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Intermediary Liability: Evaluating the liability sections of section 53 (7) and (8) of Namibia's Draft Copyright and Related Rights Bill 2021.

By

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Abstract

Internet intermediaries have enabled the general public to access information easier, including copyrighted work. This however led to right to right holders targeting intermediaries for copyright infringement instead identifying and suing every individual user of internet intermediaries.

In order to reduce the liability risks for intermediaries, lawmakers around the world began to amend or adopt their law in particular through the introduction of exemption provisions. Case in point was the U.S The Digital Millennium Copyright Act which introduced safe harbour provisions under which intermediaries can escape liability. Similarly, the EU Electronic Commerce Directive of 2000 contains safe harbour provisions which limit the liability of intermediaries.

In 2019, Namibia's Business Intellectual Property Authority (BIPA) began its journey of amending the Copyright and Neighbouring Rights Act order to be suitable for the digital era. After two consultations and reviews with stakeholder, the Draft Copyright and Related Rights Bill was published. Section 53 of the Bill expressly addresses the issue of internet service providers. The inclusion sections 53(7) and 53(8) raises concerns about increasing the liability of intermediaries considering their importance to the general public.

This dissertation aims to consider if section 53(7) and (8) is constitute an appropriate liability regime.

Contents

Chapter 1: Introduction

1.1 Context

Internet intermediaries consist of an array of companies including internet service providers (ISPs), search engines, e-commerce sites and websites.[1] They bring together or facilitate transactions between third parties on the internet. In the context of copyright, internet intermediaries have made copyrighted work easily accessible to third parties, leading to copyright holders frequently suing them for copyright infringement.[2]

Consequently, with the advent of the digital era, finding a solution to the question of liability for intermediaries became imminent.[3] The introduction of laws specific to internet intermediaries sought to place the responsibility on them for any unlawful content found on their platforms, as intermediaries typically exercise control over online communications while disavowing any responsibility for protecting ownership rights.[4] Intermediary liability provisions thus formalise the domestic lawmaker's expectations of how an intermediary should handle 'third-party' content or communications.[5]

However, the necessity to create or adapt laws as a result of the increase in copyright infringement online prioritise the importance of maintaining a balance between the interests of copyright holders and the public. For the copyright owner, the key interest is to retain creative control over their work and to be rewarded for their creative efforts.

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[1] Anupam Chander 'Internet Intermediaries as Platforms for Expression and Innovation' (2016*)* 42 *Global Commission On Internet Governance Paper Series* at 1.
[2] *Playboy Enterprise, Inc v Frena* 839 F.Supp 1522 (MD Fla. 1993); *Religious Technology Centre v Netcom Online Communication Services Inc* 907 F.Supp 1316; *Metro Goldwyn Mayer Studios V Grokster* 545 U.S. 914 (2005).
[3] Tatiana Lopez Romero 'Internet Service Provider's Liability for Online Copyright Infringement: The US Approach' (2006) 112 *julio-diciembre* 193 at 197.
[4] David Allweiss 'Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?' (1999) 15 *Touro Law Review* 1005 at 1006.
[5] Rebecca Mackinnon, Elonnai Hickok, Allon Bar, et al. *The Role of Internet Intermediaries: Fostering Freedom Online* (2014) at 39.

The key interest of the public, on the other hand, concerns sufficient access to copyrighted works, which they can use and build upon to create new works; this access is facilitated by intermediaries. Thus, increasing the liability of intermediaries would result in an imbalance, as they have played a crucial role in the public gaining access to copyright material.

The internet has become a key means by which individuals can exercise their right to freedom of opinion and expression which is guaranteed by Article 19 of the Universal Declaration of Human Rights.[6] Article 19 was drafted with the foresight to include and accommodate future technology development through which individuals can exercise their right to freedom of expression.[7] The accessibility of works remains key in the current digital age, and increasingly also concerns user-generated content (UGC). UGC refers to content such as images, videos, text, testimonials and audio posted by users on online platforms such as social media, discussion forums and wikis.[8]

In all this, the interests of intermediaries should also be taken into account. Intermediary liability creates a disincentive for innovation in information and communication technologies (ICTs), as intermediaries will be less likely to develop new ICT products and services.[9] In turn, such a disincentive for innovation may impede economic development and growth.[10] Put bluntly, the law must take care to avoid imposing liability on those who participate in the stream of lawful commerce merely because their product can be misused.[11] Instead, laws have to ensure a balance between the interests of copyright owners and internet intermediaries and the protection of the flow of information. One popular way of considering the interests of intermediaries sufficiently in this context is by limiting their liability.

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[6] Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* A/HRC/17/27 (2013) 7.
[7] Ibid.
[8] http://www.en.wikipedia.org/wiki//User-generated_content
[9] Centre for Democracy and Technology 'Intermediary Liability: Protecting Internet Platforms for Expression and Innovation' April 2020 available at http://www.cdt.org/insights/intermediary-liability-protecting-internet-platfomrms-for-expression-and-innovation/, last accessed January 2024.
[10] Ibid.
[11] Mark A. Lemley 'Inducing patent infringement' (2005) 39 *University of California Davis Law Review* 226 at 228.

This was for instance acknowledged in 2011 by the Court of Justice of the European Union (CJEU) in *Scarlet Extended SA v SABAM*[12] which recognised that a balance must be struck between service providers' rights and intellectual property rights. More specifically, the CJEU declared that the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights, including the right of businesses to conduct their business, and the right of an individual to protect personal data and to receive and impart information. The CJEU held that an injunction to install filtering systems would not respect the requirement that a fair balance be struck between, on the one hand, the protection of intellectual property rights as enjoyed, for example, by copyright owners and, on the other hand, the freedom to conduct business enjoyed by, for instance, ISPs.[13]

When crafting liability regimes for their countries, domestic lawmakers and policymakers should therefore take into account the importance of internet intermediaries for the public and try not to unnecessarily impede the creations and works of intermediaries.

1.2 Models of and approaches to intermediary liability

Broadly speaking, there are three models of intermediary liability.[14] Firstly, blanket or strict liability describes a regime under which intermediaries are liable even if they were not aware that the content on their platform was illegal. Typically, to avoid liability under such a regime an intermediary has to monitor, filter and remove content proactively.[15]

The second model is the safe harbour model or conditional liability. In this model intermediaries are safe from liability provided they take down infringing material when receiving notice from a copyright holder.[16] Under this model, the reactive removal of content is

[12] C-70/10 *Scarlet Extended SA v Société belge des auters, compositeurs et éditeurs SCRL (SABAM)* CJIEU 24 November 2001.
[13] Ibid para 49.
[14] Rebecca Mackinnon op cit note 5 at 40.
[15] Ibid.
[16] Ibid.

one way in which intermediaries can be saved from liability. In terms of this model, there is a notice and notice procedure whereby an intermediary notifies a third party that the content on its platform is allegedly unlawful after receiving notice from a copyright holder or disconnecting repeating infringers upon notice. Finally, the third model is broad immunity. Under this model the intermediary is exempt from liability for a range of third-party content[17] and is exempt from any general requirement to monitor content.[18] In terms of this model, intermediaries are treated as messengers who are not responsible for the content they carry.[19]

Apart from the three different models available to lawmakers, the creation of new laws for intermediaries normally follows one of the following two approaches.[20] Firstly, if a horizontal approach is adopted, the liability regime is applicable to any infringement regardless of the area of law.[21] In other words, the kind of infringement (whether it concerns copyright, defamation, privacy rights etc.) would not matter and the same liability regime apply. An example of a horizontal regime is the Electronic Commerce Directive (E-Commerce Directive),[22] which covers liability for all kinds of content except for gambling and privacy or data protection.[23]

Secondly, the vertical approach refers to a specific regime that lays down liability rules for issues pertaining to specific domains such as copyright, the protection of children and of personal data, counterfeiting, domain names or online gambling.[24] As a result, each domain has different regimes relating to intermediary liability. One example of vertical legislation pertains the in the United States (US) where, for instance, the Digital Millennium Copyright Act (DMCA) exempts intermediaries from liability in relation to copyright infringement.[25] The legislation

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[17] Ibid at 42.
[18] 'Internet Intermediaries: Dilemma of Liability' *Article 19* available at http://www.article19.org/resources/internet-intermediaries-dilemma-liability/, last accessed on January 2024.
[19] Ibid.
[20] Pablo Baistrocci 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' (2002) 19 *Clara Computer and High Technology Law Journal* 111 at 117
[21] Ibid.
[22] Directive 2003/31/EC
[23] Lillian Edwards *Role and Responsibility of the Internet Intermediaries in the Field of Copyright and Related Rights* (2011) 7.
[24] Ibid.
[25] s512 of the Digital Millennium Copyright Act.

concerning another regime is the US Communications and Decency Act (CDA), which exempts intermediaries from being held liable for the transmission of obscene or indecent messages by third parties.[26]

1.3 Intermediary liability in Namibia

Intermediary liability in Namibia is currently regulated in Chapter 6 of the Electronic Transactions Act (ETA) 4 of 2019, which sets out the safe harbours that exempt service providers from liability. Similar to the horizontal approach of the European Union's (EU) E-Commerce Directive, Chapter 6 can apply to the subject of copyright. Since the enactment of the ETA there has been no litigation against intermediaries for copyright infringement. Since 2019, Namibia's Business Intellectual Property Authority (BIPA), an agency of the Ministry of Industry and Trade established to improve service delivery and ensure effective administration of business and intellectual property rights, has been on a journey to update the Copyright and Neighbouring Rights Protection Act 6 of 1994 on the grounds that it is outdated and does not cover, among other aspects, internet enforcement of copyright and online enforcement.

BIPA has been in discussion with stakeholders to review the Copyright Act and to produce a working document. After further consultations, the working document has led to the Draft Copyright and Related Rights Bill of 2021, section 53 of which deals with the liability of service providers. Section 53(1)–(4) sets out the four safe harbour provisions that limit liability vis-à-vis copyright holders, which are identical to the ETA. In addition to being held accountable by rights holders for copyright infringement, the Act has laid out two instances where a service provider will also be liable: section 53(7) states that service providers are liable to persons who demand the reinstatement of material that was previously taken down. Section 53(8) holds service providers liable if the work removed by an automated system is later found to be non-infringing. The aforementioned sections aim to establish a dual liability regime for intermediaries in that they are facing liability from copyright owner and a party aggrieved by the takedown.

[26] S 230 of the Communications Decency Act.

The possible inclusion of dual liability in the Bill raises the concern that this may place an unnecessary amount of responsibility on an intermediary. This thesis aims to assess whether the dual liability of an intermediary is necessary and, indeed, desirable.

1.4 Main research question

This thesis seeks to answer the following overarching question:

Does section 53(7) and (8) constitute an appropriate liability regime for intermediaries in Namibia?

In order to develop a response to this research question, the thesis will tackle the following subsidiary research questions:

1. Does the term 'service providers' cover every type of intermediary?
2. Should service providers be provided with more immunity besides safe harbour?
3. Would it lead to the further restriction of innovation?
4. How do other countries and regions, namely the U.S., Europe, Kenya and Nigeria, address the issue of intermediary liability?
5. How will this affect the balance of interests between copyright holders and users?

1.5 Research methodology

The main method of research was a desktop examination of primary and secondary sources. The primary sources included case law and legal frameworks from different jurisdictions. More specifically, the legal frameworks of the EU and the US were examined to provide background to the development of intermediary liability laws and the recent shift towards stronger laws. Primary sources also included the recently amended copyright acts of Kenya and Nigeria to show the legal frameworks of other African countries and to compare them to the Draft Copyright and Related Rights Bill. Case law assisted in outlining the litigating history of

intermediary liability for copyright infringement. Secondary sources included textbooks and journal articles.

1.6 Chapter outline

Chapter 2: Internet Intermediaries and Intermediary Liability

The aim of next chapter, chapter 2, is to provide an overview of internet intermediaries. It will discuss their origins and what is nowadays considered to be an online intermediary. Chapter 2 will also provide important background to intermediary liability by emphasising the reason for intermediaries being the target of copyright infringement litigation and discussing the doctrine of secondary infringement and the application of the doctrine in three jurisdictions where intermediaries have been accused of copyright infringement, i.e. in the United Kingdom, Australia and Canada.

Chapter 3: Intermediary Liability in the Legal Frameworks of Foreign Jurisdictions

This chapter is an introduction to the laws adopted in select jurisdictions to regulate the liability of internet intermediaries. Focus is on the legal frameworks of the US and the EU. These jurisdictions were chosen because they have adopted different approaches to regulate intermediary liability. They have been influential in other jurisdictions and although these laws have already been introduced, their effectiveness and appropriateness to deal with intermediary liability continues to be discussed by legal scholars.

Chapter 4: Namibian Legal Framework for Intermediary Liability

Chapter 4 will introduce section 53(7) and (8) of the Draft Copyright and Related Rights Bill and assess their appropriateness. These provisions will be juxtaposed with the legal frameworks of Kenya and Nigeria. These countries have recently amended their respective copyright acts to include provisions pertaining to intermediary liability.

This chapter will also contain an overview of Namibia's ETA because it is the current regime that regulates service provider liability in the country and it takes a different approach to liability compared to the liability proposed by the Draft Copyright and Related Rights Bill.

Chapter 5: Conclusion and Recommendations

Chapter 5 concludes and seeks to provide answers to the research questions posed in this thesis and to make a number of recommendations.

Chapter 2: Internet Intermediaries and Intermediary Liability

2.1 Rise of the internet

The advent of the internet has given the public access to a variety of information that would have been impossible to attain 30 years ago. The internet was opened to civilians in 1984 and has evolved into an international electronic information system connecting universities, government and commercial enterprises in order to provide access to education, entertainment and business resources.[27]

In the context of copyright, the internet has offered copyright holders the opportunity to distribute their works to a larger audience but it has also led to an increase amount of infringement perpetrated by (anonymous) users. The introduction of the internet has thus provided users with new opportunities to commit copyright infringement and has consequently introduced new challenges for law enforcement.[28] Among other things, the development of digital technology and the internet has led to a revolution in the ability of individuals to process and manipulate information.[29] As digital information can be copied easily and perfectly, an infinite number of perfect copies may be made easily and cheaply.[30]

The ability to access and manipulate copyrighted works is not new. Prior to the internet there was the photocopier, the audio cassette and video cassette recorders. However, the analogue reproduction done by these technologies could not compete with the quality of an original work and thus copyright owners maintained a distinct advantage because of the inherent degradation in the quality of analogue media when copied.[31] The development of the

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[27] Daniel Ovanezian 'Internet Search Engine Copyright: Fair use defense to copyright infringement' (1998) 14 *Santa Clara Computer and High Technology Law Journal* 267 at 269.
[28] Ke Steven Wan 'Monopolistic Gatekeepers 'Vicarious liability for copyright infringement' (2010) 23 *Regent University Law Review* 65 at 65.
[29] Johnathan A Mukai 'Joint ventures and the online distribution of digital content' (2005) 20 *Berkeley Technology Law Journal* 781.
[30] Floris Kreiken & David Koespell 'Coase and copyright' (2013) 1 *University of Illinois Journal of Law, Technology and Policy* 1 at 10.
[31] Johnathan A Mukai op cit note 29 at 783.

internet and digital technology, however, removed the advantage offered to owners by allowing perfect reproductions across unlimited generations and providing alternative channels of distribution that could not be easily controlled or monitored.[32]

2.2 What are internet intermediaries?

Internet intermediaries have played a significant role in allowing the public to have access to copyrighted works. They provide access, and host, transmit and index content, products and services originated by third parties on the internet or provide internet-based services to third parties.[33] Intermediaries have long existed – think, for example, of libraries, real estate agents, stockbrokers and the village matchmaker.[34] The internet has brought with it new types of intermediaries with new capabilities operating at scales far beyond yesteryear's libraries and brokers.[35] These intermediaries now often operate at a countrywide, regional or even a global scale.[36] They have become such an important aspect of how the public utilises the internet that without them, it would be impossible to gain the access to information or more specifically, for the purposes of this thesis, copyrighted works.

Internet intermediaries come in a variety of forms and consist mainly of companies that provide activities, facilities and services that enable others to take full advantage of the internet and information society services.[37] With regard to what is considered an internet intermediary, the following section will discuss the most common types.

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[32] Ibid.
[33] Karine Perset 'The economic and social role of internet intermediaries' available at http://www.oecd.org/internet/ieconomy/44949023.pdf, last accessed January 2024.
[34] Anupam Chander op cit note 1 at 1.
[35] Ibid.
[36] Ibid.
[37] Pedro A Miguel De Asensio 'Internet intermediaries and the law applicable to intellectual property infringement' (2012) 2 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 350.

2.2.1 Types of intermediaries

2.2.1.1 Internet service providers (ISPs)

An internet service provider (ISP) is defined as a company that connects members of the general public to the internet.[38] Many comprise companies whose original business focused on traditional and mobile telephone services prior to expanding into internet services.[39] Early ISPs included CompuServe, AOL and Prodigy.[40] ISPs provide users with internet connections through a subscription model, requiring one to pay a recurring amount at regular intervals.

Recently, there has been move to ISPs providing free services such as webhosting, which once cost vast amounts of money. Web hosting is now a common free option with larger ISPs along with virtual web addresses and numerous email accounts,[41] which are aimed at the companies involved remaining in the competitive market.

As result of ISPs providing more services, the term ISP has expanded to mean any services offered online, including websites and social media sites that host information directed at their subscribers.

2.2.1.2 Search engines

Search engines are software programs that use sophisticated algorithms to retrieve data, files and documents from a database or network in response to a query.[42] The information is retrieved and usually indexed and presented as a series of hyperlinks.

The earliest model of a modern search engine was WebCrawler, which allowed users to search for any word in any web page. This has become the standard for all major search

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[38] Dennis D 'How to become an internet access provider' available at http://www.amazing.com/internet/, lat accessed January 2024.
[39] Rebecca Mackinnon, Elonnai Hickok, Allon Bar et al, op cit note 5 at 59.
[40] Ian Carnaghan 'The evolution of internet service providers' 14 May 2000, available at http://www.carnaghan.com/the-evolution-of-internet-service-providers/, last accessed January 2024.
[41] Ibid.
[42] 'Internet intermediaries: Dilemma of liability' *Article 19* op cit note 18 at 6.

engines since then.[43] As time passed, further innovations were developed. Alta Vista is considered to be the first high-speed search engine that enabled natural language search.[44] It was also the first multi-language search engine and included features such as advanced search techniques and the ability to search for sites linked to a particular URL.

Currently, the most popular search engine is Google which rose to prominence in 2001, due in large part to the algorithm PageRank, which ranks web pages based on number and PageRank of other websites and pages that link to them, on the premise that good or desirable pages are linked to more than others.[45] It has also maintained a minimalist interface on its search engine in contrast to many of its competitors which embed a search engine in a web portal. Since 2000, several other search engines have appeared including Yahoo! Search, MSN Search and A9.

2.2.1.3 Social networking platforms

The distinctive feature of social media platforms is that they encourage individuals to connect and interact with other users and to share content. The evolution of social media was fuelled by the human impulse to communicate and advance in digital technology.[46] In the 1980s and 1990s the growth of the internet enabled the introduction of online communication services such as CompuServe, American Online and Prodigy.[47] These platforms introduced users to digital communication through email, bulletin board messaging and real-time online chatting,[48] which inevitably gave rise to social media networks, beginning with the short-lived Six Degrees

[43] Tom Seymore, Dean Frantsvog & Satheesh Kumar 'History of search engines' (2011) 15 *International Journal of Management & Information Systems* 47 at 48.
[44] Urs Gasser 'Regulating search engines: Taking stock and looking ahead' (2006) 8 *Yale Journal of Law and Technology* 201 at 204.
[45] Tom Seymour, Dean Frantsvog & Satheesh Kumar op cit note 43 at 48.
[46]'The evolution of social media: How did it begin, and where it could go next' available at http://www.online.maryville.edu/blog/evolution-social-media/, last accessed January 2024.
[47] Ibid.
[48] Ibid.

profile uploading service in 1997.[49] This enabled users to upload a profile and make friends with other users. This service was followed by Friendster in 2001.[50]

The most well-known and used platforms of the 21st century were invented in the mid-2000s. During this time the internet was in its second phase of development, referred to as web 2.0. The term 'web 2.0' is commonly associated with web applications that facilitate interactive information sharing, interoperability, user-centred design and collaboration on the World Wide Web.[51] In 2004, Facebook was launched. It allows users to connect with friends and work colleagues, as well as people they don't know, online.[52] Users can share pictures, music videos and articles and their own thoughts and opinions with other people.

YouTube was created in 2005. This was the first major video hosting and sharing site on which videos could be uploaded and shared. A year later, Twitter (now known as X) became available to the public. This is a microblogging and social networking service on which users post and interact with messages known as 'tweets'.[53] Users can also post pictures, videos and articles similar to Facebook.

In 2010, Instagram was launched. This allows users to post pictures and videos on the site and to caption their pictures before posting them. Another image-specific site created the same year is Pinterest, which allows users to search for pictures on their search engine and thereafter collect or pin them onto boards that they have categorised or created.

2.2.1.4 Peer-to-peer networks (P2Ps)

Unlike traditional client/server communication in which specific routes to popular destinations can become overloaded,[54] peer-to-peer (P2P) enabled communication via a variety of network

[49] Ibid.
[50] Ibid.
[51] Sajithra K & Dr Rajindra Patil 'Social Media – History and Components' (2013) 7 *IOSR Journal of Business and Management* 69 at 72.
[52] 'Explained: What is Facebook?' available at http://www.webise.ie/parents/explained-what-is-facebook-2/, last accessed January 2024.
[53] http://www.igi-global.com/dictionary/i-found-myself-retweeting/30754, last accessed January 2024.
[54] Abikesh Sharma & Hao Shi 'Innovation rated-resource peer-to-peer network' (2010) 2 *International Journal of Computer Networks and Communication* 89.

routes and allows users connected to a P2P network to share resources.[55] It eliminates the need for costly server space since it relies on the storage capabilities of those who are connected to the network at any given time. P2P is essentially a communication structure in which individuals interact directly, without going through a centralised system or hierarchy.[56]

The first P2P introduced was Napster. The main advantage of a P2P is its decentralised distribution structure. The Napster file-sharing protocol was based on a central index server which contained files shared by Napster clients.[57] The central servers provided a real-time directory that specified the names and locations of a song saved on the users' computers.[58] People would search each other's computer hard drives and transfer songs, but the songs were not routed or stored on Napster servers.[59] As a result of a lawsuit filed in 1999 by multiple record companies, the CEO Hank Barry sought to change the Napster model into a fee-based membership service, where Napster users would be charged $4.95.[60] The proposed model came to fruition with the introduction of subscription-based services but it failed to obtain a licence. Napster is now a legitimate online music service.[61]

Newer P2P networks became considerably internet savvy in order not to face liability.[62] Unlike Napster they did not rely on a central server that courts could easily pinpoint and shut down; instead the networks are decentralised.[63] Rather than having a central server, individual PCs on the network handle each portion of the work originally assigned to the central indexing server.

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[55] Ibid at 89.
[56] OECD 'Peer to peer networks in OECD Countries' (2004) at 1.
[57] Ryan Sit, Mike Semanko & Raymond Kim et al 'The future of the decentralised model of P2P file sharing' (2000) *Computer Science and Engineering Department* at 2.
[58] Peter Jan Honisberg 'The evolution and revolution of Napster' (2000) 36 *University of San Francisco Law Review* 473 at 474.
[59] Ibid.
[60] Ibid at 487.
[61] Mark Harris 'A short history of Napster: How the brand has changed over the years' *LifeWire* 16 February 2023, available at http://www.lifewire.com/history-of-napster-2438592#toc-how-napster-was-reborn, last accessed January 2024.
[62] Peter Jan Honisberg op cit note 58 at 475.
[63] Ibid.

Gnutella was one of the first decentralised P2P networks; it was built on an open protocol developed to potentially peer node discovery, search and file transfer.[64] Each Gnutella user needs the Gnutellacient software to connect to the Gnutella network, thereafter it needs to search for nodes, which can be both a client and a sever.[65] Gnutella then has to be connected to a node/servent, which in turn has to respond by providing an address of one the servers. Once it gives the address it can connect through that servent to a number of other servents in the network, thereafter a user can search for files.[66] Files can be downloaded by a user sending a query to all their neighbours who in turn forward the request to all their neighbours.[67] The servent that has the file will reply back to the machine that initiated the query; the user will then be able to download directly from that servant.

One of most recognised and widely used P2P networks is BitTorrent. This network makes it easy to distribute very large files to many people while placing a minimal bandwidth requirement on the original uploaded file.[68] This solved the problem of a user having a generous bandwidth download link but the speed of the file transfer to him or her is restricted by a much smaller bandwidth uplink from another user who he or she downloaded the file from.[69]

To share files, users create a small file called a torrent.[70] The torrent contains the address of the tracker. The tracker keeps logs of peers that are currently downloading a file and helps them find each other.[71] At this point the original distributor of the file must launch a

[64] Rajesh Kumar Maurya, Prof. Suman Pandy & Vinod Kumanr 'A Survey of Peer-to-Peer Networks' (2016) 5 *International Journal of Advanced Research in Computer and Communication Engineering* 292 at 293.
[65] Ibid.
[66] Ryan Sit et al op cit note 57 at 2.
[67]Daniel Frigo, Tauseef Alwaris & Mark Ma 'Peer-to-peer networks Gnutella' at 5, available at http://www.sfu.ca/~ljilja/ENSC427/Spring13/Projects/team6/Ensc427_final_project_report.pdf, last accessed January 2024.
[68] Ryan Sit et al op cit note 57 at 3.
[69] Jahn Arne Johnson, Lars Erik Karlsen & Sebjørn Sæther Birkeland 'Peer-to-peer networking with Bit Torrent' *Department of Telemantics, NTNU* December 2005 at 5 available at http://www.web.cs.ucla.edu/classes/cs217/05BitTorrent.pdf, last accessed January 2024.
[70]Rajesh Kumar Maurya et al op cit note 64 at 293.
[71] Ibid.

BitTorrent Client, load the full torrent file and direct the client to the file that he or she possesses.[72]

A user can download a file using BitTorrent Client, which is an application that administers the download procedure and which involves opening a torrent file.[73] The complete file is not downloaded, only chunks from other peers or seeds in parallel.[74] The person downloading the file contacts the peer node and downloads different sections of the file from different peer nodes.[75]

2.3 Intermediary liability

A person who obtains copyright over their work has exclusive rights which include the right to distribute, copy or adapt their work. If a third party decides to perform any of these exclusive rights without the copyright owner's permission, the copyright holder can usually sue the third party for copyright infringement.

Prior to the internet it was comparatively easy to identify the alleged infringers and bring infringement claims against them. However, the design of the internet, which, at least in theory, now enables anyone in the world to commit copyright infringement online, makes it hard to know who someone is, where they are and what they are doing.[76] As a result, identifying, gathering evidence and suing individual infringers would often incur significant costs, rendering lawsuits against them inefficient.[77]

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[72] Jerome Harrington, Corey Kuwanoe & Cliff C. Zou 'A BitTorrent-Driven Distributed Denial-of-Service-Attach' (2007) available at *http://www.ieeexplore.iee.org./document/4550342,* last accessed January 2024.
[73] Ibid.
[74] Le Guo, Songqing Chen & Zhen Xia et al 'Measurements, Analysis, and Modelling of BitTorrent-like Systems' (2005) Internet Measurement Conference at 37.
[75] Rajesh Kumar Maurya *et al* op cit note 64 at 293.
[76] Floris Kreiken & David Koespell 'Coase and Copyright' (2013) 1 *University of Ilinois Journal of Law, Technology & Policy* 1 at 11.
[77] Niva Elkin-Koren 'Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic' (2005) 19 *New York University Journal of Legislation and Public Policy* 15 at 25-26.

The role of internet intermediaries in online copyright infringement was one of the earliest problems in the cyberspace environment to grab headlines, worrying internet industries and demanding the serious attention of lawyers.[78] On the one hand, intermediaries provide the services and facilities that users may use to possibly infringe copyright, while on the other they normally do not play an active role in performing infringing activities. Additionally, intermediaries do not know the exact content they transmit or host and tend not to edit or moderate online either before or after publication.

To the extent that the activities, facilities and services provided by intermediaries may result in the infringement of intellectual property – and in particular copyright - and may support or facilitate infringement by others, the liability of internet intermediaries, the determination if or under what circumstances they may be held liable in connection with the activities of the users of their services and the possibility of bringing claims against the intermediaries themselves have become crucial issues.[79]

The World Intellectual Property Organization (WIPO) Copyright Treaty was the first to regulate the issue by suggesting that online service providers should not be held directly liable for merely providing or enabling communication facilities to third-party infringers.[80] However, it did not provide a standard of liability for internet intermediaries, leaving this task to WIPO member state's domestic legislation.[81]

In the absence of guidance by international instruments, the concept of intermediate liability was developed. This refers to the liability of internet intermediaries for third-party online activities. To bring a claim of copyright infringement against intermediaries, the standard approach now is for copyright owners to allege secondary infringement. There is a variety of reasons why internet intermediaries are targeted in this way:[82] Internet intermediaries serve as

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[78] Lillian Edwards and Charlotte Waelde 'Online Intermediaries and Liability for Copyright Infringement' (2005) WIPO Workshop Keynote Paper at 4, available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1159640, last accessed January 2024.
[79] Pedro A De Miguel Asensio op cit note 37 at 350.
[80] Article 8 of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
[81] Tatiana López Romero 'Internet Service Providers Liability for Copyright Infringement: The US Approach' (2006) 55 *Fecha de recepcion* 193 at 197.
[82] Daniel Seng *Comparative Analysis of National Approaches of the Liability of Internet Intermediaries* (2010) 5.

the information and access gateways for infringing activities and it is typically more cost-effective to seek redress from them than from one or all individual users.[83] Even if copyright holders were able to identify the alleged infringing user it would lead the public to view the copyright holder, who which is often a large company, in a negative light which would not be a good for business. In addition, the internet intermediaries would usually have the means to compensate the copyright holder, which is not necessarily the case with individual users. The following two subsections summarise that before the enactment of specific intermediary legislation, the issue of liability was left to judge made law or an existing copyright act.

2.3.1 Secondary liability in the United States

In the United States, there are three forms of secondary liability: contributory liability, vicarious liability and the inducement of infringement allegations. The theories of secondary liability have been developed by the courts.[84]

For an intermediary to be vicariously liable, two things have to be proven. First, that the defendant had the right and ability to control the acts of a primary infringer and, second, it must have received a direct financial benefit[85]. Contributory liability requires a defendant to have induced, caused or materially contributed to the infringing activity and to have known or should have known about the infringing activity. To bring a claim of secondary infringement there must have been a direct infringement by a third party.[86] The inducement theory was developed in the *Grokster* case and will be discussed later.

[83] Ibid.
[84] Ryan Polhman 'Inducement and Grokster: Guarding against the Pitfalls of Copyright Owners 'New Weapon' (2005) 55 *DePaul Law Review* 1309 at 1311.
[85] Jonina S. Larusdottir 'Liability of Intermediaries for Copyright Infringement in the Case of Hosting on the Internet' (2010) *Stockholm Institute for Scandinavian Law* 472 at 478.
[86] N. Elkin-Koren op cit note 77 at 48.

2.3.1.1 Direct, vicarious and contributory liability

Initially, intermediaries were faced with being held liable for direct copyright infringement. In *Playboy Enterprises, Inc v Frena*,[87] the defendant was a bulletin board system (BBS) that allowed users to download and upload photos, some of which were infringing copies of photos owned by Playboy. The court found the defendant directly liable, stating that the services provided by the defendant constituted the distribution of infringing copies. The defendant was liable because it was basically providing a means by which copies would be distributed. The justification for this was that it does not matter whether or not the defendant may have been aware of the copyright infringement, as intent to infringe is not needed in order to find copyright infringement.

The rationale for direct liability in *Playboy* was not accepted in subsequent cases, with *Religious Technology Centre v Netcom Online Communication Services, Inc* [88] being influential in this regard. In the latter case, the appellants alleged that Netcom was directly, vicariously and contributorily liable for providing the internet connection that allowed Dennis Elrich access to Thomas Klemesrund's BBS, containing copyright material of L Ron Hubbard that Dennis used to for his criticism of the Church of Scientology, which he then posted on a UseNet newsgroup. The court stated that the defendants were not directly liable as Netcom's actions of storage and transmission were not a direct infringement of the exclusive right to reproduce a copyrighted work. It further stated that it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in infringement was nothing more than setting up operation and a system that is necessary for the functioning of the internet.[89]

In *Sega Enterprises LTD v Maphia*[90] the court accepted and applied the Netcom decision. It concluded that because Sega was unable to show that the operator himself directly uploaded

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[87] *Playboy Enterprises, Inc v Frena* supra note 2.
[88] *Religious Technology v Netcom Online Services,* supra note 2.
[89] Ibid at 1372.
[90] *Sega Enterprises Ltd v Maphia,* 857 F. Supp. 679 (ND Cal. 1994).

or downloaded Sega's files, he was therefore not directly liable.[91] However, the court determined that BBS operators might be contributorily liable because they knew that their users were copying games and solicited others to do the same. The court concluded that BBS operators' roles in infringing activities included providing facilities, direction, knowledge, and encouragement, and seeking profit amounted to a prima facie case of wilful contributory copyright infringement.

2.3.1.2 MGM v Grokster and the inducement theory

Secondary liability was further expanded in *MGM v Grokster*[92] where the respondents ran a P2P network that allowed digital files to be shared. MGM sued Grokster (and Stream) for their users' copyright infringement, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute copyrighted works.

The court introduced a new form of liability – inducing infringement – a doctrine applicable to patent law that was also considered sensible to copyright. To prove inducement one had to distribute a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, and actual evidence of infringement by the recipients of the device. The first requirement was met because (1) each company showed itself as aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users, (2) neither attempted to develop mechanisms to diminish infringing activities, and (3) the respondents made money by selling advertising space, by directing ads to the screens of computers employing their software. On the second requirement, there was evidence of infringement on a massive scale.

2.3.2 Authorisation of infringement

Commonwealth countries such as Australia, Canada and the United Kingdom have applied the concept of authorising infringement. The concept of authorisation is designed to a find liability

[91] Ibid at 694.
[92] *Metro Goldwyn Mayer Studios Inc v Grokster Ltd.* 545 U.S. 913 (2005).

where it is alleged that a defendant has sanctioned or initiated an infringing act.[93] Courts in all three jurisdictions have given authorisation two definitions, with Canada and Australia adopting the broader view of "sanction, approve or countenance",[94] and the United Kingdom adopting the narrow view of "grant or purport to grant".[95] However, these two definitions have not helped the courts to reach a finding of authorisation instead having recourse to at least one pertinent factor such as knowledge of an underlying infringing factor.[96] The following subsections 2.3.2.1 – 2.3.2.3 will illustrate the application of authorisation in the three previously mentioned countries.

2.3.2.1 United Kingdom

The leading case on authorisation in the UK that most courts continue to apply is *CBS v Amstrad.*[97] The case defined authorisation as to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account or only on account of the grantor. To determine authorisation the court took into account that a person must have control over the machines[98] and that an authorisation can only come from somebody purporting to have the authority.[99]

Authorisation of infringement was adapted to internet intermediaries in *20th Century Fox v Newzbin.*[100] The applicants, who were makers and distributors of films, alleged that the defendant (a website) located and categorised unlawful copies of films and provided a facility for its users to search for particular unlawful copies and display results, thereby authorising

[93]Bukola Faturoti 'Re-importing the Concept of Authorisation of Copyright Infringement to Nigeria from UK and Australia' (2017) 31 *International Review of Law* 4 at 5.
[94] For Australia see *Moorhouse v University of New South Wales*[1976] R.P.C 151 and Canada see *Muzark Corp v Composers, Authors and Publishers Association of Canada Ltd* [1953] 2 S.C.R. 182 at 193; *CCH v Law Society of Upper Canada [2004] 1 SCR 339* para 38.
[95] *Falcon v The Famous Players Film Company Ltd* [1926] 1 K.B. 474 at 499, *CBS Songs Ltd v Amstrad Consumer Electronics Plc, [1998] A.C.* 1013 at 1033.
[96] Cheng Lim Saw & Warren B. Chik 'Revisiting Authorisation in Copyright Law' (2012) 24 *Singapore Academy of Law Journal* 698 at 704.
[97] *CBS Songs Ltd v Amstrad Consumer Electronics Plc, [1998] A.C.*
[98] Ibid at 1055.
[99] Ibid at 1054.
[100] *Twentieth Century Fox Corp v Newzbin Ltd* [2010] E.C.D.R. 8 (2010).

infringement in terms section 16 of the UK Copyright, Designs and Patent Act. It was established that infringement had taken place because the premium members were primarily interested in movies and they made use of facilities to download copies of the claimant's films. The court subsequently laid out the circumstances to determine authorisation of infringement, which may include: (1) the nature of the relationship between primary infringer and alleged authoriser; (2) whether the equipment or other material supplied constitutes the means used to infringe and whether it is inevitable that it will be used to infringe (3) the degree of control which the supplier retains; and (4) steps were taken to prevent infringement.[101] The court opined that these are matters to be taken into account and may or may not be determinative depending upon all other circumstances.

In a subsequent decision, the factors mentioned in *20th Century Fox* were utilised to determine authorising infringement. In *Dramatico Entertainment Ltd v British Sky Broadcasting*,[102] the allegation for authorising infringement was against Private Bay who were not a party to the case; the defendants were merely providing access to the internet and Private Bay among other online facilities. Pirate Bay is a P2P network where users can select audio or video content and download it. The court was able to establish that Pirate Bay had authorised infringement by taking into account five factors.[103]

(1) Relationships - it held that features were plainly designed to afford users of Pirate Bay the easiest and most comprehensive service possible and the P2P network went to great lengths to facilitate and promote the download of torrent files by its users. O
(2) Means to infringe, the torrent files was the means because it enabled users to download pieces of the content or to make them available to others.
(3) Inevitably of infringement – it was Pirate Bay's intention and objective.
(4) Degree of Control – Pirate Bay had a policy that removed torrents but excluded torrents that contain copyrighted material
(5) Steps to prevent infringement – The P2P network had the ability to do so but actively encouraged infringement.

[101] Ibid.
[102] *Dramatico Entertainment Ltd v Bristish Sky Broadcasting* [2012] EWHC 268 (Ch.).
[103] Ibid 357-358.

2.3.2.2 Australia

The determination of authorised infringement for internet intermediaries in Australia has involved courts taking into account the factors set out by the courts and those codified in section 101(1)(A) of the Copyright Act. The Act sets out three factors to determine authorisation: (1) the power of the person to prevent the doing of the act, (2) the nature of the relationship between the person and the person who perpetrated the act concerned, and (3) the reasonable steps that were taken to prevent or avoid the doing of the act.

In *Universal Music Australia v Cooper,*[104] the factors in section 101(1)(A) were applied to the case but the court stated that these factors were not exhaustive and did not prevent the court from taking into account the respondent's knowledge of the nature of copyright infringement.[105] When applying section 101(1A)(c), the element of control was required to be present to determine whether Cooper should have taken steps to prevent infringement, as control was necessary to constitute authorisation.[106] The court found that Cooper did have control regarding both the user accessing his website and the remote operator placing hyperlinks on the website. It found that Cooper could have taken steps to prevent infringement by removing these hyperlinks. In addition, the disclaimers on the website indicating the legality of Mp3s were insufficient in terms of section 101(1A)(c) of the act; hence, the finding that Cooper had authorised infringement.

On appeal, the Federal Court of Australia upheld the decision of Justice Tamberlin on similar grounds, holding that Cooper could have prevented the submission of links or disabled their function, and that the hosting company could have taken down Cooper's website and declined to provide Cooper with hosting facilities. The use of other factors not from the Act was reprimanded by the court. Although it relied solely on section 101(1)(A), it acknowledged that before section 101(1)(A) authorities had identified various conditions to infer authorisation.

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[104] *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.
[105] Ibid para 81.
[106] Ibid para 88.

Nevertheless, it held that it was required to consider the three factors of this section.[107] The Federal Court's sole application of section 101(1)(A) did not prevent future courts from relying on other factors that do allow courts the freedom to consider unique factual circumstances but could lead to uncertainty and unpredictability.[108]

This uncertainty and unpredictability is most evident in *Roadshow Films v iiNet Ltd* [109] where an action was brought against the defendant, an ISP which the appellant alleged to have authorised infringement by its users to illegally download movies using Torrent. An allegation of authorisation was brought against iiNet when it refused to prevent infringement after receiving notices from the Australian Federation against Copyright Theft (AFACT). The court first applied the test in *Moorhouse;* that is, the alleged authoriser provided the means for infringement to occur, based on the test. Accordingly, iinet was not authorising infringement because the respondent providing internet access was not a means of but a pre-condition for infringement.[110] The court then applied section 101(1A) and, similar to Cooper, the court opined that this section was meant to elucidate, not vary the pre-existing law of authorisation, the court was compelled to go into further consideration of the issue of authorisation pursuant to the consideration. [111] In terms of the statute, it was not reasonable for steps to be taken because the notices given by AFACT did not provide enough information to be certain that infringement had occurred and to take action by cancelling or terminating accounts. Therefore, iiNet did not authorise infringement.

On appeal in the Federal Court, Jagot J stated that the court a quo erred in first considering the Moorhouse test, as the fundamental obligation was to apply the statute.[112] Although it only considered section 101(1)(A)(c) there were still conflicting judgments. The Federal Court dismissed the appellant's appeal Emmet J held it was not reasonable for iiNet to terminate or suspend a customer's account because the notices were no more than assertions

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[107] *Cooper v Universal Music Australia Pty Ltd* 156 FCR 380 (2006) para 147.
[108] Richard G. Kunkel 'Indifference and Secondary Liability for Copyright Infringement' (2016) *33 Santa Clara High Technology Law Journal* at 17.
[109] *Roadshow Films v iiNet Ltd* (No.3), [2010] FCA 24 (Feb.4, 2010).
[110] Ibid at 381.
[111] Ibid at 415-416.
[112] *Roadshow Films Pty Ltd v iiNet Ltd* 194 FCR 285 (2011) para 369.

not evidence of alleged primary infringement and the copyright owners did not reimburse iiNet for any costs incurred in complying with the demands made by the Infringement Notices.[113] Nicholas J held that iiNet had not authorised infringement because the defects in the AFACT notices did not warrant action iiNet to take action against its subscribers.[114] However, Jagot J held that a third factor was present because the AFACT notices were detailed enough to adopt and implement a policy or make a specific response to the AFACT.[115]

The matter was then appealed to the High Court where it agreed with the Federal Court that section 101(1A) is the provision courts must consider when determining authorisation, stating that it is an express requirement.[116] The High Court upheld the Federal Court judgment on the basis that the extent of iiNet's power was limited to an indirect power to prevent a customer's primary infringement of the appellants films by terminating contractual relationships between them and the AFACT notices did not provide a reasonable basis for sending warning signs notices to individual customers containing threats to suspend or terminate the customers' accounts.

The ruling in *Roadshow* has influenced courts to rely solely on section 101(1) (A) when determining authorisation, such as in the recent case of *Pokémon Company International v Redbubble*.[117] The case involved section 36(1)(A), which is identical to section 101(1)(A), and considered all three factors to determine if Redbubble had authorised infringement by allowing its users to make items bearing Pikachu, which the appellant had copyright over.

[113] ibid para 211.
[114] Ibid para 622.
[115] Ibid para 467.
[116] *Roadshow Films Pty Ltd v iiNet Ltd* 248 CLR 42 (2012) para 68.
[117] *Pokémon Company International v Redbubble* [2017] FCA 1541 (2017)

2.3.2.3 Canada

In Canada, courts have been lenient in holding intermediaries liable for authorising infringement. In *CCH v Law Society of Upper Canada,*[118] the issue was whether the Law Society had authorised copyright infringement by providing self-service photocopiers for patrons at the Great Library to make copies of the publisher's work. Under section 27(1) of the Copyright Act it is an infringement of copyright for anyone to do anything that the Act allows owners to do, including authorising the exercising of his or her own rights. To determine authorisation it agreed with the court in *Muzark Corp. v Composers, Authors and Publishers Association of Canada* where it stated a person does not authorise infringement by authorising the mere use of equipment that could be used to infringe copyright.[119] The court should presume that a person who authorises an activity does so only so far as it is in accordance with law and the presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authoriser and persons who committed the infringement.[120]

Applying the criteria in *Muzark*, the court concluded that the respondent did not authorise infringement because it was plausible that the photocopiers were used in a manner that was lawful as there was no evidence that they had been used in a manner that was not consistent with copyright law[121] and that the Law Society had no control over the patrons because they were not in an employer–employee or master–servant relationship.[122] Additionally, the Law Society does not exercise control over which works the patrons choose to copy, the patrons purposes for copying or the photocopies themselves.[123] In a cross-appeal the court agreed with Rothstein JA that the three factors required to prove authorisation include (i) primary infringement, (ii) that the secondary infringer should have known that he or she was dealing with a product of infringement; and (iii) whether or not the secondary infringer sold, distributed or exposed for sale the infringed good.[124]

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[118] *CCH v Law Society of Upper Canada* [2004]1 SCR 339.
[119] Ibid para 38.
[120] Ibid.
[121] Ibid para 43.
[122] Ibid para 45.
[123] Ibid.
[124] Ibid para 81.

In a subsequent case, *Society of Composers, Authors and Music (SOCAN) Publishers Canada v Canada Association of Internet Providers*,[125] where the issue was whether the respondent had authorised infringement because they knew that the material being placed in their facilities by content providers would be accessed by end-users. The case was not about determining whether there was authorisation but about what should be taken into account. The judge affirmed the criteria stated in *CCH* and opined, like *CCH,* that because not all the law related material in the library was copyrighted similarly there were massive amounts of non-copyrighted material accessible to end-users, therefore it was impossible to impute to ISPs an authority to download copyrighted material as opposed to non-copyrighted material.[126] It further held that knowledge by an ISP that someone might use its technology to violate copyright is not sufficient; it requires a demonstration that the defendant gave approval, thus sanctioning or permitting the infringing conduct.[127] The court agreed that notice of infringing content and failure to respond by taking it down may in some circumstances lead to a finding of authorisation.[128] The court however warned against a quick inference of authorisation as it would put ISPs in a difficult position where they had to judge whether the copyright objection was well founded and to choose between contesting copyright action or potentially breaching its contract with content providers.[129]

Although authorisation is used against technologies, recent cases have seen copyright owners targeting the users of these technologies instead and continuing to apply the precedents of *CCH* or *SOCAN*. In *BMG v Jon Doe*,[130] it was alleged that the defendant had authorised infringement by placing copies of music files onto a directory linked to a P2P network. Since the court in *CCH* established that providing a means to infringe does not amount to infringement, it held that the end-user's action was similar to a library placing a copy machine in a room full of copyrighted material.[131] In both cases the element of authorisation is

[125] *Society of Composers Authors and Music Publishers Canada (SOCAN) v Canada Association of Internet Providers* [2004] SCC 45.
[126] Ibid para 123.
[127] Ibid para 127.
[128] Ibid.
[129] Ibid.
[130] *BMG Canada Inc v Jon Doe* 2004 FC 488.
[131] Ibid at 14.

missing. On appeal, the federal court stated that the motions judge should have considered that copying and placing songs into shared directories could constitute authorisation because it invited and permitted other persons with internet access to have musical works communicated to them and copied by them.[132]

In *Voltage Pictures v Salna*,[133] the issue of authorisation was related to the appellant seeking a certification on application of a class proceeding, which requires a cause of action. Voltage alleged that there was one because the respondents, who were natural persons, had authorised infringement by not taking reasonable steps to ensure that the appellant's works were not made available to download on Bit Torrent, as well as advertising that the films were available to download. To determine authorisation the three factors set out in *CCH* were applied. The court subsequently held that there was no evidence of authorising infringement and, as a result, there was no cause of action. Voltage had failed to identify a direct infringer and the sharing of files could be done without the user's knowledge.[134]

On appeal, the federal court, although agreeing with the previous judgment, opined that key precedents in *CCH* and *SOCAN* arose within distinct legal and factual contexts compared to the current matter; accordingly, the extent to which they provided guidance in regard to BitTorrent technology was an arguable question.[135] This statement led to future courts developing new criteria or to further analysing the importance of these two precedents.

For instance, in *Voltage Holdings v John Doe*[136] the court agreed with Salna that the door should not be closed to evolving the law relating to authorisation in order to meet the needs of modern technology; it also cautioned that there should be a balanced approached.[137] To provide such balance, it held that one must consider whether the defendant had knowledge of the alleged infringing activity, as well as the relationship and extent of control over the user and whether the internet subscriber had some ability to prevent the act of concern.[138]

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[132] *BMG Canada Inc v Jon Doe* 2005 FCA 193, 2005 CarswellNat 1300 (2005) para 51.
[133] *Voltage Picture, LLC Canada v Salna* (2019) FC 1412, (2019) CF 1412.
[134] Ibid para 80.
[135] *Salna v Voltage Picture LLC* (2021) CAF 176 para 78.
[136] *Voltage Holding LLC v Doe* 2022 FC 827.
[137] Ibid para 67.
[138] Ibid para 68.

2.4 Conclusion

Internet intermediaries come in different forms and have enabled the public to gain access to a wealth of material including copyrighted works. Since the introduction of these technologies, the liability of intermediaries has been an issue, with copyright holders being unable to enforce their rights on every single user of these intermediaries. Copyright owners have resolved this issue by relying on the court-developed principle of secondary liability. Secondary liability has become the standard approach in different jurisdictions. The outcome of the cases shows that intermediaries have a role to play in the prevention of online copyright infringement but they also show that intermediaries should not bear the complete burden. This is because imposing liability unnecessarily would impair the stream of commerce and the innovation of new technologies.

With the introductory chapter on intermediaries and their liability for infringement completed, the next chapter will discuss how the laws in different jurisdictions have been dealing with intermediary liability.

Chapter 3: Intermediary Liability in the Legal Framework of Foreign Jurisdictions

3.1 Introduction

The purpose of laws specific to intermediaries is to provide a balanced solution that prevents online intermediaries from being held liable even though they have no knowledge of the existence of the illegal or infringing content, while at the same time properly protecting aggrieved parties.[139] Failure to shield intermediaries would impair the communication and availability of information and drive them out of business by causing them to fail.[140]

Most intermediary regimes consist of a set of activities referred to as 'safe harbour', as well as obligations with which intermediaries have to comply in order not to be held liable.[141] A safe harbour is a model of limited liability that was created as a viable solution to intermediaries being sued by copyright holders for copyright infringement. Since the 1990s and the expansion of the internet, legislators have provided online intermediaries with safe harbour by exempting them, when certain conditions are met, from liability when users post infringing content.[142]

This chapter sets out the current legal framework of the US and the EU for intermediary liability.

3.2 EU legal framework for intermediary liability

The laws that seek to address the issue of online copyright infringement can be found in three legal instruments: the Information Society Directive[143] (InfoSoc Directive), the Electronic

[139] Rose Julià-Barceló & Kamiel J. Koelman 'Intermediary liability: Intermediary liability in the E-Commerce Directive: So far so good, but it's not enough' (2000) 16 *Computer Law & Security Report* 231.
[140] Ifeanyi-Ajufo Nnenna 'Challenges of digital music copyright and the liability of internet service providers' (2013) 4 *International Journal of Advanced Legal Studies and Governance* 14 at 19.
[141] Urs Gasser & Wolfgang Schulz 'Governance of online intermediaries: Observations from a series of national case studies' (2015) 18 *Korean University Law Review* 79 at 86.
[142] Marisa N. Sanchez 'EU Directive on Copyright in the Digital Single Market: an outlier in intermediary liability and the death of safe harbour protections' (2021) 55 *University of San Francisco Law Review* 251.
[143] Information Society Directive (InfoSoc) 2001/29/EC.

Commerce Directive[144] E- Commerce Directive (ECD) and the Digital Single Market Directive (DSM Directive).[145]

3.2.1 The Information Society Directive (InfoSoc Directive)

The Information Society Directive 2001/29/EC Directive provided for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted.[146] It sought to achieve these objectives by harmonising the laws of member states members on copyright and related rights.[147] A harmonised legal framework on copyright and related rights would provide a high level of protection for intellectual property, foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness in European industry, both in the area of content provision and information technology, and more generally across a wide range of industrial and cultural sectors.[148]

The current law on copyright had to be adapted and supplemented to respond adequately to new technology[149] that resulted in copyright owners losing control of the use and distribution of their content on the web, with users starting to create a huge and uncontrollable secondary market for digital content.[150]

To ensure copyright owners do not lose the incentive to create, the InfoSoc Directive strengthened the copyright protection of rightsholders by listing a set of rules and exclusive rights which copyright holders could rely on to sue intermediaries.

3.2.2 Exclusive rights under the InfoSoc Directive

[144] Electronic Commerce Directive (E-Commerce) 2003/31/EC.
[145] Copyright in the Digital Single Market Directive 2019/790/EC.
[146] Recital 1 of the InfoSoc Directive.
[147] Ibid.
[148] Recital 4.
[149] Recital 5.
[150] Andrea Renda, Felice Simonelli, Guiseppe Mazziotti et al. 'The implementation, application and effects of the EU Directive on Copyright in the Information Society No120/November 2015' (2015) *CEPS SPECIAL REPORT* at 2.

3.2.2.1 Reproduction right

Article 2 of the Directive requires member states to provide authors, performers, phonograms producers, producers of first fixation films and broadcasting organisations the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form in whole or in part. Article 2 encompasses a broad scope of reproduction, covering various ways that can be protected as a reproduction right. The phrase 'any means and in any form' means that the reproduction right applies to both traditional and digital forms of reproduction.[151] By including temporary reproduction in the definition, the Directive takes both a literal and a technological approach.[152] The broad scope of the reproduction right is necessary to ensure legal certainty in the internal market.[153]

A landmark case on reproduction is *Infopaq International v Danske Dagblades Forening.*[154] In this case, the Court of Justice of the European Union (CJEU) held that reproduction must be given a broad interpretation. The facts of the case were that the appellant was scanning newspaper articles for commercial purposes without the authorisation of the relevant copyright holders. The issue was whether the concept of 'reproduction in part' under Article 2 encompassed the storing and subsequent printing out on paper of a text extract consisting of 11 words. The CJEU established that certain isolated sentences or even certain parts constitute reproduction in part, provided it expresses an author's intellectual creation.[155] Applying this criterion it held that the storage and printing of an extract constituted reproduction, as the data capture process used by *Infopaq* allowed for the reproduction of multiple extracts, which reproduced exactly 11 words each time, leading to lengthy fragments that expressed the intellectual creations of the author.[156]

Intermediaries eventually became a target in *ITV Broadcasting v TV Catchup Ltd*,[157] where the defendant live-streamed television programmes and films which the claimants

[151] Stefan Kulk *Internet Intermediaries and Copyright Law: Towards a Future-proof EU Legal Framework* (PhD thesis, Utrecht University. 2018) 67.
[152] Ibid.
[153] Ibid.
[154] *Infopaq International v Danske Dagblades Forening* EU (CJEU) C-5/08.
[155] Ibid para 109.
[156] Ibid.
[157] *ITV Broadcasting Ltd v TV Catchup* [2011] EWHC 1874 (Pat).

owned copyright to. The issue was whether by retransmitting the broadcasts and films, TVC was making a copy of the whole or a substantial part, or authorising it. The CJEU concluded that TVC did not authorise reproduction, as the evidence failed to establish that what exists in the buffer or on screen can be regarded as part of broadcasts. To amount to a sufficient substantial part more needs to be taken in by a single frame. It further held that there could only be infringement if the cumulative or rolling approach to infringement of broadcast copyright was accepted.[158]

3.2.2.2 The act of communication to the public

Article 3(1) states: 'Members States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.' Like Article 2 of the Directive, recital 23 states that Article 3(1) should be interpreted broadly to achieve the principle objective which is to establish a high level of protection, allowing copyright owners to obtain an appropriate reward for use of their works

In *Football Association v QC Leisure,*[159] it was held that Article 3 should be construed broadly as referring to any transmission of the protected works irrespective of the technical means or processes used.[160] With regard to what is considered an act of communication to the public in the first case dealing with Article 3, it was held that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that persons forming the public may have access to it.[161]

The introduction of internet intermediaries did not inhibit courts from broadly interpreting Article 3(1). In *Nils Svensson v Retriever AB*,[162] the defendant had provided links on its website to an article published without permission on the appellant's website. The court

[158] Ibid para 51.
[159] *Football Association Premier League Ltd v QC Leisure* EU (CJEU) C-403/08.
[160] Ibid para 193.
[161] *Socieded General de Autores y Editores de EspaÑa (SGAE) v Rafael Hotels SA* EU (ECJ) C-306/05 para 3.
[162] *Nils Svennson and Others v Retriever Sverige AB* EU (CJEU) C-466/12.

held that the InfoSoc Directive should be interpreted as meaning that the provision on a website of clickable links to copyright works freely available on another website with the copyright owner's permission does not infringe an act of communication to the public. The reason for this is that the concept of communication to the public includes two criteria: an act of communication of a work and the communication of that work to the public.[163] An act of communication means the work must be made available, which the provision of links does. The second criterion was not met because the court applied the question of whether there was a new public that the work was made available to as a result of the links. A new public entailed a class of people that was not contemplated by the copyright holders when they authorised the initial communication to the public. In this case there was no new public, as the articles had already been made available to the same people to whom the clickable links were directed, because the newspaper's website was available to all internet users.

In a recent case, *Frank Peterson v Google,*[164] the question was whether operators of video-sharing formats and the users of their platforms carry out together the communication to the public of works uploaded by the latter. The CJEU pointed out that transmission requires a chain of interventions carried out by several persons, but not all interventions constitute communication to the public. It held that the role played by a person in the transmission is more fundamental because it is the person who decides to transmit a given work to a public and who actively initiates the communication. The operators merely provide the physical facilities required to enable users to carry out communication to the public; hence, without people's intervention there would be no transmission by operators.[165] The court therefore held that the defendants were not directly liable. The court also noted that although knowledge by an operator of infringement by third parties is reprehensible conduct; it is a question of

[163] Paul Stevens 'A hyperlink can be both a permissible and an infringing act at the same time' 6 June 2014, available at http://jiplp.blogspot.com/2014/06/a-hyperlink-can-be-both-permissible-and.html, last accessed January 2024.
[164] *Frank Peterson v Google LLC and others and Elsevier Inc. v Cynado AG.* (EU) CJEU joined cases C-682/18 and C-683/18.
[165] Ibid para 102.

secondary liability that involves some mental element, but nothing in the wording of the Directive governs such matters.[166]

3.2.2.3 The distribution right

Article 4(1) requires member states to provide authors with the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. In the digital world this right is not applicable, as recital 28 of the Directive states that distribution includes the exclusive right to control the distribution of work incorporated in tangible articles. This limitation influenced the judgment in *Nederlands Uitgeversverbond v Tom Kabinet Internet BV*[167] where it was held that Article 4 cannot cover the distribution of intangible works such as e-books.[168]

[166] C-682/18 and C-683/18 *Peterson v Google LLC* [2020] E.C.D.R. 16 (2020) para 353.
[167] *Nederlands Uitgeversverbon and Another v Tom Kabinet Internet BV and others* (EU) C-263/18.
[168] Ibid para 994.

3.2.3 E-Commerce Directive

The aim of the Directive 2000/32/EC of the European Parliament and of the Council on 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) was to bring the benefits of the internal market to electronic commerce by creating a framework for the development of internet society services and promoting legal certainty through the coordination of an operational structure of national law for a common regulatory framework.[169] The E-Commerce Directive follows a horizontal approach; this means, as described above, that a legal regime is applicable to a wide array of sectors, including intellectual property. Instead of intermediaries, the E-Commerce Directive refers to 'service provider' which is defined as any natural or legal or person providing an information society service.[170]

The term 'information society services'[171] is wide enough to include activities provided by many intermediaries such as access providers, hosting providers, search engines, social networks and content platforms.[172] It spans a wide range of economic activities and services consisting of the transmission of information via communication networks.[173]

The Directive's main contribution to intermediary liability in the EU was to exempt, subject to certain conditions, mere conduit, caching and hosting activities from liability.[174] These exemptions were adopted as the European Commission was mindful of the chilling effect that intermediary liability could have on the free flow of information: if intermediaries are in doubt about their liability they may block access by removing information too quickly.[175]

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[169] Abebola Adeyemi 'Liability and exemptions of internet service providers (ISPs): Assessing the EU electronic commerce legal regime' (2018) *Computer Telecommunications Law Review* at 2.
[170] Article 2(b) of the E-Commerce Directive
[171]Article 2(a) of the Ecommerce Directive.
[172] Tambiama Madiega 'Reform of the EU Liability Regime for Online Intermediaries: Background on the forthcoming Digital Services Act' (2020) *European Parliamentary Research* at 1.
[173] Ibid.
[174] Section 4 "Liability of Intermediary of Service Providers".
[175] Stefan Kulk op cit note 151 at 104.

3.2.4 Safe harbour provisions under the E-Commerce Directive

3.2.4.1 Mere conduit

Article 12 states that an information society services that consist of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, a service provider will not be liable for the information transmission if the provider does not initiate the transmission,[176] does not select the receiver of the transmission[177] and does not select or modify the information contained in the transmission.[178] Mere conduit activities include the automatic, intermediate and transient storage of information transmitted, in so far as it takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3.2.4.2 Caching

Article 13(1) describes caching as the automatic, intermediate and temporary storage of information for the sole purpose of making the information's onward transmission to other recipients of the service upon their request more efficient. Service providers are not liable for the caching activity if the provider (1) does not modify the information,[179] (2) complies with the conditions on access to the information and the provider,[180] (3) complies with rules regarding the updating of information, specified in a manner widely recognised and used by industry,[181] (4) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of information,[182] and (5) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that information at the initial source of the transmission has been removed from the network, or

[176] Article 12(1)(a) of the Ecommerce Directive.
[177] Article 12(1)(b).
[178] Article 12(1)(c).
[179] Article 13(1)(a).
[180] Article 13(1)(b).
[181] Article 13(1)(c).
[182] Article 13(1)(d).

access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.[183]

3.2.4.3 Hosting

In terms of Article 14, intermediaries are not liable for information stored at the request of a recipient of a service, provided that the service provider (1) does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent[184] or (2) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. [185] Hosting intermediaries play a more active role with more control over the content they host. [186] They are therefore subject to more stringent duties of care and notice.[187] In a recent case, *Peterson v Google,*[188] Article 14 continues to relieve internet intermediaries of liability. The CJEU held that Article 14(1)(1)(a) should be interpreted as meaning that that the activity of an operator of a video-sharing platform or a file-sharing and hosting platform falls within the scope of that provision. For an operator to be excluded from the exemption in article 14(1) it must have knowledge or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform.[189] Therefore an operator must not play an active role but a passive technical and automatic role.[190]

3.2.5 No monitor obligation

Article 15(1) of the Directive further protects intermediaries by requiring member states not to impose a general monitoring obligation on providers that provide services covered by Articles 12, 13 and 14. Although recital 47 permits monitoring obligations in a specific case made by

[183] Article 13(1)(e).
[184] Article 14(1)(a).
[185] Article 14(1)(b).
[186]Tambiama Madiega op cit note 172 at 3.
[187] Ibid.
[188] *Frank Peterson V Google* supra note 164.
[189] Ibid para 118.
[190] Ibid para 106.

national authorities in accordance with national legislation, the CJEU has nevertheless concluded that any preventive measure is contradictory to Article 15. In *Scarlet Extended SA v SABAM,*[191] the CJEU held that a national court cannot order an internet service provider to monitor all data in its network or filter any infringing copyrighted content because it is not a fair balance of fundamental rights. The court further stated that such a system would require active observation of all information provided by all users, therefore it would amount to a general monitoring obligation and would thus be excluded by Article 15.

In *McFadden v Sony Music,*[192] the filtering measure was rejected as it would necessitate monitoring all of the information transmitted and was thus contrary to Article 15.[193] However, the third measure consisting of a password protecting an internet connection was permitted, provided it is strictly targeted in the sense that it must serve to bring an end to a third party's infringement of copyright without affecting the possibility of internet users lawfully accessing information using the provider's service.[194]

3.2.6 Is reform needed for the E-Commerce Directive?

During a public consultation in 2010,[195] the respondents pointed out that certain sections of the Directive need to be addressed. The public consultation confirmed that respondents perceived a lack of clarity in the interpretation of Articles 12-14, in particular the terms 'actual knowledge' and 'expeditious' which are part of the hosting exemptions. The interpretation of these conditions are contradictory across borders or even within the same member state.[196] Some of the rights holders asked for the exclusion of several new online activities from the scope of Articles 12-14, in particular video-sharing sites, social networks and social engines.[197] In terms of Article 15, the respondents raised three issues: (1) recital 47 on

[191] *Scarlet Extended SA v Sociéte belge des auteurs, compositeurs et éditeurs* SCRL EU (CJEU) C-70/10.
[192] *Tobias Mcfadden v Sony Music Entertainment Germany GmbH* EU (CJEU) C-484/14.
[193] Ibid para 87.
[194] Ibid para 93.
[195] 'Public consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce' (2010).
[196]See results in Commission Staff Working Document 'Online services, including e-commerce, in the single market' COM (2011) 942 Final at 32.
[197] Ibid at 27.

specific monitoring obligations raised the question of what is considered specific as opposed to general; (2) regarding recital 48, which requires member states of service providers to apply duties of care, some respondents wondered about the exact duties of care and where the border lies between an obligation to apply a duty of care and a general obligation to monitor.[198] It was, however, concluded that the revision of the liability regime in the Directive would be unnecessary.[199]

Similar sentiments were made in a public consultation launched in 2015, as some respondents viewed the Directive as still fit for purpose while others requested clarification on the implementation and rebalancing of interests, including the establishment of further categories of intermediary services.[200] Although the Directive was designed at a time when online platforms did not have the characteristics and scale they have today, it did create a technology-neutral regulatory environment that has considerably facilitated their scaling up,[201] meaning the current regime is applicable to any technology used.

In a 2018 report, it was concluded that Articles 12-15 of the e-Commerce Directive could remain unchanged because they were sufficiently flexible to adapt to new business models. In addition, any legal questions arising from Articles 12-15 do not justify a reform since it can be expected that case law will answer the questions adequately.[202]

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[198] Ibid at 47.

[199] 'Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market at the implementation of the Directive on Electronic Commerce (2000/31/EC).' available at *https://www.ec.europa.eu/information_society/newsroom/image/document/2017-4/consultation_summary_report_en_2010_42070.pdf,* last accessed January 2024.

[200] 'Results of the public consultation on the environment for platforms, online intermediaries, data and cloud computing and the collaborative economy', available at https://digital-strategy.ec.europa.eu/en/library/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud, last accessed January 2024.

[201] European Commission 'Online platforms and the Digital Single Market opportunities and challenges for Europe' COM (2016) 288 Final at 7-8.

[202] Jan Bernd Nordemann 'Liability of online service providers for copyrighted content: Regulatory action needed?' Directorate General for Internal Policies: Policy Department Economic and Scientific Policy (2018) at 18, available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)6142017_EN.pdf, last accessed January 2024.

3.2.7 Directive on Copyright in the Digital Single Market of 2019

The discussion on updating copyright law started when the European Commission sought to standardise the legislation across Europe through the Digital Single Market (DSM). The DSM strategy comprises a wide ranging group of individual legislative initiatives from the European Commission in order to adapt the European Market to the digital age. The aim of the DSM is to break down barriers within Europe by moving from 28 national digital markets to a single one,[203] in order for the EU to maintain its leading position in the digital economy and favour economic growth of European companies on a global scale.[204] To realise a DSM in Europe a number of initiatives have been instituted, including further harmonisation of copyright law across the EU member states.[205]

In 2016, the European Commission made a number of proposals for a Digital Single Market Directive. One of the main proposals was to modernise copyright law. In 2019, the Directive on Copyright in the Digital Single Market was passed (DSM Directive).[206] The new EU Copyright Directive is an expression of rightsholders' push for heightened intermediary responsibility.[207] Copyright owners had been calling for a more robust regulatory approach, mandating a more proactive role for intermediaries or online platforms in combating the infringement of content which had become frequent.[208] The intermediaries that the Directive is aimed at are online content sharing service providers (OCSSPs), which are defined as information society services, of which the main or one of the main purposes is to store and give public access to a large amount of copyrighted protected works or other protected subject matter uploaded by its

[203] 'What is the digital single market about?', available at http//:ec.europa.eu/eurostat/cache/infographs/ict/blov-4.html, last accessed January 2024.
[204] Eleanor Rosasti 'Copyright in the Digital Single Market: A taster' *WIPO MAGAZINE* December 2001.
[205] Ibid.
[206] Directive on Copyright in the Digital Single Market (Directive 2019/790/EC, 17 April 2019.)
[207] Mira Burri & Zaira Zihlman 'Internet intermediaries' liability of the recent EU copyright reform' (2020) 11 *Indian Journal of Intellectual Property Law* 35 at 43.
[208] Carsten Ullrich 'Standards for duty of care: Debating intermediary liability from a sectorial perspective' (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 111 at 112.

users, which it organises and promotes for profit-making purposes.[209] Such OCSSPs include well-known platforms like YouTube, Facebook and Vimeo, as well as any type of user-upload platform that fits this broad definition.[210]

Article 17 of the DSM Directive is aimed at tackling the so-called value gap, which is defined as the alleged mismatch between the value that online sharing platforms extract from creative content and the revenue returned to the copyright holders.[211] The liability regime in Article 17 follows a two-level approach: first, it establishes direct liability and, second, it specifies distinct ways to escape the liability regime.[212]

In this way, the Directive establishes a new liability regime. Article 17(1) holds OCSSPs liable for infringing the right of communication to the public when it gives the public access to copyrighted works or other protected subject matter uploaded by its users. It therefore assigns primary liability to OSSCPs for copyright infringement. Article 17(3) prohibits OCSSPs from relying on the hosting provider exemption in Article 14(1) of the ECD for situations covered by the Directive. Without such exemption affected platforms are unlikely to be able to continue to offer the option for user uploads without extensive moderation.[213]

To escape liability, OCSSPs should obtain a licence from a rights holder before making such work available.[214] This is, however, a cumbersome obligation as it can be hard to obtain licences for the copyrighted works.[215] Additionally, intermediaries may have difficulty in contacting rights holders to enter into a licensing agreement, as rights holders are under no obligation to enter into licensing agreements.[216] The problem of authorisation will lead to OCSSPs relying on Article 17(4) to avoid liability, as an OSSCP will be held liable unless the

[209] Article 2(6) of the DSM Directive.
[210] João Pedro Quintas 'The new copyright in the digital single market: A critical look' (2020) 1 *European Intellectual Property Review* at 17.
[211] Ibid.
[212] Martin Senftleben 'Institutionalized algorithmic enforcement: The pros and cons of the EU approach to UGC platform liability' (2020) 12 *Florida International University Law Review* at 4.
[213] Sebastian Felix Schwemer 'Article 17 at the intersection of EU copyright law and platform regulation' (2020) 19 *Nordic Intellectual Property Law Review* 400 at 413.
[214] Article 17(1) of the DSM Directive.
[215] Mira Burri & Zaira Zihlman op cit note 208 at 55.
[216] Ibid.

provider (1) has made the best efforts to obtain an authorisation from the rights holders; (2) has made the best efforts to ensure specific content is inaccessible; or (3) has disabled access or removed copyright content expeditiously after becoming aware of it and has made best efforts to prevent future uploads of this content.

Article 17(4)(b) has been criticised for implying the use of filtering or automated systems. Although Recital 66 of the DSM requires the assessment of whether an OCSSP has made its best efforts to take into account the best industry practices, the effectiveness of the steps taken and principle of proportionality. Most OCSSPs will utilise algorithm-driven tools (or upload filters) to fulfil the requirements of Article 17(4)(b).[217] This has been confirmed in *Poland v Parliament and Council,*[218] with the CJEU having regard to the factual context of Article 17 and that OCSSPs manage a significant or even a huge amount of content. OCSSPs will be unable to check all or even most of the content uploaded manually, thus there is no other means than the use of automatic content recognition tools.[219] The CJEU opined that these tools allow OCSSPs to demonstrate that they have fulfilled the Article 17(4)(b) obligation and enable service providers to fulfil the transparency obligation imposed on them in Article 17(8), as it makes it possible to gather statistics for providers to show rights holders' information on the use of content covered by any licensing agreement concluded with them.[220]

It has been argued that the implementation of filtering tools would contradict the no monitoring obligation of Article 17(8),[221] as automatic tools cannot be effective without being general; by design they scan every file uploaded onto the services site.[222] A textual interpretation of Article 17(8) would indicate that an interpretation of Article 17(4) (b) or (c)

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[217] Ibid at 49; also see Martin Senftleben op cit note 208 at 312, Christina Angelopoulos & Joao Pedro Quintais 'Fixing copyright reform: A better solution to online infringement' (2019) 10 *Journal of Intellectual Property Information Technology and E-Commerce Law* 147.
[218] *Poland v Parliament and Council Case* EU (CJEU) C-401/19.
[219] Ibid para 64.
[220] Ibid para 69.
[221] Julia Redia, Joschka Selinger & Michael Servatius 'Article 17 of the Directive on Copyright in the Digital Single Market: A fundamental rights assessment' (2016) *Gesellschaft für Freiheitsrechte* at 20; Christopher Geiger & Bernd Justin Jütte 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, automated filtering and fundamental rights: An impossible match' (2021) 70 *GRUR International* 517 at 535.
[222] Pamela Samuelson 'Pushing back on stricter copyright ISP liability rules' (2021) 27 *Michigan Technology Law Review* 299 at 319.

results in a general monitoring obligation being ruled out.[223] However, Article 17(8) does not include a ban on "a generation obligation to actively seek facts or circumstances indicating illegal activity" like Article 15 of the ECD.[224] It is therefore unclear whether the legislation intended to merely reiterate the application of Article 15(1) to OSCCPs, or whether the intention was to set a different standard.[225] Whatever the case, the type of monitoring required will amount to general monitoring which could potentially block legitimate uses.[226]

Implementing such tools is also concerning, as filtering technology is at best capable of simply identifying the contents of a file, not making the often complex determination as to whether the use of a particular file constitutes an infringement.[227] Such tools will be unable to distinguish parody, the transformative use or critical review of infringing use, which requires the ability to recognise context which is easy for humans.[228] Such inability will also contradict Article 17(7), where cooperation between OCSSPs and rights holders should not result in the unavailability of works that do not infringe a copyright and prohibit users from relying on limitations and exceptions because filtering mechanisms are not able to determine what unlawful content is. Additionally, only OCSSP's with deep pockets will be able to implement recognition technology; the implementation of more cost-effective technologies may lead to over-blocking content.[229]

To mitigate smaller OCSSPs' from using filtering systems, Article (17)(5) requires an assessment by courts to determine if service providers complied with Article 17(4). Accordingly, the principle of proportionality together with the following must be taken into account: (1) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and (2) the availability of suitable and effective means and their cost for service providers. A similar sentiment was stated in *Poland*: in terms of Article

[223] Julia Redia op cit note 212 at 20.
[224] Ibid.
[225] Ibid at 21.
[226] Christopher Geiger and Bernd Justin Jütte op cit note 211 at 538.
[227] Evan Engstorm & Nick Feamster 'The limits of filtering: A look at the functionality and shortcoming of content detection tools' (2017), available at http://www.engin.is/the-limits-of-filtering, last accessed January 2024.
[228] Mira Burri & Zaira Zihlman op cit note 208 at 64.
[229] Melanie N. Tate 'The EU Copyright Directive and the United States Copyright Act: Why an established approach is better suited to new digital reality' (2021) 43 *Houston Journal of International Law* 307 at 332.

17(5) it cannot be ruled out that in specific cases, it would be contrary to require certain providers to use content recognition tools, as such tools are neither suitable nor effective as regards certain specific types of protected work and subject matter.[230] If OCSSPs do use these technologies, the negative effects of filtering technologies is limited by Article 17(4)(b), which requires the removal of content only of works for which rights holders have provided OSSCPs with relevant and necessary information, enabling the technology to detect specific content.[231]

The European Commission intended for Article 17 to match the current forms of technology available, placing more obligations on internet intermediaries to avoid liability. In light of the criticism, the DSM Directive has not prioritised the interests of internet intermediaries, instead requiring them to be policemen. Since the Directive is still relatively new, the real impact that Article 17 will have on the function of intermediaries will only be seen in future.

3.3 US: Digital Millennium Copyright Act of 1998

The US, unlike the EU, has adopted a vertical approach to the regulation of internet intermediaries. As already stated in the introductory chapter, a vertical approach means the different domains each have specific laws relating to these intermediaries.

In the US, digital copyright is regulated by the Digital Millennium Copyright Act (DMCA).[232] When creating the DMCA, Congress recognised that if intermediaries were always held responsible it would slow the development of the internet.[233] Faced with liability for users' infringing acts, they would stop providing services.[234] Thus, the DMCA was organised around the goal of providing greater protection to service providers concerning their legal exposure to infringement that may occur in the course of their activities.[235]

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[230] *Poland v Parliament and Council s*upra note 212 para 67.
[231] Pamela Samuelson op cit note 223 at 325.
[232] Digital Millennium Copyright Act of 1998.
[233] Joel Matteson 'Unfair misuse: How section 512 of the DMCA allows abuse of the copyright fair use doctrine and how to fix it' (2018) 35 *Santa Clara High Technology Law Journal* 1 at 5.
[234] Ibid.
[235] Ibid.

The DMCA is divided into five titles: Title II, separately titled the Online Copyright Infringement Liability Limitation Act, adds a new section 512 to title 17 of the United States Code,[236] which outlines US copyright law. Section 512 found in Chapter 5 of the 17 US Code now specifically addresses the issue of ISP liability and creates limitations on infringing liability for certain types of activity.[237] The limitation of liability is found in the safe harbour provisions of the DMCA. These were enacted to clarify and limit copyright liability for storing or providing access to infringing material in order to prevent the threat of liability from having a chilling effect on the development of socially beneficial new technology.[238]

The term used in the DMCA to identify intermediaries is 'service providers'. Section 512(k) has two definitions for service providers: (1) It is an entity offering the transmission, routing or providing of connection 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 material as sent or received;[239] and (2) a provider of online services or network access or the operator or facilities therefore.[240]

3.3.1 Safe harbour provisions

3.3.1.1 Transitory digital network communication

Section 512(a) protects service providers that transmit, route or provide connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in course of transmitting, routing or providing connection, The courts have on occasion applied section 512(a) safe harbour in an expansive manner, which was not Congress's intention, as it was mainly applicable to protect backend internet infrastructure services like 'providing connectivity for a world wide web site'.[241] In contrast, it has also been argued that by narrowly interpreting,

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[236] Title 17 of the United States Code.

[237] Jerry Jie Hua 'Establishing certainty of internet service provider liability and safe harbour regulation' (2014) 9 *National Taiwan University Law Review* at 9.

[238] Mary LaFrance 'An ocean apart: Transatlantic approaches to copyright infringement by internet intermediaries' (2019) 47 *AIPLA Quarterly Journal* 267 at 270.

[239] S 512(k)(1)(A).

[240] S 512(k)(1)(B).

[241] United States Copyright Office 'Section 512 of Title 17: A Report of the Register of Copyrights' (2020) at 227, available at https://www.copyright.gov/policy/section512/section-512-full-report.pdf, last accessed January 2024.

courts are eliminating the person whom Congress hoped to exempt, the ISP.[242] For example, *In Re Aimster*, the court concluded that although the Act was not passed with P2P services in mind, the definition of ISP is broad enough to fit Aimster.[243]

3.3.1.2 System caching

Section 512(b) limits the liability of service providers for system caching, a process utilised by them to increase the efficiency of their networks. This section provides protection for the routine, intermediate and temporary storage of data on the network. An example of an intermediary case is *Field v Google Inc*.[244] The appellant contended that Google did not meet the three requirements of (1) making immediate and temporary storage of material, (2) the material being transmitted from the person who makes it available online, here Field, to a person other than himself at the direction of another person, and (3) requiring Google's storage of webpages carried out through 'an automated technical process' and for the purpose of making the material available to users who request access to the material from the originating site.[245]

The court disagreed, holding that the first requirement was met because Google's cache was temporary, approximately 14-20 days.[246] On the second contention, the court held that Google was a person other than Field, the appellant had transmitted the material in question from the pages of his website to Google's Googlebot.[247] On the final contention, the court held that there was no dispute that Google's storage is carried out through an automated technical process and that Google's principal purpose in including the webpage in its cache was to enable subsequent users to access those pages if they were unsuccessful in requesting the materials from the originating site for whatever reason.[248]

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[242] Sven Skillrud 'An Umbrella or Canopy: Why the 17 U.S.C. Section 512(1) safe harbour should be read broadly' (2005) 9 *Marquette Intellectual Property Law Review* 91 at 98.
[243] *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Circuit, 2003) at 655
[244] *Field v Google Inc* 412 F.Supp 2d 1106 (D.Nev 2006).
[245] Ibid at 1124.
[246] Ibid.
[247] Ibid at 1125.
[248] Ibid at 1125.

3.3.1.3 Information residing on systems or networks at the direction of users

Section 512(c) provides a safe harbour to service providers who provide storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider. Services are immune from liability provided the service provider does not have actual knowledge that the material infringes a copyright,[249] is not aware of facts or circumstances from which infringing activity is apparent,[250] acts expeditiously to remove or disable access to the material upon obtaining such knowledge or awareness,[251] does not receive direct financial benefit which is directly attributable to the infringing activity in which case the service provider has the right and ability to control such activity,[252] and upon notification of the claimed infringement, responds expeditiously to remove or disable access to the allegedly infringing material.[253]

The interpretation of this activity has been broadened to the extent that it involves service providers that go beyond serving up content 'at the direction of a user'.[254] The courts have held that section 512(c) includes video hosting sites that make copies of different encoding schemes, deliver videos to users' browser caches on request, use algorithms to identify and display related videos and syndicate content to a third party.[255] *UMG Recordings, Inc v Shelter Capital Partners*[256] justified the broad protection by stating that Congress created section 512(c) to cover activities beyond mere hosting; the language of the statute recognises that one is unlikely to infringe copyright by merely storing material that no one could access, and also includes activities that go beyond storage.[257] In *Viacom v YouTube,* the defendant sought protection under section 512(c), claiming that three challenged software functions – transcoding, playback and related videos – were offered by reason of storage.[258] The second

[249] S 512(c(1)(A)(i).
[250] S 512(c)(1)(A)(ii).
[251] S 512(c)(1)(A)(iii).
[252] S 512(c)(2).
[253] S 512(c)(3).
[254] United States Copyright Office op cit note 237 at 87-88.
[255] Ibid at 88.
[256] *UMG Recording, Inc v Shelter Capital Partners LLC*718 F.3d 1006 (9th Circuit 2013).
[257] Ibid at 1019.
[258] *Viacom International v YouTube Inc*, 718 F.Supp 2d 514 (S.D.N.Y. 2010).

circuit agreed, because transcoding and playback were automated functions and to exclude these automated functions from the safe harbour would eviscerate the protection afforded to service providers in section 512(c).[259] It further held that the video feature fell under section 512(c) because it is an automated response to user inputs and helps users to locate and access user-stored videos, thus it is closely related to and follows from the storage itself, and is narrowly directed towards providing access to material stored at the direction of users.[260]

3.3.1.4 Information location tools

Section 512 (d)'s liability exemptions are the same as the ones for hosting. [261] A service provider will not be liable for infringement if it links or refers users to an online location containing infringing material or an infringing activity by using information location tools that include directories, references, pointers and hypertext links.[262] Search engines may also fall into this section. For example, in *Perfect 10 v Google,*[263] the appellant argued that Google had acquired knowledge of infringing by notice but did not expeditiously suppress the infringed links. In response, Google asserted that it had met all the requirements to qualify for section 512(d) safe harbour. The main issue here was whether adequate notice was provided purporting to disclose infringement. It was found that a number of Perfect 10's notices were defective because they did not contain all the required information in a single written communication.[264] Therefore, Perfect 10 did not raise a genuine issue pertaining to material facts.

3.3.2 Threshold requirements

In order to be shielded from liability, service providers have threshold requirements they have to meet in order to qualify for the safe harbour provisions. These requirements encourage cooperation between copyright owners and ISPs.

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[259] *Viacom v YouTube, Inc.,* 676 F.3d 19 (2d Cir 2012).
[260] Ibid at 40.
[261] S 512(d)(1)(A)-(C), (2) and (3).
[262] S 512(d).
[263] *Perfect 10 Inc. v Google Inc.* 508 F.3d 1146 (9th Circuit 2011).
[264] Ibid at 1117.

In order for a service provider to qualify for one of the safe harbours, it must firstly meet the definition of a service provider. Secondly, all service providers must have a publicly stated policy that allows them to terminate account holders and subscribers for repeated instances of illicit content,[265] and lastly, must agree to accommodate and not interfere with standard tech measures (STM).[266] These are measures developed and used by copyright owners to identify or protect copyrighted works and have been developed through the consent of copyright owners and service providers, are available to any person on reasonable and non-discriminatory terms and do not impose substantial costs on service providers.[267]

The repeat infringer policy is focused on how the site is generally managed and not just on how the site responds to notice of a particular infringement. A service provider will face liability if it fails to implement its policy in a consistent or meaningful way. The court in *BMG Rights Management v Cox*[268] held that Cox did not reasonably implement a repeat infringer's policy as a deterrent to copyright infringement, because after its subscribers were terminated they were allowed to reactivate their internet accounts. Dropping the reactivation practice did not, however, lead to more termination, instead Cox stopped terminating and started to automatically delete all infringement notices.[269]

3.3.3 Impact of section 512

Safe harbour has propelled the growth of social network sites and other web 2.0 businesses. Service providers and stakeholders argue that the cooperation and balance of interests fostered by the statute have facilitated the development of an innovative, diversified technological sector and the widespread dissemination of creative works through legitimate channels witnessed over the past two decades.[270]

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[265] S 512(i)(1)(A)
[266] S 512 (i)(1)(B).
[267] S 512(i)(2).
[268] *BMG Rights Management (US) LLC v Cox Communications Inc.*, 881 F.3d 293 (4th Circuit 2018).
[269] Ibid para 304.
[270] United States Copyright Office op cit note 242 at 85.

Rights holders have contended that section 512 does not provide effective means for stemming infringing activity. Some have argued that safe harbour gives too much coverage to intermediaries and diminishes their incentive to address online infringement. It has therefore been recommended that safe harbours should be more demanding or should be abolished.[271] Rights holders generally note that large-scale infringement has rendered the notice and takedown (N+TD) process burdensome and ineffective in addressing online infringement, highlighting the sheer amount of notices and the time, financial resources and effort demanded by the process.[272] The copyright owner has the burden to properly identify the infringement, otherwise the ISP is not required to take any action.[273] The former must ensure that the complaint notice contains the necessary information listed in section 512(c)(3); if it fails to satisfy the DMCA notice provisions then its notice is not considered in evaluating whether the ISP had knowledge of infringement.[274] Additionally, when owners have looked to ISPs for help they have been reluctant to become involved, either out of an inability or an unwillingness to do so.[275]

In contrast it has been observed that copyright holders misuse the N+TD process. Copyright owners have, for instance, sent takedown notifications for the inclusion of their copyrighted material where use of it is protected under fair use.[276] Parties have also abused the DMCA process by using it for censorship instead of its intended purpose which is to protect legitimate copyright holders' rights online.[277] Service providers, being more concerned with being eligible for safe harbour, will remove the content without considering whether it is non-infringing in order to be eligible for safe harbour. Longer delays in removing material can

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[271] Matthew Sag 'Internet safe harbors and transformation of copyright law' (2017) 93 *Notre Dame Law Review* 499 at 505.
[272] United States Copyright Office op cit note 242 at 137.
[273] Section 512(c)(3)(B).
[274] Ibid.
[275] Marc J. Randazza 'Lenz v Universal: A call to reform section 512(f) of the DMCA and to strengthen fair use' (2016) 18 *Vanderbilt Journal of Entertainment and Technology Law* 743 at 753, Marketa Trimble & Salil Mehra 'Secondary liability, ISP immunity and incumbent entrenchment' (2014) 62 *The American Journal of Comparative Law* 685 at 687.
[276] Jacqui Cheng 'NFL fumbles DMCA takedown battle, could face sanctions' *ARS Technica* March 20 2007, available at http:// arstechnica.com/news.ars/post/20070320-nfl-fumbles-dmca-takedown- battle-could-face-sanctions.html; last accessed January 2024.
[277]Jeffry Cobia 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, abuses and shortcomings of the process' (2009) 10 *Minnesota Journal of Law, Science and Technology* 387 at 392.

eliminate a provider's protection under section 512, incentivising ISPs to act as quickly as possible, often before either a consumer or an independent judge can evaluate the merits of the takedown request.[278] By allowing intermediaries to take down content prior to determining whether the content is within the bounds of copyright exceptions such as fair use, ISPs can silence content which serves an important purpose before that content is properly evaluated.[279]

Consequently, owing to the growth of the internet, the obligation to remove infringing content has led to service providers undertaking measures that exceed their legal obligations in order to address the sheer volume of notices.[280] Usage of such measures exempts service providers from the checks and balances crafted under the DMCA, as they take place on privately owned platforms and are governed by intermediaries' terms of use between the two parties.[281] The well-known voluntary measures comprise the YouTube's Content ID. Using a digital identifying code, Content ID can notify rights holders whenever a newly uploaded video matches a work that they own.[282] The rights holder then chooses to block or remove the content, share information or monetise the content.[283] Voluntary measures may also include filtering the content before it is even uploaded, or takedown and staydown, which may involve an active search to make sure the content is reloaded.[284] These voluntary measures might not even be necessary considering that section 512(l) states that failure to qualify for safe harbour does not mean a service provider is liable for copyright infringement. The provider may still make use of any defences that are available to copyright defendants.[285] However, no service provider has relied on this alternative in an infringement case, showing perhaps that the

[278] Wendy Seltzer 'Free speech unmoored in copyright safe harbor: Chilling effects of the DMCA on the First Amendment' (2010) 24 *Harvard Journal of Law and Technology* 171 at 392, also see
[279] Emily M. Asp 'Section 512 of the Digital Millennium Copyright Act: User experience frustration' (2018) 103 *Iowa Law Review* 751 at 769.
[280] Sharon Bar-Ziv & Niva Elkin-Koren 'Behind scenes of online copyright enforcement: Empirical evidence on notice and takedown' (2018) 339 *Connecticut Law Review* 339 at 351.
[281] Ibid at 352.
[282] Ibid at 352.
[283] Ibid.
[284] John A. Rothchild (ed) *Research Handbook on Electronic Commerce Law* (2016) 190.
[285] 'This would include defences such as laches, implied licenses, estoppel and substantive non infringing use' Kevin C Hoffman 'The death of the DMCA: How Viacom v YouTube may define the future of digital content' (2009) 46 *Houston Law Review* 1345 at 1352.

freedom to select other defences might be taxing on them and that they prefer to rely on the limitations on liability of section 512 or adopt active measures to ensure they can still qualify for safe harbour.

Intermediaries have also sought to uphold the interests of internet users who have been affected mainly by the misuse of N+TD procedures. Erroneous takedowns have caused confusion and made many consumers fearful of sharing content that would be considered fair use. Some service providers have required additional information from rights holders sending a takedown notice, such as a follow-up email to provide more detail on how they are the copyright owners or requiring a copyright owner to submit a registration certificate or other proof of ownership before processing a takedown notice.[286] Some service providers have required rightsholders to fill in a webform, which is usually coupled with questions that the sender must answer to ensure that the submitted claims are appropriate for a section 512 notice.[287] Both these approaches, however, tend to leave ISPs outside the realm of safe harbour and do not appear to be fully honouring the requirement of expeditious removal.[288]

3.3.4 Reform of DMCA

3.3.4.1 Digital Copyright Act

In May 2020, Senator Tom Tillis released a reform bill titled the Digital Copyright Act Discussion Draft of 2021 (DCA). Tillis stated that technological advancement and business practices have changed since the enactment of the DMCA, and that the copyright law is ill suited to the needs of most copyright owners and individual users.[289] The proposal would also mean amendments to section 512 of the DMCA relating to service providers.[290] Section 2 of the DCA bill contains amendments to section 512. The DCA has been criticised for completely destroying the framework of the DMCA and replacing it with a system that will chill online creativity, take

[286] United States Copyright Office op cit note 242 at 154.
[287] Ibid at 156.
[288] Ibid.
[289] 'Digital Copyright Act of 2021', available at http://www.tillis.senate.gov/services/files/0BO551E3-4CA2-4B49-9896-5642B7B7F77, last accessed January 2024.
[290] Ibid.

choices away from consumers and harm the internet ecosystem.[291] Generally speaking, section 2 has added more responsibilities for service providers and amended certain provisions of section 512.

Groups have voiced disapproval of DCA for treating small and larger companies the same, unlike section 512 that acknowledges the differences and sets out differing obligations.[292] In contrast, the DCA fails to take into account the various sizes of intermediary, as it makes the larger ISPs the centre of legislative proposals, treating them as if the entire web through regulation or legislation is a costly mistake.[293] It should take into account that internet platforms are not simply entertainment machines but also economic engines.[294] The collapse of the section 512 division would force many intermediaries to take excessively broad actions in response to notices of alleged infringement, blocking legitimate access to websites.[295]

For instance, notice and staydown are applicable to all intermediaries under the DCA.[296] Replacing the N+TD, the notice and staydown process means once infringing material has been removed, the intermediary must prevent the same work from becoming available again in the future. It has been stated that the notice and staydown will require the use of filtering technologies. This have raised the issue that not all service providers have the finances to implement such a system, thus creating a significant burden for smaller intermediaries.[297] Use of filtering technologies to manually review all matters imposes costs on service providers, making operations difficult or impossible for non-platform libraries.[298]

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[291] 'Re-create letter to Senator Tills Digital Copyright Act' 5 March 2021 at 2, available at http://www.recreatecoalition.org/wp-content/uploads/2021/03/Recreate-letter-to-Senator-Tillis-DCA-3.5.21.pdf, last accessed January 2024.

[292] CDT letter in response to Senator Tillis 'Digital Copyright Act Discussion Draft' (2021), available at http://www.cdt.org/wp-content/uploads/2021/03/2021-03-05-CDT-Responses-to-Senator-Tillis-Digital-Copyright-Act-Discussion-Draft.pdf, last accessed January 2024.

[293] Ibid.

[294] Recreate letter op cit note 292.

[295] CDT letter op cit note 293 at 6.

[296] S 2(a)(2)(C) of DCA.

[297] Ernesto van der Saar 'The Digital Copyright Act will chill innovation and harm the internet' *Torrent Freak* 9 March 2021, available at https://torrentfreak.com/the-digital-copyright-act-will-chill-innovation-and-harm-the-internet-210309, last accessed January 2024.

[298] Lily Bailey Bailey 'Internet archive letter to Senator Thom Tillis re comments on the discussion draft of the Digital Copyright Act' 15 March 2021 at 2, available at http://www.archive.org/ia-letter-to-tillis-re-comments-on-the-discussion-draft-of-the-digital-copyright-act-3.5.21/page/n1/mode/2up, last accessed January 2024.

The notice and staydown procedure has been criticised for requiring libraries to employ filters to prevent users from uploading allegedly infringing content, as such filters would limit the freedom of expression of libraries.[299] Filtering systems often struggle with copyright exceptions such as fair use leading to the problem that legally uploaded content may be unnecessarily removed and users could be prevented from uploading content in the future.[300] Use of such technologies is mitigated by the CDA, which requires the Copyright Office in consultation with National Telecommunications and Information Administration (NTIA) to establish reasonableness best practices that account for the type and size of the service provider and the scale of infringement, which is updated every five years.[301] Best practices may include requiring a user that uploads or performs across the service to affirm that it holds copyright to that content and has permission to upload or publicly perform such content.[302] However, if the rules are changed every few years, this promising solution may hinder service providers from innovating or developing services. Furthermore, the Copyright Office is not the appropriate entity to develop best practice, even with the assistance of the NTIA, as it would require deep technological and practical expertise for entire industries.[303]

Section 512(m) provision is the red flag knowledge test, requiring a service provider to remove content once it has become aware of facts or circumstances from which infringing activity is apparent. The DCA seeks to amend that standard of infringement from 'apparent infringement' to 'infringement that is likely'[304] – this has raised concerns that the 'likely' standard would force any intermediary to be overly cautious[305] and that would lead to years of costly litigation.[306] Valid concern, considering the distinction made by Viacom between actual

[299] Ibid.
[300] 'AAL comments on Digital Copyright Act' 5 March 2021 at 2, available at http://www.aalnet.org/wp-content/uploads/2021/03/AAAL-Comments-on-Digital-Copyright-Act-030521.pdf, last accessed January 2024.
[301] S 2(a)(2)(E) of the Digital Copyright Act Discussion Draft.
[302]Ibid.
[303] Electronic Frontier Foundation 'The Digital Copyright Act of 2021/Tillis: Commentary of Electronic Frontier Foundation' 5 March 2011 at 6, available at http://www.eff.org/files/2021/03/15/dca_tillis_section_by_section_eff-_commentary_3.5.21, last accessed January 2024.
[304] S 2(a)(2)(B)(i).
[305] Recreate letter op cit note 292.
[306] 'Library Copyright Alliance on "Digital Copyright Act of 2021" Discussion Draft' available at http://www.librarycopyrightalliance.org/wp-content/uploads/2021/03/Tilllis Digital-Copyright-Act LCA 3.pdf, last accessed January 2024.

and red flag knowledge in subsequent cases, has led to further confusion[307] and the courts wrongfully applying the common law concept of wilful blindness to determine whether a service provider lacks knowledge.[308] The renewed legal uncertainty will chill investment at a time when the internet needs competition.[309]

3.4 Conclusion

The US and EU legal frameworks have sought to enact legislation that would limit the liability of intermediaries through the introduction of safe harbour provisions, but also by stipulating the obligation of intermediaries to assist copyright holders to combat online copyright infringement. In the EU, the InfoSoc Directive strengthened rights holder's copyright and is relied on when bringing a case of copyright infringement against an internet intermediary or technology, while the E-commerce Directive's safe harbour exempts intermediaries from liability if certain conditions are met. Similarly, in the US the DMCA has provided safe harbour provisions. While copyright owners will continue to bring infringement claims against intermediaries, intermediaries relying on safe harbour have been able to contest such claims. It is then up to the courts to ascertain the liability of an intermediary.

The adoption of such digital legislation has not stopped the argument for a stronger protection for copyright, mainly due to the continued development of intermediaries.[310] Intermediaries now engage in activities beyond pure data hosting, directly benefiting from hosting by gaining revenue through advertised ads on services such as display optimisation and the use of traffic data.

As the US and the EU create new laws or amend existing laws to better adapt to newer technologies, such changes involve placing more obligations on intermediaries. These changes have raised concerns as to how they will affect the functioning of these intermediaries,

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[307] *Viacom v YouTube* supra note 253 at 31; *Capitol Records LLC v Vimeo LLC* 826 F.3d 78, 93-93 (2d Cir.2016); Veoh IV 718 F.rd at 1025-26; *Disney Enterprises Inc v Hotfile Corp* No. 11-20426 CIV, 2013 WL 6336286 at 27 (S.D. Fla Sept. 20, 2013.)
[308] Ibid at 31.
[309] Electronic Frontier Foundation op cit note 304 at 3.
[310] Carsten Ullrich op cit note 209 at 111.

however, and may lead to restrictions on the information being shared, which was the main reason for the enactment of such laws in the EU and the US in the first place.

Chapter 4: Namibian Legal Framework and Intermediary Liability

4.1 Electronic Transactions Act 4 of 2009

The current framework for intermediary liability in Namibia is found in Chapter 6 of the Electronic Transactions Act (ETA).[311] The ETA came into force on 16 March 2020, therefore it is still a relatively new piece of legislation. The enactment of the Act was in response to the ever-growing technological advances that are increasingly used in everyday life for communication and business purposes.[312] Its application to copyright infringement has not been adjudicated by the courts and no concerns have been raised about its inefficiency in protecting copyright.

The preamble to the Act contains a number of objectives which include the regulation of service providers' liability for the actions of their clients. Similar to US DMCA and the EU E-Commerce Directive, the ETA lists four activities a service provider will not be liable for, provided certain conditions are met.

4.1.2 Safe harbour provisions

4.1.2.1 Mere conduits

Section 50(1) states that a service provider will not be liable for third-party material where it merely provides access to information system services for the transmitting, routing or storage of data via an information system under its control, provided it (1) does not initiate the transmission,[313] (2) does not select the address,[314] (3) performs the functions in an automatic,

[311] Electronic Transactions Act 4 of 2009.
[312] 'Simataa tables bill to regulate electronic transactions' *NBC Digital News* 14 July 2019, available at http://www.nbcnew.na/news/simataa-tables-bill-regulate-electronic-transactions.21153, last accessed January 2024.
[313] S 50(1)(a).
[314] S 50(1)(b).

technical manner without the selection of a date,[315] and (4) does not modify the data contained in the transmission.[316]

4.1.2.2 Caching

Under section 51, a service is not liable for automatic, intermediate and temporary storage of data, where the purpose of storing such data is to make the onward transmission of the data to other recipients of the service upon their request more efficient. A caching service provider will not be liable if it (1) does not modify the data,[317] (2) complies with conditions on access to the data,[318] (3) complies with rules regarding the updating of the data, specified in a manner widely recognised and used by industry,[319] (4) does not interfere with the lawful use of rights management information widely recognised and used by industry to obtain information on the use of the data,[320] and (5) removes or disables access to the data it has stored upon receiving a takedown notice.[321]

4.1.2.3 Hosting

Section 52(1) states that service providers that provide a service at the request of the recipient, consisting of the storage of data provided by them, are not liable if the hosting service provider (1) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of a third party,[322] (2) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent,[323] and (3) upon receipt of a takedown expeditiously removes or disables access to the data.[324]

[315] S 50(1)(c).
[316] S 50(1)(d).
[317] S 51(1)(a).
[318] S 51(1)(b).
[319] S 51(1)(c).
[320] S 51(1)(d).
[321] S 51(1)(e).
[322] S 52(1)(a).
[323] S 52(1)(b).
[324] S 52(1)(c).

Section 52(2) does not permit this limitation of liability unless the service provider has designated an agent to receive notifications of infringement and has provided this through its service, including on its website in locations accessible to the public.

4.1.2.4 Information location tools

Under section 53, service providers that refer or link users to a web page containing infringing data, or an infringing activity using information location tools, will not be subject to liability, if they (1) do not have actual knowledge that the data or an activity relating to the data is infringing the rights of that person,[325] (2) are not aware of facts or circumstances from which the infringing activity or the infringing nature of the data is apparent,[326] (3) do not receive a financial benefit directly attributable to the infringing activity,[327] and (4) remove or disables access to the reference or link to the data or activity within a reasonable time after being informed that the data or the activity relating to such data infringes a person's right.[328]

4.1.3 Notice and takedown and limitation of liability

Section 54 of the Act sets out the procedure for notice and takedown. Section 54(2) places further limitations on service providers for wrongful takedown if the notice complies with all the information mentioned in subsection (1). The Act also states that service providers do not have a general obligation to monitor the data which they transmit or store, and to actively seek facts or circumstances indicating an unlawful activity.[329]

The ETA combines two distinct characteristics of the two foreign jurisdictions discussed in the previous chapter. First, it follows the horizontal approach of the E-Commerce Directive where one legislation is applicable to different subjects. Second, in terms of the DMCA it

[325] S 53(1) (a).
[326] S 53(1) (b).
[327] S 53(1)(c).
[328] S 53(1)(d).
[329] S 55 of the Act.

provides a detailed outline of the procedure for notice and takedown, as well as the provisions stating that an intermediary will not be liable for the removal of non-infringing material.

4.2 Background to the development of the Draft Copyright and Related Rights Bill

The issue of digital copyright infringement in Namibia is a recently raised concern. Namibia has talented people with diverse cultural resources that could provide a solid basis for the development and strengthening of the creative industry. However, this is weakened by a number factors, including new technological developments that have made the reproduction and distribution of copyrighted works easy, cheap and fast.[330] Additionally, complaints have arisen that all music and copyrighted works are easily accessible through different digital platforms and Namibian musicians', artists' and filmmakers' works are being reproduced without their permission.[331] For example, the artist Pule discovered that his album and other artists' music were being uploaded to a WhatsApp group.[332]

Currently, the Copyright and Neighbouring Rights Act[333] regulates copyright infringement in Namibia. However, it is limited in its response to the existing dynamics of the creative industry, particularly with regard to the current digital era and the new technologies that reproduce human experience.[334] More specifically, the Act does not (expressly) cover aspects such as internet enforcement of copyright rights, online infringement, internet piracy, cross-border infringement, digital disputes, streaming sites such as Netflix, or the downloading of copyrighted works.[335]

Therefore, reform was deemed necessary to promote economic development by incentivising the creation of copyrighted works, while also maintaining the affordability and accessibility of socially beneficial copyrighted works for ordinary consumers.[336] In 2019, BIPA

[330] BIPA 'National Intellectual Property Policy and Strategy' (2019) at 16.
[331] Lucy Iiado 'Namibia: NASCAM CEO want copyright law amendments' 16 August 2019, available at http://www.musicinafrica.net, last accessed January 2024.
[332] Paheja Siririka 'Music pirates should be punished' *New Era* 15 January 2021.
[333] Copyright and Neighboring Rights Act 6 of 1994.
[334] Lucy llado op cit note 332.
[335] Ibid.
[336] Ibid.

took on the task of reviewing the current Copyright Act with the aim of developing new legislation that will serve the national development agenda. BIPA argued that new legislation was needed as the landscape of the creative industry had evolved and advanced significantly, propelled by the digital era, thus introducing opportunities which were not anticipated by the current Copyright Act.[337] BIPA's first step in updating copyright law was the drafting of the working document for the development of a new copyright legal framework in Namibia. After consultations with stakeholders on the working document, the Draft Copyright and Related Rights Bill of 2021 was drafted and released.

4.3 Draft Copyright and Related Rights Bill

In the Bill, intermediaries are referred to as service providers. Service providers are any person or entity providing an information society service, or access software providers that provide or enables computer services and other digital network access by multiple users to a computer server or digital system, including connection for the transmission of routing data.[338] This definition is similar to that of the DMCA and the EU E-Commerce Directive, consisting of two types of intermediaries, with the first being similar to Article 2(b) of the E-Commerce Directive and the second mirroring section 512(k)(1)(a).

The Bill contains standard regulations for the liability of service providers, for example safe harbour provisions[339] and the threshold requirement to remove content upon notification to qualify for the hosting[340] and linking exemption.[341] Importantly, section 53(7) and (8) are the two contested subsections that place an interesting further liability on intermediaries, which will be examined below.

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[337] Mandisa Rasmeni 'BIPA, stakeholders to review the copyright legal framework' *Namibian Economist* 17 September 2019, available at http://economist.com.na/47347/extra/bipa-stakholder-to-review-the-copyright-legal-framework/, accessed on 3 May 2023.
[338] S 1 of Draft Copyright and Related Rights Bill.
[339] S 53(1)-(4).
[340] S 53(3)(d).
[341] S 53(4)(d).

4.4 Section 53(7) and (8) of the Digital Copyright and Related Rights Bill 2021

Focusing on the two contested sections, it would appear that both would grant relief to internet users or alleged copyright infringers; this is commendable as they are mostly left out of the discussion. For instance, the DMCA has been criticised for the lack of input from advocates for ordinary consumers; this is believed to be a major flaw in the Act during the drafting process, with input being gleaned mainly from rights holders, intermediaries, library groups and recording machine manufacturers.[342]

4.4.1 Section 53(7)

Section 53(7) invalidates the immunity of service providers for failure to comply with procedures set out in section 53 and holds them liable to persons who made the reinstatement demand, for expenses incurred by any losses or damages sustained. This section is intended to hold intermediaries liable to the copyright owner and internet users.

The wording 'invalidation of immunity' presumably refers to the loss of safe harbour protection making intermediaries liable for copyright infringement. The term 'procedures' is broad enough to include the procedure set out in the safe harbour provision of section 53(1) and (4) and procedures for reinstatement of copyrighted works in section 53(5) which permits parties effected to write a demand for the reinstatement of the work, and section 53(6) requires service providers to restore the work upon receipt of a written demand but to remove the work again if the claimant who submitted the original claim of infringement initiates an infringement claim against the person who made the demand.

Section 53(7) therefore provides an incentive for intermediaries is to comply with reinstatement procedures. This is arguably needed because including a counternotification provision does not guarantee that a platform will comply and intermediaries usually ignore such notice as eligibility for safe harbour would not depend on complying with restoration

[342] Emily Asp op cit note 280 at 768.

requests.[343] Although section 53(7) could be considered to be a solution for intermediaries that ignore restoration request, the effectiveness of section 53(7) is dependent on a person showing initiative. That is, they would have had to make a counter-notification and if an intermediary fails to restore the work, section 53(7) is relied on. However the issue is that users generally will be hesitant to upload content after the removal of content has taken place, thus resulting in general inactivity,[344] and therefore will be less likely to demand the reinstatement of a copyrighted work owing to the delay in restoring content, lack of familiarity with copyright law and lack of access to affordable legal representation. Similar concerns are shared by scholars in relation to section 17(9) of the EU's DSM Directive, which requires OCSSP's to put a complaint and redress mechanism for users in place to dispute the removal of works (but does not hold them liable), arguing that the mechanism might appear unattractive to users owing to the time it takes to make a decision.[345] Additionally, intermediaries have had little reason to make users aware that counter notification is an option.[346]

4.4.2 Section 53(8)

Section 53(8) states that a service provider may use an automaded system to comply with obligation of adopting a system designed to reduce incidences of repeate offences in terms of section 53(3)(e) and (4)(e), such as the uploading of infringing content by internet users. The wording of section 53(8) entails that a service provider that decides to use an automated system to reduce the uploading of infringing content in the first place, is liable to the person, most probably the aggrieved internet user, who uploaded non-infringing content.

Section 53(8) provides internet users with another legal remedy but this is not as commendable. The first issue with section 53(8) is that it does not provide for the limitation of

[343] Matthew Sag op cit note 272 at 535.
[344] Chatzistogianna Maria *Liability of Internet Service Providers under Article 17 of the Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market* (LLM thesis, International Hellenic University, 2022) 33.
[345] Martin Senftleben 'Bermuda Triangle: Licensing, filtering and privileging user-generated content under the New Directive on Copyright in the Digital Single Market' (2019), available at http://ssrn.com/abstract=3367219, accessed on 15 June 2023; Chatzistogianna op cit note 341.
[346] Marc J. Randazza op cit note 271 at 747.

liability, and by doing so it is deviating from the norm as it is common in most jurisdictions for intermediaries to be immune from liability if the work removed is non-infringing. As evidenced in section 512(g)(1) of DMCA if the takedown was based on good faith, or section 54(2) of the ECTA for wrongful takedowns. Section 53(8) lacks accountability towards a rights holder if they sent an incorrect notice and to both intermediaries and rights holders so as not to limit the availability of works uploaded by users.

Other African countries that have recently amended their copyright acts have included similar provisions: for Nigeria this refers to any action done in good faith[347] and for Kenya wrongful takedown.[348] The purpose of providing immunity in such cases is to protect intermediaries against the liability to third parties whose material was taken down by them in order to comply with notice and takedown procedures, the failure of which would make them liable to rights holders.[349] The inclusion of immunity indicates an understanding that the fear of liability will cause intermediaries to respond promptly to a takedown notice, resulting in occasional mistakes. Intermediaries are eager to take down information that is potentially infringing; even if they are unsure about its legality they may err on the side of caution by over censoring.[350]

The second issue is the use of automated systems. Section 53(8) should be seen in the following light: In the event that service providers do use automated systems, they face liability if the removal of material is later found to be non-infringing. But without an exemption , this fails to take into account that such systems are not always able to detect whether materials infringe copyright. Automated tools that are only able to recognise full or partial matches between two or several files will not be able to assess whether a particular match ultimately amounts to illegal reproduction.[351] Depending on the size of the service provider, it may not be

[347] S 55(5) Copyright Act 8 of 2023.
[348] S 35B(10) Copyright Act 12 of 2001.
[349] S. Rept 105-551 – The Digital Millennium Copyright Act of 1998 at 59.
[350] Peter K. Yu 'Digital copyright enforcement measures and their human rights threats' in Christopher Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (2015) at 462-63.
[351] Evan Engstorm & Nick Feamster op cit note 223 at 18.

affordable for some to develop automated systems.[352] Nevertheless, although that is a valid criticism at this point in time, with the large volume of material on the internet, using automated systems is the most practical way for intermediaries to remove infringing content as stated in *Poland v Parliament Council.* This realisation does not mean, however, that intermediaries should be left with no immunity.

A saving grace is the wording 'may use automated systems'. This section does not make it compulsory to use such systems when removing content but that does not mean intermediaries won't. This mirrors the wording in the DSM Directive and Digital Copyright Act, both of which did not expressly require that intermediaries must employ automated systems. However, both regimes have faced criticism as most intermediaries will use them regardless, with the DSM Directive facing criticism that Article 17(4)(b) requiring best efforts to ensure unavailability of specific works and Article 17(4)(c) use best efforts to prevent future uploads and the proposed notice and Staydown procedure S 2(a)(2)(C) of DCA means the use of filtering technologies. To mitigate the use fitering systemsboth pieces of legislations contain provisions that do not require automated systems to be used, the DCA must establish reasonable best practises taking into account the size and type of service providers. In order to determine whether the OCCSP's applied best efforts were made in terms of article 17(4)(b)and(c), article 17(5) specifies particular factors to consider during the proportionality assessment meaning in some cases putting filtering technologies would not be necessary to demonstrate best efforts were made. The choice of factors suggest that smaller companies and economically less potent OCSSP's will not be measured the same ways as larger one.[353]

4.4.3 Overall criticism and potential harm of section 53(7) and (8)

Section 50(2) can be relied on by copyright holders as evidenced in Chapter 2, where, since the inception of the internet, copyright holders have relied on court-developed doctrines and

[352] Ibid at 22.

[353] Christopher Geiger and Bernd Justin Jütte op cit note 217 at 534.

existing copyright law to determine the liability of internet intermediaries. In other words, section 50(2) can be used to bring a claim of infringement against ISPs. This liability claim can be shielded provided they comply with the procedure in sections 53(3)(d) and 54(3)(d) requiring them to remove content upon notice. However, the removal will place them in a position where they may face liability from an internet user, as section 53(7) holds them liable for not complying with procedure in that they did not reinstate work upon receipt of a written demand and section 53(8) punishes an intermediary if they remove content, through use of an automated system, that happened to be non-infringing. This means that intermediaries face dual liability.

The approach proposed by the Bill is similar to that which other intermediary regimes have included but also differs in important ways. Such approaches are similar in that such legislations also contain safe harbour provisions. Section 53(7) of the Draft Copyright and Related Rights Bill is similar to Section 35(B)(6) where service providers are liable for failure to takedown or disable access to material and section 35(B)(7) for not notifying and providing copy of notice in the Kenyan Copyright Act.[354] In addition, the Nigerian Copyright Act[355] , in section 55(8), states that service providers that fail to notify a subscriber of a takedown notice and do not take down or disable access to infringing content or links to the content is liable for breach of duty and for infringement and Section 55 (9) states that a service provider who does not notify subscriber or remove content commits an offence and liable to a fine or conviction. The aforementioned provisions hold intermediaries liable for not complying with procedures relating to the removal of infringing content, but the difference is that both the Nigerian and the Kenyan Copyright Act specify the procedures and in contrast section 53(7) states who an intermediary is liable to. Despite the differences it is clear that liability for non-compliance is a common practice. It is also preventable as intermediaries are shielded from liability if they complete the notice and takedown or counternotification procedure thus protecting intermediaries against an infringement claim by a copyright owner or a liability claim by an internet users.

[354] Act 12 of 2001.
[355] Act 8 of 2023.

The way in which the Bill differs, however is that it does not contain a provision that shields intermediaries for acting in good faith. In contrast, section 512(f) of the DMCA limits liability for the removal of infringing material or material that is found to be non-infringing, while 55(7) of Nigeria's Copyright Act expands this limitation by stating that a service provider is not liable for any action done under good faith. Sections in the Bill that relate to wrongful takedown in response to a valid notice like section 54(2) of Namibia's Electronic Transactions Act and section 35(B)(10) of Kenya's Copyright Act are also absent.

Unlike the DMCA, section 53(8) of the Bill does not absolve service providers from liability for removal of content later found to be non-infringing. Whilst it can encourage service providers to take down content manually or in invest in proper software section, 53(8) fails to understand that most service providers will use it instead of manually taking down content and some might not be able to invest in good software. Since section 58(3) is about the removal of works by an automated system, the sensible option is to include a limitation of liability for the wrongful takedown of material, that is later found to be non-fringing. Considering the number of wrongful takedowns that may occur if an automated system is used, such limitation is important regardless if an automated system is used or not because intermediaries concerned with being eligible for safe harbour will takedown material in a quick manner. This limitation of liability could also be applied to section 53(3)(d) and 4(d) either a service provider is not liable if they removed content based on good faith or wrongfully taking down content based on a vaild or invalid notice in order to not be held liable under section 53(7). The lack of limitation allows aggrieved parties to take action against intermediaries, which seems unjustified considering that most service providers are generally doing so in response to a notice by a third party, which could be wrong.

The Bill does not contain a provision for any wrong actions of a copyright owner or an internet user for instance. Examples of such provision include:

1. According to section 512(f) of the DMCA, any person who knowingly misrepresents that material or an activity was infringing or the material removed or disabled was done so by mistake or misidentification under the "put back" procedure is liable.

Such mispresentation relates to copyright owners or users who make a knowing mispresentation in the notice or counter notice.[356]

2. Nigeria Copyright Act: section 57 similarly holds a person liable for knowingly misrepresenting works as infringing copyright or were removing such work by mistake.
3. Kenya Copyright Act: section 35(B)(8) states that a person is liable for false or malicious lodging of a takedown or counter notices and Section 35B(9) holds a person liable for false or malicious mispresentation .
4. Section 54(8) of the ETA states any person who makes false or misleading statement in a takedown notice, a notice objecting to takedown or further information provided by the person who requested for takedown to the service provider is liable.

The addition of such a provision is the recognition by lawmakers that combating online copyright infringement is not solely an intermediary's obligation, and parties who require intermediaries to undertake an action must also play their part by ensuring that their notices are correct and do not abuse their extra-judicial privilege. Lawmakers were able to predict that parties would provide false notice which an intermediary would rely on in order to remove or reinstate material. The misrepresentation provision is intended to deter knowingly false allegations in recognition that they are detrimental to service providers, copyright owners and internet users.[357] Section 53(7) could state that any person who lodges a false written demand is liable and that an intermediary is not liable for not complying with reinstatement if the written demand is false or misrepresented. Additionally it could state that lodging of false takedown notice that was not checked to make sure that the material was indeed infringing copyright makes a copyright owner liable, therefore placing some responsibility on the copyright owner for the wrongful takedown.

[356] Amanda Reid 'Considering Fair Use: DMCA's Take Down and Repeat Infringers Policies' (2019) 24 *Communication Law and Policy* 101 at 112.
[357] S. Rept 105-551 – The Digital Millennium Copyright Act of 1998 at 59.

It is argued here that placing liability on intermediaries for copyright infringement, without similar liabilities being placed on other parties and no further liability limitations for intermediaires means that the interests of intermediaries are not sufficiently considered. When creating the DMCA, the U.S. Congress considered the concerns of service providers and developed a law facilitating the robust development and world expansion of electronic commerce, communications, research, development and education in the digital age.[358]

The focus of section 53(7) and (8) is mainly on providing internet users with a legal basis for bringing a claim against intermediaries, seemingly in order to correct the issue of users typically not being considered in the enactment of such legislation. However this does not help the issue, and will impact the public's interest in having access to material. This is because intermediaries are concerned with facing liability from copyright owners and aggrieved internet users and they will find themselves constantly facing litigation which is costly and disadvantageous. This might deter intermediaries from facilitating access to such information, possibly causing some service providers to shut down and deterring new platforms from being created. In the EU, owing to Article 17, some platforms have already suggested they will no longer be operating after the DSM Directive is implemented.[359] The CEO of YouTube warned that EU residents are at risk of being cut off from videos that were viewed 90 billion times in just one month.[360] If digital platform companies perceive that their liability outweighs the potential benefits of operating in Namibia, the Draft Copyright Bill could wipe out entire platforms,[361]thus tilting the copyright regime towards an imbalance between copyright holders' and users' interest.

Too much regulation can be inefficient and lessen the usefulness and potential of the internet.[362] Consequently, the Bill fails to recognise that intermediaries are more than parasite

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[358] S. Rept 105-190 – The Digital Millennium Copyright Act 1998 at 1-2.
[359] Alexandra Brooks 'Liable for anonymous: The danger of holding digital platforms liable for copyright infringement of third party users' (2020) 52 *George Washington Law Review* 129 at 147.
[360] Susan Wojcicki 'The potential unintended consequences of Article 13' YouTube Creator Blog, available at https://www.youtube-creators.googleblog.com/108/11/i-support-goals-of-article-13-i-also.html, last accessed January 2024.
[361] Alexandra Brooks op cit note 369 at 149.
[362] Joan Gilsdorf 'Copyright liability of on-line service providers' (1998) 66 *University of Cincinnati Law Review* 619 at 622.

enterprises that have to be tolerated; rather, they are intrinsically valuable services.[363] The have become a crucial means for communication and commerce as well as for education and entertainment. The range of services offered by internet intermediaries has flourished over the past decade, mainly due to the legal protection that they have enjoyed from liability for third-party content that internet users send via their services.[364] Increasing intermediary liability shows that policymakers have forgotten the true purpose of copyright, which is to promote the dissemination of information for the progress of culture.[365] Dissemination is encouraged because we want the public to be able to read, view, and listen, to be able to extract ideas, to make their own and to build on them.[366] The creation of blogs, fan fiction, videos, music and other mashups is a result of many users having access to the copyrighted works of others.[367] Digital platforms have created a space where such creation may occur and these works may be shared online.

Increased liability for intermediaries could further impede users to exercise their right to freedom of expression. Access to the internet is recognised as paramount to the enjoyment and exercise of the right to freedom of opinion and expression guaranteed by Article 19 of the Universal Declaration of Human Rights (UDHR).[368] The internet has provided the technological enrichment of individual freedom of expression and has the ability to strengthen it by providing, developing and facilitating new mechanisms for exchanging data and, as a consequence, a more intense flow of information.[369]

In the case of Namibia, Article 21 of the Namibian Constitution grants all persons freedom of speech and expression, which shall include the freedom of the press and other media. By explicitly providing such freedom to express oneself it has been argued that Article

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[363] Cathy Gellis 'The Digital Copyright Act: We told Senator Tillis not to do this, but he did it anyway. So we told him again' *Tech Dirt* 8 March 2021, available at http://www.techdirt.com/2021/03/08/digital-copyright-act-we-told-senator-tillis-not-to-do-this-he-did-it-anyway-so-we-told-him-again/ last accessed January 2024..

[364] Frank La Rue op cit note 6 at 7.

[365] Steven D Jamar 'Internet expression in the 21st century: Where technology and law collide' (2010) 19 *Widener Law Journal* 843 at 851.

[366] Jessica Litman *Digital Copyright* (2006) 175.

[367] Edward Lee 'Warming up to USER-GENERATED CONTENT' (2008) 5 *University of Illinois Law* Review 1459 at 1461.

[368] Peter K. Yu op cit note 360 at 468.

[369] Vincenzo Zenzo-Zencovish *Freedom of Expression: A Critical and Comparative Analysis* (2008) 101.

19, the UDHR and even Article 21 foresaw to include and to accommodate future technological development through which individuals can exercise their right to freedom.[370] Similarly, in *Fantasy Enterprises v Nasilworski*[371] the court held that freedom of expression in Namibia extends to non-political disclosure; includes graphic expressions; and contemplates not only the act of imparting but also of receiving information and ideas.[372] Therefore, intermediaries' liability to both copyright holders and to other persons may be considered unconstitutional if their refusal to operate ultimately impedes a person's right to freedom of expression.

4.5 Futile sections?

The prevalence of online copyright infringement, and whether intermediaries should play a part in combating online copyright infringement is no longer a question. Consequently, the Copyright and Related Rights Bill provision of intermediary liability is considered to be necessary even though it can be argued that online copyright infringement in Namibia is not (yet) rampant. It has been reported that Namibia's internet penetration stands at just over 51% of the population, and that the Namibia Internet Governance Forum aims to achieve 100% internet coverage of the local population in order to unlock the power of Namibia's digital future.[373] But the fact that half of Namibia's population has internet access means that copyright infringement does indeed already take place online, and that once even more people have access to the internet, there will be an increase of the public utilising the internet to gain access to copyrighted work. This suggests that Namibia is instead preparing for possible litigation, as amendments to copyright law to protect musicians and copyrighted music on the internet have not been as much of a concern in Namibia as in other jurisdictions. Accordingly, the overhaul of Namibia copyright legislation is in response to the worldwide shift and to ensure that authors of copyrighted work are protected in the current and ever changing digital landscape.

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[370] Frank La Rue op cit note 6 at 7.
[371] *Fantasy Enterprises v Nasilworski* (APPEAL 159 OF 1996) [1998] NAHC 1.
[372] Ibid at 9.
[373] 'Only Half of Namibia's Population Has Access to the Internet' *Namibia Economist* 24 November 2021.

Overall, therefore, BIPA's inclusion of intermediary liability provisions is necessary considering the ever-increasing prevalence of online infringement world-wide but also in Namibia, and it follows international standards. Against this background, it is noteworthy that Kenya has sought to repeal provisions related to the liability of intermediaries. Two years ago, Home Bay Women Representative Gladys Wanga sought to amend the Copyright Bill of 2019 by proposing the Copyright (Amendment) Bill 2022. The Amandment Bill included the proposal to repeal section 35B which lays out the notice and takedown procedure to follow, section 35C which obliges an internet service provider to cooperate with investigating agencies to find offending materials, and section 35D which allows a person whose copyright is infringed to seek a court order against an ISP.

The proposed amendment received a backlash from stakeholders in Kenya on various grounds: (1) the repeal would legalise piracy as it would remove the first line of defence against piracy – ISPs;[374] (2) it would go against the international best practice;[375] (3) the current provisions are of key importance in setting out the minimum standard for online enforcement a service provider should follow;[376] (4) the provisions protect the creative industry in Kenya by providing incentives and a legal basis for better cooperation from ISPs to support rights holders in their fight against piracy;[377] and (5) the proposed provisions would remove any form of obligation on the part of ISPs to deal with the infringement of copyrighted works.[378] The 2022 Bill, now titled the Copyright Amendment Act No. 14 of 2022 , was eventually passed;[379] however, the proposal to repeal the provision on service provider liability was ultimately not included.[380] Kenya's attempt at a repeal does not mean that the proposed liability provisions

[374] 'In Copyright Bill change, a big win for Kenya's creative industry' *Business Today* 16 February 2022, available at https://businesstoday.co.ke/in-copyright-bill-change-a-big-win-for-kenyas-creative-industry/, last accessed January 2024.
[375] Ibid.
[376] Departmental Committee on Communication, Information and Innovation 'Report on the Consideration of the Copyright (Amendment) Bill, 2021 (National Assembly Bills no. 44 of 2021)' (2022) at 26, available at http://196.202.208.105/handle/123456789/1948, last accessed January 2024.
[377] Ibid.
[378] Ibid at 28.
[379] The Copyright Amendment Act 14 of 2022.
[380] Cynthia Nkuzi 'Developments in Kenya's Copyright Law: The Copyright (Amendment) Act of 2022' *Centre for Intellectual Property and Information Law* 7 June 2022, available at

are an improvement; instead, it evinces that intermediaries should co-operate when it comes to online copyright enforcement. This involves them responding to takedown and reinstatement notices, although they should in principle be guaranteed freedom from liability.

4.6 Conclusion

The development of an intermediary liability regime is not an immediate concern for African countries. However, over the years, owing to the continuous increase in internet usage on the continent, lawmakers have sought to amend or develop legislation to mitigate the issue of online copyright infringement, including provisions that regulate the liability of intermediaries.

Namibia has followed suit with BIPA creating the 2021 Draft Copyright and Related Rights Protection Bill. The Bill, in addition to laying out the standard liability provisions, includes provisions that enable alleged copyright infringers, normally internet users, to seek legal action against service providers in terms of section 53(7) for failure to comply with procedures and section 53(8) for the wrongful removal of non-infringing material. These two sections place additional responsibility on internet service providers. In doing so, Namibia is following the trend in other jurisdictions where the effectiveness of the current liability regimes for intermediaries is being questioned and discussions on stronger liability are taking place. Such demands for stronger liability laws have begun since the enactment of the DMCA in the U.S. and the E-Commerce Directive in the EU. Many stakeholders in the copyright industry, especially rightsholders, would have preferred stronger liability for internet service providers in national laws back in the 1990s and 2000s, but went along with safe harbour as part of the legislative compromise concerning the updating of copyright rules for the digital world.[381]

The liability regime proposed by the Namibian Bill does not follow international best practises, because of the lack of liability limitations and because it does not include a liability provision for copyright owner or a third party. It is argued here that the proposed liability regime would substantially and negatively affect the functioning of intermediaries, resulting in

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http://www.cipit.strathmore.edu/developments-in-kenyas-copyright-law-the-copyright-amendment-act-of-2022, accessed January 2024.

[381] Pamela Samuelson op cit note 219 at 301.

the interests of the public to have access to copyrighted material being adversely impacted and causing an imbalance between the interests of the public, intermediaries and copyright owners.

Chapter 5: Conclusions and Recommendations

5.1 Conclusions

Internet intermediaries have played an important role in combating online copyright infringement. They have been the target of copyright litigation cases where courts have, in some cases, not found them liable. This is because the courts have understood the important role intermediaries play in society as facilitators of information and how judgments made in favour of copyright holders negatively affect the dissemination of information.

This understanding has influenced legislators when devising a liability regime. Such a regime consists of a list of intermediary activities that a service provider could raise as a defence in a copyright infringement case – referred to as safe harbour – and the requirements to cooperate with copyright holders to prevent infringing material from being uploaded and disseminated on their platforms.

Such legislation has been the standard for the past 20 years since the enactment of the Digital Millennium Copyright Act (DMCA) in the U.S. and the e-Commerce Directive in the EU. As newer intermediaries have developed, including social media networks and e-commerce sites, they have been able to be protected under safe harbour provisions as a result of the broad interpretations given by courts. Consequently, rights holders have advocated for stronger laws, expressing the concern that legislation has not been effective in protecting their rights and has resulted in newer intermediaries hiding behind the safe harbour provisions.

Consequently, law and policymakers have developed or taken on the challenge of drafting new legislation. These legislative efforts, for example the Digital Single Market (DSM) Directive and Digital Copyright Act Discussion Draft of 2021 (DCA), increase responsibilities of intermediaries, implying the use of filtering technologies. The DSM Directive has introduced a heightened liability regime – and Article 17 makes provisions specific to online content sharing service providers (OCSSPs). This has been criticised for burdening intermediaries and solely

benefiting copyright holders as well as the way it will affect the functioning of internet intermediaries.

In Namibia, BIPA has, since 2019, sought to devise a legal regime suited to the digital landscape, resulting in the adoption of the Copyright and Related Rights Bill of 2021, with section 53(7) and (8) being the contested provisions in this thesis. Both provisions hold intermediaries liable to non-copyright holders, that is, an aggrieved party. This thesis aimed to ascertain the appropriateness of these two provision in conjunction with intermediaries already being sued for copyright infringement.

The thesis first outlined the contested provision. Section 53(7) invalidates a service providers immunity and holds service providers liable to persons who demand the reinstatement of material that was previously taken down, if they failed to comply with notice and takedown procedure or reinstatement of material upon a written demand. Section 53(8) holds service providers liable if the work removed by an automated system is later found to be non-infringing.

Section 53(7) was commended as it provides a legal incentive for intermediaries to comply with counter-notification procedures but the success of section 53(7) will require initiative on the part of the public, who generally fail to make use of the counter notification procedure. Section 53(8) was criticised for not including a limitation of liability for the takedown of material that is later found to be non-infringing as many foreign and fellow African countries have done, on the understanding that intermediaries' fear of liability will cause them to swiftly remove the offending content. It would further be unpractical to not include such limitation, considering that most intermediaries would likely employ automated systems, which are often unable to distinguish infringing from non-infringing material. Section 53(8) was commended for not making it mandatory to use automated systems based on the wording of the section but it should be clearly stated in order to provide certainty that not all service providers have to employ automated systems and include provision similar to what can be found in the Copyright and Digital Act and the DSM Directive where the size and type of service providers determines the best practises and whether best efforts were made.

Secondly, a critical analysis of section 53(7) and (8) was carried out. The proposed provisions in conjunction with section 50(2) being used to claim secondary infringement, would mean that intermediaries effectively face dual liability towards two parties. Facing dual liability, with no limitation of liability provision, has the effect of deterring intermediaries from performing functions that benefit internet users. The two provisions, although providing a right of action will have an impact on the public's interest of accessing material. Dual liability fails to take into account the important role internet intermediaries play in the daily life of the public and how such provisions could impede the exercise of freedom of expression. Additionally, the interest of intermediaries are seemingly not sufficiently considered. While the approach of the Bill was found to be following best overseas practises in general, it was observed that they lacked liability of parties who use either takedown or reinstatement procedures and limitation of liability for wrongful takedown or removing work based on good faithwas absent.

Thirdly, the thesis raised the question of the necessity of section 53(7) and (8). It was reported that the internet penetration in Nambia is 51% and will continue to increase with the goal that the entire population is ultimately able to access the internet. Bearing this in mind, online copyright infringement does already occur in Namibia, whicbh makes the inclusion of this section essential. Therefore, BIPA is commended for its efforts which are the opposite of those evidenced by Kenya. In the latter country attempts were made to repeal section 35B which lays down the notice and takedown procedure to follow, section 35C which obliges an internet service provider to cooperate with investigating agencies to find offending materials, and section 35D which allows a person whose copyright is infringed to seek a court order against an internet service provider. Subsequently a backlash was experienced from various stakeholders. It is concluded that intermediaries' obligations towards copyright owners and internet users should co-exist with protections and sharing of responsibility by other parties for wrongful acts.

In light of the foregoing, this thesis concludes that section 53(7) and (8) is, in general, a necessary inclusion and the proposed regime also aligns with the approaches adopted in other jurisdictions. However, more attention should be paid to lessen the burden on intermediaries and not impede their development.

5.2 Recommendations

1. Section 53(8) should include a limitation of liability for the wrongful takedown of material, that is later found to be non-fringing when content is removed by an automated system.

2. Section 53(8) should clearly state that certain service providers are exempt from employing automated systems and may utilise other methods to remove materials. This is similar to section 2(a)(2)(E) of the DCA, which requires the Copyright Office to take into account the size of the service provider when establishing best practices.

3. A provision should be included to address a case where an aggrieved party brings a claim for failing to reinstate the work upon receipt of demand in terms of section 53(7). This provision should state that such person is liable either for the written demand lodged being false or they misrepresented that the material was removed by mistake or misidentification, if the reason for non-compliance is a result of an invalid written demand.

4. To further exempt service providers from liability in section 53(7), it should be stated that persons who lodge a false takedown notice are liable.

5. Include a provision for a service provider not be held liable under section 53(7) when they remove content based on good faith or wrongfully taking down content based on a vaild or invalid notice.

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