The Same Problem, Different Outcome: Online Copyright Infringement and Intermediary Liability Under US and EU Laws

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ABSTRACT

The protection of copyright owners' rights online is much more challenging with the significant increase of the digital marketplace. Although the problem is same for both the United States and European Union, their approach how to solve it is hugely different. Recently, the European Union adopted a new Copyright Directive, which, in Article 17 (formerly Article 13) indirectly introduces filtering and monitoring obligations to online platforms that allow users to upload content. It creates the "de facto strict liability regime" for internet intermediaries to root out copyright-infringing content. In contrast with this approach, in the United States internet intermediaries still benefit from the legislative immunities that exclude them from copyright-infringement liability uploaded by their users. This article compares the new European Union directive with the United States approach and shows that these differences might create uncertainties in the digital marketplace. This article also reviews potential consequences of Article 17 and demonstrates the need for a harmonized secondary liability regime to Internet Service Providers at the European level, without sacrificing safe harbor provisions. The article proposes the adoption of the "fair use doctrine" and "fair remuneration" provisions as an effective and alternative tool to protect the rights of all players in the digital scene and simultaneously tackles the so-called "value gap" problem.

INTRODUCTION

Think of your favorite Meme.[1] Then think of copyright consequences: what happens when you post it on social media and share it with your friends.

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1. *See Meme*, DICTIONARY.COM, https://www.dictionary.com/browse/meme, [https://perma.cc/3N69-Q9MB] (last visited Apr. 15, 2019) ("A cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way."). *See also Do the Memes Violate Copyright Law?*, THELAWTOG, https://thelawtog.com/memes-violate-copyright-law/ [https://perma.cc/6L8K-UZXR] (last visited July 22, 2019) ("[a]n Internet Meme is in legal terms, a

Is your act illicit? Does it infringe a copyright? Are you liable for such copyright infringement? Or are internet intermediaries[2] liable for the content you uploaded on their platform? Can you use fair use[3] or "safe harbor"[4] provisions as an affirmative defense[5] as a shield from liability?

If you start searching for answers in copyright law, you would be on the right track, but despite the fact that the problem is common, the laws governing issues of online copyright infringement and intermediaries' liability in the United States[6] differ from the recently adopted law addressing the same issues in the European Union.[7]

Copyright law grants authors exclusive rights over their works, providing, also, a means of redress.[8] Providing exclusive rights incentivizes cultural progress and public welfare.[9] The United States Constitution clearly states that the Congress is granted with power "to promote the progress of

derivative work, and usually copyright owner is the only party with the legal right to create a derivative work").

2. "Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide internet-based services to third parties." OECD, *The Economic and Social Role of Internet Intermediaries*, 9, 1-49, (April 2010) https://www.oecd.org/internet/ieconomy/44949023.pdf [https://perma.cc/4B43-2AEN] (citation omitted).

3. "Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use." *More Information on Fair Use*, U.S. COPYRIGHT OFFICE (Sept. 2019) https://www.copyright.gov/fair-use/more-info.html [https://perma.cc/HD8N-XKWN].

4. Generally, "a safe harbor is a provision in a law or regulation that affords protection from liability or penalty under specific situations, or if certain conditions are met. Sometimes a safe harbor reduces liabiliyu if "good faith" is demonstrated." Jean Murray, *What is a Safe Harbor Law or Provision?*, THE BALANCE SMALL BUSINESS (July 30, 2019), https://www.thebalancesmb.com/what-is-a-safe-harbor-law-or-provision-398457 [https://perma.cc/EU9R-XTF8]. Section 512 of the Digital Millennium Copyright Act (DMCA) provides safe harbor provisions to shield internet platforms from copyright infringement liability. *See* Cyrus Sarosh Jan Manekshaw, *Liability of ISPs: Immunity from Liability Under the Digital Millennium Copyright Act and the Communications Decency Act*, 10 COMPUTER L. REV. & TECH. J. 101, 105 (2005); John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansions of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1834 (2013).

5. In fact, affirmative defenses are a set of reasons/evidence asserted by the defendant to avoid liability and win the lawsuit. According to Sinai, "An affirmative defense overcomes the claim without regard to whether the claim is true and could be proven. An affirmative defense is one that 'avoids' rather than 'denies' the truth of a plaintiff's allegations." Yuval Sinai, *The Doctrine of Affirmative Defense in Civil Cases – Between Common Law and Jewish Law*, 34 N.C. J. INT'L L. & COM. REG. 111, 115 (2008). Moreover, "An affirmative defense does not tend to rebut factual propositions asserted by a plaintiff, but seeks to establish an independent reason why the plaintiff should not recover." Gorman v. Life Ins. Co. of North America, 811 S.W.3d 542, 546 (Tex. 1991); *see also*, Texas Beef Cattle Co. v. Green 921 S.W.2d 203, 212 (Tex. 1996) (citing Roy W. McDonald, Texas Civil Practice § 9:44, at 378 (1992)).

6. *E.g.,* Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2012).

7. *See* Directive 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 1996/9/EC and 2001/29/EC, 2019 O.J (L 130) 1-34 (EC) [hereinafter Copyright Directive].

8. Under Section 106 of the Copyright Act, the owner of copyright has the following exclusive rights: to reproduce the copyrighted work in copies, to distribute copies of the copyrighted work, to prepare derivative works based upon the copyrighted work, to perform or/and display copyrighted work publicly, and in case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. *See* 17 U.S.C. §106 (2002).

9. *See* Sony Corp. of Am. V. Universal City Studios. Inc., 464 U.S. 417, 477 (1984); Mazer v. Stein, 347 U.S. 201, 219 (1954); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Fox Film Corp. v. Doyal 286 U.S. 123, 127-28 (1932); H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".[10] This statement serves as the basis for establishing copyright law—a protective mechanism to balance the freedoms and relevant limitations of copyright holders' rights. The most prominent difficulties in applying copyright law arise in the context of digital platforms, where the formation and maintenance of this kind of mechanism is a controversial and complicated task to accomplish.[11] This article will focus on the discussion of practical consequences of the legislative tools that try to regulate this problem, because "the law in action never perfectly mirrors the law on books."[12]

The Digital Millennium Copyright Act of 1998[13] ("DMCA"), enacted in the United States, and the Electronic Commerce Directive ("ECD")[14] of 2000, implemented in the European Union, provide Internet Service Providers[15] ("ISPs") with the legislative immunities to be excluded from copyright infringement liability uploaded by their users, at least until ISPs have knowledge about the unlawful nature of the relevant content.[16] The

10. U.S. CONST. art. VIII, § 8, cl. 8.

11. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909) ("In enacting copyright law Congress must consider [..] two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly"). The Supreme Court also noted that copyright law challenges "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the one hand, [. . .]." Sony Corp. of Am.v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* Hearst Corp. v. Stark, 639 F. Supp. 970, 978 (N.D. Cal. 1986). Wendy M. Pollak underlines that "New technological advances continuously upset this balance by facilitating the ability to copy works without permission from copyright holders […]." Wendy M. Pollak, *Tuning in: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L.REV. 2445 (2000).

12. Matthew Sag, *Internet Safe Harbors and Transformation of Copyright Law*, 93 NOTRE DAM L. REV. 499, 560 (2017).

13. The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

14. Council Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market, 2000 O.J. (L. 178) 1-16 (EC) [hereinafter E-Commerce Directive].

15. The present article uses the term "Internet Service Provider" (ISPs) to refer to a person/company which provides its subscribers/users with the ability to access the internet, host a web-site and/or upload/download files. Internet Service Providers (ISPs) are defined as a company that "provides internet connections and services to individuals and organizations. […] ISPs may also provide software packages (such as browsers), e-mail accounts and a personal web-site or home page." Grace Young, Erik Gregersen & Parul Jain, *Internet Service Provider*, ENCYCLOPEAEDIA BRITTANICA, (Mar, 13, 2018), https://www.britannica.com/technology/Internet-service-provider [https://perma.cc/ZUE5 - UE6X]. In the United States, the legal definition of Internet Service Provider is stipulated by the DMCA, which states ISPs are an "entity offering transmission, routing or connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received" or as a "provider for online services or network access, or operator facilities therefor." 17 U.S.C. §512(K)(1)(A-B). On the other hand, in the European Union, the E-Commerce Directive provides broader legal definition of ISPs and defines them as "any natural or legal person providing an information society service." E-Commerce Directive, *supra* note 14, art. 2(b).

16. Megan Smallen, *Copyright Owners Take on the World (Wide Web): A Proposal to Amend the DMCA Notice and Takedown Procedures*, 46 SW. L. REV. 169, 169–70 (2016).

primary aim of enacting these safe harbor provisions was to encourage the spread of, and innovation on the internet platform.[17]

Some critics claim that the out-of-date nature of "safe harbor" provisions simply creates a shield for willful infringement by the intermediaries.[18] In this context, the EU enacted the new Directive on Copyright in the Digital Single Market[19] ("Copyright Directive"). Article 17[20] (formerly widely known as article 13[21]) of the Copyright Directive indirectly introduces filtering and monitoring obligations on online platforms, and establishes direct liability system for the internet intermediaries, if copyright infringement occurs. Article 17(6) of the Copyright Directive stipulates that internet intermediaries, whose monthly number of visitors exceeds five million, "shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information."[22] This statement does not explicitly oblige internet intermediaries to create filtering and monitoring mechanism on their platform, but the necessity of establishing this kind of mechanism is inevitable in order to avoid penalties.[23] This approach is significantly different from the approach taken by the United States[24] which tries to settle the constant dispute between Intermediaries and copyright-holders by excluding ISPs from copyright infringement liability and implementing "notice and take down" system.[25] These key differences may create_significant uncertainties in the digital marketplace[26] and will have an impact on the internet, which in fact, does not have boarders.[27]

17. The DMCA was enacted for "the purpose of bringing U.S. copyright law squarely into the digital age and facilitating the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." Lior Katz, *Viacom v. YouTube: An Erroneous Ruling Based on the Outmoded DMCA*, 31 LOY. L.A. ENT. L. REV. 101, 113 (2010/2011) (citation omitted). *See also* In re Aimster Copyright Litig., 334 F.d3d 643, 655 (7th Cir. 2003) ("The DMCA is an attempt to deal with special problems created by the so-called digital revolution.").

18. *See* Bruce Boyden, *The Failure of the DMCA Notice and Take Down System: a Twentieth Century Solution to Twenty-First Century Problem*, GEO. MASON. CENT. FOR PROTECTION INTELL. PROP., 1, 1-6, (2013); *see also* Cary Sherman, *Medium: Five Stubborn Truths About YouTube and The Value Gap*, RECORDING INDUS. ASS'N OF AMERICA (Aug. 18, 2017) https://www.riaa.com/medium-five-stubborn-truths-youtube-value-gap/ [https://perma.cc/C8BL-92KJ].

19. *See* Copyright Directive, *supra* note 7.

20. *See* Copyright Directive, *supra* note 7, art. 17.

21. Proposal for Council Directive 2016/0280 of the European Parliament and of the Council on Copyright in the Digital Single Market COM, art. 13.

22. Copyright Directive, *supra* note 7, art. 17(6).

23. James Vincent, *Europe's Controversial Overhaul of Online Copyright Receives Final Approval*, THE VERGE (Mar. 26. 2019, 8:00 AM) https://www.theverge.com/2019/3/26/18280726/ europe-copyright-directive [https://perma.cc/PY2D-XA65].

24. *See* Online Copyright Infringement Liability Act, 17 U.S.C. § 512 (2012).

25. *Id.* § 512(c)(3).

26. Kris Ericson, *The EU Copyright Directive Creates New Legal Uncertainties*, LSE BLOG (Apr. 6, 2019), https://blogs.lse.ac.uk/businessreview/2019/04/06/the-eu-copyright-directive-creates-new-legal-uncertainties/ [https://perma.cc/Q7MW-678L].

27. *Id. See also* Nicola Lucchi, *Intellectual Property Rights in Digital Media: A Comprehensive Analysis of Legal Protection, Technological Measures, and New Business Models Under EU and U.S. Law*, 53 BUFF. L. REV. 1111, 1116 (2005).

This Article examines the importance of establishing secondary liability standards akin to those adopted by the European Union, without sacrificing safe harbor provisions. The article then proposes adoption of "fair use doctrine,"[28] and "fair remuneration"[29] provisions as an effective and alternative tool to protect user's rights, while simultaneously tackling the so called "value gap" problem.[30]

Comparing the United States and the European Union approaches, Part I outlines the copyright protection problems in the internet era, and underlines the importance of including a balancing mechanism which will regulate fairer practical rules of play on the digital scene. Part I also discusses practical consequences of the safe harbor provisions in relation to the "value gap" problem, and provides a summary overview of EU's response to this problem in adopting the Copyright Directive. Part II proposes a harmonized EU framework for determining obligations of the intermediaries to prevent copyright infringement, as a solution to the "value gap problem." The proposal suggests adoption of the "fair use doctrine," which was already rejected by EU legislators, as an effective alternative tool for protection of users' rights. Part III discusses the potential objections to the solution.

I. INTERNET SERVICE PROVIDERS AND ONLINE COPYRIGHT INFRINGEMENT LIABILITY

The United States tries to settle the constant dispute between ISPs[31] and copyright-holders by excluding ISPs from copyright infringement liability, and implementing the "notice and take down" mechanism,[32] while the EU responses to this problem in an opposite way.[33] Part I of the present article provides an overview of how safe harbor provisions are regulated under the US and EU laws, discusses how the EU tries to reform copyright law to address the "value gap problem," and analyzes the potential implications of this new approach.

A. US APPROACH

If we look back to history, it is worth mentioning that the DMCA was enacted by Congress in 1998, seven years after the creation of the first web-

28. U.S. COPYRIGHT OFFICE, *supra* note 3.

29. *See also* Ananay Aguilar, *The New Copyright Directive: Fair Remuneration in Exploitation Contracts of Authors and Performers – Part 1, Article 18 and 19*, KLUWER COPYRIGHT BLOG (July 15, 2019), http://copyrightblog.kluweriplaw.com/2019/07/15/the-new-copyright-directive-fair-remunerat ion-in-exploitation-contracts-of-authors-and-performers-part-1-articles-18-and-19/ [https://perma.cc/6ZWT-KMKS].

30. The term "value gap" is used in music industry since 2016 to explain why copyright holders shall receive larger portion of digital revenues. *See* Stuart Dredge, *Why Safe Harbor Will be the Music Industry's Big Battle in 2016*, MUSICALLY (Nov. 16, 2015) https://musically.com/2015/11/16/why-safe-harbour-will-be-the-music-industrys-big-battle-in-2016/ [https://perma.cc/5KY9-YH47].

31. ENCYCLOPEAEDIA BRITTANICA, *supra* note 15.

32. 17 U.S.C. § 512(c)(3).

33. Ryma Abbasi & Aida Ben Chehida Douss, *Security Frameworks in Contemporary Electronic Government*, IGI GLOBAL, 182 (2018).

page,[34] shielding ISPs from copyright infringement liability in order to "help foster the growth of internet-based services"[35] At that time, nearly 5% of the world population had access to the internet.[36] Therefore, Section 512[37] was formulated to limit ISP liability for the unauthorized content uploaded on their platform to those instances involving ISPs' knowledge of the unlawful nature of the relevant content.[38] In order to measure effectiveness of shielding ISPs from the copyright infringement liability, it is important to understand the statutory requirements of DMCA provisions (in particular, Section 512) and key aspects from the relevant case law.

1. Safe Harbors for Internet Service Providers under 17 U.S.C. Section 512 and Relevant Case Law

Section 512 provides several categories of "safe harbor" provisions which limit ISPs liability if they follow several procedures, and engage in the following activities:

> (a) Serving as a conduit[39] for the automatic online transmission of material as directed by third parties;
> (b) caching[40] (i.e., temporarily storing) material that is being transmitted automatically over the internet from one third party to another;
> (c) storing (i.e., hosting) material at the direction of a user on a service provider's system or network[41]; or
> (d) referring or linking users to online sites using information location tools[42] (e.g., a search engine)[43]

In addition to this, ISPs, to be eligible for safe harbor protection, are required to adopt and implement a reasonable policy against "repeat infringers."[44] In this regard, it is worthwhile to mention that the statute does not define who might be considered as a "repeat infringer."[45] The courts recognize that Section 512(i) is a flexible legislative means, which gives ISPs

34. Alyson Shontell, *Flashback: This is What the First-Ever Website Looked Like*, BUSINESS INSIDER (June 29, 2011, 4:57 PM), https://www.businessinsider.com/flashback-this-is-what-the-first-website-ever-looked-like-2011-6 [https://perma.cc/33KB-B2PE].

35. *Section 512 Study*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/policy/section512 [https://perma.cc/X6EW-HSAJ] (last visited Feb. 15, 2019).

36. *Internet Users*, INTERNET LIVE STATS, http://www.internetlivestats.com/internet-users/#trend. [https://perma.cc/ELK2-85WF] (last visited Feb. 15, 2019).

37. Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2012).

38. Smallen, *supra* note 16, at 169.

39. 17 U.S.C. § 512(a).

40. *Id.* § 512(b).

41. *Id.* § 512(c).

42. *Id.* § 512(d).

43. Section 512 Study: Notice and Request Public Comment, U.S. Copyright Office, 80 Fed. Reg. 81862, 81863 (Dec. 31, 2015).

44. 17 U.S.C. § 512(i)(1)(A) ("ISPs must "adopt and reasonably implement and inform subscribers and account holders of the service providers' system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.").

45. *Id. See* Ventura Content, Ltd v. Motherless, Inc., 885 F. 3d 597, 614 (9th Cir. 2018) ("Even if a website deletes infringing material as soon as it learns about it, the safe harbor is unavailable unless the site has a policy of excluding repeat infringers"). *See also* BMG Rights Mgmt, LLC v. Cox Comme'ns, Inc., 881 F. 3d 293 (4th Cir. 2018).

a chance to reasonably implement a policy against repeat infringers.[46] The Ninth Circuit segregates the concept of "reasonable implementation" into two components: "first, whether a service provider implements a policy, and second, whether that implementation is reasonable."[47] In *Disney Enterprises, Inc. v. Hotfile Corp*,[48] the district court found that Panamian Corporation - Hotfile Corp., which operated the website *hotfile.com*, had an unreasonable user termination policy[49] because "in spite of 10 million complaints about 8 million videos, Hotfile terminated only 43 users, apparently only those who were the subject of a court order or threatened litigation."[50]

The second prerequisite for ISPs to qualify for the limitation on liability is that they must "accommodate technical measures"[51] to identify or protect copyrighted works.[52] In general, the courts refused to exclude ISPs from copyright infringement liability when they refused "to accommodate or implement a 'standard technical measure.'"[53]

Section 512 also outlines additional prerequisites for ISPs seeking safe harbor protection under Sections 512(b), 512 (c) or 512 (d). Under Section 512(c), ISPs must designate a copyright agent[54] and maintain a "Notice-and-Takedown" system.[55] By designating a copyright agent, a service provider receives copyright infringement notices.[56] Moreover, the copyright holder can send takedown notice to ISPs, and request that ISPs remove copyright-infringing content from their platform.[57] When asked to remove infringing content, a service provider is required to respond "expeditiously to remove or disable access"[58] to the unauthorized content.[59] The statute prescribes that

46. *See, e.g.*, Perfect 10 v. Giganews, 993 F. Supp. 2d 1192, 1996 (C.D. Cal. 2014); Wolk v. Kodak, 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2012); Capitol Records v. Vimeo, 972 F. Supp. 2d 500, 514-17 (S.D.N.Y. 2013).

47. Perfect 10, Inc. v. Giganews, Inc., 993 F. Supp. 2d 1192, 1196 (C.D. Cal. 2014); *see* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109-10 (9th Cir. 2007).

48. Disney Enterprises, Inc. v. Hotfile Corp., No 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013).

49. *Id.* at *24.

50. *An Overview of the DMCA "Safe Harbors" 17 U.S.C. § 512*, UNIVERSITY OF KANSAS SCHOOL OF LAW (Feb. 2016), https://cdn.ymaws.com/www.csusa.org/resource/resmgr/MW16/CLE/DMCA512safeharborsFeb.2016.pdf [https://perma.cc/NJ85-L6DJ].

51. 17 U.S.C. § 512(i)(1)(B) (addressing the definition of the term "standard technical measures" as "measures that are used by copyright owners to identify or protect copyrighted works and (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks").

52. *Id.* § 512(i)(2).

53. Viacom Int'l, Inc. v. Youtube Inc., 676 F. 3d 19, 41 (2d Cir. 2012). *See* Tong Xu, *The Future of Online User-Generated Content in the Video-Sharing Business: Capitol Records LLC v. Vimeo LLC*, 17 TUL. J. TECH & INTELL. PROP. 375, 379 (2014).

54. 17 U.S.C. § 512(c)(2)(A) ("ISPs are obliged to "designate an agent to receive notifications of claimed infringement […], by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office.").

55. 17 U.S.C. § 512(c)(3).

56. *Id.* § 512(c)(2).

57. *See* 17 U.S.C. § 512(c)(3).

58. *Id.* § 512(c)(1)(C).

59. *Id.*

written notice contain the following elements:[60] (i) the physical or electronic signature; (ii) "identification of the copyrighted work claimed to have been infringed;"[61] (iii) identification of the infringing content (e.g. by providing a link) and "information reasonably sufficient to permit the service provider to locate the material;"[62] (iv) contact information of the complaint;[63] (v) a statement that "the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law;"[64] and (vi) a statement that "the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."[65] If notice substantially fails[66] to include the abovementioned elements, it would not be sufficient to demonstrate that ISPs had actual notice, and therefore, had knowledge of the unauthorized use that must be the basis for statutory liability.[67] The Ninth Circuit in *Perfect 10, Inc. v. CCBill LLC*[68] confirmed that Perfect 10 did not provide notice that substantially complied with the requirements of Section 512(c)(3). The court discussed the substantiality test and noted that "compliance is not 'substantial' if the notice provided complies with only some of the requirements of § 512(c)(3)(A). […] The statute thus signals that substantial compliance means substantial compliance with *all* of § 512(c)(3)'s clauses, not just some of them."[69]

In addition to this, DMCA safe harbor provisions were strengthened by the precedential court decisions, denying monitoring and policing obligations for ISPs to root out the copyright infringement on their platforms.[70] No duty-to-monitor rule is explicitly enshrined in the Section

60. *Id.* § 512(c)(3).

61. *Id.* § 512(c)(3)(ii).

62. *Id.* § 512(c)(3)(iii).

63. *Id.* § 512(c)(3)(iv).

64. *Id.* § 512(c)(3)(v).

65. *Id.* § 512(c)(3)(vi).

66. Section 512(c)(3)(B)(ii) (explaining that a service provider will not be deemed to have notice of infringement when "the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A)").

67. *Id.* 512(c)(3)(B)(i) ("[A] notification […] that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1) (A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent."); *see* also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112-14 (9th Cir. 2007) ("[A] service provider will not be deemed to have notice of infringement when "the notification […] fails to comply substantially with all the provisions of [17 U.S.C. 512(c)(3)(A)]") (citation omitted).

68. Perfect 10, Inc. v. CCBill LLC, 481 F.3d 751, 761 (9th Cir. 2007), opinion amended and superseded on denial of reh'g, 488 F.3d 1102 (9th Cir. 2007).

69. *Id.* at 761 (emphasis in original). *See also Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.,* 351 F.3d 1229, 1236 (D.C. Cir. 2003).

70. *See, e.g.,* Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp.2d 514, 518 (S.D.N.Y. 2010); UMG Recordings, Inc v. Veoh Networks Inc., 665 F.Supp.2d 1099, 1110 (C.D. Cal. 2009).

512(m)[71] and this is also supported by the court rulings.[72] One of the most notable decisions regarding this issue is *Viacom Int'l, Inc. v. YouTube Inc.*[73] The court underlined that, "Plaintiffs often suggest that YouTube can readily locate the infringements by using its own identification tools. [But] It had no duty to do so."[74] The general principle of the safe harbor system is to safeguard ISPs from policing and monitoring obligations and avoid too complex, costly and heavy burden for them.[75] Legislators were very concerned with reducing the liability of ISPs and there is a historical and a public policy rationale behind this approach.[76] The legislators aimed to craft a copyright legislative system that would not only grant exclusive rights to copyright owners but also encourage and incentivize the distribution of new creations to the public in some exceptional circumstances, under which the public would be able to use the copyrighted material without facing the threat of liability.[77] But nowadays, it is worthwhile to mention that the internet became the essential means of commerce and copyright holders needed stronger and adequate protection of their rights to be fairly remunerated.

2. The "Value Gap" Problem v. Safe Harbor Provisions

Some critics have raised concerns regarding the out-of-date nature of safe harbor provisions, and claim that they are used by ISPs to avoid paying fair royalties to music creators.[78] This process is known as a "value gap" problem[79] and the whole music industry is united in calling for the policymakers to take the urgent actions aimed to fix the "the value gap" problem.[80] On the one hand, the artists and songwriters claim that ISPs misuse the safe harbor exemptions.[81] These critics claim that harbor

71. 17 U.S.C. § 512(m)(1) ("Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on – a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.").

72. *See Perfect 10, Inc.*, 481 F.3d 751; *Recording Indus. Ass'n of Am., Inc.*, 351 F.3d at 1236.

73. *See* Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp.2d 514, 518 (S.D.N.Y. 2010).

74. Viacom Int'l, Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 117 (S.D.N.Y. 2013).

75. *See* Jennifer L. Kostyu, *Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers*, 48 CATH. U. L. REV. 1237, 1272 (1999).

76. *See* Emily M. Asp, *Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration*, 103 IOWA L. REV. 751, 756 (2018).

77. *Id. See also* H.R. Rep. No. 60-2222, at 7 (1909) (noting that copyright exists "[n]ot primarily for the benefit of the author, but […] for the benefit of the public[,]" as "it will stimulate writing and invention […]"; and the main mission of the copyright system rests "upon the ground that the welfare of the public will be served […] by securing to authors for limited periods the exclusive rights to their writings").

78. Sherman, *supra* note 18.

79. The term "value gap" has been used in the music industry since 2016 to explain why copyright holders receive a larger portion of digital revenues. *See* Dredge, *supra* note 30.

80. *E.g.*, IFPI, GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY, REWARDING CREATIVITY: FIXING THE VALUE GAP 25 (2017), https://www.ifpi.org/downloads/GMR2017_ ValueGap.pdf. [https://perma.cc/Z6CN-3XP3] ("In June 2016, over 1,000 recording artists, performers, and songwriters, including Sir Paul McCartney, Robin Schulz, David Guetta, Sting and Coldplay, signed a letter asking the European Commission to take urgent action to address the value gap") (citation omitted).

81. *See* Yifat Nahmias, Niva Elkin-Koren & Maayan Perel, *Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals*, STAN. L. & POL'Y REV. 1, 4 (forthcoming 2020) ("[…] platforms banking on the safe harbor as a shield to either avoid licensing or dictate low royalties to rightholders"); *see also* Am.

provisions have "allowed major tech companies to grow and generate huge profits by creating ease of use for consumers to carry almost every recorded song in history in their pocket […], while songwriters' and artists' earnings continue to diminish. Music consumption has skyrocketed, but the monies earned by individual writers and artists for that consumption has plummeted."[82] The term "value gap" describes imbalance between what the ISPs extract from their copyrighted content and the royalties, and what they pay in royalties to the copyright holders. For example, "Pandora had the highest per-play royalty rate. At $0.01682 per play, an independent artist would need around 87,515 plays to earn the US monthly minimum wage of $1,472. YouTube had the worst per-stream payouts. At $0.00074 per stream, artists and content creators would make $1,472 after 1,989,189 million plays."[83] These numbers elucidate that ISPs do not play by the same rules in the digital marketplace.[84] This situation creates unfair competition as well.[85] Legislative authorities state that one of the reasons behind the adoption of Article 17 in the Copyright Directive is to address the "value gap" problem.[86] Safe harbor provisions have become a "hiding place" for ISPs,[87] giving them opportunity to avoid paying fair royalties to copyright-owners.[88]

On the other hand, some scholars call the "value gap" a "rhetorical device,"[89] used only in the music industry, and "never used elsewhere."[90] Some of them indicate that "value gap" is "EU's imaginary"[91] issue which

Ass'n of Indep. Music, et al., *Joint Comments of the American Association of Independent Music, et al. on Section 512 Study: Notice and Request for Public Comment*, 1, 2 (Apr. 1, 2016), https://www.regulations.gov/document?D=COLC-2015-0013-89806 [https://perma.cc/FY2A-PSVL] ("The DMCA was supposed to provide balance between service providers and content owners, but instead it provides harmful 'safe havens' under which many platforms either pay nothing or pay less than market value for music.").

82. IFPI, *supra* note 80.

83. Daniel Sanches, *What Streaming Music Services Pay (Updated for 2019)*, DIGITAL MUSIC NEWS (Dec. 25, 2018), https://www.digitalmusicnews.com/2018/12/25/streaming-music-services-pay-2019/ [https://perma.cc/48DS-GBDC].

84. *Id.*

85. *See* Marcel Boyer, *Competitive Market Value of Copyright in Music: A Digital Gordian Knot*, 44(4) U.T. P. J. CAN. PUB. POL'Y 411, 416 (2018). *See also* Bill Rosenblatt, *EU Article 13 (Now Article 17) Passes After More Changes, Making Copyright Filtering More Likely*, COPYRIGHT AND TECHNOLOGY BLOG (Apr. 1, 2019) https://copyrightandtechnology.com/2019/04/01/eu-article-13-now-article-17-passes-after-more-changes-making-copyright-filtering-more-likely/ [https://perma.cc/U4ZR-2ZHA].

86. Giuseppe Colangelo & Mariateresa Maggiolino, *ISPs' Copyright Liability in the EU Digital Single Market Strategy*, INT'L J. L. & TECH. 1, 1 (2017); *see also* European Commission MEMO/19/115, Questions & Answers: EU Negotiators Reach a Breakthrough to Modernise Copyright Rules (Feb. 13, 2019).

87. Midem, *The Value Gap Debate: How the EU is Changing the Game*, YOUTUBE (Jun. 7, 2018), https://www.youtube.com/watch?v=OXlFYE-w4Q0 [https://perma.cc/MT6T-GJ8P].

88. *Id.*

89. Giancarlo Frosio, *To Filter, or Not to Filter? That Is the Question in Eu Copyright Reform*, 36 CARDOZO ARTS & ENT. L.J. 331, 361–62 (2018).

90. *Id.*

91. Cory Doctorow, *How the EU's Imaginary "Value Gap" Would Kill User-Generated Content Online*, BOINGBOING (Mar. 29, 2019, 7:45 AM), https://boingboing.net/2017/03/29/massive-private-censorship.html [https://perma.cc/DU5S-GY5T]. *See also* Ana Mazgal, *EU Copyright Should Protect Users' Rights and Prevent Content Filtering*, COMMUNIA (Jan. 9, 2017), https://www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering/ [https://perma.cc/2T3Y-VUVC].

will hinder the proper functioning of the User Generated Content (UGC).[92] Some scholars outline the importance of the DMCA safe harbor provisions. Professor Matthew Sag notes that, "The DMCA safe harbors have been a tremendous benefit to the U.S. copyright system and to the U.S. economy."[93] He argues that "safe harbors have enabled the spectacular growth of ecommerce, online communities, and whole new genres of communication and expression. They see the safe harbors as essential to the openness and dynamism of the internet and as a fair allocation of responsibilities relating to the acknowledged problem of online infringement."[94]

B. EU APPROACH

The European E-commerce Directive ("EED")[95] is considered comparable to the DMCA safe harbor provisions[96] that shield ISPs from copyright infringement liability. However, recently, the EU adopted new legislation —the Directive on Copyright in the Digital Single Market.[97] In Article 17 of the Copyright Directive, the European Commission indirectly introduces filtering and monitoring obligations on particular online platforms that allow users to upload content.[98] Does adoption of the Directive sacrifice the safe harbor protection for ISPs, and impose direct liability if copyright-infringement occurs on their platforms? Do ISPs still have legislative immunities? Is it detrimental for EU rule of law and EU acquis? Is the EU legislation crafted in such a way as to potentially root out the "value gap" problem? This part of the article analyzes how the safe harbor provisions are regulated by EU legislation, and compares it to the new Copyright Directive. Particular attention is given to Article 17, and the analyses of how the EED and the Copyright Directive differ, and, in some instances, contradict each other.

1. Liability Limitation for ISPs under the EED

In European Union, the EED grants ISPs legislative immunities.[99] Mere conduit, catching and hosting activities are covered by the relevant safe harbor provisions. Article 12 of the EED stipulates that ISPs are not liable for "the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission."[100] According to the article 13, ISPs are not liable for

> […] the automatic, intermediate and temporary storage of that

92. Mazgal, *supra* note 91.

93. Sag, *supra* note 12.

94. Sag, *supra* note 12, at 560.

95. E-Commerce Directive *supra* note 14.

96. *See* Annette Kur, *Secondary Trademark Liability in Germany and the EU*, 37 COLUM. J. L. & ARTS 525 (2014).

97. *See* Copyright Directive, *supra* note 7.

98. *Id.* art. 17.

99. E-Commerce Directive, *supra* note 14, art. 12, 13, 14, 15.

100. E-Commerce Directive, *supra* note 14, art. 12.

> information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
>
> (a) the provider does not modify the information;
> (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;
> (d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and
> (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.[101]

In addition to this, ISPs are shielded by the copyright infringement liability, if "provider does not have actual knowledge of illegal activity,"[102] but ISPs lose the benefit of the Article 14 exemption if, upon obtaining actual knowledge of illegal activity or information, or awareness of facts or circumstances from which the illegal activity or information is apparent, they fail to act expeditiously to remove or disable access to the information.[103] Generally, ISPs are under no obligation either to monitor the information that they transmit or store, or to actively seek facts or circumstances indicating illegal activity, when providing hosting, caching and/or mere conduit services.[104] Moreover, the InfoSoc Directive[105] also provides an exemption of intermediary liability where the infringing reproduction of protected works is "transient or incidental, and an integral and essential part of a technological process"[106], "subject to certain requirements."[107]

If we look through the EU case law, it is worthy to mention that in *Google France* (Cases C-236/08 to C-238/8),[108] concerning Google's provision of the "AdWords" ad referencing service, the CJEU held that "it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores".[109] "The facts that:

101. *See id.* art. 13.

102. *See id.* art. 14.

103. *Id.*

104. *See id.* art. 15.

105. Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 1-10 (EC) [hereinafter InfoSoc Directive].

106. *Id.* art. 5(1).

107. Gregor Pryor, Hunter H. Thomson & Eleanor Brooks, *European Copyright Reform – Safe Harbour and the Value Gap,* REEDSMITH (Jun. 6, 2017), https://www.reedsmith.com/en/perspectives/2017/06/european-copyright-reform-safe-harbour-and-the-value-gap [https://perma.cc/DUK7-9HR9].

108. Joined Cases C-236/08 to C-238/08, Google France and Google Inc. v. Louis Vuitton Malletier and Others, 2010 E.C.R I-02417.

109. *Id.* para. 114.

(i) Google received remuneration for advertisers' use of its system; and (ii) the system automatically matched the two sets of data in response to each search query, were found by the CJEU to be insufficient to deprive Google of its Article 14 defense."[110]

Adoption of the new Copyright Directive creates strongly disseminated circumstances and reveals some divergences in the EU rule of law.[111] Therefore, it is very important to analyze Article 17 of the new Copyright Directive and point out potential consequences caused by its adoption.

2. Article 17 of the EU Copyright Directive

In April 15, 2019 the European Council ratified "The Directive on Copyright in the Digital Single Market," which introduces "sweeping reforms to how copyrighted content posted online is governed."[112] The most controversial part in this Copyright Directive is Article 17 (formerly known as article 13), which proactively imposes filtering obligations on particular online platforms that allow users to upload content. According to the InfoSoc Directive[113] "act of communication"[114] to the public is considered a copyright owner's exclusive right. Article 17 stipulates that an act of communication to the public is performed when an ISPs give "the public access" to the copyrighted content, uploaded by its users. Consequently, if ISPs do not obtain an authorization from the right-holder, their action is considered to be copyright-infringement, no matter how this content is located on the platform, whether it is uploaded by general users, or by the ISPs.[115] The requirement of obtaining authorization from the right-holders by ISPs extends to "acts carried out by users of the services […] when they are not acting on a commercial basis or where their activity does not generate significant revenues."[116] From the practical standpoint and the cross-border nature of the internet, recently adopted copyright law in the EU would influence US tech giant companies as well. For example, User Generated Platforms, such as YouTube, Facebook and Twitter would be required to obtain licenses to each uploaded content on its web-site.[117] Otherwise, the

110. Pryor et al., *supra* note 107.

111. *See* Mazgal, *supra* note 91; Eugenio Foco, *Controversy Between Article 13 of the Proposed Directive for Copyright in the Digital Single Market and the EU Aquis*, MEDIA LAWS (Jan. 9, 2018), http://www.medialaws.eu/controversy-between-article-13-of-the-proposed-directive-for-copyright-in-the-digital-single-market-and-the-eu-acquis/ [https://perma.cc/A72T-X54G].

112. Carly Page, *European Council Gives Final Thumbs Up to Controversial Copyright Directive*, THE INQUIRER (Apr. 15, 2019) https://www.theinquirer.net/inquirer/news/3074166/copyright-directive-final-vote-law [https://perma.cc/JRT3-RFXU].

113. *See* InfoSoc Directive, *supra* note 105.

114. *Id.* art. 3(1) ("Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works […]"). *See also* J KOO, THE RIGHT OF COMMUNICATION TO THE PUBLIC IN EU COPYRIGHT LAW 84 (1st ed. 2019). *See also* Proposal for Council Directive 2016/0280, *supra* note 21, art. 13(1) ("an online content sharing service providers performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright protected works or the protected subject matter uploaded by its users").

115. Copyright Directive, *supra* note 7, art. 17(1).

116. *Id.* art. 17(2).

117. Karina Grisse, *After the Storm - Examining the Final Version of Article 17 of the New Directive (EU) 2019/790*, OXFORD J. INTELL. PROP. L. & PRAC. 887, 893 (2019) ("as it is users who upload the content,

liability for giving "public access" to the unauthorized content is imposed on it.[118]

> Article 17(4) Stipulates that:
>
> If no authorization is granted, online content-sharing service providers shall be liable for unauthorized 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:
>
> (a) made best efforts to obtain an authorization, 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).[119]

Moreover, the Copyright Directive sets out different liability pre-conditions for ISPs by considering their type, size of service and audience.[120] ISPs that "have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million" are required to act expeditiously "upon receiving a sufficiently substantiated notice, to disable access to the notified works […] to remove those works […] from their websites".[121] In other words, similar to the U.S. DMCA, small and new ISPs will be required to implement a notice-and-takedown regime. However, in addition to this, they could also "possibly be liable for not making 'best efforts' to obtain licenses."[122] Article 17 specifies different conditions of liability for ISPs whose average number of unique visitors *monthly* exceed five million. They "shall also demonstrate that they have made *best efforts* to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information."[123] The term "best effort" lacks clarity, as it is not defined in the Copyright Directive.[124] The legal uncertainty and this type of broad wording can lead to the vogue and unintended consequences,[125] because excluding

the provider does not know in advance which and whose content is made available on the platform and thus needs to be licensed"). *See also* Nahmias et al., *supra* note 81, at 13 ("unless platforms 'conclude fair and appropriate licensing agreements with right holders,' they will be directly liable for the sharing of infringing content by users"). *See also* Stan Adams, *Why the EU Copyright is a Threat to Fair Use*, CENTER FOR DEMOCRACY AND TECHNOLOGY (Mar. 1, 2019), https://cdt.org/blog/why-the-eu-copyright-directive-is-a-threat-to-fair-use/ [https://perma.cc/6B5A-SJAR].

118. Copyright Directive, *supra* note 7, art. 17(4).

119. Copyright Directive, *supra* note 7, art. 17(4).

120. Copyright Directive, *supra* note 7, art. 17(5).

121. Copyright Directive, *supra* note 7, art. 17(6).

122. Rosenblatt, *supra* note 85. *See* Copyright Directive, *supra* note 7, art. 17(4)(a).

123. Copyright Directive, *supra* note 7, art.17(6) (emphasis added).

124. *Id.* art. 17(4)(a).

125. Grisse, *supra* note 117, at 893-94 ("The burden of proof of having made best efforts to obtain authorization rests upon the [ISPs]").

ISPs from copyright infringement liability might be depended on how the "best effort" criteria will be interpreted and evaluated.

Alternatively, instead of obtaining authorization, ISPs can choose to implement "filtering measures" which, by creating the special algorithm, automatically monitors and filters copyright infringements before it is uploaded and placed on their platform. Admittedly, "the law does not explicitly call for such filters, but critics say it will be an inevitability as sites seek to avoid penalties."[126] Member States are required to provide the effective redress mechanism in case of dispute the application of the filtering measures.[127] Article 17 of the Copyright Directive creates the "*de facto* strict liability regime" which can practically be achieved by implementing a filtering system.[128] The automated filtering and monitoring mechanism would not be able to differentiate whether the content is infringing or legitimate, and would, undoubtfully, create circumstances that pose a threat to preserving an appropriate and fair balance between copyright enforcement rights of users, and ISPs' legitimate interests.[129]

C. CRITICISM OF ARTICLE 17 OF THE EU COPYRIGHT DIRECTIVE

Before discussing the potential consequences of Article 17, it is worthwhile to mention that by adopting a new Copyright Directive, Member States still have opportunity to determine the details of the legislation method and form of implementation independently but in accordance with the Directive's objectives.[130] But despite the nature and characteristic of the Directive as a legislative tool, it will have "a huge impact on how the internet works in Europe and further afield."[131] As mentioned above, adoption of the new Copyright Directive might have legitimate goals to achieve, but it is important to discuss how this "well-intentioned" law, particularly Article 17 of the Directive, is likely to achieve a desirable outcome.

126. Vincent, *supra* note 23.

127. Copyright Directive, *supra* note 7, art. 17(9) ("Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them").

128. Giancarlo Frosio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe*, 12 OXFORD J. INTELL. PROP. L. & PRAC. 1, 11 (2017).

129. *See* Christina Angelopoulos & Stijn Smet, *Notice-and-Fair-Balance: How to Reach a Compromise Between Fundamental Rigts in European Intermediary Liability*, 8 IViR Media L.J. 266, 285 (2016) ("Automatic takedown […] fails to reach a viable compromise. There is no burden-sharing; instead the intermediary and end-users must alone assume the full responsibility. Automatic takedown can therefore not be incorporated into a balance-based system of intermediary liability.").

130. A directive is a "legal instrument of the European Union (EU) as defined in Article 288 of the Treaty on the Functioning of the European Union (TFEU). A directive is a measure of general application that is binding as to the result to be achieved, but that leaves member states discretion as to how to achieve the result. Directives usually contain a deadline by which EU member states must implement it into national law (usually two years)." *Directive (EU)*, Glossary, THOMSON REUTERS PRACTICAL LAW, https://content.next.westlaw.com/Document/I2501722ae8db11e398db8b09b4f043e0/View/FullText.html?originationContext=knowHow&transitionType=KnowHowItem&contextData=(sc.DocLink)&firstPage=true&bhcp=1. [https://perma.cc/3TG8-L24V] (last visited Dec. 12, 2019).

131. Vincent, *supra* note 23.

The primary intention behind Article 17 was to incentivize the right-holders, by stimulating "innovation, creativity, investment and production of new content, also in the digital environment, with a view to avoiding fragmentation of the internal market."[132] A number of figures in the music industry supported the framework of the Article 17, arguing that it would ensure copyright owner's fair remuneration in the digital marketplace.[133] For example, Sir Paul McCartney in his open letter claimed that, "The value gap is that gulf between the value these platforms derive from music and the value they pay creators. The proposed Copyright Directive and its article article 13 [ex-article 17] would address the value gap and help assure a sustainable future for the music ecosystem and its creators, fans and digital music services alike."[134] On the one hand, the Copyright Directive intends to enhance obligations for ISPs dealing with unlawful third-party content, as well as appropriate and proportionate digital royalty payouts to copyright owners.[135] According to recital 73 of the Copyright Directive:

> The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.

The abovementioned recital 73 clearly states that under some circumstances, authors are entitled to remuneration proportionate to the full value. It means that "if currently creator receives a lump sum from a contractor for the full economic value of the rights […] the contractors can now make a case to only pay them a proportion of that."[136] This does not empower copyright holders to a greater portion of revenues and may create a worse position for copyright holders than current market practices.[137]

Article 17(7) of the Copyright Directive also aims to protect users who take advantage of the limitations and exceptions to copyright.[138] Achieving

132. Copyright Directive, *supra* note 7, at recital 2.

133. *See* Bruce Houghton, *1300 Musicians, Trade Groups Push for Article 13 Adoption Today, Big Tech Degrees*, HYPEBOT (July 05, 2018), https://www.hypebot.com/hypebot/2018/07/paul-mccartney-1300-musicians-push-for-article-13-adoption-ahead-of-key-vote.html [https://perma.cc/ 4XZ5-AX2P].

134. Andre Paine, *'The Value Gap Jeopardises the Music Ecosystem': Paul McCartney Leads Last-Ditch Appeal on EU Vote*, MUSIC WEEK (July 4, 2018, *11:36 AM)* http://www.musicweek.com/talent/read/the-value-gap-jeopardises-the-music-ecosystem-paul-mccartney-leads-last-ditch-appeal-on-eu-vote/073049 [https://perma.cc/F8EK-ZCS6].

135. *See* Copyright Directive, *supra* note 7, art.18; *see* Copyright Directive, *supra* note 7, at recital 3 ("In order to achieve a well-functioning and fair marketplace for copyrights, there should also be rules on […] the transparency of authors' and performers […] remuneration"); *see* Copyright Directive, *supra* note 7, at recital 61 ("Rightholders should receive appropriate remuneration for the use of their works or the subject matter"); *see* Copyright Directive, *supra* note 7, at recital 73.

136. Aguilar, *supra* note 29.

137. Aguilar, *supra* note 29.

138. Copyright Directive, *supra* note 7, art. 17(7) ("The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.").

this goal becomes problematic with the creation of a filtering and monitoring system. Despite the language of Article 17(8), which includes the statement that "the application of this Article shall not lead to any general monitoring obligation,"[139] opponents of the legislation claim that ISPs will practically be forced to create an algorithm that will filter uploaded content automatically, otherwise it would be impossible to comply with the Directive's requirements, or to avoid penalties and liabilities.[140] From a practical standpoint, the filtering systems are not designed to recognize the parody, since we have "an algorithm without a sense of humor"[141] and enforcement of users' rights, in this regard, remains in question. Some critics refer to the day of the adoption of the Copyright Directive as a "dark day for internet freedom."[142] They argue that "the law is vague and poorly thought-out and will end up restricting how content is shared online, stifling innovation and free speech."[143]

In addition to this, creation of the filtering mechanism costs a lot of money, and "only platforms with deep pockets" will be able to comply with the Copyright Directive's requirement.[144] "Even if small enterprises get an exemption from its scope, this simply means they are not allowed to scale up and compete with the big US platforms."[145] Consequently, the new Copyright Directive's impact is presumably dangerous for free markets, since the text of Article 17 hinders competition by creating "needlessly burdensome" circumstances for startups.[146]

Admittedly, the obligations introduced by the proposed text are incompatible with both the existing EU directives and the EU Charter of Fundamental Rights, as interpreted by the CJEU.[147] It thereby risks creating more legal uncertainty than it resolves."[148] Amending of the DMCA in the image of the new EU Directive would be ineffective and inappropriate. The

139. Copyright Directive, *supra* note 7, art. 17(8).

140. Vincent, *supra* note 23.

141. Sabine Jacques, *The EU is Trying to Protect Your Memes – But it's a Battle Against Humourless Algorithms*, THE CONVERSATION (Mar. 19, 2019), https://theconversation.com/the-eu-is-trying-to-protect-your-memes-but-its-a-battle-against-humourless-algorithms-112573 [https://perma.cc /XNH4-LYMK].

142. Jake Johnson, *'Dark Day for Internet Freedom': EU Approves Rules to Create Online Censorship Machine*, COMMON DREAMS (Mar. 26, 2019), https://www.commondreams.org/news/ 2019/03/26/dark-day-internet-freedom-eu-approves-rules-create-online-censorship-machine [https:// perma.cc/TY7H-TN2H] ("Julia Reda, a German member of the European Parliament (MEPs) and outspoken opponent of the copyright directive, said it is a 'dark day for internet freedom' after the rules overwhelmingly passed").

143. Vincent, *supra* note 23.

144. *The Council APPROVED the Copyright Directive: How Did EU Member States Vote?*, #SAVEYOURINTERNET, https://saveyourinternet.eu/ [https://perma.cc/B2Z3-QY3S] (last visited Apr. 23, 2019).

145. *Id.*

146. Rosenblatt, *supra* note 85.

147. *See, e.g.*, C-70/10, Scarlet Extended Sa v. Societe Belge des Auters, Compositeurs et editeurs SCRL (SABAM), 2011 E.C.R. 771. *See also* Christina Angelopoulos & Joao Pedro Quintais, *Fixing Copyright Reform: How to Address Online Infringement and Bridge the Value Gap*, KLUWER COPYRIGHT BLOG (Aug. 30, 2018), http://copyrightblog.kluweriplaw.com/2018/08/30/fixing-copyright-reform-address-online-infringement-bridge-value-gap/ [https://perma.cc/7VXA-2L28].

148. *Id.*

problems that the Copyright Directive intends to address remain unresolved, creating unfavorable situations for all players in this "game:" (1) in terms of copyright holders, it does not empower them to receive a greater portion of revenues generated by ISPs; (2) in terms of users, it does not protect them from the limitations and exceptions to copyright; and (3) in terms of ISPs - it imposes "needlessly burdensome" liability for ISPs.

On the one hand, the directive aims—*inter alia*—to close the "value gap" between ISPs and copyright holders.[149] On the other hand, it may destroy the internet as we know it by transforming "the web from a free and open platform to a tool to police information and limit ideas."[150] Crafting legislation that will fairly address online copyright infringement and allocate the interests of all "players" on the digital scene, is a big challenge for both the United States and the European Union, despite their different approaches to the problem. While the US tries to "accommodate intermediaries through safe harbor provisions, EU law has focused more on the interests of authors and publishers by providing a high level of copyright protection."[151]

II. FAIRER BALANCE OF INTERESTS IN THE EU COPYRIGHT LAW

As discussed in Part I, the main objective of Article 17 is consistent with the risks inherent in the language of the law.[152]

This article proposes a creation of a harmonized EU framework for determining the obligations the intermediaries have to prevent copyright infringement. It further suggests an adoption of an *alternative*, more effective compensation system for copyright holders to ensure fair remuneration on the digital platform. Part II of this article outlines the importance of harmonizing secondary liability to ISPs at European level, without sacrificing safe harbor provisions and suggests adoption of the "fair use doctrine,"[153] and "fair remuneration"[154] provisions as effective tools for tackling the "value gap" problem.[155]

A. HARMONIZED SECONDARY LIABILITY REGIME FOR INTERNET INTERMEDIARIES

The non-existence of a harmonized regime of ISP liability for online copyright infringement is one of the most prominent legal loopholes in the

149. Frosio, *supra* note 89, at 332.

150. Ephrat Livni, *The EU Copyright Law That Artists Love – And Internet Pioneers Say Would Destroy the Web*, QUARTZ (Sept. 11, 2018), https://qz.com/1386244/eu-copyright-law-artists-love-it-internet-pioneers-say-its-destructive/ [https://perma.cc/SN5K-UJQ4].

151. Ali Amirmahani, *Digital Apples and Oranges: A Comparative Analysis of Intermediary Copyright Liability in the United States and European Union*, 30 BERKELEY TECH. L.J. 865, 866 (2015).

152. Vincent, *supra* note 23.

153. U.S. COPYRIGHT OFFICE, *supra* note 3.

154. The author suggests the creation of one harmonized framework which would establish a statutory remuneration mechanism at the European level.

155. Dredge, *supra* note 30.

EU Copyright law.[156] Imposing secondary liability on ISPs would be the optimal way to address such infringement.[157] It would also do the lion's share of work in resolving the 'value gap' controversy. The present proposal suggests the repeal of Article 17 of the new Copyright Directive, and adoption of new legislation to ensure consistency with the EDD framework and the currently developed EU *acquis*.

The logical question, of course, is how to craft a reform and institute a harmonized secondary liability framework. The answer to this question can be found in CJEU case law. In this regard it is worthwhile to mention the following three cases that underscore the exclusive right of communication to the public in relation to digital media services—*GS Media/Sanom*,[158] *Filmspeler*,[159] and *Ziggo/Brein*[160] ("The PirateBay").

In The Pirate Bay case, the Stichting Brein, a Netherlands foundation which protects the interests of copyright holders[161], brought proceedings before the court seeking an order that would require ISPs (Ziggo and XS4ALL) "to block the domain names and IP addresses of the online sharing platform—The Pirate Bay (TPB)."[162] The Pirate Bay platform allowed its users to share and upload copyrighted contents, without having an authorized consent of copyright-holders.[163] In addition to this, the Pirate Bay offered a search engine which arranged copyrighted works based off the categories of the works, their genre, and their popularity.[164] Moreover, the same operators expressly displayed (on blogs and forums accessible on the platform) their intention of making protected works available to users, and encouraged the latter to make copies of those works.[165]

The CJEU paid particular attention to the fact that copyright-protected works were available to the public through The Pirate Bay in such a way that any individual could access and download the works from wherever, and

156. *See* Jan Bernd Nordemann, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, EUROPEAN PARLAMENT, 1, 25, IMCO 614.207 (2018), http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf [https://perma.cc/5JM8-6Q7H] ("liability rules for internet providers are dominated by national law secondary liability rules, which are not harmonised on the EU level"); *id.* at 22 ("The national member states provide for a vast variety of different concepts, which also produce different results…").

157. *Id.* at 25 ("So far, liability rules for internet providers are dominated by national law secondary liability rules, which are not harmonised on the EU level. It is therefore desirable to introduce liability rules on the EU level, in particular for damages, for internet providers in order to create a level playing field on the digital single market.").

158. Case C-160/15, GS Media BV v. Sanoma Media Neth. BV, 2016 E.C.R. 644.

159. Case C-527/15, Stichting Brein v. Wullems, 2017 E.C.R. 300, 3 C.M.L.R. 30 (2017).

160. Case C-610/15, Stichting Brein v. Ziggo BV, 2017 E.C.R. 456.

161. *Id.* para. 8.

162. *Id.* paras. 2, 13.

163. *Id.* para. 12 ("The torrent files offered on the online sharing platform [The Pirate Bay] relate mainly to copyright-protected works, without the rightholders having given their consent to the operators or users of that platform to carry out the sharing acts in question.").

164. *Id.* para. 38 ("In addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform's operators checking to ensure that a work has been placed in the appropriate category.").

165. *Id.* para. 45.

whenever, they desired.[166] The CJEU ruled that The Pirate Bay infringed owners' exclusive copyrights, because "the making available and management of an online sharing platform" was "an act of communication" for the purposes of the EU Copyright Directive.[167] Lastly, the court emphasized that The Pirate Bay carried out its service with the purpose of obtaining a profit; it was clear from the observations submitted to the court that the platform generated considerable advertising revenues.[168] But the court admitted that the "profit-making nature of a communication", within the nature of Copyright Directive, is not relevant.[169]

The CJEU emphasized two cumulative elements for a showing of ISPs' liability.[170] First, the party bringing the suit must show infringing conduct, an unauthorized act that violates copyright-holder's rights. Because the "act of communication" to the public is considered a copyright owner's exclusive right,[171] the CJEU reasoned that ISPs could not be shielded from liability by protections of the safe harbor provisions, as long as the ISPs manage their online sharing platform in a way that makes copyright content easily accessible for its users to download, use, upload and share, without authorized consent. [172] "Absent TPB [The Pirate Bay], it would be either impossible or more difficult for the users to share the work online."[173]

Second, the ISPs must have actual knowledge of the act that infringes copyright-owner's rights.[174] The court acknowledged that the work was placed on the platform not by The Pirate Bay operators but by the users.[175] "Nevertheless, the [c]ourt concluded that the management of an online sharing platform amounts to an intervention to provide access to protected works in full knowledge of the consequences."[176]

In order to qualify an "act of communication" as a copyright infringement, the CJEU in several decisions emphasized the requirement of full knowledge of consequences to give acess to a protected work. For

166. *Id.* para. 31 ("Furthermore, as is apparent from Article 3(1) of Directive 2001/29, in order for there to be an 'act of communication', it is sufficient, in particular, that a work is made available to a public in such a way that the persons comprising that public may access it, from wherever and whenever they individually choose, irrespective of whether they avail themselves of that opportunity (see, to that effect, judgment of 26 April 2017, Stichting Brein, C 527/15, EU:C:2017:300, paragraph 36 and the case-law cited)").

167. *Id.* para. 39 ("In the light of the foregoing, the making available and management of an online sharing platform, such as that at issue in the main proceedings, must be considered to be an act of communication for the purposes of Article 3(1) of Directive 2001/29.").

168. *Id.* para. 46.

169. *Id.* para. 29.

170. *See* Christina Angelopoulos, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, KLUWER COPYRIGHT BLOG (June 30, 2017), http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/ [https://perma.cc/EP4Z-6K55].

171. *See* Infosoc Directive, *supra* note 105, art 3(1).

172. Case C-610/15, Stichting Brein v. Ziggo BV, 2017 E.C.R. 456, para. 38.

173. Angelopoulos, *supra* note 170.

174. Angelopoulos, *supra* note 170.

175. Case C-610/15, Stichting Brein v. Ziggo BV, 2017 E.C.R. 456, para. 36.

176. Angelopoulos, *supra* note 170.

example, in *Stichting Brein v Filmspeler* (Case C-527/15),[177] rightholders filed a lawsuit against a media player, which knowingly and intentionally offered links to illicit audiovisual content. The CJEU ruled that "Where a person knows or ought to have known (particularly if they circumvent restrictions) that a hyperlink he posted provides access to a work illegally placed on the internet, the provision of that link constitutes a communication to the public."[178] While assessing the state of mind element for establishing copyright infringement liability, intent is also very important. In the *Stichting Brein v. Filmspeler* case, the court found that intent provided links to illegal content, so the seller of the media player was fully liable for illegal communication to the public. "Platforms should only be subject to obligations to take action against infringing content where: **a)** it can be shown that they intend to cause infringement or b) after obtaining knowledge of a copy of a work being uploaded in contravention of the exception."[179]

B. HARMONIZED FAIR REMUNERATION SYSTEM AND FAIR USE DOCTRINE

In connection with the right of authors to be adequately compensated for the fruits of their labor, and to receive fair remuneration, legislators must craft a policy that can provide a statutory guarantee of those rights. Establishing common remuneration rules is very important, particularly in the online environment.[180] Statutory licenses[181] "can provide significant revenues for creators, they constitute interesting tools for legislators in order to avoid the blocking effect of exclusivity, while at the same time ensuring that the creator can participate fairly in the creative reuse of their works."[182]

In the 2010 *Padawan* decision,[183] the European Court of Justice held that the concept of "fair compensation" "must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the European Union."[184] With reference to Recitals 35 and 38 of the Information Society Directive,[185] the Court also found that "fair

177. Case C-527/15, Stichting Brein v. Wullems, 2017 E.C.R. 300, 3 C.M.L.R. 30 (2017).

178. Miryam Boston & James Seadon, *CJEU Delivers Landmark Ruling on Communication to the Public in Filmspeler Case*, FIELD FISHER: SNIPPETS INTELLECTUAL PROPERTY BLOG (May 4, 2017, 9:57 AM), https://intellectualpropertyblog.fieldfisher.com/2017/cjeu-delivers-landmark-ruling-on-communication-to-the-public-in-filmspeler-case [https://perma.cc/QG4B-46QX].

179. Angelopoulos, *supra* note 170.

180. Christina Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, MEP JULIA REDA, 1, 2 (2017), https://juliareda.eu/ wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf. [https://perma.cc/BV7L - LQB4].

181. *See* Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, 15-14 MAX PLANCK INST. INNOV. & COMPET. 1, 3 (2015) ("Uses covered by a limitation can lead to an obligation to pay a fair remuneration to the creator. In these cases, these 'limitation-based remuneration rights' are often called 'statutory licenses' but this terminology is not always uniformly applied.").

182. *Id.* at 1.

183. Case C-267/08, Padwan SL v. Sociedad General de Autores y Editores de Espana (SGAE), 2010 E.C.R. I-10055.

184. *Id.* para. 32.

185. *Id.* paras. 36, 39, 41 ("the word 'compensate' in recitals 35 and 38 in the preamble to Directive 2001/29 expresses the intention of the European Union legislature to establish a specific compensation

compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception."[186]

This decision is very important as twenty-three countries of the EU member states[187] use the dramatically different levy schemes for "fair compensation" to copyright holders.[188] Levies differ in tariffs for the same media or equipment, and apply different methods of calculation.[189] They also differ in beneficiaries and the processes itself for setting tariffs and distribution, contestability of tariffs, governance and supervision of agencies are also different.[190] Therefore, creation of one harmonized framework which would create statutory remuneration mechanism at the European level would be a step forward in addressing the "value gap" problem.[191]

In addition to this, general internet-users, engaging in noncommercial sharing of copyrighted works and other subject-matter do not have to be considered copyright infringers. To solve these issues, adoption of "fair use" provision in European copyright law is urgently needed, but it was rejected by EU legislators several times.[192] The U.S. Copyright Act, Section 107, provides that uses are fair and non-infringing depending on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and the effect of the use upon the potential market for or value of the copyrighted work.[193] Fair Use doctrine helps to frame copyright limitations as open-ended provisions, which allow reaction to new situations in a more flexible way. While it is true that the results of the application of the open-ended provisions are often said to be less predictable,[194] many scholars have challenged this assumption, and

scheme triggered by the existence of harm to the detriment of the rightholders, which gives rise, in principle, to the obligation to 'compensate' them.").

186. *Id.* para 42.

187. Giuseppe Mazziotti, *Copyright in the EU Digital Single Market*, CEPS DIGITAL FORUM, 1, 98 (2013) ("It is worth noting that the UK, Ireland, Luxemburg, Malta and Cyprus are the only member states of the European Union where levy systems have never existed.").

188. *Id.* at 16.

189. *Id.* at 101.

190. *Id.* at 10.

191. *See* Angelopoulos, *supra* note 170 ("This right of fair compensation ensures that: a) creators receive a fair share of the amounts collected under the statutory license system (which we propose to be at least 50% of collected rights revenue); and b) they are not forced to transfer that share to publishers and other derivative right-holders in the context of unbalanced contractual negotiations.").

192. *See* Martin R.F. Senftleben & Bernt Hugenholtz, *Fair Use in Europe. In Search of Flexibilities*, IViR, 1, 1 (2011) ("with the accelerating pace of technological change in the 21st century, and in view of the complex process of law making in the EU, the need for flexible copyright norms both at the EU and the national level is now greater than ever"); *see also* Christophe Geiger & Elena Izymenko, *Towards A European "Fair Use" Grounded in Freedom of Expression*, 35 AM. U. INT'L K. REV. 1, 23-24 (2019) ("The text of the new Directive on Copyright in the D.S.M. that has recently been adopted by the European Parliament does not promise to solve" [inflexibility of the EU Copyright law to keep up with technological developments]. There is an "urgent need for more flexibility in European copyright. This calls for a serious reconsideration of an idea of possible introduction of open-ended copyright limitation in E.U. *acquis*."). *See id.* at 35 ("An open-ended copyright limitation of the "fair use" type can constitute a solution to the current rigidity of the E.U. copyright system.").

193. Copyright Act of 1976, 17 U.S.C. § 107 (2019). *See* U.S. COPYRIGHT OFFICE, *supra* note 3.

194. *See* Senftleben & Hugenholtz, *supra* note 192, at 9 ("The rule of fair use as it presently exists and is applied in the United States has always attracted criticism, particularly for its presumed lack of

claim in response that the fair use rule, as it is applied by the U.S. courts, provides more legal security than it is sometimes assumed.[195] Rapid and unpredictable technological development creates the need of flexible norm, which will fairly accommodate unforeseen circumstances.

C. REASONS FOR ADOPTING PROPOSAL

While discussing the reasons for adopting the proposal, it is important to draw a line between Article 17 of the Copyright Directive, and the solution this article intends to suggest. As we already mentioned the main problem with the Article 17 is that it contradicts with the EU acquis, and the established practice under the EED; therefore it is considered a threat to the EU rule of law. This article suggests several reasons for harmonizing the EU approach to ISP liability, and closing the existing gap in the EU Copyright Law.

1. Strengthening the Digital Single Market and the EU Rule of Law

Non-existence of the harmonized regime of ISPs liability for online copyright infringement is one of the most prominent legal loopholes in the EU Copyright law.[196] There are no explicit pan-EU liability rules written down in any EU legislative framework.[197] The EDD provides only liability privileges for ISPs, but it does not establish liability. National law applies and Member States provide "a vast variety of different concepts, which also produce different results as to the persons secondarily liable. Such national concepts for secondary liability have different labels such as joint tortfeasor, accessory liability, authorization or Stoererhaftung."[198] Therefore, creation of harmonized Secondary liability system in the EU Copyright Law will strengthen the digital market. Present proposal ensures consistency with E-commerce framework and follows traditional horizontal approach of the EU to create pan-EU concept liability rules.

2. Positive Economic Effects

This harmonized legal framework will promote good faith and fair dealings of the internal competitive market, because, "Establishing common remuneration rules mitigates the potential volume of litigation and provides legal security and economic predictability for the cultural and creative industries."[199] This new harmonized legal framework will stimulate

predictability."). *See* also J.P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 133 (2014); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) ("Fair use is often criticized as unpredictable. . ."); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008) ("Fair use […] remains fairly unpredictable and uncertain in many settings.").

195. *See, e.g.*, Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 521-22 (2010); *see also* P. Bernt Hugenholtz, *Flexible Copyright: Can EU Author's Right Accommodate Fair Use?* IVIR, 417-33 (2016).

196. *See* Nordemann, *supra* note 156.

197. Nordemann, *supra* note 156, at 19.

198. Nordemann, *supra* note 156, at 22.

199. Joint Statement, International Confederation of Societies of Authors and Composers, The EU Urgently Needs Remuneration Rules for Authors and Performers (Dec. 10, 2018),

innovation, creativity, investment and production on the digital platform. Moreover, it will ensure fair remuneration of the copyright holders on the digital platform, and will create more stable legal basis for balancing the interests of all players in this scenario copyright owners, ISPs and internet users. It will also encourage a fairer allocation of profits generated by the distribution of copyright-protected content by online platforms.

III. POSSIBLE CRITICISM OF THE PROPOSAL

Some critics may argue that the proposal must be rejected because the adoption and implementation of "fair use" provision in European copyright law might cause "legal uncertainty and erode traditional civil law culture in the field of copyright."[200] Moreover, some may believe that application of open-ended fair use provisions may have a "destabilizing effect," [201] since judges in the EU, in contrast to those in the U.S., are more adept in dealing with civil law, rather than common law.[202] In addition to this, critics may challenge political feasibility of the proposal, questioning the necessity of harmonized secondary liability legislation as the main tool for striking a reasonable balance between the interests of the ISPs, the users and the copyright holders. These potential criticisms are addressed in the following part of the paper.

A. ADOPTION OF "FAIR USE" DOCTRINE AT THE EU LEVEL

Some critics may claim that the adoption of the adoption of the open-ended fair use doctrine would compromise the EU legal system; the EU is comprised of civil law countries, and the "fair use" doctrine must be applied on a "case-by case basis"[203] Civil law judges might have difficulties in applying and clarifying the scope of "fair use" because the *stare decisis* principle[204] is not applicable in civil law states.

However, other open-ended provisions have already made their way into current EU law; for example, EU's Trademark law provides for a "due

https://www.cisac.org/Newsroom/Society-News/Joint-statement-The-EU-urgently-needs-remuneration-rules-for-authors-and-performers [https://perma.cc/3CA8-A5DZ].

200. Martin Senftleben, *The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231, 231-32 (2017).

201. *Id.*

202. *Id.* ("In the debate over the introduction of open-ended fair use provisions in the copyright legislation of civil law countries, it is often argued that judges with a civil law background do not have the experience necessary to apply open-ended norms in an appropriate way. […] Policy makers are concerned that the adoption of fair use provisions could cause legal uncertainty and erode traditional civil law culture in the field of copyright.").

203. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules for the statute, like the doctrine it recognizes, calls for case-by-case analysis.") (citation omitted).

204. Senftleben, *supra* note 200, at 265.

cause defense."[205] Article 5(2) of the EU Trade Mark Directive[206] and Article 9(2)(c) of the EU Trade Mark Regulation (EUTMR)[207] stipulate broad exclusive rights of trademark owners to protect their rights by using an open-ended "due cause" defense. The "due cause" defense elucidates that

> civil law judges have no difficulty in applying open-ended norms in an appropriate way and clarifying the scope and reach of open provisions by developing a consistent line of case law that makes the outcome of future cases foreseeable. As their colleagues in common law countries, civil law judges develop assessment factors that serve as guidelines for the application of open norms.[208]

Moreover, 2013/2014 Public Consultation on the Review of EU Copyright Rules[209] underscores the importance of open norms in EU copyright law that allow for a more flexible approach to new situations on digital platforms.[210] In our digitalized and quickly developing world of technology, there is an urgent need for adoption of a more flexible norm that will defend users from copyright infringement liabilities in certain circumstances. [211]

It is, however, also true that the results of the application of the open-ended provisions are often said to be less predictable.[212] But many scholars have challenged this assumption and claim in response that the fair use rule as it is applied by US courts provides more legal security than is sometimes assumed.[213]

B. NECESSITY OF HARMONIZED SECONDARY LIABILITY

Some critics may question the necessity of harmonized secondary liability regime in the EU, especially when Article 17 of the new directive clearly imposes direct liability to the intermediaries for all copyright-infringing content uploaded by its users.[214] However, the problems that arise under the current framework of Article 17 are undeniable, and can be classified threefold: (1) the framework challenges the established practice under the EED regarding the safe-harbor protection for ISPs, and, as such, is detrimental to the EU rule of Law; (2) ISPs will be required to install

205. *See* Case C-65/12, Leidseplein v. Red Bull, 2014 E.C.R. 49 (interpreting the term "due cause" under Art. 5(2) of the Trade Marks Directive and finding that a third party is shielded by the immunity and alleged illicit use of a reputable trademark if it was used before the mark was registered and the usage was in a good faith).

206. Directive 2015/2436 of the European Parliament and the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks, art. 5(2), 2015 O.J. (L 336) (EC).

207. Commission Regulation 2015/2424, 2015 O.J. (L 341) art. 9(2)(c), 21.

208. Senftleben, *supra* note 200, at 284-85.

209. *Public Consultation on the Review of the EU Copyright Rules*, at 18, 33-36 COM (2014); *see* Senftleben, *supra* note 200, at 232.

210. *Id.*

211. *See* Sag, *supra* note 194, at 49 ("In the digital age, innovation and freedom of expression increasingly require the use, reinterpretation, and remixing of copyright content; the fair use doctrine is often the only aspect of copyright law that makes these activities possible.").

212. *See* Senftleben & Hugenholtz, *supra* note 192, at 9; J.P. Liu, *supra* note 194; Cotter, *supra* note 194.

213. *See, e.g.*, Senftleben, *supra* note 195; *see also* Hugenholtz, *supra* note 195.

214. Copyright Directive, *supra* note 7, art. 17(6).

technology that policies uploads and prevents copyright infringement before they occur; (3) Internet platforms might be converted into a space where freedom of speech will be violated.

Creation of harmonized secondary liability will create a more stable legal basis without sacrificing safe-harbor protection for ISPs. Introducing the imposition of secondary liability for ISPs would be an optimal solution to address such infringement and to ensure the fair balance between the interests of ISPs, copyright holders and users.

C. POLITICAL FEASIBILITY

One of the reasonable objections over adoption of the proposal presented by this article is that it might have political obstacles. On April 15, 2019 the European Council, comprised of EU Member states, approved the new EU Copyright directive in Luxemburg, where nineteen Member States voted for the Directive, three Member States abstained, and only six Member Stated voted against the new law.[215] Consequently, critics may logically argue that adopting a harmonized secondary liability system so close in time to the recent adoption of the EU Copyright Directive is not practical. The present article acknowledges this problem and suggests a more flexible and fair proposal, one without disruptive effects on the EU rule of law.

The main argument in response to this statement lies in the driving force behind the adoption of the new copyright directive. People who defend a new copyright directive cite resolving the "value gap" problem as the main reason for their decision.[216] Thus, the motivation behind the adoption of the new Directive can be rationally used to overcome prospective political challenges to the present proposal.

CONCLUSION

Two decades ago, the DMCA in the United States and the ECD in the European Union granted ISPs with legislative immunities to copyright infringements on their platforms. Since that time, the digital marketplace has expanded significantly, and protecting copyright owners' rights on the internet platforms became much more challenging, creating the need for regulatory changes. Contrary to the U.S. approach, the EU tried enacting legislative change by which ISPs would be directly liable for the unauthorized uploads of copyrighted content by their users. Potential consequences of those changes might be detrimental for the EU rule of law. This article suggests a solution that would create more legal certainty and a fairer balance of interests in the digital marketplace. The present article also introduces the need of harmonizing secondary liability to ISPs at the European level, without sacrificing safe harbor provisions. An adoption of the "fair use doctrine" and "fair remuneration" provisions could be an effective

215. #SAVEYOURINTERNET, *supra* note 144.

216. *See* GLOBAL MUSIC REPORT 2017, *supra* note 80.

alternative tool for protecting the rights of all players on the digital scene, while simultaneously tackling the "value gap" problem.