). *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY—CASES AND MATERIALS*. Fifth Edition. Retrieved from: <https://law.duke.edu/cspd/pdf/ipcasebook.pdf>, p. 515.

<sup>11</sup> US Court of Appeals for the Ninth Circuit, 239 F.3d 1004 (2001), *A&M Records, Inc. v. Napster, Inc.*

<sup>12</sup> Washington University School of Law (2013). *Case Study: A&M Records, Inc. v. Napster, Inc.* Retrieved from: <https://onlinelaw.wustl.edu/blog/case-study-am-records-inc-v-napster-inc/>.

Napster used peer-to-peer technology where a network is created between several user's computers that communicate with each other directly without using a server.<sup>13</sup> In the high-speed era of internet, peer-to-peer technology evoked digital piracy and the infringement of intellectual property rights. It is not allowed to reproduce and distribute materials that are protected with copyrights without permission from the copyright holder.<sup>14</sup>

Napster made music files available to its users and allowed sharing and searching of copyrighted works via the Internet. Napster used indexing that enabled searching of files and users were able to download a copy of the file from another users' computer to its own computer. For music files, after the transfer from one computer to another, the quality of the recording was not as good as the original. Napster was accused of wholesale reproduction and for distributing copyrighted works.<sup>15</sup>

For a *prima facie* case of direct infringement, the court explained in the Napster case that at the same time two requirements need to be fulfilled. It is necessary to demonstrate the ownership of the infringed material and that an exclusive right of a copyright holder has been infringed.<sup>16</sup> The exclusive rights of a copyright holder are following:

- “Reproduce the work in copies or phonorecords.
- Prepare derivative works based upon the work.
- Distribute copies or phonorecords of the work to the public by sale or other transfer of ownership or by rental, lease, or lending.
- Perform the work publicly if it is a literary, musical, dramatic, or choreographic work; a pantomime; or a motion picture or other audiovisual work.
- Display the work publicly if it is a literary, musical, dramatic, or choreographic work; a pantomime; or a pictorial, graphic, or sculptural work. This right also applies to the individual images of a motion picture or other audiovisual work.
- Perform the work publicly by means of a digital audio transmission if the work is a sound recording.”<sup>17</sup>

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<sup>13</sup> Jaybhaye, A., Barkha, D. (2021), *supra nota* 9, p. 2147.

<sup>14</sup> *Ibid*, p. 2284.

<sup>15</sup> US Court of Appeals for the Ninth Circuit, 239 F.3d 1004 (2001), *A&M Records, Inc. v. Napster, Inc.* Retrieved from: <https://law.justia.com/cases/federal/appellate-courts/F3/239/1004/636120/>.

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

<sup>17</sup> U.S. Copyright Office (2023). *What is Copyright?*. Retrieved from: <https://www.copyright.gov/what-is-copyright/>.

Demonstration of ownership was not a problem in the case, but Napster argued that the users of Napster software do not engage in direct infringement of copyrighted files as the users have the right of fair use of the materials. The fair use of the files was sampling, space-shifting and distribution. Sampling means a temporary copy of a file before it is purchased. Space-shifting means that a file is being accessed via the Napster software, but the user owns the file already in a CD or other format. Specifically for music industry, distribution means allowed distribution of a file either by a new or established artist. For the court to identify if the users had fair use of the materials, certain factors needed to be evaluated. Those factors were following:

1. “The purpose and character of the use.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the work as a whole.
4. The effect of the use upon the potential market for the work or the value of the work”.<sup>18</sup>

The court evaluated that if an original work is retransmitted in a different form such as instead of CD is used downloading a music file in a MP3 file format, this does not transform the copyrighted work and does not constitute a fair use of the copyrighted work. For evaluating purpose and character, it is necessary to identify either the use was commercial or not. Proving commercial use does not required to provide evidence that there was a direct economic benefit. For non-commercial use evidence needs to provided that the particular use is harmful of if the distribution becomes widespread then it impacts the potential market of the copyrighted work. In the Napster case, the court classified it as commercial use as the user was sharing the file with another user who is anonymous and the users are getting the files free of charge which otherwise would need to be purchased. As Napster users were sharing the entire copyrighted work, the court concluded that this constitutes a wholesale copying. Additionally, as Napster allowed files to be shared and downloaded free of charge, this reduced the copyright holder’s ability to charge for the same downloads. As Napster provided the software that allowed users to search, find and download copyrighted works, Napster contributed to the infringing activity. Napster did not have any procedures in place to limit or avoid copyright infringements and as Napster benefitted financially from the infringing files, this constituted vicarious liability of Napster.<sup>19</sup>

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<sup>18</sup> A&M Records, Inc. v. Napster, Inc., *supra nota* 15.

<sup>19</sup> *Ibid.*

### 1.1.2. MGM Studios Inc. v. Grokster

Contributory and vicarious copyright infringement liabilities were the only forms of secondary liability until the Grokster case.<sup>20</sup> Grokster case is another landmark intellectual property case in United States that is about inducement liability.<sup>21</sup>

Similarly as Napster, Grokster was a file sharing program that used peer-to-peer technology, but it did not have a central database server. Users were connected to the peer-to-peer network by supernodes. The connected users' computers became an index server and gathered information on the files that were shared from the other users' computers. Grokster technology enabled direct access of files from a peer-to-peer network users' computer and it was not necessary for Grokster to be an intermediary database in this network.<sup>22</sup> Even though it was possible to share any kind of digital files by using Grokster's technology, it was mainly used to share copyrighted music and video files without respective permission.<sup>23</sup> The technology used by Grokster had the potential to avoid secondary liability for sharing copyrighted materials via the peer-to-peer network.<sup>24</sup> Grokster was sued for infringement of copyrights.<sup>25</sup>

The Grokster case had two competing values – protection of copyright and limiting liability of copyright infringement to promote technological innovation.<sup>26</sup> The court focused on the purpose of Grokster software and did not consider the technical design of the software. It was identified that Grokster software's main purpose was to allow mass copying of sound recordings. There was a legal loophole in the applicable laws and regulations that Grokster exploited to avoid liability of copyright infringement.<sup>27</sup> Nevertheless, the court ruled that companies that use peer-to-peer technology could be held liable by influencing and allowing infringement of copyrights by its' users.<sup>28</sup> The importance of this court ruling is evident in enabling other platforms to thrive who promote protection of copyrights such as Spotify or Netflix.<sup>29</sup>

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<sup>20</sup> Supreme Court of the United States, 545 U.S. 913 (2005), *MGM Studios, Inc. v. Grokster, Ltd.*

<sup>21</sup> Boyle, J., Jenkins, J. (2021), *supra nota* 10, p. 526.

<sup>22</sup> Lin, P. (2020). The Portal to Intermediary Liability: Merging Secondary Liability with Equity and Private International Law. *Wake Forest Journal of Business and Intellectual Property Law*, 20(3), 250-276, pp. 259-260.

<sup>23</sup> Supreme Court of the United States, 545 U.S. 913 (2005), *MGM Studios, Inc. v. Grokster, Ltd.* Retrieved from: <https://supreme.justia.com/cases/federal/us/545/913/>.

<sup>24</sup> Lin, P. (2020), *supra nota* 22, pp. 259-260.

<sup>25</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, *supra nota* 20.

<sup>26</sup> *Ibid.*

<sup>27</sup> Lin, P. (2020), *supra nota* 22, pp. 259-260.

<sup>28</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, *supra nota* 20.

<sup>29</sup> Menell, P. S. (2022). Reflections on Music Copyright Justice. *Pepperdine Law Review*, 49(3), 533-614, pp. 543-544.

## **1.2. The Digital Millennium Copyright Act and the Viacom International Inc. v. YouTube, Inc. case – the safe harbor of United States**

The authors of United States Constitution believed that it is important to regulate and protect intellectual property rights. It was believed that it will support economic independence, innovation and overall domestic growth.<sup>30</sup> For the protection of intellectual property rights, in addition to primary liability, it was necessary to establish secondary liability. Only recently, there were only two forms of secondary liability in the United States. Those were contributory infringement and vicarious liability which were explained in the Napster case. Nevertheless, to be able to claim contributory infringement and vicarious liability on a third party, there needs to be a direct infringement of an exclusive right of the copyright holder.<sup>31</sup> Online platforms could potentially enable millions of users to infringe copyrighted works. Instead of imposing primary liability with each of those users individually, it is more efficient to strike at the root of the infringement by using secondary liability on the online platform.<sup>32</sup>

The initial goal was to have strict liability for online platforms for the infringement of copyright. That would have imposed online platforms to monitor potential copyright infringements similarly as there is strict product liability on product seller and it is up for the product seller to decide how to minimize their risk for liability. It did not become the reality due to DMCA.<sup>33</sup> The DMCA section 512 defined certain limitation of copyright liabilities for intermediaries that are called the safe harbors. The goal of the safe harbors was to foster the growth of internet-based services and join copyright owners and internet service providers to jointly detect and address copyright infringements.<sup>34</sup> DMCA section 512 includes four different safe harbors that limit the liability for infringing materials of the internet service providers if the internet service provider:

1. Serves as a conduit for the automatic online transmission of material as directed by third parties (“mere conduit”).
2. Temporarily stores material that is being transmitted automatically over the internet from one third party to another (“caching”).

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<sup>30</sup> United States Courts (2020). *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*. Retrieved from: <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

<sup>31</sup> Boyle, J., Jenkins, J. (2021), *supra nota* 10, p. 515.

<sup>32</sup> *Ibid*, p. 518.

<sup>33</sup> *Ibid*, p. 540.

<sup>34</sup> U.S. Copyright Office (2020). *Section 512 Study*. Retrieved from: <https://www.copyright.gov/policy/section512/>.

3. Stores material at the direction of a user on an online service provider's system or network ("hosting").
4. Refers or links users to online sites using information location tools, such as a search engine ("linking").<sup>35</sup>

The safe harbor is best to explain with the 2012 *Viacom v. YouTube* case.<sup>36</sup> Viacom alleged both, direct and secondary, copyright infringement of YouTube as YouTube publicly performed, displayed and reproduced copyrighted works of Viacom. The DMCA section 512(c) was the key section that was analysed in the *Viacom* case. The DMCA section 512(c) "limits the liability of online service providers for copyright infringement that occurs by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." The DMCA section 512(c) is only applicable if the online platform provider:

- "does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
  - in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
  - upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- upon notification of claimed infringement, responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."<sup>37</sup>

Each of the safe harbors have their own requirement to be able to qualify for its protection, but there are some requirements that are common for all the safe harbors. The entity needs to be a service provider and the exact definition depends on the specific safe harbor itself. For example, to be able to use DMCA 512(c) the entity needs to provide email or hosting services. Then the service provider needs to demonstrate that it has in place respective policies and procedures to

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<sup>35</sup> United States Copyright Office (2020). *Section 512 of title 17. A report of the register of copyrights*. Retrieved from: <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>, p. 23.

<sup>36</sup> Court of Appeals for the Second Circuit, 676 F.3d 19 (2012), *Viacom Intern., Inc. v. YouTube, Inc.*

<sup>37</sup> *Ibid.*

remove users who repeatedly infringe copyrighted works. The policy and procedure do not need to be perfect, but it needs to demonstrate that it is reasonably effective. Finally, the service provider must adapt measures to fight copyright infringement, but at the same time cannot interrupt standard technical measures that copyright owners are using to identify and protect its' copyrighted works.<sup>38</sup>

The DMCA section 512(c) defines a notice and take down process for the service providers. Once the service provider is made aware of the infringing copyrighted works, the service provider needs to remove or disable to copyrighted works without delay. The key point here is that the removal needs to be made for the specific infringing material that the service provider is being made aware of. The removal of infringing copyrighted works is not a general obligation that the service provider needs to review all content to identify all the infringing copyrighted works. This principle is defined in the DMCA section 512(m) saying that “safe harbor protection cannot be conditioned on affirmative monitoring by a service provider.”<sup>39</sup> The DMCA section 512(m) means if service provider has a general awareness that copyrighted works may be infringed, this does not mean that the service provider needs to monitor or otherwise take action to identify the infringing activity.<sup>40</sup> It means that service providers do not need to use general monitoring to identify infringements of copyrighted works.

Online platform providers have explained that there needs to be some safeguards for the intermediaries as they cannot assume full liability of their users as this would discourage further investments and development in the e-commerce. Therefore, from no liability to full liability, there needed to be a middle way for the online platform and the notice and take down obligation was the middle path. Once the online platform provider is aware of the infringing copyrighted work, it needs to act and disable or remove the infringing content, otherwise the platform provider would lose its safe harbor protection.<sup>41</sup>

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<sup>38</sup> Hickey, K. J. (2020). *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*. Retrieved from: <https://crsreports.congress.gov/product/pdf/IF/IF11478>.

<sup>39</sup> *Viacom Intern., Inc. v. YouTube, Inc.*, *supra nota* 36.

<sup>40</sup> *Ibid.*

<sup>41</sup> Kumar, R., Nair, L. R. (2012). Information Technology Act, 2000 and the Copyright Act, 1957: Searching for the Safest Harbor?. *NUJS Law Review*, 5(4), 555-582, p. 559.



## 2. Liability of online platforms in European Union in infringing intellectual property rights

### 2.1. The e-Commerce Directive – the safe harbor of European Union

Peer-to-peer technology has evolved since the Napster and Grokster cases.<sup>42</sup> The European Commission has named the peer-to-peer technology a collaborative economy that has created an open marketplace for businesses.<sup>43</sup> The evolution and the vast usage of technology have made some of the online platforms very powerful. Thinking about Airbnb, Amazon, Netflix or Facebook, we cannot consider them purely just an intermediary service provider anymore.<sup>44</sup>

The DMCA section 512 provided safe harbors for certain type of services in the United States. In addition to rights, the United States safe harbor contained limitations that would make the service provider lose its safe harbor protection. In the European Union, the e-Commerce Directive contains similar limitations as the DMCA.<sup>45</sup> The aim of the e-Commerce Directive was to harmonize minimum standard across the European Union for the liability of intermediary service providers.<sup>46</sup> The safe harbor of the European Union is written in the articles 12 to 14 of the e-Commerce Directive that describe specific functions of the intermediary service providers.

Article 12 of the e-Commerce Directive is very similar to the DMCA section 512(a) that describes mere conduits. Under the article 12(1) of the e-Commerce Directive, the intermediary service providers are protected against liability if the service provider does not initiate the transmission, does not select the received of the transmission and does not select or amend the information that is in the transmission. The intermediary service providers who could enjoy the protection of article 12 of the e-Commerce Directive are telecommunication carriers, Internet access providers or other service providers who are focal for the functioning of the Internet itself. Initially it seemed that the

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<sup>42</sup> Murati, E. (2021). What Are Digital Platforms? An Overview of Definitions, Typologies, Economics, and Legal Challenges Arising from the Platform Economy in EU. *European Journal of Privacy Law & Technologies*, 2021(1), 19-55, p. 37.

<sup>43</sup> *Ibid*, pp. 38-39.

<sup>44</sup> *Ibid*, pp. 47-48.

<sup>45</sup> Boyle, J., Jenkins, J. (2021), *supra nota* 10, pp. 540-541.

<sup>46</sup> Madiega, T. (2020). *Reform of the EU liability regime for online intermediaries. Background on the forthcoming digital services act*. Retrieved from: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS\\_IDA\(2020\)649404\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf), p. 1.

mere conduit is an absolute standard and does not need to comply with the notice and take down obligations, but in the *Twentieth Century Fox Film Corporation v. British Telecommunication PLC* case, the Court relied on the article 12(3) of the e-Commerce Directive<sup>47</sup> that says that article 12 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.<sup>48</sup> This means that the intermediary service providers who seek for the limitation of liability under article 12(1) of the e-Commerce Directive would still need to be compliant with the notice and take down obligations.

The recital 42 of the e-Commerce Directive says that the exemptions from liability established in the e-Commerce Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of or no control over the information which is transmitted or stored. The recital 42 of the e-Commerce Directive was mainly for the mere conduit and caching activities of the intermediary service providers.<sup>49</sup> Based on the recital 42 of the e-Commerce Directive, the Court of Justice has made a conceptual distinction between the passive and active role of an intermediary service provider. In the *Google France* case<sup>50</sup>, the Court of Justice explained the following:

“Service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.”<sup>51</sup>

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<sup>47</sup> Kumar, R., Nair, L. R. (2012), *supra nota* 41, p. 562.

<sup>48</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, p. 1–16.

<sup>49</sup> Commission, Directorate-General for Communications Networks, Content and Technology, van Hoboken, J., Quintais, J. P., Poort, J., van Nico, E. (2019). *Hosting intermediary services and illegal content online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape – Final report*. Retrieved from: <https://data.europa.eu/doi/10.2759/284542>, p. 31.

<sup>50</sup> *Google France and Google*, 23.03.2010, C-238/08, ECLI:EU:C:2010:159.

<sup>51</sup> See paragraph 120 of the judgement of case C-238/08.

In the L’Oreal case<sup>52</sup>, the Court of Justice has said that “the operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.”<sup>53</sup> The Google France and L’Oreal cases have provided clarification in defining the distinction between passive and active role, but the acceptable level of passiveness depends on the specific role of the intermediary service provider.<sup>54</sup>

Passive role is usually for intermediary service provider who fall under the meaning of mere conduit in the article 12 of the e-Commerce Directive and caching in the article 13 of the e-Commerce Directive. Mere conduit and caching intermediary service providers usually do not have any or have a limited knowledge about the content their users transmit. Hosting providers, as defined in the article 14 of the e-Commerce Directive, have an active role in executing control over the content on their hosted services which is why they need to comply more strictly with the notice and take down requirement.<sup>55</sup>

In the Google France case, the Court of Justice said the following:

“Service provider transmits information from the recipient of that service, namely the advertiser, over a communications network accessible to internet users and stores, that is to say, holds in memory on its server, certain data, such as the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser’s site.”<sup>56</sup>

If the service provider meets the conditions, it qualifies the intermediary service provider as a hosting provider under article 14 of the e-Commerce Directive. It means that article 14 of the e-Commerce Directive is not only for the intermediary service providers that directly store infringed copyrighted works (for example such as YouTube) but would apply to other service providers as well that provide access to copyrighted works that are stored elsewhere (for example such as file-sharing service providers that use torrent files). This wide interpretation from the court could mean that article 14 of the e-Commerce Directive would apply to such intermediary service providers who are search engines or use links to provide access to copyrighted works. However, linking services and search engines were specifically not included in the e-Commerce Directive with the

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<sup>52</sup> L’Oréal and Others, 12.06.2011, C-324/09, ECLI:EU:C:2011:474.

<sup>53</sup> See paragraph 123 of the judgement of case C-324/09.

<sup>54</sup> Madiega, T. (2020), *supra nota* 46, p. 2.

<sup>55</sup> *Ibid*, p. 3.

<sup>56</sup> See paragraph 111 of the judgement of case C-238/08.

intention to leave the discretion of deciding on the liability of linking services and search engines to the Member States of the European Union.<sup>57</sup> As each Member State can define the liability of infringing copyrighted works for linking services and search engines, this is one of the reasons why intermediary service providers are experiencing higher legal uncertainty in the European Union compared to the United States. Unites States provides protection for intermediary service providers via safe harbor in the DMCA to reduce their liability in the infringement of copyrighted works. Compared to the United States, the European Union takes a different focus and provides higher protection for the copyright holders. There are several cases in the European Union that demonstrate higher burden and due to it higher cost for compliance for intermediary service providers to prevent copyright infringements.<sup>58</sup>

### **2.1.1. Nils Svensson and Others v. Retriever Sverige AB**

The linking services were analysed in the Nils Svensson and Others v. Retriever Sverige AB case.<sup>59</sup> Prior to the Svensson case, it remained unclear if linking services would qualify as an act of communication to the public under the copyright protection. Before the Svensson decision came into force, linking services were not qualified as communication the public due to the following reasons:

1. “There is no transmission involved.
2. Even if transmission is not necessary for there to be a communication, the rights of the copyright owner apply only to communication of the work, and whatever a hyperlink provides, it is not of a work.
3. The new public requirement is not fulfilled.”<sup>60</sup>

The Court of Justice of the European Union (hereinafter CJEU) explained the following:

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<sup>57</sup> Matulionyte, R., Lankauskas, M. (2013). BitTorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of the E-commerce Directive. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 4(3), 179-189, pp. 184-185.

<sup>58</sup> Amirmahani, A. (2015). Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union. *Berkeley Technology Law Journal*, 30(Annual Review), 865-898, pp. 865-866.

<sup>59</sup> Svensson and Others, 13.02.2014, C-466/11, ECLI:EU:C:2014:76.

<sup>60</sup> Burri, M. (2014). Permission to Link: Making Available via Hyperlinks in the European Union after Svensson. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 5(3), 245-255, p. 248.

“Where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorisation.”<sup>61</sup>

If a hyperlink is used to access a protected copyrighted work and that access has not been approved by the copyright holder, all persons who are able to access the copyrighted work via the link are a new public.<sup>62</sup> The CJEU has interpreted in the Svensson case that if there is a hyperlink on a webpage that directs a person to another website where the copyrighted work is freely available, this is not an act of communication to the public. However, if an unauthorized link is used by the new public to access copyrighted work, this is communication to the public and constitutes an infringement of copyright.<sup>63</sup> It becomes difficult when the hyperlink used to direct to another site that used to be public and later access restrictions were set up.<sup>64</sup>

There have been three important judgements on the linking services and whether they are communication to the public or not. Paperboy search engine case in Germany where the federal court ruled that it is not a communication to the public if a newspaper website search engine provides a link to the original source of the news. Napster.no case in Norway where the Supreme Court ruled that linking is not an act of communication to the public in situations where a hyperlink led to an unlawful uploading of a music file as it did not make the music files available to the public. In the Sanoma and Playtech v. GS Media case in Dutch, the court said that hyperlink is a communication to public.<sup>65</sup> If court decides that hyperlink itself is a communication to public, this becomes very problematic. Hyperlink provides a user with a location of a webpage. If hyperlink itself is considered communication to the public of the works on the webpage, it could mean that

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<sup>61</sup> See paragraph 31 of the judgement of case C-466/11.

<sup>62</sup> Burri, M. (2014), *supra nota* 60, p. 250

<sup>63</sup> Kelli, A., Värvi, A., Ristikivi, M., Lepik, G. (2020). Üliõpilane ja autoriõigus. *Juridica*, 5, 378-388, p. 383.

<sup>64</sup> Burri, M. (2014), *supra nota* 60, pp. 250-251.

<sup>65</sup> *Ibid*, p. 249.

permission of the webpage owner needs to be obtained to allow such linking in the first place and additionally, consent needs to be obtained from all copyright holders of all the copyrighted works on that webpage.<sup>66</sup> All the above three cases are about secondary liability and this is not harmonized in the EU.<sup>67</sup>

An analogue of the Svensson case in the United States would be *Perfect 10, Inc. v. Amazon*. In that case the court said that Google did not infringe the original copyrighted works by displaying a smaller version of the image in the Google search result. The court explained that the image was changed so much that it fell within the fair use exception. It was further explained that providing an in-line link or frame a copyrighted work does not infringe the copyright holder rights to perform or display a work publicly. A link to the original copyrighted work is only an address for users to locate the original work.<sup>68</sup>

There are differences between the regulations of United States and European Union. European Union provides immunity to less intermediary service providers than does the United States regulation. For example, while United States offers protection for search engines, then in the European Union, this is left for the Member States to decide. Furthermore, each Member State needs to implement the goal of the e-Commerce Directive into their national legislation and each Member State may implement it differently. This could cause discrepancies between Member States.<sup>69</sup>

### **2.1.2. UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wegag Filmproduktionsgesellschaft mbH**

In the UPC Telekabel case<sup>70</sup>, it was requested from UPC Telekabel to restrict its users access to infringing copyrighted works.<sup>71</sup> The main question in the case was whether UPC Telekabel had taken reasonable measures without imposing such restriction to avoid liability in infringing

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<sup>66</sup> Bently, L., Derclaye, E., Dinwoodie, G. B., Dreier, T., Dusollier, S., Geiger, C., Griffiths, J., Hilty, R., Hugenholtz, P. B., Janssens, M., Kretschmer, M., Metzger, A., Peukert, A., Ricolfi, M., Senftleben, M., Strowel, A. M., Xalabarder, R. (2013). The Reference to the CJEU in Case C-466/12 Svensson. *University of Cambridge Faculty of Law Research Paper*, 2013(6), p. 11.

<sup>67</sup> Burri, M. (2014), *supra nota* 60, p. 249.

<sup>68</sup> Amirmahani, A. (2015), *supra nota* 58, p. 880.

<sup>69</sup> *Ibid*, p. 874.

<sup>70</sup> UPC Telekabel Wien, 27.03.2014, C-314/12, ECLI:EU:C:2014:192.

<sup>71</sup> See paragraph 2 of the judgement of case C-314/12.

copyrighted works<sup>72</sup> and if an injunction to block access can be framed in general terms. The CJEU has ruled in the L'Oréal v. eBay case in 2009 that it is possible to request an intermediary platform provider to stop an infringement of copyrighted work and additionally, stop any further infringement as well.<sup>73</sup> The CJEU specified that if intermediary platform provider is ordered to block access for its users, the order needs to be effective, proportionate and discouraging, but at the same time it cannot limit legitimate trade. However, no guidelines are provided to intermediary platform providers how to achieve the goal of effective, proportionate, discouraging for its users to stop infringement of copyrighted works without limiting legitimate trade. If a copyright holder is not satisfied with the measures taken by the intermediary platform provider, then for the intermediary platform provider to be able to avoid liability and penalties is by showing that it has taken all reasonable measures. Measures taken may not be enough to allow intermediary platform provider to differentiate legal content from illegal.<sup>74</sup> Therefore, there is no legal certainty for the intermediary platform providers as no guidelines have not been provided to avoid liability as it is not possible for them to foresee if the intermediary platform provider has taken necessary measures to comply with its obligations from the regulation.<sup>75</sup>

## **2.2. Protection of copyrighted works in the Digital Single Market**

Intellectual property law is not harmonized in the European Union. Even with the newest addition of the CDSM, the InfoSec and e-Commerce Directive remain relevant for the protection of copyright.<sup>76</sup> The purpose of the CDSM was to redefine liability of intermediary service providers, specifically for the OCSSPs. The CDSM defines that OCSSPs perform copyright relevant acts when content is being uploaded to their platform by their users. Nevertheless, the article 17 of the CDSM includes safe harbor conditions that the OCSSPs could avoid liability of copyright

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<sup>72</sup> Schellekens, M. (2015). The Internet Access Provider: Unwilling or Unable. *International Journal of Law and Information Technology*, 23(3), 310-321, p. 311.

<sup>73</sup> *Ibid*, pp. 312-313.

<sup>74</sup> *Ibid*, p. 313.

<sup>75</sup> Geiger, C., Jütte, B. J. (2021). Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match. *GRUR International*, 70(6), 517-543, p. 529.

<sup>76</sup> McDonagh, K. (2022). Directive 2019/790/EU (Directive on copyright and related rights in the Digital Single Market. A. Lodder & A. Murray (Eds.), *EU Regulation of e-Commerce: A Commentary* (Edward Elgar, 2022), p. 310.

infringement.<sup>77</sup> Article 17(4) of the CDSM is *lex specialis* to the article 14 of the e-Commerce Directive.<sup>78</sup>

When CDSM is *lex specialis* to certain extend of the e-Commerce Directive, the OCSSP meaning needs to be compared with the definition of information society service provider in the e-Commerce Directive. Article 2(a) of the e-Commerce Directive defines information society services within the meaning of article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.<sup>79</sup> It defines very generally that information society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.<sup>80</sup> Article 2(6) of the CDSM defines OCSSP as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.<sup>81</sup> The definition of OCSSP includes information society services but defines a specific role of an information society service provider that could be considered to be a specific intermediary service provider that mainly stores and provides access to large amount of copyrighted works to its users with the purpose to generate profit. Nevertheless, according to the recital 62 of the CDSM, to determine if an intermediary service provider is an OCSSP under the CDSM, there are several elements that need to be considered such as number of users and hosted files. Case-by-case analysis of intermediary service providers needs to be made to avoid that non-commercial or less dominant providers are counted as OCSSP.<sup>82</sup> Once an intermediary service provider is defined as OCSSP, then article 17 of the CDSM kicks in immediately.

Article 17(4) of the CDSM says that if no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

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<sup>77</sup> Geiger, C., Jütte, B. J. (2021), *supra nota* 75, p. 518.

<sup>78</sup> Grisse, K. (2019). After the storm—examining the final version of Article 17 of the new Directive (EU) 2019/790. *Journal of Intellectual Property Law & Practice*, 14(11), 887-899, p. 892.

<sup>79</sup> Directive on electronic commerce Art. 2, a.

<sup>80</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 217, 5.8.1998, p. 18–26.

<sup>81</sup> CDSM Art. 2 s 6.

<sup>82</sup> Bridy, A. (2020). The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform. *Vanderbilt Journal of Entertainment & Technology Law*, 22(2), 323-358, p. 352.



- a) made best efforts to obtain an authorisation, and
- b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
- c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).<sup>83</sup>

Article 17(4) of the CDSM defines primary and secondary liability of OCSSPs. There is a strict primary liability for the OCSSP for infringement of copyrighted works unless the OCSSP demonstrates that it has made best efforts to obtain authorization for the copyrighted work or that no authorization was given due to failed negotiations or that the copyright holder was unreachable for negotiation. Secondary liability of the OCSSP comes from article 17(4)(b) and 17(4)(c) of the CDSM.<sup>84</sup>

It is unsure how OCSSP can meet the best effort requirement. Notice and take down obligations came from the e-Commerce Directive, but the obligations of OCSSPs have shifted towards notice and stay down.<sup>85</sup> Considering this, the amount of online content is huge and it is unrealistic to require OCSSP to make best effort to get permission from all copyright holders.<sup>86</sup> It is necessary to introduce principle of proportionality and have a level of reasonability in the best effort criteria. For example, it is reasonable to request that an OCSSP requests authorization from big music labels but it can become unreasonable or even impossible for the OCSSP to search for the copyright holder or an unknown work.<sup>87</sup> If OCSSPs are expected to look up each copyright holder and offer them license conditions, this would require a general monitoring obligation that would allow to review all uploaded content.<sup>88</sup> However, this would directly go against the article 17(8) of the CDSM that prohibits any general monitoring obligation, nevertheless article 17(4) of the

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<sup>83</sup> CDSM Art. 17 s 4.

<sup>84</sup> Grisse, K. (2019), *supra nota* 78, p. 892.

<sup>85</sup> Geiger, C., Jütte, B. J. (2021), *supra nota* 75, p. 530.

<sup>86</sup> Samuelson, P. (2021). Pushing Back on Stricter Copyright ISP Liability Rules. *Michigan Technology Law Review*, 27(2), 299-343, p. 321.

<sup>87</sup> Grisse, K. (2019), *supra nota* 78, pp. 892-893.

<sup>88</sup> Metzger, A., Senftleben, M. (2020). Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market - Central Features of the New Regulatory Approach to Online Content-Sharing Platforms. *Journal of the Copyright Society of the USA*, 67(3), 279-312, p. 288.

CDSM require filtering mechanism for content uploads. Such filtering systems are already being used to meet industry standard for professional diligence. What is missing for OCSSPs is that copyright holders would provide them with respective metadata of protected works that OCSSPs could link to filtering software to enable notice and stay down.<sup>89</sup>

### 2.2.1. Glawischnig-Piesczek case and monitoring obligation

The CJEU has said in previous cases such as L’Oreal and SABAM that general monitoring requirements cannot be imposed on OCSSPs.<sup>90</sup> This might change with the Glawischnig-Piesczek case.<sup>91</sup> It is a defamatory case where photos of Eva Glawischnig-Piesczek were published on Facebook. Eva Glawischnig-Piesczek requested Facebook to remove the pictures and any similar content as well. The national court satisfied the claim<sup>92</sup> and CJEU supported the decision<sup>93</sup> with following explanation:

“Ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content.”<sup>94</sup>

CJEU did say that automated means can be used to achieve removal of illegal content and any similar content as well. The CJEU evaluated that if such automated monitoring is done *ad hoc*, it does not conflict with the prohibition in article 15 of the e-Commerce Directive<sup>95</sup> and article 17(8) of the CDSM.

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<sup>89</sup> Grisse, K. (2019), *supra nota* 78, p. 894.

<sup>90</sup> Gosztonyi, G. (2020). The Contribution of the Court of Justice of the European Union to a Better Understanding the Liability and Monitoring Issues regarding Intermediary Service Providers. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica*, 59, 133-144, p. 142.

<sup>91</sup> Glawischnig-Piesczek, 03.10.2019, C-18/18, ECLI:EU:C:2019:821.

<sup>92</sup> Gosztonyi, G. (2020), *supra nota* 90, p. 142.

<sup>93</sup> *Ibid*, p. 143.

<sup>94</sup> See paragraph 53 of the judgement of case C-18/18.

<sup>95</sup> Gosztonyi, G. (2020), *supra nota* 90, p. 143.

It is problematic to monitor content that is similar to the illegal content. Such monitoring would make the OCSSP from passive and impartial to be an active contributor to that platform.<sup>96</sup> CJEU does not explained as well why removal of similar content to the illegal content does not constitute an active monitoring obligation. Advocate General provided more context to the matter that if a software tool was used for such monitoring, it does not require the OCSSP to use non-automatic filtering. Such reasoning was used by the CJEU too quickly and concluded that OCSSPs could rely on automated monitoring tools and technologies.<sup>97</sup>

Another problem is that European Union law has not defined limits on territory for the scope of measures that the Member States can adopt. This means that Member States could adopt measures that have a worldwide effect.<sup>98</sup> Advocate General Szpunar has shared same opinion.<sup>99</sup> It could be problematic to enforce such content removal especially if the infringement of the copyrighted work is not an infringement under a third state law.<sup>100</sup>

### **2.2.2. Google and YouTube joined cases of C-682/18 and C-683/18**

Advocate General Saugmandsgaard Oe provided his opinion on the identical and equivalent content in the joined cases of C-682/18 and C-683/18. Identical content is when same copyright-protected work is used and equivalent content is when identical files are used but in a different format. An example to explain this is when an entire movie is showed in YouTube, but as it is in a smaller screen frame without providing any additional information, this would be an equivalent infringement of copyrighted work.<sup>101</sup>

It is difficult for OCSSPs to determine if a specific content is legal or not and to make a distinction, it would require factual context and knowledge.<sup>102</sup> Article 14 of the e-Commerce Directive applies

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<sup>96</sup> Knol Radoja, K. (2020). Freedom of Expression on the Internet - Case 18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*. *Balkan Social Science Review*, 15, 7-24, p. 16.

<sup>97</sup> Cavaliere, P. (2019). *Glawischnig-Piesczek v Facebook on the Expanding Scope of Internet Service Providers' Monitoring Obligations*. *European Data Protection Law Review (EDPL)*, 5(4), 573-578, p. 575.

<sup>98</sup> Knapp, M. (2022). *The Scope of Jurisdiction in Cross-Border Intellectual Property Disputes: Tackling Online Copyright Infringements*. *Bialostockie Studia Prawnicze*, 27(1), 159-172, p. 167.

<sup>99</sup> *Opinion of Advocate General Szpunar delivered on 4 June 2019. Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, ECLI:EU:C:2019:458, p 86.

<sup>100</sup> Knapp, M. (2022), *supra nota* 98, p. 167.

<sup>101</sup> Oruc, T. (2022). *The Prohibition of General Monitoring Obligation for Video-Sharing Platforms under Article 15 of the E-Commerce Directive in Light of Recent Developments: Is It Still Necessary to Maintain It?*. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 13(3), 176-199, pp. 181-182.

<sup>102</sup> Wilman, F. (2021). *The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content - Between the e-Commerce Directive and the Digital Services Act*. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(3), 317-341, p. 332.

for OCSSPs that are content-neutral and an OCSSP cannot enjoy the liability exemption from the article 14 of the e-Commerce Directive once it has knowledge of the infringement.<sup>103</sup> Advocate General Saugmandsgaard Oe provided further explanation in the Google joined cases that the notice and take down process was created to have a balance between different interests, especially to protect the freedom of expression. The notice and take down process would ensure that OCSSPs do not need to conduct a legal assessment whether content is illegal or not. Notification of infringement would provide necessary information for OCSSPs to verify if a content is illegal or not.<sup>104</sup>

In Glawischnig-Piesczek case the CJEU injunction involved only specific obligations to monitor and actively to seek illegal activity.<sup>105</sup> In the SABAM case, the CJEU said that general and permanent monitoring is not allowed, but once a content is notified to be illegal, such monitoring obligations can be imposed on the OCSSPs. This is in line with the ruling by the CJEU for the monitoring obligation for specific content in Glawischnig-Piesczek case.<sup>106</sup> Nevertheless, the injunctions need to be proportionate and consider that not all providers may have respective resources to implement technologies to identify infringing content and apply blocks.<sup>107</sup>

### **2.2.3. Poland case to annul article 17(4) of the CDSM**

Article 17 of the CDSM changed fundamentally the regime for intermediary platform providers in the European Union. OCSSPs will have direct liability when their users upload infringing content. Best effort is expected from OCSSPs to obtain authorization from copyright holders and it is not clear how OCSSPs should meet this obligation. It has been discussed earlier that for OCSSPs to be compliant, they may need to implement automatic filtering on content uploading<sup>108</sup> and the CJEU has said that automatic filtering may be unavoidable. This would mean that it is a *de facto*

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<sup>103</sup> Wimmers, J. (2021). The out-of-Court Dispute Settlement Mechanism in the Digital Services Act: A Disservice to Its Own Goals. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(5), 381-401, p. 384.

<sup>104</sup> *Ibid*, pp. 384-385.

<sup>105</sup> Opinion of Advocate General Saugmandsgaard Oe delivered on 16 July 2020. Frank Peterson v. Google LLC and Others and Elsevier Inc. v. Cyando AG. Joined Cases C-682/18 and C-683/18. ECLI:EU:C:2020:586, p 220.

<sup>106</sup> Oruc, T. (2022), *supra nota* 101, p. 182.

<sup>107</sup> Opinion of Advocate General Saugmandsgaard Oe, *supra nota* 105, p 222.

<sup>108</sup> Lucic, S. (2022). The Operator's Liability for Copyright Violations Committed by Users of Its Platform. *LAW Theory and Practice*, 39(4), 109-123, p. 120.

obligation. It means that it is not written in the regulation itself, but in fact there is no other alternative method to comply with the imposed legal obligations.<sup>109</sup>

Poland raised a lawsuit (C-401/19) about article 17(4)(b) and 17(4)(c) of the CDSM to identify its incompatibility with freedom of expression. Poland explained that articles 17(4)(b) and 17(4)(c) of the CDSM require tracking and filtering technology and it violates the freedom of expression.<sup>110</sup> The CJEU did confirm in the C-401/19 judgement that the framework of article 17 of the CDSM creates a *de facto* obligation for OCSSPs to *ex ante* review the content of its users prior having it uploaded on its platform. Such *ex ante* review is not only based on information that is shared by copyright holders or private parties, but following the Glawischnig-Piesczek case, the information could be provided by public authorities as well. As OCSSPs obligation needs to strictly target only illegal content, the CJEU understood as well that this is difficult to achieve. The CJEU defined a proportionality test in such case that gives some safeguards for the OCSSPs. It means that OCSSPs do not need to prevent content uploads if they would need to assess independently if the content is illegal or not. Furthermore, until automatic filtering technologies are precise and do not block lawful content, OCSSPs are not obliged to conduct filtering of uploaded content. It can be required from OCSSPs to use automatic technologies only for specific and clear cases. Problematic is that this filtering obligation may be expended if the goal is to protect certain public interests, for example protecting the public against terrorism. Nevertheless, for such cases the proportionality test should be used to find a balance and the CJEU has said that filtering obligations need to be enclosed with effective and expeditious *ex post* mechanisms.<sup>111</sup>

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<sup>109</sup> Kornelius, W. (2023). Prior Filtering Obligations after Case C-401/19: Balancing the Content Moderation Triangle: A Comparative Analysis of the Legal Implications of Case C-401/19 for Filtering Obligations Ex Ante and the Freedom of Expression in Europe. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 14(1), 123-147, p. 125.

<sup>110</sup> Lucic, S. (2022), *supra nota* 108, p. 115.

<sup>111</sup> Kornelius, W. (2023), *supra nota* 109, pp. 145-147.

## 3. Regulating online platforms in the European Union

### 3.1. Gatekeepers

OCSSP is defined in the article 2(6) of the CDSM as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.<sup>112</sup> The DSA does not use OCSSP term but explains intermediary services via information society services defined in article 3(g) of the DSA. Similarly, as in e-Commerce Directive, the DSA article 3(g) includes mere conduit, caching and hosting. Excluding few amendments in the wording of mere conduit in article 4, caching in article 5 and hosting in article 6 of the DSA, the content and meaning remain same as is defined mere conduit in article 12, caching in article 13 and hosting in article 14 of the e-Commerce Directive.

Online platform is defined in the article 3(i) of the DSA as a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public.<sup>113</sup> Comparing article 3(i) of the DSA with article 2(6) of the CDSM, both definitions include storing and making public the content by the users of the platform. OCSSP is clearly defined that it used to make available copyrighted works, but this is not present in the definition of the online platform. However, the online platforms, as defined in the DSA, could be used similarly as OCSSP to store and make available copyrighted works.

The DSA scope is to regulate VLOPs or very large online search engines. VLOP is not that clearly defined in the DSA, but article 33(1) of the DSA refers that an online platform can be designated as very large online platform pursuant to article 33(4) of the DSA.<sup>114</sup> Article 33(4) of the DSA says that the Commission shall, ..., adopt a decision designating as a very large online platform ... for the purposes of this Regulation the online platform ... which has a number of average monthly active recipients of the service equal to or higher than 45 million. The Commission makes its decision based on the data reported by the provider of the online platform.<sup>115</sup> Up until now, the

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<sup>112</sup> CDSM Art. 2 s 6.

<sup>113</sup> DSA Art. 3, i.

<sup>114</sup> DSA Art. 33 s 1.

<sup>115</sup> DSA Art. 33 s 4.

Commission has identified 17 online platform providers as VLOPs such as Facebook, Instagram, Pinterest, TikTok, Twitter, YouTube.<sup>116</sup> Nevertheless, even when the Commission identifies an online platform as an VLOP, it can be argued. Zalando has brought an action against the Commission to order for the decision to identify Zalando as VLOP to be annulled.<sup>117</sup> The court has not made its decision yet, but the decision will have a significant impact on the process to identify online platforms as VLOPs in the future and the possibility for online platforms to challenge the Commission's decision to identify an online platform as VLOP.

The DMA does not use the term VLOP and uses gatekeeper instead. Article 2(1) of the DMA defines gatekeeper as an undertaking providing core platform services.<sup>118</sup> Article 2(2) of the DMA define that core platform services, and to name few relevant from copyright protection perspective, includes core services such as online intermediation services, video-sharing platform services and online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services that provides any of the core platform services.<sup>119</sup> Article 2(5) of the DMA define online intermediation services according to Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services<sup>120</sup> and Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.<sup>121</sup> As explained earlier, OCSSP is an information society service provider that could be considered to be a specific intermediary service provider that mainly stores and provides access to large amount of copyrighted works to its users with the purpose to generate profit.<sup>122</sup> Comparing the OCSSP definition with gatekeeper, both are intermediary service providers with the purpose to receive remuneration. Difference is that the gatekeeper includes a higher number of different core platform services compared to

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<sup>116</sup> European Commission (2023). *Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines*. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2413](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413).

<sup>117</sup> Action brought on 27.06.2023, Zalando v. Commission, T-348/23.

<sup>118</sup> DMA Art. 2 s 1.

<sup>119</sup> DMA Art. 2 s 2.

<sup>120</sup> DMA Art. 2 s 5.

<sup>121</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). OJ L 241, 17.9.2015, p. 1–15. Art. 1 s 1, b.

<sup>122</sup> Bridy, A., (2020), *supra nota* 82, p. 352.

OCSSP. Based on the definition analysis, OCSSP, VLOP and gatekeeper are compatible with each other. This means that OCSSP can be a gatekeeper and *vice versa*.

### 3.2. Protection of copyrighted works under Digital Services Act

The European Union wanted to reform the liability regime for online platforms under the e-Commerce Directive and proposed a new regulatory framework called DSA and DMA. The DSA and DMA are meant to complement each other. The DSA has been created around intermediary services and define the obligations, liability and transparency regarding illegal content for online platforms.<sup>123</sup> The Commission has identified several online platforms as gatekeepers such as YouTube under article 2(2)(d) of the DMA, and TikTok, Facebook and Instagram under article 2(2)(c) of the DMA.<sup>124</sup>

OCSSP and VLOP are both intermediary service providers and there is an overlap. This overlap could mean that the DSA could apply to OCSSPs as well. If an online platform is identified as an OCSSP according to article 2(6) of the CDSM, they need to comply with article 17 of the CDSM. However, it is said that article 17 of the CDSM is *lex specialis* to the DSA<sup>125</sup>, the DSA does not affect those specific regulations.<sup>126</sup> For example, YouTube has been identified as an VLOP, but as YouTube provides an online platform for content that could be copyrighted works, it is at the same time an OCSSP as well. The safe harbor from article 14 of the e-Commerce Directive, article 17 of the CDSM and respectively article 5 of the DSA are still applicable for that part of the content that is a copyrighted work.<sup>127</sup> The DSA applies to OCSSPs in matters that falls outside of the scope of article 17 of the CDSM and if article 17 of the CDSM leaves discretion to Member States.<sup>128</sup>

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<sup>123</sup> Fisher, A., Streinz, T. (2022). Confronting Data Inequality. *Columbia Journal of Transnational Law*, 60(3), 829-956, pp. 910-911.

<sup>124</sup> European Commission (2023). *Digital Markets Act: Commission designates six gatekeepers*. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4328](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328).

<sup>125</sup> Peukert, A., Husovec, M., Kretschmer, M., Mezei, P., Quintais, J. P. (2022). European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. *IIC*, 53, 358-376, p. 361.

<sup>126</sup> Quintais, J. P., Schwemer, S. F. (2022). The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright? *European Journal of Risk Regulation* (2022), 13, 191-217, p. 203.

<sup>127</sup> *Ibid*, p. 202.

<sup>128</sup> *Ibid*, p. 204.



### 3.2.1. Monitoring obligation under the DSA

In the Glawischnig-Piesczek case, the CJEU concluded that automated means can be used to achieve removal of illegal content and any similar content as well.<sup>129</sup> The same obligations will exist in the DSA, nevertheless that article 15 of the e-Commerce Directive, article 17(8) of the CDSM, and article 8 of the DSA prohibit general monitoring.<sup>130</sup> As courts can issue an order to stop infringing copyrighted works, this falls within the meaning of specific monitoring obligation. During the preparation of the DSA, several shortcomings were identified such as that the previous regime under the e-Commerce Directive discouraged voluntary action to fight online infringement of copyrighted works and the meaning of active role remained unclear.<sup>131</sup>

The DSA includes a Good Samaritan clause<sup>132</sup> that was inspired from the United States section 230 of the US Communications Act of 1934.<sup>133</sup> The Good Samaritan clause is defined in the article 7 of the DSA saying that online platform providers shall not be deemed ineligible for the exemptions from liability referred to in articles 4, 5 and 6 of the DSA solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in the DSA.<sup>134</sup> Recital 26 of the DSA explains if online platforms conducts voluntary investigation to detect, identify and act against illegal content, the online platform can still rely on the liability exemption. However, the investigation needs to be done based on good faith and in diligent manner. This means that it shall be objective, non-discriminatory and proportionate. The proportionality needs to be evaluated between the rights and legitimate interest of all involved parties. Automated tools can be used to conduct such investigation, but the online platform needs to ensure that the chosen tool is reliable and considers the above-mentioned conditions.<sup>135</sup> Online platforms have used automated tools since e-Commerce Directive entered into force, to benefit from the liability exemption if they act

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<sup>129</sup> Gosztonyi, G. (2020), *supra nota* 90, p. 143.

<sup>130</sup> Kornelius, W. (2023), *supra nota* 109, pp. 125-138.

<sup>131</sup> Buiten, M. C. (2021). The Digital Services Act From Intermediary Liability to Platform Regulation. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(5), 361-380, p. 370.

<sup>132</sup> *Ibid*, p. 371.

<sup>133</sup> G'sell, F. (2023). The Digital Services Act (DSA): A General Assessment (April 15, 2023). in *Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung e.V., Institute for Digital Law (IRDT), Trier April 2023*, p. 6.

<sup>134</sup> DSA Art. 7.

<sup>135</sup> DSA recital 26.

against illegal content. The CJEU said in the YouTube v. Cyando case if online platform uses measures to detect illegal content, it does not mean that the online platform has taken an active role in the infringement of copyrighted works.<sup>136</sup> Online platforms will not take active role under the DSA if they comply with article 7 of the DSA and with the guidelines explained in the recital 26 of the DSA.

The notice and take down process from the e-Commerce Directive and notice and stay down process from the CDSM have been replaced with a notice and action process in article 16(1) of the DSA that require from the providers of hosting services to put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Those mechanisms shall be easy to access, user-friendly and shall allow for the submission of notices exclusively by electronic means. This change is more favourable for the online platforms because in the case for illegal content is reappearing, online platform does not need to ensure the stay down obligation<sup>137</sup> that was defined in the CDSM.

Recital 54 of the DSA it explains that where a provider of hosting services decides, on the ground that the information provided by the recipients is illegal content ..., to remove or disable access to information provided by a recipient of the service or to otherwise restrict its visibility or monetisation, for instance following receipt of a notice or acting on its own initiative, including exclusively by automated means, ... where this information is necessary to identify the illegality of the content, such as in cases of infringements of intellectual property rights. It is interesting that recital 54 of the DSA has a reference to automated means to identify the illegality of the content as this has an indication to general monitoring.

The Commission is against general monitoring obligation as long as online platform does not receive a notification by a user of the illegal content. This means that it is not possible to initiate a claim against the online platform for the infringement of copyrighted works as the platform provider does not have the obligation to monitor the content under the DSA.<sup>138</sup> Furthermore, the DSA does not introduce changes in the liability exemption for online platforms that are defined in

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<sup>136</sup> Genc-Gelgec, B. (2022). Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies? *Croatian Yearbook of European Law and Policy*, 18, 25-60, p. 44.

<sup>137</sup> Buiten, M. C. (2021), *supra nota* 131, p. 374.

<sup>138</sup> Rustad, M. L., Koenig, T. H. (2023). The Case for a CDA Section 230 Notice-and-Takedown Duty. *Nevada Law Journal*, 23(2), p. 602.

the e-Commerce Directive but impose stronger due diligence obligations.<sup>139</sup> Nevertheless, it remains unclear what is meant with good faith and in diligent manner.

### 3.2.1.1. *Google Ireland and Others case and monitoring obligation*

The DSA constitutes obligations on the online platforms on transparency reporting and mechanisms for notification of illegal content. As the DSA becomes applicable from 17<sup>th</sup> of February 2024, the rules from DSA are not harmonized at European Union yet. Nevertheless, some Member States such as Austria has already started to implement similar rules as from the DSA into their legislation.<sup>140</sup>

*The Austrian law Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen* that is that federal law in Austria on measures for the protection of users of communications platform has established in § 3(1) that service providers shall establish an effective and transparent procedure for handling and processing notifications relating to allegedly illegal content available on the communication platform.<sup>141</sup> The aim was to increase the responsibility of online platforms by introducing a notice and action procedure for allegedly illegal content and to provide transparency by reporting how such notices are being handled.<sup>142</sup>

The CJEU has explained that for the proper functioning of the internal market by ensuring the free movement of information society services between Member States<sup>143</sup>, Member State needs to act according to principle of mutual recognition and should not restrict the free movement of information society services by imposing additional obligation.<sup>144</sup> If a Member State imposes measures to regulate online platforms not established on its territory, it would undermine the mutual trust between Member States and would be against the principle of mutual recognition.<sup>145</sup> Additionally, the Advocate General has explained that Member States cannot impose general

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<sup>139</sup> Strowel, A., De Meyere, J. (2023). The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms? *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 14(1), 66-83, p. 74.

<sup>140</sup> Opinion of Advocate General Szpunar, 08.06.2023, *Google Ireland and Others*, C-376/22, ECLI:EU:C:2023:467, pp 1-3.

<sup>141</sup> Court decision, *Google Ireland and Others*, 9.11.2023, C-376/22, ECLI:EU:C:2023:835, p 13.

<sup>142</sup> Request for a preliminary ruling, 10.06.2022, *Google Ireland and Others*, C-376/22, p 1.

<sup>143</sup> See paragraph 54 of judgement of case C-376/22.

<sup>144</sup> See paragraph 44 of judgement of case C-376/22.

<sup>145</sup> *Google Ireland and Others*, *supra nota* 141, p 53.

monitoring obligation to online platforms, but it needs to be specific to an individual infringement.<sup>146</sup>

The importance of this case is that Member States cannot impose further general rules on the online platforms that are already defined in the regulation. It is not prohibited to impose specific monitoring obligations and this is in line with the ruling by the CJEU for the monitoring obligation for specific content in Glawischnig-Piesczek case. Furthermore, the online platforms need to comply with the applicable rules of the Member States where it is established, nevertheless they provide their services to another Member State.

### 3.2.2. DMA

The DSA focuses on rules that govern the online platforms of the gatekeepers, but the DMA focuses on regulating the market behaviour of the online platforms.<sup>147</sup> Specifically, the DMA aim is to open up the competition by removing barriers for companies to enter into digital market and to have a fair digital market for companies and users.<sup>148</sup>

The DMA defines gatekeeper very broadly as an undertaking providing core platform services. Article 3(1) of the DMA assists to classify an undertaking as a gatekeeper, if the undertaking has a significant impact on the internal market, it provides a core platform service which is an important gateway for business users to reach end users and it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.<sup>149</sup> This means that even if the Commission fails to identify an entrenched and durable position within the market, the Commission still can classify an undertaking as a gatekeeper if it thinks that the undertaking may have such position in the future and is difficult to challenge by the undertakings in the Court.<sup>150</sup> This is one of the reasons why the DMA has been heavily criticized as there is no need to prove that the undertakings have caused any harmful effect on the competition or end

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<sup>146</sup> Opinion of Advocate General Szpunar, *supra nota* 140, pp 50, 52.

<sup>147</sup> Huckova, R., Semanova, M. (2022). The Position and Regulation of Gatekeepers in the Context of the New European Legislation. *EU and Comparative Law Issues and Challenges Series*, 6, 509-526, p. 521.

<sup>148</sup> Huckova, R., Semanova, M. (2023). Various Consequences of Digital Markets Act on Gatekeepers. *EU and Comparative Law Issues and Challenges Series*, 7, 295-314, p. 298.

<sup>149</sup> DMA Art. 3 s 1.

<sup>150</sup> McIntyre, R. (2023). Decentralisation and Recentralisation: An Institutional Analysis of EU Competition Law and the Digital Markets Act. *LSE Law Review*, 8(3), 227-285, pp. 279-281.

users. Furthermore, the DMA has been established in a way that may not capture harmful behaviour by the undertakings.<sup>151</sup>

Another criticism about the DMA is the gatekeeper definition as it does not require actual dominant position in the digital market. Gatekeepers dominant position is evident on their own platform where they can control and influence the terms and conditions. In the digital market, gatekeepers face intense competition from other platforms but also from new innovators.<sup>152</sup> Furthermore, the DMA does not apply equally to large online platforms. For example, the Commission identified YouTube as a gatekeeper, but there are other large video sharing and streaming services that have not been identified as gatekeeper such as Netflix or Amazon Prime. Nevertheless, YouTube competes with Netflix and Amazon Prime. This shows clearly that special responsibilities from the DMA are not assigned to the gatekeeper because of their dominant position but based on the business model.<sup>153</sup> The DMA rules move the gatekeepers away from the competition by allowing other undertakings to enter the competition in the market.<sup>154</sup>

The DMA does not create legal certainty for large online platforms. While there are clear requirements when a large online platform qualifies as a VLOP under the DSA, it is not that clear if the Commission will identify an undertaking as a gatekeeper under the DMA.

### **3.2. Contradictions between CDSM, DSA and DMA**

Large online platforms are like any other company that monetize their intellectual property. The intellectual property has allowed to get high number of users which has made some of the online platforms to become large and powerful. As explained earlier, it is not a requirement to have a dominant position in the digital market to be identified as a gatekeeper, it is the business model on the usage of the intellectual property.<sup>155</sup> Once an online platform is identified as gatekeeper, only then it needs to comply with the special rules from the DMA. Additionally to the DMA, as explained earlier, gatekeepers are VLOPs at the same time and this means that the gatekeepers need to comply with the DSA. Furthermore, gatekeepers are not only VLOPs but OCSSP as well,

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<sup>151</sup> Huckova, R., Semanova, M. (2023), *supra nota* 148, p. 310.

<sup>152</sup> Huckova, R., Semanova, M. (2022), *supra nota* 147, p. 522.

<sup>153</sup> Huckova, R., Semanova, M. (2023), *supra nota* 148, p. 302.

<sup>154</sup> Cremer, J., Crawford, G. S., Dinielli, D., Fletcher, A., Heidhues, P., Schnitzer, M., Morton, F. (2023). Fairness and Contestability in the Digital Markets Act. *Yale Journal on Regulation*, 40(3), 973-1012, p. 1000.

<sup>155</sup> Huckova, R., Semanova, M. (2023), *supra nota* 148, p. 302.

and this means that CDSM applies too. Nevertheless, the question remains, how can gatekeepers comply with CDSM, DSA and DMA simultaneously in the protection of copyrighted works.

The DMA does not include specific obligations in the protection of copyrighted works for the gatekeepers. The DMA has special rules for the gatekeepers to ensure that their intellectual property does not create a monopoly and due to that the gatekeeper cannot exercise unfair practices and conditions for other businesses who want to use its intellectual property or copyrighted works on the gatekeepers' platforms. In addition to the DMA, the gatekeeper is in a dual position to comply with the CDSM and DSA for the protection of copyrighted works. Both, CDSM and DSA, require gatekeepers to establish a notification procedure to report infringement of copyrighted works.

Article 17(4)(c) of the CDSM provide a general requirement for the notification process. The CDSM does not provide any further clarification how the notification process needs to be set up, neither what is necessary and relevant information for gatekeeper to decide whether the content needs to be removed or not. This is problematic for the gatekeepers as once they have been notified about the infringing content, they need to remove it from their website and make best effort to prevent future uploads. The CDSM does not mention that removal of content needs to be evaluated and balanced with the fundamental rights of the users, but this has been thoroughly analysed in the *Poland v. Parliament and Council* case.<sup>156</sup> Advocate General Saugmandsgaard Oe did explain in the Google joined cases that the notice and take down process was created to have a balance between different interests, especially to protect the freedom of expression. The notice and take down process would ensure that gatekeepers do not need to conduct a legal assessment whether content is illegal or not.<sup>157</sup> Considering that there are no guidelines for the gatekeepers on the necessary and relevant information to decide whether content is illegal or not, and to find a balance for the protection of freedom of expression, eventually it means that gatekeepers still need to conduct a legal assessment to ensure their compliance with article 17(4)(c) of the CDSM.

The DSA seems to provide some resolution for the problems with article 17(4)(c) of the CDSM. Article 16(1) of the DSA provide a general requirement for the notification process similarly as article 17(4)(c) in the CDSM but clarify necessary and relevant information for gatekeeper in the article 16(2) of the DSA that was missing in the CDSM. Article 16(3) says that information

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<sup>156</sup> *Poland v. Parliament and Council*, 26.04.2022, C-401/19, ECLI:EU:C:2022:297.

<sup>157</sup> Wimmers, J. (2021), *supra nota* 103, pp. 384-385.

received via the notification process allows gatekeeper to identify the illegality of the content without a detailed legal examination.<sup>158</sup> The DSA does not mention either that the removal of content needs to be evaluated and balanced with the fundamental rights of the users, but this is explained in the recital 22 of the DSA. Recital 22 of the DSA says that the removal or disabling of access should be undertaken in the observance of the fundamental rights of the recipients of the service, including the right to freedom of expression and of information.<sup>159</sup> Recital 52 of the DSA clarify the list of fundamental rights and for parties affected by illegal content, it includes the protection of intellectual property.<sup>160</sup> Therefore, even if gatekeepers have guidelines for the necessary and relevant information to decide whether content is illegal or not, but they still need to find a balance between the protection of freedom of expression and the protection of intellectual property, eventually it means that gatekeepers still need to conduct a legal assessment under the DSA.

The article 16(6) of the DSA refer to that decisions on removal of content can be made using automated means<sup>161</sup> and recital 54 of the DSA has a reference to automated means to identify the illegality of the content, both indicate towards general monitoring.<sup>162</sup> Both, CDSM and DSA, prohibit imposing general monitoring obligations on gatekeepers, but it is possible to impose monitoring obligations for specific content on gatekeepers as was explained in the Glawischnig-Piesczek case. It remains unclear whether monitoring obligations for specific content are applicable under the DSA as well.

While the DSA provides clarification on the requirements for infringing content notification requirements compared to the CDSM, the main difference is on the obligation to act based on the information received from the notification. The CDSM requires the gatekeeper to use best efforts to prevent the future uploads of infringing content, the DSA only requires taking action on that specific content that was reported to be illegal. This is further clarified in the recital 51 of the DSA explaining that any action taken by a gatekeeper pursuant to receiving a notice should be strictly targeted, in the sense that it should serve to remove or disable access to the specific items of information considered to constitute illegal content. This means that gatekeepers do not need to

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<sup>158</sup> DSA Art. 16 s 3.

<sup>159</sup> DSA recital 22.

<sup>160</sup> DSA recital 52.

<sup>161</sup> DSA Art. 16 s 6.

<sup>162</sup> DSA recital 54.

ensure the stay down obligation if the illegal content is reappearing.<sup>163</sup> As CDSM and DSA both apply to gatekeepers, it remains unclear whether gatekeeper needs to comply with notice and stay down obligation from the CDSM or notice and take action obligation from the DSA.

Both, the CDSM and DSA, protect intellectual property and require a process to notify about infringement copyrighted works and illegal content. The DSA should apply in matters that fall outside of the scope of article 17 of the CDSM<sup>164</sup>, however, there is no clarification what those situations could be. CDSM and DSA are relevant in the European Union, but as the law does not define limits on territory for the scope of measures that the Member States can adopt, this could potentially mean that some measures could have a worldwide effect.<sup>165</sup> Gatekeepers have international user base, and the removal of content is complicated from international perspective as the content may not be illegal or infringing under a third state law.<sup>166</sup> Therefore, it remains unclear how gatekeepers could remain compliant with CDSM and DSA in the removal of infringing copyrighted works and illegal content.

As explained earlier, the DMA regulates the behaviour of gatekeepers and does not cause specific compliance problems to ensure protection of intellectual property rights of copyright holders. It is more problematic for gatekeepers to comply with CDSM and DSA simultaneously. Firstly, there is a contradiction between the necessary and relevant information received via the notification process for the gatekeepers to decide whether content needs to be removed or not. Secondly, CDSM and DSA prohibit imposing general monitoring obligations on gatekeepers, but it is possible to impose specific monitoring obligations on gatekeepers under the CDSM. It is not known whether the same specific monitoring obligations can be imposed on gatekeepers under the DSA. Thirdly, the CDSM requires gatekeepers to ensure that infringing and illegal content future uploads are prevented, but at the same time the DSA requires that gatekeepers only remove or disable access to the specific items of information considered to constitute illegal content. Finally, the DSA should apply in matters that fall outside of the scope of article 17 of the CDSM, but there is no clarification what those situations could be. This has been summarized in Table 1 below. Therefore, it is not possible for gatekeepers to comply with CDSM and DSA simultaneously in the protection of copyrighted works.

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<sup>163</sup> DSA recital 51.

<sup>164</sup> Quintais, J. P., Schwemer, S. F. (2022), *supra nota* 126, p. 204.

<sup>165</sup> Knapp, M. (2022), *supra nota* 98, p. 167.

<sup>166</sup> *Ibid*, p. 167.



Table 1. Comparison of CDSM and DSA in the protection of intellectual property rights

<b>Legislation</b>	<b>What is the process to notify about infringing or illegal content?</b>	<b>Is general monitoring allowed?</b>	<b>What actions need to be taken based on the information received via notification process?</b>
CDSM	<p>Article 17(4)(c) of the CDSM provide a general requirement for the notification process. The CDSM does not provide any further clarification how the notification process needs to be set up, neither what is necessary and relevant information that needs to be provided to decide whether the content needs to be removed or not. No legal assessment needs to be conducted based on the provided information whether content is illegal or not, but as the removal of content needs to be balanced with the protection of freedom of expression, it may mean that legal assessment needs to be conducted prior to removal of content.</p>	<p>Article 17(8) of the CDSM prohibit general monitoring, but it is possible to impose monitoring obligations for specific content.</p>	<p>The CDSM requires that best effort is used to prevent the future uploads of infringing content. This means that content that was notified to be infringing copyrighted work needs to stay down. Once the infringing content is removed, it needs to be ensured that once the infringing content is reappearing then it is being removed.</p>

<p>DSA</p>	<p>Article 16(1) of the DSA provide a general requirement for the notification process and the necessary and relevant information is clarified in the article 16(2) of the DSA. Article 16(3) clarifies that information received via the notification process allows to identify the illegality of the content without a detailed legal examination, but as the removal of content needs to be balanced with the protection of fundamental rights of the users, it may mean that legal assessment needs to be conducted prior to removal of content.</p>	<p>Article 8 of the DSA prohibit general monitoring, but it remains unclear whether monitoring obligations can be imposed for specific content as with the CDSM.</p>	<p>The DSA requires that removal or disabling of access is being taken on that specific content that was reported to be illegal. For clarification that under the DSA it is not required to ensure the stay down obligation if the illegal content is reappearing.</p>
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Source: Created by the author.

## 4. Importance of DSA and DMA for the United States and in the future

The United States Congress requested in 2019 and 2020 investigation into Facebook, Google, Amazon and Apple to identify how to improve antitrust laws. It was identified that it is necessary to try and find a way to restore antimonopoly goals and to reduce the risks coming from monopolistic power. Another proposal was to lower the standards that are necessary to prove monopolization. This gives an indication into the shift of regulations to target more aggressively big online platforms.<sup>167</sup> For that purpose, in 2021 was announced a new legislation that will regulate the large online platforms in the United States. That legislation is called the Competition and Antitrust Law Enforcement Reform Act (hereinafter CALERA) and it has been proposed that the United States should take the DSA and DMA from the European Union as a reference. Taking the DSA and DMA as a reference would enable the United States to tackle specific issues in the online sphere such as advertising or other content related practices.<sup>168</sup>

As in the European Union, the United States realized that competition law purely is not enough to regulate large online platforms and *ex ante* legislations are needed to regulate competition in digital market.<sup>169</sup> For that purpose, in 2021, the American Innovation and Choice Online Act (hereinafter AICO) was introduced to regulate dominant online platforms by preventing them of using their dominant power in harming competition and users. Interesting is that the AICO target very much the same conducts that is done in the DMA.<sup>170</sup> This shows that there is a mutual understanding on political level in European Union and in the United States that some online platforms have abused their dominant power and harmed consumers by its actions.<sup>171</sup>

United States has created a close list but at the same time a broader definition of intermediary service provider that would fall under the AICO. Broad definition has certain benefits as it adds

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<sup>167</sup> Wang, X. (2022). YouTube Creativity and the Regulator's Dilemma: An Assessment of Factors Shaping Creative Production on Video-Sharing Platforms. *Albany Law Journal of Science & Technology*, 32(3), 197-278, p. 274.

<sup>168</sup> Hassard, P. (2022). What's Not to Like?: The EU's Case against Big Tech and Important Lessons for the United States. *North Carolina Journal of International Law*, 47(3), 521-540, pp. 531-534.

<sup>169</sup> Tombal, T. (2022), Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches. *European Competition Journal*, 18(3), 468-500, p. 490.

<sup>170</sup> Antel, J., Barbu-O'Connor, C., Carroll, J., Daw, K., Klotz, R. (2022). Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US. *European Competition and Regulatory Law Review (CoRe)*, 6(1), 35-55, p. 53.

<sup>171</sup> Antel, J., *et al.* (2022), *supra nota* 170, p. 53.

flexibility and is more time resilient during the development of technology. For example, the broader definition by the United States allows to target browsers that are not covered by the European Union.<sup>172</sup> Both, the United States and European Union have the understanding that online platforms need to be targeted and regulated, but notably the differences in the legal reforms, there is a need for a more global harmonization on the regulation of online platforms.<sup>173</sup>

Neither of the legislations, in the European Union and United States, has been applicable in practice yet. The DSA will be applicable from 17<sup>th</sup> of February 2024 in the European Union<sup>174</sup> and first gatekeepers will need to comply with the DMA from 6<sup>th</sup> of March 2024.<sup>175</sup> Both, CALERA and AICO, have been introduced in the United States senate, but have not become law yet.<sup>176</sup> Therefore, it is difficult to evaluate how the DSA and DMA will contradict with CALERA and AICO, and how complicated will be for the online platforms to comply with the legislations from European Union and the United States. However, as CALERA and AICO are inspired by DSA and DMA, and there are many similarities, the assumption is that the legislations should not contradict on the substantive points. The DSA and DMA have flexibility that should be time resilient during the development of technology as is for the AICO, but United States has taken a step forward from the DSA and DMA and introduced broader interpretation of intermediary service providers. This allows to apply AICO on new business model that have gained dominance compared with the DMA.

Even if United States has been inspired by the DSA and DMA, there is lack of cooperation between United States and European Union to have harmonized approach on the regulation of online platforms. Nevertheless, as CALERA and AICO have not become laws yet, it gives the United States an opportunity to see the advantages and disadvantages of DSA and DMA in practice and potentially amend CALERA and AICO before it is passed to become law. If DSA and DMA are successful in practice, it has the potential to lead to better global harmonization of the regulations between European Union and the United States.

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<sup>172</sup> Tombal, T. (2022), *supra nota* 169, p. 478.

<sup>173</sup> Antel, J., *et al.* (2022), *supra nota* 170, p. 54.

<sup>174</sup> European Commission (2023). *Questions and Answers: Digital Services Act\**. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).

<sup>175</sup> European Commission (2023), *supra nota* 124.

<sup>176</sup> Congress.gov (2021). *S.225 - Competition and Antitrust Law Enforcement Reform Act of 2021*. Retrieved from: <https://www.congress.gov/bill/117th-congress/senate-bill/225?s=1&r=1&q=%7B%22search%22%3A%22News+media+and+reporting%22%7D>. Congress.gov (2021). *S.3267 - Consolidation Prevention and Competition Promotion Act of 2021*. Retrieved from: <https://www.congress.gov/bill/117th-congress/senate-bill/3267>.

For the protection of intellectual property rights in the digital age, there has been no further developments in the United States since the introduction safe harbor concept for online platforms to exempt their liability in infringement of copyrighted works. This is confirmed by the recent ruling by the United States Supreme Court in *Gonzalez v. Google LLC* case where the safe harbor precludes the filing of a claim against the online platform.<sup>177</sup> The safe harbor concept is not perfect and is strongly debated even in the United States, but the approach from Europe has demonstrated that by removing hyperlinks that are used to access a protected copyrighted work, for example an article, this has caused the content to be subject to censorship. Therefore, safe harbor can be good to support free speech, but it can also benefit smaller intermediary service providers that do not have the resources to remove infringing content from their platforms.<sup>178</sup>

While United States and European Union have a mutual understanding on political level that some online platforms have abused their dominant power and have taken steps to regulate it, there is an opposite understanding on the protection of intellectual property rights on the Internet and the exemption of liability for online platforms. The European Union has made significant developments since the introduction of safe harbor concept and has imposed stronger liability commitments on the online platforms. It seems that the United States does not fully agree with the approach taken by the European Union in the protection of copyrighted works on the Internet and while it understands that the safe harbor might need to be changed, it takes more time to evaluate the options to ensure freedom of speech and the protection of innovation and growth for the online platforms.

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<sup>177</sup> Nash, M. (2023). *Supreme Court Maintains Internet Safe Harbor Provisions ... for Now*. Retrieved from: <https://www.jdsupra.com/legalnews/supreme-court-maintains-internet-safe-8486007/>.

<sup>178</sup> Pokrovskaya, A. (2023). Intermediaries liability for copyright infringement: application of the “safe harbor” model. *E3S Web of Conferences* 420, 06046, pp. 6-7.

## CONCLUSION

The aim of the research was to give an overview on how the concept of safe harbor was introduced in the United States that limited the liability of intermediary service providers in the infringement of copyrighted works, how the safe harbor concept was transposed and what were the developments in the European Union in the protection of intellectual property rights in the digital age.

The European Union introduced the safe harbor with the e-Commerce Directive, and it was further developed in the CDSM. Recently, the European Commission proposed the DSA and DMA that influence large online platforms in the protection of intellectual property rights. Therefore, it was necessary to evaluate if the terminology used in the CDSM, DSA and DMA are compatible and for that purpose, the gatekeeper definition from the DMA was taken as a basis to compare with the meanings of OCSSP from the CDSM and VLOP from the DSA. Once the terminology was clarified, it was necessary to review whether CDSM, DSA and DMA have simultaneous application on online platforms that are identified as gatekeepers and whether there are any compliance problems to meet the obligation to protect intellectual property rights.

The hypothesis of the research was that OCSSPs can qualify as gatekeepers and due to unclear requirements for the protection of intellectual property rights that are imposed on gatekeepers from CDSM, DSA and DMA, gatekeepers could be non-compliant with CDSM, DSA and DMA.

The first research question was, how is VLOP and gatekeeper definition from DSA and DMA compatible with OCSSP definition from CDSM? OCSSP is defined in the CDSM as an intermediary service provider that stores and gives public access to copyrighted works that have been uploaded by the online platform users. Instead of using OCSSP, the DSA uses VLOP, but has the similar meaning as OCSSP, an intermediary service provider that stores and gives public access to information. The DSA does not say that the information is copyrighted work, however, the information could include copyrighted work as is specifically defined in the OCSSP definition. The DMA uses gatekeeper instead of OCSSP, but both are intermediary service providers with the purpose to receive remuneration. This means that OCSSP definition is compatible with VLOP and gatekeeper definitions. OCSSP can be a gatekeeper and *vice versa*.

The second research question was, how can gatekeepers comply with CDSM, DSA and DMA simultaneously in the protection of copyrighted works? The DMA does not cover protection of intellectual property rights on online platforms but defines special rules for gatekeepers to ensure that its intellectual property does not give them dominant power. Gatekeepers cannot exercise unfair practices and conditions for other businesses who want to use its intellectual property or copyrighted works on the gatekeepers' platforms. Nevertheless, gatekeeper is in dual position and needs to comply with CDSM and DSA for the protection of copyrighted works.

CDSM and DSA require that a notification process is being set up by the gatekeeper, but there is no clarification in the CDSM what is necessary and relevant information that needs to be provided to decide whether the content needs to be removed or not. Such clarification is present in the DSA. Both, CDSM and DSA, prohibit imposing general monitoring obligations on gatekeepers, but it is possible to impose specific monitoring obligations under the CDSM. It is not known whether specific monitoring obligations can be imposed on gatekeepers under the DSA. The DSA should apply in matters that fall outside of the scope of article 17 of the CDSM, but there is no clarification what those situations could be. As CDSM and DSA require different actions from gatekeepers regarding infringing content, it remains unclear whether gatekeeper needs to make best effort to prevent the future uploads of infringing content as is required according to CDSM or take action on the specific content that was reported to be illegal as required by the DSA. As a conclusion, due to unclear requirements for the protection of intellectual property rights that are imposed on gatekeepers from CDSM and DSA, it is not possible for gatekeepers to comply with CDSM and DSA simultaneously in the protection of copyrighted works.

The United States introduced the safe harbor concept and European Union transposed similar concept to its legislation. European Union developed the safe harbor concept further and realized that competition law is not enough to regulate large online platforms. There was a need to regulate competition in digital market and the DSA and DMA were introduced. United States followed soon and introduced CALERA and AICO. Nevertheless, European Union and United States agree that large online platforms need to be regulated to avoid the abuse of their dominant power, but there is an opposite understanding on the protection of intellectual property rights and the exemption of liability for intermediary service providers. The European Union imposed stronger liability commitments on online platforms, and even when it is strongly debated in the United States, United States does not seem to take the European Union approach on the protection of copyrighted works as a reference.

The DSA will be applicable from February 2024 and potentially will provide clarification for gatekeepers in matters what are the situations when the DSA is applicable and falls outside of the scope of article 17 of the CDSM. New cases could come where CJEU can provide further explanation and guidelines for the gatekeepers to ensure that gatekeeper complies with the protection of intellectual property rights from CDSM and DSA. Furthermore, it will be possible to see whether the joint effect of CDSM and DSA will have an impact on the freedom of speech and the protection of innovation and growth for the online platforms. After that it is possible to research whether United States could use the European Union approach on the protection of copyrighted works and make changes in the safe harbor concept that exempt online platform liability in infringement of copyrighted works.



## REFERENCES

### Scientific articles

1. Achleitner, R. (2023). The Enforcement of the Digital Markets Act: Is There Space for Private Enforcement? The Restraint towards Private Enforcement in the DMA. *Zeitschrift für Öffentliches Recht (ZoR): Journal of Public Law*, 78(2), 287-300. Retrieved DOI: [10.33196/zoer202302028701](https://doi.org/10.33196/zoer202302028701).
2. Amirmahani, A. (2015). Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union. *Berkeley Technology Law Journal*, 30(Annual Review), 865-898. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/berktech30&i=958>.
3. Antel, J., Barbu-O'Connor, C., Carroll, J., Daw, K., Klotz, R. (2022). Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US. *European Competition and Regulatory Law Review (CoRe)*, 6(1), 35-55. Retrieved DOI: [10.21552/core/2022/1/7](https://doi.org/10.21552/core/2022/1/7).
4. Bridy, A. (2020). The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform. *Vanderbilt Journal of Entertainment & Technology Law*, 22(2), 323-358. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/vanep22&i=323>.
5. Buiten, M. C. (2021). The Digital Services Act From Intermediary Liability to Platform Regulation. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(5), 361-380. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/jipitec12&i=559>.
6. Burri, M. (2014). Permission to Link: Making Available via Hyperlinks in the European Union after Svensson. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 5(3), 245-255. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/jipitec5&i=253>.
7. Cavaliere, P. (2019). Glawischnig-Piesczek v Facebook on the Expanding Scope of Internet Service Providers' Monitoring Obligations. *European Data Protection Law Review (EDPL)*, 5(4), 573-578. Retrieved DOI: [10.21552/edpl/2019/4/19](https://doi.org/10.21552/edpl/2019/4/19).
8. Cremer, J., Crawford, G. S., Dinielli, D., Fletcher, A., Heidhues, P., Schnitzer, M., Morton, F. (2023). Fairness and Contestability in the Digital Markets Act. *Yale Journal*

- on Regulation*, 40(3), 973-1012. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/yjor40&i=981>.
9. Fisher, A., Streinz, T. (2022). Confronting Data Inequality. *Columbia Journal of Transnational Law*, 60(3), 829-956. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/cjtl60&i=841>.
  10. Geiger, C., Jütte, B. J. (2021). Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match. *GRUR International*, 70(6), 517-543. Retrieved from:  
<https://ssrn.com/abstract=3776267>.
  11. Genc-Gelgec, B. (2022). Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies? *Croatian Yearbook of European Law and Policy*, 18, 25-60. Retrieved from: <https://heinonline.org/HOL/P?h=hein.intyb/cybelp0018&i=39>.
  12. Gosztonyi, G. (2020). The Contribution of the Court of Justice of the European Union to a Better Understanding the Liability and Monitoring Issues regarding Intermediary Service Providers. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica*, 59, 133-144. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/ausbud59&i=133>.
  13. Grisse, K. (2019). After the storm—examining the final version of Article 17 of the new Directive (EU) 2019/790. *Journal of Intellectual Property Law & Practice*, 14(11), 887–899. Retrieved from: <https://doi.org/10.1093/jiplp/jpz122>.
  14. Hassard, P. (2022). What's Not to Like?: The EU's Case against Big Tech and Important Lessons for the United States. *North Carolina Journal of International Law*, 47(3), 521-540. Retrieved from: <https://scholarship.law.unc.edu/ncilj/vol47/iss4/2>.
  15. Huckova, R., Semanova, M. (2022). The Position and Regulation of Gatekeepers in the Context of the New European Legislation. *EU and Comparative Law Issues and Challenges Series*, 6, 509-526. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/eucmlihs6&i=521>.
  16. Huckova, R., Semanova, M. (2023). Various Consequences of Digital Markets Act on Gatekeepers. *EU and Comparative Law Issues and Challenges Series*, 7, 295-314. Retrieved from: <https://doi.org/10.25234/eclic/27452>.
  17. Jaybhaye, A., Barkha, D. (2021). Copyright Piracy in the Digital Age with Special Reference to Napster's Case. *International Journal of Law Management & Humanities*, 4(5), 2137-2148. Retrieved from: <https://doi.org/10.10000/IJLMH.112136>.

18. Kelli, A., Värav, A., Ristikivi, M., Lepik, G. (2020). Üliõpilane ja autoriõigus. *Juridica*, 5, 378-388. Retrieved from:  
[https://www.juridica.ee/article\\_full.php?uri=2020\\_5\\_li\\_pilane\\_ja\\_autori\\_igus](https://www.juridica.ee/article_full.php?uri=2020_5_li_pilane_ja_autori_igus).
19. Knapp, M. (2022). The Scope of Jurisdiction in Cross-Border Intellectual Property Disputes: Tackling Online Copyright Infringements. *Bialostockie Studia Prawnicze*, 27(1), 159-172. Retrieved from: <https://doi.org/10.15290/bsp.2022.27.01.10>.
20. Knol Radoja, K. (2020). Freedom of Expression on the Internet - Case 18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited. *Balkan Social Science Review*, 15, 7-24. Retrieved from:  
[https://www.researchgate.net/publication/342832594\\_FREEDOM\\_OF\\_EXPRESSION\\_ON\\_THE\\_INTERNET\\_-CASE\\_1818\\_EVA\\_GLAWISCHNIG-PIESCZEK\\_V\\_FACEBOOK\\_IRELAND\\_LIMITED](https://www.researchgate.net/publication/342832594_FREEDOM_OF_EXPRESSION_ON_THE_INTERNET_-CASE_1818_EVA_GLAWISCHNIG-PIESCZEK_V_FACEBOOK_IRELAND_LIMITED).
21. Kornelius, W. (2023). Prior Filtering Obligations after Case C-401/19: Balancing the Content Moderation Triangle: A Comparative Analysis of the Legal Implications of Case C-401/19 for Filtering Obligations Ex Ante and the Freedom of Expression in Europe. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 14(1), 123-147. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jipitec14&i=126>.
22. Kumar, R., Nair, L. R. (2012). Information Technology Act, 2000 and the Copyright Act, 1957: Searching for the Safest Harbor?. *NUJS Law Review*, 5(4), 555-582. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/nujslr5&i=568>.
23. Lin, P. (2020). The Portal to Intermediary Liability: Merging Secondary Liability with Equity and Private International Law. *Wake Forest Journal of Business and Intellectual Property Law*, 20(3), 250-276. Retrieved from: <https://ssrn.com/abstract=3695866>.
24. Lipton, J. (2002). Information Wants to Be Property: Legal Commodification of E-Commerce Assets. *International Review of Law, Computers & Technology*, 16(1), 53-66. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/irlct16&i=51>.
25. Lucic, S. (2022). The Operator's Liability for Copyright Violations Committed by Users of Its Platform. *LAW Theory and Practice*, 39(4), 109-123. Retrieved DOI: [10.5937/ptp2204109L](https://doi.org/10.5937/ptp2204109L).
26. Matulionyte, R., Lankauskas, M. (2013). BitTorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of the E-commerce Directive. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*,

- 4(3), 179-189. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jipitec4&i=185>.
27. McIntyre, R. (2023). Decentralisation and Recentralisation: An Institutional Analysis of EU Competition Law and the Digital Markets Act. *LSE Law Review*, 8(3), 227-285. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/lselr8&i=238>.
28. Menell, P. S. (2022). Reflections on Music Copyright Justice. *Pepperdine Law Review*, 49(3), 533-614. Retrieved from: <https://dx.doi.org/10.2139/ssrn.3943710>.
29. Metzger, A., Senftleben, M. (2020). Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market - Central Features of the New Regulatory Approach to Online Content-Sharing Platforms. *Journal of the Copyright Society of the USA*, 67(3), 279-312. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jocoso67&i=313>.
30. Murati, E. (2021). What Are Digital Platforms? An Overview of Definitions, Typologies, Economics, and Legal Challenges Arising from the Platform Economy in EU. *European Journal of Privacy Law & Technologies*, 2021(1), 19-55. Retrieved from:  
<https://universitypress.unisob.na.it/ojs/index.php/ejplt/article/view/1264/662>.
31. Oruc, T. (2022). The Prohibition of General Monitoring Obligation for Video-Sharing Platforms under Article 15 of the E-Commerce Directive in Light of Recent Developments: Is It Still Necessary to Maintain It?. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 13(3), 176-199. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jipitec13&i=188>.
32. Peukert, A., Husovec, M., Kretschmer, M., Mezei, P., Quintais, J. P. (2022). European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. *IIC*, 53, 358–376. Retrieved from: <https://dx.doi.org/10.2139/ssrn.4016208>.
33. Quintais, J. P., Schwemer, S. F. (2022). The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright? *European Journal of Risk Regulation* (2022), 13, 191–217. Retrieved from: <https://dx.doi.org/10.2139/ssrn.3841606>.
34. Reinbothe, J. (2000). Proposed EC Directive on Copyright and Related Rights in the Information Society and the Proposal for a Directive on E-Commerce. *International Intellectual Property Law & Policy*, 4, 65-1-65-16. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/intepro4&i=781>.
35. Rustad, M. L., & Koenig, T. H. (2023). The Case for a CDA Section 230 Notice-and-Takedown Duty. *Nevada Law Journal*, 23(2), 533-620. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/nevlj23&i=545>.

36. Samuelson, P. (2021). Pushing Back on Stricter Copyright ISP Liability Rules. *Michigan Technology Law Review*, 27(2), 299-343. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/mttlr27&i=313>.
37. Schellekens, M. (2015). The Internet Access Provider: Unwilling or Unable. *International Journal of Law and Information Technology*, 23(3), 310-321. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/ijlit23&i=324>.
38. Strowel, A., De Meyere, J. (2023). The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms? *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 14(1), 66-83. Retrieved from: <https://heinonline.org/HOL/P?h=hein.journals/jipitec14&i=69>.
39. Tombal, T. (2022). Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches. *European Competition Journal*, 18(3), 468-500. Retrieved DOI: 10.1080/17441056.2022.2034331.
40. Wilman, F. (2021). The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content - Between the e-Commerce Directive and the Digital Services Act. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(3), 317-341. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jipitec12&i=329>.
41. Wimmers, J. (2021). The out-of-Court Dispute Settlement Mechanism in the Digital Services Act: A Disservice to Its Own Goals. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(5), 381-401. Retrieved from:  
<https://heinonline.org/HOL/P?h=hein.journals/jipitec12&i=579>.

## **EU and international legislation**

1. Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. OJ L 217, 5.8.1998, p. 18–26. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0048>.
2. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, p. 1–16. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>.

3. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). OJ L 241, 17.9.2015, p. 1–15. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L1535>.
4. Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. OJ L 130, 17.5.2019, p. 92–125. Retrieved from: <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.
5. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). OJ L 265, 12.10.2022, p. 1–66. Retrieved from: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC).
6. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). OJ L 277, 27.10.2022, p. 1–102. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1666857835014>.
7. United States Digital Millennium Copyright Act of 1998. Retrieved from: <https://www.congress.gov/bill/105th-congress/house-bill/2281/text>.

### **Court cases**

1. US Court of Appeals for the Ninth Circuit, 239 F.3d 1004 (2001), *A&M Records, Inc. v. Napster, Inc.* Retrieved September, 08, 2023, from <https://law.justia.com/cases/federal/appellate-courts/F3/239/1004/636120/>, 08.09.2023.
2. Supreme Court of the United States, 545 U.S. 913 (2005), *MGM Studios, Inc. v. Grokster, Ltd.* Retrieved November, 11, 2023, from <https://supreme.justia.com/cases/federal/us/545/913/>.
3. Court of Appeals for the Second Circuit, 676 F.3d 19 (2012), *Viacom Intern., Inc. v. YouTube, Inc.*
4. Court decision, Google France and Google, 23.03.2010, C-238/08, ECLI:EU:C:2010:159.
5. Court decision, L'Oréal and Others, 12.06.2011, C-324/09, ECLI:EU:C:2011:474.

6. Court decision, Svensson and Others, 13.02.2014, C-466/11, ECLI:EU:C:2014:76.
7. Court decision, UPC Telekabel Wien, 27.03.2014, C-314/12, ECLI:EU:C:2014:192.
8. Court decision, Glawischnig-Piesczek, 03.10.2019, C-18/18, ECLI:EU:C:2019:821.
9. Court decision, Poland v. Parliament and Council, 26.04.2022, C-401/19, ECLI:EU:C:2022:297.
10. Request for a preliminary ruling, 10.06.2022, Google Ireland and Others, C-376/22.
11. Action brought on 27.06.2023, Zalando v. Commission, T-348/23.
12. Court decision, Google Ireland and Others, 9.11.2023, C-376/22, ECLI:EU:C:2023:835.

### **Advocate General opinions**

1. Opinion of Advocate General Szpunar, 04.06.2019, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, ECLI:EU:C:2019:458.
2. Opinion of Advocate General Saugmandsgaard Øe, 16.06.2020, Frank Peterson v. Google LLC and Others and Elsevier Inc. v. Cyando AG, C-682/18 and C-683/18, ECLI:EU:C:2020:586.
3. Opinion of Advocate General Szpunar, 08.06.2023, Google Ireland and Others, C-376/22, ECLI:EU:C:2023:467.

### **Other sources**

1. Bently, L., Derclaye, E., Dinwoodie, G. B., Dreier, T., Dusollier, S., Geiger, C., Griffiths, J., Hilty, R., Hugenholtz, P. B., Janssens, M., Kretschmer, M., Metzger, A., Peukert, A., Ricolfi, M., Senftleben, M., Strowel, A. M., Xalabarder, R. (2013). The Reference to the CJEU in Case C-466/12 Svensson. *University of Cambridge Faculty of Law Research Paper*. 2013 (6). Retrieved from: <https://dx.doi.org/10.2139/ssrn.2220326>.
2. Boyle, J., Jenkins, J. (2021). *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY—CASES AND MATERIALS*. Fifth Edition. Retrieved from: <https://law.duke.edu/cspd/pdf/ipcasebook.pdf>.
3. Commission, Directorate-General for Communications Networks, Content and Technology, van Hoboken, J., Quintais, J. P., Poort, J., van Nico, E. (2019). *Hosting intermediary services and illegal content online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape – Final report*. Retrieved from: <https://data.europa.eu/doi/10.2759/284542>.
4. Congress.gov (2021). *S.225 - Competition and Antitrust Law Enforcement Reform Act of 2021*. Retrieved December, 27, 2023 from: <https://www.congress.gov/bill/117th->

- congress/senate-bill/225?s=1&r=1&q=%7B%22search%22%3A%22News+media+and+reporting%22%7D.*
5. Congress.gov (2021). *S.3267 - Consolidation Prevention and Competition Promotion Act of 2021*. Retrieved December, 27, 2023 from: <https://www.congress.gov/bill/117th-congress/senate-bill/3267>.
  6. European Commission (2023). *Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines*. Retrieved November, 06, 2023, from [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2413](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413).
  7. European Commission (2023). *Digital Markets Act: Commission designates six gatekeepers*. Retrieved November, 08, 2023, from [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4328](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328).
  8. European Commission (2023). *Questions and Answers: Digital Services Act\**. Retrieved December, 27, 2023 from [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).
  9. G'sell, F. (2023). *The Digital Services Act (DSA): A General Assessment (April 15, 2023)*. in Antje von Ungern-Sternberg (ed.), *Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung e.V., Institute for Digital Law (IRDT), Trier April 2023*. Retrieved from: <https://dx.doi.org/10.2139/ssrn.4403433>.
  10. Hickey, K. J. (2020). *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*. Retrieved September, 30, 2023, from <https://crsreports.congress.gov/product/pdf/IF/IF11478>.
  11. Madiega, T. (2020). *Reform of the EU liability regime for online intermediaries. Background on the forthcoming digital services act*. Retrieved October, 01, 2023, from [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS\\_IDA\(2020\)649404\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf).
  12. McDonagh, K. (2022). *Directive 2019/790/EU (Directive on copyright and related rights in the Digital Single Market*. A. Lodder & A. Murray (Eds.), *EU Regulation of e-Commerce: A Commentary (Edward Elgar, 2022)*. Retrieved from: <https://ssrn.com/abstract=4506609>.
  13. Nash, M. (2023). *Supreme Court Maintains Internet Safe Harbor Provisions ... for Now*. Retrieved December, 28, 2023 from: <https://www.jdsupra.com/legalnews/supreme-court-maintains-internet-safe-8486007/>.



14. Pokrovskaya, A. (2023). Intermediaries liability for copyright infringement: application of the “safe harbor” model. *E3S Web of Conferences* 420, 06046, pp. 6-7. Retrieved DOI: [10.1051/e3sconf/202342006046](https://doi.org/10.1051/e3sconf/202342006046).
15. United States Copyright Office (2020). *Section 512 of title 17. A report of the register of copyrights*. Retrieved September, 30, 2023, from <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.
16. United States Courts (2020). *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*. Retrieved September, 08, 2023, from <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.
17. U.S. Copyright Office (2020). *Section 512 Study*. Retrieved September, 30, 2023, from <https://www.copyright.gov/policy/section512/>.
18. U.S. Copyright Office (2023). *What is Copyright?*. Retrieved September, 26, 2023, from <https://www.copyright.gov/what-is-copyright/>.
19. Washington University School of Law (2013). *Case Study: A&M Records, Inc. v. Napster, Inc.* Retrieved September, 08, 2023, from <https://onlinelaw.wustl.edu/blog/case-study-am-records-inc-v-napster-inc/>.

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