

**THE ENFORCEMENT OF DIGITAL COPYRIGHT IN
EGYPT: THE ROLE AND LIABILITY OF INTERNET
SERVICE PROVIDERS**

BY

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ABSTRACT

The thesis examines to what extent copyright holders can enforce the online reproduction and communication rights against online service providers in Egypt. The objective of the thesis is therefore to highlight that the existing Egyptian copyright law 2002/82 is insufficient to impose liability on internet service providers, both substantively and also with regards to enforcement. Various recommendations are thus made to improve the legislative framework in Egypt, all with a view of achieving that a fair balance is struck for all those parties, who/which are involved in digital communications, particularly online end users, so that their rights to online privacy and access to information are preserved. For this purpose, a comparative methodology has been adopted and recourse is made to US and European laws. This comparative approach is further complemented by a critical examination of existing deficiencies within the legislative liability regime for internet service providers in the US and Europe in order to ensure that foreign laws are not merely transplanted, but that the best and most suitable legislative framework is adopted by the Egyptian legislator.

DECLARATION

I declare that the work presented in this thesis is to the best of my knowledge and belief original, except as otherwise acknowledged in the text thereof and that this material has not been submitted in whole or in part for a degree at this or any other university.

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TABLE OF CONTENTS

ABSTRACT	2
DECLARATION	3
ACKNOWLEDGEMENT	4
TABLE OF ABBREVIATIONS	8
CHAPTER 1: INTRODUCTION	13
1.1 BACKGROUND AND RESEARCH QUESTION	13
1.2 EGYPT AS A CASE STUDY	22
1.3 THE SCOPE OF THE THESIS AND A TRANSLATION NOTICE	24
1.4 STRUCTURE AND OUTLINE OF THE STUDY	24
CHAPTER 2: DEFINING THE LIABILITY OF ONLINE PROVIDERS IN EGYPT	26
2.1 INTRODUCTION	26
2.2 THE PROBLEM IN DEFINING THE LIABILITY OF PROVIDERS	26
2.3 AN ANALYSIS OF THE APPLICATION OF TORT LAW IN COMMON LAW & CIVIL LAW SYSTEMS	33
2.4 APPLYING THE PRINCIPLES OF THE DUTY OF CARE TO PROVIDERS	36
2.5 THE LIABILITY OF ONLINE PROVIDERS IN THE US	41
2.5.1 Liability Based on the Actual Knowledge Standard	42
2.5.2 Liability Based on the Awareness Standard	43
2.5.3 Liability Based on the Inducement Standard	46
2.6 THE LIABILITY OF ONLINE PROVIDERS IN EUROPE	49
2.6.1 Negligence Tort in Europe	49
2.6.2 The Scope of the Duty of Care under Directive 2000/31	51
2.6.3 Joint Liability	54
2.6.4 Duty to Act	56

2.7 THE EGYPTIAN TORT LIABILITY APPROACH	59
2.7.1 The Economic Court	61
2.7.2 The Prejudice Element	63
2.7.3 The Fault Element	64
2.7.4 The Causation Element & the Joint Liability Approach	68
2.7.5 The Application of Egyptian Tortious Liability to Online Providers	71
2.8 CONCLUSION	72
CHAPTER 3: THE SCOPE OF THE EXCLUSIVE RIGHTS IN EGYPT	75
3.1 INTRODUCTION	75
3.2 THE ENACTMENT PROCESS OF THE EIP	77
3.3 THE INTERNATIONAL OBLIGATIONS IN RESPECT OF THE EXCLUSIVE RIGHTS	80
3.3.1 The Berne Convention	81
3.3.2 The Rome Convention	86
3.3.3 The TRIPs Agreement	88
3.3.4 The WIPO Treaties 1996	92
3.3.5 The European Agreements	96
3.4 THE EXCLUSIVE RIGHTS OF COPYRIGHT HOLDERS UNDER THE EIP	99
3.4.1 The Reproduction Right under the WIPO & the EIP	103
3.4.2 The Communication Right under the EIP	109
3.4.3 The Scope of Liability of Online Providers in Egypt	116
3.5 CONCLUSION	120
CHAPTER 4: THE IMMUNITY SYSTEM IN EGYPT	122
4.1 INTRODUCTION	122
4.2 THE DEFINITIONS OF PROVIDERS IN THE US & EUROPE	123
4.2.1 Transitory Communication	124
4.2.2 Caching Systems	127
4.2.3 Hosting and Information Location Tools (Storage Provider)	131

4.3 THE SCOPE OF IMMUNITY IN THE US & EUROPE _____	135
4.3.1 The Actual Knowledge Standard _____	
4.3.2 The Awareness Standard _____	147
4.3.3 Expeditious Response & Updated Technology _____	155
4.4 THE SCOPE OF IMMUNITY UNDER THE EIP _____	160
4.5 THE APPLICATION OF THE IMMUNITY PRINCIPLES TO ONLINE PROVIDERS IN EGYPT _____	163
4.6 CONCLUSION _____	165
CHAPTER 5: THE RIGHTS OF ONLINE END USERS & INJUNCTIVE RELIEF IN EGYPT _____	169
5.1 INTRODUCTION _____	169
5.2 THE RIGHTS OF END USERS & THE LIABILITY OF ONLINE PROVIDERS _____	170
5.3 PRIVACY & ACCESS TO INFORMATION RIGHTS IN THE US & EUROPE _____	175
5.3.1 The Repeat Infringer in the US and Standard Technical Measures _____	176
5.3.2 Online Privacy and Access to Information in Europe _____	180
5.4 THE INTERNATIONAL OBLIGATIONS IN RESPECT OF INJUNCTIVE RELIEF _____	188
5.4.1 Injunctive Relief under the TRIPS Agreement _____	190
5.4.2 Injunctive Relief in the US _____	192
5.4.3 Injunctive Relief in Europe _____	194
5.5 INJUNCTIVE RELIEF UNDER THE EIP _____	199
5.5.1 The Procedural Conditions for Issuing Injunctive Relief _____	200
5.5.2 The Scope of Measures under the EIP _____	203
5.6 CONCLUSION _____	208
CHAPTER 6: CONCLUSION _____	210
BIBLIOGRAPHY _____	219

TABLE OF ABBREVIATIONS

17 of U.S.C

Copyright Law of the United States of America and Related Laws

ACTA

Anti-Counterfeiting Trade Agreement

BGB

German Civil Code

CCP Law

Egyptian Civil and Commercial Procedures Code 1954

CJEU

Court of Justice of the European Union

Commission

The European Union Commission

Data Protection Directive 1995/46

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data EC

Directive 97/66

Directive 97/66 of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector

Directive 2000/31

European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular the Electronic Commerce, in the Internal Market

Directive 2001/29

Parliament of the European Union Directive of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

Directive 2004/48

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Directive 2009/136

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer

DMCA

The United States Digital Millennium Copyright Act of 1998

ECC

Egyptian Civil Code

ECGP

The European Commission Green Paper, Copyright and Related Rights in the Information Society 1995; Follow-up of the Commission of the European Communities to the Green Paper and Related Rights in the Information Society, COM (96) 568 final (20 November 1996)

ECHR

European Convention on Human Rights

E-FTA

European Free Trade Association

EIP

Egyptian Intellectual Property Rights Law (2002/82)

EM-FAT

Euro-Mediterranean Free Association Agreement

EPA

Egyptian People's Assembly

ePrivacy Directive

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector

EU

European Union

FCC

French Civil Code

FTA

Free Trade Agreements

GATT

General Agreement on Tariffs and Trade

HADOP II

La loi relative à la protection pénale de la propriété littéraire et artistique sur internet

HRREP

House of Representatives Report No.105-55

IIPA

International Intellectual Property Alliance

IREPA

Internal Regulation of Egyptian people's Assembly

ITIDA

Information Technology Industry Development Agency (Egypt)

ISPs

Internet Service Provider(s)

Joint Committee

People's Assembly of the Arab Republic of Egypt, Joint Committee Report No.3
(8th Legislative Term, 1st Session, 6 June 2001)

LECN

French Law in the Confidence of the Digital Economy of 21 June 2004

MCs

Mixed Courts

NCs

National Courts

NTRA

National Telecommunication Regulatory Authority

S. Rep

Senate Judiciary Report

SAFC

Supreme Armed Forces Council

Storage Provider

Hosting & Information Location Tools Providers

TMG 2007

Federal Teleservices Act/2001(TDG 2001) by the German Telemedia Act

TRIPs

Agreement on Trade-Related Aspects of Intellectual Property Rights

TRL 2003/10

Egyptian Telecommunications Law 2003/10

Universal Service Directive

Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services

WIPO

World Intellectual Property Organisation

WCT

WIPO Copyright Treaty

White Paper

The U.S. Commerce Department Report of the Working Group, Intellectual Property and the National Information Infrastructure

WPPT

WIPO Performances and Phonograms Treaty

UGC

User-Generated-Content

USTR

United States Trade Representative

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND AND RESEARCH QUESTION

The main objective of the thesis is to comprehensively and critically analyse how the imposition of liability on internet service providers (hereinafter a service provider) is critical to protect digital copyrights in Egypt. The analysis focuses on the international substantive rules and enforcement provisions as set out, particularly in the Berne Convention, the Rome Convention, the TRIPs Agreement and the WIPO Treaties, as these forums have affected the manner in which liability is imposed on online service providers.¹ It is also analysed, which legal principles the US and Europe, namely France and Germany, have adopted to impose liability on service providers, as well as the consequences of this. Subsequently, the findings are then compared with the Egyptian approach. It is also assessed how a balance can be struck, so that the conflicting interests of those involved in digital transmissions are fairly balanced and it is ensured that the rights of online end users, including the right to privacy and access information, are safeguarded. This is particularly important since the liability of providers is closely tied to the rights of online end users.

It should be noted that the thesis is not concerned with evaluating to what extent Egypt has implemented the World Trade Organisation (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), as this has been the focus of earlier scholarly work.² However, the TRIPs enforcement provisions remain particularly relevant for the analysis since one of the main objectives for the adoption of the Egyptian unified law on the Protection of

¹ World Intellectual Property Organisation (WIPO) Copyright Treaty, Dec. 20, 1996, S. TREATY DOC.NO.105-17, 36 I.L.M. 65 (1996) (1996, December 20) http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html > (accessed Feb 18, 2012); WIPO Performance and Phonograms Treaty, Dec. 20, 1996, S. TREATY. DOC.NO. 105-17, 36 I.L.M. 76 (1996) (1996, December 20) <http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf> (accessed July 18, 2012).

² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS or TRIPS Agreement]. Mohamed Salem A. Balat, A Legal Analysis of Egypt’s Implementation of the TRIPS Agreement Against The Background of Intellectual Property Rights in The World Trade Organisation (2005) (unpublished Ph.D. thesis, University of Manchester, 2007).

Intellectual Property Rights 2002/82 (hereinafter EIP)³ was to achieve compliance with Egypt's obligations under the international enforcement treaties in relation to the exclusive rights of copyright holders. Nonetheless, the problem with the TRIPs Agreement is that the Agreement does not specially address the challenges and difficulties, which arise from the emergence of the internet or enormous development within modern technologies.⁴

The problem with modern technologies is that in the past two centuries, the vital purpose of copyright law was to enhance and promote extensive public access to a wide range of informational works through notions, such as the fair use doctrine. Nonetheless, within a digital environment, new technologies pose challenges to the protection and enforcement of works, since copying is rendered much easier and also since copyright infringements can take place outside a particular jurisdiction through the use of online service providers' servers, which allow online end users to violate the digital reproduction and communication rights of copyright holders.⁵

The pressing question which lawmakers have to therefore address is not whether digital reproduction and communication activities should be subjected to copyright law, but instead how this can be achieved in the digital realm.⁶ In response to this issue, the previous Clinton administration⁷ and the European Community⁸ adopted two proposals, which were submitted to the WIPO

³ Law No. 82 of June 2, 2002, al-Jaridah al-Rasmiyah [*Official Gazette of Egypt*], June 2, 2002, vol. 2bis.

⁴ Susan A. Mort, "The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighbouring Rights" (1997-1998), *Fordham Intellectual Property, Media and Entertainment Law Journal* 173, at 184.

⁵ Jacqueline D. Lipton, "Secondary Liability and the Fragmentation of Digital Copyright Law" (2009) 3, *Akron Intellectual Property Journal* 105, at 107; Teresa Hackett, "Learning with Libraries and Copyright Issues" in Information Meeting on Education Content and copyright in the Digital Age, *WIPO*, (November 21, 2005) http://www.wipo.int/edocs/mdocs/copyright/en/educ_cr_im_05/educ_cr_im_05_www_53634.pdf (accessed Sep 4, 2013).

⁶ Jeanmaire Lovoi, "Note: Competing Interests: Anti-Piracy Efforts Triumph Under TRIPS but New Copying Technology Undermines The Success" (1999), *Brooklyn Journal of International Law* 445, at 448.

⁷ The Clinton administration revealed its Information Infrastructure Task Force White paper 1995 (including the text for the proposed legislation, which later became part of the two WIPO Treaties and the Digital Millennium Copyright Act of 1998 (DMCA).

⁸ The European Commission published another Green Paper entitled "Copyright and Related Rights in the Information Society" (hereinafter ECGP 1995); Follow-Up of the Commission of

Committees, so that new regulations could be developed to solve the emerging problems from digital transmissions.⁹ For this reason, the World Intellectual Property Organisation (WIPO) hosted an international diplomatic conference in Geneva from the 2nd to the 20th December 1996.¹⁰

At the diplomatic conference two treaties were adopted; the WIPO Copyright Treaty (hereinafter WCT)¹¹ and the WIPO Performances and Phonograms Treaty (hereinafter WPPT).¹² These two treaties grant copyright holders exclusive rights to reproduce and communicate, including the right to make works available to the public online; for example to authorise or to prohibit the dissemination of works and other protected materials through interactive networks, such as the internet.¹³ The WIPO Treaties 1996 are therefore considered the main international sources for the protection and enforcement of the reproduction and communication rights of copyright holders online.¹⁴

As a result, regional bodies, such as the EU, and countries all over the world, including the US, have transposed the WIPO Treaties into their regional and/or domestic legal systems.. For instance, section 106 of the Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code (hereinafter 17 of U.S.C) regulates copyright holders' exclusive rights,¹⁵ whereas in Europe, the Parliament of the European Union passed the Directive of the European Parliament and of the Council of 22 May 2001 on the

the European Communities to the Green Paper and Related Rights in the Information Society, COM (96) 568 final (Nov. 20, 1996), at 12.

⁸ Article 2(2) of the TRIPs Agreement and Article 1(1) of the WPPT.

⁹ Mihaly Ficsor, "Award a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument", in P. Bernet Hugenholtz ed., *The Future of Copyright in a Digital Environment* (Kluwer Law International, UK, 1996), at 111, 117.

¹⁰ W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th edition, Sweet & Maxwell, UK, 1999).

¹¹ World Intellectual Property Organisation (WIPO) Copyright Treaty, Dec. 20, 1996, S. TREATY DOC.NO.105-17, 36 I.L.M. 65 (1996) (1996, December 20) http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (accessed Feb, 18 2012).

¹² WIPO Performance and Phonograms Treaty, Dec. 20, 1996, S. TREATY. DOC.NO. 105-17, 36 I.L.M. 76 (1996) (1996, December 20) http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf (accessed July 18, 2012).

¹³ Articles 1(4) and 8 of the WCT; Articles 10, 12 (1), 14 and 15 of the WPPT.

¹⁴ WIPO, "WIPO Welcome U.S Ratification of 'Internet Treaties'" (Sep. 14, 1999), http://www.wipo.int/edocs/prdocs/en/1999/wipo_pr_1999_183.htm (accessed July 18, 2012).

¹⁵ 17 of U.S.C Sec. 106 (1)-(6) of DMCA.

Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter Directive 2001/29) in order to spell out the holders' exclusive online rights in accordance with the principles set forth in the WIPO Treaties 1996.¹⁶

However the risks for holders are exacerbated by the fact that it is difficult for copyright holders to pursue infringers since the unauthorised copying cannot be easily linked to a person or a particular place.¹⁷ For this reason, copyright holders seek to bring civil proceedings against service providers, as they play an active role in encouraging and facilitating copyright violations and resultant monetary damage by third parties on their networks.¹⁸

Copyright holders therefore want to reform international and national copyright laws since their interests are best protected if strict liability was imposed on service providers and they could bring civil proceedings against service providers to enforce their rights to compensation and other remedies.¹⁹ However, service providers argue that if strict liability or liability without fault was applied that liability will be imposed on them, despite them being no aware of the copyright infringement on their networks²⁰ and that such an approach would give copyright holders absolute exclusive rights, which would have an adverse effect for society.²¹ This is because providers would adopt pre-emptive and protective technological measures to avoid potential allegations from copyright

¹⁶ Articles 2-5 of Directive 2001/29.

¹⁷ Mathew Ingram "RIAA Drops Lawsuit Strategy for "Three Strikes" Plan (19 December, 2008), *GiGAOM*, <<http://gigaom.com/2008/12/19/riaa-drops-lawsuit-strategy-for-three-strikes-plan>> (accessed February 29, 2011).

¹⁸ Elvin Wong Chi Chung, *The Working of Pop Music Culture in the Age of Digital Reproduction* (PhD thesis, University of Hong Kong, 2010), at 13-105 (the author cited one commentator, who is against copyright owners' claim, who states that "...even if the decline of CD sales was caused primarily by file-sharing, one should not simply conclude that the majors are facing an 'out-and-out crisis'").

¹⁹ Yannis Bakos, et al., "Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing and Micropayment Systems" at Conference on Internet Publishing and Beyond, *The Economics of Digital Information and Intellectual Property* (June, 1997), <<http://pages.stern.nyu.edu/~bakos/aig/aig.html>> (accessed 20 May, 2011); Susan A. Mort, "The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighbouring Rights" (1996-1997) 8(1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 173, at 190.

²⁰ Coenraad Visser, "Online Service Providers: Models for Limiting Their Liability" (2000) 12 *South African Mercantile Law Journal* 164, at 164-165.

²¹ William Party, *Moral Panics and Copyright Wars* (Oxford University Press, USA, 2009), at 7, 36.

holders, even if this denies end users the rights to evoke the fair use defense and violates the principle of proportionality.²²

Yet certain jurisdictions shield service providers from liability until they actually know or are aware of the illegal content or unlawful activities, but fail to control this, by for instance removing or even disabling access. This means that liability of service providers is premised on fault when it is shown that the existing duty to take reasonable care is breached.²³

Nevertheless it is doubtful whether service providers should be held liable since the WIPO Treaties 1996, despite covering digital online transmissions, do not address liability in an unambiguous manner.²⁴ As a result, some jurisdictions regulate liability very clearly, as for example, the US and the European Union, whilst other jurisdictions, such as Egypt, have not adopted a clear cut regime.²⁵

The US, in an effort to provide effective online copyright protection and to limit the potential liability of providers, adopted the Digital Millennium Copyright Act of 1998 (the DMCA).²⁶ The DMCA implements the two WIPO treaties and Title II of the DMCA (section 512 of DMCA) clarifies that providers are liable for copyright infringement, which take place over the internet.²⁷ Fundamentally, section 512 of the US Copyright Act recognises that liability depends on the

²² *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* (C-275/06) (CJEU (Grand Chamber) (29 January, 2008), at 65-68.

²³ Alexander Bayer, "Liability 2.0-Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany" in Liber Amicorum Joseph Straus, ed., *Patents and Technological Progress in a Globalized World* (Springer, UK, 2009), at 369.

²⁴ In this context, the WIPO Treaties did not address liability of ISPs except in Article 8 of the Agreed Statement, which provides that "it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication." This Agreed Statement is further discussed in the next chapter.

²⁵ Anu Bradford, "When the WTO Works, and How It Fails" (2012-2011) 51, *Virginia Journal of International Law* 1, at 3.

²⁶ Digital Millennium Copyright Act, § 202, Pub. L. No. 105-304, 112 Stat. 2860, 17U.S.C. Sec. 512 (1998, October 28) <http://www.copyright.gov/title17/92appb.pdf> (accessed July 12, 2012).

²⁷ ISP copyright liability is dealt with in Title II of the Digital Millennium Copyright Act (Section 512 of the U.S. Copyright Act).

particular services and therefore sets out a number of “safe harbour” provisions to exempt service providers.²⁸

Section 512 of the US Copyright Act applies two general tort principles - vicarious liability²⁹ and contributory liability- in order to determine whether a service provider should be held liable for the copyright infringement of a network user.³⁰ These two liability principles, which are borrowed from the law of tort, make it possible to effectively analyse whether an internet service provider should be held liable.³¹ Hence, liability is imposed out when the act of a provider does not fall within the exceptions set out in section 512 of DMCA and the two liability principles are established.³² Therefore, the scope of the safe harbor provisions set forth in section 512 of the DMCA combined with the principles established by US cases are the most important elements upon which liability of providers is based.³³

On the other side of the Atlantic, Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular the Electronic Commerce, in the Internal Market (hereinafter the Directive 2000/31) harmonises liability for service providers in all Member States. The Directive has horizontal effect and Articles 12 to 15

²⁸ “Safe harbours” are limitations of liability under section 512(a)(b)(c) and (d) of the US Copyright Act for provider’s activities, such as transitory digital network communications, system caching, information on systems or networks at the direction of users and information location tools.

²⁹ Vicarious liability originates from the tort law doctrine of agency - *respondent superior*, it is the responsibility of the superior for the acts of its subordinate; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), pp.261-62 (confirming the connection between vicarious copyright liability and respondent superior); *PRS v. Cyril Theatrical Syndicate, Ltd* [1924]1 K.B.1 and *PRS v. Mitchell & Booker* [1924]1 K.B. 762.

³⁰ Contributory liability stems from tortious *enterprise* liability pursuant to which those, who directly contribute to another’s infringement should be held accountable; *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

³¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003).

³² For example, the cases of *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981).

³³ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012).

impose liability for all kinds of service providers and also set out the scope of liability and when immunity can be pleaded.³⁴

However in Egypt, which has got one of the largest network infrastructures in the Middle East and Africa, Egyptian can upload and download unlimited amounts of illegal copyrighted works.³⁵ This is because the majority of Egyptian service providers provide unlimited ADSL+, which allows end users to easily reproduce and distribute unauthorised copyrighted materials from any network without permission being sought from copyright holders.³⁶

This digital piracy has resulted in seventy-five percent of revenues having vanished,³⁷ causing more than \$50 million losses annually.³⁸ This is despite the new Egyptian copyright law granting exclusive rights and remedies to copyright holders and enabling copyright holders to bring any kind of civil proceedings against service providers. This is because until to date no decision has been issued by the courts, which imposes copyright liability on internet service providers, nor have courts ordered service providers stop or prevent illegal or unlawful acts or to remove contents from their systems.³⁹

Hence, the question arises why copyright holders cannot pursue civil proceedings against online service providers and apply for injunctive relief in

³⁴ Articles 12 to 14 of the Directive 2000/31.

³⁵ 65% of the Egyptian population are young users, whose average age is between 18 to 25 years old. Online privacy in Egypt is thus attributable to young adults; see, "Internet Statistics Egypt and Online User Behaviour", *AD-MANESS*, (January 03, 2011), available in English versions at; <http://www.admadness.co/2011/01/internet-statistics-egypt/> (Accessed July 18, 2012).

³⁶ NaglaRizk, "Notes from Egypt's alternative Music Scene: Business Models, Commons and Copyright" (2010) 13(3) *The Journal of World Intellectual Property* 491 (author cited this statistic from Alexa.com); see, "Internet and e-commerce industry in Egypt", *ecommerce-journal*, (April 7, 2009), available in English version at; <http://www.ecommerce-journal.com/articles/14478_internet_and_e_commerce_industry_in_egypt>(Accessed July 18, 2012).

³⁷ Guy Brown, Interview with Inas El-Dihgady , a prominent Egyptian director, " The movie business in Egypt", (8 December 2002), *business Features news*, <<http://www.ameinfo.com/16692.html>>, (Accessed June 28, 2012).

³⁸ Report for George Washington, Creative and Innovative Economy Centre by Bertrand Moullier, "Giant with feet of clay: Creativity, IP rights and Economic Challenges in the Egyptian Film Industry", (2007), at 5, 19.

³⁹ Dr Hashem is the Executive Vice President of the Information Technology Industry Development (*ITIDA*). This interview had been conducted with an Egyptian author on 05 August 2011; see, International Intellectual Property Alliance (IIPA), 2010 Special Report on Copyright Protection and Enforcement (hereinafter IIPA Special Report/ 2010); Special Report/ 2010, at 177.

order to protect their exclusive online rights. The answer to this question is further illustrated by the discussions of the Egyptian delegations, which took place at both the Joint Committee when the new Egyptian copyright law (hereinafter EIP) was drafted, as well as the Diplomatic Conference of the WIPO Treaties 1996.

The thesis therefore firstly explains the difficulties when defining the scope of liability to which service providers should be subjected to. The analysis focuses on the general principles of the law of tort under both the common law and civil law systems in the US and Europe, especially France and Germany.⁴⁰

After the liability standard, which the US and Europe have adopted, has been defined, the thesis critically analyses the relevant civil procedure rules for infringement claims under tort law, including the right to compensation under the Egyptian Civil Code 1948 (hereinafter ECC), namely the personal tort approach and joint liability concept, as set out in Articles 163 and 169 of the EIP. The thesis compares all previous findings in order to identify why the Egyptian courts have not yet imposed liability on service providers.

After it has been explained, in which instances service providers can be held tortuously liable in the US and Europe, this is then applied to service providers in Egypt in order to identify which unlawful activities of providers fall within the scope of the holders' exclusive rights. The thesis does not attempt to offer an analysis of all the exclusive rights of holders, but only considers the online reproduction and communication rights of copyright holders, as liability in respect of these two rights is globally most controversial.

The paper also provides a comprehensive critical analysis of the scope of these two rights as set forth in the Berne Convention, the TRIPs Agreement, and the WIPO Treaties 1996, particularly Articles 1(4) and 8 of the WCT and Articles 10, 12 (1), 14 and 15 of the WPPT and compares the different outcomes with the

⁴⁰ The reason for choosing these jurisdictions are that the US adopts the common law system and it can thus be explained how liability of service providers is regulated under this system. For the same reason, Germany and French have been chosen, as they follow the civil law system, though both jurisdictions regulate the liability of providers differently and the research covers all the different legal mechanisms in relation to this subject matter.

principles adopted in the US and Europe principles, as well as the Egyptian copyright law, most notably Articles 138 and 171 of the EIP. The thesis therefore discusses the Preparatory Memorandum of the Joint Committee, which captured the discussions when these two Articles were drafted. The aim is to define which unlawful activities trigger the liability of service providers in Egypt and entitle copyright holders to bring civil proceedings.

Once the scope of the exclusive rights of the copyright holders has been defined, it is discussed when online service providers can plead immunity from copyright infringement claims. The thesis comprehensively and critically analyses the enforcement provisions, which regulate the immunity of service providers, as set forth in section 512 of the DMCA and Articles 12 to 15 of Directive 2000/31. In these jurisdictions, the immunity mechanism has been greatly expanded through case law, but this has also resulted in broad and conflicting interpretations, especially with regards to the required elements to satisfy that a service provider had actual knowledge or was aware of the infringement.

The thesis therefore discusses the principles, which have been established by US courts, most notably in the *Viacom v. YouTube and Google* case.⁴¹ The thesis also discusses the principles, which have been developed by national courts in Europe, namely in France and Germany and compares them with the principles established by the Court of Justice of the European Union, particularly in the *Google*,⁴² *L'Oreal*,⁴³ and *SABAM* cases.⁴⁴ The thesis then analyses all these principles and compares them with the exceptions set out in Articles 171 and 172 of the EIP. The objective here is to define in which circumstances service providers should be immune in Egypt and to clearly outline in which situations, service providers should be held liable.

⁴¹ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012).

⁴² *Google France Sarl v Louis Vuitton Malletier SA* (C-236/08) [2011] Bus. L.R. 1 (CJEU (Grand Chamber) (23 March, 2010) (hereinafter CJEU/Google France).

⁴³ *L'Oreal SA v eBay International AG* (C-324/09) [2011] E.T.M.R. 52 (CJEU (Grand Chamber) (21 July, 211) (hereinafter CJEU/L'Oreal).

⁴⁴ *BelgishVerening Van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, (c-360/10), (CJEU) (Third Chamber) (16 February, 2012) (hereinafter SABAM case).

The second objective of the thesis is to illustrate the relationship how the imposition of liability on internet service providers can also violate the rights of online end users. In order to achieve this goal, the thesis critically analyses the entire liability system in order to assess how it affects the rights of online end users to assert privacy and to access information, as also safeguarded by the Universal Declaration on Human Rights and the European Convention on Human Rights. The paper highlights how the adoption of the repeat infringer policy by service providers, as enshrined in section 512(i) of the DMCA, can violate the right to privacy. The analysis compares section 512(i) of the DMCA with Directive 2009/136, which regulates personal data protection in Europe and explains why European policymakers have rejected to adopt such a policy.⁴⁵

After the rights of online end users have been defined, the paper comprehensively and critically analyses the scope of injunction measures, as set out in the TRIPs Agreement, which are available in the US and Europe. The thesis then analyses Article 179 of the EIP, which deals with injunction measures and discusses the procedural conditions for the grant of injunctions. Finally, the thesis compares the findings in order to highlight why it is difficult for copyright holders to seek an injunction and to thus stop copyright infringement in Egypt.

Lastly, the thesis makes several recommendations in order to enable the Egyptian legislators to adopt a liability regime for internet service providers, so that digital copyrights are protected and enforced without this undermining the rights of end users to have privacy online and to access information.

1.2 EGYPT AS A CASE STUDY

The Egyptian Copyright Law 82/2002 (hereinafter EIP) grants copyright holders absolute exclusive rights online. Also, the Egyptian Civil Code (hereinafter ECC) spells out a tortious liability concept, so that copyright holders can bring civil proceedings and seek remedies from online service providers whose end users have uploaded or downloaded unauthorised copies through their systems.

⁴⁵ The European Parliament and of the Council of 25 November 2009 (Directive/2009/136) entered into force on December 19, 2009.

However, although the rate of online infringement is increasing continuously, no online service provider has been found liable in Egypt. Therefore, the objective of this thesis is to answer why copyright holders cannot claim compensation in negligence and seek remedies from service providers. Once the paper has investigated the deficiencies of the current Egyptian enforcement provisions in respect to this matter, the research will propose the best recommendations to the Egyptian legislators on how to enhance the enforcement of digital copyright online in Egypt

It should be noted that the same deficiencies with respect to service providers' liability, which are characteristic of the Egyptian legislative system, also exist in most other Arab and North African countries.⁴⁶ This is because most Arab countries adopt similar laws to Egypt because Egypt's laws are perceived to constitute best practice guidance for these other jurisdictions. For that reasons, Egyptian laws and jurisprudence have an immense influence on the laws, which are adopted by other Arab countries. Egyptians are also particularly employed in the legal sector of several Arab governments and many Arab law firms recruit Egyptian lawyers for the purpose of coping with the continuous changes characteristic of any legal system.⁴⁷ This means that once the role, which internet service providers should play in protecting digital copyright, is clearly spelled out in Egypt, digital copyright protection will also be enhanced in most Arab countries.⁴⁸

Finally, the thesis significantly contributes to the enforcement of digital copyright in Egypt. The complete work of the thesis presents a unique contribution, which can be considered a secondary source for researchers around the world since the imposition of liability on providers in Egypt has never been previously researched in any Arab country, Europe or in the US.

⁴⁶ AcrliIfes, "State of the Judiciary Report: Egypt 2003" (2004), IFES State of the Judiciary Report Series <<http://www.pogar.org/publications/other/judiciary/sojrep-egypt-04en.pdf>> (accessed June 12, 2012).

⁴⁷ *Id.*

⁴⁸ Such as Dr. Sanhury, the late Egyptian jurist, who was the head of the team responsible for drafting most of Egypt's laws and who has also played a very important role in the Arab world since he also drafted many laws and even constitutions; Hassan Ali Radhi, *Judiciary and Arbitration in Bahrain: a Historical and Analytical Study* (Kluwer Law, UK, 2003) at 77.

1.3 THE SCOPE OF THE THESIS AND A TRANSLATION NOTICE

The thesis relies on non-official translations of Egyptian legislation, which are made available to the international community. For example the English text of the EIP and its executive regulations are provided by the government of Egypt to WIPO and is also available on its site. In case of perceived discrepancies between the original official Arabic text and the non-official English text, this is highlighted and discussed, whilst it has to be borne in mind that the original Arabic text constitutes the authoritative legal source.

It is worth mentioning that the author has encountered many problems when collecting books and articles about service providers' liability in Egypt since this topic has not been addressed in any Arab country, the US and Europe. The author therefore depended on the Preparatory Memorandum of the Joint Committee and the Plenary of the Egyptian Public's Assembly to determine the intentions of the delegations of experts and members of Parliament when drafting the EIP 2002/82. The author has therefore provided his own translation of material, which is only available in Arabic.

As a result of this, the study refers predominantly to academic literature from the US and other English-speaking countries, as well as European publications, which are published in English. Similarly, translations from other non-English jurisdictions are those, which the authorities have provided to international bodies or are from literary scholars from websites, including blogs.⁴⁹

In addition, it is worth mentioning that the thesis only deals with the substantive rules and enforcement provisions in relation to digital copyright, particularly contributory liability of providers and recourse is made to international law, as well as Egyptian, US, French and German law. Hence any other subject matters are not relevant to this topic.

1.4 STRUCTURE AND OUTLINE OF THE STUDY

⁴⁹ *Legi France, gouv.fr* <<http://195.83.177.9/code/index.phtml?lang=uk>> (accessed February 06, 2012).

The thesis advances six interrelated chapters. The first chapter posits the methodology and the research question of the study.

Secondly, the thesis defines the problem of holding online service providers liable. This section analyses tort law and the duty of care concept and applies the principles of secondary liability to service providers in the US and Europe and then compares these tortious liability concepts to those adopted by the Egyptian legislative system.

Thirdly, the scope of the reproduction and communication rights of copyright holders as guaranteed by the international Berne Convention, the Rome Convention, the TRIPs Agreement and the WIPO Treaties 1996 are considered. The thesis also critically analyses the US and European provisions and case law, which impose liability on service providers and explains how copyright owners in Egypt can enforce their exclusive rights online. Furthermore, the study analyses the substantive rules set forth in the new Egyptian copyright law.

The fourth chapter analyses when service providers can plead immunity under US and European law. The thesis comprehensively analyses in which circumstances basis liability is imposed on service providers and the extent of the immunity provisions on which service providers can rely. The thesis also explores how extensive the immunity exceptions are under the EIP.

The fifth chapter discusses the kind of injunctions, which competent courts can grant against service providers in order to prevent and stop copyright infringement. The findings about the available injunctive measures under the EIP are compared in order to assess the scope of available remedies and the rights of online end users.

The last chapter summarises all of the findings and recommends how the Egyptian legislators can enhance the enforcement of digital copyright works without eroding the rights of end users rights, particularly online privacy and access to information.

CHAPTER 2: DEFINING THE LIABILITY OF ONLINE PROVIDERS IN EGYPT

2.1 INTRODUCTION

Throughout the years, copyright law has been subject to many fundamental changes due to rapid advances in the world of technology.⁵⁰ Nowadays service providers enable users to freely copy and distribute copyrighted work at nearly zero costs. This, however, has caused increased tension between copyright-holders and providers. As a result, the issue whether service providers should be held legally accountable for copyright infringement has become the subject of many debates not only in academic journals, but also court decisions and laws adopted by countries, including in the US and the European Union and this in turn has also caused a great deal of legal uncertainty.⁵¹

The main question, which has to be therefore addressed, is what type of liability should be imposed on service providers and which legal regime Egypt should adopt. For this purpose recourse is made to the Egyptian Copyright Law 2002/82 (hereinafter EIP) and also Egyptian tort law, though particular emphasis is placed on how US and European legislators and courts have approached the topic of secondary liability for service providers. It is hoped that any resultant recommendations assist the Egyptian legislator to strengthen the rights of copyright holders, including their ability to seek compensation.

2.2 THE PROBLEM IN DEFINING THE LIABILITY OF ONLINE PROVIDERS

Article 45(1) of the TRIPS Agreement stipulates that member states should equip courts, as part of their enforcement procedures, with the authority to order the infringer to pay the right holder adequate compensation. The compensations are for damages, and the injuries suffered because of the infringement of a

⁵⁰ Peter Menell, "Envisioning Copyright Law's Digital Future" (2002) 46, *New York Law School Law Review* 63, at 64-65.

⁵¹ Matthew Helton, "Secondary Liability for Copyright Infringement: Bit Torrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce" (2006) 40, *Columbia Journal of Law and Social Problem* 1, at 1-5.

person's Intellectual Property right by an infringer who knowingly, or with reasonable grounds to know, has engaged in a number of infringing activities.”⁵²

Also, Article 14 of the WCT and Article 23 of the WPPT contain the same rules as Article 45 of the TRIPs Agreement.⁵³ This means that there is at least partial compatibility between the enforcement provisions of the TRIPs Agreement and the WIPO Treaties. The TRIPs Agreement requires Members to impose civil liability on a defendant as part of their enforcement systems. Hence, an injured party can seek compensation when his protected exclusive rights have been violated. However, in respect of the digital sphere, online service providers facilitate the copyright infringement by end users. This is because providers allow end users to reproduce and distribute millions of illegal digital copies at a minimum cost without being required to seek permission from the copyright holders.⁵⁴

Also, digital transmissions, which occur on the servers of internet providers, create new hybrid forms of rights.⁵⁵ These new forms of rights do not accord with the traditional concept of the term “fixation” and also do not respect the pre-established border between the notions of “copy-related” and “non-copy-related” material, making it much harder for holders to use old protective means to bring legal proceedings against direct infringers.⁵⁶ The problem also becomes

⁵² Article 45(1) of the TRIPs.

⁵³ Article 41(1) of the TRIPs Agreement 1994 provides that “Members shall ensure that enforcement procedures...are available under their law so as to permit effective action against any act of infringement of intellectual property rights...including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement.”

⁵⁴ Information Infrastructure Task Force, The Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure: The White Paper (Sept. 1995) (hereinafter White Paper 1995), at 748.

⁵⁵ Yannis Bakos, et al., “Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing and Micropayment Systems” at Conference on Internet Publishing and Beyond, *The Economics of Digital Information and Intellectual Property*, (June, 1997), <<http://pages.stern.nyu.edu/~bakos/aig/aig.html>>, (accessed 20 May, 2012).

⁵⁶ The term ‘copy-related’ refers to the right of distribution, the rental right or the right of public lending and covers acts by means of which copies are made available to the public, typically for “deferred” use, since the act of making available and the perception (watching, listening, studying) of the signs, images and sounds in which a work is expressed or which are embodied in an object of neighbouring rights as actual ‘use’ by members of the public takes place at different times. The term ‘copy-unrelated rights’ refers to the public performance right, the right to broadcast and the right to communicate to the public by wire acts through which works and objects of neighboring rights are made available for direct use (watching, listening, perceiving) to members of the public; WIPO, Doc. CR/KRT/05/7 (2005), at 11.

more complicated because copyright infringers potentially reside anywhere in the world. This can raise jurisdictional problems, particularly since it is relatively easy to be anonymous online, so that it becomes difficult for copyright holders to define primary infringers.⁵⁷

Consequently, copyright holders cannot seek compensation or recover their fixed costs for the creation of their works. Copyright holders therefore argue that since liability of online providers has become the most effective means to prevent or stop online digital infringements that national copyright laws should impose strict liability on service providers.⁵⁸ This is because despite providers performing their duty of care by preventing illegal contents or activities on their systems,⁵⁹ they nevertheless play an active role in encouraging and facilitating the violation of holders' exclusive online rights online and thereby cause monetary damages.⁶⁰ Copyright holders thus argue that since liability of providers is the most effective means to prevent or stop online copyright infringement that therefore national copyright laws should impose strict liability on internet providers.⁶¹

For this reason, copyright holders are interested in reforming international and national copyright laws, so that direct liability is imposed on internet service providers, so that they only have to pursue civil proceedings against them to seek compensation and other remedies.⁶² Strict liability or liability without fault

⁵⁷ Jacqueline D. Lipton, "Secondary Liability and the Fragmentation of Digital Copyright Law" (2009) 3, *Akron Intellectual Property Journal* 105, at 107.

⁵⁸ Articles 41.1 and 42 of the TRIPs Agreement; Mihaly Ficsor, "The WIPO "Internet Treaties": The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-revolutionary Central European" (2006/2007), 6 *The John Marshall Review of Intellectual Property Law* 17, at 26.

⁵⁹ White Paper 1995, at 748.

⁶⁰ Elvin Wong Chi Chung, *The Working of Pop Music Culture in the Age of Digital Reproduction* (PhD thesis, University of Hong Kong, 2010), at 13-105 (the author cited one commentator, who is against copyright owners' claim, who states that "...even if the decline of CD sales was caused primarily by file-sharing, one should not simply conclude that the majors are facing an 'out-and-out crisis'").

⁶¹ Articles 41.1 and 42 of the TRIPs Agreement; Mihaly Ficsor, "The WIPO "Internet Treaties": The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-revolutionary Central European" (2006/2007), 6 *The John Marshall Review of Intellectual Property Law* 17, at 26.

⁶² Yannis Bakos, et al., "Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing and Micropayment Systems" at Conference on Internet Publishing and Beyond, *The Economics of Digital Information and Intellectual Property* (June, 1997),

means that providers are liable irrespective of whether they actually know that copyright infringement takes place on their servers.⁶³ The justification for the strict liability approach is based on the idea that providers should control illegal activities, which occur on their systems and a failure to prevent or restrict available access should attract liability.⁶⁴

However online service providers reject such an approach on the basis that this kind of liability requires no proof of actual knowledge and awareness and they thus have no practical ability to control information on their servers.⁶⁵ Further, the kind of hardware and software, which is currently used, automatically follows commands and instructions from individual customers, so that they merely transport messages to different locations.⁶⁶ Also such liability may give copyright holders absolute exclusive rights since holders can seek damages and injunctive measures against providers without having to spend time and money to establish fault,⁶⁷ and if this happened social utility and social justice, as well as the market place as a whole, may be negatively affected.⁶⁸

As for social utility, absolute exclusive rights would result in the provider having to adopt practical and effective technological measures, which can remove and prevent any potential unauthorised materials on their systems in order to shield themselves from liability, despite these types of measures possibly having a detrimental effect on end users' privacy rights, and impeding the fair use

<<http://pages.stern.nyu.edu/~bakos/aig/aig.html>> (accessed 20 May 2011); Susan A. Mort, "The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighbouring Rights" (1996-1997) 8(1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 173, at 190; David Engel, "ISPs cannot turn a blind eye to material on their systems" (1999) *Entertainment Law Review* 184, at 185.

⁶³ Niva Elkin-Koren, "Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic" (2005-2006) 9(15), *New York University Journal of Legislation and Public Policy* 15, at 46.

⁶⁴ Toby Headdon, "Beyond Liability: on the availability and scope of injunction against online intermediaries after L'Oreal v eBay" (2012), *European Intellectual Property Review* 138, at 141.

⁶⁵ Coenraad Visser, "Online Service Providers: Models for Limiting Their Liability" (2000) 12 *South African Mercantile Law Journal* 164, at 164-165.

⁶⁶ Min Yan, "The Law Surrounding the Facilitation of Online Copyright Infringement" (2012), *European Intellectual Property Review* 122, at 123.

⁶⁷ Korrasut Khopuangklang, "Should ISPs in Thailand Act at the Behest of the Entertainment Industry to Control p2p File Sharing?" (2011), *European Intellectual Property Review* 632, at 632.

⁶⁸ William Party, *Moral Panics and Copyright Wars*, (Oxford University Press, USA, 2009), at 7 & 36.

defence.⁶⁹ Also, the implementation of such technology does not mean that service providers can monitor all material, which is available on their servers, since changes can be made to hosted material in a remarkably short period of time and this makes it difficult to assess whether new material actually infringes copyright or not, especially where a licence has been granted.⁷⁰

As for social justice, a strict liability approach requires the provider to configure its software system in a particular manner and this requires a huge financial investment and the additional costs have to be also recouped and the best solution for this would be to increase the price for services.⁷¹ This in turn causes problems for end users and the market place.

As for end users, many of them, especially in developing countries, may be deprived from access to information, as they cannot afford the price set by the online provider.⁷² It is important to note that once a number of people can pay the margin of the increased price in society; this does not mean that the concept of direct liability for service providers is working efficiently within the market place.⁷³ Certain members of society can then only enjoy interacting and sharing different cultures, while the rest are likely to be deprived of these rights and this leads to an imbalance in the distribution of resources.⁷⁴

Considering market place economics, the notion of strict liability does not result in the copyright holders being compensated by the actual infringer for their

⁶⁹ Michael Nwogugu, "The Economics of Digital Content and Illegal Online File Sharing: Some Segal Issues" (2006), *Computer and Telecommunications Law Review* 5, at 8; Ian Brown, "Communication Data Retention in an Evolving Internet" (2011), *International Journal of Law & Information Technology* 95, at 98.

⁷⁰ R. Julià-Barceló, "Liability for On-line Intermediaries" (1998), *European Intellectual Property Review* 453, at 460.

⁷¹ Microeconomic theory explains that very often the best solution is to increase the price. W. Nicholson, *Microeconomic Theory: Basic principles and extensions* (7th edition, Academic Internet Publishers, USA, 1998), at 501.

⁷² Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press HC, UK, 2008), at 14, 114.

⁷³ William W. Fisher III, "Reconstructing the Fair Use Doctrine" (1988) 101, *Harvard Law Review* 1661, 1770; James Boyle, "Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property" (2000) 53, *Vanderbilt Law Review* 2007, at 2031.

⁷⁴ Patricia J. Pascual, "E-Government", (2003)

<<http://www.apdip.net/publications/iesprimers/eprimer-egov.pdf>> (accessed 24 May 2012) at 12.

losses, but results in the service providers being held responsible. As a result, infringers are not deterred to store infringing materials on the internet and to stop infringing activities and thus thus causes an increase in the cost for service providers and a likely decrease in the number of users.⁷⁵ As a result, the potential investment is negatively affected since the technological communication market does not assure investors sufficient profits to cover their expenditures.⁷⁶

On this basis, providers argue that they should be granted absolute immunity from any kind of liability, especially online service providers, which are located in developing countries, since developed countries, such as the US and Europe, are globally the biggest exporters of digital copyright works.⁷⁷ Legislation regulation of liability in developing countries may lead to a shift in the economic and political bargaining power, away from developing countries to developed ones.⁷⁸ As a result, economic development in developing countries might be harmed and end users' rights, namely the right to privacy and access to information, may be violated.⁷⁹ This is because developed countries may compel service providers to adopt technology, which limits or disables end user access to information or risky contents if a liability regime is adopted, which finds

⁷⁵ Jonina S. Larusdottir, "Liability of Intermediaries for Copyright Infringement in the Case of Hosting on the Internet", Stockholm Institute for Scandinavian Law, 2010, at 474-475 <<http://www.scandinavianlaw.se/pdf/47-22.pdf>> (accessed July 12, 2012).

⁷⁶ Michael Blakeney, "International Proposal for the Criminal Enforcement of Intellectual Property Rights: International Concern with Counterfeiting and Piracy" (2010), *Intellectual Property Quarterly* 1, at 9.

⁷⁷ Developing countries argued that the US and Europe created exclusive rights for their holders and that it is unreasonable to give exclusive rights to specific holders. Thus there is no truly new creator or specific owner, who is entitled to exclusive rights and who can prevent users from accessing digital content; Wendy J. Gordon, "Property Right in Self Expression: Equality and Individualism in the Nature Law of Intellectual Property" (1993) 102, *Yale Law Journal* 1533, at 1553-1559; Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Press, USA, 1995), at 75- 83.

⁷⁸ Hugh C. Hansen, "Impact of the Trips Agreement of Specific Discipline Copyrightable Literary and Artistic Work-International Copyright: An Unorthodox Analysis" (1996) 29, *Vanderbilt Journal of Transnational Law* 579, at 580.

⁷⁹ Developing countries argued that since most of the new productions are based on pre-existing products, it is impossible to determine the value of the creators' contributions on which the new works are based. Justine Hughes, "The Philosophy of Intellectual Property" (1988) 77, *Georgetown Law Journal* 287, at 309; Stacey L. Dogan, "Copyright in Cyberspace: Interdiction, Learning Cyber Law in Cyberspace", (Oct 12, 2006), *Cyberspace law* <<http://www.cyberspacelaw.org/dogan/>> (accessed July 12, 2012).

service provider directly liable whenever they have actual knowledge that copyright infringement is taking place.⁸⁰

Indeed, the immunity approach can greatly benefit internet users, consumer groups and creators of derivative works.⁸¹ The no liability approach is also particularly beneficial for service providers, as they would not have to invest any money to configure their systems with technology, which monitors and cleans out illegal contents and activities from their systems.⁸²

However, the weakness of such an approach is that providers ignore legitimate demands from copyright holders to take down infringing materials, as they would not want to waste their time and money to monitor or remove unlawful contents, so long as they know that holders cannot seek damages or injunctions against them.⁸³ A “no liability” approach may also be detrimental for online service providers in the long-term since it can result in reduced income from copyright holders, who are likely to become more reluctant to distribute their works on the internet.⁸⁴

It can be concluded from the previous discussions that the issue is not related to whether or not the service providers should be liable, because liability of the online provider is a foregone conclusion; but, rather, the main issue is how copyright liability can be imposed on providers, whilst striking a fair for all

⁸⁰ Niva Klkin Koren, “Copyright Law and Social Dialogue on the Information Superhighway: The Case against Copyright Liability for Bulletin Broad Operators” (1995) 13, *Cardozo Arts & Entertainment Law Journal* 345, at 363.

⁸¹ Hugh C. Hansen, “Impact of the Trips Agreement of Specific Discipline Copyrightable Literary and Artistic Work-International Copyright: An Unorthodox Analysis” (1996) 29, *Vanderbilt Journal of Transnational Law* 579, at 584.

⁸² Paul Ohm, “The Rise and Fall of Invasive ISP Surveillance” (2009), *University Illinois Law Review* 1417, at 1425.

⁸³ Copyright holders argue that in case of digital piracy, reproduction is easily done in a perfect manner at a very low cost, which causes a decrease in the size of investments, as well as the number of new creations; Christopher Yoo, “Copyright and Product Differentiation” (2004) 79, *New York University Law Review* 212, at 214.

⁸⁴ This model is entirely inappropriate when it comes to protecting copyrighted works. Consequently, authors would no longer be incentivised to create and distribute new creative works and new works will therefore ultimately diminish in numbers. As a result readers, listeners and viewers would be left with only a few new works to enjoy. See, I. Fred Koenigsberg, “The Fifth Annual Christopher A. Meyer Memorial Lecture: Humpty Dumpty in Copyright land” (2004) 51, *Journal Copyright Society of the U.S.A* 677, at 689; Peter Drahos, *A Philosophy of Intellectual Property*, (Dartmouth Press, UK, 1995), at 75-83; R. Julia Barcelo, “Liability for Online Intermediaries” (1998), *European Intellectual Property Review*, at 453, 462.

parties involved in the digital transmission, including end users. This topic has become a critical issue for legislators around the world⁸⁵ since the WIPO Treaties 1996 are ambiguous and do not clearly impose liability on service providers.⁸⁶ Yet the imposition of liability has enormous economic and social consequences for all jurisdictions around the world.

Some jurisdictions prefer to grant service providers absolute immunity from liability, whilst other countries impose strict liability, regardless of whether the providers had knowledge or were aware of the infringing activities. Each of these models has negative effects for copyright holder, service providers and internet end users; these two models are therefore excluded from the scope of this research. Thus, what can be deemed a suitable liability standard, which can be imposed on providers? The next discussion analyses the general principles of tort law in order to define the most suitable liability approach.

2.3 AN ANALYSIS OF THE APPLICATION OF TORT LAW IN COMMON LAW & CIVIL LAW SYSTEMS

The general principle of liability holds that if an unlawful act is committed by an actor, which causes damage to others or the interests of others, compensation can be sought in the law of tort.⁸⁷ Generally speaking, a tort is a civil wrong, which occurs when one party “destroys another party’s initial entitlement by imposing a negative externality on him.”⁸⁸ This means that the law of tort is therefore the law of civil liability for wrongfully-inflicted injury, or at least a very large part of it. A breach of contract and a breach of trust are perhaps the other two most important civil wrongs.⁸⁹ However, the approach towards tort law varies from one legal system to another. It is therefore crucial to analyse the main tort law

⁸⁵ L. H. Holms, “Note and Comment: Making Waves in Statutory Safe Harbours: Re-evaluating Internet Providers’ liability for Third-Party Content and Copyright Infringement” (2001) 7, *Roger Williams University Law Review* 215, at 215.

⁸⁶ The WIPO Treaties did not address liability of ISPs except for an Agreed Statement in Article 8, which provides that “it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication.” This Agreed Statement is further discussed in the next chapter.

⁸⁷ Mark Lunney, at et., *Tort Law: Text and Materials* (Oxford: Oxford University Press, 2008), at 1.

⁸⁸ Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* (Boston: Harcourt Brace Jovanovich, Publishers, 1988), at 165.

⁸⁹ *Id.*

principles in both the common and civil law and to apply these findings to copyright liability in order to determine what type of liability should be imposed on service providers.

The main function of tort law within the copyright law context is to regulate how an injured party seeks compensation and/or requests injunctive measures against an infringer to prevent or stop any further infringement of his rights. Tort law fulfils the same function in common law and civil law systems alike. However, the main difference between the two systems is conceptual and lies within the required elements to establish fault.⁹⁰ In civil law systems, delictual liability is exclusively concerned with the allocation of losses, whereas the common law system relies on tort liability, also for the determination and direct enforcement of rights, and can also result in strict liability.⁹¹

Also, the sources of the law of tort within the two systems differ. Case law has created the common law of tort, although some areas are covered by statutes, whereas the civil law system of tort is mainly contained in the civil code. This means that under the civil law system, all forms of tortious liability are based on statutory principles and general rules.⁹²

Further, within the common law system, intentional or negligence based torts are two key elements to establish tortious fault. As for intention in tort, this is established when the tortfeasor acts for the purpose of causing harmful consequences or the tortfeasor has knowledge with substantial certainty that his act results in harm. An intentional tort differs from a negligence based tort in that it simply results from the failure of the tortfeasor to take sufficient care in fulfilling a required duty (i.e. the duty of care). Also, under the common law system, case law has created intentional torts, such as inducement liability,⁹³ while the civil law system the statutes spell out when an intentional tort is

⁹⁰ Kamiel J. Koelman, 'Online Intermediary Liability', in *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*, (Kluwer Law International, London, 2000), at 7-10.

⁹¹ Raymond Youngs, *English, French & German Comparative Law* (Routledge-Cavendish, Abingdon, 2007), at 336.

⁹² For example, the Egyptian Civil Code 1954 (ECC); Article 163 of the ECC.

⁹³ *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.*, 125 S.Ct. 2764 (2005).

committed. For example, the concept of fault is set out in Article 163 of the Egyptian Code Civil (ECC) and includes intentional, as well as negligence based, tortious acts.⁹⁴

As for negligence based torts, negligence is based on the concept of fault. Fault here refers to a state of mind or the attitude of the tortfeasor. In this regard, fault is divided into two kinds of liability; liability without fault or strict liability and liability with fault. The requirement of fault expresses the ethical maxim that people are morally and psychologically responsible for their actions or omissions only when they can exercise free will to avoid harm. In other words, only if a person is to blame for his actions or omissions, should he be held liable.⁹⁵

The civil law legal system adopts a similar concept of fault as the common law system, namely unlawfulness. The notion of “unlawfulness” is intended to qualify the act or omission of the defendant.⁹⁶ Unlike the common law tort, the concept of unlawfulness under the civil law system imposes liability, even if a person does not directly infringe a right since his actions may be unlawful because the duty of care has been breached or because insufficient reasonable care was displayed.⁹⁷ Hence, negligence is a tort, which relies on the existence of a breach of duty of care owed by one person to another and the duty of care is usually defined as “an obligation, recognized by law, to avoid conduct fraught with unreasonable risk of danger to others.”⁹⁸ Reasonable care here means failing to adopt reasonable measures to avoid the infringement.⁹⁹

Hence, the dividing line between direct/strict liability, indirect liability, and liability based on fault and immunity from liability requires that it is identified what duty of care a reasonable person would expect to be owed and analysis whether this standard has been discharged.¹⁰⁰ However, it should be noted that

⁹⁴ Articles 163 of the (ECC).

⁹⁵ Izhak England, *The Philosophy of Tort Law*, (Dartmouth, Aldershot, 1992), at 9.

⁹⁶ Kamiel J. Koelman, ‘Online Intermediary Liability’, in *Copyright And Electronic Commerce: Legal Aspects of Electronic Copyright Management*, (London: Kluwer Law International, 2000), at 7-10.

⁹⁷ *Id*

⁹⁸ John G Fleming, *The Law of Torts* (LBC Information Services, Sydney, 1998), at 149.

⁹⁹ Richard A. Posner, “A Theory of Negligence”, (1972) (1), *Journal of Legal Study*, at 29-34.

¹⁰⁰ John G Fleming, *The Law of Torts* (LBC Information Services, Sydney, 1998), at 149.

even if fault/unlawfulness meets the requirements, it is not enough to prove that a defendant is liable since a causal element has to be also established. The generally criterion to define this element is a *condition sine qua non* for damage to occur. In the common law system, this is known as the “but for” test, which means that but for the actions, the injured party’s damages would not have occurred. If this is not warranted, the conduct concerned is not the main cause of the harm of the injured party and the defendant will thus not be held liable.¹⁰¹

Nevertheless, if a defendant’s conduct can be said to be the main reason for the harm, the defendant may nevertheless escape liability if his conduct is not recognised in the statute as “legal cause” for the harm or “adequate causation.” Adequate causation, in relation to contributory liability, for example, is found to exist if an act or an omission has promoted the objective possibility of a particular consequence. In deciding this, all the circumstances, which existed at the time, are considered.¹⁰² In several common law countries, courts use the “foreseeability” test to define whether there was a “legal cause.” Under this test, an actor is liable, if an injured party can prove that the actor negligently failed to prevent harm in circumstances where he should have foreseen that such harm might reasonably occur.¹⁰³

Accordingly, a failure to satisfy the “duty to take care” may be deemed an unlawful act or a tort in itself or may contribute towards establishing fault and result in liability. Hence, similar factors are used by judges in common law and civil law countries alike to establish whether a duty of care exists, whether it has been breached and whether the breach has caused the harm . Hence, the question arises what duty of care is imposed on internet service providers for copyright holders to seek compensation when this duty has been breached. The next discussion tries to exactly answer this question.

2.4 APPLYING THE PRINCIPLES OF THE DUTY OF CARE TO ONLINE PROVIDERS

¹⁰¹ B.S. Markesinis, *A Comparative Analysis of the German Law of Tort*, (Clarendon Press, Oxford, 1986), at 69.

¹⁰² *Id.*, at 67- 71.

¹⁰³ W.V.H. Rogers, *Winfield and Jolowicz on Tort*, (Sweet & Maxwell, London, 1989), at 131.

Tortious principles can be applied to find online service providers liable for violations of the exclusive rights of copyright holders. Hence, a service provider can be held if it negligently or intentionally facilitates copyright infringement by internet users and is therefore indirectly liable for harm done to copyright owners on the basis of tort law principles.¹⁰⁴

Thus, providers may be held liable for copyright infringement when copyright holders can prove that providers have promoted copyright infringement or knew with substantial certainty that its subscribers or internet end users are infringing the reproduction and communication rights of copyright holders, but nevertheless failed to take affirmative steps to stop or prevent this.¹⁰⁵

Liability is thus imposed whenever service providers breach their duty of care, which arises on the basis that providers are well placed to discourage copyright infringement through monitoring or the adoption of technology, which renders infringement more difficult. Liability to compensate copyright holders thus shifts to providers but this may not be the best approach.¹⁰⁶ This is because the provider becomes incentivized to adopt precautions to prevent potential infringements in order to reduce litigation costs. So long as the likely cost for adopting these technological measures is less than the likely litigation costs, providers will most likely adopt rules to hold direct copyright infringers liable.¹⁰⁷ Tort law thus incentivises providers to adopt measures to minimise infringement.¹⁰⁸

A service provider will therefore only be liable for infringement if it knew or should have known that the infringing contents are on its system failed to satisfy its duty of care to prevent and stop this. Most civil law and common law courts

¹⁰⁴ Qian Wang, "Discussion on the Determination of Indirect Liability of the Information Location Tool Provider – and Compare the Decisions of the *Baidu* and *Yahoo! China* Cases", (2007) (4), *Intellectual Property*, at 3-8.

¹⁰⁵ Nigel Foster, et al., *German Legal System and Laws* (3rd, Oxford University Press, New York 2002), at 435.

¹⁰⁶ William M. Landes, "Indirect Liability for Copyright Infringement: An Economic Perspective", *Journal of Economic Perspectives*, Vol.17, No.2, (Spring 2003), at 114.

¹⁰⁷ SJ Grant, *Introductory Economics* (Longman, Singapore, 2003) at 192-193.

¹⁰⁸ Richard A. Posner, *The Economic Structure of Tort Law* (Harvard University Press, Cambridge Mass, 1987).

interpret the duty of care in a similar manner and take into account the scope of the duty of care to determine liability.¹⁰⁹

As for the civil law system, there are no specific provisions, which regulate prerequisites for online copyright liability of service providers; it may therefore easily cause practical problems when courts face liability claims. Instead, some civil law countries apply a joint tort liability approach to copyright liability of service providers. However, many civil law courts interpret the provisions, which regulate joint liability as covering both negligent and intentional torts.¹¹⁰

With regards to the common law system, vicarious liability originates from the liability of the superior for the acts of the subordinate, so that this concept can be evoked when a provider controls the activities of the primary infringer.¹¹¹ Vicarious liability thus requires firstly that a third party has the right and ability to supervise infringing activities and secondly that the third party has a direct financial incentives from the continuation of the infringing behaviour.¹¹² However, the problem with vicarious liability is that this liability approach might only be forced upon providers when they have the ability to control and manage material on their servers. Furthermore, it may be impossible for providers to manage and monitor contents, which is hosted on their facilities in real time. Hence, the adoption of a vicarious liability approach would result in strict liability being imposed on providers and this would have adverse economic and social effects.¹¹³ As a result, this liability standard has been excluded from the scope of this research.

¹⁰⁹ For example, in many civil countries joint tort liability is applied to service providers for their indirect copyright liability, while in several common law countries, there are two main strands of indirect liability; vicarious and contributory liability. R.W.M. Dias, at el., *Tort Law*, (Clarendon Press, Oxford, 1984) at 103-109.

¹¹⁰ For example, the German Civil Code (BGB); Article 830(1)(2) of BGB sets out the requirements upon which joint liability is based.

¹¹¹ R. Julia Barcelo, "Liability for On-line Intermediaries" (1998), *European Intellectual Property Review* 453, at 455.

¹¹² Vicarious liability originates from the tort law doctrine of agency –“respondent superior”, the superior is responsible for the acts of its subordinate; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) at 261-62; *M. Witmark & Sons v. Pastime Amusement Co*, 298 F. 470 (E.D.S.C. 1924) (In the case of a theatre, the theatre owner benefits from the rental of the theatre of the primary infringing performers, satisfying the elements of vicarious liability through the control over the theatre property).

¹¹³ *Id.*

However, the most popular liability approach applied by both civil and common law systems is contributory liability. Contributory liability stems from the tort theory of *enterprise* liability and is established by fault of a defendant, who has knowledge of the infringement, materially contributes to the infringement and fails to take preemptive action to prevent the infringement from occurring.¹¹⁴ This liability standard requires an injured party to prove that the service provider has committed these failures. This can be established by proving either that the provider had actual knowledge or was aware that illegal activities were occurring on its system, but instead of preventing these, promoted the facilities to its end users, so that the holder's exclusive rights were infringed.¹¹⁵ Hence, a service provider is liable when it had actual knowledge or was aware of the infringing acts and activities on its system, but failed to prevent them.¹¹⁶

Thus, there are two knowledge standards upon which a breach duty of care can be established. The first one is the actual knowledge standard, which means the provider must have actually known that its system is used by end users to infringe copyrighted works. Secondly, knowledge is assumed when the online service provider is aware that infringements take place on its network.¹¹⁷ The amount of knowledge, which is required, differs from jurisdiction to jurisdiction.

Certain civil law systems, such as France, adopt the "actual knowledge" standard since this is the best model to achieve a fair balance for all parties participating in the digital transmission. However, other jurisdictions adopt the "awareness" or "constructive knowledge" standard, as they consider this to be the best liability approach for service providers since many academics have already averred that the knowledge standard is insufficient to determine what sort of liability should be imposed; particularly in respect of new network platforms, such as Web 2.0, for example on YouTube.¹¹⁸ However, certain common law

¹¹⁴ *Sony Corporation of America v. Universal City Studios Inc.*, 104 S. Ct. 774.

¹¹⁵ 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 474.

¹¹⁶ *Id.*

¹¹⁷ Min Yan, "The Law Surrounding the Facilitation of Online Copyright Infringement" (2012), *European Intellectual Property Review* 122, at 124-25.

¹¹⁸ A Web 2.0 site allows users to interact and collaborate with each other in a social media dialogue as creators of user-generated content in a virtual community, in contrast to websites where people are limited to the passive viewing of content. Examples of Web 2.0 include social

systems, such as the US, have adopted a broad knowledge standard, including both the actual knowledge, as well as the awareness standard.¹¹⁹ Here, many scholars have submitted that the imposition of liability is based on the principle of broad knowledge and that this is the fairest liability approach for all involved parties, including copyright holders, service providers and internet users.

Copyright holders can bring civil proceedings against online service providers if they can prove that providers have negligently or intentionally promoted their systems to third parties, who have directly infringed copyrighted works. Hence, liability enables holders to enforce and protect their rights online and assured them that the internet is a medium, which protects the distribution of their copyrighted works and communication with end users.¹²⁰

As for internet service providers, liability based on knowledge appears to be the most suitable liability standard for service providers. This is because service providers are not considered legally liable until it is proven that they had actual knowledge or were aware of the unlawful content or activities and they unsuccessfully failed to control, remove or disable the available access to the illegal activities or content, despite having actual knowledge or awareness. This means that limited liability places responsibility on the entity, which has knowingly assisted or provided means to facilitate the infringement. As a result, liability will only be imposed on a provider when the broad knowledge requirement is satisfied. Not much pressure is thus imposed on providers to enforce holders' rights online until such knowledge is proven and accordingly providers do not have to invest in adopting technological measures to monitor

networking sites, blogs, wikis, video sharing sites, hosted services, web applications, mashups and folksonomies; Time O' Reilly, "Web 2.0: Compact Definition?" *O'Reilly radar*, (October 01, 2005), <http://tcc-web20.googlecode.com/svn/trunk/Pesquisa/O'Reilly%20Radar%20-%20Web%202.0%20Compact%20Definition.pdf>, (accessed 15 March 2013).

¹¹⁹ Giovanni Sartor, "The Italian Google-case: Privacy, Freedom of Speech and Responsibility of Providers for Users-Generated Contents" (2010), *International Journal of Law & Information Technology* 356, at 374-375.

¹²⁰ Genan Zilkha, "The RIAA's Troubling Solution to File-Sharing" (2010), *Fordham Intellectual Property, Media & Entertainment Law Journal*, 667.

their systems. This in turn drives the fee down for their services and results in increased subscribers, strengthens their investment and profits.¹²¹

End users also benefit from this particular liability standard. As explained above, this liability standard does not require providers to install technological preventive measures within their systems, which violate end users' rights, including the right to privacy and access to information, so that also end users' online rights are preserved. Further, the liability standard may encourage communication technology companies to invest more into communication services, which certainly enhances market competition in digital technologies and thus drives down prices towards the equilibrium price.¹²² Once prices for services no longer increase, services' prices will become affordable for all kinds of people; so that both rich and poor can access the same information.¹²³

For these reasons, the thesis argues that the suitable liability standard for service providers should be based *inter alia* on the knowledge standard. The next part further illustrates this by making recourse to various cases and by analysing enforcement provisions, which are based on the knowledge standard, including the actual knowledge and awareness standard employed in the US and Europe.

2.5 THE LIABILITY OF ONLINE PROVIDERS IN THE US

As mentioned above, the US Congress passed the Digital Millennium Copyright Act of 1998 (hereinafter DMCA) in order to transpose the WIPO Internet Treaties 1996.¹²⁴ Section 512 of the DMCA states that a service provider, which is defined in section 512 (a)(k)(1)(A) of the DMCA, is not liable, so long as it

¹²¹ Nava Elkin-Koren, "Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic" (2005-2006) 9(15), *New York University Journal of Legislation and Public Policy* 15.

¹²² The equilibrium price is regulated by the laws of supply and demand and this generates great benefits for all parties which deal with digital copyrighted works online; N. Gregory Mankiw, *Principles of Microeconomics* (3rd edition, Thomson Nelson, Canada, 2006), at 68.

¹²³ Lawrence Lessig, *Code; Version 2.0* (Basic Books, USA, 2006) at 123.

¹²⁴ Digital Millennium Copyright Act, § 202, Pub. L. No. 105-304, 112 Stat. 2860, 17 U.S.C. Sec. 512 (1998, October 28), <http://www.copyright.gov/title17/92appb.pdf>, (accessed Dec 12, 2011).

only plays a passive role and this requires that the provider is not involved with the contents of its subscribers.¹²⁵

Accordingly, when a service provider is involved with data storage or is linked to its users through its system or network, it may be considered to play an active role pursuant to section 512 (c)(1)(K)(1)(B) of the DMCA. Liability of this kind depends on whether a service provider has actual knowledge or is aware of the illegal material and acts of its users.¹²⁶ Thus, “actual knowledge” and having a “reason to know” about the infringing activities play a crucial role when determining and defining the legal liability of internet service providers.¹²⁷

2.5.1 Liability Based on the Actual Knowledge Standard

Liability based on knowledge appears to be the most suitable liability standard for online service providers. This is because service providers are not considered legally liable until it is proven that they had actual knowledge or were aware of the unlawful content or activities and they unsuccessfully failed to control, remove or disable the available access to the illegal activities or content, despite having actual knowledge or awareness. This limited liability approach places responsibility on the entity, which has knowingly assisted or provided means to facilitate the infringement. As a result, liability is only imposed on a provider when the broad knowledge requirement is made out. Service providers are not under much pressure to enforce holders’ rights online until such knowledge is established, so that no additional expensive fees are incurred by providers to install technological protective measures. This drives their service fees down, leads to more subscribers being able to afford their services and benefits service providers’ investments and incomes.¹²⁸

¹²⁵ Section 512 (a)(k)(1) (A) of the DMCA.

¹²⁶ Section 512 (c)(1)(K)(1)(B) of the DMCA.

¹²⁷ Contra Adam R. Fox, “The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment” (2001) 27, *Rutgers Computer & Technology Law Journal* 267, at 273-74.

¹²⁸ Nava Elkin-Koren, “Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic” (2005-2006) 9(15), *New York University Journal of Legislation and Public Policy* 15.

2.5.2 Liability Based on the Awareness Standard

As for the “having reason to know” requirement, US courts pose a dual question when they examine whether the awareness requirement is satisfied; firstly what a service provider knows or “has reason to know/should have known” about the consequences associated with the behaviour; and secondly whether its behaviour was reasonable in light of the consequences.¹²⁹ If the answer is positive, then the provider has acted reasonably and is not held liable.¹³⁰ This means that US courts adopt basic tort law principles to assess whether an actor has had a “reason to know” that infringement is take place and an objective test is therefore adopted, which assesses whether a person of reasonable intelligence or of superior intelligence would have understood that infringement is taking place.¹³¹ The actor should thus take some precautionary measures in order to avoid that damage s occasioned through the unlawful acts.¹³² A reason to know is made out when the provider has an adequate amount of evidence, which indicates that an act takes place, which may cause damage in the eyes of a reasonable person in a similar situation.¹³³

Yet under the “should have reason to know” standard, the actor is obliged to ascertain the facts under consideration. In cases where a provider is subjected to a “reason to know” standard, such an obligation is not imposed.¹³⁴ Further, a reason to know is obviously connected to the main negligence principles,¹³⁵ thus it can be concluded that Congress intended to link the awareness requirement to this standard, so that being aware can found a claim on the basis of the reasonable person standard, rather than the “should have known of the infringement” standard, which demands the provider to carefully and generally

¹²⁹ Restatement (Second) of Torts Sec. 284 (a).

¹³⁰ Section 512(c) (d)(1)(A) of DMCA.

¹³¹ Arthur Best et al., *Basic Tort Law Cases, statutes, and Problems* (Aspen Publisher, USA, 2007), at 132-34.

¹³² Contributory liability stems from the tort theory of *enterprise* liability and is based on the notion that one who directly contributes to another’s infringement should be held accountable; *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), at 975.

¹³³ Restatement (Second) of Torts Sec.12 (1979) (defining “reason to know” and “should know”).

¹³⁴ *Id.*

¹³⁵ Alfred C. Yen, “Third-Party Copyright Liability after Grokster” (2006) 91, *Minnesota Law Review* 178, at 215.

monitor its presented services and to positively search for facts indicative of infringements.¹³⁶

When the more stringent awareness standard is applied to a service provider, it is important that no broad and sweeping statements are made, as this would impose a heavy and undue burden on providers, who have to deal with “ubiquitous” illegal websites, but instead diligent service provider should not turn a blind eye to flagrant or blatant facts or circumstances from which infringement is apparent.¹³⁷ US courts also do not require online service provider to take excessive precautionary measures when harm results from illegal conducts of third parties.¹³⁸

This is because when a burden becomes too unreasonable and goes beyond what a reasonable person would consider normal, no liability is imposed.¹³⁹ Hence if an investigation of the facts and circumstances imposes an excessive burden¹⁴⁰ and exceeds reasonable expectations, liability will not be established.¹⁴¹ US courts have also developed a framework to evaluate the different responses, service providers should take in order to assess whether they have acted reasonably and to compare their actions to similar situations of other industry actors.¹⁴²

In this context, US courts generally consider the economic benefits and undertake a cost-benefit analysis, which considers the likely cost of harm, the cost of avoidance and the magnitude of harm when determining whether service providers have violated their duty and also when imposing remedies, all with a

¹³⁶ S. Rep. 105-190 (1998) at 44; H.R. Rep. No. 105-551, pt.2 (1998) at 53.

¹³⁷ *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971) at 1162.

¹³⁸ Restatement (Third) of Torts § 19 cmt.g (1967).

¹³⁹ Robert P. Merges, et al., *Intellectual Property in the New Technological Age* (5th edition, Aspen Publishers, USA, 2010), at 680; David Nimmer, *Copyright: Scared Text, Technology, and the DMCA* (Kluwer Law International, UK, 2003) at 358.

¹⁴⁰ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F. 3D 93 (2d Cir. April 1, 2012) at 110; *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), slip op. (S.D.N.Y. June 23, 2010) at 20; *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 09-56777 (9th Cir. June 17, 2010).

¹⁴¹ Restatement (Third) of Torts.

¹⁴² Debra Weinstein, “Define Expeditious: Uncharted Territory of the DMCA Safe Harbour Provision” (2008) 26, *Cardozo Arts & Entertainment* 589, at 610.

view of determining whether or not providers knew, should have been aware or had constructive knowledge.¹⁴³

In the American *Sony Corporation v. Universal City Studios* case, the plaintiffs argued that Sony was liable under the contributory doctrine, as it was selling VCRs that allowed the public to perform acts that were regarded direct infringements since the plaintiffs' works could be copied.¹⁴⁴ On appeal, the American Supreme Court overturned the Ninth Circuit's decision and held that Sony was not liable on the basis that selling a staple article or any commodity of commerce suitable for substantially non-infringing use, did not constitute contributory infringement.¹⁴⁵ Furthermore, the Supreme Court stated that the sale of copyright equipment is similar to selling other articles of commerce and did not constitute contributory infringement, as the product was generally used for substantially non-infringing uses. The Supreme Court thereby limited the scope of contributory infringement.¹⁴⁶

Hence, in cases where certain products can be used for legitimate reasons or for "non-infringing" purposes, the makers of these products will not be held contributory liable in any way,¹⁴⁷ irrespective of the makers' constructive knowledge or awareness about their customers' potential infringement and their material contribution to the infringing acts.¹⁴⁸ On the other hand, in cases where the providers' system is designed in a way, which only facilitates infringing

¹⁴³ Workshop on service provider liability, WIPO, Doc. OSP/LIA/1 Rev.1 (22 November 1999), at 30; Allen N. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet: Overview of International Developments" in Alain Strowel, *File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing Limited, UK & USA, 2009), at 19.

¹⁴⁴ *Sony Corporation v. Universal City Studios*, 464 U.S. 417 (1984), at 423. On appeal, the Ninth Circuit overturned the decision and held that the defendants were, in fact, liable for the contributory infringement, as they knew that the VCRs would be used to reproduce copyrighted materials and they thus induced, caused, or materially contributed to the infringing conduct because the infringement by the customers would otherwise not have been possible without the VCRs. *Sony Corporation of America v. Universal City Studios Inc.*, 659 F.2d 963 (9th Cir. 1981), at 975.

¹⁴⁵ US Patent Law Section 271(b) of Ch.35 of the United States Code provides that "whoever actively induce infringement of a patent shall be liable as an infringer." Section 271 (c) of the Patent Act.

¹⁴⁶ *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984) 442 (applying patent laws "staple article of commerce" doctrine to copyright law).

¹⁴⁷ *Id.*

¹⁴⁸ *Recording Industry Ass'n of America v. Verizon Internet Servs, Inc.*, 351 F.3d 1229 (D.D.C. 2003).

activities, the provider is contributory liable,¹⁴⁹ irrespective of the level of knowledge or awareness, which the service provider has,¹⁵⁰ as it is unreasonable to shield the online service provider from copyright liability. This is because copyright infringement is significantly facilitated.¹⁵¹

Thus, contributory liability exists in cases where there are facts, which alert service providers to the direct infringing activities of others or where service providers materially contribute to the infringement by facilitating the acts or behaviour¹⁵² and fail to take affirmative technological steps to prevent the dissemination of the material.¹⁵³

2.5.3 Liability Based on the Inducement Standard

Whilst negligence theory is dominant to establish liability, intentional tort theory has also been employed in online copyright infringement cases. Most US courts consider an actor, who causes direct prejudice to an injured party, an intentional infringer.¹⁵⁴ Alternatively, intention will be inferred when a defendant “knows with substantial certainty” that the conduct will cause damage.¹⁵⁵ Accordingly, an internet service provider is culpable if the provider knows with “substantive certainty” that its technology or service is used by infringers, who violate copyrighted works and nevertheless continues to allow its network system to be used for infringing activities.¹⁵⁶

¹⁴⁹ *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. (N.D. Cal. 1995), at 1361.

¹⁵⁰ *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir.1971).

¹⁵¹ *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F. Supp (S.D.N.Y.1966) at 399; Alfred C. Yen, “Sony, Tort Doctrines, and the Puzzle of Peer-To-Peer” (2005) 55(4), *Case Western Reserve Law Review* 815, at 825-28.

¹⁵² *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir.1971), at 1163.

¹⁵³ *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁵⁴ Restatement (Second) of Torts Sec. 13 (a) (1965).

¹⁵⁵ Restatement (Third) of Tort: Liab. For Physical Harm Sec. 1.

¹⁵⁶ Alfred C Yen, “Third Party Copyright after Grokster” (2006) Boston College Law School Faculty Papers, Paper 133 <<http://lawdigitalcommons.bc.edu/lfp/133>> (accessed April 19, 2012), at 37; Maureen Daly, “Life after Grokster: Analysis of US and European Approaches to File-sharing”, (2007) *European Intellectual Property Review* 319, at 320.

The American landmark case, which deals with intentional liability, is *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* The *Grokster* case created a new form of intentional liability, also known as inducement liability.¹⁵⁷ The court imported the inducement rule from patent law into copyright law. As a result, any person who distributes a device with the purpose of promoting that its use results in the infringement of copyrighted works, as evidenced by clear expressions or different affirmative steps and thereby encourages or fosters infringement will be considered liable for all the resulting infringing acts of the third parties.¹⁵⁸ Consequently, manufacturers of products, which can be used for wide ranging distribution, should be aware that injuries may be inevitable and expect to be held liable.¹⁵⁹

Inducement liability is based on the idea that knowledge that one's activities permit infringing uses and this then forms the basis for an expansive inducement concept.¹⁶⁰ This means that if providers continue with the conduct, irrespective of whether they intended the infringement, they will be held liable, as they knew that the infringement could happen and are therefore considered culpable.¹⁶¹

Accordingly, under the dissimilar *Sony* doctrine, if a service provided by a service provider does not have a non-infringing use, the provider might not be protected from inducement liability.¹⁶² Here, the court emphasised that nothing in the *Sony* case requires courts to ignore evidence of intention to promote infringement if such evidence undoubtedly existed.¹⁶³ The court found *Grokster* liable for inducing infringement since liability is established where "one... promotes its use to infringe copyright, as shown by a *clear expression* or other

¹⁵⁷ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. (2005) at 913, 936-37.

¹⁵⁸ *Id.*

¹⁵⁹ *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539 (D. Md. 1997) at 548. As a result, liability supplants a sophisticated balancing analyses of negligence or product liability; Craig M. Lawson, "The Puzzle of Intended Harm in the Tort of Battery" (2001) 74, *Journal Temp. Law Review*, at 355, 362-65.

¹⁶⁰ Alfred C Yen, "Third Party Copyright after *Grokster*" Boston College Law School Faculty Papers (12 Feb 2006) <<http://lawdigitalcommons.bc.edu/lfp/133>> (accessed May 30, 2012), at 36.

¹⁶¹ Jane C. Ginsburg et al., "Inducers and Authorisers: A Comparison of the US Supreme Court's *Grokster* Decision and the Australian Federal Court's *Kazaa* Ruling" (2006), *Media & Arts Law Review* 1, at 7.

¹⁶² Weixiao Wei, "ISP Copyright in Chain: Collision of the Knowledge Standard and the New Tort Liability Act" (2011), *European Intellectual Property Review* 507, at 509.

¹⁶³ *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984) at 439.

affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”¹⁶⁴

In the *Perfect 10, Inc. v. Amazon.com, Inc* case, the Ninth Circuit attempted to interpret the previous sentence and concluded that the scope of inducement liability could be understood as a failure to act in order to prevent or stop infringing activities from occurring.¹⁶⁵ In this regard, the court concluded that a service provider’s liability is established upon it being notified or becoming aware, but nevertheless still failing to adopt proper affirmative measures in order to avoid damages, which may inevitably be caused to the copyrighted works, but instead continuing to provide access to the infringing works.¹⁶⁶ This means that the test following the *Perfect 10* case consists of two elements: availability of knowledge or awareness and a failure to take affirmative steps to stop the copyright infringement.¹⁶⁷

The *Grokster* case affects these new platforms detrimentally in the following manner: firstly it results in inducement liability being imposed, despite this excessively burdening providers, which have to monitor the ubiquitous illegal material and activities of its users in order to shield themselves from being sued by copyright holders for any infringing activities; secondly the limitation of the *Sony* doctrine may result in new operators adopting pre-emptive measures in order to avoid liability by adopting improved technological tools, which avoid

¹⁶⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. (2005) at 936-37.

¹⁶⁵ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, (9th Cir. 2007) at 727 (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc.*, 316 F.2d 304 (2d Cir.1963) at 307.

¹⁶⁶ *Id.*, at 729.

¹⁶⁷ The implication of the *Grokster* case is that liability of service providers depends on whether the probative elements can be made out, including that there is: (1) an infringement-dependant business plan; (2) promotion of infringement (i.e. advertising); and (3) a failure to filter. It was argued that the three elements do not all have to be met since these elements might not always be present in service provider cases.¹⁶⁷ A defendant may promote copyright infringement and may fail to filter but have no business model dependant on infringement, or the defendant may depend on a high proportion of infringement but takes no step to promote infringement and may apply technology to prevent infringement and it is therefore argued that satisfying any of these elements is sufficient to establish inducement liability. However, the opposite view is that it is not a requirement, as in the *Grokster* decision where all three elements had to be present before inducement was made out; Sam Ricketson et al., “Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling?” (2006) 11, *Media & Arts Law Review* 1, at 9.

guilty knowledge, whatever the future construction of copyright liability will be in a fast-changing technological world.¹⁶⁸

2.6 THE LIABILITY OF ONLINE PROVIDERS IN EUROPE

In Europe, many countries follow the civil law legal system, for example France and Germany. A determination of civil liability of service providers in Europe rests on two fundamental elements. Firstly, a causal relationship has to be shown to exist between the unlawful acts or omission committed by an actor and the damage caused to an injured party, and which have to be the natural result of the unlawful acts/omission.¹⁶⁹ Secondly, it is assessed who is responsible for the consequences of the particular act or omission and in some cases an objective standard is adopted or even strict liability is imposed whenever an actor creates certain risks.¹⁷⁰ In some cases a subjective test is applied, particularly in wilful misconduct or negligence cases. A subjective test is therefore employed when it is determined whether there has been a breach of the duty of care.¹⁷¹

Furthermore, in some European jurisdictions, such as France, intentional liability is not regulated by virtue of the civil law, whilst Germany employs “joint liability” theory. When the liability of a service provider is difficult to establish under the particular statute, some jurisdictions, such as Germany impose liability on a provider when the provider became aware of specific infringing activities, but nevertheless failed to take affirmative measures to prevent or block the infringing activities on its system. Hence, it is important to further scrutinise these European liability approaches, particularly negligence liability, joint liability and the duty to act.

2.6.1 Negligence Tort in Europe

An injured party, who wishes to bring civil proceedings against an internet service provider, has to prove three elements; that a duty of care is owed to him

¹⁶⁸ I Alfred C. Yen, “Third Party Copyright Liability after *Grokster*” (2007) 16(3), *Information & Communications Technology Law* 233, at 272.

¹⁶⁹ Agustin Waisman et al., “Theoretical Foundations of Search Engine Liability” (2011) *International Review of Intellectual Property and Competition Law* 785, at 791.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

by the defendant, that there has been a breach of the duty by a defendant and that the damage has been caused as a result of it. When assessing whether causation is established, courts apply the “*novus actus interveniens*” test and if this is the case, the defendant is not held liable for the injury or damage suffered by the injured party.¹⁷²

Hence, the court assesses whether the service provider’s unlawful act is closely linked to the damage, which has been caused to the copyright holder,¹⁷³ and whenever a positive or negative behaviour is predicted, liability may be imposed, as long as the duty of care is established.¹⁷⁴ Here the general duty of care, also known as the neighbour principle, holds that a person owes a duty of care to anybody who is so closely and directly affected by the act or omission of another person.¹⁷⁵

Therefore, the duty of care obliges an actor to avoid unlawful acts, which may affect others. This means that a duty of care automatically arises when the breach of the duty of care is considered a civil wrong by virtue of the statute.¹⁷⁶ A copyright holder can thus take civil proceedings against the service provider if the provider has a duty to prevent and stop the infringing activities from occurring on its servers, but the provider instead facilitates that users directly infringe the copyright holders’ works and thereby cause harm.¹⁷⁷

However, it will be difficult to claim compensation under the principles of negligence against service providers if the harm caused is only financial loss, which, for example, happens when negligent statements are made. This is because the general law of negligence provides no compensation for purely economic loss, except when the defendant knows that the recipient

¹⁷² *R v Smith* [1959] 2 QB 35 (CMAC).

¹⁷³ Christian Von Bar, *Non-Contractual Liability Arising out of Damage Caused to Another* (Stamfli, UK, 2009), at 765.

¹⁷⁴ Agustin Waisman, “Theoretical Foundations of Search Engine Liability” (2011), *International Review of Intellectual Property and Competition Law* 785, at 792.

¹⁷⁵ Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* (Harcourt Brace Jovanovich, Publishers, USA, 1988), at 165.

¹⁷⁶ S Boyron J Bell et al (trs), *Principle of French Law* (Oxford University Press, USA, 1998), at 355.

¹⁷⁷ Priyambada Mishra, et al., “Striking a Balance Liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour” (2009) 14, *Journal of Intellectual Property Rights* 312, at 324.

predominantly depends on the negligent statement and relies on it to his detriment.¹⁷⁸ Nonetheless the problem here is that in case of negligence, the actor has no knowledge or awareness that his course of action will cause damage to others, yet his acts are the main cause for both harm and injury.¹⁷⁹

When one applies this analysis to the context of liability of online service providers, one can argue that damages are caused by a service provider, as it is a natural result of the provider's unlawful acts and thus entitle the injured party to seek compensation from the provider.¹⁸⁰ This does not mean that a contractual relationship has to exist between them, but rather liability is based on the idea that the service provider is in a position to know that its service materially contributes to the infringement of copyrighted works and that they fail to prevent the occurrence of the infringing activities. Hence, the standard of the duty of care, the scope of liability and the required level of knowledge are the most important elements in order to establish copyright liability of service providers.¹⁸¹ The next section discusses the scope of the duty of care in Europe, whereas the scope of liability and the level of the broad knowledge requirement are considered later.

2.6.2 The Scope of the Duty of Care under Directive 2000/31

Recital 48 of the Preamble of Directive 2000/31 states that Member States may impose a reasonable duty of care on service providers to detect and prevent certain illegal kinds of activities, provided that the particular duties are specified in law.¹⁸² The Directive thereby imposes a reasonable level as the applicable standard for the duty of care in negligence. When determining the standard, the courts ask whether or not an actor has conducted like an ordinary sensible person would have done. Accordingly, if the court finds that the actor has failed to

¹⁷⁸ Sarabdeen Jawahitha, "Negligent liability and E-consumers in Malaysia" (2004), *Computer and Telecommunications Law Review* 1, at 4.

¹⁷⁹ Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* (Harcourt Brace Jovanovich, Publishers, 988) at 165.

¹⁸⁰ Stephen Perry, "The Moral Foundations of Tort Law" (1992) 77, *Iowa Law Review* 449, at 450; Arthur Ripstein, "Justice and Responsibility" (2004) 17, *Canadian Journal of Law & Jurisprudence* 361, at 362.

¹⁸¹ Sarabdeen Jawahitha, "Negligent Liability and E-consumers in Malaysia" (2004), *Computer and Telecommunications Law Review* 1, at 4.

¹⁸² Recital 48 of the Preamble of Directive 2000/31.

exercise such care as an ordinary sensible person would have displayed in order to avoid causing harm to others, including foreseeable harm, the court may hold the defendant liable for the unlawful acts of the third party.¹⁸³

In other words, the standard of care and the duty owed by a service provider is established once the service provider's knowledge has been established.¹⁸⁴ However, it must be kept in mind that general knowledge is insufficient for the duty of care to arise.¹⁸⁵ Hence, the service provider is only liable if it is aware that specific copyright infringement takes place on its system and fails to stop or prevent this from taking place.¹⁸⁶

Yet, Article 14 of Directive 2000/31 deals with the duty of care and requires an assessment of the level of knowledge. Article 14(1) (a) of the Directive states that an information society service shall not be held liable if;

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

It seems that Article 14 of the Directive governs criminal and civil liability. A service provider is protected from criminal liability if it lacks actual knowledge, while the same provider can claim immunity from damages for its users' unlawful activities if it is unaware of facts and circumstances from which the illegal activity or information is apparent. Hence, a copyright holder can request

¹⁸³ John G Fleming, *The Law of Torts* (LBC Information Services, Sydney, Australia, 1998) at 149.

¹⁸⁴ The duty to take precautions is left up to Member States to define; Yaniv Bnhamou, “Compensation of damages for infringements of intellectual property rights in France, under Directive 2004/48/EC and its transposition law - new notions?” (2009), *International Review of Intellectual Property and Competition Law* 125, at 127.

¹⁸⁵ Anneka Bain, “Is It an Infringement of Trade Mark Law for the Operator of an Online Marketplace (such as eBay) to Allow Counterfeit Goods to be Sold? As a Matter of Policy, Should It be?” (2011), *European Intellectual Property Review* 162, at 165.

¹⁸⁶ Michael Racicot et al., “Internet Content-Related Liability Study” (1998) 14(2), *Computer Law & Security Report* 96, at 101.

any kind of injunctive measure in two situations: if a service provider has actual knowledge or if it is aware of the illegal activity or information.¹⁸⁷

In case a copyright holder wants to bring civil proceedings, i.e. pursue a tortious liability lawsuit and seek compensation, the holder can only do this if it can prove that the provider is aware of the illegal activity or content on its system, but has failed to remove or disable access to the illegal acts or materials.¹⁸⁸

France and Germany have both already adopted the duty of care standard, set forth in Article 14 of Directive 2000/31, as part of their domestic legislation. In France, the immunity defences were adopted by the law entitled Confidence in the Digital Economy of June 21 2004 (hereinafter LCEN)¹⁸⁹ and Articles 6-I-2 and 6-I-3 of the LCEN create a presumption that a provider has only the requisite level of knowledge if it has been notified and the notice contains the required documents and information set out in Article 6-I-5 of LCEN.¹⁹⁰

Further, in Germany, the 2007 revision of the Federal Teleservices Act/2001(TDG 2001) by virtue of the German Telemedia Act (hereinafter TMG 2007) transposes Article 14 of Directive 2000/31. Section 10 of TMG 2007 regulates liability of caching providers and section 11 of TMG 2007 deals with the liability of hosting providers, which implement the Directive, so that a service provider's knowledge, including actual knowledge and awareness, of the infringement, *inter alia*, constitute the key factors for determining liability.¹⁹¹

However, owing a duty of care is insufficient to give rise to liability under negligence and is also not enough to give an injured party a right to seek

¹⁸⁷ Commission First Report on the application of Directive 2000/31/EC, COM (2003) 702 final (Nov. 21 2003) <http://www.edis.sk/ekes/ecomm_legalen.pdf> (accessed June 14, 2012), at 12, 29.

¹⁸⁸ Muareen Daly, "Life after *Grokster*: analysis of US and European approaches to file-sharing" (2007), *European Intellectual Property Review* 319, at 319-20.

¹⁸⁹ French law addresses liability of ISPs, as Directive/2000/31/EC does dated June 8, 2000, and French Law No 2004-575, dated June 21, 2004, and called *Loi pour la confiance dans l'économie numérique* (LCEN); Article 6 of the LCEN has horizontal effect and addresses not only copyright infringement but all forms of civil and criminal liability relating to online content.

¹⁹⁰ Article 6-I-5 of LCEN.

¹⁹¹ Sec. 11 of the TMG 2007; However, in Germany no Notice-and-Take-Down Regime has been Adopted. Trevor Cook, tr., "Report for Congress", LIDC Congress 2011; French Report, <<http://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=31691>> (accessed April 09, 2012) at 17.

compensation from the provider, as there is another element which has to be met, which is that the provider by breaching its duty of care causes injury, which is the result of the provider's unlawful act. In this context, Article 13(1) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of Intellectual Property rights (hereinafter Directive 2004/48) deals with claiming damages and distinguishes two different scenarios; where the infringer acts "knowingly or with reasonable grounds to know." The former takes place when a service provider is aware that a copyright holders' right is infringed, while the latter means that a service provider ought to have known, but failed to take necessary precautionary methods to avoid that an infringement was committed.¹⁹²

Hence, under Directive 2000/31, negligence may arise where there is a breach of a duty of care or lack of reasonable care, as set out in the statutory provisions.¹⁹³ The required time and costs to adopt necessary precautionary measures to avoid the risk, as well as service provider's ability to avoid the risk all together will be considered when the requisite standard of professional competence is identified, as well as the experience of the service provider.¹⁹⁴

2.6.3 Joint Liability

Certain civil law jurisdictions assess liability of service providers on the basis of a joint liability standard. Joint liability in tort law is commonly confined to the principles developed by Hazel Carty.¹⁹⁵ According to Hazel's principles, a person will be considered a joint infringer, if he acts in cooperation with others pursuant to a common design in order to perform acts, which infringe

¹⁹² Yaniv Benhamou, "Compensation of Damages for Infringements of Intellectual Property Rights in France, under Directive 2004/48/EC and its Transposition law - new notions?" (2009), *International Review of Intellectual Property and Competition Law* 125, at 128.

¹⁹³ Kamiel J. Koelman, "Online Intermediary Liability", in P. Bernet Hugenholtz, *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (Kluwer Law International, UK, 2000) at 10; Nigel Foster et al., *German Legal System and Laws* (3rd edition, Oxford University Press, USA, 2002) at 435.

¹⁹⁴ Jawahitha Sarabdeen, "E-Consumer Redress Mechanism for Negligence in Malaysia: A Survey Analysis" (2009), 4 *Ibima Business Review* 1, at 20.

¹⁹⁵ David Bainbridge, *Intellectual Property* (7th edition, Pearson Education Limited, UK, 2009) at 169.

copyrighted works of others.¹⁹⁶ The term “common design” refers to how the infringers jointly provide security to the performance through which the infringing act is carried out.¹⁹⁷ The definition suggests that when a joint infringer decides to carry on with his illegal conduct, which harmfully damages the third party, liability should be imposed.¹⁹⁸

For example in Germany, legislators reinforced joint liability for online service providers by virtue of the TMG 2007, the German Civil Code (BGB) and several copyright law provisions.¹⁹⁹ German courts often refer to section 830 of the BGB when dealing with joint copyright liability cases where the third party has contributed to the direct copyright infringement. Section 830(1) states:

[I]f more than one person has caused damage by a jointly committed tort, and then each of them is responsible for the damage. The same applies if it cannot be established which of several persons involved caused the damage by his act.”²⁰⁰

The second paragraph of section 830 (2) of BGB applies too and provides that:

“...instigators and accessories are equivalent to joint tortfeasors.”²⁰¹

Read literally, service providers may be held jointly liable with a direct infringer in two cases; where the service provider has not played an active role, but is aware of the circumstances, i.e. that the infringer violated the copyright of others

¹⁹⁶ *Id.*

¹⁹⁷ Warren R. Shiell, “Viral Online Copyright Infringement in the United States and the United Kingdom: the End of Music or Secondary Copyright Liability?” (2004), *Entertainment Law Review* 107 at 111.

¹⁹⁸ Paul S. Davies, “Accessory Liability: Protecting Intellectual Property Rights” (2011), *Intellectual Property Quarterly* 390, at 398.

¹⁹⁹ The provisions refer to Section 16(1) of the German Copyright Act, which addresses the right of reproduction; Section 17(1) of the German Copyright Act addresses the right of redistribution; Article 19a of the revised German Copyright Act 2003 addresses the right of making available to the public and Article 97 of the Copyright Act provides a remedy for copyright infringement.

²⁰⁰ Sec.830 (1) of the BGB.

²⁰¹ Sec.830 (2) of the BGB.

on its own server and failed to remove or block access,²⁰² or where the online service provider has played an active role to assist or induce, incite or persuade in the eyes of the direct infringer the course of action, irrespective of the level of participation, which the provider had in relation to the infringement.²⁰³ In other words, the services and the assistance, which have been provided by the service provider, was one of the reasons, which led the direct infringer to perform the infringing activities and which they would not have done without the assistance of the service provider.²⁰⁴

In summary, joint tort liability can be established if the service provider has in any way assisted the direct infringer in performing acts, which mainly consist of copyright infringements, for example, *inter alia*, unauthorised reproduction or making available of copyrighted work to the public without permission from the copyright holder.²⁰⁵

2.6.4 Duty to Act

The duty to act is either set out in the statute or can arise as a result of an injunction, which is addressed to the online service provider and is granted either by courts or administrative bodies. In this context, Recital 40 of the Preamble of Directive 2000/31 provides that service providers have a duty to act under certain circumstances with a view to preventing or stopping illegal activities.²⁰⁶ Article 19 of Directive 2000/31 also states that service providers are under an obligation to adopt sufficient measures to supervise and investigate copyright infringement and to prevent and stop it.²⁰⁷ Further, Recital 45 of Directive 2000/31 states that any limitations of service providers' liability does not affect the availability of different kinds of injunctions and these injunctions may

²⁰² Gerald Spindle, et al., "Secondary Copyright Infringement - New Perspectives in Germany and Europe" (2006) 37, *International Review of Intellectual Property and Competition Law* 788, at 796.

²⁰³ *Id.*

²⁰⁴ H. Hart et al., *Causation in the Law* (2nd edition, Oxford University Press, USA, 1985), at 187-8.

²⁰⁵ Alexander Bayer, "Liability 2.0-Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany" in Liber Amicorum Joseph Straus, ed., *Patents and Technological Progress in a Globalized World* (Springer, UK, 2009), at 368-074.

²⁰⁶ Recital 40 of the Preamble of Directive 2000/31.

²⁰⁷ Article 19(1) of Directive 2000/31.

consist of orders made by courts or administrative authorities, which require the termination or prevention of any infringement, including the removal of illegal information or the disabling of access.²⁰⁸

In addition, Article 8(3) of Directive 2001/29 entitles copyright holders to apply for an injunction against service providers where their services are used by third parties in a way, which infringes their rights.²⁰⁹ Recital 24 of the Preamble of Directive 2004/48 defines the kinds of injunctions and states that injunctions may include “prohibitive measures” to prevent all infringements of Intellectual Property rights and “corrective measures”, which includes recalling, removing from distribution or at times destroying the infringing goods, as well as the materials used for their creation.²¹⁰ Nevertheless Article 15(1) of Directive 2000/31 prohibits service providers from monitoring the data, which is being stored on their servers. This means that the standard of care under this Article constrains the activities, which service providers have to undertake pursuant to Article 12-14 of the Directive 2000/31 and they therefore do not have to go further than what is required under Article 15 of Directive 2000/31.²¹¹

Accordingly, under Directive 2000/31, two conflicting duties are imposed on service providers; firstly, service providers have duty to prevent infringing activities; secondly, providers do not have to monitor the stored data of users to identify illegal acts. Recital 47 of the Preamble of Directive 2000/31 and Article 15(1) of Directive 2000/31 prevent Member States from imposing a general monitoring obligation on service providers. This means that monitoring obligations should only be imposed in specific cases and should not affect orders by national authorities in accordance with national legislation.²¹²

Consequently, liability based on the duty to act does not arise under tort law, but the concept is recognised from principles governing Intellectual Property

²⁰⁸ Recital 45 of the Preamble of Directive 2000/31; Articles 12(3), 13(2), 14(3) and 18(1) of Directive 2000/31.

²⁰⁹ Article 8(3) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (2001) OJ L 167/10 and Article 11 of Directive 2004/48 on the enforcement of intellectual property rights (2004) OJ L 195/16.

²¹⁰ Recital 24 of the Preamble of Directive 2004/48.

²¹¹ Article 15(1) of Directive 2000/31.

²¹² Recital 47 of the Preamble of Directive 2000/31.

violations,²¹³ which thus means that this kind of liability should only be applied in cases where reasonable infringement threats are carried out by a potential actor.²¹⁴

This liability can be applied to service providers, when the continued prevention was an expected act; though the causal link and whether there has been a failure to successfully undertake the required affirmative steps to remove the altered infringing acts and contents and to prevent any form of “continuation” or similar potential infringement have to be also considered.²¹⁵ However the scope of “continuation” is a controversial subject amongst Member States.²¹⁶

In Germany, for example, courts have developed this kind of liability under “disturbance liability” or “Störerhaftung.” German courts borrowed “disturbance liability” from the property defence under section 823(1) and Article 1004 of the BGB. According to these provisions, a person is a “disturber” if he violates one of the exclusive property rights in circumstances where it was possible and reasonable to prevent this.²¹⁷ “Disturbance liability” is therefore a form of strict liability and requires no fault of the disturber.²¹⁸ For that reason, disturbance liability is not regarded as giving rise to a claim for damages under section 97(1) of the German Copyright Act (Urheberrechtsgesetz; hereinafter UrhG) since the injured party can only claim injunctive relief, as well as removal.²¹⁹

²¹³ Alexander Bayer, “Liability 2.0-Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in Liber Amicorum Joseph Straus, ed., *Patents and Technological Progress in a Globalized World* (Springer, UK, 2009) at 367.

²¹⁴ Roberto Garza Barbosa, “International Copyright Law and Litigation: A Mechanism for Improvement” (2007) 11(1), *Marquette Intellectual Property Law Review* 79, at 84.

²¹⁵ Alexander Bayer, “Liability 2.0-Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in Liber Amicorum Joseph Straus, ed., *Patents and Technological Progress in a Globalized World* (Springer, UK, 2009), at 369.

²¹⁶ Anneka Bain, “Is It an Infringement of Trade Mark Law for the Operator of an Online Marketplace (such as eBay) to Allow Counterfeit Goods to be sold? As a Matter of Policy, Should It Be?” (2011), *European Intellectual Property Review* 162, at 167.

²¹⁷ Thomas Hoeren, “German Law on Internet Liability of Intermediaries”, Report Paper to LIDC Congress, <http://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=31684>, at 2-4.

²¹⁸ *Id.*, at 3.

²¹⁹ Gerald Spindle, “Secondary Copyright Infringement-new Perspective in Germany and Europe” (2006) *International Review of Intellectual Property and Competition Law* 788, at 796-97, 801.

German courts usually refer to section 7(2) 2nd TMG, which incorporates Articles 12(3), 13(2), and 14(3) of Directive 2000/31. Hence, whenever disturbance liability is applied after a service provider becomes aware of the acts of infringements, and upon being notified, the provider is under a duty to check and is also legally obligated to instantly delete the contents after verifying that a violation has taken place.²²⁰

A disturber has to also adopt the necessary precautionary measures to prevent the occurrence of similar acts of violations based upon the general legal principle that anyone who creates or allows any source of danger, which falls within the scope of his or her duty, has to take all expected and necessary measures and preventive steps to prevent any kind of potential danger, which may constitute a threat to third parties.²²¹ Thus, it can be concluded that under the TMG and German cases, liability of service providers is only established after providers fail to take affirmative steps to prevent or stop infringing information and activities from being displayed on their network systems.

The above discussion demonstrates that in the US and Europe, liability of service providers is premised on fault when it is shown that the existing duty to take reasonable care is breached by the service provider. However, compensation cannot only be sought from service providers for their unlawful acts by establishing that a duty of care exists; it has to be also established that the online service provider is aware about the particular infringing activities. A service provider is deemed to have been aware if it was shown that the infringing activities actually occurred on its system and the service provider failed to block or prevent further similar infringing contents on its system.

2.7 THE EGYPTIAN TORT LIABILITY APPROACH

²²⁰ Anneka Bain, "Is It an Infringement of Trade Mark Law for the Operator of an Online Marketplace (such as eBay) to Allow Counterfeit Goods to be sold? As a Matter of Policy, Should It Be?" (2011), *European Intellectual Property Review* 162, at 164.

²²¹ The German Federal Supreme Court, Case No. Az.: I ZR 18/04 (July, 12 2007). R A Jens Reininghaus et al., "District Court of Hamburg to the Liability of the Operator of an Internet Cafe for Violations by a Guest..." (March 16, 2011) *Filesharing.Infos* <<http://www.filesharing-infos.de/news/tauschboersen/landgericht-hamburg-zur-haftung-des-betreibers-eines-internetcafes-fur-rechtsverletzungen-durch-einen-gast/?lang=en>> (accessed May 10, 2012).

This section aims to define the type of liability, which the Egyptian law system imposes on service providers. Although Article 179 of the EIP regulates injunctive measures, the EIP does not spell out particular civil proceedings for the infringement of the exclusive rights of copyright holder in the form of tortious liability lawsuits. Therefore, copyright holders have to resort to other laws when they want to seek compensation and other remedies. In this context, a civil suit for compensation for copyright infringement has to be filed pursuant to the Egyptian Civil Code (ECC), particularly Article 163, which sets out the general tort law principles in Egypt. This means that recourse has to be made to Article 163 of ECC in respect of tort law claims and the findings are then compared with the general principles of tort law, as explained above, in order to determine the deficiencies within the liability regime for service providers in Egypt.

In this context, Article 163 of the ECC states that “every fault, which causes damage to another, imposes an obligation of reparation on the person by whom it is committed.” This category of liability is known under the statute as liability arising from personal acts. The liability standard under Article 163 of the ECC consists of three basic elements: prejudice should be direct and certain, fault has to be shown to amount to a civil wrong under the statute and finally causation or “legal cause” requires prejudice to be a direct result of the unlawful act. However, it is important to note that although moral prejudice is of importance to copyright holders, the study excludes this and instead only covers financial losses of copyright holders, which result from an actor’s unlawful act.

However, Articles 47-56 of the CCP Law and Article 10 of the Egyptian State Council Law 1972 (hereinafter ESCL) state that a competent court is the only court that has jurisdiction over tortious liability lawsuits for compensation. Therefore, it is quite important to determine firstly the competent court, which is authorised to deal with tortious liability in Egypt and then to discuss the three required elements, which have to be met in order to establish tortious liability under Egyptian law.

2.7.1 The Economic Court

Article 47 of the ECCP and Article 10 of the ESCL contain the general rules and fundamental principles, which have to be followed to pursue civil and administrative claims in the civil and administrative courts.²²² Civil courts have jurisdiction in relation to all civil claims between private parties at both the national and international level, whilst administrative courts have jurisdiction over civil proceedings when a claim is of an administrative character and this also includes any subject matter, which the EIP regulates.²²³ Both courts have skilful judges with sufficient knowledge, who can deal with both civil and administrative cases and can also issue the necessary injunctive measures.²²⁴

However, the main problem with civil actions in Egypt is that they seem everlasting to the extent that they have been described as moving “at a snail’s pace.”²²⁵ One of the main reasons for the delay is that most judges usually first refer cases to one of the experts appointed by the Ministry of Justice.²²⁶ As a result, enforcement through the civil courts is not a particularly promising route. For that reason, the ex-President of Egypt passed the Egyptian Economic Court Law No. 120/2008 (thereafter E-court),²²⁷ although the TRIPs Agreement does not require its members to establish specific courts to implement and enforce Intellectual Property rights.²²⁸

Article 4(8) & (9) of the E-court defines the jurisdictional scope of the economic court and provides that economic courts are the only courts entitled to deal with

²²² Law No. 13 of May 9, 1968, al-Jaridah al-Rasmiyah [Official Gazette of Egypt] May 9, 1968, vol. 19 [Civil & Commercial Procedures, current and amended].

²²³ Law No. 47 of October 5, 1972, al-Jaridah al-Rasmiyah (Official Gazette of Egypt) October 5, 1972, vol. 40 (hereinafter ESCL); Article 10 of the ESCL.

²²⁴ Articles 42 to 62 of the ECCP.

²²⁵ The United States Trade Preventive (hereinafter USTR), *International Intellectual Property Alliance (IIPA) 2001 Special 301 REPORT: Egypt 97* [Hereinafter USTR 301 2001 Report: Egypt].

²²⁶ Nermine Al Ali, et al, *Egypt country chapter, Anti-counterfeiting 2009-A Global Guide*, World Trademark Review 2009 <www.iccwbo.org/bascap/id7829/index.html> (accessed, February, 05, 2012) at 81.

²²⁷ Law No.120 of May 22, 2008, al-Jaridah al-Rasmiyah (Official Gazette of Egypt) May 22, 2008.

²²⁸ Article 41(1) of TRIPs Agreement.

all claims relating to the subject-matters regulated by the EIP,²²⁹ including requests to have a case expedited, as well as interim orders.²³⁰ Furthermore, pursuant to the E-court, an economic court is set up within the area of jurisdiction of each Court of Appeal. In addition, economic courts are divided amongst themselves into two main bodies; the first body, which is responsible for claims between the state and private citizens; and the second body, which is responsible for claims between private individuals.²³¹

The economic court has a preliminary and an appellate chamber and each chamber has three judges with appropriate commercial experience. The preliminary chamber has only jurisdiction over economic cases, which do not exceed EGP 5 million.²³² Economic cases in excess of EGP 5 million are heard by the judgements of chambers, which also have a first layer of jurisdiction,²³³ and these cases can be appealed before the Court of Cassation.²³⁴

Economic courts save a lot of time and are also useful in relation to claims, which involve more than one Intellectual Property right, as the EIP cannot prevent the overlap of different types of rights, especially in cases where ministers have jurisdiction over these kinds of claims.²³⁵ Also, one of the most important advantages of this court is the role, which the preparation panel plays and which requires the parties to prepare a memo with their demands and cardinal points of agreements and disagreements within a period of thirty days,

²²⁹ Khlaed Elfakhri, “doing business in Egypt” Report presented to UHY, (Cairo, 2010) <http://www.uhy.com/media/PDFs/doing_business_guides/Doing%20Business%20in%20Egypt.pdf> (accessed February 06, 2012), at 13.

²³⁰ Article 3 of E-court.

²³¹ “Egypt new economic courts begin it work” *Egypt-News*, (Oct 16, 2008), <http://news.egypt.com/en/index2.php?option=com_content&do_pdf=1&id=4365> (Accessed February 06, 2012).

²³² Article 6 of E-court.

²³³ Article 26 of E-court.

²³⁴ Article 11 of E-court.

²³⁵ Timothy P. Trainer, “Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?” (2008-2009) 8(1), *The John Marshall Review of Intellectual Property Law* 47, at 54 (the author explains that “In Egypt, it appears that the copyright-holders must fit with Egyptian Customs, but these regulations appear to require that the copyright-holder also file the complaint with the Trade Agreement Sector of the Ministry of Foreign Trade and Industry, thus raising the question which agency is the “real” competent authority.”

which can be extended and which provides the parties with an opportunity to resolve their dispute in an organised and amicable manner.²³⁶

Economic courts thus play an important role in enforcing digital copyright law by utilising civil measures, which are more appealing to copyright holders.

2.7.2 The Prejudice Element

According to Article 163 of the EIP, monetary prejudice is the most crucial element when establishing tortious liability since an Egyptian court automatically accepts an injured party's civil claim when any form of violation is committed by an actor for any of the statutorily protected rights.²³⁷ Hence, monetary prejudice occurs when an actor's unlawful acts cause damage to the injured party's monetary rights, including "loss suffered", "gain missed" and "loss of chance."²³⁸ In other words, the injured party should suffer from a loss or an injury, which usually takes the form of financial loss. Financial loss might arise from the interference with the injured party's legitimate interests in relation to the exploitation or the use of his exclusive rights without his permission.²³⁹

Furthermore, damage suffered by an injured party must be a "natural result" of the fault²⁴⁰ and be causally connected to it. In other words, the court only considers damage, which has already taken place,²⁴¹ not imminent damage, as this kind of damage is insufficient to permit the injured parties to pursue civil proceedings.²⁴² Hence, damages under Article 163 of ECC are available if the actor's unlawful conduct causes financial loss to the injured party; regardless of the defendant's actual knowledge or awareness of his unlawful acts. This means that unlike Article 13(1) of Directive 2004/48, which deals with claiming

²³⁶ Article 8(4) of E-court.

²³⁷ Egyptian Cassation Civil Court, No. 18-1316 (22 July, 1967), at 200.

²³⁸ Egyptian Cassation Civil Court, No. 30-361 (16 May, 1979), at 251.

²³⁹ Abe Al-Rashid Ma'moon et al., *Authors' Rights & Neighbouring Rights According to the New Law No. 82 of 2002 for The Protection of Intellectual Property Right* (Dar-Al-Nahda Al-Arabiya, Cairo, 2006/2007), at 504-505.

²⁴⁰ Article 221(1) of ECC.

²⁴¹ Egyptian Cassation Civil Court, No. 49-1894 (20 March, 1984), at 179.

²⁴² Egyptian Cassation Criminal Court, No. 6-582-189 (05 March, 1955), at 189.

damages, Article 163 of ECC does not require the injured party to prove actual knowledge or awareness when damages are assessed.²⁴³

2.7.3 The Fault Element

Article 163 of the EIP defines fault as a failure to observe a certain standard of care.²⁴⁴ Fault is automatically established where an unlawful act is considered a civil wrong under the statute.²⁴⁵ Fault under Article 163 of the ECC is based on the trespass concept and an actor may be considered a trespasser if his conduct violates or breaches the others' rights, which are protected by the statute.²⁴⁶ Yet every divergent conduct, which violates any of the substantive rights, may be considered an unlawful act, which entitles the injured party to seek compensation from the actor.²⁴⁷

Furthermore, fault may be established either by negligence or an intentional tort. In this regard, if an actor intentionally causes damage or has knowledge with substantial certainty that his act will cause damage, and his intention was to carry on despite the result, the actor is intentionally liable for his unlawful personal act.²⁴⁸ Alternatively, negligence can be established in two different circumstances: firstly when a protected right is infringed by an actor and inadvertent damage is caused to the injured party.²⁴⁹

Secondly an actor may also be held negligently liable if a substantive right is violated by the actor's omission, so long as the omission is recognised as a civil wrong under the statute.²⁵⁰ However, in these two cases, prejudice must be a

²⁴³ Article 221 of the ECC.

²⁴⁴ Walaa Arakeeb, *Theory Obligation under Egyptian Civil Cod* (1st edition, Dar-El-Ktob, Cairo, 2008), at 16.

²⁴⁵ Yaniv Benhamou, "Compensation of Prejudice for Infringements of Intellectual Property Rights in France, Under the Directive 2004/48/EC and Its Transposition Law-New Notions?" (2009) 40(2), *International Institution of Communication* 125, 126.

²⁴⁶ A trespass can also be established on the basis of a breach of an unwritten pre-existing duty and duties can arise from regulations, morals, and technical standards; Egyptian Cassation Civil Court, No. 18-11 (3 January, 1967), at 3.

²⁴⁷ Egyptian Cassation Civil Court, No. 17-1089 (16 Nov, 1965), at 16; Egyptian Cassation Civil Court, No. 18-1720 (21 Nov, 1967).

²⁴⁸ Egyptian Cassation Civil Court, No.19-762 (16 April, 1968), at 19.

²⁴⁹ Egyptian Cassation Civil Court, No. 6-249 (09 Dec, 1954), at 32.

²⁵⁰ Egyptian Cassation Civil Court, No. 2-2142- 77 (16 Dec, 1937), at 77; Civil Court of Appeal, No. 45-114 (24 March, 1964), at 93.

natural result of the actor's fault. Prejudice is considered a normal result if the injured party can show that if the actor had taken the necessary standard precautions; the damages would not have been occasioned.²⁵¹

However, in all these cases, Egyptian courts assess whether negligence or intention amounts to fault.²⁵² Furthermore, when assessing the actor's fault, Egyptian courts apply two different tests: an objective test and a subjective test. The objective test focuses on the conduct of the actor, whilst the subjective test scrutinises the actor's personal capacities (consciousness).²⁵³ This means, in principle, whether fault is based on negligence or intention, in most cases the infringer will not be liable unless it is proven that he was sufficiently aware about the damages caused to others by his behavior. In other words, a person will not be liable for trespassing unless he is conscious of his act or neglect.²⁵⁴ Furthermore, although a juristic person does not, *per se*, enjoy discretion, as a natural person, a juristic person can also be liable in tort in cases where his representative causes damages to a third party.²⁵⁵

As for the objective test, this test is used by Egyptian courts to assess whether the actor's conduct adheres to the standard of a reasonable person's behavior.²⁵⁶ Furthermore, when courts apply this test, two main questions have to be answered. Firstly to what extent should an actor know or have reason to know about the risk? Secondly what could the actor have done to avoid it?²⁵⁷ Hence, if the actor's conduct was different from what a reasonable person would have done in similar circumstances, the infringer may be held personally liable for

²⁵¹ Egyptian Cassation Civil Court, No. 18-104 (17 January, 1967), at 16.

²⁵² Abdel Razeq El Sanhoury, *Explain the Law of Civil* (2nd edition, Dar-El-Nahda-El Arabia, Cairo, 1967), at 785.

²⁵³ However, French tort law has abandoned the view that culpability is a necessary element of fault, neither that it is a moral, but instead a social concept. There is no separate test, which applies to children or disabled persons: the objective test applies to everyone.

²⁵⁴ Article 164 of ECC.

²⁵⁵ Egyptian Cassation Civil Court, No. 16-614 (20 May, 1965), at 99.

²⁵⁶ Egyptian Cassation Civil Court, No.16 -870, (30 Jun, 1965) at 137; Habib Abraham El Khalel, *Omission's Civil and Criminal Liability* (PhD Thesis, Cairo University, 1967) at 112-114.

²⁵⁷ Egyptian Cassation Civil Court, 20-799 (13 May, 1969), at 123; Egyptian Cassation Civil Court, 20-799 (26 June, 1969), at 166.

unreasonable conduct.²⁵⁸ It is therefore quite crucial to define the scope of both the reasonable person standard and the knowledge requirement.

Regarding the former, according to El Sanhorry, a reasonable person in similar circumstances is a person who represents the most normal average person, who neither has supernatural intelligence, nor is a negligent person.²⁵⁹ Furthermore, it is pertinent to note that customs and traditions play a significant role in determining a similar standard in relation to the reasonable person.²⁶⁰ Customs and usage can determine how a reasonable person may behave in the course of his undertakings and can guide common sense or expert intuition when judging particular conduct under certain circumstances. Furthermore, customs, usage, habits and traditions can determine what the acts of a reasonable person can be during the course of particular actions or events. Hence, these factors guide a person's common sense or his expert intuition when judging how to respond to certain acts or conduct in particular circumstances.²⁶¹

Evidence of customs is also a strong indicator when determining whether the risk was unreasonable. It should be evaluated whether required protective measures were adopted to avoid any risk, how particular circumstances were dealt with and how a reasonable person would have responded. Evidence of customs also allows the actor an opportunity to gain knowledge of what is necessary and to explain the reasonable expectations in relation to his acts under different circumstances.²⁶² Hence, whenever an actor's conduct is similar to the behavior and conduct of another reasonable person facing the same or similar circumstances, the actor is not liable.²⁶³

As for the scope of knowledge standard, according to the Oxford Legal Dictionary; the term "knowledge" can be defined as: "(1) information and skills

²⁵⁸ Abdel Razk El Sanhory, *Explain the Law of Civil* (2nd edition, Dar-El-Nahda-El Arabia, Cairo, 1967), at 888-89.

²⁵⁹ *Id.*, at 884; Egyptian Cassation Civil Court, 16-870 (03 June, 1965), at 137.

²⁶⁰ Solomon Morcks et al., *The Obligations; Faults, and Tort of Civil Liability* (Iryny El-Slam Press, Cairo, 1988), at 230-232.

²⁶¹ Egyptian Cassation Civil Court, No.29- 686 (06 March, 1978), at 134.

²⁶² Egyptian Cassation Civil Court, No. 20-1075 (26 Jun, 1969), at 166. The court imposes a high standard of care.

²⁶³ Sliman Mrcoss, et al., *Egyptian Civil Code: The Obligations: Tort of Law*, (Iryny El-Slam Press, Cairo, 1988), at 215-220.

acquired through experience or education; (2) the sum of what is known; (3) awareness or familiarity gained by experience of a fact or situation.”²⁶⁴ However the term “awareness” is defined as internal acknowledgement or recognition of the moral quality of one’s motives and actions on which a judge may base his assessment.²⁶⁵ Thus in the legal sense, “knowledge” is therefore divided into two types: “actual knowledge” and “awareness” of infringement. However, the Egyptian law does not define the scope of these terms.

Nevertheless, Egyptian jurisprudence and the Egyptian Cassation Court define the scope of “knowledge” based on the traditional tort law approach when determining whether fault can be established. In this context, an actor is liable for his negligent conduct, if his unlawful act causes damage to a third party, which is the natural result of his failure to act in accordance with the reasonable person standard.²⁶⁶ Alternatively, if the actor knew that his act may infringe the copyright of others, or if the actor had actual knowledge that his conduct may breach copyright and still decided to carry on or adopted a reckless attitude towards the occurrence of infringement, the actor is considered intentionally liable.²⁶⁷

Thus under Egyptian law, “knowledge” and “having reason to know” have the same meaning as “actual knowledge” or “awareness” under section 512 of the DMCA 1998 and Article 14 of Directive 2000/31. However, there are some differences. The Egyptian knowledge standard is employed to assess the personal conduct of an actor in order to define whether or not his conduct is intentionally observed in accordance with the reasonable person standard, whereas under both the DMCA and the 2000/31 Directive, a broad knowledge standard is established to assess whether an actor had knowledge about the third party’s unlawful acts.

²⁶⁴ Oxford English Dictionary (third edition, November 2010; online version June 2012) <<http://www.oed.com/view/Entry/104170#eid143969764>>, (accessed May 27, 2011).

²⁶⁵ Oxford Legal English Dictionary, (third edition, September 2011; online version June 2012) <<http://www.oed.com/view/Entry/39460#eid8571161>>, (accessed May 27, 2011).

²⁶⁶ Egyptian Cassation Civil Court, No; 19-762 (April 16, 1968) at 110.

²⁶⁷ Abe Al-Rashid Ma'moon et al., *Authors' Rights & Neighbouring Rights According to the New Law No. 82 of 2002 for The Protection of Intellectual Property Right*, (Dar-El-Nahda-El Arabia, Cairo, 2006/2007), at 501-503.

Hence, under Article 163 of ECC, tort liability is based on personal fault and does not relate to a concept of a duty of care.²⁶⁸ Thus, an actor is liable if his unlawful act has been committed against a person, even if he has no obligation towards this person. This means that the objective test is not used to assess whether an actor has knowledge about a third party's unlawful acts in order to impose contributory liability, but only unlawful acts. .

2.7.4 The Causation Element & the Joint Liability Approach

Establishing causation is important because it is not enough for an injured party to prove that the actor's unlawful conduct caused him damage. The injured party has to also prove that the unlawful act of the actor is the only direct and certain legal reason, which caused the damage. Otherwise courts may find that the actor's conduct does not result in tortious liability.²⁶⁹

In practice, it is possible that more than one conduct has caused damage to an injured party. When determining whether a particular conduct is relevant to attribute the consequences of an act or omission to an actor in order to attribute liability, Egyptian courts apply Article 169 of the ECC. This Article provides that:

“When *several persons* are responsible for an injury, they are *jointly* and severally responsible to make reparation for the injury. The liability *will be shared* equally between them, unless the judge *fixes* their individual share in the damage due.”²⁷⁰

Hence pursuant to Article 169 of the ECC, when several unlawful acts may have contributed to causing damage to the injured party, the court applies the Direct-Important-Test (DIT), also known as the *conditio sine qua non* test, which literally means: without the conduct, the damage would not have occurred.²⁷¹ The key question, which the court asks, is what damage would have occurred

²⁶⁸ Walaa Arakeeb, *Theory of Obligation under Egyptian Civil Code: Involuntarily Sources of Obligation* (Dar El Kotob-El-Komia, Cairo, 2008), at 17.

²⁶⁹ Egyptian Cassation Civil Court, No. 18-1386 (27 July, 1967), at 209.

²⁷⁰ Article 169 of the ECC.

²⁷¹ The Alexandria Civil Court of Appeal, No. 4-151 (24 April, 1951) at 54.

without the unlawful conduct. If the court finds that all the damage was attributable to the unlawful conduct, the court may impose joint liability on all actors, who by their unlawful conduct participated in the causing of prejudice.²⁷²

However, if the facts show that the unlawful acts of some actors were not a direct reason for causing prejudice; the court generally does not find the actors liable.²⁷³ Furthermore, if different unlawful acts were anticipated to cause a lot of damage to the injured party, the causal link will not be established, except for the unlawful acts, which directly and in a very certain way caused damages as a natural result of the unlawful act.²⁷⁴

However, if one of the actors can show that the damage, which was caused to the injured party, was not his fault, but was the result of an intervening external event beyond his control, such as unforeseen circumstances, force majeure or the fault of the injured party or of a third party, which had a significant effect on his ability to prevent the occurrence of the damages, no liability will be imposed. In this regard, Article 165 of the ECC states that:

“In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the damage resulted from a cause beyond his control, such as unforeseen circumstances, Force Majeure, the fault of the victim or of a third party.”²⁷⁵

When dealing with a case where there are external reasons, the court firstly determines whether any kind of duty of care is imposed, and if not, the court assesses whether a reasonable person in similar circumstances would have acted like the actor.²⁷⁶ In this regard, the court enquires what the external intervening causes were and assesses to what extent they have had an effect on the ability of

²⁷² Abdel Razeq El Sanhoury, *Explain the Law of Civil* (2nd edition, Dar-El-Nahda-El –Arabia, Cairo, 1967), at 598.

²⁷³ Egyptian Cassation Civil Court, No. 17-1201 (19 May, 1966), 165; See, Egyptian Cassation Civil Court, No. 19-1448 (Nov 28, 1968), at 22; Egyptian Cassation Civil Court, No. 18-1560 (26 Oct, 1967), at 236.

²⁷⁴ Article 221 of ECC.

²⁷⁵ Article 165 of the ECC.

²⁷⁶ Article 163 of ECC; Egyptian Cassation Civil Court, No. 16-396 (25 March, 1965) at 61; the Highest Administrative Court, No. 5-106 (12 Dec, 1959), at 15.

a reasonable person to prevent the occurrence of the damage. The court asks related questions about the nature of the external reasons: are these intervening reasons unpredictable, irresistible and exterior to the actor or have they arisen due to the actor's fault.²⁷⁷

If the external cause is an exterior unpredictable reason, the actor is not liable.²⁷⁸ However otherwise the damages caused to the injured party can be expected by the actor and in such case the court examines whether there has been any obstructive reason, for instance a heavy financial burden, which prevented the actor from stopping the occurrence of the prejudice. If there was no such reason, the court considers that the actor's unlawful act was the only reason, which caused the damage to the injured party.²⁷⁹

However, in cases where the act of an injured party is jointly anticipated to cause harm or if the injured party has a duty to limit the damage, but fails to do so, liability is also imposed.²⁸⁰ The court also does not consider the actor's unlawful conduct to be the only direct and certain reason, which caused harm to the injured party; unless the court believes that the actor's unlawful conduct was so overwhelming compared to the injured party's conduct.²⁸¹ Yet, the same rules apply also to a third party's unlawful conduct, so long as the conduct proves to be unpredictable, irresistible and exterior to the actor himself and is not at all connected to the fault of the actor, so that the liability is only imposed on the third party.²⁸²

However, if the injured party can prove that the actor should have been expected or had any reason to make him expect the third party's fault and it was in his ability to prevent the harm, but the actor negligently or intentionally failed to do so, the court may only hold the actor liable.²⁸³ However, if the actor claims that

²⁷⁷ *Id.*

²⁷⁸ Egyptian Cassation Civil Court, No. 31-1-930 (27 March, 1980), at 183.

²⁷⁹ Article 165 of ECC; Egyptian Cassation Civil Court, No. 16-396 (25 March, 1965), at 61; the Highest Administrative Court, No. 5-106 (12 Dec, 1959), at 15.

²⁸⁰ Egyptian Cassation Criminal Court, No. 17-475 (25 April, 1966), at 17.

²⁸¹ Article 221 of ECC.

²⁸² Egyptian Cassation Civil Court, No. 24-894 (12 June, 2012), at 157.

²⁸³ Egyptian Cassation Civil Court, No. 17-199 (27 Jan, 1966), at 26; Egyptian Cassation Civil Court, No. 13-522 (26 April, 1962), at 79.

it does not owe a duty of care to the injured party to prevent the third party's unlawful act, although it expected damage, the court is unlikely to find the actor liable for damages.²⁸⁴ This means that as long as Article 169 of the ECC does not regulate a duty of care owed by the actor to the injured party, it will be impossible for the injured party to bring any civil proceedings against the actor for the third party's unlawful act.

Accordingly, joint tort liability under the ECC allows the following defence: an infringer can shield himself from liability by claiming that the chain of causation between the prejudice and the fault has been broken by an external intervening cause or an unlawful act by a third party. In such case, the third party's fault is deemed to constitute the overwhelming reason, which caused the prejudice to the injured copyright holder. However, one can argue that the Egyptian joint liability concept can be used in the same way as the German joint liability concept and contributory liability approach. Nevertheless joint liability under Article 169 lacks both the most significant second paragraph of section 830(2) of BGB,²⁸⁵ as well as the knowledge and awareness standards upon which the duty of care is established.

2.7.5 The Application of Egyptian Tortious Liability to Online Providers

Service provider liability under Egyptian copyright law can be established and the Egyptian civil system can impose different forms of liability on service providers. Furthermore, Egyptian enforcement procedures make reference to Egyptian tort theory in Articles 163, 165 and 169 of the ECC. Moreover, tortious liability can be based on three elements, particularly prejudice, fault and causation.

It has also been discussed that although Articles 163 & 169 of the EIP correspond with Article 45(1) of the TRIPs Agreement and bestow judicial authority to order infringers to pay copyright holders adequate compensation for

²⁸⁴ Articles 165 and 221 of ECC; Egyptian Cassation Civil Court, No. 17-199 (27 January, 1966), at 26.

²⁸⁵ Sec.830 (2) of the BGB.

their injury, copyright holders cannot bring civil proceedings against providers for two reasons; firstly, the Egyptian enforcement procedures do not impose a duty of care concept through which copyright holders can prove that a provider had actual knowledge or was aware of the activities and contents on its system and instead of placing an onus on the provider to take measures to stop or prevent such unlawful acts, they assess the direct infringer's ability to violate the holders' rights online.²⁸⁶ This means that tort liability under Articles 163 and 169 can only be imposed on the direct infringer and cannot be imposed on the service provider, which merely performs the role of assisting with the copyright infringement.²⁸⁷

Also, in most liability cases, Egyptian courts cannot rely on custom and usage to evaluate whether online service providers was aware of the infringing activities because this area has not yet been developed in Egypt and there are no legal cases which define the standard of a reasonable person in this area. It is therefore difficult for Egyptian courts to find providers liable. This means that under the Egyptian civil system, service providers are in all cases not liable for copyright infringements which occur on their servers. This means that in Egypt, service providers are immune from liability for infringing acts and contents uploaded or downloaded by end users. The main problem with the grant of absolute immunity is that this can disincentivise holders from creating new works with the potential of causing long term financial problems for providers, as explained above. Hence, it seems particularly important for Egypt to adopt more detailed legislation, which addresses the secondary liability of service providers and it appears sensible to pass legislation, which imposes liability on service providers on the basis of actual knowledge and awareness about copyright infringement.

2.8 CONCLUSION

²⁸⁶ Nooman M.K. Gooma, *Théorie des sources de l'obligation* (Librairie générale de droit et de jurisprudence, Paris, 1968), at 117-18.

²⁸⁷ Consumers International IP Watch list Report 2010: Appendix A: Country Reports – Egypt (2010) *a2knetwork.org*, <<http://a2knetwork.org/reports2010/egypt>> (accessed March 13, 2012) at 167.

It is pertinent that a consistent and coherent copyright liability regime is adopted for online service providers. Articles 163 & 169 of the ECC should therefore regulate secondary liability based on a knowledge requirement. The following recommendations are therefore made to overcome existing deficiency.

Proposals for reform must ensure that the Egyptian legislators add new Articles to the EIP, which take account of the following:

- (1) Direct and inducement liability should be excluded from the scope of liability for service providers.
- (2) The new amendment should impose a duty of care as defined within Recital 48 of the Preamble of Directive 2000/31.
- (3) The Egyptian legislature should add a new subparagraph to Article 169 of the ECC, similar to section 830(2) of the German BGB, which regulates secondary liability for providers and should impose a joint liability standard.
- (4) In case a holder seeks compensation from an internet provider; the new amendment should contain the following rules;

4.1 The standard of the duty of care should be established once the provider's knowledge or awareness has been established and there has been a failure by the service provider to stop the illegal activities or remove the illegal contents. Here Article 6-I-5 of the French LCEN and section 10 of German TMG 2007 can be considered the best examples for the Egyptian legislator when drafting the duty of care based on a broad knowledge requirement;

4.2 The assessment of damages caused as a result of a provider's unlawful act should be determined according to Article 13(1) of Directive 2004/48.

- (5) In case a holder does not want to request compensation from the provider, the Egyptian legislator should add the following new Articles to the EIP;

5.1 The holders have a right to request any kind of injunctions, as described within Recitals 24, 40 & 48 of the Preamble of Directive 2000/31 and Article 8(3) of Directive 2001/29. These new Article should be based on Article 15 & Recital 47 of the Preamble of Directive 2000/31.

5.2 Providers should be held liable pursuant to the principle of disturbance liability as set out in section 7(2) of the German TMG.

CHAPTER 3: THE SCOPE OF THE EXCLUSIVE RIGHTS IN EGYPT

3.1 INTRODUCTION

Copyright law has been fundamentally affected by rapid advances in the world of technology, starting with printing and photocopying, the piano-roll up to the mp3 player, from the mp3 player to Web 2.0 and many other changes yet to come.²⁸⁸ The problem is that internet users use decentralised networks and new storage platforms to upload and download unauthorised digital contents through the network systems of service providers.²⁸⁹ Some of these activities, such as caching, automatically create temporary copies on servers, while other activities, such as YouTube, activate new storage platforms when copyrighted work is being uploaded to become available for other unauthorised uses.²⁹⁰

For these reasons, copyright holders claim that online service providers should be held liable, as they infringe their exclusive reproduction and communication rights by allowing subscribers to use their systems to download unlimited copies, making them available to public users without permission and the license fee being paid.²⁹¹ On the other hand, providers argue that they should not be liable, as they do not know exactly who is responsible for the commission of the infringing activities.²⁹²

However, as explained in the previous chapter, copyright holders cannot bring civil proceedings against providers, as the Egyptian civil system does not regulate the liability of service providers based on a duty of care concept.

²⁸⁸ Peter Menell, "Envisioning Copyright Law's Digital Future" (2002) 46, *New York Law School Law Review* 63, at 64-65.

²⁸⁹ Decentralized network 42 (also known as dn42) is a decentralized peer-to-peer network, which uses VPNs and software BGP routers. It is a network, which explores routing technologies and tries to establish direct non-NATed connections between members. Dn42 hardly uses physical links between single networks but instead only virtual ones. These virtual links use the Internet as transport but are logically independent from it, so that one the virtual link is more like a fibre or copper line, < <http://nowhere.ws/guides/dn42/>>, (accessed 15 March 2013).

²⁹⁰ Pheh Hoon Lim, et al., "P2P Online File Sharing: Transnational Convergence and Divergence in Balancing Stakeholder Interests" (2011), *European Intellectual Property Review* 690, at 691.

²⁹¹ Nagla Rizk, "Notes From Egypt's Alternative Music Scene: Business Models, Commons and Copyright" (2010) 13(3), *The Journal of World Intellectual Property* 49.

²⁹² Alfred C. Yen, "Third-party Copyright Liability after Grokster" (2007)16(3), *Information & Communications Technology Law* 234, at 234.

Therefore, the previous chapter recommended that the Egyptian legislator amends the EIP and also the ECC, so that providers are shielded from copyright liability until the point where they actually know or are aware that infringement takes place and they fail to exercise control by removing or disabling access.

This means that the scope of liability of service providers depends on how broadly the exclusive online rights of copyright holders are interpreted. This is because the scope of the exclusive rights is the only legal framework, which defines the unlawful acts of providers online and which entitles holders to bring civil proceedings against providers whether through tortious liability and compensation claims and/or through the adoption of absolute remedies, which prevent or put a stop to the illegal activities.

The aim of this chapter is therefore to accurately define the scope of the exclusive rights of holders online under the Egyptian Copyright Law 2002/82 (hereinafter EIP) in order to assist the Egyptian legislator to enact a duty of care concept within the Egyptian legislative system, as explained in the previous chapter.

In doing so, the thesis firstly illustrates the legislative process of the drafting stages of the EIP and then defines the scope of the exclusive rights of copyright holders pursuant to international law, namely the Berne Convention, the Rome Convention, the TRIPs Agreement and the WIPO Treaties 1996. The aim is to define the international obligations, which oblige Egypt to respect the substantive rules and enforcement provisions for digital copyright works. Once the research has spelled out these obligations, the study discusses when copyright holders can pursue civil proceedings against direct infringers.

As part of the discussion, the paper analyses the substantive rules, which regulate the reproduction and communication rights, as set out in Articles 138, 146, 156 and 157 of the EIP. The research only considers these two rights, as these rights are most controversial in many jurisdictions across the world, especially what constitutes unlawful activities of providers, so that liability can be imposed on them. The findings are then compared with the substantive rights

provided by international treaties, as mentioned above, in order to hopefully provide new recommendations for the Egyptian legislator, which can help to reform this area in such a way that a fair balance is struck between securing the exclusive rights of holders and safeguarding the interests of other parties, which are also involved in electronic communications.

3.2 THE ENACTMENT PROCESS OF THE EIP

The aim is to illustrate why the Egyptian delegations chose to draft the EIP in the way they did and to explain the laws, which currently govern online service providers in Egypt. This is done to identify deficiencies within the protective system for exclusive rights holders, which also have an effect on the ability of the Egyptian legislator to regulate secondary liability within the Egyptian legal system.

Indeed, section 301 of the US DCMA successfully puts pressure on other countries to adopt legislation in accordance with the main principles established under the TRIPs Agreement and other international agreements.²⁹³ It is therefore important to explore the legislative process and general principles upon which the EIP is based.

In this regard, Article 1(2) of the Internal Regulation of the Egyptian People's Assembly (IREPA) provides that the People's Assembly must nominate 19 Committees of Experts.²⁹⁴ Each committee has its specific role in relation to particular subject matters. In addition, Article 36 of the IREPA fully explains the process for the election of members of the Committee of Experts. Elected members are normally Members of Parliament (MPs), lawyers, experts of particular fields or even delegates or representatives from particular social groups.²⁹⁵

Constitutionally, whenever the government of the day submits a particular bill to the EPA, the head of the EPA must immediately refer the new bill to the

²⁹³ Shayrah Ilias et al., *Intellectual Property Rights and International Trade* (Nova Science Publishers, USA, 2008), at 45.

²⁹⁴ This Article is conformity with Article 82 of the Egyptian Constitution 1971.

²⁹⁵ Article 36 -43 of the Internal Regulation of EPA.

specialised Committee of Experts, which is responsible for this particular subject matter.²⁹⁶ Whenever the Committee receives a new draft bill, the delegations of the Committee fully discuss the draft proposal and prepare a new basic proposal along with a final report, which is submitted to the EPA's Plenary (the Plenary of the EPA), who then debates and discusses the bill in front of the Members of the Egyptian Parliament.²⁹⁷

In 2001, Judge Hassan Badrawy presented and submitted a new draft proposal.²⁹⁸ This was then referred to the Committee of Education and Sciences Research (Joint Committee)²⁹⁹ and the head of the Joint Committee, which immediately set a schedule to discuss the draft EIP in several sessions and the delegations were informed of the dates. The delegations of the Joint Committee were composed of copyright specialists and professionals. Members of the committee were judges, expert copyright jurists, several well-known business men and representatives from interest groups and other ministerial bodies, for example the Ministries of Culture, Media, and Information and Communication Technology.³⁰⁰

The Joint Committee discussed the draft proposal and then submitted its basic proposal and its report to the Plenary of the EPA. Finally, the MPs at the EPA's Plenary agreed to adopt the basic proposal as law, which the Joint Committee had proposed.³⁰¹ Hence, the EIP was mainly based on the basic proposal, which the Joint Committee had presented to the EPA. This chapter therefore mainly depends on the Preparatory Memorandum of the Joint Committee for the interpretation of any of the issues relating to copyright in cases where the EIP is ambiguous or unclear.

²⁹⁶ Article 36 of the Internal Regulation of EPA.

²⁹⁷ Article 44 of IPRA; Final Report of Joint Committee No; 21, at 3.

²⁹⁸ At this time, Dr. Judge Hassan Badrawy was responsible for the Intellectual Property Rights section at the Ministry of Justice.

²⁹⁹ People's Assembly of the Arab Republic of Egypt, Joint Committee Report No.3, Presented by Hassan Bradawy (8th Legislative Term, 1st Session, 6 June 2001) (Joint Committee).

³⁰⁰ Joint Committee Finale Report (No 21, 2001) at 1-4.

³⁰¹ People's Assembly of the Arab Republic of Egypt, Records of the Fifty Sixth Session (evening session, 10 April 2002).

At the end of the legislative process, the new Intellectual Property Protection Law 82/ 2002 (EIP) was enacted and entered into effect on 2nd June 2002.³⁰² The EIP unifies the law, so that the majority of Intellectual Property, as well as other associated rights are covered by it. The EIP comprises four books, which fully discuss patents, utility models, integrated circuits and undisclosed information (book one); trademarks, geographical indications, and industrial drawings and designs (book two); author rights and neighboring rights (book three) and plant varieties (book four).³⁰³ Each of these books contains specific and remarkably precise provisions and also detailed civil and criminal enforcement measures.³⁰⁴ Furthermore, according to the EIP, the protection of hard and soft copies are the prerogative of the Author's Right Office at the Ministry of Culture, which is now the only official body responsible for the protection and enforcement of both forms of copies.³⁰⁵

The Egyptian Telecommunications Law 2003/10 (hereinafter TRL 2003/10) defines online service providers, sets out the legal requirement for entering the Egyptian electronic communication market and spells out the regulatory framework for service providers.³⁰⁶ In this context, Article 1 of the TRL 2003/10 appoints the National Telecommunication Regulatory Authority (NTRA) as the authority, which can issue licenses to Telecommunication Service Providers (ISPs) to provide various forms of telecommunication services in Egypt.³⁰⁷

Also, it was not until the EIP had been drafted that the administration of computer software and databases was dealt with by the Intellectual Property

³⁰² Law No. 82 of June 2, 2002, al-Jaridah al-Rasmiyah [*Official Gazette of Egypt*] June 2, 2002, vol. 2bis.

³⁰³ Final Report of Joint Committee, at 51.

³⁰⁴ This suggests that the draft law adopts a holistic approach towards Intellectual Property matters, an approach which experts recommend for developing countries to maximize their Intellectual Property benefits and consolidate their efforts. Mart Lessit et al., "Institutional Issue for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement" Commission on Intellectual Property Rights; Study Paper No. 9 (2002) <http://www.iprcommission.org/papers/pdfs/study_papers/sp9_pengelly_study.pdf> (accessed March 26, 2012), at 6.

³⁰⁵ Article 184 of EIP.

³⁰⁶ Law No.10 of February 2003, al-Jarida al-Rasmiya [*Official Gazette of Egypt*] February 04, 2003, 16 [Telecommunication Regulation Law-TRL] <http://www.tra.gov.eg/uploads/law/law_en.pdf> (accessed February 04, 2012).

³⁰⁷ Articles 21-43 of TRL 2003/10 stipulate the conditions which ISPs must meet in order to obtain licenses.

Office of the Information Technology Industry Development Agency (ITIDA), which is under the command of the Ministry of Information Technology and Communication.³⁰⁸ The ITIDA is a specialist in the area of computer programs and databases. It has excellent technological capabilities and can easily be used as a contact point for the implementation of digital copyright.³⁰⁹ For that reason, whenever the ITIDA is notified by the Attorney General or competent court, the ITIDA immediately gathers information and collects evidence, though the ITIDA has itself no juridical authority to either investigate or monitor digital communications online.³¹⁰

3.3 THE INTERNATIONAL OBLIGATIONS IN RESPECT OF THE EXCLUSIVE RIGHTS

The Egyptian legal system follows the “*monist*” or self-executing approach, through which all international treaties become part of its national law,³¹¹ so that international legal obligations are directly applied without any further need for implementing legislation in the case of the Berne Convention.³¹² This means that all parties can simply rely on the international obligations in cases where national laws are unclear.³¹³

Therefore, it is quite important to explicate which international obligations Egypt has to adhere in respect of the exclusive rights of holders, as set out in the Berne Convention, the Rome Convention, the TRIPs Agreement and the WIPO Treaties 1996, the European bilateral agreements and the American bilateral agreements. Hence, the next discussion explains the scope of the reproduction and communication rights pursuant to these international obligations.

³⁰⁸ Law No. 15 of April 22, 2004, al-Jaridah al-Rasmiyah [Official Gazette of Egypt], April 22, 2004, 17*bis* [Electronic Signature and Establishing ITIDA, current]. Minister of Communications and Information Technology (MCIT); Exec. Reg. No. 107/2005, establishing office for the protection computer programs and databases, Issue 115(bis), 25 May 2005, in force 25 May 2005.

³⁰⁹ Exec. Reg. No. 58/2006, concerning the establishment of a higher advisory committee for IPRs in info-tech and communications, Issue 59, 16 March 2006, in force 17 March 2006.

³¹⁰ Article 2 of Exec. Reg. No. 107/200.

³¹¹ This principle is established by Article 151 of the 1971 Constitution of Egypt.

³¹² Carolos M. Correa, *Trade Related Aspect of Intellectual Property Right: A Commentary on the TRIPs Agreement* (Oxford University Press, USA, 2007) at 22.

³¹³ Plenary of PA, No 7 (Dec 24, 2011) at 36.

3.3.1 The Berne Convention

Egypt is a party to the Berne Convention of 1886,³¹⁴ the most powerful copyright treaty, therefore, according to the self-executing principle, whenever the Egyptian delegations draft a law, which relates to the process of regulating any subject matter associated with the protection and enforcement of copyright law, the scope of the substantive provisions within the Convention must be considered.³¹⁵ Also any Egyptian individual or government body can rely on the Berne Convention whenever local domestic laws are silent or ambiguous in relation to the particular subject matter.³¹⁶

However, the problem with holders relying on the Berne Convention is that the Egyptian courts cannot fully rely on the Berne Convention since the Convention does not extend protection to cover digital infringement activities. Nevertheless, it is quite important to appreciate the scope of the exclusive rights of holders under the Berne Convention, particularly the reproduction and communication rights, as this greatly helps with identifying the problems of defining the scope of these two rights within the EIP.

As for the reproduction right, Article 9(1) of the Berne Convention provides that:

“[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form.*”³¹⁷

³¹⁴ The Berne Convention was subjected to various revisions by several experts in the field “Proposal for Revision the Substantive Copyright Conventions: (Articles 1 to 20)” Doc S/1 (1967 Stockholm), at 73-199. Berne Convention for the Protection of Literary and Artistic Property, Art 3(1) (a), Sep. 9, 1886, revised July 24, 1971 S. Treaty Doc. No. 99-27, 828 U.N.Y.S. 221 (hereinafter Berne Convention). The Berne Convention entered into force on March 02, 1977 <http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=946C> (March 14, 2012); Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Polices of Intellectual Property* (The Brookings Institution, USA, 1998), at 103.

³¹⁵ Article 151 of the 1971 Constitution of Egypt.

³¹⁶ Carolos M. Correa, *Trade Related Aspect of Intellectual Property Right: A Commentary on the TRIPs Agreement* (Oxford University Press, USA, 2007) at 22.

³¹⁷ Article 9(1) of the Berne Convention 1971; the term “in any manner of form” is neither used in Article 10 of the Rome Convention, nor in Article 14(1) of the TRIPs Agreement.

In an internet providers' liability scenario, the question is whether some volatile digital reproductions can fall within the scope of the reproduction right of holders under the Berne Convention. The enormous problem is that the Berne Convention did not adopt any compulsory fixation test, which could provide a convincing answer to this question.³¹⁸ However, the records in relation to the revisions from the Stockholm Diplomatic Conferences 1967 make clear that the fixation of a work is the essential element of the concept of the reproduction right.³¹⁹ Nevertheless, the meaning of the term "fixation" was not directly determined.³²⁰ Thus the answer to this question depends on the interpretation of the sentence "*in any manner or form*" used within the text of Article 9(1) of the Berne Convention.

Scholars interpret this sentence in two different ways under the maximalist or minimalist approach. Some supporters of the maximalist approach argue that the sentence "*any manner and form*" implies that permanent and temporary copies are considered copies under the reproduction right. In addition, copies are considered to fall within this definition, so long as no prejudice is caused to the appropriate limitations and exceptions under Article 9(2) of the Convention.³²¹

It is therefore necessary to interpret the terms employed in this sentence in order to define the scope of the reproduction right under the Berne Convention. In this context, *fixation* may be interpreted to mean representation with a sufficient degree of stability, so that what is fixed can be perceived, reproduced or otherwise communicated.³²² Whereas the term *manner* may be used to describe

³¹⁸ Sam Ricketson, et al, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition, Oxford University Press, 2010), at 645.

³¹⁹ Sam Ricketson, *The Berne Convention for The Protection of Literary and Artistic Works: 1886-186* (Sweet & Maxwell, UK, 1986) at 373-374.

³²⁰ Sam Ricketson, et al, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition, 2005, Oxford University Press, USA, 2010) at 639-645.

³²¹ Jorge Reinbothe, et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002) at 43.

³²² Aaron Perzanowski, "Essays: Fixing Ram Copies" (2010) 104, *Northwestern University Law Review* 1067, at 1072.

“the exact way in which actions are to be carried out, usually as specified in a will, contract, or other legal documents.”³²³

From a technological perspective, the term “*manner*” may be used to denote that reproduction may technologically occur, while the term *form* may be used to refer to the following: “the particular character, nature, structure, or constitution of a thing. It can also refer to the particular mode, in which a thing exists or manifests itself in order to be presented.”³²⁴ Thus, according to these definitions, a level of stability is required for an illegal copy to be considered an unlawful act, which violates the reproduction right.

However, supporters of the maximalist approach also argue that any signal duplication primarily involves the right of reproduction, so long as it has an adequate level of stability to be perceived, reproduced or communicated and thus constitutes a reproducible form.³²⁵ As a result, all types of reproduction, even the ones with virtually no stability, would satisfy the fixation test.³²⁶ However they also acknowledge that member states may adopt statutory exceptions in respect to temporary, incidental or instrumental digital reproduction, so that they do not fall within the scope of the exclusive rights.³²⁷

The limitation to the maximalist approach is firmly entrenched in Article 9(2) of the Berne Convention, which permits statutory exceptions.³²⁸ Under this section, a temporary copy may be excluded from the reproduction right if the following three conditions are met; firstly, it has to be shown that they fall within “*special*

³²³ Oxford English Dictionary (third edition, September 2000; online version March 2012) <http://www.oed.com/view/Entry/113569?redirectedFrom=manner#eid37942734> (accessed May 03, 2012) at 9b.

³²⁴ Oxford English Dictionary (second edition, 1989; online version March 2012) <<http://www.oed.com/view/Entry/73421?rkey=wsZPWK&result=1&isAdvanced=true#>> (accessed May 03, 2012) at 5.

³²⁵ UNESCO/WIPO, Doc. CEGO/I/7 (Paris, 20 February 1981) <http://www.wipo.int/mdocsarchives/IGC%20%281971%29_IV_1981/IGC_IV_13_E.pdf> (accessed June 26, 2012).

³²⁶ Jorge Reinbothe, et al., *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 42-43.

³²⁷ Mihaly Ficsor, “Copyright for Digital Era: The WIPO ‘Internet’ Treaties” (1996-1997) 21(3/4), *Columbia-Vla Journal of Law & The Arts* 197, at 204.

³²⁸ Martin Senftleben, *Copyright, Limitation and the Three-Step Test* (Kluwer Law International, UK/Canada, 2004), at 22.

cases”, for instance are educational or considered to be in the public interest; secondly, this does not “*conflict with the normal exploitation*” of the right holders; and finally, this also does not “*unreasonably prejudice...the legitimate interests of the author.*”³²⁹

However, proponents of the minimalist approach argue that the right of reproduction should be narrowly interpreted and that therefore the three fixation elements of having to be perceived and reproduced and communicated should be jointly read together. By reading these three elements together, the broadness of the fixation scope is minimised and copies with no degree of stability, such as browsing, cannot fall within the scope of the reproduction right.³³⁰

Furthermore, proponents of the minimalist approach consider that the rationale of the maximalist approach does not confer sufficient freedom on contracting parties to exclude temporary copies pursuant to Article 9(2) of the Berne Convention, as this Article cannot be applied to the reproduction right since it includes three main conditions for the exceptions to be evoked, which can only be applied to specific domestic rules to assess the authors’ rights as a form of copyright exceptions; but it would be exceedingly difficult to implement all these conditions in relation to the reproduction rights.³³¹ This is because when these conditions are applied to temporary copy cases, all the possible applications of the exceptions would become excluded.³³²

Alternatively, opponents of the minimalist approach suggest that certain forms of digital representation can be excluded from the exclusive reproduction right

³²⁹ Records of the 1967 Stockholm Conference, at 112.

³³⁰ Pamela Samuelson, “The NII Intellectual Property Report” (1994) 37(12), *Communication of The American* 21, 22.

³³¹ One commentator argues that the exceptions under the Berne Convention remain a theoretical construct, rather than a substantive reflection of a balanced system, which is both progressive in terms of preserving future creativity and impressive in its balancing of the competing interests: Ruth L. Okediji, “The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment” (September, 2005), Paper presented to International Centre for Trade and Sustainable Development (ICTSD), <http://ictsd.net/downloads/2008/12/okediji_copyright_2005.pdf> (accessed February 14, 2012) at 15.

³³² Sam Ricketson, et al, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition, 2005, Oxford University Press, USA, 2010) at 777.

set out in Article 9(1) of the Berne Convention³³³ because, for example, a negative clause, for instance “the reproduction right shall not be applied to...” can be adopted by countries or alternatively a definition, which specifies that the reproduction right only applies to permanent or “non-temporary” reproductions.³³⁴

As for the communication right, this right includes a number of provisions, which clearly confirm the rights to publicly perform and communicate works to the public through transmissions and which cover a wide range of activities in relation to works in nonmaterial form. According to Article 11^{bis} (1) of the Berne Convention, communication rights are applied to all work categories protected under Berne, but the Article also specifies the following three main types of protected communications: (i) broadcasting works or the communication thereof to the public by any means; (ii) “any communication to the public by wire or broadcasting through an organisation other than the original one”; (iii) public communication by loudspeaker or any other analogous instrument. In addition, Article 14(1)(i) confers the exclusive right of communication to the public by wire in respect of cinematographic works. Article 14(1)(ii) grants authors of literary and artistic works the exclusive right to communicate cinematographic adaptation of their works to the public by wire.

Hence, the Egyptian legislator should consider the following points; firstly, the application of the reproduction and communication rights in respect to specific technologies and services were not fully dealt with by the Berne Convention. Secondly, there is no affirmative duty to demonstrate that the reproduction rights should only be applied to forms of work, which are characterised as “fixed”. On the other hand, there is also no explicit reference to reflect that the same rights

³³³ Mihaly Ficsor, “Copyright for Digital Era: The WIPO ‘Internet’ Treaties” (1996-1997) 21(3/4), *Columbia-Vla Journal of Law & The Arts* 197, at 205.

³³⁴ These approaches are not accommodating, as the minimalist approach cannot adapt the copyright limitations in relation to new methods of work exploitation through which copyright law achieves to be coterminous with necessary legislative changes driven by continuous advances in technology. However it is submitted that these approach can be adopted by legislation in case provider’s liability is unregulated until further developed. See, Dan L. Burk et al., “Fair Use Infrastructure for Rights Management Systems” (2001) 15, *Harvard Journal of Law & Technology* 1, at 5; Hachen Sun, “Overcoming the Achilles Heel of Copyright Law” (2007) 5(2), *Northwestern Journal of Technology and Intellectual Property* 122, at 122, 125.

under the Berne Convention apply to the kinds of works, which have never been stored.

However, in most cases, Egyptian courts should interpret the fixation test and communication right, as set forth under the Berne Convention, in a way, which supports the minimum approach and the copyright limitations should be evoked when the rights conflict,³³⁵ so that the best possible social outcome is achieved.³³⁶

3.3.2 The Rome Convention

Egypt is not a party to the Rome Convention.³³⁷ Therefore, Egyptian individuals, legal entities or courts cannot rely on this Convention, as Egypt is not bound by this treaty. However, the EIP gives performers and producers similar exclusive rights or neighbouring rights, as those contained in the Rome Convention, as discussed later.³³⁸ Neighbouring rights (also known as related rights) mean that the general right relates to performances, broadcasts, phonograms and sound recordings. The current common law approach tends to assimilate these kinds of rights in the area of copyrights.³³⁹ In contrast, in civil law countries, such as Egypt, neighbouring rights are often included in the Copyright Acts. These rights generally aim to provide adequate protection to the beneficiaries, performers and producers of phonograms and which are derived from the author's rights.³⁴⁰ It is therefore important to understand how the reproduction and communication rights are regulated under the Convention.

³³⁵ Jeff Fisher, et al., "The 'Satire/Parody' Distinction in Copyright and Trademark Law Can Satire Ever Be A Fair Use?" Paper presented A.B.A Section of Litigation Intellectual Property Litigation Committee Roundtable Discussion, No. 07345/977489.1 (June 21, 2006) <<http://www.fbm.com>>, (accessed February 15, 2012).

³³⁶ William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford University Press, USA, 2004) at 9, 200.

³³⁷ United Nations Education, Scientific and Culture Organisation (UNESCO), WIPO-Geneva, Doc. OIT/UNESCO/OMPI/ICE.13/7, (Paris, July, 08, 1991), <<http://unesdoc.unesco.org/images/0009/000904/090401eb.pdf>> (accessed March 03, 2012).

³³⁸ The EIP protects and enforces the economic exclusive rights of performers and producers: Articles 156 & 157 of EIP.

³³⁹ Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, USA, 2001) at 143.

³⁴⁰ The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (hereinafter Rome Convention). For this reason, the Rome

As for the reproduction right, Article 3(e) of the 1961 Rome Convention offers the following definition for reproduction: a “reproduction” is the making of a copy or copies of “fixation.” However the term fixation is not defined. However, the Diplomatic Conference considered the concept self-evident.³⁴¹ Furthermore, the Convention spells out minimum economic rights for performers, phonogram producers and broadcasting organisations. Article 13 only speaks about “reproduction” of fixations of performances and broadcasts. Article 7 provides that performers can prevent any misuse of their reproduction right. Article 10 entitles “producers of phonograms to enjoy the right to authorise or *prohibit the direct or indirect reproduction* of their phonograms. It is worth mentioning that Articles 7, 10 and 13 of the Rome Convention are in no way concerned with the exclusive rights to authorise or prohibit; instead they are primarily concerned with the rights to prevent reproduction.³⁴²

Hence, the exclusive right of reproduction is granted to performers, irrespective of whether the original fixation enjoys proper authorisation and the reproduction is different from the formally authorised one. “Direct or indirect reproduction” is mentioned in Article 10 of the Rome Convention and the Report by the Reporters-General of the Rome Diplomatic Conference defines the direct and indirect reproduction right as including “...among other things, reproduction by means of (a) molding and casting; (b) recording the sounds produced by playing a pre-existent phonogram, and (c) recording off the air a broadcast of the sounds produced by playing a phonogram...”³⁴³

As for the communication right, the Rome Convention does not formally define the term “communication to the public.” However Article 3(f) and (g) of the

Convention subordinates neighbouring rights to copyright: “Protection granted under this Convention shall leave intact and shall in no way affect the protection in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection”: Article 1 of the Rome Convention.

³⁴¹ Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Right of Performers and Producers of Phonograms to be Considered by the Diplomatic Conference; WIPO, Doc. CRNE/DC/5 (30 August 1996) at 7.04-05.

³⁴² Claude Masouye, *Guide to the Rome Convention and of the Phonograms Convention* (3rd edition, World Intellectual Property Organisation, 1999), at 73.

³⁴³ “Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisation,” ILO, UNESCO, BIRPI publication, Geneva - Paris, 1968 (reprinted as WIPO Publication No. 326 (E) (hereinafter: Records of the 1961 Rome Conference); Records of the 1961 Rome Conference, at 46.

Rome Convention directly define “broadcasting” as “transmission...for reception by the public.”³⁴⁴ Also pursuant to Articles 7(1)(a) and 12, the right of communication refers to the rights of performance and producers of phonograms. However, under the Rome Convention, the right of communication to the public by wire covers two rights; the right to broadcast and the right to communicate to the public and these are also called public performance rights under the Berne Convention.³⁴⁵

However, under the Rome Convention, it is difficult to perceive that copyright holders can rely on the reproduction and communication rights to protect and enforce their exclusive rights online. This is because the scope of these two rights under the Convention has been structured in an extremely vague manner, which makes it difficult to apply them to the digital enforcement environment.

3.3.3 The TRIPs Agreement

The TRIPs Agreement was ratified by the Egyptian People’s Assembly (EPA) on 16th April 1995 and has been applied since the issuance of the Presidential Decree No. 72/1995.³⁴⁶ However the status of the TRIPs Agreement within the Egyptian legal system, especially in the area of copyright law, is completely different to the self-executing principles and it is therefore important to accurately clarify the role of the TRIPs Agreement at the time when the Egyptian delegations drafted the new EIP. The following part, therefore, illustrates the exclusive rights of holders, as set forth within the TRIPs Agreement. The negotiations of the Egyptian delegations at the Joint Committee and the Plenary of the EPA are then discussed in order to explore the position of the TRIPs Agreement within the basic proposal of the EIP.

³⁴⁴ Mihaly Ficsor, *The Law of Copyright and the Internet* (2nd edition, 2002, Oxford University Press, USA, 2010) at 159.

³⁴⁵ Claude Masouye, *Guide to the Rome Convention and of the Phonograms Convention* (3rd edition, 1981, World Intellectual Property Organisation, Sydney, Australia, 1999) at 51

³⁴⁶ Egyptian People’s Assembly approved Presidential Decree 72/1995 by which Egypt became a WTO member and agreed to adhere to the WTO Agreements. The Presidential Decree 72/1995 was issued on 20 March 1995, approving Egypt’s status as a WTO member and its accession to the WTO Agreements, as concluded at the Uruguay Round of trade negotiations. The decision was published in the Egyptian Gazette on 15 June 1995.

The seventies and the eighties witnessed a tremendous development in the field of technology. This contributed to the increase in Intellectual Property transactions and increased interdependence of the world economy.³⁴⁷ In the 1980s, Western nations noticed how the protection and enforcement of Intellectual Property laws varied greatly across nations. At the same time, the WIPO suffered from a fundamental institutional weakness to enforce the Treaties. Consequently, Intellectual Property products were vulnerable, as there was no effective international protection, nor appropriate remedies.³⁴⁸ For these reasons, at the end of the 1980s, a set of new norms were prepared in two different forums - the Uruguay Round negotiations of the GATT framework and the WIPO in order to achieve strong intellectual property protection across the world. The former set of norms was prepared by only one committee of experts, whilst the latter norms were prepared by two committees.

Yet the work by the WIPO committees resulted in unwanted interference since they hampered the Uruguay Round negotiations in relation to the trade-related aspects of the Intellectual Property Rights (TRIPs). As a result, the Intellectual Property debate shifted to the GATT negotiations. This shift was significant since developing countries were not united.³⁴⁹ Consequently, in 1994, the GATT Uruguay Round Agreement of Trade Related Aspect of Intellectual Property Rights (TRIPs) was drafted.

The TRIPs Agreement lays down minimum standards, which require all WTO Members to abide to Articles 1 to 21 of the Berne Convention, including Article 9 of the Berne Convention. This requirement was imposed irrespective of whether Members were parties to the Berne Convention or not,³⁵⁰ so that the TRIPs Agreement effectively succeeded in achieving compliance in relation to

³⁴⁷ H.J. Reichmann, "Form Free Riders to Fair Followers: Global Competition under the TRIPs Agreement" (1997) 29, *New York University Journal of International Law and Politics* 11, at 11.

³⁴⁸ Jeanmarie Lovoi, "Note: Competing Interest: Anti-Piracy Efforts Triumph Under TRIPs But New Copying Technology Undermines The Success" (1999) 25, *Brooklyn Journal of International Law* 445, at 457.

³⁴⁹ Christopher Wadlow, "Including Trade in Counterfeit Goods" the origin of TRIPs as a GATT anti-counterfeiting code" (2007) 3, *Intellectual Property Quarterly* 350, at 402.

³⁵⁰ Article 9 of the TRIPs.

the right of reproduction enshrined in Article 9 of the Berne Convention.³⁵¹ However, TRIPs unlike the Berne Convention, imposes various obligations in specific areas, such as cinematographic works, sound recordings and in respect of different forms of live performances.³⁵²

In addition, the negotiation of the TRIPs proved that the three-step test was a suitable common denominator for the evaluation process in relation to specified limitations and to the general exceptions granted in relation to authors' rights. In this context, the three-step-test used by Article 13 of TRIPs constitutes a generic interpretation tool. This test is used in the area of literary and artistic works and is applied to the economic rights in the same manner in relation to Article 9(2) of the Berne Convention. It can therefore be concluded that it is one of the most effective "Berne-plus" elements of the TRIPs Agreements.³⁵³

However, after TRIPs was concluded, online transmissions became a fundamental aspect of the exploitation of copyrighted work. However the TRIPs Agreement did not in any way deal with the communication right, including the making available right. Also, both the Berne Convention and the TRIPs Agreement do not refer to the general distribution right, though the TRIPs Agreement deals with several sensitive areas, particularly enforcement procedures. In this context, Articles 41-61 of Part III and IV of the TRIPs set out the necessary enforcement measures, i.e. the civil procedures and remedies, which Member States have to adopt within their domestic enforcement procedures and make available to holders, so that they can enforce their exclusive rights.³⁵⁴

Further, although the Egyptian delegations at the Joint Committee sessions admitted that the TRIPs Agreement upon its ratification forms part of Egypt's laws, they acknowledged that some TRIPs provisions have no direct

³⁵¹ Alan Stroy, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed" (2003) 40, *Houston Law Review* 763, at 767.

³⁵² Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 312.

³⁵³ Article 13 of the TRIPs.

³⁵⁴ Article 41(1) of the TRIPs.

applicability within the EIP, so that the TRIPs provisions still require implementation by an enabling act.³⁵⁵ The Members of Parliament also shared this view. In this regard, Dr Srour emphasised that Egypt is “a country that has long respected its international obligations under the condition that the other involved developed countries did the same. Therefore, it is obvious that the Egyptian legislative system will never in any way attempt to implement the TRIPs Agreement in a way that contradicts the interests of the poor people in Egypt.”³⁵⁶ Dr Srour also stressed the fact that “none of the obligations under TRIPs can ever be superior in its implementation than the main public Egyptian interests and welfare.”³⁵⁷

This approach towards the TRIPs has also been confirmed by the Egyptian Higher Administrative Court. The Court declared that the Ministerial Decree No. 547/2000, which was directly based on TRIPs Article 70 (9),³⁵⁸ was invalid on the basis that the Minister had taken a step, which only the legislative body could take and thus had usurped his exclusive legislative powers when he directly applied the provisions of the TRIPs Agreement.³⁵⁹ The Court also made clear that the TRIPs Agreement has no direct effect in Egypt and opined that no decisions taken by the administration can be based on any of its provisions.³⁶⁰

The rationale for not adopting a self-executing approach towards the TRIPs Agreement is that each contracting party of the TRIPs Agreement has a different legal system and some of the provisions and rules were drafted, so that

³⁵⁵ Dr Hossam El Saghi was one of the members of the delegations and supported the idea that the TRIPs Agreement provisions should not be self-executing within the Egyptian legislative system; Joint Committee Final Report (No 21, 2001) at 10-12. Hossam El Saghir, *Basic and Principle of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS AGREEMENT): An Analytical Study Focusing on the Position of Developing Countries, With Special Attention of Patent* (Dar Al-Nada-Al-Arabiya, Cairo, 1999), at 115.

³⁵⁶ Plenary of PA, No 80 (June 16, 2001), at 35.

³⁵⁷ Plenary of PA, No 80 (June 16, 2001), at 49.

³⁵⁸ Concerning the establishment of the mailbox system in countries that did not previously grant patents for pharmaceutical and agricultural chemical products, but granted the applicants exclusive marketing rights during the transition period given to developing countries.

³⁵⁹ The Higher Administrative Court, 1st circuit, case no. 6965/49 (December, 25, 2004). The European Court of Justice “ECJ” also rejected the direct applicability of TRIPs under EC law in *Parfums Christian Dior SA and Tuk Consultancy BV*, joined cases C-300/98 and C-392/98, 14 December 2000, at 44.

³⁶⁰ Hossam El Saghir, “Intellectual Property Monograph (Egypt)”, in R. Blanpain, eds., *International Encyclopaedia of Laws* (2nd edition, Kluwer Law International, UK, 2009) at 77.

contracting parties could freely adopt several different implementing interpretations for the enforcement procedures.³⁶¹

For example, Article 41(1) of the TRIPs deals with “expeditious remedies” and Article 45(2) deals with damages, which are “adequate to compensate for the injury.” As many parties interpret the concept of damage differently, a self-executing approach causes problems and difficulties. Accordingly, these two provisions are not directly enforceable under Egyptian law. In other words, the implementation of the TRIPs provisions still have to be transposed.³⁶²

As can be seen, the TRIPs Agreement has been a significant factor in expanding the scope and extent of international Intellectual Property protection and is therefore also dubbed “Berne Plus.” However, the TRIPs Agreement does not specifically address the challenges and difficulties arising from the emergence of the internet, neither the enormous developments in modern technologies. Nevertheless, the Agreement requires Member States to adopt different kinds of domestic procedures and remedies as part of their enforcement procedures. These remedies and procedures certainly achieve effective enforcement of the rights bestowed on copyright holders.³⁶³ Nonetheless, such enforcement provisions are not directly applicable within the new EIP. Thus, many of the provisions included in the TRIPs Agreement may not have been directly addressed in the EIP.³⁶⁴

3.3.4 The WIPO Treaties 1996

By the time the TRIPs Agreement was signed, the international copyright community faced a new challenge, i.e. during the *de facto* finalisation of the

³⁶¹ Carolos M. Correa, *Trade Related Aspect of Intellectual Property Right: A Commentary on the TRIPs Agreement* (Oxford University Press 2007) at 409.

³⁶² Hossam El Saghir, *Basic and Principles of the Agreement on Trade Related Aspect of Intellectual Property Right (TRIPs Agreement): An Analytical Study Focusing on the Position of Developing Countries, With Special Attention to Patent* (Dar El Nada Al Arabia, Cairo, 1999), at 155.

³⁶³ Susan A. Mort, “The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighbouring Rights” (1997-1998), *Fordham Intellectual Property, Media and Entertainment Law Journal* 173, at 184.

³⁶⁴ WTO, World Trade Organisation Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation-Egypt*, IP/Q/EGY/1, IP/Q2/EGY1, IP/Q3/EGY1, IP/Q4/EGY/1 (October 11, 2005) (hereinafter WTO/Egyptian Legislation Review).

TRIPs, which took place at the end of 1992 and the full signing, which took place in 1994, the internet began a truly spectacular development. The international copyright community was thus unable to celebrate the TRIPs Agreement, but instead sat idle for a long time.³⁶⁵ This is because the phenomena of digital technology and the humongous development of the internet raised many questions, which required urgent responses. Undoubtedly, the main issue is that the internet has become such a formidable platform for the dissemination of all forms of copyright works and makes widespread piracy very easy because of the networks of service providers.³⁶⁶ However, no further negotiations could be held to further address these newly emerging technological challenges. This was also the case since it is generally difficult to find solutions to problems, which digital technologies create for copyright holders.

Consequently, holders strongly argue that the inability of the TRIPs Agreement to prevent digital piracy results in more illegal activities through online reproduction and dissemination of their copyrighted works on the servers of providers. As a result, copyright holders face huge financial losses, which cannot be recouped through compensation claims, as it is difficult to locate particular infringers and to bring civil proceedings against them.³⁶⁷

For that reason, the WIPO conference took place in Geneva on the 2nd December 1996 and two related treaties were adopted: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Copyright Treaty (WPPT). These two treaties reform the legal principles, which govern the protection of copyright

³⁶⁵ Mihaly Ficsor, "The WIPO 'Internet Treaties': The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-Revolutionary Central European" (2006-2007), *The John Marshall Review of Intellectual Property Law* 17, at 19.

³⁶⁶ Timothy P. Trainer, "Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?" (2008/09) 8, *The John Marshall Review of Intellectual Property Law* 47, at 50-55.

³⁶⁷ Daniel E. Abrams, "Comments: Personal Video Recorders, Emerging Technology and the Threat to Antiquate the Fair Use Doctrine" (2004), *Albany Law Journal of Science and Technology* 127, at 129; Yannis Bakos, et al., "Bundling Information Goods: Pricing Profits and Efficiency" (1999) *Management Science*, <<http://people.stern.nyu.edu/bakos/big.pdf>> (accessed June 26, 2012).

at the international level and strengthen the online rights of performers and phonogram producers.³⁶⁸

Like the TRIPs, the WCT builds upon the Berne Convention and Article 1 of the WCT reaffirms that the treaty is a special agreement in accordance with Article 20 of the Berne Convention and does not contain any provisions which conflict with the Berne Convention and also does not prejudice the rights and obligations spelled out in other treaties.³⁶⁹ This means that the WCT successfully creates minimum standards for its contracting parties and thereby expands copyright protection to the digital sphere, particularly the reproduction right.³⁷⁰

The WCT spells out three core exclusive rights for authors, which are set out in Article 8 of the WCT. This also introduces a new designation for the right to make available to the public and the right of communication to the public. Article 10 of the WCT requires the contracting parties to provide limited author rights or to create exceptions, as required under the Treaty and the Berne Convention. However, the WCT also explicitly states that contracting parties are permitted to formulate a number of novel exceptions. This appears appropriate in the realm of digital networking.³⁷¹

The WPPT deals with the digital rights of performers and phonogram producers. The treaty expands and implements the Rome Convention, but extends it to the digital environment. Producers and performers of fixed phonograms and performances are granted a broad “reproduction right”, so that copyright holders are entitled to authorise direct and indirect reproductions, including in relation to all digital forms.³⁷² The treaty equips performers and producers of phonograms with similar rights to the ones provided to other authors, including the right to

³⁶⁸ “The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)” prepared by the *International Bureau of WIPO* in National Seminar on the WIPO Internet Treaties and The Digital Technology, Doc. WIPO/CR/RIO/01/02 (Brazilian, 20 Aug, 2001) <www.wipo.int/edocs/mdocs/.../en/wipo.../wipo_cr_rio_01_2.doc> (accessed March 06, 2012).

³⁶⁹ Michael J. O’Sullivan, “International Copyright Protection for Copyright Holders in the Internet Age” (2000) 13, *New York International Law Review* 1, at 16.

³⁷⁰ WIPO, “Summary of the WIPO Copyright Treaty (WCT) (1996)” <http://www.wipo.int/treaties/en/ip/summary_wct.html> (accessed April 20, 2012), at 12.

³⁷¹ Article 10 of WCT.

³⁷² WIPO, “Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996)” <http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html> (accessed April 20, 2012) at 2.

make available to the public. This right is very similar to the ones conferred by virtue of the WCT.³⁷³ In addition, the treaty also spells out some limitations and exceptions.³⁷⁴

Nevertheless, the WIPO Treaties suffer from various inherent problems. The Treaties were initiated by developed nations, especially the US and Europe. As a result many commentators believe that these Treaties were never able to strike a reasonable balance for all involved parties, especially between holders in developed nations with an advanced technological infrastructure and end users in developing countries for whom it is important that the right to access to information is not impeded.³⁷⁵

Another problem with the Treaties is that they do not include specific enforcement provisions, but instead require each state to ensure that states adopt domestic legislation to ensure that effective actions can be taken against copyright infringements. Nevertheless, the WIPO Treaties have considerably updated the multilateral Intellectual Property regime.³⁷⁶

However, Egypt is not a member of the WIPO Treaties 1996 and the Treaties have therefore no direct effect in Egypt and thus cannot be enforced. Nevertheless, the delegations of the Joint Committee and MPs at the Plenary of EPA have granted authors, performers, and producers the same exclusive rights, as these Treaties.³⁷⁷ This decision was reached after discussions with local copyright chambers and various business groups when the draft proposal was negotiated at the Joint Committee. This is also because the entertainment and creative industries successfully lobbied the delegations to draft the basic proposal in such a way that online protection and effective enforcement are

³⁷³ Articles 10 and 14 of WPPT.

³⁷⁴ Article 16 of WPPT.

³⁷⁵ Jennifer Burke Sylva, "Symposium: Digital Delivery and Distribution of Music and Other Media-Recent Trends in Copyright Law: Relevant Technology; and Emerging Business Models" (2000) 20, *Loyola of Los Angeles Entertainment Law Review* 217, at 224.

³⁷⁶ Peter K. Yu, "Current and Crosscurrents in the International Intellectual Property Regime" (2004), *Loyola of Los Angeles Law Review* 323, at 375.

³⁷⁷ Articles 147, 156, and 157 of EIP.

granted to copyright holders.³⁷⁸ Hence, many provisions of the WIPO Treaties are addressed by the new EIP.

3.3.5 The European Agreements

Egypt was one of the first Arab countries, which concluded a bilateral Euro-Mediterranean Free Association Agreement (EM-FAT) with the European Union (EU) in 2004.³⁷⁹ The EM-FAT includes certain provisions, which deal with Intellectual Property and signatories to the agreement have to thus provide effective protection in respect of all intellectual property rights by ensuring that protection is aligned with international intellectual property protection standards.³⁸⁰

However, the EM-FAT contains vague terminology and does not specify whether terms refer to the EU, WTO or WIPO standards. This ambiguity may result in several countries choosing to adopt a new set of international Intellectual Property standards in the future. Yet Article 37 of the EM-Egypt-FAT only makes reference to the “prevailing international standards.”³⁸¹ This means that Egypt is not obligated to adopt a high degree of protection, as a result of the vague terminology.

In 2007, Egypt concluded a free trade agreement with the European Free Trade Association (E-FTA), nearly ten years after starting the first negotiations.³⁸² The E-FTA free trade agreements contain Intellectual Property clauses and annexes similar to those included in the EU Association Agreements, particularly in

³⁷⁸ Joint Committee Final Report, (No 21, 2001); Basma Abdegafar, *The Illusive Trade Of: Intellectual Property Rights, Innovation System, and Egypt's Pharmaceutical Industry* (University of Toronto Press, Canada, 2006) at 25.

³⁷⁹ The European Union has concluded Association Agreements with Tunisia (1998), Morocco (2000), Algeria (2001), Lebanon (2002), Jordan (2002), and Egypt (2004) and, on an interim basis, with the Palestinian Authority (1997). The text of these agreements can be obtained from <<http://ec.europa.eu>> Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, Of The One Part, And The Arab Republic of Egypt, Of The Other Part, EU- Egypt, June, 25, 2001 [EM-Egypt-FAT].

³⁸⁰ Article 93(1) of AA.

³⁸¹ Article 37 of the EU-Egypt.

³⁸² The Free Trade Agreement between the EFTA States and the Arab 3. Republic of Egypt, EFTA (Switz., Liech., Nor., Ice.)-Egypt, January 27, 2007 [EFTA Agreement]. The Free Trade Agreement between the Arab Republic of Egypt and the EFTA States (EFTA Agreement), Article 2 of Annex V. E-FTA was concluded on 27 Jan, 2007.

relation to international Intellectual Property treaties, which countries are required to accede to, despite them going beyond the E-FAT in some respects. For example, one provision of the E-FTA free trade agreement stipulates that the country “will do its utmost to accede to the international conventions concerning Intellectual Property Rights to which EFTA States are Parties.”³⁸³

In addition, some of the E-FTA free trade agreements require “additional substantive standards”, so that state parties have to directly guarantee similar protection levels as in Europe.³⁸⁴ However, the E-FTA Agreement with Egypt does not contain such provisions. This means that these obligations contained in the Egyptian E-FTA agreements do not exceed the minimum protection level of the TRIPs Agreement.³⁸⁵

3.3.6 The United States Agreements

The US has used Free Trade Agreements (FTA) as a strong tool to put pressure on developing countries to accede to the TRIPs plus obligations. FTAs can result in broader scope of rights and higher enforcement levels. For that reason, the US hoped to conclude a free trade agreement with Egypt. In September 2011, an American representative met with the Egyptian authorities in order to reach a satisfactory formula.³⁸⁶

However, Dr. Isa Mahmud, the ex-Minister of Trade and Industry, stated that despite the strong relationship with the US, the Americans have made no remarkable contributions to the Egyptian economy.³⁸⁷ Dr Isa explained that during the American negotiations the outcomes always favoured the US at the expense of Egypt and that during the two meetings with the US Trade

³⁸³ Article 2(3) of the E-FTA.

³⁸⁴ Article 3(1) of the E-FTA.

³⁸⁵ “Egypt Free Trade Agreement enters into force”, *efta*, (January 01, 2007) <<http://www.efta.int/free-trade/free-trade-news/2007-08-01-efta-egypt-fta-enters-into-force.aspx>> (accessed February. 04, 2012).

³⁸⁶ Several Egyptian news outlets reported that during an official visit to Cairo, in September 2011, Congressman David Dreir stated that he has plans to propose the establishment of an Egypt-US FTA. Egypt.com, US Congressman to propose free trade with Egypt, (29 Sept 2011), <<http://news.egypt.com/english/permalink/50744.html>> (accessed Feb 28, 2012).

³⁸⁷ Isa Mahmud, “America did Nothing for Egyptian Economy”, *TolElAssboa* (December. 31, 2011) <http://www.tol7.com/2011_12_31_archive.html> (accessed February 04, 2012).

Representatives in Jordan and Geneva several attempts have been made to persuade the Egyptian agencies to go through with the negotiations to reach a suitable agreement.³⁸⁸ Dr Isa further concluded from previous meetings that the US is finally convinced that the FAT negotiations should only deal with the economic affairs, without any interference in other political aspects.³⁸⁹

However, many Egyptians now believe that the relationship between Egypt and the US should be restructured in such a way that Egypt maintains strong economic and political bargaining power during negotiations. It therefore seems that future FTA negotiations may be more difficult, also since some of the FTA Agreements with other Arab countries, for example chapter 15 of the U.S-Oman FTA, include a number of provisions, which negatively regulate online liability of service providers, thereby ensuring that Omanis can enjoy the rights to privacy and access to information.³⁹⁰

It can thus be concluded that both the delegations and the MPs drafted the new EIP law with a view of achieving maximum protection for the reproduction and communication rights of authors, performers, and producers, as it was considered that this would be advantageous for Egypt.³⁹¹ This represents a victory for the entertainment industry since the new EIP spells out the same exclusive rights as the WIPO Treaties.³⁹² On the other hand, the minimalistic protection approach should be followed,³⁹³ irrespective of whether TRIPs is or is not self-executing, particularly since Egypt strongly resisted the new TRIPs-plus. Hence, the Egyptian national law is the sole means through which any international obligations can be established.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area [hereinafter U.S-Oman FTA], <<http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>> (accessed February. 04, 2012).

³⁹¹ Plenary of PA, No 80, (June 16, 2001), at 64.

³⁹² Joint Committee Final Report, No 24, (March 19, 2001), at 25-29.

³⁹³ Final Report Joint Committee Final Report, No 31, (March 28, 2001), at 13-23.

3.4 THE EXCLUSIVE RIGHTS OF COPYRIGHT HOLDERS UNDER THE EIP

Under the EIP, authors, performers and producers are granted full exclusive rights online. The exclusive rights mean that they are entitled to control the actions and behaviours of members in order to regulate and organise the process in which their copyrighted works are being dealt with until authorisation has been obtained from copyright holders.³⁹⁴ Hence, the scope of the exclusive rights also defines the extent to which providers can be held responsible. It is therefore quite important to determine the scope of the exclusive rights, particularly the reproduction and communication rights under the EIP.

However, the Egyptian economic court cannot accept a claim against a provider until the court is assured that the holder is eligible to bring a civil action and seek remedies. It is therefore important to firstly explain when a holder can be considered an eligible claimant, who can sue a provider and secondly to define the scope of the reproduction and communication rights in the EIP.

In this context, authors, performers and producers are considered the only copyright holders, who are legally entitled to bring civil proceedings and to apply for injunctive measures against direct infringers. Transferees, joint copyright holders and other stakeholders are granted the same rights as copyright holders.

In this regard, in accordance with Article 9(1) of the Berne Convention, Article 147 of the EIP fully grants the author and his successor the exclusive rights to authorise or prevent any kind of utilisation, including any kind of reproduction and communication of the copyrighted work, along with the right of making these kinds of work available to the public.³⁹⁵ Where there are joint copyright works, all authors are granted equal rights, unless a different written agreement

³⁹⁴ Simon Olswang, "Access Right: An Evolutionary Path for Copyright into the Digital Era" (1995) 5, *European Intellectual Property Review* 215, 217.

³⁹⁵ In accordance with Article 9(1) of the TRIPs Agreement, Article 147 of EIP states that "The author and his universal successor shall have the exclusive right to authorize or prevent any form of exploitation of his work, particularly through reproduction....public communication... making the work available to the public in any manner, including through computers, internet, information networks, communication networks and other means..."

exists. Each of the authors has the right to act independently in order to control any acts of infringement of the jointly owned work and is certainly entitled to take all the necessary measures to protect the copyrighted work from any possible infringing acts, which may threaten their work.³⁹⁶

Article 140 of the EIP explains which types of works are protected.³⁹⁷ The statute does not protect ideas, but only applies to work, which can be expressed.³⁹⁸ Protection is granted for fifty years from the date when the work was initially presented for the first time, either through publication or the making available to the public, depending on which of these actions took place first.³⁹⁹ In case of a joint authorship, the work enjoys protection during the life time of all co-authors and for a period of fifty years, which starts to run from the date of the death of the last surviving author.⁴⁰⁰

In addition, Article 156 of the EIP grants performers a variety of rights, including the right to communicate or to make their performance available to the public, as well as to produce copies and the right to prevent any unauthorised exploitation of their own performances, unless written permission has been granted. The Article also provides performers the right to fix their performances and to make them available to the public, so that users can look at it irrespective of the time or place where it occurs.⁴⁰¹ The term of protection is fifty years, which is calculated exactly from the date when the performance first occurred or the recording was made.⁴⁰²

Moreover, Article 157 of the EIP grants several rights to producers of sound recordings, including the right to prevent any form of exploitation of their works,

³⁹⁶ Article 174 of the EIP.

³⁹⁷ For example, books, articles, dramatic works, musical works, artistic works, audio-visual works.

³⁹⁸ In accordance with Article 9(2) of the TRIPs; Article 141(1) of the EIP.

³⁹⁹ Article 162 & 163 of the EIP.

⁴⁰⁰ Article 161 of the EIP.

⁴⁰¹ In accordance with Article 14.1 of the TRIPs Agreement; Article 156 of the EIP states that “Performers shall enjoy the following exclusive economic rights: (i) Communicate their performance to the public; authorize making available to the public... copies therefrom (ii)... (iii)...(iv) making a registered performance available to the public through broadcasting computer or other means, for the aim of being separately received in any place or at time ...”

⁴⁰² Article 156 of the EIP corresponds with Article 14(5) of the TRIPs, but conflicts with Article 14 of the Rome Convention, which grants 20 years of protection to performers.

which might in any way make the sound recordings available to the public through any means whether by wire, wireless or through computers if no written permission has been granted.⁴⁰³

The rights to prevent reproduction and communication under the EIP denote copying the work without previous written authorisation from the producers of the sound recording. Furthermore, reproduction does not mean performing the recording by just playing it, but any unauthorised reproduction, including partial reproduction of sound recordings and all other forms of reproduction, including on radios or televisions programmes.⁴⁰⁴ In these cases the term of protection is only fifty years from the date of registration or the date from when the work was firstly made available to the public, whichever one first occurred.⁴⁰⁵

Yet there are several other parties, which may have a legitimate interest in strong Intellectual Property rights. This category extends to all exclusive and nonexclusive licensees and distributors, who are obviously keen on protecting their investments and are willing to take the necessary steps to stop all infringing activities. This category can also include local and international non-governmental organisations, such as consumer protection groups, other trade unions and partnership and coalitions of copyright holders, along with a number of other groups, who have an interest in copyright.

In this regard, the Egyptian Cassation Court has for a very long time clearly recognised the right of collecting societies to initiate judicial proceedings and legal measures as representatives of their members.⁴⁰⁶ Therefore interested

⁴⁰³ Article 157 states that “Producers of sound recordings shall enjoy the following exclusive economic rights: (1) Prevent any exploitation of their recordings in any manner, without their prior written authorization. Prohibited exploitation, in this sense, includes, in particular, reproduction... making them available through computers or any other means... (2).”

⁴⁰⁴ Adrian Sterling, “The 50th Anniversary of the Rome Convention: Rome Convention 1961: Fifty years on Retrospect and Prospect” BLACA/IPI Seminar 2011 (October 05, 2011), 1-8; Claude Masouye, “Rome Convention and the Phonograms Convention”, WIPO, Doc. 617/E (Geneva, 1981), at 43.

⁴⁰⁵ Article 14(5) of the TRIPs corresponds with Article 167 of the EIP.

⁴⁰⁶ *CASIRO v. Sout Al Kahera*, Cairo Appellate Court, (May 23, 1972). The case was decided under the now obsolete Copyright Law No.45 of 1954. The Court of Appeal reversed the decision of the Court of First Instance and found that the particular collecting society could right enforce the rights of its members on their behalf against the defendant, which had failed to obtain a broadcasting license.

parties are entitled to bring civil proceedings and can also apply for injunctive relief from the competent court in order to avoid all harmful infringement.⁴⁰⁷ Hence, a licensee can at any time bring a civil liability claim against infringers.⁴⁰⁸

In summary, any illegal acts, which violate or infringe one of the exclusive rights of authors, performers, or producers, can be pursued in the economic courts and compensation and other remedies can be sought. In addition, the law organises and regulates the role of civil society groups in relation to the implementation and enforcement of different Intellectual Property rights by giving *locus standi* to these groups to bring legal proceedings on behalf of their members.

The scope of the exclusive rights of copyright holders is the demarcation line between finding an internet service provider liable or immune. Only if the online activities of a service provider fall within the scope of one of the exclusive rights of copyright holders can copyright liability be imposed on a service provider on the basis that the provider plays an active role in facilitating the reproduction or the making available of the copyrighted work to internet users. Hence, in such a case the provider cannot be immune from tortious liability and injunctive measures can be ordered against it.

Accordingly, it is crucial to define the reproduction right and the communication right under the WIPO Treaties and to then compare the findings with the two rights in the EIP in order to determine the types of unlawful infringement activities for which service providers may be held responsible. The next part therefore discusses this matter in more detail.

⁴⁰⁷ Article 179 stipulates that “The Head of the Court of jurisdiction may order, upon request of the interested party, and pursuant to an injunction that one or more of the following or other relevant provisional measures be taken, if infringement has taken place on any of the rights provided for in the present chapter ...”

⁴⁰⁸ Egyptian Cassation Civil Court, No. 436-22, (June 14, 1956).

3.4.1 The Reproduction Right under the WIPO & the EIP

A digital single can be roughly divided into two kinds: stable representations and ephemeral ones. Representations are made of stable storage and are deemed to infringe the reproduction right.⁴⁰⁹ However evanescent representations only contain contents, for example, when a machine is “buffering.” Buffering only amounts to temporary storage and works are only stored on the temporary memory, which is a characteristic part of any streaming process. Ephemeral representations may possibly include caching reproduction, as these representations are also only temporarily stored on the permanent memory, though this process is not required for the streaming process, but is only supplementary or subsidiary.⁴¹⁰

Some types of copyright content representations are purely instrumental to the technical stages of the automated operations.⁴¹¹ These automated operations can be stored temporarily on internal and external locations. The former often exclusively takes place on the personal computer’s Random Access Memory (RAM),⁴¹² whilst the later occurs during the course of the network communications, as transient information resides temporarily on the providers’ server.⁴¹³

Two problems are caused by the temporary reproduction taking place externally. Firstly, digital works may be automatically replaced, deleted and altered by the computer performing the next task.⁴¹⁴ Secondly, temporary copies of unauthorised copyrighted works, which are kept on the providers’ servers, can

⁴⁰⁹ John Smillie, “Digital Copyright Reform in New Zealand” (2004) 26 (7), *European Intellectual Property Review* 302, at 302.

⁴¹⁰ Maurizio Borghi, “Chasing Copyright Infringement in the Streaming landscape” (2011), *International Review of Intellectual Property and Competition Law* 316, at 328.

⁴¹¹ P. Bernet Hugenholtz, “Caching and Copyright: The Right of Temporary Copying” (2000), *European Intellectual Property Review* 482, at 488.

⁴¹² Matthew Jackson, “From Broadcast to Webcast: Copyright Law and Streaming Media” (2003) 11, *Texas Intellectual Property Law Journal* 447, 451.

⁴¹³ Hafliði Kristján Larsson, “Uncertainty in the Scope of Copyright: The Case of Illegal File-sharing in the UK” (2009), *European Intellectual Property Review* 124, at 127.

⁴¹⁴ Weixiao Wei, “The Liability of Internet Service Providers for Copyright Infringement and Defamation Actions in the United Kingdom and China: a Comparative Study” (2006), *European Intellectual Property Review* 528, at 531.

be reproduced unquantifiable times by users, who can make them available across the internet.⁴¹⁵

Therefore, the key question is whether the reproduction right includes stable and evanescent copies or whether temporary forms are excluded. In this context, it is important to critically analyse the Agreed Statement to the reproduction right under the WIPO Treaties 1996 and the reproduction right under the EIP and to compare the findings with the previous analysis.

The study heavily focuses on the reproduction right as set out in Article 1(4) of the WCT and its Agreed Statement since the WPPT was not separately discussed at the Diplomatic Conference from the WCT. Nevertheless, whilst Articles 10 and 14 of the WPPT and their Agreed Statements regulate the same right for performers and producers of phonographs, the study will only analyse Article 1(4) of the WCT in order to avoid that the discussions or explanations relating to this issue are repeated.

The Preparatory Memorandum of the Second Session of the Committee of Experts of the WIPO Treaties acknowledged that the meaning of Article 9(1) of the Berne Convention can cover acts of reproduction through computer systems.⁴¹⁶ Therefore, in the Second and Seventh Sessions, the US and EU submitted two different proposals. The proposals are in line with a broad interpretation of the reproduction right. The proposal covers all types of permanent and temporary reproductions, including the reproduction process, whether in relation to the uploading or downloading.⁴¹⁷

Expectedly, the draft text of Article 7(1) of the Basic Proposal of the WCT confirmed the US and European proposals in the following form:

“... [re]production...shall include direct and indirect reproduction of their works, or phonogram both for

⁴¹⁵ *Id.*

⁴¹⁶ WIPO Report on the Second Session of the Committee of Experts on a Possible Protocol to the Berne Convention, Doc. BCP/CE/VII/I-INR/CE/VI/ (1992), at 48-55 (hereinafter, Committee of Expert).

⁴¹⁷ Basic Proposal WCT, WIPO, Doc. BCP/CE/V/9-INR/CE/IV/8 (Geneva, 12 September, 1995), at 61.

performers and phonogram producers whether permanent or temporary, in any manner or form.”⁴¹⁸

Clearly, the purpose of the draft was, *inter alia*, to clarify that both permanent and temporary reproductions amount to reproduction, similarly to what is set forth in Article 9(1) of the Berne Convention. However, the draft triggered a substantial controversy amongst those attending the Diplomatic Conference. Egypt expressed strong objections to the American and European draft proposal, as it meant that the reproduction right would cover any kind of transient copies generated in the course of online transmissions.⁴¹⁹

This means that any form of reproduction would fall within the holders’ reproduction right, particularly since the draft proposal failed to differentiate between temporary, transient or incidental, and permanent reproductions, whether or not these reproductions had been authorised by the author and even covered situations to which legal privilege could be pleaded.⁴²⁰ As a result, the initial draft was abandoned and Egypt added the following amendments:

“Temporary reproduction does, not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention...”⁴²¹

The new amendments aimed to eliminate temporary copies from the scope of the reproduction right.⁴²² However the Diplomatic Conference adopted the current Agreed Statement of Article 1(4) of the WCT. The Agreed Statements in relation to Articles 10 and 14 of the WPPT, which was endorsed by the delegations, provides that:

“Reproduction rights, as set out in Article 9 of the Berne Convention ... *fully apply in the digital environment*...it is understood that the *storage* of a protected work in

⁴¹⁸ Basic Proposal (1996), Draft of Article 7 of the WCT.

⁴¹⁹ Basic Proposal WCT, WIPO, Doc. BCP/CE/V/9-INR/CE/IV/8 (Geneva, 12 September, 1995), at 59.

⁴²⁰ Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 13, 39-40.

⁴²¹ Basic Proposal WCT, WIPO, Doc. CRNR/DC/56 (Geneva, 12 December, 1996), at 1-2.

⁴²² Basic Proposal WCT, WIPO, Doc. CRNR/DC/57 (Geneva, 12 December, 1996), at 1-3.

digital *form* in an electronic medium constitutes a reproduction [in accordance with]... the meaning of Article 9 of the Berne Convention”⁴²³

Hence, the Agreed Statement provides that the reproduction right under these Articles covers both permanent and temporary forms. However, the Agreed Statement does not prejudice the application of any appropriate limitations and exceptions, which ultimately determine the scope of the reproduction right.⁴²⁴

However, the language used within the Agreed Statement strongly favours the maximalist approach and reinforces this. As a result, the Agreed Statement firmly supports the ubiquity of the rights of reproduction within the digital domain.⁴²⁵ However, the minimalist proponents strongly favoured language, which supported the idea of excluding temporary forms from the reproduction right under the WCT and the WPPT and based their arguments on the pillar that during the discussions of the draft Article 7 of the Basic Proposal of the WCT, the debates of the delegates were based on a wide fixation term in order to cover both permanent and temporary reproduction copies. In other words, both approaches are covered by the reproduction right under Article 7(1) of the Basic Proposal of the WCT. As a result of strong disagreement between the delegations, the Basic Proposal did not find its way into the text of Article 1(4) of the WCT.⁴²⁶ Hence, the maximalist vision failed to take hold.

Furthermore, the term storage usually refers to information, which can be generally stored. The term does not include information, which automatically evaporates after a moment. Therefore, whenever digital information is stored on a component, this does not denote that content is stored on a stable memory. Furthermore, the term “*storage*” has been considered by the Second WIPO/UNESCO Committee of Governmental Experts.⁴²⁷ In section 3, the recommendation refers to the term “*storage in, and retrieval from computer*

⁴²³ Agreed Statement of Article 1(4) of WCT.

⁴²⁴ Basic Proposal WCT, WIPO, Doc. CRNR/DC/54 (Geneva, 12 December, 1996), at 1-3.

⁴²⁵ Mihaly Ficsor, *The Law of Copyright and the Internet*, (2nd edition, 2002, Oxford University Press, USA, 2010), at 448-450.

⁴²⁶ Records of the Diplomatic Conference, at 189.

⁴²⁷ Section 3 of the Committee of Governmental Experts, 1982.

*systems of protected works may involve ... (b) the right to reproduction....*⁴²⁸

Furthermore, as the concept of “*storage*” cannot be transposed in most cases to the digital environment, the delegations may have used the term in their recommendation by eliminating temporary copies from the reproduction right as if they were never stored. One can therefore argue that when the delegations of the Diplomatic Conference used the same term within the text of the Agreed Statement of Article 1(4) of the WCT, they might have also used it in the same manner, so that a reproduction copy, which is never stored, is excluded from the scope of the reproduction right.

However, it is reasonable to argue that an evanescent digital reproduction can be excluded from the scope of the term “*storage*” in Article 1(4) of the WCT since the drafters of the WCT and the WPPT gave Member States the right to exclude the temporary reproduction right from the holders’ exclusive right when drafting the reproduction right within their legislative frameworks. This appears patently obvious not only from the controversy in relation to the scope of the reproduction right at the Diplomatic Conference, but more fundamentally from the language adopted by the Agreed Statements. Hence, temporary digital reproductions can be excluded from the right of reproduction.

This means that liability of online service providers in relation to temporary reproductions depends on whether or not the particular legislation in question excludes or includes the temporary reproduction right from the holders’ exclusive rights. Hence, the question arises which approach the Egyptian legislator has adopted when it drafted the reproduction right in the EIP. The next discussion analyses the reproduction right in the EIP in order to answer this question and to compare the right with the previous findings.

In this context, Article 147 of the EIP unconditionally prohibits any form of online temporary or permanent downloading of copyrighted work without authorisation. Article 138(9) of the EIP defines the scope of the reproduction right as:

⁴²⁸ “Copyright” (monthly review of WIPO) Sep. 1982, at 244-246.

“[T]he making of one or more reproductions of a work or phonogram and in any form, including permanent or temporal electronic storage of the work or phonogram....”⁴²⁹

Hence, all forms of ephemeral copies, which can be found on both the computer’s Random Access Memory (RAM) for the internet and the providers’ servers, can be considered acts of infringement. It is therefore clear that the scope of the reproduction right under the EIP covers both permanent and temporary forms. It thus appears that the EIP has adopted the maximalist approach, as explained above. This means that the local delegation at the Joint Committee adopted a completely different approach than the Egyptian delegation at the Diplomatic Conference of the WIPO 1996.

Accordingly, in Egypt all the online reproduction activities, such as browsing or caching, which automatically reproduce temporary copies on the servers, may be considered acts of infringement of the reproduction right of copyright holders and service providers, so that it is to obtain approval and authorisation for each of these digital transmissions; otherwise these activities may fall within the scope of the exclusive reproduction rights of copyright holders and they may thus be held directly liable for copyright infringement.⁴³⁰

This clearly illustrates why it is important to reform the reproduction right under the EIP in a way, which gives immunity to service providers in respect of temporary copies, which are kept on their servers during the course of the display of contents. Otherwise liability of providers for copyright infringement is left wide open, despite the Egyptian legislator previously having followed recommendations to regulate secondary liability in the EIP and the ECC, as explained in the previous chapter. The reproduction right should thus be reformed again, as otherwise service providers can be held directly liable for all infringing reproduction activities, which occur on their system.

⁴²⁹ Article 138(9) of the EIP.

⁴³⁰ Daniel Seng, “Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries; Egypt” (WIPO, 2010), <http://www.wipo.int/copyright/en/doc/liability_of_internet_intermediaries.pdf> (accessed March 14, 2012) at 24-25.

3.4.2 The Communication Right under the EIP

The activities of Web 2.0 can be performed through decentralised and UGC platforms. The former aggregates websites from which users can directly or indirectly upload and download unauthorised copyright contents.⁴³¹ The latter provide space to their users, who can then upload illegal copyright works on their pages and share them with others via private, local and global networks.⁴³² Moreover, digital transmissions on these new platforms engage the reproduction, distribution and communication rights. The integration of the exclusive rights with these new technologies creates a new right, but which is not protected through the old methods.⁴³³ Accordingly, this can cause confusion for service providers each time copyrighted work is made available on their networks since service providers have no actual knowledge about the virtual negotiations, which occur on their systems between their subscribers and copyright holders.⁴³⁴

Providers thus lack knowledge and as a result cannot determine the uses which are undertaken, for example whether there are only transient copies or “direct” copies and whether users make these copies to study, watch a moving image or to listen or stream.⁴³⁵ As a result, this right causes practical problems whenever online transmissions occur.

During the last minutes of the Diplomatic Conference the famous “umbrella solution” was presented to address these problems. The essence of the umbrella solution is to identify these acts and to close any gaps. However, states should have a margin of appreciation when it comes to implementing national laws and

⁴³¹ Mario Viola de Azeved, et al., “Peer-to-Peer Privacy Violations and ISP liability: Data Protection in the User-Generated Web” (2011) EUI Working Papers, No. 2011/011, at 1.

⁴³² Jessica A. Wood, “The Darknet: A Digital Copyright Revolution” (2010) 16(4), *Richmond Journal of Law & Technology* 1, at 35-36.

⁴³³ For this reason, the EU submitted a proposal to resolve this problem, which suggested applying the reproduction right together with the right to communicate to the public. Proposal of the European Community and its Member States, Basic Proposal WCT, WIPO, oc. BCP/CE/VII/1-INR/CE/VI/1, at 3.

⁴³⁴ Negotiation here means the bargaining, which takes place between copyright holders and members of the public with respect to the commercial dissemination of protected copyright holders’ materials through technological measures. These negotiations determine the rights of copyright holders, including licensing conditions and fee, which members of the public have to pay to access to copyrighted material. Mihaly Ficsor, “Copyright for the Digital Era: The WIPO ‘Internet’ Treaties” (1996-1997) 21, *Columbia-VLA Journal of Law & The Arts* 197, at 207-208.

⁴³⁵ Basic Proposal WCT, WIPO, Doc. CR/KRT/05/7 (Sudan, February, 2005) at 12.

characterising the particular acts and selecting a combination of certain exclusive rights.⁴³⁶

The Treaties for the first time cover all the categories of work in relation to the communication right to the public and clarify that the right also covers interactive transmissions. This can be seen in Article 8 of the WCT, which provides that:

“Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literally and authors of artistic works should enjoy the exclusive rights of authorizing any *communication to the public* of their works, by any means including wire or wireless, including *the making available to the public* of their works, in such a way that the Members of the public may access this work “from a place and at a time individually chosen by them.”⁴³⁷

As a second step, the contracting parties are free to adopt the manner in which holders of exclusive rights can authorise the “*making available to the public*” and can also freely implement a right other than the right of communication to the public or a combination of diverse rights, so long as the exclusive rights are extended to cover the acts of “*making available*.”⁴³⁸

This means that the communication right contained in the WIPO Treaties 1996, including the making available right, is considered comprehensive⁴³⁹ and serves to fill any gaps by eliminating uncertainties associated with the fragmented

⁴³⁶ Mihaly Ficsor, *The Law of Copyright and the Internet* (2nd edition, 2002, Oxford University Press, USA, 2010) at 206-209.

⁴³⁷ Basic Proposal WCT, WIPO, doc. CRNR/DC/89 (Geneva, 20 December, 1996), at 5. Articles 10 and 14 of the WPPT provide essentially the same right for producers of phonograms. These provisions were practically adopted in the same way as those in the basic proposal, without any substantial debates, first by the Main Committee I, and then also by the Plenary of the Conference. The two parallel provisions are, *mutatis mutandis*, the same; Records of the Diplomatic Conference, at 627, 762.

⁴³⁸ Mihaly Ficsor, “Copyright for Digital Era: The WIPO ‘Internet’ Treaties” (1996-1997) 21(3/4), *Columbia-Vla Journal of Law & The Arts* 197, at 211.

⁴³⁹ Jorge Reinbothe, et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 108.

coverage provided by the Berne Convention.⁴⁴⁰ However, it can be concluded from the text of Article 8 of the WCT that there are three limitations to the communication right to the public. These limitations can also be found in the Berne Convention, the rights to make available and to distribute.

The concept of communicating to the public is derived from the Berne Convention. The communication right therefore only covers remote communications when it is unclear where the communication originates from, is performed and/or is perceptible.⁴⁴¹ Also, Article 8 of the WCT cannot override or rewrite the structure of rights already formulated in the Berne provisions, with broadcasting being a clear example. Hence, as most types of broadcasting and several forms of communication to the public are already covered under the Berne communication rights, Article 8 of the WCT has only limited application to this area since it is already regulated by the Berne Convention.⁴⁴²

Finally, Article 8 of the WCT cannot override the Berne exceptions to the communication rights. In other words, the words “without prejudice,” which are used in Article 8 of the WCT mean that the limitations contained in the Berne Convention are excluded from Article 8 of the WCT.⁴⁴³ This means that all forms, which have not been regulated by the Berne Convention, are covered by Article 8 of the WCT without prejudice to all communication rights and their exceptions set forth under the Berne Convention.

The right of making available has several elements; firstly the act of making available to the public covers the offering of works for access and extends to the entire transmission to the user, whenever it occurs. As can be seen from the above terms in italics, they define the scope of the making available right and the following discussion fully explores the meaning of each of these terms. The term

⁴⁴⁰ Mihaly Ficsor, *The Law of Copyright and the Internet*, (2nd edition, Oxford University Press, USA, 2010) at 494.

⁴⁴¹ Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 109.

⁴⁴² *Id.*, at 105-106.

⁴⁴³ For example, the broadcasting rights secured under Article 11bis(1) of the Berne Convention are subject to paragraph (2), which allows Berne members to create non-voluntary licensing provisions. Yet Article 8 does not limit the scope of the paragraph and preserves the objective of paragraph 11^{bis}(2) of the Berne Convention.

“*public*” may mean that the close family or a close circle of social acquaintances is not included within the meaning of the notion of “*public*.” Accordingly, stored work on a server, which is accessible only to family members, does not denote making available to the public.⁴⁴⁴ However, simply making the work available in an indiscriminate manner basis or even to a limited group, such as university students or allowing any member of the general public to easily access the work may fall within the scope of the right.⁴⁴⁵

Yet the term “*place*” may indicate that the right of making available is only limited to distant transmissions. In relation to the service provider scenario, the concept of “*place*” in relation to the making available right can take place directly and indirectly, i.e. if a provider hosts a website with links to other websites from which users can download unauthorised copies of content, there is a direct place. Equally, there may be some links, which can be identified from the file name and when users click on these links, they are directly taken to another website where they can automatically request to download files onto their hard drive.⁴⁴⁶

In contrast, indirect uses involve the identification of names from other websites, which users can click on in order to be taken to websites from where they can then choose to download a variety of files. In these cases, providers do not know whether or not these sites store illicit materials. Accordingly, whenever work is accessed, the communication occurs and this is covered under the exclusive right, including how the work itself is offered or made available on the server of the provider and the entire transmission to the terminal where public users can access the work.⁴⁴⁷

Furthermore, the term “*choice*” refers to the on-demand situation and excludes from the making available right any exploitation, which is offered at specified

⁴⁴⁴ Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 111.

⁴⁴⁵ Sam Ricketson et al, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition, Oxford University Press, USA, 2010), at 744.

⁴⁴⁶ *Id*, at 745-746.

⁴⁴⁷ Basic Proposal of WPPT, WIPO, Doc. INR/CE/III/2, at 25, 29.

times and predetermined programs for the general public, such as broadcasted radio or TV programmes by any means, including digital networks. However, in the case of streaming media, one has to distinguish between two different situations. Firstly, the mere setting up of a server enables individual members of the public to access and choose the time and place when the act should be made available and whenever the work is then accessed by users, the process of communicating this work is usually covered by the exclusive rights under Article 8 of the WCT and Articles 10 and 14 of the WPPT.⁴⁴⁸

Secondly, when live media is made available through a pay-per-view-service, technological measures often prevent the ephemeral download of network transmissions. The offering of these services does not fall within the scope of the making available right to the public, so long as individual users have to rely on programming and cannot individually choose the time when they want to access the work. Accordingly, as this business model prevents the making available to the public, it is excluded from the scope of the communication right.⁴⁴⁹

Further, the Diplomatic Conference use the phrases “*by wire or wireless*” and “*from a place and a time individually chosen by them*” on many occasions, especially in relation to Article 8 of the WCT and Articles 10 and 14 of the WPPT. The preceding sentences were never used in the text of the Treaties in respect of the distribution rights contained in Article 6 of the WCT and Articles 8 and 12 of the WPPT. The question therefore arises whether this clear silence means that the distribution right should be excluded from the communication right, including the making available right.⁴⁵⁰ An assessment of whether or not the distribution right can be included in the communication right requires an analysis of the Agreed Statement of Article 6 of the WCT. The Agreed Statement of Article 6 of the WCT states that:

⁴⁴⁸ Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis*, (Butterworths Lexis Nexis, UK, 2002), at 108.

⁴⁴⁹ *Id.*, at 109.

⁴⁵⁰ Qian Wang, “The New Right of Communication Through the Information Network in The People’s Republic of China” in Brian Fitzgerald, eds., *Copyright Law, Digital Content and The Internet The Asia-Pacific* (University Press, Canada, 2008), at 187-219.

“... the expression “copies” and “original and copies”, being subject to the right of distribution and rental under the said articles, refer exclusively to fixed copies that can be *put into circulation as tangible objects*.”

As explained above, the nature of a copy may determine the form in which it appears and how it will be presented. Accordingly, the concept of copy under the distribution right should be understood as “*put[ting] into circulation as tangible objects*.” Accordingly, any object, which does not meet this threshold, for example evanescent signals, has to be excluded from the scope of the distribution right.⁴⁵¹ This may imply that since it is hard to put a temporary copy “*into the circulation as tangible object*”, such as RAM, that these copies are irrelevant to the distribution right. However, it may still be subjected to the reproduction rights under Article 1(4) of the WCT.⁴⁵²

Nevertheless some commentators opine that the interpretation of these Articles and their Agreed Statements in relation to the regulation of the distribution rights should be understood as minimum threshold for protection and that the requirement of a tangible object can easily be neglected by the domestic legislator if it is desires that stronger copyright protection is provided.⁴⁵³

As for the communication right in Egypt, the EIP grants copyright holders “exclusive economic communication rights” with regards to licensing and to prevent any form of unauthorised uses, including the right to make works available to the public.⁴⁵⁴ In this context, Article 138(16) of the EIP defines the scope of the communication right as:

“wire or wireless transmission of images, sounds, or the image and sounds of the work; performance or

⁴⁵¹ Basic Proposal WCT, WIPO, Doc CRNR/DC/4 (Geneva, 30 August 1996) at 36.

⁴⁵² Mihaly Ficsor, “Copyright for Digital Era: The WIPO ‘Internet’ Treaties” (1996-1997) 21(3/4), *Columbia-Vla Journal of Law & The Arts* 197, at 212.

⁴⁵³ At the fifth Session of the Committee of Experts, the Chairman stated that “[r]eference had been made to the requirement that the distribution right should cover not only tangible objects but also intangible or temporary copies of protected subject matter”: WIPO, Doc. BCP/CE/V/9-INR/CE/IV/8 (Geneva, 12 September, 1995), at 59. See, also, Basic Proposal WCT, WIPO, Doc. CRNE/DC/4 (1996), at 10.

⁴⁵⁴ Articles 147, 156 and 157 of the EIP. Abdel Rashied Ma'mon et al., *The Author's Rights and The Neighbour's Rights* (Dar El-Nahda-El-Arabia, Cairo, 2006/2007) at 401.

phonogram; or broadcasting in a manner that enables receiving thereof through transmission alone to *persons than family members and close friends, in any place other than the place of transmission*. No regard shall be given, in this respect, to the time and place of receiving, including *the time and place selected by the receiver alone through the computer or any other device.*”⁴⁵⁵

Whereas Article 138(10) of the EIP defines the making available right as:

“...Any act may, *in any manner*, lead to making the work, phonogram, broadcast, or performance available to the public...”⁴⁵⁶

When the communication right, including the making available right, as set forth in the WIPO Treaties 1996, is compared with Article 138(10) & (16), one can observe an obvious resemblance between the language of draft Articles 138(10) & (16) and Article 8 of the WCT and Articles 10 and 14 of the WPPT, except in relation to the distribution right, as the EIP regulates the communication right, including the making available right in a way, which includes all forms of communication, as well as the distribution right. It thus appears that the EIP adopts an umbrella solution, just as the WIPO Treaties 1996.⁴⁵⁷

Yet in spite of the similarity between the communication rights under the EIP and the WIPO Treaties 1996, the local delegations at the Joint Committee neglected the interpretation of any of the terms in these Articles and also failed to refer to the WIPO Treaties in order to clarify or define the scope of the communication right. As the WIPO Treaties 1996 have no direct effect in Egypt, as explained above, Egyptian courts cannot in any way rely on the Treaties when interpreting the terms in Article 138 (10) & (16).⁴⁵⁸

Hence, the question arises what happens when an infringer violates a copyright holder’s communication right online. How would the courts in this case define

⁴⁵⁵ Article 138(16) of the EIP.

⁴⁵⁶ Article 138(10) of the EIP.

⁴⁵⁷ Joint Committee, Preparatory Memorandum No. 24 (March 03, 2011) at 4- 5.

⁴⁵⁸ *Id.*

the scope of the communication right set out in Article 138(10) & (16) of the EIP? Unfortunately neither the Preparatory Memorandum of the Joint Committee, nor the discussions at the Plenary of the EPA answer this important question.

3.4.3 The Scope of Liability of Online Providers in Egypt

It can be concluded from the previous analysis that Article 138(9) & (16) of the EIP defines the scope of the reproduction and communication rights in such a way that service providers are directly liable for the various forms of online activities, including all acts of transmission, caching and storing and making available, irrespective of the fact that service providers neither edit, choose, nor modify any of the copied material and only store copies on their network system for the amount of time, which is needed to transfer them upon the request of a third party. It is therefore quite important to examine whether holders can bring civil proceedings on the basis of direct liability against a provider under the WIPO Treaties 1996. For this purpose, the next part explores the discussions of the Joint Committee and those, which took place at the Diplomatic Conference of the WIPO Treaties 1996.

At the Diplomatic Conference, the US and EU submitted a basic proposal, which was designed to extend direct liability to service providers, irrespective of whether a service provider has actual knowledge of the particular infringing acts or materials on its server due to its position on the internet, which makes it possible to control infringing activities.⁴⁵⁹ However, at the Seventh Session, Egypt proposed a significant amendment. The amendment added the following second paragraph to the draft of the basic proposal of Article 10 of the WCT, which later became Article 8 of the WCT and which states that:

“For the purposes of paragraph (1), the phrase “making available” means the initial act of making the [work] available to the public and does not include merely

⁴⁵⁹ Niva Elkin-Koren, “Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic” (2005-2006) 9(15), *New York University Journal of Legislation and Public Policy* 15, at 46.

providing facilities or the means for enabling such act.”⁴⁶⁰

The amendment obviously revolved around secondary liability of service providers.⁴⁶¹ In other words, the proposal aimed to exempt providers from direct liability. This proposal could reform the Agreed Statement of Article 8 of the WCT in such a way that service providers which only act as “common carriers” are shielded from direct liability.⁴⁶² For this purpose, the second paragraph of the Agreed Statement of Article 8 of the WCT provides that:

“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party applying Article 11^{bis} (2).”⁴⁶³

It appears from the Agreed Statement that if a service provider plays a merely passive role, providers will be released from any direct infringement liability for the act, but are not shielded from secondary liability. Thus, it can be concluded from the Agreed Statement of Article 8 of the WCT that service providers can be held indirectly liable if they knew about or were aware of infringing activities of third parties on their systems, but intentionally or negligently failed to prevent these activities, as explained in the previous chapter. However the problem is that service providers have no actual knowledge or are unaware of the illegal uploading and downloading activities on their networks when users automatically move from one internet location to knowingly visit other locations where the work is made available.⁴⁶⁴

⁴⁶⁰ Basic Proposal of WPPT, WIPO, Doc. CRNR/DC/57 (Geneva, 12 December 1996), at 3-4.

⁴⁶¹ Jorge Reinbothe et al, *The WIPO Treaties 1996, The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (Butterworths Lexis Nexis, UK, 2002), at 112.

⁴⁶² Min Yan, “The Law Surrounding the Facilitation of Online Copyright Infringement” (2012), *European Intellectual Property Review* 122, at 123.

⁴⁶³ Agreed Statement concerning Article 8 of the WCT.

⁴⁶⁴ Workshop on Service Provider Liability, WIPO, Doc. OSP/LIA/1 Rev, (Geneva, 9-10, December 1999), at 5.

For this reason, the contracting parties included certain safe harbour provisions to shield service providers from liability. However, immunity cannot be evoked if service providers have actual knowledge or are aware of the infringing activities. Similarly, liability will be imposed if service providers fail to expeditiously remove infringing material or refuse to implement the applicable injunctive relief or fail to comply with other similar legal remedies.⁴⁶⁵

Interestingly, there is no similar statement about the mere provision of physical facilities for enabling or making available in relation to the reproduction right. This may suggest that the Treaties left it up to the contracting parties to decide how to regulate this in accordance with their views about temporary reproduction. This conclusion was a result of lengthy discussions between delegation members of the WIPO Conference. Hence, if a contracting party does not precisely regulate the scope of the reproduction right and immunity of service providers through the passing of national laws, service providers may be held directly liable for temporary copies, which are kept on their servers.

The Preparatory Memorandum of the Joint Committee and the Plenary of the EPA confirms that the Egyptian delegation did not mention copyright liability for providers in relation to the reproduction and communication rights. This means that the delegation of the Joint Committee adopted a completely different approach than the Egyptian delegation, who attended the Diplomatic Conference of the WIPO 1996, as explained above. It can therefore be concluded that the topic of online liability of service providers has been neglected.⁴⁶⁶

Accordingly, Egyptian service providers are directly liable for all temporary copies, even if these are incidental and automatic copies, which have been transmitted by their subscribers. Furthermore, service providers are considered liable for the activities of their subscribers, their data and the hosting of websites, which include links to other websites, which enable internet users to

⁴⁶⁵ Mihaly Ficsor, "The WIPO "Internet Treaties" The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-revolutionary Central European" (2006/2007) 6, *The John Marshall Review of Intellectual Property Law*, 17, at 26-27.

⁴⁶⁶ *Id.*; Plenary of PA, No. 48 (March 03, 2002), 5-7.

directly upload and download content files, even though providers themselves have no knowledge about the infringing activities on their servers.⁴⁶⁷

Hence the question arises why, if service providers can be held directly liable for any kind of reproduction and communication on their system, no copyright holders can bring civil proceedings against providers when providers directly violate their reproduction or communication rights online.

As discussed in the previous chapter, under Egyptian tort law principles, providers are mostly immune from direct liability, irrespective of the size of their investment size because of the following:

Firstly, a service provider is shielded from direct copyright liability when it adopts within its system technological measures, which monitor and record activities of online users and their contents and take down alleged contents regardless of the fair use defence of end users. However, the problem with a monitoring infrastructure is that such preventative measures require an enormous financial investment from providers.

A small service provider with limited funds may not be able to set up such a monitoring system to shield itself from direct liability, so that it is excessively burdened and does not gain any benefits.⁴⁶⁸ As discussed previously, Egyptian courts may not order the provider to pay a substantial amount of compensation for direct copyright infringement, as this may be perceived as excessive and liability may thus be restricted.⁴⁶⁹ Hence, the deficiencies within the ECC and the EIP in relation to secondary liability and the scope of the exclusive rights of holders online mean that copyright holders cannot bring civil proceedings against service providers. .

⁴⁶⁷ Louisa Hearn, "Video Piracy's New Battleground" (June 26, 2006) *Sydney Morning Herald* <<http://www.smh.com.au/news/web/video-piracys-new-battleground/2006/06/23/1150845364940.html>> (accessed Nov 29, 2011); Rolf Auf der Maur, "Internet Distribution of Music Performances" (1999) 27, *International Business Lawyer* 165, 167.

⁴⁶⁸ Keith Black, "Technical Knockout: How Mixed Martial Arts Will Change Copyright Enforcement on the Web" (2010) 21, *Fordham Intellectual Property, Media and Entertainment Law Journal* 740, at 754.

⁴⁶⁹ Articles 165 of the ECC; Egyptian Cassation Civil Court, No. 17-199 (27 January, 1966), at 26.

It can thus be concluded that it is difficult to predict how a service provider can be shielded from direct liability in Egypt. The scope of the exclusive rights under the EIP makes it extremely difficult to decide whether service providers would be considered directly liable for the contents and acts, which take place on their systems. New recommendations should therefore be presented to the Egyptian legislator to reform the online reproduction and communication rights of copyright holders.

3.5 CONCLUSION

This chapter comprehensively analysed the substantive rules of the exclusive rights of copyright holders, particularly the reproduction right and communication right pursuant to the Berne Convention, the Rome Convention, the TRIPS Agreement and WIPO 1996 and the same rights as set out in the EIP. The chapter concluded that under these international treaties, internet service providers are only immune from direct liability. This is because the two rights have been drafted in such a way that providers are directly liable for violating the exclusive reproduction and communication rights of copyright holders if copyright holders have not authorised all of the acts, which are taking place on their networks.

It is therefore important to provide an appropriate framework for secondary liability, which is based on a duty of care concept. The Egyptian legislators should thus reform the scope of the reproduction and communication rights, as set forth in Article 138(9)(10) & (16) of the EIP, so that providers are rendered immune from direct liability for any form of temporary reproduction and acts of transmission, which occur on their servers. The chapter therefore strongly recommends that the Egyptian legislator should reform the ECC and the EIP in the following manner:

- (1) When adopting a proper duty of care concept within the Egyptian civil legal system, the Egyptian legislature should adopt a minimum approach towards Article 138(9)(10)&(16) of the EIP. The best option would be to adopt the draft proposal, which the Egyptian delegation submitted to the Diplomatic Conference and which contains the following negative clause: “Temporary reproduction and

communication rights do not as such constitute reproduction and communication rights within the meaning of Article 9(1) (10)&(16) of the Berne Convention...”

- (2) It is equally crucial that the Egyptian legislator adds a new subparagraph to Article 138(16) of the EIP. The new second paragraph should define the following terms: “*public*” and “*place*” and “*choice*” and similar definitions should be adopted as the ones adopted in Article 8 of the WCT and by the delegations at the Diplomatic Conference of the WIPO Treaties 1996.

CHAPTER 4: THE IMMUNITY SYSTEM IN EGYPT

4.1 INTRODUCTION

As explained in the previous chapters, the Egyptian delegations failed to consider the role, which online service providers can play and therefore did not deal with their liability when they drafted the EIP. The second chapter explained that the ECC does not regulate a duty of care concept. For this reason, the second and third chapters recommended that the Egyptian legislator imposes secondary liability on service providers and base this on a duty of care concept. However, as long as the Egyptian legal system fails to establish secondary liability for service providers, service providers are not immune from claims.

Yet Articles 171(9) and 172 (1) of the EIP set out some circumstances in which no liability is imposed, though the question arises whether the immunity system in these two Articles can also be applied to service providers. In order to answer this question, a comparative study is adopted and the immunity system in the US and Europe are compared with the one adopted by the EIP.

In the US, section 512 of the DMCA limits the liability exceptions to the following four categories of activities: transitory communications, system caching,⁴⁷⁰ storage of information on systems or networks at the direction of users⁴⁷¹ and information location tools.⁴⁷² Apart from the imposition of a lower immunity threshold in order to conduct transitory communications, which are defined in section 512(a)(k)(1)(A) of the DMCA, a higher immunity threshold is imposed to conduct system caching, storage of information on systems or networks, which are directed by users, as well as information location tools, which are defined in section 512 (a)(k)(1)(B) of the DMCA.⁴⁷³

⁴⁷⁰ 17 U.S.C. Sec.512 (b) of the DMCA.

⁴⁷¹ 17 U.S.C. Sec.512 (c) of the DMCA.

⁴⁷² 17 U.S.C. Sec.512(d) of the DMCA.

⁴⁷³ 17. U.S.C Sec.512(c)(1)(A) of the DMCA. See, *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D Cal. 2008) at 1147. See, J. Band and M. Schruers, "Symposium Copyright Law as Communication Policy: Convergence of Paradigms and Culture- Safe Harbours against the Liability Hurricane: The Communications Decency Act and the Digital Millenniums Copyright Act" (2002) 20, *Cardozo Arts and Entertainment Law Journal* 295, at 303

In Europe, immunity from copyright liability for service providers is regulated by Articles 12- 14 of Directive 2000/31, which is structured in a horizontal manner and allows for objective and subjective exemptions.⁴⁷⁴ The objective exemption is available to service providers, which are engaged in “mere conduit” activities, so long as the definition in Article 12 of Directive 2000/31 is satisfied.⁴⁷⁵ The subjective exemption can be evoked by service providers, which perform the act of “caching” and “hosting” and which have to comply with the requirements of Article 12, as well as the additional due diligence prerequisites set out in Articles 13 and 14 of Directive 2000/31, especially the knowledge requirements.⁴⁷⁶

It can be concluded from the previous discussions in respect of section 512 of the DMCA and Articles 12-14 of Directive 2000/31 that providers are immune when two prerequisites are satisfied. Firstly, the activities of a service provider should fall within the scope of the definition of providers, which distinguish active providers from those, which merely fulfil passive roles. Secondly, the provider has to meet all the conditions to be considered immune from liability for copyright infringement.

This chapter is divided into four main parts; the first part deals with the definitions of the different types of providers; the second part discusses the immunity system under section 512 of the DMCA and Article 12 to 14 of Directive 2000/31 and the third part analyses the exceptions contained in the EIP and finally provides recommendations for the Egyptian legislator to reform or regulate the immunity system, so that an adequate balance is struck for all the parties involved in digital transmissions.

4.2 THE DEFINITIONS OF ONLINE PROVIDERS IN THE US & EUROPE

⁴⁷⁴ The horizontal approach means that liability and immunity of service providers applies to all types of illegal activities, as opposed to different rules for different kinds of infringements. For example, all types of illegal activities are covered, which are initiated by third parties online, including copyright and trademark piracy, etc.

⁴⁷⁵ Article 12 of Directive 2000/31.

⁴⁷⁶ Articles 13 & 14 of Directive 2000/31.

The aim of this part is to explain the activities of the four categories of providers, which can evoke immunity under section 512 of the DMCA. It is worth mentioning that the categories and definitions of providers contained in the DMCA and those in the Directive 2000/31 are similar. It is therefore unnecessary to repeat any of the discussions or explanations in respect of this. Instead, the research heavily draws on section 512 (k)(1)(A)(B) of the DMCA when the different types of definitions for providers is discussed.

Also, it should be noted that Directive 2000/31 does not deal with information location tools. For this reason some Member States, such as Austria, Portugal and Spain, consider that information location tools are hosting providers and therefore apply the same liability rules, as set out in Article 14 of the Directive 2000/31/EU. In contrast, countries, such as France and Germany, have not established any particular liability for information location tools, but instead apply general principles to these particular providers.⁴⁷⁷

Therefore, whenever the terminology “storage provider” is used, it should be understood as denoting two things: first, the term covers hosting providers and information location tool pursuant to section 512 (c)(d)(k)(1)(B) of the DMCA and hosting providers pursuant to Article 14 of Directive 2000/31; second, the same rules which govern liability of hosting providers are applied to information location tools.⁴⁷⁸ The study also highlights whenever the statutory provisions or judicial decisions are starkly different in the US and Europe.

4.2.1 Transitory Communication

Transitory communication means that a service provider facilitates the physical transportation of data between information source and recipient.⁴⁷⁹ Providers

⁴⁷⁷ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), COM (2003) 702 final (Nov. 21, 2003) (hereinafter First Commission Report). First Commission Report, at 65-67 &72-75.

⁴⁷⁸ Information location tools serve a social need, as they facilitate internet use, constraining their use has to be particularly justified and well-founded; See, Google’s mission is to organize the world’s information and make it universally accessible and useful Google, *Google*, <<http://www.google.fi/intl/en/corporate/>> (accessed April 27, 2012).

⁴⁷⁹ Recital 42 of the Preamble of Directive 2000/31.

thus connect users to the internet and the World Wide Web.⁴⁸⁰ These activities do not enable providers to be actually aware or able to control the content of subscribers on their systems.⁴⁸¹ The type of provider is defined in section 512 (k)(1)(A) of the DMCA as:

“[A]n entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁴⁸²

Also Article 12 of Directive 2000/31 states that an access provider is immune from liability, so long as it merely provides the subscriber with access to information and if its activity:

“(1)... (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission... (2) The acts of transmission and of provision of access referred to in paragraph 1 include *the automatic*, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission... (3)”⁴⁸³

Hence, under the DMCA and the European Directive, transitory communication or access providers are entirely immune from liability if a provider merely acts as a data conduit. A data conduit means that digital communication occurs on the providers’ server, but is initiated by internet users.⁴⁸⁴ Therefore, an access

⁴⁸⁰ Ronald J. Mann et al., “The Promise of Internet Intermediary Liability” (2005) 47, *William & Mary Law Review* 239, at 255-257.

⁴⁸¹ Jonathan Zittrain, “The Generative Internet” (2006) 119, *Harvard Law Review* 974, at 993.

⁴⁸² Section 512(k)(1)(A) of the DMCA.

⁴⁸³ Article 12 of Directive 2000/31.

⁴⁸⁴ In conformity with Article 12 of Directive 2000/31 and Recital 42 of the Preamble of Directive 2000/31.

provider should not control data on its system. This means access providers must not select “*the recipient of the transmission.*”⁴⁸⁵ In this context, Congress stated that actions performed by internet service providers in response to specific requests from internet users or from other networks should not be considered as selecting the recipient⁴⁸⁶ and a copy of the data, which the recipient stores must not be kept longer on its system than is necessary to transmit the material.⁴⁸⁷

Also the US Congress and the European Parliament used the term “*automatic technical*” process to clarify the difference between fulfilling a publishing and an editorial function with respect to specific online material, for instance from radio stations, automatic functions, commands or requests from users, internet location tools or from other networks. Both legislative bodies consider whether the activity is an automatic function.⁴⁸⁸ Hence, US Congress and the European Parliament impose limited liability on service providers, which merely fulfill a passive role between two users on their networks.⁴⁸⁹

Further, the material must be transmitted “*without modification of its content*”,⁴⁹⁰ which means that modifications have to implement the content of the material, though not the format.⁴⁹¹ In other words, so long as the activities of the service providers are for the purpose of facilitating end user access to content materials, their role falls within the scope of the safe harbor provisions.⁴⁹² Hence, access providers under the DMCA and the Directive 2000/31 require access providers not to at all get involved with the activities of their subscribers, as otherwise copyright holders may claim that providers have actual knowledge or are aware that infringing activities occur on their servers.⁴⁹³

⁴⁸⁵ 17 U.S.C. Sec.512(a)(3) of the DMCA.

⁴⁸⁶ H.R. REP. No. 105-551, pt. 2 (1998) at 51 & Recital 42 in the Preamble of Directive 2000/31.

⁴⁸⁷ 17 U.S.C. Sec. 512(a)(4) of THE DMCA & Article 12 (ii) of Directive 2000/31.

⁴⁸⁸ H.R. REP.No. 105-55, pt. 2 (1998) at 51.

⁴⁸⁹ Jef Tyson, et al., “How Instant Messaging Works, How Stuff Works”, <<http://computer.howstuffworks.com/e-mail-messaging/instant-messaging.htm?printable=1>> (accessed March 29, 2012).

⁴⁹⁰ 17 U.S.C. Sec.512(a)(5) of THE DMCA & Article 12(i) of Directive 2000/31.

⁴⁹¹ H.R. REP. No. 105-551, pt. 2 (1998) at 51.

⁴⁹² *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077 (C.D. Cal. 2004) at 1091.

⁴⁹³ Agustin Waisman, “Theoretical Foundations of search engine Liability” (2011), *International Review of Intellectual Property and Competition Law* 785, at 794.

4.2.2 Caching Systems

The second category is what is known as caching providers. The problem with this category is that new network platforms, such as Web 2.0 applications, require providers to enhance their networks' infrastructures through their subscribers, which certainly imposes an enormous burden on them.⁴⁹⁴ Providers may therefore struggle to survive.⁴⁹⁵ For that reason, the best solution for providers wanting to avoid huge investments is to provide a caching service, as only temporary copies of copyrighted works are automatically and incidentally made available during the digital transmission upon request by the end user, either directly from the caching provider's server or indirectly from servers of other providers, which also keep the requested file temporarily for the same purpose.⁴⁹⁶

However, copyright holders argue that caching activities should be treated just as fixed copies and providers should therefore be liable for infringing their exclusive rights due to section 106 of the DMCA.⁴⁹⁷ Section 106 of the DMCA gives copyright owners the exclusive right to reproduce protected works.⁴⁹⁸ Also, the initial and final report of the Green Paper 1994 (hereinafter the US Green Paper) states that the exclusive reproduction rights covers all types of digital copies.⁴⁹⁹ This report has been endorsed by the US Commerce

⁴⁹⁴ Web 2.0 allows users to interact and collaborate with each other in a social media dialogue as creators of user-generated content in a virtual community through social networking sites, blogs, wikis, video sharing sites, hosted services, web applications, mashups and folksonomies, such as virtual worlds and video distribution; see, Paul Anderson, "What is Web 2.0? Ideas, technology and implications for education", *Technology & Standards Watch*, (Feb 2007), <www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf> (accessed April 28, 2013).

⁴⁹⁵ Susan P. Crawford, "The Ambulance, the Squad Car & the Internet" (2006) 21 *Berkeley Technology Law Journal* 873, at 877-78. Guy Pessach, "An International-Comparative perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, & Next Generations Questions" (2007) 40, *Vanderbilt Journal of Transnational Law* 87, 124.

⁴⁹⁶ "Light Reading Insider, Deep Packet Inspection: Vendors Tap into New Markets", <<http://www.lightreading.com/insider/details.asp?skuid=1974&skuitemitemid=1060>> (accessed April 19, 2012).

⁴⁹⁷ Guy Pessach, "An International-Comparative perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present & Next Generations Questions" (2007) 40, *Vanderbilt Journal Transnational Law* 87, at 124.

⁴⁹⁸ 17 U.S.C. Sec.106 (2006) of the DMCA.

⁴⁹⁹ Working Group on Intellectual Property Rights of Information Infrastructure Task Force, Green Paper on Intellectual Property Rights and the National Information Infrastructure (Prelim. Draft July 1994) (hereinafter "US Green Paper"). U.S Green Paper, at 13-15, 32, 35-37.

Department in its Report of the Working Group on Intellectual Property Rights, known as the White Paper,⁵⁰⁰ which clearly states that any reproduction of a copyrighted work during the course of a network communication, including activities such as internet browsing, caching and e-mail application, triggers the reproduction right.⁵⁰¹

Similarly, the European Communities Report 1996⁵⁰² recommends that all forms of digital embodiments should be subjected to the exclusive reproduction right, including “*transient or other ephemeral acts of reproduction.*”⁵⁰³ This maximalist approach is reflected in Article 2(a) of Directive 2001/29,⁵⁰⁴ which ensures that copyright holders can authorise or prohibit any form of copying, whether “*direct or indirect, temporary or permanent [...] by any means and in any form, in whole or in part.*”⁵⁰⁵ This implies that the main providers of streaming media can be held liable in several respects. They may also be liable for live transmissions, as digital content is automatically buffered as part of the technical stages.⁵⁰⁶

However, some commentators voiced concerns about this approach since temporary copies are made during the incident transmission process on the service providers’ servers and are only available for not more than a transitory duration, therefore, the caching activities of providers should not be deemed a violation of the reproduction right.⁵⁰⁷ The rationale here is that the automated

⁵⁰⁰ On 5th of September 1995, the US Commerce Department released the Report of the Working Group on Intellectual Property Rights entitled *Intellectual Property and the National Information Infrastructure*, also known as the White Paper. Bruce A. Lehman, et al., “Intellectual Property and The National Information Infrastructure” (Sept 1995) Report of the Working Group on Intellectual Property Rights <<http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>> (accessed Aug. 2011).

⁵⁰¹ White Paper (1995), at 64-66 & 202-04.

⁵⁰² EC Follow Up to the Green Paper (1996), at 11.

⁵⁰³ E.C.G.P. 1995, at 11.

⁵⁰⁴ World Intellectual Property Organisation, 2 Recodes of the Diplomatic Conference on Certain Copyright and Neighbouring Right Question 624 (1999).

⁵⁰⁵ Article 2 of Directive 2001/29/EU.

⁵⁰⁶ Maurizio Borghi, “Chasing Copyright Infringement in the Streaming Landscape” (2011), *International Review of Intellectual Property and Competition Law* 317, 330.

⁵⁰⁷ *CoStar Group, Inc. v. Loopnet, Inc.* 373 F.3d. 544 (4th Cir. 2004) at 549-50.

copying by machines initiated by others is insufficient to establish a direct infringement of the reproduction right.⁵⁰⁸

For this reason, section 512(b)(1)(a)(b)(c)(e) of the DMCA states that caching providers should not be liable;

“...for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which (A) the material is made available online by a person other than the service provider; (B) the material is transmitted from the person described in subparagraph (A); and (C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A)... (e) the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3)...”⁵⁰⁹

Also, in Europe, Article 13 of Directive 2000/3 states that providers are not liable for automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry; (d) the provider does not interfere with the lawful use of

⁵⁰⁸ *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1368-69 (N.D. Cal. 1995) at 1365-70, 1373.

⁵⁰⁹ Section 512(b)(1)(a)(b)(c) (k) (1) (B) of the DMCA.

technology, widely recognized and used by industry, to obtain data on the use of the information; (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge...⁵¹⁰

According to these definitions, if a caching provider under the DMCA and the Directive wants to shield itself from copyright liability, the provider must not in any way interfere with the lawful use of technology, which is commonly used by the industry when data is acquired.⁵¹¹ And it must expeditiously remove or disable access to stored information whenever it has actual knowledge of the removal or access disablement of the available information at the initial transmission source,⁵¹² which has been ordered by the responsible court or administrative authority.⁵¹³

Hence, liability of a caching provider under both statutes may be limited to temporary reproductions and does not include long-term caching. This means that any volatile copies might be kept on the service providers' servers for the purpose of conveying material to customers or conveying material to be stored at the behest of a customer without any interference or active role from the providers, so that the caching providers is shielded from liability for a violation of the holders' exclusive reproduction right.⁵¹⁴

However, if the holder can prove that a caching provider has actual knowledge or is aware that the unlawful acts are committed by its subscribers on its systems and upon becoming aware fails to expeditiously remove or disable access to the material, which is claimed to be infringing, then the provider will be deprived

⁵¹⁰ A service provider "... is [in] no way involve[d] with the information transmitted, ... does not modify the information that he transmits; this requirement does not cover manipulations of a *technical nature* which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission"; See, Recital 43 of the Preamble of Directive 2000/31.

⁵¹¹ Section 512(d)(2)(c) of the DMCA. Recital 43 of the Preamble to Directive 2000/31 & Article 13(1)(d) of Directive 2000/31.

⁵¹² Section 512(b)(2)(e) of the DMCA.

⁵¹³ Article 13(1)(e) of Directive 2000/31.

⁵¹⁴ For more details about long-term caching: Matt Blaze, et al., "Long-Term Caching Strategies for Very Large Distributed File Systems" *USENIX* <<http://www.usenix.org/publications/library/proceedings/blaze.pdf>> (accessed May. 25, 2012).

from the liability exception and may be held liable for violating the exclusive reproduction rights of the holder on the basis of the tort liability concept, explained in the previous chapter.⁵¹⁵

4.2.3 Hosting and Information Location Tools (Storage Provider)

Online storage of information on systems is the third service, which can be exempted. The best example of this kind of service is found on new network platforms, such as Web 2.0, which normally takes place either on decentralised networks or through User-Generated-Contents (UGC). The most famous decentralised platform is the BitTorrent website. A provider can use the decentralised network to physically transport data from the information source to end users through aggregating many decentralised websites from which internet users can directly or indirectly download and upload works, including copyrighted works for which no permission has been granted by copyright holders.⁵¹⁶

Also, a provider of UGC can provide space on its server for its subscribers where they can “store” huge amounts of illegal copyrighted works on their pages and share these with other users, who download the illegal material without having to pay any licence fees to copyright owners. The most popular platform for this activity is YouTube. YouTube organises different types of information and makes it universally accessible and useful.⁵¹⁷

As a matter of fact, the previous described activities of these new platforms go far beyond fulfilling a neutral function, as these new platforms can store material on their network systems at the request of subscribers or internet users and they

⁵¹⁵ Marc Aaron Melzer, “Copyright Enforcement in the Cloud” (2011) 21, *Fordham Intellectual Property Media & Entertainment Law Journal* 403, at 324.

⁵¹⁶ Ronald J. Mann et al., “The Promise of Internet Intermediary Liability” (2005) 47, *William & Mary Law Review* 239, at 255-257.

⁵¹⁷ Jack M. Balkin, “Media Access: A Question of Design” (2008) 76, *George Washington Law Review* 933, at 936-37; Rosa Julia Barcelo, “On Line Intermediary Liability Issues: Comparing EU and US Legal Frameworks” (2000) 22, *European Intellectual Property Review* 105, at 111. On July 21, 2010, Facebook announced that it had 500 million members; Jenna Wrotham, “Facebook Tops 500 Million Users”(July 21, 2010) *N.Y. Times*, <<http://dealbook.nytimes.com/2010/07/22/facebook-tops-500-million-users/>> (accessed July 19, 2012) at B8.

can also edit, modify or manage content in a manner, which enables other users to access and download material without permission having to be sought from copyright holders.⁵¹⁸ Copyright holders therefore argue that these activities violate their right to display under section 106(5). As a result, operators of these new platforms are vulnerable to possible allegations of contributory liability.⁵¹⁹ Accordingly, the question arises to what extent these activities are unlawful, so that the liability exception for the storage of information cannot be evoked.⁵²⁰

Section 512(c)(1) formulates the principle that:

“...a service provider shall not be liable...for infringement of copyright by reason of 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...”

Also, Article 14 of the Directive 2000/31 states that:

“Where an information society service that consists of the storage of the information provided by a recipient of service. Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service...”⁵²¹

Thus, it seems that the interpretation of the term “*storage*” is a keyword, which defines the scope of the activities of storage providers, which either fall within or outside the scope of the immunity provisions. Unfortunately, neither the US Congress, nor the European Parliament has interpreted this term. Therefore, recourse has to be made to the dicta of US courts and the European Court of Justice in order to ascertain how the issue is being dealt with.⁵²²

⁵¹⁸ Jessica A. Wood, “The Darkent: A Digital Copyright Revolution” (2010) XVI (4), *Richmond Journal of Law & Technology* 1, at 3.

⁵¹⁹ Memorandum complaint, *Viacom Int'l Inc. v. YouTube, Inc.*, (No. 07 Civ. 2103) (S.D.N.Y. 2007/ 2008) at 3.

⁵²⁰ *Id.*

⁵²¹ Article 14 of Directive 2000/31.

⁵²² Courts of the Member States can request a preliminary reference to avoid any uncertainty in respect of the interpretation of Articles of Directives. A preliminary reference is not just an opinion, but the interpretation has to be followed by all courts of the Member States when they

In this context, many US courts have made it clear that the word “*storage*” should not be interpreted too narrowly, so that the purpose of the statute is met.⁵²³ For example, in the *YouTube* case, the Court of Appeal established a new principle, when it interpreted the term “storage.” The court stated that the only activity, which can fall within the immunity provisions, is what constitutes an automated function, such as indexing and displaying related information, and which aims to assist users of storage providers to locate and access all previously stored materials on request by other users.⁵²⁴

However, the court made clear that if storage activities of providers include acts, which involve contents from internet users, such activities may not fall within the safe harbour provision.⁵²⁵ This means that a storage provider, cannot publish, nor alter contents or be involved in any form with the infringing material of its subscribers, but instead only subscribers can exercise these functions.⁵²⁶

In Europe, in the *Google France Sarl v Louis Vuitton Malletier SA*,⁵²⁷ and *L’Oreal v eBay* cases,⁵²⁸ the Court of Justice interpreted the term “*storage*” in the text of Article 14 of Directive 2000/31 and held that although *Google* and *L’Oreal* fell within the scope of the definition of “*information society service*” that both providers should not be permitted to evoke the liability exception contained in Article 14 of Directive 2000/31.⁵²⁹ The Court explained that this is because the storage of information, which was transmitted by its users, was not in itself a sufficient reason to conclude that the service fell, in all situations,

deal with the same legal issue. See, The Institution-General Presentation, European Commission, and <http://curia.europa.eu/jcms/jcms/Jo2_6999> (accessed April 16, 2012).

⁵²³ *Id.*, 29.

⁵²⁴ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 12 & 31.

⁵²⁵ Martine B. Robins, “A good Idea at the Time: Recent Digital Millennium Copyright Act § 512(c) Safe Harbour Jurisprudence-Analysis and Critique of Current Applications and Implications” (2012) 15, *Tulane Journal of Technology and Intellectual Property* 1, at 17.

⁵²⁶ *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001) at 1088.

⁵²⁷ *Google France Sarl v Louis Vuitton Malletier SA* (C-236/08) [2011] Bus. L.R. 1 (CJEU (Grand Chamber) (23 March, 2010) (hereinafter CJEU/Google France).

⁵²⁸ In this case, L’Oreal sued eBay for infringing its Intellectual Property rights through performing extensive transactions by displaying L’Oreal goods on eBay’s website and triggering a number of sponsored links through specific keywords, which corresponded with the trademarks displayed on the website of search engine operators, such as Google; see, *L’Oreal SA v eBay International AG* (C-324/09) [2011] E.T.M.R. 52 (CJEU (Grand Chamber) (21 July, 211) (hereinafter CJEU/L’Oreal).

⁵²⁹ Georghios Psaroudakis, “In Search of the Trade Mark Functions: Keyword Advertising in European law” (2012), *European Intellectual Property Review* 33, at 33.

within the scope of Article 14(1) of Directive 2000/31.⁵³⁰ Hence, according to the Court of Justice, only those provider, which do play a neutral and purely passive role and which do not know or control stored data are exempt from liability under the Directive, for example those, which only facilitate access to information or provide general information to users.⁵³¹ On the other hand, the Court further explained that service providers which offer, promote, contribute or deal with the data, which their users have stored, do not perform a neutral role and can therefore not rely on the liability exception in Article 14(1) (a) of Directive 2000/31.⁵³²

The “neutrality principle” of the Court of Justice in the *Google* case was further scrutinised by the Advocate-General in his opinion in the *L’Oreal* case. The Advocate-General noted that there are two core reasons why the “neutrality principle” is not the correct test under the Directive. Firstly, the standard cannot be considered an absolute liability standard since eBay could directly intervene and use technical means and methods within its software system to shield itself from liability.⁵³³ Secondly, an assessment of legal liability for service providers on the basis of a business model may soon become out-dated.⁵³⁴ Instead the Advocate-General suggested that liability should focus on the types of activity, which a service provider performs and accordingly the definition or exact determination of these activities should determine whether liability can be successfully pleaded, as this best accomplishes the objectives of the Directive.⁵³⁵

It can be concluded from the analysis of the substantive rules and principles developed by US courts, as well as the Court of Justice of the European Union that although the DMCA and Directive 2000/31 are drafted in a way which permits contributory liability to be imposed on these new platforms, US courts,

⁵³⁰ CJEU/*L’Oreal*, at 111.

⁵³¹ Recital 42 of the Preamble of Directive 2000/31; CJEU/*Google France*, at 112-114; CJEU/*L’Oreal*, at 115.

⁵³² CJEU/*Google France*, at 111-114; CJEU/*L’Oreal* at 116 & 120

⁵³³ Court Justice of the European Union, (C-324/09) (CJEU/*L’Oreal*) Advocate General Jääskinen, however, is of the opinion that the neutrality test is not the right test under the Directive, paragraph 145 of his opinion on *L’Oreal v. Google*, (hereinafter Advocate’s opinion/CJEU), Advocate’s Opinion/CJEU, at 149.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

unlike the Court of Justice of the European Union, have been reluctant to consider operators of these new platforms publishers, but instead they are treated like hosting and information location tools, so that the safe harbour protection has been extended to their activities in appropriate cases. Furthermore, in Europe, the Court of Justice has established a new liability standard based on the idea of the neutrality principle. Yet this principle may exclude many of the new platforms, such as Web 2.0, from the liability exception. This may create uncertainty for online service providers and weaken the immunity provisions. Those providing information society services may also not want to deal anymore with third party content.⁵³⁶

However, under the principles established by US courts and the Court of Justice of the European Union, when the function of a storage provider goes beyond the automated handling of user supplied contents, the activity may no longer be classified “*storage*” at the directions of users, but instead contributory liability may be imposed on the service provider.⁵³⁷

4.3 THE SCOPE OF IMMUNITY IN THE US & EUROPE

As mentioned in the previous chapter, pursuant to Article 45(1) of the TRIPs, a holder can seek compensation for harm caused by a service provider, which knows that its unlawful acts may damage the holder. Hence, the TRIPs Agreement requires contracting parties to impose civil liability as part of their enforcement mechanisms. Contracting parties have to thus firstly clarify on which basis liability is imposed on internet providers. Contracting parties have to also define the framework for immunity on which service providers can rely, so that providers are afforded reasonable legal certainty. It should be noted that the provision of blanket immunity for services providers conflicts with the Agreed Statements of Article 8 of the WCT and Articles 10 and 14 of the

⁵³⁶ Christine Riefa, “CJHU Case C 324/09 L’Oreal v. eBay: The End of Online Auction Intermediary Liability as we Know it” (July, 18, 2011) *recent-ecl*, <<http://recent-ecl.blogspot.co.uk/2011/07/cjeu-case-c-32409-loreal-v-ebay-end-of.html>> (accessed June 12, 2012).

⁵³⁷ *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. (N.D. Cal. 1995), at 1361.

WPPT.⁵³⁸ For this reason, many different jurisdictions have adopted rules to ensure that in particular circumstances service providers are considered immune from claims.

For example, section 512(c)(1)(A) of the DMCA spells out three requirements, which providers have to satisfy in order to successfully plead the immunity defence. These requirements are as follows:

“(1) A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, if the service provider; (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.”⁵³⁹

Similarly, Article 14(1)(a) of the Directive states that an information society service shall not be held liable if:

“... (a) the provider does not have *actual knowledge* of illegal activity or information and as regards to *claims for damages*, is not *aware* of facts or circumstances from which the illegal activity or information is apparent: or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information...”⁵⁴⁰

⁵³⁸ Article 14(2) of the WCT and Article 23(2) of the WPPT.

⁵³⁹ 17 U.S.C. Sec.512(c) (1)(A) of the DMCA (2000).

⁵⁴⁰ A service provider is protected from criminal liability but not from an injunction measure if it lacks actual knowledge, while the same provider can claim immunity from an injunction measure and damages for its users' unlawful activities if it is unaware of facts and circumstances from which the illegal activity or information is apparent: Article 14(1)(a) of Directive 2000/31; see, Commission First Report on the application of Directive 2000/3 1/EC, COM (2003) 702 final (Nov. 21 2003) <http://www.edis.sk/ekes/ecommm_legalen.pdf> (accessed June 14, 2012), at 12, 29.

When these two statutes are read together, one can identify three disjunctive conditions on which immunity of online service providers is based. Hence, service providers should not be held liable if they do not have actual knowledge of specific infringements, or, in the absence of such knowledge, providers are unaware of facts or circumstances from which the infringing activity is apparent, and upon receiving sufficient notification, they act expeditiously to remove, or disable access to the material.⁵⁴¹

Here, many questions need to be answered. What is the standard of knowledge and awareness that needs to be met to establish a breach of the duty of care owed by a service provider to a holder? And what is the response that a service provider is expected to discharge once it becomes aware of infringing acts and contents occurring on its system? In order to answer these questions, the study methodologically provides a comparative study of the principles established by US courts, particularly in the recent *YouTube* case and the decisions of the Court of Justice of the European Union in the *Google* and *L'Oreal* cases.

According to the principles established in these cases three cardinal points have to be discussed to answer these questions. Firstly, the scope of the actual knowledge standard, secondly, the awareness requirement and thirdly, the nature of the response of the provider once it becomes aware of the infringing contents occurring on its network system. The next part of the discussion discusses these points in more detail.

4.3.1 The Actual Knowledge Standard

Pursuant to section 512(c) of the DMCA, providers have to adopt a notice and takedown system. This regime enables copyright holders to identify the infringing materials, which have to be removed by providers.⁵⁴² Under this regime, the provider must designate an agent to handle infringement claims. The DMCA also requires providers to make the names of their agents and contracts

⁵⁴¹ 17 U.S.C. Sec.512(c) of DMCA (2000) & Article 14 of Directive 2000/31.

⁵⁴² J. Breta, "Berkeley Technology Law Journal Annual Review and Technology Intellectual Property Copyright: Digital Media- Harboring Doubts about the Efficacy of section 512 Immunity under the DMCA" (2003), *Berkeley Technology Law Journal* 43, at 50.

readily available, both through the providers' own website and through registration at the Copyright Office.⁵⁴³ Further, the notification sent by holders must contain six substantial elements, which are set out in section 512(c)(3)(A) of the DMCA; otherwise the notification will not be considered sufficient when it is decided whether the provider had the requisite level of knowledge under section 512(c)(3)(B)(ii) of the DMCA.⁵⁴⁴

A notification is only considered sufficient if the following elements are met: (i) a physical or electronic signature of the complainant has been submitted; (ii) the copyright work or a representative list of multiple works has been identified; (iii) the infringing material and information that reasonably allows the ISP to locate the infringing material have been identified; (iv) the complainant's contact information has been provided; (v) a statement of good faith that the use of the material is not authorised; and (vi) a statement under penalty of perjury that the notice is accurate.⁵⁴⁵ Hence, if the notification does not comply with all these requirements, the notification will not be considered sufficient when it is decided whether the provider had the requisite level of knowledge under section 512(c)(3)(B)(ii) of the DMCA.⁵⁴⁶

However, in a case where the service provider fails to notify the copyright holder and does not insist on doing so upon receiving the correct notice, the service provider is deemed to have received a proper notice.⁵⁴⁷ On the other hand, if a service provider sends a notice to a copyright holder, who refuses to send the correct notice, it is presumed that the service provider has not received the correct notice and is therefore exempt from liability. This clause is intended

⁵⁴³ *Id.*, at 51; as subsection 512(c)(2) does not limit the liability of information location tools under section 512(d), it appears that the term "designated agent" for purposes of section 512(d) merely refers to a designated agent, which receives notifications, rather than a formally designated agent under section 512(c)(2) through whom a notice is filed with the US Copyright Office.

⁵⁴⁴ 17 U.S.C. Sec.512(c)(3)(B)(ii) of the DMCA.

⁵⁴⁵ 17 U.S.C. Sec.512(c)(3)(A) of the DMCA.

⁵⁴⁶ 17 U.S.C. Sec.512(c)(3)(B)(ii) of the DMCA.

⁵⁴⁷ 17 U.S.C. Sec.512(c)(3)(B)(2) of the DMCA.

to facilitate that copyright holders provide effective notices and to prevent ignorance about faulty notices.⁵⁴⁸

However, one can argue that the elements under subparagraphs (ii) “identification of the work claimed to have been infringed” and (iii) “identification of the material that is claimed to be infringing” are the most important elements, as they are the main information a provider needs to have to assess whether to use the take down procedure and how and where illegal contents is located, which has to be taken down. A failure to comply with these two aspects may mean that a service provider has not the requisite knowledge.⁵⁴⁹

However, it should be noted that although the DMCA sets out six elements for a sufficient notification, many US courts have adopted two different interpretations when determining whether the identification was sufficient. Some courts apply a stricter interpretation standard, whilst others are more lenient and this creates uncertainty for courts when determining whether a service provider should or should not be deprived from the safe harbour provisions.

Also, in Europe, the actual knowledge requirement in Article 14 of Directive 2000/31 is based on a subjective test, so that a provider has to be subjectively aware of a “specific infringement” and the belief does not need to be reasonable. However, unlike the DMCA, Article 14 of Directive 2000/31 does not define when and how a notice can be considered a sufficient notification. As a result, uncertainty prevails in respect to which situations copyrighted works and the location of the infringing material have been sufficiently identified, so that there is sufficient notice giving rise to a duty of care owed by service providers. Also, courts in Europe have adopted different interpretations in relation to this issue. The next discussion therefore investigates which principles US courts, the Court of Justice of the European Union and European national courts in France and

⁵⁴⁸ 17 U.S.C. Sec.512(c)(3)(B) of the DMCA.

⁵⁴⁹ Andrea Frey, “Noted: To Sue or Not Sue: Video-Sharing Web Sites Copyright Infringement, and the Inevitability of Corporate Control” (2008) 2, *Brook Journal of Corporate Financial Commercial Law* 167, at 174.

Germany have established in order to define the scope of the actual knowledge requirement.⁵⁵⁰

Many US courts consider that the validity of a notice under section 512(c)(3)(A)(ii) depends on whether the notice contains sufficient information about the allegedly infringing material, such as the artist's name or the representative list of the works or links to and from websites, which may assist the providers with taking down the works on the provided list.⁵⁵¹ Although most US courts interpret section 512(c)(3)(A)(ii) of the DMCA strictly,⁵⁵² some courts are more lenient on the basis that the notice has to only "substantially", rather than "perfectly" comply with the notice requirements.⁵⁵³

⁵⁵⁰ Section 11 of the German Telemedia Act (hereafter, TMG 2007) regulates the liability of hosting providers and implements Article 14 of Directive 2000/31. This section faithfully implements the actual knowledge and awareness requirements and renders them key factors when determining liability of service providers. Hence, whenever copyright holders seek compensation, they must prove that providers are aware of facts or circumstances from which illegal activity or information is apparent. However the French TMG does not adopt a notice-and-take-down regime, as the American DMCA and it therefore remains unclear, which effect a notice has when determining whether a service provider has actual knowledge or is aware of the infringement. While in France, similar to section 512 of the DMCA, Article 6-I-5 of the LCEN states that the hosting provider is aware of the facts through a notice, which is similar to section 512(c)(3)(A) of the DMCA. Article 6-I-5 of the LCEN states that "The notice must contain the following elements; 1) The date of the notification; 2) If the notifying person is a natural person, their surname, forename, profession, residence, nationality, date and place of birth; if the application is a legal entity: its form, name, registered office and its legal representative; 3) The name and residence of the recipient or, if this is a legal entity, its name and registered office; 4) A description of the disputed facts and their exact location; 5) The reasons for which the content must be removed, including an indication of the provisions and justification of the facts; 6) A copy of the correspondence addressed to the author or producer of the disputed information or activities requesting them to be stopped, removed or amended, or proof that the author or producer could not be contacted." However, unlike the DMCA, the French procedure does not result in an automatic take down of the contents after the provider is notified; see, Gerald Spindler et al., "Study on the Liability of Internet Intermediates" BC. General Trends in The EU, (November, 12, 2007), <http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf>, (accessed May 24, 2012), at 45-47.

⁵⁵¹ *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d (C.D. Cal. 2001) at 1082. Luca Tiberi et al., "Liability of Service Providers" (2003) *Computer and Telecommunications Law Review* 49, at 52. Jennifer Bretan, "Harbouring Doubts about the Efficacy of Section 512 Immunity under the DMCA" (2003) 18, *Berkeley Technology Law Journal* 44, 51.

⁵⁵² Todd E. Reese, "Comment, Wading through the Muddy Waters: The Court's Misapplication of Section 512(c) of the Digital Millennium Copyright Act" (2004) 34, *South Western University Law Review* 287, at 309.

⁵⁵³ *ALS Scan v. RemarQ Communities, Inc.*, 239 F. 3d 619 (4th Cir. 2001) at 619, 625; see, Richard Raysman et al., "Notice and Takedown under the Digital Millennium Copyright Act" (Feb 08, 2002) *New York Law Journal* <<http://www.newyorklawjournal.com/index.jsp>> (accessed March 19, 2012) at 3.

As for section 512(c)(3)(A)(iii), the Ninth Circuit Court in *Perfect 10 v CCBill* adopted a strict interpretation standard towards this section and held that the defendants were not liable for copyright infringement,⁵⁵⁴ as the notifications, which had been sent by *Perfect 10* to *CCBill* were ineffective according to the principles established by the House and the Senate's juridical reports. In this regard, the Court stated that these reports required that a notice was sufficient, if it contained "...a copy or description of the allegedly infringing material and the so-called "uniform resource locator" (URL) (i.e. web site address) which allegedly contains the infringing material,"⁵⁵⁵ and as long as some of the notifications sent by the plaintiff did not precisely identify the specific URLs of some of the violated images, the Court could not find that the notifications were sufficient to prove that the defendant had actual knowledge.⁵⁵⁶

The court explained why it adopted such a strict interpretation and held that the substantial burden of determining whether or not the posted materials were infringing or not rested with the copyright holders.⁵⁵⁷ It explained that if the court had interpreted the section leniently, the burden could shift from copyright holders to service providers and Congress had not intended this when it drafted section 512 (c)(3)(A)(iii) of the DMCA.⁵⁵⁸

In Europe, under Article 14 of Directive 2000/31, it is still unclear, who can send a notice and whether a notice from any user of the internet will be accepted. Moreover, unlike the principles developed by US courts, it remains unclear whether in relation to cases where numerous copyright works are claimed to be infringed on a single site, whether or not copyright holders must provide a full list of all the infringing materials or just present a representative list and when

⁵⁵⁴ *Perfect 10, Inc. v. CCBill LLC*, 340 F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004) 34; 488 F.3d 1102 (9th Cir. 2007), at 1112-1113. In this case, Perfect-10 was the publisher and owner of an adult entertainment magazine and the subscription website Perfect10.com alleged that the defendants hosted websites, which posted stolen images from its magazine and website and thus accused the defendants of violating copyrighted works.

⁵⁵⁵ H.R. Rep. No. 105-551 pt. 2 (1998) at 55. The Senate Judiciary Report, S. Rep. No. 105-190 (5/11/98) (hereinafter S. Rep. 105-190 (1998)); S. Rep. 105-190 (1998) at 46.

⁵⁵⁶ *Perfect 10, Inc. v. CCBill LLC*, 340 F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004) 34; 488 F.3d 1102 (9th Cir. 2007), at 1112-1113.

⁵⁵⁷ *UMG Recordings Inc. et al. v. Veoh Networks Inc.*, No. 09-56777, (9th Cir. March 14, 2013) at 29-32.

⁵⁵⁸ *Id.*

and how the notification can be deemed sufficient.⁵⁵⁹ The Court of Justice therefore tried to spell out in which circumstances a notification is considered sufficient.

In this context, the Court of Justice of the European Union held in the *L'Oreal* case that actual knowledge may be established when a service provider is notified that infringing activity takes place or information is displayed. The Court made clear that a notification has to be sufficiently precise and adequately substantiated. This means that a notification does not automatically result in the provider being exempted from liability under Article 14 of Directive 2000/31, especially since a notification about unlawful activities or information may be inaccurate or inadequately substantiated. Yet the problem is that what can be considered sufficiently precise or adequately substantiated is still unclear, as the Court of Justice did not explain when and how a notice can be considered a sufficient notification.⁵⁶⁰

As a result, the Court of Justice left it up to national courts of Member States to decide in which circumstances a notification can be considered sufficient. For example, the French Supreme Court in *Nord Ouest Productive vs. Dailymotion* (17th February 2011) endorsed the decision of the Paris Court of Appeal and held that *Dailymotion* was not liable for hosting the plaintiff's copyrighted works on its website on the basis that the notification, which the plaintiff had sent, did not include all the information required by Article 6-1-5 of the LECN.⁵⁶¹ In this

⁵⁵⁹ Hogan Lovells et al, "The French Supreme Court Confirms that Dailymotion and an Aggregator of RSS Flows are Both Hosting Service Providers" (March 01, 2011) *Lexology*, <<http://www.lexology.com/library/detail.aspx?g=1fc53c40-cb31-440f-937f-8d2de627c752>> (accessed May 15, 2012); see, Mario Viola De Azevedo Cunha et al, "Peer-to-Peer Privacy Violation and ISP Liability: Data Protection in the User-Generated Web", EUI Working Paper Law 2011/11 <http://cadmus.eui.eu/bitstream/handle/1814/18254/2011_11.pdf?sequence=1> (accessed May 24, 2012), at 10; see, Jeanne Mehaud, "The Liability of Hosting Service Providers: What's New under French Law?" (April 28, 2008) *Bird & Bird* <http://www.twobirds.com/english/publications/articles/Liability_hosting_service_providers_France.cfm> (accessed May 15, 2012).

⁵⁶⁰ Christine Riefa, "CJHU Case C 324/09 L'Oreal v. eBay: The end of online auction intermediary liability as we know it" (July, 18, 2011) *recent-ecl* <<http://recent-ecl.blogspot.co.uk/2011/07/cjeu-case-c-32409-loreal-v-ebay-end-of.html>> (accessed June 12, 2012).

⁵⁶¹ Article 6-I-5 of the French LCEN also explains the essential elements for a notification without counter-notice. The Article states that hosting providers are aware of disputed facts when they receive the following information: 1) The date of the notification; 2) If the notifying

context, the Court made clear that the information requirements have to be complied with in order to identify the infringing content in a way that is accurate and precise.⁵⁶²

Thus, French judges require the hosting provider to be aware of the litigious contents if they receive a notification and which has to contain all the information, particularly a description of the contentious facts, the precise location, as well as the reasons why the content should be eliminated; otherwise the notification will not be considered to prove that the provider has actual knowledge.⁵⁶³

Similarly, in Germany, courts have recently adopted a more strict approach, comparable to the standard promulgated by US and French courts. For instance, in the *GEMA v YouTube* case (20th April 2012), the Hamburg District Court held that the letter sent by *GEMA*, which listed 258 copyrighted works on *YouTube*'s platform, including the URLs of each named video, was sufficient for the defendant to locate the illegal contents in order to prevent further infringements on its system. *YouTube* was found liable because it had failed to adopt proper

person is a natural person, their surname, forename, profession, residence, nationality, date and place of birth; if the application is a legal entity: its form, name, registered office and its legal representative; 3) The name and residence of the recipient or, if this is a legal entity, its name and registered office; 4) A description of the disputed facts and their exact location; 5) The reasons for which the content must be removed, including an indication of the provisions and justification of the facts; 6) A copy of the correspondence addressed to the author or producer of the disputed information or activities requesting them to be stopped, removed or amended, or proof that the author or producer could not be contacted; see, Pierre Sirinelli et al., "User-Generated Content and ISP Liability in France", *Bird & Bird*, (Feb 04, 2009). <<http://www.lexology.com/library/detail.aspx?g=75ee5536-1b93-43df-81cd-408f9235ac43>>, (accessed May 15, 2012).

⁵⁶² Hogan Lovells et al, "The French Supreme Court Confirms that Dialymotion and an Aggregator of RSS Flows are Both Hosting Service Providers" (March 01, 2011) *Lexology*, <<http://www.lexology.com/library/detail.aspx?g=1fc53c40-cb31-440f-937f-8d2de627c752>> (accessed May 15, 2012).

⁵⁶³ Mario Viola De Azevedo Cunha et al, "Peer-to-Peer Privacy Violation and ISP Liability: Data Protection in the User-Generated Web", EUI Working Paper Law 2011/11 <http://cadmus.eui.eu/bitstream/handle/1814/18254/2011_11.pdf?sequence=1> (accessed May 24, 2012), at 10; see, Jeanne Mehaud, "The Liability of Hosting Service Providers: What's New under French Law?", (April 28, 2008) *Bird & Bird* <http://www.twobirds.com/english/publications/articles/Liability_hosting_service_providers_France.cfm> (accessed May 15, 2012). Florence Chafiol-Chaumont, "France: Liability for Hosting Content" *Live Wire*, (April, 2008), <<http://www.nabarro.com/Downloads/7989-LiveWire-30-March-2008.pdf>> (accessed May 15, 2012).

preventative measures to stop and prevent the unlawful acts from further occurring on its system.⁵⁶⁴

However, in the recent American *YouTube* case, such strict interpretation was not followed. On Appeal, the plaintiffs argued that the District Court erred in granting summary judgment to the defendants, despite the internal emails from YouTube proving that the motive behind YouTube's decision to end the feature to flag videos was to avoid being notified about unlicensed material on the site in order to shield itself from copyright liability.⁵⁶⁵ After the Appellate Court conducted a comprehensive analysis of the possibility of applying the "wilful blindness" doctrine directly to section 512(m) of the DMCA, the Court concluded that the wilful blindness doctrine may be applied in appropriate circumstances in order to identify and establish knowledge of a service provider about specific infringement activities.⁵⁶⁶

This new liability principle, which the Appellate Court established, is based on a new refutable presumption that copyright holders owe a duty of care to copyright holders. This principle is based on the idea of that if a holder can prove that there is a high probability that copyright infringement occurs on the server of a service provider and the provider is intentionally avoiding to confirm this and fails to take any affirmative or positive steps to prevent or reduce the rate of infringement, the provider should be held liable for infringing the holders' exclusive rights.⁵⁶⁷

However, the most crucial aspect of the *YouTube* ruling is that copyright holders can verify whether service providers have subjective knowledge through documents, such as emails, even when the six elements under section

⁵⁶⁴ *Id.*

⁵⁶⁵ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 19-22; Defendant's Opposition to Plaintiffs Motions for Partial Summary judgment *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Memorandum Complaint & Defence of YouTube case, 2010) at 19.

⁵⁶⁶ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 23- 24.

⁵⁶⁷ *Id.*, at 23 (*United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

512(c)(3)(A) of the DMCA are not being complied with.⁵⁶⁸ This means that the *YouTube* case might cause many problems. Such a lenient interpretation of the elements, which are required to sufficiently submit a notification, poses a real risk to providers since they may be held liable, even though they have not anticipated the infringing activities.⁵⁶⁹ This may thus lead to providers installing technological protective measures to remove and monitor materials, which subscribers store on their facilities. Such technology can have a negative impact for the autonomy and freedom of end users, human relationships, equality and even democracy and civil society.⁵⁷⁰ This is because data, which flows through a provider's network system, is deemed as "diverse as a human thought."⁵⁷¹

The lenient interpretation standard adopted in the *YouTube* case might also result in service providers installing technology, as part of a policy to deter infringing activities, which may result in copyright holders being granted absolute exclusive rights, which can help them to monopolise the market place.⁵⁷² If the market place was monopolised, holders could reform the architectures of social norms upon which society is based and frustrate the end users' right to access digital copyrighted works and thus create artificial scarcity and undermine the availability of copyright works.⁵⁷³ This in turn would result in less users being able to access and use information since they could not pay more than the marginal cost, as opposed to the price determined by copyright owners and service providers, so that end users could be denied access to copyrighted works.⁵⁷⁴

It therefore seems that a stringent interpretation as developed by national courts in the US, France and Germany is a much more practical approach towards

⁵⁶⁸ Brian Leary, "Safe Harbour Start-ups: Liability Rulemaking under The DMCA" (2012) 87, *New York University Law Review* 1135, 1163, footnote 152.

⁵⁶⁹ Noppapun Supasiripongchai, "The Enforcement of the Copyright Law in Thailand: What Could the Answer to Massive Copyright Violations in Thailand" (2011), *European Intellectual Property Review* 795, at 798.

⁵⁷⁰ Julie E. Cohen, "Examined Lives: Informational Privacy and the Subject as Object, (2000) 52, *Stanford Law Review* 1373, at 1425.

⁵⁷¹ *Reno v. ACLU*, 929 F. Supp., 824 (E.D. Pa 1996) at 842.

⁵⁷² Johan A. Rothchild "The Social Costs of Technological Protection Measures" (2007) 34, *Florida State University Law Review* 1181, at 1198.

⁵⁷³ Lawrence Lessig, *Code; Version 2.0* (Basic Books, USA, 2006) at 123-024.

⁵⁷⁴ James Boyle, "Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property" (2000) 53, *Vanderbilt Law Review* 2007, at 2031.

determining whether the notification was sufficient. Consequently, the strict interpretation of the actual knowledge requirement should be adopted by the legislator for the following reasons:

Firstly, a strict interpretation standard may lead to a lower liability risk for providers, as it has to be established that the provider knows about the infringing material for potential liability to be established.⁵⁷⁵ It is therefore likely that providers risk liability and do not monitor content stored on their facilities or restrict access to resources. This is particularly true for service providers, whose income is based on the amount of material stored, as this best promotes their self-interest by allowing easy and quick access.⁵⁷⁶

Secondly, a stringent application of the notice provisions protects public access to information because a compliant notice and subsequent “takedown” significantly minimise the problem caused by the use of the notice-and-takedown regime. This is because the take-down system has a fundamental drawback, namely that copyright owners abuse the system by sending out a number of notices, which contain misleading or malicious information to providers, which upon receiving these notices, quickly remove the altered unlawful material, irrespective of whether or not end users are entitled to evoke the fair use defence.⁵⁷⁷

Hence, the imposition of liability under the takedown regime can lead to problems in relation to the fair use doctrine.⁵⁷⁸ Therefore, a strict interpretation can reduce these dangers and it is paramount to provide providers with adequate

⁵⁷⁵ Dennis Lievens, “eBay’s Accessory Liability for Counterfeiting-why Joint Liability Just Doesn’t Cut the Mustard” (2011), *International Review of Intellectual Property and Competition Law* 508, at 517, 518.

⁵⁷⁶ Stephen Loughnan, “Service Provider Liability for User Copyright Infringement on the Internet” (1997), *Australian Intellectual Property Journal* 18, at 20.

⁵⁷⁷ Letter from Fred von Lohmann & Jennifer S. Granick, Elec. Frontier Found., to U.S. Copyright Office, Library of Cong. 22 (Dec. 2, 2008), <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>, (accessed March 31, 2012).

⁵⁷⁸ Matt Williams, “The Truth and “Truthiness” about Knowledge Material Misrepresentations” (2007) 9(1), *North Carolina Journal of Law & Technology* 1, at 17.

information, so that they can find and examine the allegedly infringing contents and expeditiously remove or disable access.⁵⁷⁹

4.3.2 The Awareness Standard

As explained above, it is important to comprehensively and critically analyse the provisions, which regulate the awareness standard in section 512 of the DMCA and Article 14 of Directive 2000/31. With regards to the awareness requirement under section 512(c)(1)(A)(i)(ii) of the DMCA, two conditions have to be discharged by a service provider to claim immunity from damages for the infringing acts by its users. Firstly, the provider must not in any way have “actual knowledge” of the infringements; secondly, the provider must not in any way be aware of the different facts or circumstances from which the acts of infringements are apparent.⁵⁸⁰

However, section 512(c)(1)(A)(ii) and section 512(d)(1)(B) do not define how a provider can be said to have “awareness of infringement.” Hence, the question is what normative framework US courts should adopt when assessing whether or not a service provider is aware of infringing activity. When answering this question, the phrase “*aware of facts or circumstances from which infringing activity is apparent*” in section 512(1)(A)(ii) has to be interpreted.

In this context, awareness means simply that one is conscious of the existence of a fact, even if there is “a varying degree of chance that it may not exist.”⁵⁸¹ The term “circumstance” is defined as “logical surroundings” of an action that takes

⁵⁷⁹ Google estimated that 40% of the takedown notices it received were legally invalid, dubious and frivolous. Mark A. Lemley, “Rationalizing Internet Safe Harbours” (2008) 6, *Journal of Telecommunications and High Technology Law* 101, at 110, 114; see, Ted Gibbons, “Google Submission Hammers Section 92AP”, (Mar 16, 2009) *PC World New Zealand* <<http://pcworld.co.nz/pcworld/pcw.nsf/feature/93FEDCEF6636CF90CC25757A0072B4B7>> (accessed March 31, 2012).

⁵⁸⁰ *The Football Association Premi v. YouTube, Inc*, doc. 10-3242-CV, United States Court of Appeals for Second Circuit <<http://law.justia.com/cases/federal/appellate-courts/ca2/10-3342/446/>> (accessed July 01, 2012) at 11.

⁵⁸¹ Oxford English Legal Dictionary: the term “fact” means that something has really occurred; hence it is a particular truth known by actual observation or authentic testimony: See, Oxford Legal English Dictionary (2nd edition, 1989; online version March 2012) <http://www.oed.com/view/Entry/67478?rskey=lebycR&result=147&isAdvanced=true#eid4938370> > (accessed May 27, 2011) at 4.

the form of the time, place, manner, cause, occasion, etc.,”⁵⁸² while the term “apparent” means “appearing to the senses or mind, as distinct from what really is...”⁵⁸³ Thus, according to these definitions, it can be concluded that an infringement is apparent if an objectively existing fact shows that there is a high degree of coincidence and strong and credible evidence that the infringement is occurring. However, definite evidence is not required, otherwise there would not be any difference between actual knowledge and awareness, which in turn may lead to the awareness provisions becoming swallowed up by the actual knowledge provisions and this is not what was intended by Congress, as it drafted each provision independently.⁵⁸⁴

Congress nevertheless described the “awareness” requirement as a “red flag” test, which is attainable independently of the take-down-notice.⁵⁸⁵ Red-flag knowledge consists of two elements: the subjective and the objective one.⁵⁸⁶ The former is the common element, which also has to be established in actual knowledge and awareness cases, whilst the objective component is only confined to the awareness requirement. This means that the red-flag test merely incorporates the objective standard, but this does not mean that the awareness provision is swallowed up by the actual knowledge provision. Both the awareness and the actual knowledge provisions operate independently.⁵⁸⁷

However, when the red-flag test is used to assess whether a service provider is aware, the court asks the following: was a provider subjectively aware of certain facts and objectively would a reasonable person have been aware of the infringement and are these facts sufficient to find that a service provider was

⁵⁸² Oxford Legal English Dictionary (2nd edition, 1989; online version March 2012) <http://www.oed.com/view/Entry/33377?rskey=6KyRhF&result=1&isAdvanced=true#>, (accessed May 27, 2012).

⁵⁸³ Oxford English Dictionary (2nd edition, 1989; online version March 2012) <http://www.oed.com/view/Entry/9518?rskey=IK4sXI&result=1&isAdvanced=false#eid>, (accessed March 27, 2012) at 6.

⁵⁸⁴ Keith Black, “Technical Knockout: How Mixed Martial Arts Will Change Copyright Enforcement on the Web” (2010) 21, *Fordham Intellectual Property Media & Entertainment Law Journal* 739, at 751.

⁵⁸⁵ H.R. Rep. No.105-551, p.2 (1998) at 57-58.

⁵⁸⁶ *Id.*, at 44-55.

⁵⁸⁷ *UMG Recordings Inc. et al. v. Veoh Networks Inc.*, No. 09-56777, (9th Cir. March 14, 2013), at 40-41.

aware of the infringement. When answering this question, US courts examine whether these elements are made out.

For a court to determine whether or not the subjective element is made out, the court asks whether a service provider has deliberately turned a “blind eye” to the illegal material from which the infringement is apparent when the material is “flagrant” and “blatant” enough and in such an instance the service provider can be aware without being notified by the copyright owners or right holders.⁵⁸⁸ This means that courts only consider awareness in relation to “specific and identifiable infringement” and not awareness based on general knowledge.⁵⁸⁹

In this context, most US courts describe the infringing acts or material as “flagrant” and “blatant” to evidence that the infringement was “obvious.” This does not impose a somehow unreasonable burden on operators of directories of websites, neither does it require that sites are monitored or supervised for inappropriate content; but, if a site contains solely copyright infringements, then the site can be described as a “pirate” site.⁵⁹⁰ However, the names “illegal.net” and “stolen celebrity pics.com” were considered insufficient to meet the “red-flag” test. This is because the use of these domains may simply be “an attempt to increase their salacious/exciting appeal.”⁵⁹¹

Also in the recent *YouTube* case, after the Second Circuit Court affirmed the application of the “wilful blindness” liability standard, the Court defined the scope of the subjective element and stated that a provider is most likely to be found wilfully blind by virtue of being aware when there is a high possibility infringing content exists, but deliberately avoids to confirm this and fails to take down infringing contents.⁵⁹²

⁵⁸⁸ David Nimmer, *Copyright: Scared Text, Technology, and the DMCA* (Kluwer Law International, UK, 2003) at 358.

⁵⁸⁹ *UMG Recordings Inc. et al. v. Veoh Networks Inc.*, No. 09-56777, (9th Cir. March 14, 2013) at 33.

⁵⁹⁰ H.R. Rep. No. 105-551, p.2 (1998) at 57-58.

⁵⁹¹ *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004); 488 F3d 1102 (9th Cir, 2007) at 1119.

⁵⁹² *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 16, 24.

According to the court, copyright liability should be imposed on providers, if a holder can prove that there is substantial and specifically infringing content on the provider's system, as in such an instance it is difficult for a provider to claim that it was unaware of the unlawful acts and therefore failed to take affirmative step to prevent the infringing acts.⁵⁹³

However, the court made clear that for the duty to take affirmative steps to stop infringing activities on one's server to arise; more than general knowledge is required for wilful blindness liability to be imposed.⁵⁹⁴ For that reason, the Appellate Court rejected the plaintiff's argument that *YouTube* should be liable for obvious red-flag knowledge, despite the fact that documents indicated that *YouTube* estimated that about 75-80% of its total streams contained illegal copyrighted materials, as these statistics were not sufficiently adequate to determine *YouTube*'s red flag knowledge and that it had unsuccessfully failed to remove the infringing content.⁵⁹⁵ This approach does not encourage providers to adopt technical pre-emptive measures to remove possibly or potentially infringing content.⁵⁹⁶

Once the court verifies that the subjective element is established, the court poses another question in order to assess whether the objective element is satisfied. The court asks whether the illegal infringement was objectively obvious to a service provider. The court assesses to which extent a service provider was aware about the infringing activities by asking how a reasonable person in similar circumstances would have responded. In other words, the court adopts an

⁵⁹³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, (9th Cir. 2007) at 727-728(citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *A & M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001) at 1022)) (citing *Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc.*, 316 F.2d 304 (2d Cir.1963) at 307.

⁵⁹⁴ *Id.*, at 16, 24.

⁵⁹⁵ Viacom also submitted a report commissioned by *Google* from Credit Suisse, which estimated that nearly more than 60% of *YouTube*'s content was considered "premium" copyrighted content. The report mentioned that authorised material only amounted to around 10% of the total *YouTube* content; however the court rejected this report; see, *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 19.

⁵⁹⁶ *Id.*; 17 U.S.C. Sec. 512 (m)(1)(2006) of DMCA.

objective test to determine whether the infringement was obvious to a reasonable person.⁵⁹⁷

However, the main issue is that section 512(c)(1)(A)(ii) does not explicitly define the parameters of the reasonable person test. Decisions about the reasonableness of a defendant's behaviour often involve clear determinations about the motivations of the defendant's acts or activities. They also involve an assessment of the disadvantages and benefits gained from the behaviour and requires considering social custom.⁵⁹⁸

It can be concluded that a service provider is immune if it is not aware of any unlawful acts on its server. Awareness can be best described as a "red flag" test, which contains a subjective and objective element.⁵⁹⁹ Thus, awareness is only established if both elements are established. Hence, if the service provider becomes aware of illegal acts or contents, from which infringement is apparent to a reasonable person, but fails to take action to stop or prevent these unlawful acts, the provider is no longer exempted from liability.⁶⁰⁰

In Europe, Article 14 suggests that a service provider is liable if a copyright holder can prove that the provider is objectively aware of specific infringements, irrespective of primary intention or motivation. However, in the *L'Oreal* case, the Court of Justice explained the normative framework through which providers can be immune from copyright liability. In this context, the Court held that when a provider does not play an active role, it cannot be ordered to pay damages; however this is not the case if it is established that the provider was aware of facts or circumstances from which a "*diligent economic operator*" should have recognised the activity in question is illegal, but did not act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.⁶⁰¹

⁵⁹⁷ Jonathan Band et al., "Safe Harbors against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act" <www.policybandwidth.com/doc/JBand-CDAvDMCA.pdf>, (accessed Apr 04, 2012) at 13-15.

⁵⁹⁸ Restatement (Third) of Torts: Liab. For Physical Harm Sec.1.

⁵⁹⁹ H.R. Rep. No.105-551, p. 2 (1998) at 44.

⁶⁰⁰ H.R. Rep. No.105-551, p. 1 (1998) at 22.

⁶⁰¹ CJEU/*L'Oreal*, at 124.

However, the Court of Justice did not define how a service provider can be described as a *diligent economic operator*. Hence, European national courts have to interpret the “diligent economic operator” standard, but may do so in different ways and this can cause uncertainty for service providers. Hence, the question arises how European national courts should apply the diligent standard. The next part discusses the first element of the diligent standard and compares it to the wilful blindness approach and then explains how France and Germany apply this standard within their legal systems.

The diligent standard has been established by the Court of Justice to assess whether or not the provider had a suspicion or not and can evoke the immunity defence. The standard is borrowed from the patent context and in a recent patent case the Court of Appeal dealt with the test in the context of economic torts and noted that liability can be established under the “blind-eye knowledge” concept.⁶⁰² The court considered that the same concept should be applied to the copyright context.⁶⁰³

When applying this concept to the non-diligent provider, it can be concluded that, similar to the “wilful blindness” doctrine, liability of a provider can be established under the blind-eye doctrine on the basis that the provider turns a blind-eye to the infringing activities on its systems, which also proves that the provider is aware of the illegal acts and contents on its system, but instead of stopping them, fails to do so and is therefore prevented from evoking the immunity defence. This means that the diligent standard is an extremely influential/powerful self-regulatory tool, which can be used whenever a service provider is aware that unlawful activities are performed by its users, regardless of the means or sources used to become aware.⁶⁰⁴

The Court of Justice also explained the sources through which service providers can gain awareness about infringements. The Court stated that providers can

⁶⁰² Paul S. Davies, “Access Liability Protecting Intellectual Property Rights” (2011), *Intellectual Property Quarterly* 390, at 405.

⁶⁰³ *Id.*

⁶⁰⁴ Francesco Rizzuto, “The Liability of online intermediary service providers for infringements of intellectual property rights” (2012), *Computer and Telecommunication Law Review* 4, at 14.

become aware of infringing acts through two sources. Firstly, providers can become aware of facts and circumstances from insufficient notifications. Secondly, providers can become aware by undertaking their own investigations.⁶⁰⁵ The former might not cause problems; however the second one can.

The problem with the latter source is that service providers are required to carry out investigations of their systems and this can render service providers more vulnerable, as in practice holders cannot identify which of their own items are illicitly posted on Web 2.0 and even if they can, they can make mistakes in relation to identifying the locations of the material. Hence, just as it is difficult for holders to specify the precise location of the illegal material, it is equally difficult for service providers.⁶⁰⁶

This means that according to the Court of Justice awareness of potentially infringing activities and contents on a service provider's system can be sufficient to give rise to a duty of care. As a result, providers may adopt technology to shield themselves from being sued by copyright holders, even though this will likely be at the expense of users' privacy and access to information rights. This means that unlike under the wilful blindness approach, the standard set by the Court of Justice shifts the burden from copyright holders to service providers.⁶⁰⁷

However, European national courts, namely French and German courts, prohibit providers to use these two sources. For example, on 29th October 2007, the High Court of First Instance of Paris ruled that Wikimedia was not liable for violating the plaintiffs' exclusive right.⁶⁰⁸ The court made clear that the LCEN does not

⁶⁰⁵ CJEU/L'Oreal, at 121-122.

⁶⁰⁶ Eric Goldman, "The New Appellate Decision in *Viacom v. YouTube* looks Like a Loss for Google..." *arstechnica* <<http://arstechnica.com/tech-policy/2012/04/second-circuit-ruling-in-viacom-v-youtube-is-a-bummer-for-google-and-the-ugc-community/>> (accessed April 06, 2012).

⁶⁰⁷ For more details about the specific allocation of burden of proof; Ulrich Magnus, et al., "Comparative Analysis of National Liability Systems for Remedying Damage Caused by Defective Consumer Services" Final Report for a Study Commissioned By The European Commission, (April 2004), <http://ec.europa.eu/consumers/cons_safe/serv_safe/liability/reportd_en.pdf> (accessed May 24, 2012) at 6.

⁶⁰⁸ The High Court of First Instance Praise- *Mrs M.B, Mr P.T. and Mr F.D vs. Wikimedia Foundation Inc* (29 October 2007) <<http://copyrightfrance.blogspot.co.uk/2007/11/wikipedia-french-case-hosting-providers.html>> (accessed May 24, 2012). In this case three Frenchmen

impose a general obligation to monitor information on its site or to ascertain circumstances, which indicate unlawful acts. Most French courts therefore do not consider that a provider can be considered liable under the “manifestly illegal” standard.⁶⁰⁹

Further, in the German *Rapid-Share* case, the Dusseldorf Court of Appeal overturned the first instance decision and found that the claim for liability for making works available and facilitating access to stored data was dismissed, as the defendant was not required to manually review the uploaded content in order to protect copyright holders, as this would impose an undue burden on providers, which obviously do not have the manpower to satisfy such demands.⁶¹⁰ Hence, the court adopted a similar approach as in the wilful blindness approach. The wilful blindness and diligent economic operator approaches suggest that a service provider, which fails to prevent its subscribers from reproducing and communicating popular illegal files, may be found to purposely turn a blind eye to the specific infringing content and its system therefore facilitates the infringement of the holders’ exclusive rights.

The underlying reason for this is that the last few years have witnessed enormous advances in technology, which also allow providers to become aware of evidence, which proves specific infringements and, in addition, to assist in effectively finding and removing infringing material, without having to be notified through a takedown notice or having actual knowledge about the infringing file.⁶¹¹ Hence, if a provider fails to install these technological

brought an action before the President of the High Court of First Instance of Paris. They claimed damages as their privacy had been severely violated because they were quoted as being gay on the Wikimedia website. The Paris High Court of First Instance (TGI) found that the defendant was not liable.

⁶⁰⁹ Brad Spitz, “Wikimedia French Case: Hosting Providers do not Have the Obligation to Monitor Content” Copyright and Media in France (November 05, 2007) <<http://copyrightfrance.blogspot.co.uk/search?q=6-I-5>> (accessed May 24, 2012). See, ⁶⁰⁹ William C. Harrelson, “Filtering the Internet to Prevent Copyright Infringement: ISP Safe Harbours and Secondary Liability in the U.S and France” (2011) 35(2), *New Matter* 5, at 6.

⁶¹⁰ Dusseldorf Court of Appeals, *Rapid Share v. Company Capelight Pictures*, No. I-20You 166/09 (March, 22, 2010). In this case, as is the case with most file-hosting services, Rapid Share held a large number of movies, music and software files. The files were widely distributed without right holders having authorised this.

⁶¹¹ Milton Mueller, et al., “Policing the Network: Using DPI for Copyright Enforcement” (2012) 9(4), *Surveillance & Society*, at 348-364.

preventive measures within its system, this can be understood to suggest that the provider does not intentionally prevent the unlawful acts. For this reason, the activities of providers should fall outside the scope of the immunity provisions.⁶¹²

4.3.3 Expeditious Response & Updated Technology

When a sufficient notification has been sent to an internet service provider or a service provider becomes aware that infringement takes place, does the provider become liable because it has actual “knowledge” or is “aware” of the illegal contents? Section 512(c)(1)(c) of the DMCA and Article 14(1)(b) of Directive 2000/31 spell out the general rule, namely that a provider upon becoming aware will not be able to claim immunity from copyright liability if it did not expeditiously remove or stop all available access to any infringing material or infringing acts.⁶¹³

The problem here is that under both the DMCA and Directive 2000/31, no guidance is given as to what “*expeditiously*” means. Hence, it is unclear what response is expected from a provider, once it becomes aware. It is therefore important to define what the term “*expeditiously*” means. In this regard, one can argue that the scope of the actual knowledge and awareness requirements defines this term. An expeditious response of a service provider may depend on how a service provider becomes aware of the infringing activities. There are two situations, in which a service provider cannot claim that it does not owe a duty of care to the copyright holder. The following discussion assesses these two situations in more detail.

As for the first situation, a provider cannot plead the safe harbour provision when a service provider receives an official notification, which complies with all the elements set forth in the statute, for instance, section 512 of the DMCA and the provider then does not act expeditiously to remove the unauthorised material

⁶¹² David Mirchin, “Viacom v. YouTube” (November 01, 2012) *InformationToday*, <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=4&sid=a0a86bdf-59ee-470c-bda6-640a7265fb91%40sessionmgr104&hid=112>, (accessed March 30, 2013).

⁶¹³ 17 U.S.C. Sec.512(c)(1)(C) of DMCA (2000).

or render it inaccessible. Hence, a provider, which wants to avoid legal liability, must directly and accurately take down and delete every single remaining or reposted unauthorised notified contents and acts after receiving a sufficient notification. Accordingly, when a holder sends an insufficient notification to the providers, the provider can delay its response.⁶¹⁴

Some jurisdictions therefore require providers to adopt within their system a notice-and-take-down regime through which holders can send sufficient identification about unlawful content to them, which they have to continuously remove, but the problem here is that whenever a provider takes down the alleged contents, very often the same contents simply appears somewhere else.⁶¹⁵ For this reason, the Senate Juridical Report states that Congress intended to encourage service providers to prevent or stop further copyright violations.⁶¹⁶ This means that service providers should adopt the most updated detection software, which is readily available and not of a prohibitively high cost. However, even if a service provider adopts the most updated technology, some courts cannot define when and how a notice can be considered sufficient and courts have also adopted different interpretations, for example in the US.⁶¹⁷

As a result, the only solution for an internet service provider is to take down any notified contents, even though the notice may not be sufficient. Otherwise the provider will be at risk from either getting sued by copyright holders if they delay responses or by subscribers in case they expeditiously remove material, despite the notice containing errors or even being wrong. For example, the DMAC, states that to avoid the risk of pre-adjudicated/wrongful takedown that:

“The ISPs cannot be liable for good faith taking the identified material down, and even allows the ISP to

⁶¹⁴ Commentators have noted that French courts are likely to adopt principles based on their interpretation of Article 6-I-7(2) of the LCEN, which permits the imposition of “targeted and temporary surveillance charges.”

⁶¹⁵ Nate Anderson, “Rights Holders Tire of Takedown What-A-Mole, Seek gov’t Help” *arstechnical*, <<http://arstechnica.com/tech-policy/2010/05/rightsholders-tire-of-takedown-whac-a-mole-seek-govt-help/>> (accessed June 06, 2012).

⁶¹⁶ S. Rep. No. 105-190 (1998) at 5.

⁶¹⁷ 17 U.S.C. Sec.512(c)(3) of the DMCA.

replace the removed or disabled material in certain circumstances.”⁶¹⁸

The DMCA therefore also contains an analogous counter notification procedure through which subscribers can challenge claims of infringement. By virtue of section 512(g)(2) and (3), a service provider can, in specific situations, repost removed content and enable access to it within no less than 10 days, but no more than 14 business working days from the date of receiving an effective counter notice.⁶¹⁹

The second situation is when a service provider becomes aware of facts or circumstances relating to infringements on their own servers. In such a situation, providers must directly act to identify and confirm the illegality and immediately put an end to the activities.⁶²⁰ The problem here is that due to the rapid accumulation rate of infringements occurring on providers’ systems, service providers may not wait to examine whether the contents or activities are illegal or not, instead providers may install technology, which expeditiously takes down the alleged materials, including infringing and non-infringing material, as otherwise courts may find them liable for copyright infringement on the basis that they fail to use technology to prevent or stop the continuing occurrence of the illegal activities.⁶²¹

Yet, the situation becomes more complicated when the wilful blindness and diligent economic operator approaches are applied since these approaches put more pressure on service providers to manage their services by guaranteeing that their services will not be used to infringe Intellectual Property rights. In doing so, a service provider has to adopt all reasonable measures to stop or take down

⁶¹⁸ 17 U.S.C. Sec.512 (g)(1)-(3) of the DMCA.

⁶¹⁹ C. Folawn, “Comments: Neighbourhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement under Digital Millennium Copyright Act” (2003) 26, *Seattle University Law Review* 979, at 991-992.

⁶²⁰ Ashley Benjamin, “Industry News and Article L’Oreal v. eBay: a question of liability” *Dehns*, (2011)

http://www.dehns.com/site/information/industry_news_and_articles/loreal_v_ebay_a_question_of_liability.html, (accessed June 16, 2012).

⁶²¹ Christina Angelopoulos, “Filtering the Internet for Copyrighted Content in Europe” *Iris Plus*, (March, 2009)

<http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2009.pdf.en> (accessed May 30, 2012) at 3-4.

any further infringements on their systems, even if such response violates the fair use doctrine.⁶²² In practice, once the provider takes down alleged contents, end users cannot serve a counter-notice to have their materials put back up,⁶²³ as end users are required to prove the misrepresentation of a copyright holder⁶²⁴ and this may cost huge sums of money for users since they are unaware of their legal rights.⁶²⁵

In all cases, a service provider must therefore install filtering software through which it can detect suspicious cases and to successfully take down infringing material.⁶²⁶ The available technology is therefore a definite factor, which determines the response of service providers. If technology is available, which can identify copyright material and take it down; then it will be difficult for service providers, which do not configure such technology, to rely on the safe harbour defence on the basis that the provider could have expedited the detection and retrieval of the infringing material, but purposely failed to do so.⁶²⁷

However, in most cases a service providers' response is usually assessed by courts according to the available technological standards and courts have to consider whether the process of adopting new updated technology would substantially burden providers or the operation of the provider's system or network.⁶²⁸ Therefore, it is necessary to assess the magnitude of the harm expected to be experienced by a copyright holder in the digital network

⁶²² Francesco Rizzuto, "The Liability of online intermediary service for infringements of intellectual property rights" (2012), *Computer and Telecommunication Law Review* 1, footnote 46, at 36.

⁶²³ Rebecca Tushnet, "Power without Responsibility: Intermediaries and the First Amendment" (2008) 76, *The George Washington International Law Review* 986, at 1014.

⁶²⁴ *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004), at 1005.

⁶²⁵ Mike Scott, "The Unintended Consequences of Legislating Technology: The Digital Millennium Copyright Act: Safe Harbours Under the Digital Millennium Copyright Act" (2005) 9, *New York Journal of Legislation and Public Policy* 99, at 136-37.

⁶²⁶ Katonomist Nicola Searle, "GEMA vs. YouTube-What the Hamburg Court Really Said..." *The Ipkat* (April 21, 2012) <<http://ipkitten.blogspot.co.uk/2012/04/gema-vs-youtube-what-hamburg-court.html>> (accessed May 30, 2012). German Federal Supreme Court, No. Az.: I ZR 35/04 (April 19, 2007).

⁶²⁷ "YouTube Rolls Out Filtering Tools" (2007, October 16), BBC, <http://news.bbc.co.uk/nol/ukfs_news/mobile/newsid_7040000/newsid_7046900/7046916.stm> (accessed April 09, 2012); Audible Magic Corporation (2008) "Response to the European Commission's Creative Content Online Consultation" <http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/comp/audible_magic_en.pdf> (accessed April 09, 2012).

⁶²⁸ 17 U.S.C. Sec.512 (2)(A) (2000) of the DMCA.

environment in case these steps are ignored,⁶²⁹ as well as the harm suffered by internet users when being denied their right to privacy.⁶³⁰

In such an instance, courts ought to apply the principle of the “undue burden standard.”⁶³¹ Literally this means that court ask whether there is a less burdensome tool available, which is nearly as effective to achieve the same result and can therefore prevent or restrain access to infringing content. If the technology does not perform as well as the burdensome technology, courts would require the burdensome technology to be used.⁶³²

An example of a less burdensome, but extremely effective technology is Audible-Magic. According to the UK government this newly improved fingerprint technology has a confirmed level of zero false positives and can therefore accurately assess whether copyright law has been infringed and distinguish infringing material from no-infringing material. It would thus not be considered an extreme step to require the implementation of such a technology from all similarly placed service providers.⁶³³

Yet even though Audible-Magic is available, providers can still argue that although they use Audible-Magic and can therefore control, eliminate or substantially reduce infringing acts, they cannot entirely prevent infringements. Furthermore, many US courts have held that a failure of a service provider to expeditiously remove or deny access does not violate section 512(c)(3) of the DMCA.⁶³⁴

Hence, an “expeditious” response depends on the particular facts of a case, as opposed to a uniform list of elements and as the Senate and the House Juridical Reports acknowledge, different factual circumstances result in different

⁶²⁹ 17 U.S.C. Sec.512 (2)(B)(2000) of the DMCA.

⁶³⁰ 17 U.S.C. Sec. 512(j)(2)(C)(2000) of the DMCA.

⁶³¹ Nina Golden, “Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities” (2008) 10, *Vanderbilt Journal of Entertainment and Technology Law* 363, at 382.

17 U.S.C. Sec. 512(j)(2)(D) (2000) of the DMCA.

⁶³³ Government Response to a Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR: January 2009), at 4.

⁶³⁴ *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) at 653.

responses by service providers, so that each case is different.⁶³⁵ A delayed response may therefore not be considered a failure to comply with the requirements under section 512(c)(3) of the DMCA or Article 14(1)(b) of Directive 2000/31, especially when the delayed response is the result of an inadequate notice, which results in providers requiring more time to examine whether the notification specifies the location of the allegedly illegal material.⁶³⁶

4.4 THE SCOPE OF IMMUNITY UNDER THE EIP

In most online copyright infringement cases, the direct infringer is the one who violates the substantive rights of the holders online, whilst the service providers are the indirect infringers, which promote the infringement or know with substantial certainty that the infringement occurs.⁶³⁷ However, as discussed in the previous chapter, in Egypt, a service provider may be held directly or indirectly liable for any digital reproduction and for any kind of communication to the public, which occurs on its network system. The only way for service providers to be immune from liability is when these temporary copies and communication activities, including the making available right, fall within the limitations from copyright infringement set out in the statute. In this context, Articles 171(9) and 172 (1) of the EIP provide a list of limitations, which exclude economical infringement,⁶³⁸ performances⁶³⁹ and any kind of reproduction of volatile copies of copyrighted works, which are digitally stored, transmitted or received. In this regard, Article 171(9) states that:

“Without prejudice to the moral rights of the author under this Law, the author may not, after the publication of the work, prevent **third parties** from carrying out any of the following acts: ... (9) Ephemeral reproduction of a work where such reproduction is made in relay, during a digital transmission of the work or in

⁶³⁵ S. REP. No. 105-190 (1998) at 44.

⁶³⁶ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006) at 854 (“some notices include invalid, truncated URLs with an ellipsis between the domain name of the website and the file name of the particular webpage on which that image appeared. Other notices listed entire websites as infringing, or entire directories within a website”).

⁶³⁷ Assaf Jacob et al, “To cache or not to cache-That is the question; p2p “system caching”-The Copyright Dilemma” (2010) 32, *Whittier Law Review* 421, 431.

⁶³⁸ Article 171 of the EIP.

⁶³⁹ Article 173 of the EIP.

the course of a process of reception of a digitally stored work, within the normal operation of the device used by an authorised person.”⁶⁴⁰

As for immunity from liability for providers in relation to the communication right, including the making available right, Article 172(1) states that:

“Without prejudice to the moral rights of the author under this Law, the author or his successor may not prevent newspapers, periodicals or broadcasting organisations, inasmuch as justified by their aims, from doing the following: (1) Publishing excerpts from his works which were legally made available to the public... unless the author has prohibited such publication...(2)...(3)...”

Article 172(1) of the EIP imposes two conditions for immunity to be granted. First, the work has been made legally available to the public; second, that the holder has not prohibited that others deal with the work online. This Article explains how third parties can benefit from the liability exceptions. The Article contains an exhaustive list and includes newspapers, periodicals and broadcasting organisations. Hence, the only party, which is excluded from liability is the one mentioned above in the list. However, the list does not mention anything about online service providers. This means that the immunity, which is regulated by this Article, cannot be applied to providers. As a result, copyright holders have to authorise providers in respect of any acts of communication, which occur on their systems; otherwise the providers will be held liable for copyright infringement.

On the other hand, Article 171(9) of the EIP mentions that a third party is immune from liability, so long as the temporary reproduction of the published work is automatically made during a digital transmission of the work or in the course of a process of reception of a digitally stored work, within the normal operation of the device used by an authorised person. Therefore, it is important to define the meaning of a “*third party*” in this Article. Recourse is made to the

⁶⁴⁰ Article 171(9) of the EIP.

negotiations of the delegations that took place at the Joint Committee when this Article was drafted. The Preparatory Memorandum of the Joint Committee states that the main purpose for drafting the limitations was to achieve a balance between two main rights: the right of access to education of end users⁶⁴¹ and the right of copyright owners to protect their reproduction and communication rights online.⁶⁴²

However, the Preparatory Memorandum of the Joint Committee also mentions that when the delegations met in order to discuss third party liability, the President of the Committee asked the delegations to postpone the discussions until the representative of the Ministry of Communication and Information Technology had prepared its report, as well as recommendations.⁶⁴³

Yet when the President of the Joint Committee submitted its Final Proposal to the Plenary of the EPA; neither the delegation, nor the representative of the Ministry of Communication and Information Technology had submitted the expected report or the required recommendations. Moreover, at the Plenary of the EPA, none of the MPs appeared to have recognised the legislative shortcomings.⁶⁴⁴ This implies that the delegations only intended to limit the width of Articles 147, 156 and 157 of the EIP by excluding a number of temporary reproductions, namely when copies are automatically generated without interference or modification by a third party so long as no prohibition order is sought by the copyright holder against the third party.

When this analysis is applied to the online service provider scenario, one can note that Article 171(9) of the EIP does not expressly mention anything about who can be described as a third party. This implies that the term “third party” used in the previous Article only relates to online end users, but not service providers since this would have otherwise been clearly mentioned in the Article. As a result, a service provider has to obtain permission from copyright holders

⁶⁴¹ Joint Committee, Final Report, No.26 (March 25, 2001), at 12.

⁶⁴² *Id.*, at 17.

⁶⁴³ Joint Committee, Final Report, No.30 (March 28, 2001), at 4.

⁶⁴⁴ Ironically at the Plenary of PA, none of the MPs recognised this defect in the final proposal and as a result the final proposal was adopted without this important point having been discussed. Plenary of PA, No.36 (March 02, 2002).

for every single temporary and permanent reproduction of copyrighted works, which is hosted on its server, even though the copy is automatically generated on its system without any interference or modification. Otherwise the provider will be directly liable for infringing the reproduction right.

Accordingly, as long as Articles 171(9) and 172(1) of the EIP do not regulate the immunity of online service providers, there is no protection from liability. Service providers are vulnerable and may be considered directly liable for permanently or temporarily keeping copies on their systems and for allowing that their networks are used to distribute and store copyrighted works without being granted permission. This is irrespective of the fact that service provider do not edit, choose or modify any copied material and only store these copies on their network system for the amount of time, which is needed to transfer them upon request of a third party.⁶⁴⁵ Hence, it seems particularly important for Egypt to adopt more detailed legislation to create a framework for liability and immunity for service providers, as explained above.

4.5 THE APPLICATION OF THE IMMUNITY PRINCIPLES TO ONLINE PROVIDERS IN EGYPT

This chapter explained that in order to establish that an internet service provider has actual knowledge, the notification should comply with all these requirements, as otherwise it may be found that the provider did not have the requisite level of knowledge under section 512(c) (3) (B) (ii) of the DMCA. However, the problem here is that different courts have adopted different interpretations in relation to the required elements and this makes it more difficult for providers to decide whether or not the notification is sufficient. Uncertainty is further increased by the term “expeditious”, as the provider may take down any altered material, even though the end user can evoke the fair use defense. For that reasons, case laws in the US, France and Germany suggest that the elements, on which the immunity system is established, should be interpreted more strictly and the chapter also explained why a strict interpretation of the

⁶⁴⁵ Joseph P. Liu, “Owning Digital Copies: Copyright Law and the Incident of Copy Ownership” (2001) 24(4), *William and Mary Law Review* 1245, 1265.

elements is better than a lenient interpretation for end users' rights to privacy and access to information.

This chapter also concluded that a high infringing rate on a website is not enough to establish that a service provider is aware. Also, when the wilful blindness and diligent economic operator approaches are applied to service providers, the chapter concluded that turning a blind eye and acting in a non-diligent manner can result in a finding that the service provider is aware. Thus, a finding of "awareness" about specific infringements in a particular case also requires that a reasonable person considers that in the circumstances the provider was aware, but this imposes a heavy burden on providers, which struggle with "ubiquitous" illegal websites.

Accordingly, the chapter argued that providers may adopt technology, which can remove allegedly infringing content, which is hosted by users on their systems. However, the main problem with the use of modern technology is that this technology protects copyright holders excessively at the expense of end users, who no longer can assert the fair use doctrine and are deprived of their rights to privacy and access to information. Also the implementation of such technology may require huge financial investments and this can be a heavy burden for providers. All of this can lead to copyright holders being granted absolute exclusive rights. Once holders achieve to monopolise the digital copyright market, end users rights, particularly to access information, may be violated.

In addition, this chapter concluded that the Egyptian delegations at the Joint Committee entirely neglected how service providers can enforce and protect copyrighted works online. This chapter also found that Egyptian law does not provide a framework to regulate immunity for service providers. However, as explained in chapter 2, the Egyptian legislator should adopt the duty of care concept to impose liability on service providers which breach their duty. Also, as a part of establishing a liability system, this chapter recommended that an immunity system is adopted within Egypt's civil law system. This is crucial to ensure that service providers have a defence when holders abuse the liability

system. Such a system would reduce pressure from providers and thereby safeguard the rights of privacy and access to information of end users.

In order to avoid the defects from an immunity system, the study strongly recommends that the Egyptian legislators should exclude the awareness, wilful blindness and diligent economic operator concepts from the scope of the immunity system. Instead the Egyptian legislators should only adopt the actual knowledge requirement as the sole element upon which immunity of providers should be established. In this context, the paper therefore sets out a new proposal for the Egyptian legislator to regulate the notice and take down of infringing material.

4.6 CONCLUSION

The Egyptian legislators should adopt the following immunity system:

- 1- The Egyptian legislators should firstly add a new Recital to the Preamble of the EIP in order to acknowledge that it is important that technology reinforces and protects copyright works online. This new Recital should state that providers should install those types of technologies, which representatives of internet users, consumer groups, the IT sector, copyright holders and internet service providers consider most suitable. The new Recital should also emphasise that copyright law protects end users' online rights when copyright owners and service providers abuse technological preventative measures.
- 2- New provisions should define transitory communication providers, caching providers and storage providers, including hosting and information location tools, similarly to section 512 (k)(1)(a)(b)(c)(d) of the DMCA and Articles 12 to 14 of Directive 2000/31. The term "storage" should precisely define the type of activity and exemption from liability should depend on the particular activity, which a provider plays.
- 3- The chapter suggests that a new notice-and-take-down mechanism is adopted. The aim of this is to avoid any drawbacks from the old notice and take down system, to avoid the problems surrounding the awareness requirement and the willful blindness and diligent economic operator principles. The new proposal should contain seven Articles and the following core principles:

Article 1

The ITIDA is the technical contact point for the Head of the Economic Court.

Article 2

The members of the Preparation Panel Procedures at each Economic Court should consist of an expert judge in digital copyright law, interested parties, including an end user, an internet service provider, a copy right holder and finally one technical expert from the ITIDA.

Article 3

Each Economic Court allows interested parties to notify the Head of the Economic Court of copyright infringement through electronic means.

Article 4

Any notification has to be sufficient. The activities of providers may fall outside the immunity provisions if illegal material or activity is intentionally or negligently kept on the network system after providers have received sufficient notification from the interested party or the Economic Courts.

Article 5

Once the Economic Courts receive such notification, the Head of Economic Court verifies whether the notification complies with the substantive requirements under the notice provisions. For technical purpose, the Head of the Economic Court may advice the ITIDA. In such case, the ITIDA should write its report within a period not exceeding three days from the date when the Head of the Economic Court received the notification from the interested party.

The ITIDA's report should cover the following fundamental aspects:

- (1) Information about the kind of copyrighted work, which is alleged to be infringed and thereby the Head of the Economic Court has to determine whether the

interested party is eligible to bring civil proceedings or not. The Head of the Economic Court should also examine whether or not the allegedly infringing activities fall within any of the limitations set forth under the EIP or not. The magnitude of the harm likely to be caused to the copyright holders should also be considered.

- (2) The ITIDA should demonstrate whether the online service provider plays a passive or active role in facilitating the unlawful acts or deliberately tries to avoid the facts, by turning a blind eye to the infringing activities on its systems in circumstances where the service provider is aware that infringement takes place on its system.
- (3) The ITIDA should inform the Head of the Economic Court about the practical technological preventative measures, which can stop the infringing activities, including imminent ones. Also, the report should state which technology the provider uses and whether or not the implementation of such technology could negatively affect the rights of online end users, particularly the right to privacy and access to information and what reasonable technological methods the providers could use to protect all parties involved in the digital transmission activities on its server.

Article 6

If the ITIDA report confirms that the holder has abused the notification system; the Head of the Economic Court has the authority to either bring civil or criminal counter-proceedings against the claimant except when the claimant can prove that this was done in good faith.

Article 7

If the report confirms that the facts and circumstances mentioned in the notification are true, then the Head of the Economic Court can decide to grant an injunctive measure against the service provider to diligently remove/disable access to the infringing contents and to notify the end users and any interested party, who might have a right in evoking the fair use doctrine about the notification and to give them five days from the date the parties received the

notification to send counter-notifications through a rapid preliminary review procedure.

(1) Once the Head of the Economic Court receives the counter-notice from any interested parties, the Head of the Economic Court immediately issues an injunctive measure to the providers in order to restore the material again and the Head of Court should hold a hearing session for all the parties before the Preparation Panel Procedures. After the first meeting, the judge may issue an injunctive measure to order a provider to suspend the particular activities on its network system. After two weeks, if the dispute has not been agreeably settled, the Head of the Economic Court can refer the case to the competent court within a maximum of 15 working days from the date of the first meeting.

(2) If any of the parties do not respond or do not admit to the infringing activities or contents, the Head of the Economic Court can issue an injunctive measures to the provider, which should diligently and expeditiously take down the alleged content and refer the case to the court within a maximum of 7 days from the last day of the five days, and inform the interested parties, so that they can send their counter-notification.

CHAPTER 5: THE RIGHTS OF ONLINE END USERS & INJUNCTIVE RELIEF IN EGYPT

5.1 INTRODUCTION

As explained in the previous chapters, copyright holders are granted exclusive rights over the original copyrighted works.⁶⁴⁶ Holders argue that online service providers should be liable for copyright infringement because they play an active role in facilitating the reproduction and distribution of illicit material without their permissions.⁶⁴⁷ For that reason, holders have tried to change copyright law in light of the new digital environment. Yet such efforts may be perceived to be an interference with what is considered to be in the public interest, particularly the rights to privacy and public access to information. Many scholars therefore argue that the protection of the exclusive rights of holders should not come at the expense of online end users, even if the ultimate goal of copyright law is to protect and enforce the exclusive rights of holders.⁶⁴⁸ Accordingly, the exclusive rights of holders have never been absolute, but were always limited and allowed for exceptions, for instance end users' rights online.⁶⁴⁹ However, this discussion does not intend to analyse the scope of the limitations compared to the holders' exclusive rights, but solely deals with the role and liability of online service providers in relation to end user rights of privacy and access to information in Egypt.

Also, injunctions are essential tools to enforce the exclusive rights of copyright holders since they equip right holders with an immediate remedy, which can stop any further acts of infringement. Injunctive relief also preserves evidence and

⁶⁴⁶ Article 1(4) of the WCT and Article 7 of the WPPT.

⁶⁴⁷ Min Yan, "The Law Surrounding the Facilitation of Online Copyright Infringement" (2012), *European Intellectual Property Review* 122, at 124-25.

⁶⁴⁸ Teresa Hackett, "Learning with Libraries and Copyright Issues" in Information Meeting on Education Content and copyright in the Digital Age, *WIPO*, (November 21, 2005) http://www.wipo.int/edocs/mdocs/copyright/en/educ_cr_im_05/educ_cr_im_05_www_53634.pdf f> (accessed Sep 04, 2013).

⁶⁴⁹ For example, the Berne Convention for the Protection of Literary and Artistic Works, as well as the WCT, the WPPT and the TRIPs Agreement require members of the Union to create exceptions, so that the public are able to utilise works without payment. Robert Burrell, et. al., *Copyright Exception: the Digital Impact*, (Cambridge University Press, Cambridge, 2005), at 330-386.

makes it possible to estimate how much damage has been occasioned.⁶⁵⁰ Article 179 of the EIP grants all copyright holders the right to apply for injunctive measures from the Economic Courts, thereby ensuring that copyright holders can enforce their exclusive rights online.⁶⁵¹ Although Article 179 of the EIP provides for injunctive measures for more than ten years, no injunction has ever been granted. The question is why no such measure has ever been awarded. Also has Article 179 been drafted in a way, which preserves the rights of end users online?

When answering these questions, it is important to appreciate that service provider, which enforce the exclusive rights of holders may violate the online rights of end users. The analysis critically compares the provisions, which deal with injunctive relief in the US and Europe and demonstrates how a repeat infringer policy can have negative effects on end user rights, which also explains why Europe has rejected to adopt a repeat infringer policy. The outcomes from the previous analysis will be compared to Article 179 of the EIP in order to answer why no injunctive measures have been issued to date.

5.2 THE RIGHTS OF END USERS & THE LIABILITY OF ONLINE PROVIDERS

As explained above, the imposition of strict liability on An internet service provider can result in the adoption of technical measures, which decreases internal or external infringement activities on its system. This is normally done to shield the provider from liability, irrespective of whether the use of such technology violates the privacy and access to information rights of end users.⁶⁵² This is because strict liability only requires copyright holders to prove an

⁶⁵⁰ Ebrahim Ahmed Ebrahim, *The Position of the foreign Authors in Egypt: Hand Book; The Fact and The Law* (Hatih Press, Cairo, 2008) at114.

⁶⁵¹ Joint Committee Final Report No.31 (Mar 28, 2001), at 14-16.

⁶⁵² Micheal Nwogugu, "Economics of Digital Content: New Digital Control and P2P Control Systems/Methods" (2008) 14(6), *Computer and Telecommunications Law Review* 140, at 143-148.

unlawful act by a service provider, i.e. that a reasonable man in similar circumstances would have responded.⁶⁵³

As a result, the only solution for providers to protect themselves from strict liability claims is to adopt such technologies, which can generally monitor the activities of its end users, for instance “deep-packet inspection” (hereinafter DPI). DPI is based on Uniform Resource Locators (URL), which can accurately monitor the whole network and can also trace the entire historical record.⁶⁵⁴ In other words, this strategy ensures that there are no secrets on the network, as every action is carefully recorded and stored.⁶⁵⁵ Further, some providers adopt DPI-URL technology, which can accurately monitor traffic through means of DPI and reset or impede any connections to infringers’ specific URLs in accordance with the Access Control List of the network management system. This mechanism can be used in different ways to collect end user IP addresses, and to analyse stored data on the computer hard drive.⁶⁵⁶

Whilst the liability of a service provider is based on its failure to satisfy the duty to take care, which may constitute an unlawful act or tort in itself and therefore result in liability, such approach may not impose much pressure on the provider as the provider is shielded from liability until the point where it, *inter alia*, actually knows or is aware of the illegal content or unlawful activities through sufficient notifications sent by copyright holders and it fails to by remove or disable access.⁶⁵⁷ This means that the liability of service providers is premised on fault, i.e. the service provider’s breach of its duty of care.⁶⁵⁸

⁶⁵³ Julie Cohen, “Overcoming Property: Does Copyright Trump Privacy” (2003), *University of Illinois Journal of Law & Technology Policy*, at 101.

⁶⁵⁴ Cormac Callanan et al., “Internet Blocking: Balancing Cybercrime Responses in Democratic Societies” (Report presented to Open Society Institute October, 2009) at 116.

⁶⁵⁵ Richard Warner, “Undermined Norms: The Corrosive Effect of Information Processing Technology on Information Privacy” (2011) 55, *Saint Louis University Law Journal* 1047, at 1048.

⁶⁵⁶ Broder Klenschmidt, “An International Comparison of ISP’s Liabilities for Unlawful Third Party Content” (2010) 18, *International Journal of Law and Information Technology* 332, at 334-6.

⁶⁵⁷ Alexander Bayer, “Liability 2.0-Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in Liber Amicorum Joseph Straus, ed., *Patents and Technological Progress in a Globalized World* (Springer, UK, 2009), at 369.

⁶⁵⁸ *Id*

However, the problem is that the identification of the allegedly infringing work through a notification is interpreted by some courts very leniently and this renders providers more vulnerable to being successfully pursued.⁶⁵⁹ As a result, the scope of immunity is not as clear and providers may therefore respond to any notification, even ones, which are invalid, dubious and frivolous and this is detrimental for the access to information rights of online end users.⁶⁶⁰

Also liability based on the awareness standard, including the principles of willful blindness and the diligent economic operator,⁶⁶¹ poses a problem for service providers since they can be held liable if holders can prove that there is a substantial amount of infringing acts or contents on its system, which the provider has failed to remove. However, providers could shield themselves from liability if they can demonstrate that they have been proactive and have adopted technological preventative measures to take down content, even if they have not examined whether end users can evoke the fair use doctrine or this violates their right to privacy.⁶⁶² Online service providers may thus install fingerprinting technology, such as Audible Magic, which scans video clips for signature vectors and compare these vectors with a database, which stores them.⁶⁶³ Providers would also have to hire qualified staff and employees, who continuously make use of such technology to view, store, and watch the activities of all internet users.⁶⁶⁴

Yet some laws, for instance in the US, require providers to either store dynamic IP addresses of end users for the prevention, investigation, detection and

⁶⁵⁹ *ALS Scan v. RemarQ Communities, Inc.*, 239 F. 3d 619 (4th Cir. 2001) at 619, 625.

⁶⁶⁰ Google estimated that 40% of the takedown notices it received were legally invalid, dubious and frivolous Ted Gibbons, "Google Submission Hammers Section 92AP", (Mar. 16, 2009) *PC World New Zealand* <<http://pcworld.co.nz/pcworld/pcw.nsf/feature/93FEDCEF6636CF90CC25757A0072B4B7>> (accessed March 31, 2012).

⁶⁶¹ *Google France Sarl v Louis Vuitton Malletier SA* (C-236/08) [2011] Bus. L.R. 1 (CJEU (Grand Chamber) (23 March, 2010)(hereinafter CJEU/Google France); see, also, *L'Oreal SA v eBay International AG* (C-324/09) [2011] E.T.M.R. 52 (CJEU (Grand Chamber) (21 July, 211) (hereinafter CJEU/L'Oreal).

⁶⁶² David. O. Blood et al., "A Focus on Filters: Latest Developments in *MGM v. Grokster*", (2008) 20(2), *Intellectual Property & Technology Law Journal* 1, at 1-5.

⁶⁶³ Eugene C. Kim, "Note; YouTube: Testing the Safe Harbours of Digital Copyright Law" (2007) 17, *Southern California Interdisciplinary Law Journal*, 139, 146.

⁶⁶⁴ Nate Anderson, *Google Bows to EU Pressure*, "Will Anonymize Log Files after 18 Months" (June 13, 2007), *Arstechnical*, <<http://www.arstechnica.com>> (accessed Mar 12, 2012).

prosecution of direct infringers or to adopt a policy, which terminates the internet of repeat infringers.⁶⁶⁵ Additionally, some courts and laws provide that copyright holders have a right to request an unlimited injunction against providers in order to prevent that any unlawful acts take place on their system.⁶⁶⁶ The adoption of such an order requires that the service provider installs intrusive technology and to adopt a repeat infringer policy and this then seriously violates the end user's rights to privacy and access to information.⁶⁶⁷

However, Europe values privacy rights and access to information more or at least similarly to the rights of copyright holders.⁶⁶⁸ It is also argued that in all copyright protection and enforcement cases, it is equally paramount that privacy and access to information rights are equally considered.⁶⁶⁹ Yet this does not mean that providers should not be responsible for protecting and enforcing the exclusive rights of holders by adopting a takedown procedure by providers, even though this denies the public to some extent access to a certain amount of information. This is because without the creative labour of authors and copyright holders, those works would not be made available for public access in the first place. Such an approach also benefits the public in the long-term, as imposing liability on providers facilitates creativity, as holders are assured that they are protected and also ensures that holders can make use of the digital environment and grant access to their content to end users.⁶⁷⁰ Service providers should therefore not be overburdened and required to adopt pre-emptive technological

⁶⁶⁵ Providers can evoke the safe harbor provisions under section 512(i) of the DMCA if they terminate the account of "repeat infringers in appropriate circumstances." *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004), at 1080.

⁶⁶⁶ *Belgish Vereniging Van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, (c-360/10), (CJEU (Third Chamber) (16 February, 2012) (hereinafter SABAM case).

⁶⁶⁷ Julie E. Cohen, "Examined Lives: Informational Privacy and the Subject as Object" (2000) 52, *Stanford Law Review* 1373, 1425.

⁶⁶⁸ *Belgish Vereniging Van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, (c-360/10), (CJEU (Third Chamber) (16 February, 2012) (hereinafter SABAM case).

⁶⁶⁹ *Productores de Musica de España (Promusicae) v. Telefonica de España SAU*, [2008] E.C.D.R. 10.

⁶⁷⁰ Korrasut Khopuangklang, "Should ISPs in Thailand Act at the Behest of the Entertainment Industry to Control p2p File Sharing?" (2011), *European Intellectual Property Review* 632, at 632.

measures, so that the rights of all parties, which are involved in the digital transmission, are preserved.⁶⁷¹

It has therefore been argued that copyright law should not bestow absolute rights on copyright holders by regulating liability of service providers in a way, which preserves social utility and social justice within society.⁶⁷² Social utility and social justice include the ability of all people, including rich and poor, to participate in the *ex-ante* creation and exploitation of copyrighted works under the fair use doctrine.⁶⁷³ This helps with the production of better information, knowledge and aesthetic expression, rather than to just limit access to individual works or to violate the right to privacy.⁶⁷⁴

Copyright law should therefore embrace new technologies, which preserve the right of privacy of end users and which give them an affirmative right to be engaged; firstly, in new forms of creative expression and secondly, to receive information and to enjoy many cultural productions, irrespective of frontiers.⁶⁷⁵ In this context, Katyal explains that “the great irony of this situation is not the intractability of the conflict between privacy and intellectual property in cyberspace, but the inability of legislators to fashion a solution that squares with other constitutional values of property, personhood, and autonomy...”⁶⁷⁶

Thus, the aim of next discussion is to describe how a fair balance can be struck for all those involved in the digital transmission of electronic communication, particularly online end users.

⁶⁷¹ Lawrence Lessig, *Code; Version 2.0* (Basic Books, New York, USA, 2006), at 287; Ian Kerr “To Observe and Protect? How Digital Rights Management Systems Threaten Piracy and What Policy Markets Should Do About it” In Peter Yu (eds.) *Intellectual Property and Information Wealth: Copyright and Related Right* (Praeger Publishers, UK, 2007) at 287; see, also, William M. Landes and Richard A. Posner, ‘An Economic Analysis of Copyright Law’, in *Economic Analysis of the Law: Selected Readings*, (Blackwell Publishing, Oxford, 2002), at 87.

⁶⁷² William Party, *Moral Panics and Copyright Wars* (Oxford University Press, USA, 2009), at 7, 36.

⁶⁷³ Cass R Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford University Press, USA, 2006) at 151, 173; Hanoeh Dagan et al., “The Liberal Commons” (2001) 110, *Yale Law Journal* 549, at 622.

⁶⁷⁴ *Id.*

⁶⁷⁵ Universal Declaration of Human Rights, G.A. Res. 217A, art. 19. U.N. GAOR, 3d Sess., 1st Plen. Mtg, U.N. Doc A/810 (Dec.12, 1948).

⁶⁷⁶ Sonia K. Katyal, “Privacy vs. Piracy” (2004) (7), *Yale Journal of Law & Technology*, at 336.

5.3 PRIVACY & ACCESS TO INFORMATION RIGHTS IN THE US & EUROPE

As explained in the previous chapters, in an effort to provide effective online copyright protection and to limit potential liability of online providers, US Congress has adopted a framework to regulate the liability of service providers in such a way that liability is only imposed on providers which have actual knowledge or which are aware that infringing acts take place or infringing contents is hosted on their systems and nevertheless fail to stop or prevent this.⁶⁷⁷

Furthermore, section 512(i) of the DMCA sets out the required elements, which a provider has to establish to successfully plead immunity. This section requires providers to adopt a policy, which terminates accounts of subscribers who are repeat infringers and in no way interfere with the “standard technical measures.” However, section 512 has to be read in light of section 512(m)(1) of the DMCA, which explicitly states that:

“Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on...a service provider monitoring its service or affirmatively seeking facts indicating infringing activity...”⁶⁷⁸

This means that section 512(m)(1) of the DMCA limits the application of section 512(i) of the DMCA. Therefore, when an internet service provider evokes the policy to terminate an account of a repeat infringer, it must comply with section 512(m) and this means that a provider cannot monitor its system to seek facts which are suggestive of infringing acts or contents. The main aim of section 512(m)(1) of the DMCA is thus to protect end users’ online rights, namely the right to privacy and access to information. However, as explained in the previous chapters, liability is based on the idea that a service provider breaches

⁶⁷⁷ISP copyright liability was established in Title II of the Digital Millennium Copyright Act (Section 512 of the US Copyright Act).

⁶⁷⁸ 17 U.S.C Sec.512(m)(1) of the DMCA.2006

its duty of care when it fails to remove contents, which it knew to be infringing and allowed the same copyrighted material to be posted by other users.⁶⁷⁹

Unlike the DMCA, Europe does not require service providers to adopt a policy to terminate access to repeat infringers in order for service providers to plead immunity. This is because Europe values the right to access information, freedom of expression and personal data protection and they therefore form part of the constitutional system and the EU's overall policy agenda.

Hence, it is crucial to answer two questions. How can a service provider apply section 512(i)(m)(1) of the DMCA by adopting the repeat infringer policy within its system? And why did Europe reject such a policy? The next part tries to answer these questions by analysing the provisions, which deal with the repeat infringer policy in the DMCA and by discussing why Europe did not follow the same approach.

5.3.1 The Repeat Infringer in the US and Standard Technical Measure

Providers can evoke the safe harbor provision in section 512(i) if they adopt a policy under which accounts of “*repeat infringers* [are cancelled] *in appropriate circumstances*.”⁶⁸⁰ However, section 512(i) has to be read in light of section 512(m)(1) of the DMCA. Section 512(m) provides that safe harbor protection does not allow service providers to monitor their systems or to affirmatively seek facts suggestive of infringement.⁶⁸¹ The rationale behind this sub-section is that if the DMCA permits a provider to voluntarily monitor its users' activities and communications, this will perhaps result in providers constantly trying to obtain information about past subscribers to determine whether or not they are repeat infringers; hence, the system may violate the privacy rights of end users.⁶⁸²

⁶⁷⁹ Memorandum complaint, *Viacom Int'l Inc. v. YouTube, Inc.*, (No. 07 Civ. 2103) (S.D.N.Y. 2007/ 2008) at 5; Urs Gasser, “Regulating Search Engines: Taking Stock and Looking Ahead” (2006) 9(124), *Yale Journal of Law & Technology* 1, at 6.

⁶⁸⁰ *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) at 1080.

⁶⁸¹ *Lo Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) at 1145.

⁶⁸² David Nimmer, “Repeat Infringers” (2005) 52, *Journal of the Copyright Society of the USA* 167, at 206.

However, an exception may undermine the application of this prohibition; i.e. the safe harbor provision does not support affirmative monitoring unless the extent of the monitoring includes a “*standard technical measure*”, as made clear in section 512(i). It is therefore particularly important to determine what exactly a “repeat infringer” is, as well as what can be considered a “standard technical measure” under the DMCA and how these terms have been interpreted by case law.

Unfortunately, the DMCA does not clearly identify when a normal user becomes a repeat infringer, though the House and the Senate Juridical Reports state that online copyright infringement is clearly divided into three categories: inadvertent/unintentional, non-commercial and wilful and commercial.⁶⁸³ A repeat infringer is therefore someone who “repeatedly” or “flagrantly” misuses his internet access by violating the copyrights of others. It is crucial that all users clearly understand that their illegal misconduct can result in them losing access to the internet.⁶⁸⁴ The term “flagrantly” and “deliberately” refers to infringements, which are surprising or notorious/famous. Hence, the protective policy focuses on egregious offenders, rather than casual offenders, who only ever infringed copyright twice.⁶⁸⁵

However, service providers cannot rely on courts to determine who a “repeat infringer” is for the purpose of section 512(i). This is because courts have not consistently interpreted the term. Some have said that a notice about infringements from a copyright holder is sufficient to trigger the duty to terminate access under the DMCA.⁶⁸⁶ Others, however, have said that notices do not provide sufficient evidence of repeat infringement because they could be inaccurate, while some courts have held that something less than actual

⁶⁸³ H.R. REP. No. 105-551 (1998) at 61; S. REP. No. 105-90 (1998) at 52.

⁶⁸⁴ *Id.*

⁶⁸⁵ Peter K. Yu, “The Graduated Response” (2010) 62, *Florida Law Review* 1374, at 1406; Annemarie Bridy, “Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement” (2010), 89 *Oregon Law Review* 81.

⁶⁸⁶ *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) at 1088.

knowledge of blatant infringement can establish circumstances, which require termination under section 512(i) of the DMCA.⁶⁸⁷

Nevertheless neither the DMCA, nor the courts have quantified the number of infringements, which are needed to describe an internet user as a “repeat infringer.”⁶⁸⁸ Due to this uncertainty, it is submitted that section 512(i) can result in unfair results since a service provider may rely on this section to block internet access of certain users, while others do not do the same, despite all of them accessing the same illegal content.⁶⁸⁹ The other problem is that this system can be rather expensive for service providers since they have to spend a lot of money on updating and configuring their hardware in a way, which can identify their subscribers and notify them of alleged infringements.⁶⁹⁰

Yet, it is not clear whether providers must block a specific IP address to stop posts or whether a provider can simply block the individual’s user name to evoke the exception. The later would not solve the problem since any repeat infringer can simply create a new username and can once again download or upload the same or different infringing content, whilst the former option could violate the freedom of speech and the right to receive information, which is protected by the First Amendment.⁶⁹¹

With regards to the standard technical measure, a service provider can shield itself from liability if it adopts and implements the repeat infringer policy and “*accommodates*” and not “*interferes*” with the “*standard technical measure*.”⁶⁹² However, the extent to which a service provider can comply with these requirements remains unknown, even to providers themselves, because these requirements have not been defined. It is also still unclear to determine which

⁶⁸⁷ *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004), at 1105.

⁶⁸⁸ *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, (C.D. Cal. 2009), at 1118

⁶⁸⁹ David Nimmer, “Repeat Infringers” (2005) 52, *Journal of the Copyright Society of the USA* 167, at 206.

⁶⁹⁰ Michael Geist, “Estimating the Cost of Three-Strikes and You’re out System” (Jan 26, 2010) *Toronto-Star* <<http://www.thestar.com/business/article/755443--geist-three-strikes-and-youre-out-system-draw-cries-of-foul-from-governments>> (accessed March 24, 2012).

⁶⁹¹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In this case, the Supreme Court declared that “it is now well established that the constitution protects the right to receive information and ideas...is fundamental to our free society.”

⁶⁹² 17 U.S.C Sec.512 (i)(1)(B) of the DMCA.

technology is satisfactory for the purpose of the DMCA. This uncertainty allows service providers to develop new legal standards, despite this leaving them vulnerable to legal challenges.⁶⁹³ It is therefore important to define these terms.

The term “accommodating” means “...to fit or equip (something) for use...”⁶⁹⁴ This implies that service providers are obligated to implement technical measures which copyright holders use,⁶⁹⁵ whereas the term “interfere” means “action to come into collision or opposition, so as to affect the course.”⁶⁹⁶ This means that a service provider should play a passive role when copyright owners use technical measures. However, section 512(m) states that a service provider does not have a duty to monitor, nor to look affirmatively for facts suggestive of infringements except when this is “*consistent with standard technical measures... [under] subsection (i).*” In the *YouTube* case, the Court of Appeal interpreted the above italic sentence and defined what a service provider should do to comply with section 512(i) of the DMCA. The court held that a service provider was liable if it “refused to accommodate or implement a “standard technical measure...” however refusing to adopt a mechanism to affirmatively monitor one’s own network has no such result.⁶⁹⁷

Three conclusions can be drawn from this. Firstly, service providers should not play an active role in monitoring users’ activities, but should facilitate the policing goals of copyright holders through technical measures. Secondly, this textual interpretation sheds light on what “*standard technical measures*” are, by excluding the possibility of a device, which gives copyright owners full control. However, the problem is that the phrase “*standard technical measures*” is

⁶⁹³ Lauren G. Gallo, “The impossible of ‘Standard Technical Measure’ for UGC Websites” (2011) 34 (2), *Columbia Journal of Law & The Arts* 284, at 288-89.

⁶⁹⁴ Oxford English Dictionary, (third edition, December 2011, online version June 2012) at 3.

⁶⁹⁵ Section 512(i)(2) of the DMCA, which specifies that “standard technology measures means technical measures that are used by copyright owners” and affirms that this requirement is not proactive, which means this provision can be interpreted to require service providers to passively tolerate or become compatible with standard technical measures.

⁶⁹⁶ Oxford English Dictionary (second edition, 1989, online version June 2012) at 4(a).

⁶⁹⁷ *Viacom v. YouTube and Google*, No. 10-3270 (2nd Cir. Apr. 5, 2012) at 33.

notoriously difficult to define in light of changing norms within technology and surveillance.⁶⁹⁸

Thirdly, any challenge based on a discriminatory standard technical measure is insufficient to not allow the service provider the benefit of the safe harbor provisions.⁶⁹⁹ In other words, if a service provider wants to implement an identification content tool for selected copyright holders, this has no consequences under the DMCA.⁷⁰⁰

Accordingly, it is crucial that a normative framework is adopted, so that service providers can deal with repeat infringers and comply with the requirements in relation to the standard technical measure. One solution is to define a repeat infringer as someone, who has been convicted by the civil or criminal court of copyright infringement for at least two or three counts. Once an interested party has confirmed that an internet user has committed an infringement; the interested party can inform the service provider about the infringer. The provider should then immediately terminate access to the IP address of the infringer.

5.3.2 Online Privacy and Access to Information in Europe

Europe has recognised the importance of protecting human rights, including access to information and the protection of personal data online. Europe acknowledges that a right to access information through the internet has become a fundamental aspect of freedom of expression. In this context, Article 19 of the Universal Declaration on Human Rights and Article 10 of the European Convention on Human Rights broadly acknowledge that access to the internet – digital inclusion – forms now an essential part of freedom of expression.⁷⁰¹ The European Convention of Human Rights, as adopted in the Charter of

⁶⁹⁸ Sonia K. Katyal, “Privacy vs. Piracy” (2005) 7, *Yale Journal Law & Technology* 222, at 275.

⁶⁹⁹ Elliott Alderman, “Reading the Tea Leaves: ISP Obligations after the Second Circuit’s *Viacom v. YouTube* Decision (2012),” <<http://www.aldermanlawoffice.com/Reading-the-Tea-Leaves-ISP-Obligations-After-The-Second-Circuits-Viacom-v-YouTube-Decision-2012.shtml>> (accessed June, 22, 2012).

⁷⁰⁰ Mitchell Zimmerman, “Copyright Alert: *Viacom v. YouTube/Google*” Fenwick <<http://www.fenwick.com/Publications/Pages/Copyright-Alert-Viacom-v.-YouTube-Google.aspx>> (accessed June 22, 2012).

⁷⁰¹ Article 10 of the European Convention on Human Rights (hereinafter ECHR).

Fundamental Rights (CFR), is also directly effective.⁷⁰² In this regard, Article 36 of the CFR guarantees access to “services of general economic interest.”⁷⁰³ In addition, Recital 9 in the Preamble of Directive 2000/31 recognises that:

“[T]he free movement of the information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of Convention for the Protection of Human Rights and Fundamental Freedoms...”⁷⁰⁴

Furthermore, Articles 6 and 8(1) of ECHR both protect privacy and data.⁷⁰⁵ Also, Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereafter EC Data Protection Directive 1995/46) states that the protection covers:

“[A]ny information relating to an identified or identifiable natural person including IP address as it is clearly relating to the activities of the holder of the IP address, therefore it is considered as personal data.”⁷⁰⁶

In addition, Article 1(5)(b) of Directive 97/66 of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (hereafter Directive/97/66) provides that:

⁷⁰² Article 6(1) of the Treaty of the European Union (hereinafter TEU)

⁷⁰³ Article 36 of the CFR.

⁷⁰⁴ Recital 9 of Directive 2000/31

⁷⁰⁵ Articles 6 and 8(1) of the ECHR and the Directives adopt the same principles for the protection of privacy and personal data as Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter e-Privacy Directive).

⁷⁰⁶ Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA) (2010/C 147/01) <http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf> (accessed June 01, 2012).

“[T]his Directive shall not apply to; (a)... (b) Questions relating to the information society services covered by the Directives/95/46 and 97/66...”⁷⁰⁷

This means that providers cannot evoke immunity from liability in cases where service providers violate the interests of their subscribers by collecting, transmitting or monitoring personal data without the users’ consent or where they go beyond the limits established by law, in particular the prohibition of monitoring contained in Article 15(1) of Directive/31/2000.⁷⁰⁸ In this regard Article 15(1) states that:

“ (1) Member States shall not impose a general obligation on providers, when providing the services covered by Article 12, 13, and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity...(2)...(3)...”⁷⁰⁹

Yet Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009(Directive/2009/136) entered into force on December 19, 2009. This Directive amended Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (the Universal Service Directive) and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the ePrivacy Directive). Both these Directives are part of the “Telecom Package” and the five Directives set out the regulatory framework for electronic communications networks and services in the EU.⁷¹⁰

Further, in November 2007, the Commission of the European Union (Commission) proposed to amend the Universal Service Directive and the ePrivacy Directive. Most of these amendments were aimed at strengthening the

⁷⁰⁷ Article 1(5)(b) of Directive 97/66.

⁷⁰⁸ In this ruling, the European Court of Justice responded to the Spanish Court that Directive 2000/31 “does not require states to lay down...an obligation to disclose personal data in civil proceedings.” *Productores de Musica de España (Promusicae) v. Telefonica de España SAU*, [2008] E.C.D.R. 10.

⁷⁰⁹ Article 15 of Directive 2000/31.

⁷¹⁰ Regulation Electronic Communications, <ec.europa.eu>, (accessed April 6, 2013).

security-related provisions of the ePrivacy Directive. Indeed, one of the objectives of the proposal was to “enhance[e] the protection of individuals’ privacy and personal data in the electronic communications sector, in particular through strengthened security-related provisions and improved enforcement mechanisms.”⁷¹¹

In this context, Article 2(h) of the amended ePrivacy Directive now defines a “personal data breach” as “a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored, or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community.”⁷¹²

Article 3 makes clear that the ePrivacy Directive applies to “the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.”⁷¹³

Article 29 of the Data Protection Working Party (WP29), which is the independent EU advisory body on data protection and privacy,⁷¹⁴ states that the scope of the Directive should be broadened by amending Article 3 of the proposal, so that the Directive would also apply to the processing of personal data, including “public and private communications networks and publicly

⁷¹¹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation (SEC (2007) 1472) (SEC(2007)1473), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0698:FIN:EN:PDF>>, (accessed February 1, 2013), at 3.

⁷¹² Article 2(h) of the amended ePrivacy Directive.

⁷¹³ Article 3 of the amended ePrivacy Directive.

⁷¹⁴ The Working Party has been established by Article 29 of Directive 95/46/EC. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 15 of Directive/2002/58/EC. <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/tasks-art-29_en.pdf> (accessed February 1, 2013).

accessible private networks supporting data collection and identification devices.”⁷¹⁵ However, the Parliament failed to adopt this amendment.

Yet, Recital 59 of the preamble of Directive 2009/136 states that “the interest of users in being notified is clearly not limited to the electronic communications sector, and therefore explicit, mandatory notification requirements applicable to all sectors should be introduced at Community level as a matter of priority” and that the Commission “should take appropriate steps... to encourage... data breach notifications rules... regardless of the sector, or the type, of data concerned.”

In relation to online providers, the Opinion of the European Data Protection Supervisor had recommended that providers of information society services - defined by Directive 2000/31 on electronic commerce as “a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”⁷¹⁶ - should be under a duty to notify a security breach since they often process sensitive personal information.⁷¹⁷ The opinion of WP29 had also expressed strong support for the extension of personal data breach notifications to information society services and had noted that this is “necessary given the ever increasing role these services play in the daily lives of European Citizens.”⁷¹⁸

Article 4(3) of the amended ePrivacy Directive states that a provider must, “without undue delay, notify the personal data breach to the competent authority” and to the subscriber or individual affected by the breach, if the

⁷¹⁵ Opinion 8/2006 on the review of the regulatory Framework for Electronic Communications and Services, with focus on the e-Privacy Directive http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp126_en.pdf, (accessed February 03, 2013).

⁷¹⁶ Recital 17 of the Preamble of Directive 2000/31/EC.

⁷¹⁷ Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council amending, among others, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) <<http://www.europarl.europa.eu/oeil/resume.jsp?id=5563642&eventId=1079158&backToCaller=NO&language=en>>, (accessed February 3, 2013).

⁷¹⁸ The Working Party has been established by Article 29 of Directive 95/46/EC. Its tasks are set out in Article 30 of Directive 95/46/EC and in Article 15 of Directive 2002/58/EC. <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/tasks-art-29_en.pdf>, (accessed February 03, 2013).

personal data breach is “likely to adversely affect the[ir] personal data or privacy.” The Parliament, in Recital 52 of the proposal, had broadened the scope by adding “users” and “individuals” to the list of people, who must be notified when a security breach takes place. Not only subscribers, but also “individuals” should be informed of a security breach, if their personal data is lost or compromised as a result of the breach, and if this breach results in substantial harm to “users.” This amendment became part of the final Directive, which requires providers to protect the personal data of their subscribers and others, such as the subscriber’s family, his roommates and his casual friends, who use his system to check their emails, as they would otherwise not be protected.⁷¹⁹

Providers do not only have to notify data breaches, but also have a duty to prevent them. This is made clear in Recital 57 of the preamble of Directive 2009/136, which states that “the provider of a publicly available electronic communications service should take appropriate technical and organisational measures to ensure the security of its services.”⁷²⁰ Also, Article 4(1a)(2) of the amended ePrivacy Directive states that providers must “ensure that personal data can be accessed only by authorised personnel for legally authorised purposes, protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and ensure the implementation of a security policy with respect to the processing of personal data.”⁷²¹

In addition, Article 4(3) of the amended ePrivacy Directive specifies that these technical protection measures “shall render the data unintelligible to any person who is not authorised to access it.” Yet the Directive does not define “unintelligible.” However, this means providers have to adopt a policy, which ensures that personal data, which is processed on their system, is secure and that they implement strong measures to prevent incidents, which can lead to a security breach.⁷²²

⁷¹⁹ Recital 59 of the Preamble of Directive/2009/136.

⁷²⁰ Recital 52 of the Preamble of Directive/2009/136.

⁷²¹ Article 4(1a)(2) of the amended ePrivacy Directive.

⁷²² Article 4(3) of the amended ePrivacy Directive.

Finally, Article 20 of the amended Universal Service Directive provides that Member States may require providers to include in their contract information about “the means of protection against risks to personal security, privacy and personal data” when an electronic communication network is used. A public service announcement was introduced, which states that providers’ contracts “shall... include any information provided by the relevant public authorities on the use of electronic communications networks and services to engage in unlawful activities or to disseminate harmful content, and on the means of protection against risks to personal security, privacy and personal data referred to in Article 21(4) and relevant to the service provided.”⁷²³ The wording of the Directive, which amends Article 20, is similar, except that a contract also includes information, which may be provided by the relevant public authorities.⁷²⁴

Europe thus provides firm privacy protection and also protects the end users’ right to access information. National legislators are strictly tied by the EUHR and the *dicta* of the Court of Justice whenever they attempt to draft any provision, which even slightly touches or conflicts with the rights to privacy and freedom of expression.⁷²⁵ Accordingly, holders, who want to discover information or data, which belongs to end users during legal proceedings, may violate end users privacy if the information or data is obtained without judicial supervision.⁷²⁶

For that reason, in February 2010, European policymakers reluctantly objected that the repeat infringer or the “three strike” system in the Anti-Counterfeiting Trade Agreement (ACTA) is adopted.⁷²⁷ The reason for the refusal was that such a system conflicts with the EUHR and negatively affects the privacy of end users

⁷²³ Articles 20 & 21 of the amended Universal Service Directive.

⁷²⁴ Article 20 of Directive/2009/136.

⁷²⁵ Sonia K. Katyal, “Privacy vs. Piracy” (2004), 7 *Yale Journals of Law & Technology* 222, at 336.

⁷²⁶ *Id.*, at 340.

⁷²⁷ Scott M. Fulton, “Strongest Condemnation Yet of Anti-Counterfeiting, ‘Three Strikes’ from EU”, March 10, 2008), *betanews*, <<http://betanews.com/2010/03/10/strongest-condemnation-yet-of-anti-counterfeiting-three-strikes-from-eu/>>, (accessed June 01, 2012).

and their entitlement to freedom of expression.⁷²⁸ As a result, national legislators considered it impossible to enforce this system in Europe.⁷²⁹

For example, in Germany, online service providers are not required to block or monitor stored contents or to actively ascertain facts suggestive of copyright infringement because such an invasive procedure requires filtering and blocking measures, which contradict constitutional and political values. Unlike the diligent test, the German court, in the *Rapid Share* case, established that the application of the “word filtering preventive measures” and a careful human review of the content for effective elimination of illegal material are inappropriate.⁷³⁰ In this context, the court clearly rejected all sorts of investigations to ascertain IP addresses, which can identify further infringements.⁷³¹ Also, unlike the diligent test and the wilful blindness doctrine, the German court refused to impose a duty to monitor on service providers on the basis that the mere suspicion that many infringing activities take place on a provider’s system is insufficient to establish liability.⁷³²

However, in France, ex-president Nicolas Sarkozy proposed, in 2007, that an independent legal authority -“Hadopi” should deal with preventing and punishing online piracy by terminating infringers’ internet connection after sending them three notifications.⁷³³ However, the French National Assembly rejected the bill on 9th April 2009, as the right to protect property has to be

⁷²⁸ Agreement on EU Telecoms Reform paves way for stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizen, Memo/09/491, (Nov 05, 2009) <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/491>> (accessed June 01, 2012).

⁷²⁹ David Meyer, “Europe ‘Will not Accept’ Three Strikes in Acta”, *DigitalGov* (Feb 26, 2010), <http://www.zdnet.co.uk/news/networking/2010/02/26/europe-will-not-accept-three-strikes-in-acta-treaty-40057434/>, (accessed June 01, 2012).

⁷³⁰ Jaqui Cheng, “German says “nein” to three-strike infringement plan” *arstechnica* (Feb 06, 2009), <<http://arstechnica.com/tech-policy/2009/02/germany-walks-away-from-three-strikes-internet-policy/>> (accessed June 01, 2012).

⁷³¹ Dusseldorf Court of Appeals, *Rapid Share v. Company Capelight Pictures*, No. I-20You 166/09 (March, 22, 2010).

⁷³² *Id.*

⁷³³ Olivennes Committee, “Agreement for the Development and protection of Cultural Works and Programmes on New Networks” (23 November 2007), <[http://www.culture.gouv.fr/culture/actualites/dossiers/intemetcreationO8/Accords_%20Version anglaise.pdf](http://www.culture.gouv.fr/culture/actualites/dossiers/intemetcreationO8/Accords_%20Version%20anglaise.pdf)>, (English version) (accessed June, 2012).

balanced against the right to privacy and the three-strike policy therefore did not sufficiently protect the latter right.⁷³⁴

However, in late 2009, a new French law was passed to combat digital piracy known as the “three strikes law” or “Hadopi II” after having been scrutinised by the highest constitutional court in France.⁷³⁵ Hadopi II creates a new state agency to which repeat offenders can be referred to and a judge can then order that the person’s internet access is cut off and impose substantial fines through a simplified process akin to that for traffic violations. Hence, under the new Hadopi II, only a court has the right to finally order termination of internet access.⁷³⁶

To sum up, European policymakers always consider end users’ rights, particularly the right to privacy. As a result, when authorities draft legislation, they have to ensure that individuals have the right to know how these different policies affect the service, which they receive from internet service and content providers.⁷³⁷

5.4 THE INTERNATIONAL OBLIGATIONS IN RESPECT OF INJUNCTIVE RELIEF

There are four different types of injunctions. The two main types are mandatory and prohibitory injunctions. Mandatory injunctions require service providers to take positive steps to stop the consequences of the unlawful act, which have already been caused. Prohibitory injunctions require providers to halt the illegal acts or that such content is displayed on their systems. The other two injunctions are permanent injunctions and preliminary injunctions. These two injunctions

⁷³⁴ Association des Fournisseurs d’ Acces et de Services Internet (AFA), “Project de Loi Creation et Internet’: Pour le Respect des Accords de l’ Elysee” (June 24, 2008), <http://www.afa-france.com/p_20080624.html> (accessed June 01, 2012).

⁷³⁵ Eiric Pfanner, “France Approves Wide Crackdown on Net Piracy”, *New York Times*, Eric Pfanner, (October 22, 2009), <http://www.nytimes.com/2009/10/23/technology23net.html?_r=1> (accessed June 01, 2012).

⁷³⁶ Ronan Kennedy, “No Three Strikes for Ireland Yet: EU Copyright Law and Individual Liability in Recent File Sharing Litigation” (2011), *Journal of Internet Law* 1, at 27.

⁷³⁷ For more details about neutrality theory: Douglas A. Hass, “The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates” *Berkeley Electronic Press* (2007), <http://www.kentlaw.edu/faculty/rwarner/classes/privacy/materials/network_neutrality/hess_neverwasneutralnet.pdf>, (accessed June 17, 2012) at 45-48.

may be granted in mandatory or prohibitory form; however, French courts only issue such preliminary injunctions if a copyright holder can prove that his case has merits and is thus well-founded.⁷³⁸

Furthermore, in the US in strict liability cases, injunctive relief can be granted together with compensation.⁷³⁹ However, US courts only grant these injunctions when it can be shown that the acts of a service provider violate the holder's exclusive rights in the statute.⁷⁴⁰ Therefore, according to the DMCA, a service provider, which can successfully evoke the safe harbour provisions, cannot be liable "for monetary relief."⁷⁴¹ Yet a service provider can still be held liable within the limits recognised by section 512 (j), as an injunction or other equitable relief can be imposed on it.⁷⁴² The regulation of injunctive relief under the DMCA is unclear and based on difference facts and circumstances.

However, in Europe, most copyright holders appear to prefer a quick provisional measure (i.e. an injunction), as opposed to damages, as the main enforcement remedy. The reasons for this are the often prohibitively high financial costs, which are hardly reflected in the award of damages and also the time it takes until a substantive copyright infringement case is decided. Hence, damages are not demanded by right holders as a matter of course.⁷⁴³

It is therefore important to ascertain the scope of the remedies, which can be ordered against service providers, under the TRIPs Agreement, in the US and Europe. It has to be also assessed whether these remedies negatively affect the privacy of end users and their right to access information. This requires an

⁷³⁸ *In re Le Floch v. Blys*, First Instance Court of Rennes (référé) June 16, 1999.

"A preliminary injunction can only be granted if the action is serious on the merits. In the present case, the defendant argued that the patent lacked novelty and the First Instance Court of Rennes considered that on the facts the sale and manufacture of the apparatus could be prohibited). The brief summary in English available at <<http://www.cabinetbeaudelomenie.com/gb/documentation/etudes/overview.html>> (accessed February 08, 2012).

⁷³⁹ Section 502 of the the US Copyright Act.

⁷⁴⁰ M.B. Nimmer al et, *Nimmer on Copyright*, (Mathew Bender, New York/San Francisco, 2000) at § 14:06[B].

⁷⁴¹ 17 U.S.C. Sec.512 (a), (b)(1), (c)(1), (d) (2000) of the DMCA.

⁷⁴² 17 U.S.C. Sec.512 (2000) of the DMCA.

⁷⁴³ European Commission, doc. SEC (2010) 1589, (Brussels, Dec 22, 2010) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1589:FIN:EN:PDF>> (accessed June, 17, 2012), at 21.

evaluation of relevant cases and statutes, which regulate this area, so that it can be analysed whether a fair balance is struck for all the parties, which are involved in digital transmissions.

For this purpose, the research critically analyses the provisions, which equip courts with the power to award remedies and recourse will be particularly made to the fundamental principles developed by the Court of Justice in the *L'Oreal* and *SABAM* cases.

5.4.1 Injunctive Relief under the TRIPS Agreement

Article 41(1) of the TRIPs requires members to include injunction measures as part of their available enforcement procedures in order to impede an infringer from infringement, also by preventing infringing activities, including imminent copyright infringements.⁷⁴⁴ This mechanism has become the most effective means to prevent or stop digital infringements.

Article 14 of the WCT and Article 23 of the WPPT also contain the same rules as Article 41 of the TRIPs Agreement.⁷⁴⁵ This means that there is at least partial compatibility between the enforcement provisions of the TRIPs Agreement and the WIPO Treaties in relation to injunctive relief. Article 50 of the TRIPs Agreement requires the same elements to be established for an injunction, as Article 14(2) of the WCT and Article 23(2) of the WPPT.

Hence, those states, which are parties to the TRIPs Agreement, but which are not parties to the WIPO Treaties 1996, make available the injunction measures set forth in the TRIPs Agreement to enforce and protect the holders' exclusive right online, so long as they have domestic laws to that effect.⁷⁴⁶ For example, as mentioned above, Egypt is a party to TRIPs Agreement, but is not a party to the

⁷⁴⁴ Articles 41(1), 44 and 50.1(a) and 50.3 of the TRIPs.

⁷⁴⁵ Article 41(1) of the TRIPs Agreement 1994 provides that "Members shall ensure that enforcement procedures...are available under their law so as to permit effective action against any act of infringement of intellectual property rights...including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement."

⁷⁴⁶ Articles 41.1 and 42 of the TRIPs Agreement; Mihaly Ficsor, "The WIPO "Internet Treaties": The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-revolutionary Central European" (2006/2007), 6 *The John Marshall Review of Intellectual Property Law* 17, at 26.

WIPO Treaties 1996. However, Egypt grants holders' exclusive rights online and the EIP allows holders to apply for injunctions, so long as all the conditions set out in the TRIPs Agreement are met. Hence, holders can use injunctions to stop digital infringements on the system of online service providers; otherwise the EIP would not comply with the obligations imposed by the TRIPs Agreement. It is therefore important to discuss the conditions, which the TRIPs Agreement requires.

According to the TRIPs Agreement, injunction measures should be made available for copyright holders, so long as all requirements set forth in Article 50 of the TRIPs Agreement are met. Article 50 of the TRIPs Agreement provides that courts must be given the authority to issue certain kinds of provisional injunctions without: (1) "notice to the other party"; (2) without "unnecessary complications" or, overly burdensome documentation or "evidentiary requirements," and (3) the injunctions must be available at a reasonable cost. Hence, only if the EIP complies with all these requirements set out in Article 50 of the TRIPs Agreement, does it comply with the "availability" requirement imposed by the TRIPs Agreement.⁷⁴⁷

In determining whether all these requirements are satisfied under the EIP, it is important to assess how effective the enforcement system is for copyright holders. Furthermore, according to the TRIPs Agreement, enforcement procedures should be "effective" and "deterrent" in order to stop further infringements. There are several indicia, which reveal whether the remedies can be considered "effective" and "deterrent." The piracy level is a significant indicator. For example, if piracy levels are on the rise in a state, which already has more than 50% of piracy, then this suggests that the system fails to deter infringements. Nevertheless, in cases where there is a decrease in the level of piracy, the enforcement measures may be considered effective as more

⁷⁴⁷ Articles 49 & 50 of the TRIPs Agreement.

compliance is achieved.⁷⁴⁸ In other words, all the remedies must be effective and deter infringements to reduce the amount of piracy.⁷⁴⁹

However, as mentioned above, in Egypt, Article 179 grants copyright holders remedies in order to enforce their exclusive rights; nevertheless no injunction has been issued to date, although the rate of digital infringements is increasing and causes annual losses of roughly one billion Egyptian pounds.⁷⁵⁰ This strongly suggests that the injunction measures in Article 179 of the EIP are not effectiveness and also do not deter infringements. The Article therefore may not comply with Article 50 of the TRIPs Agreement. The aim of the next section is therefore to explore whether Article 179 complies with Article 50 of the TRIPs Agreement. The next discussion highlights particular issues and for this purpose firstly analyses the remedies available in the US and Europe and then compares them with the available the remedies in Article 179.

5.4.2 Injunctive Relief in the US

For copyright holders to be granted *ex parte* relief is beneficial since evidence can thus be preserved. Moreover, when a provider qualifies for the safe harbour provision,⁷⁵¹ US courts grants injunctive relief in three forms: (1) a restraining order, which clearly restricts the service provider from allowing access to the infringing materials or activities on a certain online site on the network or the system of the provider;⁷⁵² (2) an order which restrains the service provider from granting access to a subscriber or an account holder who is identified as having committed infringing activities on the provider's system or network. A service provider is entitled to terminate the account of a subscriber or an account holder,

⁷⁴⁸ In 2012, the International Intellectual Property Alliance (IIPA) Special Report on Copyright Protection and Enforcement reported that in Egypt 97% of all digital distributions of copyright content are pirated and that centralised and decentralised websites are used: IIPA Special Report/2010, at 177; Nagla Rizk, "Notes From Egypt's Alternative Music Scene: Business Models, Commons and Copyright" (2010) 13(3), *The Journal of World Intellectual Property*, 491 (the author cited this statistic from Alexa.com).

⁷⁴⁹ Etmias Tekeste Biadgleng et al., "The Changing Structure and Governance of Intellectual Property Enforcement" South Centre; Research Papers No. 15 (2008), at 5.

⁷⁵⁰ Report for George Washington, Creative and Innovative Economy Centre by Bertrand Moullier, "Giant with feet of clay: Creativity, IP Rights and Economic Challenges in the Egyptian Film Industry" (2007), at 5, 19.

⁷⁵¹ 17 U.S.C. Sec.512 (a) (2000) of the DMCA.

⁷⁵² 17 U.S.C. Sec.512 (j)(1)(A)(i) (2000) of the DMCA.

who is specified as an infringer in the order;⁷⁵³ and (3) other injunctive relief, which “the Court may have believed to be necessarily vital to prevent or restrain the infringing activities specified in the order of the Court at a particular online location, if such relief represents the slightest burdensome on the provider amongst other forms of relief that could be comparably effective under such circumstances to achieve the same purpose.”⁷⁵⁴

Whenever a provider can be considered a mere conduit, the safe harbour provision in section 512(a) applies, so that the only probable injunctive relief consists of the following: (1) an order restraining the service provider from granting access to a subscriber or an account holder who is clearly involved in committing infringements by using the provider’s own system or network, by ending the account of the subscriber or account holder specified in the order⁷⁵⁵ or (2) a restraining order which prevents the service provider from providing access by following reasonable steps to successfully manage to restrict access to a certain identified online location located in a place other than the US.⁷⁵⁶

The DMCA provides that injunctive relief can normally only granted after a provider has been notified and is given the opportunity to appear. Moreover, there is no requirement for advance notices in orders which require that it is guaranteed that evidence is preserved or protected, i.e. when an order is made, which has an unfavourable effect on the operation of the service provider’s own communication network. Moreover, injunctive relief can be easily ordered against a qualifying service provider, i.e. injunctive relief can be ordered, so long as the activities of the provider clearly fall within the scope of the safe harbour provisions.

The scope of an injunction under the DMCA is more restricted, which means that injunctions do not impose requirements to accurately monitor a system to prevent specific copyright infringements or to take down previously removed content. The exception in section 512(j) limits injunctive relief, so that only two

⁷⁵³ 17 U.S.C. Sec.512 (j)(1)(A)(ii) (2000) of the DMCA.

⁷⁵⁴ 17 U.S.C. Sec.512 (j)(1)(A)(iii) (2000) of the DMCA.

⁷⁵⁵ 17 U.S.C. Sec.512 (j)(1)(B)(i) (2000) of the DMCA.

⁷⁵⁶ 17 U.S.C. Sec.512 (j)(1)(B)(ii) (2000) of the DMCA.

types of orders can be made; orders requiring a service provider to deny access to the infringing user by terminating that user's account and where the infringing site takes place outside the United States, orders requiring the service provider to take "reasonable steps...to block access to a specific identified online location outside the United States."⁷⁵⁷

However, courts may order such relief as they consider necessary, but, at the same time, must select, equally effective measures and which are the least burdensome. The DMCA lists four factors, which courts have to consider when determining the scope of the injunctive relief: (a) whether such an injunction, either alone or in combination with other injunctions issued against the same service provider would significantly burden either the provider or the operation of the provider's system or network; (b) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement; (c) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to non-infringing material at other online locations; and (d) whether other less burdensome and comparably effective means are available to prevent or restrain access to the infringing material.⁷⁵⁸

Again, this is reminiscent of the factors that have to be considered when determining whether a breach of the duty of care has been established. Interestingly, factor (C) appears to be included to protect freedom of speech, as it implies that an access provider may not (readily) be required to block access to infringing content, if such blocking would affect the availability of non-infringing material.

5.4.3 Injunctive Relief in Europe

According to general tort law, as discussed in the second chapter, in Europe, it is not necessary to establish fault for an injunction to be issued. This means that the

⁷⁵⁷ *Id*

⁷⁵⁸ Aaron Schwabach, *Internet and the Law: Technology, Society, and Compromises*, (ABC-CLIO, California, 2006), at 101.

statutory threshold levels to establish fault do not apply to injunction.⁷⁵⁹ However, in most cases, courts examine whether a service provider breached its duty of care and therefore acted unlawfully or whether the provider is immune.⁷⁶⁰

Even if a service provider is immune, the last paragraphs of Articles 12-14 of Directive 2000/31 all require that injunctive relief is available even if the liability exemption applies.⁷⁶¹ Thus it is quite important to define firstly the scope of the injunction measures in Europe and secondly to what extent the scope of the injunctions can affect the rights of end users online.

As for the scope of the injunction measures, Recital 45 of the Preamble of Directive 2000/31 states that the limitations in respect of liability for intermediary service providers do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.⁷⁶² It seems from the language in Recital 45 that any national court in Europe may issue an injunction to block access to notified unlawful content irrespective of the liability of a service provider.⁷⁶³

Further, Recital 47 of the Preamble of Directive 2000/31, which mirrors Article 15 of the Directive,⁷⁶⁴ defines the scope of injunctions. It states that Member States are prohibited from adopting any rules, which require service providers to generally monitor their systems except for specific cases because this would necessarily involve some kind of monitoring and may be considered a

⁷⁵⁹ Articles 12(3), 13(2) and 14(3) of Directive 2000/31.

⁷⁶⁰ B.S. Markesinis, *The German Law of Torts, a Comparative Introduction*, (Clarendon Press, Oxford, 1994) at 413-014.

⁷⁶¹ Recital 45 of the Preamble of Directive 2000/31.

⁷⁶² The Recital 45 of the Preamble of Directive 2000/31.

⁷⁶³ The limitations include the requirements in Article 2(3)(a) of Directive 2004/48 and specified in Recital 16 of the Preamble of Directive 2001/29 and both state that the rules laid down in these Directives "... shall not affect... Articles 12 to 15 of Directive 2000/31/EC..." Article 2(3)(a) of Directive 2004/48 and specified in Recital 16 of the Preamble of Directive 2001/29.

⁷⁶⁴ Article 15 of Directive 2000/31 states that providers are required to monitor information or to seek facts or circumstances suggestive of illegal activity.

mandatory injunction.⁷⁶⁵ However, similar to Article 50 of the TRIPs Agreement, Article 3 of Directive 2004/48 sets out the minimum requirements for these measures and stipulates that:

“(1)...measures, procedures and remedies shall be *fair* and *equitable* and shall not be *unnecessarily complicated* or costly, or entail unreasonable time-limits or unwarranted delays. (2) Those measures, procedures and remedies shall also be *effective, proportionate* and *dissuasive* and shall be applied in such a manner as to avoid the creation of *barriers to legitimate* trade and to provide for safeguards against their abuse.”⁷⁶⁶

When reading these Articles together, it becomes clear that whenever national courts deal with injunction applications, they have to consider whether these requirements as set out in Article 3 of Directive 2004/48 are made out when considering the prohibition in Article 15 of Directive 2000/31. This implies that a general monitoring obligation is prohibited and national courts can only order injunctions against service providers in specific cases.⁷⁶⁷

However, Article 18(1) of Directive 2000/31 allows Member States to pass national laws, which equip courts with the power to issue preliminary injunctions against information society service providers, so that the enforcement is effective and deterrent. In this regard the Article provides that:

“Member States shall ensure that court actions available under the national law concerning information society services’ activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged *infringement and to prevent any* further impairment of the interests involved...”⁷⁶⁸

Whilst Article 11 of Directive 2004/48 spells out how far-reaching injunctions can be by providing that:

⁷⁶⁵ Recital 47 of the Preamble of Directive 2000/31.

⁷⁶⁶ Article 3 of Directive of 2004/48.

⁷⁶⁷ Recital 47 of the Preamble of Directive 2000/31.

⁷⁶⁸ Article 18(1) of Directive 2000/31.

“Member States shall ensure that, where a judicial decision is taken of finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an *injunction* aimed at prohibiting the continuation of the infringement...”⁷⁶⁹

The previous two Articles explain that depending on the particular case, and if justified by the circumstances, the measures, procedures and remedies should prevent further infringements of Intellectual Property rights.⁷⁷⁰

In this context, in the *L’Oreal* case the High Court in London made a preliminary reference to the Court of Justice and asked whether Article 11 of Directive 2004/48 requires Member States to provide holders the right to request injunction measures against service providers in order for them to take measures, which can prevent future infringements of those rights, and if so, what these measures should consist of.⁷⁷¹

In this regard, the Court of Justice found that to ensure that the rules in these Articles are not rendered redundant,⁷⁷² Article 11 of Directive 2004/48 has to be interpreted in a manner, which requires Member States to ensure that national courts have jurisdiction to protect Intellectual Property rights by ordering online intermediate service providers to adopt the necessary practical measures, which can put an end to the infringements and to even prevent further infringements of that kind.⁷⁷³

The Court of Justice also stated that service providers can be ordered to implement positive measures, which identify its users more easily. The Court of Justice further explained that although the protection of personal data is important that those who are infringing copyright are acting in the course of trade, rather than privately and thus reasoned that those persons should be

⁷⁶⁹ Article 11 of Directive 2004/48.

⁷⁷⁰ Recital 24 of the Preamble of Directive 2004/48.

⁷⁷¹ *L’Oreal SA v eBay International AG* (C-324/09) [2011] E.T.M.R. 52 (CJEU (Grand Chamber) (21 July, 211) (hereinafter CJEU/*L’Oreal*).

⁷⁷² CJEU/*L’Oreal*, at 121.

⁷⁷³ *Id.*, at 127-128, 130-134.

clearly identified.⁷⁷⁴ However, the Court made it also very clear that injunctions must be effective, proportionate and dissuasive and should not, by any means, create barriers to legitimate trade.⁷⁷⁵

The Court of Justice also explained two important limitations in respect to injunctions; firstly, according to Article 15(1) of Directive 2000/31 and Article 2(3) of Directive 2004/48, the measures should not require that all data and information are monitored from all customers. This is because extensive monitoring is incompatible with Article 3 of Directive 2004/48, which requires that measures are fair, proportionate and not extremely expensive.⁷⁷⁶

Secondly, the Court of Justice made clear that pursuant to Article 3 of Directive 2004/48, national courts have to ensure that the measures do not create barriers to lawful trade.⁷⁷⁷ Hence, injunctions issued against online intermediary service providers cannot be designed or have the effect of an interim prohibition on the provision of services.⁷⁷⁸

With regards to the rights of online end users, the Belgian Court ordered the access provider to block and filter out infringing files shared by its subscribers via P2P networks. However, on appeal the Brussel Appeal Court asked the Court of Justice for a preliminary reference on whether the Directives allow national courts to issue orders to a provider to set up a general filtering system at its own economic cost and for an indeterminate period of time, which is one of the most effective preventive measures, for establishing a good monitoring system and to effectively observe all the electronic communications on its network and between all subscribers.⁷⁷⁹

In this regard, on 25th of November 2011, the Court of Justice ruled that the Articles and Recitals of these Directives entitle national courts to order comprehensive injunctions against online service providers in order to put an

⁷⁷⁴ CJEU/L'Oreal, at 127-128, 142.

⁷⁷⁵ *Id.*, at 136-138.

⁷⁷⁶ *Id.*, at 139.

⁷⁷⁷ *Id.*, at 140.

⁷⁷⁸ *Id.*, at 140.

⁷⁷⁹ *Belgish Vereniging Van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, (C-360/10), (CJEU (Third Chamber) (16 February, 2012) (hereinafter SABAM case).

end to copyright infringements and to prevent the reoccurrence of these acts in the future.⁷⁸⁰ The Court made clear that injunctions, which are unlimited in duration and require full monitoring of virtually all information stored by hosting service providers,⁷⁸¹ are inappropriate for two reasons.

Firstly, such an injunction would violate the privacy rights of users,⁷⁸² as this kind of technology would require an unambiguous identification and a regular and systematic analysis and processing of protected personal data stored on the provider's network system, which would facilitate the identification of users.⁷⁸³ Secondly, any other approach could undermine the freedom to receive information since the filtering system might not properly distinguish between legal and illegal contents.⁷⁸⁴ Hence, national courts should not grant any injunctions, which adversely affect personal data or the right to freely receive or impart information.⁷⁸⁵

Accordingly, Member States have to carefully transpose the Directives in such a way that a fair balance is struck between respecting the rights to private life, to receive information and to have practical and adequate remedies. The responsible authorities and courts of the Member States have to therefore interpret their national laws in accordance with the Directives and must be extremely cautious not to interpret the Directives in a manner, which conflicts with the fundamental rights or any of the other general principles of EU law, such as the principle of proportionality.⁷⁸⁶ It also seems that the courts in Europe consider whether the elements for establishing a duty of care are established when ordering injunctions.

5.5 INJUNCTIVE RELIEF UNDER THE EIP

⁷⁸⁰ *Id.*, at 31.

⁷⁸¹ CJEU/SABAM, at 39.

⁷⁸² *Id.*, at 40.

⁷⁸³ *Id.*, at 51.

⁷⁸⁴ *Id.*, at 50-51.

⁷⁸⁵ *Id.*, at 53-55.

⁷⁸⁶ *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU* (C-275/06) (CJEU (Grand Chamber) (29 January, 2008) at 65-68.

As mentioned above, the TRIPs Agreement and the WIPO Treaties 1996 impose minimum requirements, so that signatory states have to ensure that suitable injunction measures are adopted as part of their domestic enforcement system to prevent different forms of infringements. However, the EIP does not specifically spell out any rules, which can guide judges, who have to deal with these kinds of claims. Therefore, the Civil and Commercial Procedure Law 1954 (CCP Law) and its amended version are being relied upon by the economic courts in cases where the EIP is vague or silent.⁷⁸⁷

The objective of this part is to assess to what extent the injunction measures under Article 179 deter digital infringement online. When answering this question, the study discusses the conditions, which have to be established in order for a court to grant an injunction and to define the types of injunctions available under Article 179 in comparison to the minimum standard set out in the TRIPs Agreement.

5.5.1 The Procedural Conditions for Issuing Injunctive Relief

The EIP does not make any references to certain requirements or factors, which can guide a judge when deciding whether or not to grant an interim injunction. It is therefore important to firstly explain the general principles, which the Egyptian Cassation court has developed and to then consider the corresponding approach in France in order to identify practical guidance.

The Egyptian Cassation court has held that in injunction cases, the economic court has to verify two matters: firstly, the court has to clearly establish that the plaintiff is legally entitled to pursue a case for copyright infringement and secondly, that a *prima facie* case is established that the holder should be protected. This means that a holder must prove that his protected rights actually exist and that there is compelling evidence to show that there are infringements

⁷⁸⁷ Article 194-200 of CCP Law; Mohames S. Abdel Wahab, “An overview of the Egyptian Legal System and Legal Research” (2006), Paper presented to Hauser Global Law School Program, available in English at <<http://www.nyulawglobal.org/globalex/egypt.htm>> (accessed March 21, 2012).

and that damages are caused and it is therefore urgently necessary that the court grants an injunction.⁷⁸⁸

In this context, the economic court has to evaluate the *urgency* of the request in order to assess which necessary procedures are appropriate, i.e. whether provisional measures should be ordered and whether irreparable damage would otherwise be caused to the copyright holder for which he cannot be compensated, even if he succeeds in a subsequent infringement action.⁷⁸⁹ If the court finds that irreparable damage will be occasioned, the urgency factor is made out and the court has to grant the injunction to put an end to the infringing act.⁷⁹⁰

This means that the court has to assess the *urgency* of the situation, but without assessing the merits of the case, as the merits should be decided when the substantive copyright infringement claim is being heard.⁷⁹¹ Hence, the court is not allowed to assess the merits of the case, but instead has to only determine whether an *urgent* situation actually exists, irrespective of the matters, which are to be decided at the substantive trial.⁷⁹²

In France, any application for an injunction results in the court performing a two-fold assessment. The court firstly examines how necessary the request is to prevent irreparable harm and determines the importance and urgency in order to justify the issuing of the injunction within a short period of time after the right holder becomes aware of the infringing activities.⁷⁹³ In this regard, the court has found that a period of six months from the date of discovery is entirely suitable to ensure the requirement that the injunction should be for a short time period;

⁷⁸⁸ Egyptian Cassation Civil Court, No. 31-1834 (12 Dec, 1982), at 33.

⁷⁸⁹ Egyptian Cassation Civil Court, No. 36-1605 (21 Dec, 1987), at 1135.

⁷⁹⁰ Egyptian Cassation Civil Court, No. 34-1914 (12 March, 1985), at 50.

⁷⁹¹ *Id.*

⁷⁹² *Id.*

⁷⁹³ Larry Coury, "C'est What? Saisie! A Comparison of Patent Infringement Remedies Among the G7 Economic Nations" (2002-2003) 13, *Fordham Intellectual Property, Media and Entertainment Law Journal* 1101, at 1155.

and courts examine how well founded the merits are i.e. how strong the case is.⁷⁹⁴

This means that French courts assess whether the case appears well-founded and any application for an injunction has to be substantively linked to the infringing acts, which in turn depends on whether the claim has merits and an obvious infringement can be established.⁷⁹⁵ For this reason, French courts have been unwilling to grant injunction orders in cases where the defendant provides a justifiable challenge to the validity of the Intellectual Property rights.⁷⁹⁶

Egyptians and French courts tend to apply the same standards when evaluating the necessity requirement and place much emphasis on how strong the owner's claims are. However, the second requirement, which French law employs, is not applied by Egyptian courts. Hence, Egyptian courts have two options when an alleged infringer challenges the copyright holder's exclusive right. The court can consider that the registration of a copyright work constitutes *prima facie* proof of the validity of a claim or they can proceed with issuing the provisional injunction and leave the matter undecided until the outcome of the substantive trial.⁷⁹⁷

However, the rules, which regulate injunctions under the EIP, are more appropriate for copyright holders than French law. If Egypt had adopted the French legal concept, the economic court would have to establish a connection between the issuing of the injunction and the substantive action and this would require the copyright holder to present compelling evidence of copyright infringement. However, under the Egyptian tort liability approach, as explained in the second chapter, courts mostly find that the copyright holder cannot succeed on the merits, as the Egyptian civil system does not allow that

⁷⁹⁴ *Id.*

⁷⁹⁵ *Id.*

⁷⁹⁶ *In re Le Floch v. Blys*, First Instance Court of Rennes (référé) June 16, 1999.

“A preliminary injunction can only be granted if the action has merits. In the present case, the defendant argued that the patent lacked novelty, but the First Instance Court of Rennes considered that the facts were not sufficient to prohibit the sale and manufacture of the involved apparatus). A brief summary in English is available at <<http://www.cabinetbeaudelomenie.com/gb/documentation/etudes/overview.html>> (accessed February 08, 2012).

⁷⁹⁷ Egyptian Cassation Civil Court, No. 32-708 (21 Feb, 1983).

secondary liability is imposed. Consequently, it is more likely that courts would refuse to issue injunctions, despite the fact that the *urgency* element is made out.

The French approach is more suitable for the French civil system, as secondary liability of service providers is much more regulated. It is therefore much easier for copyright holders to prove that the provider had actual knowledge about the infringement. On the other hand, as the situation is much more uncertain in Egypt, the injunction system under the EIP is more favourable to copyright holders, as the court can issue injunctions, which are valid until the hearing of the substantive case, which may put pressure on the alleged infringer to resolve the dispute amicably with the copyright holder.

In conclusion, when seeking a provisional injunction under the EIP 2002/82 and the CCPL, a whole new set of rules should be developed to provide more guidance to judges, who deal with injunction applications. The French model appears most suited in relation to establishing the requisite urgency and could help courts determining whether or not a case is frivolous.

5.5.2 The Scope of Measures under the EIP

In general Article 194 of the CCP Law and its amended version tend to limit the unrestricted power of judges in relation to issuing provisional measures. As a result, judges can only grant these measures as defined by the CCP Law or by virtue of other specialised laws. For that reason, the Egyptian Cassation Court discarded the argument of claimants that the CCP Law does not limit the availability of provisional measures.⁷⁹⁸ Hence, economic courts can only grant injunctive relief pursuant to Article 179 of the EIP. This means that other injunctions cannot be awarded by the courts.⁷⁹⁹ However Article 179 states that:

“The head of the Court of jurisdiction may order, upon request of the interested party and pursuant to an injunction that one or *more of the following* or *other relevant provisional measure be taken, if infringement has taken place on* any of the rights provided ...: (1)

⁷⁹⁸ Egyptian Cassation Civil Court, No.60-2659 (9 March, 1999).

⁷⁹⁹ Egyptian Cassation Civil Court, No.66-1975 (12 Dec, 1996).

Conducting detailed description of the work... (2) *Ceasing* the publication... (3) *Seizure* of the original copy-⁸⁰⁰ - (4) *Proving* the incident of infringement on the protected right; (5)... The requesting party shall be required to *submit the merits of the case to the court within 15 days...otherwise; such order shall cease to have effect.*⁸⁰¹

Hence, according to the principles established under this Article, all applications for provisional measures have to be submitted to the president of the economic court. The president of the economic court can thus consider whether a provisional injunction should be awarded, as well as the merits of the case. In point of fact, the structure of Article 179 makes clear that requests, reviews and injunction orders can be made in the absence of the other party to stop the infringement, which has already taken place.⁸⁰²

Further, unlike the TRIPs Agreement, Article 179 of the EIP does not in any way grant copyright holder the opportunity to seek injunctions for imminent infringements.⁸⁰³ However, at the Joint Committee, Dr Hossam Lotfy mentioned that injunctions should cover imminent infringements since this is required under Articles 41(1) of the TRIPs Agreement and is considered standard practice in several jurisdictions.⁸⁰⁴ Nevertheless, the Joint Committee and the MPs at the Plenary of the PA decided that copyright holders can only apply for injunctive relief for acts of infringement, which have already taken place and in accordance with Article 179. Therefore, economic courts cannot grant provisional injunctions for imminent infringements or acts of infringements, which have not yet occurred, but which are going to happen. This means that an injunction measure is only available after a right has been infringed. For instance in Egypt,

⁸⁰⁰ In conformity with Article 13(3) of the Berne Convention.

⁸⁰¹ In conformity with Articles 41-50 of the TRIPs Agreement.

⁸⁰² Joint Committee Final Report, No. 31 (March 28, 2001) at 15-18. Copyright owners can still appear *inter partes* during the adjudication stage of an infringement suit.

⁸⁰³ This conclusion is based on a comparison of Article 44 and Article 50 of the TRIPs Agreement.

⁸⁰⁴ Joint Committee Final Report, No.31 (March 28, 2001) at 15; Article 50 of the TRIPs Agreement.

unlike France,⁸⁰⁵ introductory actions for infringements are inadequate for right holders to seek injunctive relief.⁸⁰⁶

In addition, Article 179 conflicts with the general principles of the CCP Law due to the language, which Article 179 uses. The Article provides that courts can order that “*other relevant provisional measures [can] be taken.*” This implies that the text of the Article is clear enough to illustrate the delegations’ intentions to deviate from the main principles and rules set forth in the CCP Law and its amended version. Instead, the delegations decided to permit provisional measures and also made use of a non-exhaustive list.⁸⁰⁷ This means that the injunction measures, which can be granted under Article 179, are by no means non-exhaustive.⁸⁰⁸ Consequently, economic courts are entitled to order any appropriate injunction.

For example, the economic court can grant permanent or preliminary injunctions to service providers and require that technical measures are adopted to stop or prevent at a particular time any acts, which are considered infringements of copyright. Furthermore, courts can issue a mandatory and prohibitory measure against providers to take down infringing material, which may be hosted on their servers. In addition, the court can also require providers to identify personal data of third parties, who have performed the copyright infringements.⁸⁰⁹

However, three aspects have to be mentioned in this context. Firstly, the Article does not regulate how the right to privacy and access to information of online users can be preserved. A new subparagraph should therefore be added to Article 179, which restricts courts from issuing injunctions, which violate the rights of users to privacy of personal data and to freely receive or impart information.

⁸⁰⁵ A request to grant a provisional injunction was based on a claim for infringement; Cabinet Chaillot, “Action for Infringement in France” <<http://www.chaillot.com>> (accessed March 16, 2012)

⁸⁰⁶ Ahmed Sedki Mahmoud, *Provisional Protection of Intellectual Property Rights According to the Provisions of Law No. 82 of 2002* (Dar Al-Nahda- El-Arabia, Cairo, 2004), at 27-28.

⁸⁰⁷ This outcome has been reached by comparing Article 179 and Article 194 of the CCP Law and its amendment.

⁸⁰⁸ Before the amendment of Article 194 of the CCP Law, the Egyptian Cassation Court judges had discretion and could award provisional measures, even if this was not stipulated in the CCP Law or in any other relevant specialised law. In this regard, Egyptian Cassation Civil Court, No.53-455 (Jan 20, 1988), at 123.

⁸⁰⁹ Article 47 of the TRIPs Agreement.

Secondly, as mentioned above, since the EIP entered into force in 2002 and until the submission of this research, no injunctions have ever been awarded, despite infringements increasing continually. The reason for this is subparagraph (5), which requires copyright holders to refer the dispute to a substantive trial within 15 days from when the injunction is ordered. Otherwise the provisional injunction will become invalid.⁸¹⁰ This means that whenever a court issues an injunction, copyright holders have to ask the same court to consider the merits of their case within no more than 15 days. However, Egyptian law does not regulate secondary liability and as a result, copyright holders have never applied for an injunction as of yet. This is because if they do, their liability against service providers will be rejected, as there is no law, which imposes secondary liability on them. In the end, the injunction will be invalid. For example, the Egyptian State Council Administrative Court rejected the claim by the Egyptian Telecommunications Regulator (hereinafter ETR) that all mobile operators should monitor all copyrighted contents. The court opined that the ETR did not have the power to decide this issue since the law pertaining to online activities is too unclear.⁸¹¹

In conclusion, the injunctions, which can be granted under Article 179 of the EIP, are non-exhaustive. As a result courts can issue any suitable injunction, which prevents the particular infringements. However as long as the EIP and the Egyptian Civil Code do not regulate secondary liability of service providers, service providers do not have to monitor or remove any illegal contents from their networks. Consequently, copyright holders cannot request economic courts to order injunctions, so long as Article 179(5) requires holders to transfer disputes to the economic court where it is still difficult to establish secondary liability for service providers.

Thirdly, there is nothing in the EIP or the relevant CCP Law to justify that holders should be prevented from limiting their loss by restraining imminent

⁸¹⁰Article 179(2) of the EIP.

⁸¹¹ Yasmine Saleh, "Egypt's Court Overturns Telecom News Monitoring" *Reuters* (Nov 27, 2010), <<http://www.reuters.com/article/2010/11/27/us-egypt-media-court-idUSTRE6AQ12V20101127>> (accessed March 13, 2012).

infringement. This means that the injunction measures in Article 179 of the EIP are ineffective and do not deter digital piracy. Hence, injunction measures in Article 179 of the EIP are inconsistent with Articles 41 of the TRIPs Agreement since Article 179 does enable holders to request measures from the competent courts, which prevent or stop imminent infringement activities. The EIP has to be therefore amended, so that holders can obtain provisional injunctions when there is evidence that an infringement is imminent, as well when an infringement has already taken place.

The British approach provides guidance since *quia timet injunctions* can be granted to restrain all kinds of imminent threats or damage.⁸¹² Before a court orders such an injunction, the court has to firstly ensure that the applicant has proven that there is an imminent danger; that the threatened injury will be practically irreparable; and that whenever the injurious circumstances ensue, it will be impossible to protect the plaintiff's interests, if relief is denied;⁸¹³ and secondly, that the applicant has "a strong probability that the feared conduct and damage will occur."⁸¹⁴

Once the applicant proves to the court these elements, English courts appear to be persuaded to grant *quia timet* injunctions "whenever it [seems] that what was going on was calculated to infringe the plaintiff's rights."⁸¹⁵ Evidence of a clear violation of copyright law or a likely difficulty in quantifying damages at a later stage, will mean that the court is more inclined to grant a *quia timet* injunction.⁸¹⁶

⁸¹² L.A. Sheridan, *Injunction and Similar Order* (Barry Rose Law Publisher, 1999), at 115.

⁸¹³ *Fletcher v. Bealey* (1884) [28 Ch.D. 688 at p. 698].

⁸¹⁴ As noted by Lord Buckmaster in *Graigola Merthyr Co. Ltd. v. Swansea Corporation* [1929] AC 344, 353, "a mere vague apprehension" would not be sufficient", at 116-117.

⁸¹⁵ As per Sumption QC in *British Telecommunications plc v. One in a Million Ltd* [1999] 4 All ER 476. In this case BT brought a claim against One in a Million, which threatened to infringe its trademarks. It was found that a *quia timet* injunction does not "require proof that damage would certainly occur as it was enough to show that what was going on was calculated to infringe the plaintiff's rights."

⁸¹⁶ Earlier infringing conduct by the same defendant is likely to be sufficient to convince the court to grant a *quia timet* injunction to prevent future infringing conduct. See also, *Linpac Moulding Ltd. v. Eagleton Direct Export Ltd* [1994] FSR 545, where the court granted an injunction to restrain future copyright infringement since the defendant had previously infringed the copyright.

5.6 CONCLUSION

The chapter defined the scope of injunction relief under Article 179 of the EIP. It was explained that courts only grant injunctions in respect of infringements, which have already occurred. Further, the list of injunctions in Article 179 of the EIP is non-exhaustive; so that courts can issue any appropriate injunction to prevent the different forms of infringement. However, Article 179(5) requires that the substantive dispute is referred to trial within 15 days from when the injunction has been granted, as otherwise the injunction measure becomes invalid. This explains why copyright holders will never request injunctions until the Egyptian civil system adopts a liability mechanism for service providers since it is impossible for copyright holder to prove that service providers owe them a duty of care, as no such concept exist in respect of service providers.

The chapter also explained that the available injunctions only cover infringements, which have already taken place, but not imminent copyright infringements, despite this being crucial. The thesis therefore recommends that the legislator adds a new subparagraph to Article 179 of the EIP, so that judges issue injunctions also in respect of imminent copyright infringements. The thesis suggests that the same test, which the UK courts have adopted for *quia timet injunction*, is adopted when the sub-section is drafted.

The Article 179 of the EIP has to be also amended, so that there is compliance with the TRIPS Agreement, but when provisional injunctions are granted, the rights of end users have to be also considered. The Article has to be amended, and a more detailed and transparent scheme adopted. The following matters should therefore be borne in mind:

- 1- A new Recital should be added to the EIP, which contains the principles of Article 19 of the Universal Declaration on Human Rights and Article 10 of the European Convention on Human Rights.
- 2- A new Recital should expressly prohibit general monitoring of end users' data online and the limitation of providers' liability should not be applied to cases where online service providers violate the rights of end users online in particular without the users' consent.

- 3- A new Recital should be added to the Preamble of the EIP, which defines the data of a user and a personal data breach as any kind of act, which may disclose the end user's data, including any of his data in any tangible or intangible electronic communication, whether stored internally or externally and in whatever form. Whoever commits such an act violates the data privacy of the end user online, even when such an act happened as a result of a security breach or for any other reason, so long as this act took place without the consent of the affected user.
- 4- Any natural or legal person is not allowed to breach the end users' data privacy online and to take pre-emptive measures to do so.
- 5- A new Recital in the Preamble of the EIP should state that injunction measures should be fair and equitable and should not be unnecessarily complicated or costly, set unreasonable time limits or cause unwarranted delays. All measures, procedures and remedies shall also be effective, proportionate and dissuasive in terminating and prohibiting the continuation of the infringement. Infinite measures or general monitoring of all information, which occur through electronic communication, should be prohibited.
- 6- The new Article should be required to firstly verify whether urgency is established and grant injunctions for a period of six months from the date of discovery and secondly should examine whether the case has merits, i.e. assess whether the applicant has a strong case.
- 7- As for imminent infringements, a new subparagraph should be added to Article 179, which requires applicant to prove that an infringing act is almost certainly about to happen and whether this causes irreparable harm to the copyright holder for which he cannot be compensated even if he succeeds in a subsequent infringement action and if this is the case the court must assess, which procedures is necessary and appropriate, including whether provisional measures should be ordered.

CHAPTER 6: CONCLUSION

The thesis comprehensively and critically analysed the substantive rules and enforcement provisions in relation to online service provider liability under international, bilateral and national laws, namely in the US and Europe. The thesis compared these substantive rules and enforcement provisions with those adopted by Egypt in order to identify in which aspects Egypt fails to regulate the liability of service providers.

Chapter 2 analysed the substantive rules and enforcement provisions of the liability approaches, in particular contributory liability and made recourse to US, French and German statutes and case law, particularly section 830(2) of the German BGB. The thesis concluded that secondary liability for internet service providers is based on a duty of care concept in all of these jurisdictions. This duty of care is not confined to preventing copyright infringement, but also extends to preventing and stopping further infringements if providers have been notified. However, to commence civil proceedings and to be granted injunctions, copyright holders have to establish that unlawful acts have been committed and that this causes them monetary damage.

Chapter 2 also analysed the enforcement provisions of the EIP and reference was made to Egyptian tort law, as enshrined in Article 163 of the ECC. Furthermore, the thesis explained that three core elements have to be established for a tort under Egyptian law, namely prejudice, fault and causation. Yet Article 163 does not apply the duty of care concept. The thesis also examined Article 169 of the ECC, which regulates joint liability and concluded that Article 169 does not spell out a necessary legal mechanism for holders to establish that they are owed a duty of care by providers. For secondary liability to be established in Egypt, the legislators have to add a new subparagraph to Article 169 of the ECC, similar to section 830(2) of the German BGB and add the same definitions as section 512 (k)(1)(A)(B) of the DMCA.

The thesis also recommended that the legislators adopt a duty of care concept and the definition contained in Recital 48 of the Preamble of Directive 2000/31.

In addition, the thesis recommended that the legislators should also define damages caused by unlawful acts of a service provider, as Article 13 (1) of Directive 2004/48 does. Furthermore, the Egyptian legislator should adopt the principles developed in the *Sony* case as best practice guidance when imposing secondary liability on internet service providers. Whilst France has adopted the concept of inducement liability, Egypt should not adopt this concept.

For the regulation of secondary liability, the thesis defined the scope of liability and immunity of service providers in the US and Europe. In this context, chapter 3 provided a comprehensive critical analysis of the temporary reproduction and communication rights, including the making available right, as regulated by the WIPO Treaties 1996, bilateral and national laws, particularly US and Egyptian law. The thesis discussed the Preparatory Memorandum to Articles 1(4) of the WCT and Articles 7 and 14 of the WPPT and compared them with Article 9(1) of the Berne Convention and found that the term “*storage*”, which is used in these Agreed Statements, should be interpreted in a way, which allows Member States to exclude temporary copies from the scope of the reproduction right of copyright holders online.

The same methodology was used to define the scope of the communication right, including the making available right. In this regard, the thesis interpreted the terms used in Article 8 of the WCT and Articles 10 and 14 of the WPPT and found that these Articles give holders exclusive rights to authorise any *communication to the public* by any means, including wire or wireless, and to *make their works available to the public*, in such a way that members of the public can access their works “*from a place and at a time individually chosen by them.*”

Further, the chapter explained when authors, performers and producers can assert their exclusive online rights, particularly the reproduction and communication rights under Articles 138(9), 147, 156, and 157 of the EIP and compared them with the same rights as granted in international agreements and concluded that the EIP regulated the temporary reproduction rights as covering both permanent and temporary forms. With regards to the communication right,

including the making available right, the thesis found that the EIP regulates this right similar to the WIPO Treaties 1996. The thesis analysed the Preparatory Memorandum of the EIP and highlighted that the delegations when drafting Article 138(16) did not define the scope of this right and did not define the terms in this Article. As a result, it is difficult for copyright holders to assert the communication right.

The thesis highlighted that the reproduction and communication rights under the EIP impose liability on internet service providers even for temporary infringing communications, which take place on their systems. The thesis therefore urges the Egyptian legislators to add a new Recital to the EIP and to adopt the interpretation for the term “*storage*”, as set out in chapter 3. The thesis also recommends that the legislator adopts the amendment proposal, which the Egyptian delegations submitted to the Diplomatic Conference of the WIPO 1996.

The thesis also suggested that the Egyptian legislators should revise Articles 138(9) & (16), 147, 156, and 157 in relation to the communication right to ensure that they are similar to the Agreed Statements of Article 8 of the WCT and Articles 10 and 14 of the WPPT. The Egyptian legislator should also define all the terms used in the text of the communication right, particularly the meaning of “public”, “place” and “choice.” In this context, the legislator can use the Preparatory Memorandum and the Agreed Statements of Article 8 of the WCT and Articles 10 and 14 of the WPPT as guidelines when defining the terms mentioned in the communication rights.

Finally, the Egyptian legislators should enact a new subparagraph after the limitations and exceptions in Articles 171 and 173 of EIP, so that online service providers are explicitly rendered immune from being held directly liable for infringing the communication right and any temporary reproduction rights, as long as the copies have been kept on their servers during the incidental digital transmission.

Chapter 4 discussed the immunity system adopted in the US and Europe and concluded that online service providers are not liable so long as they have no actual knowledge or are unaware about the illegal activities on their network systems and in case they become aware after receiving a sufficient notification from the holders, they must expeditiously and diligently remove the altered illegal information. In this context, unlike Europe, section 512 of the DMCA requires that all providers defined in section 512 of the DMCA adopt a policy to terminate the accounts of subscribers, who are considered repeat infringers, otherwise they may be held liable.

Hence, service providers can claim immunity if upon receiving a notification from the holders and they thereby having actual knowledge or them being aware of circumstances or facts suggestive of illegal activities, they expeditiously remove the works or put an end to the activities and if necessary terminate the account of the particular subscribers. As for the notification requirements, chapter 4 analysed section 512(c)(1)(3)(A)(i)(ii) of the DMCA and US case law and concluded that holders have to prove that providers have actual knowledge. Section 512(c) of the DMCA spells out a notice-and-take-down system, which holders can use to prove that providers had actual knowledge if the notification was sufficient. Under the DMCA the notification is considered sufficient if six elements are satisfied. This means that a failure to comply with these elements results in the notification being deemed insufficient to establish that the provider had actual knowledge. The thesis also discussed how US courts have developed a “red flag” test to evaluate whether providers are aware and explained how to apply this test, including the subjective and objective elements.

In addition the chapter analysed the main principles established under Articles 12-15 of the Directive 2000/31 and decisions from the Court of Justice of the European Union, French and German courts. The thesis concluded that the *Google* case makes clear that no actual knowledge has to be established if a service provider plays an active role, as playing an active role is sufficient to establish deliberate and intentional infringement. However, a provider, which merely plays a passive role, can escape liability if upon becoming aware diligently removes or disables access to the infringing material. It is noteworthy

that unlike France, neither Directive 2000/31, nor the Court of Justice has adopted the takedown regime.

The thesis highlighted the serious drawbacks of a notice regime for copyright holders and online providers. In this regard, chapter 4 concluded that the current takedown notice procedure has been heavily criticised for being easily abused, thereby harming legitimate end users and therefore violating the fair use doctrine. Some courts interpret the actual knowledge and awareness requirements in a very lenient way, whilst other courts have adopted a strict approach.

Strict interpretation means that a notice, which fails to substantially comply with the requirements, will not be considered to result in the provider having actual knowledge. However, in the *YouTube* case, the Second Circuit Court adopted a lenient interpretation and concluded that liability of service providers is based on “wilful blindness” when holders can prove that a provider is deliberately not dealing with a high rate of specific infringement on its platform.

In relation to Europe, it was also explained that liability is based on the diligent economic operator standard developed by the Court of Justice in the *L’Oreal* case. Under this new liability standard, a service provider is liable if the infringing activities are obvious and the provider fails to stop them. Unlike the “wilful blindness” doctrine, the diligent liability doctrine is based on the rationale that if a service provider is aware of copyright infringements, but fails to prevent them, the provider is liable.

As a result, the thesis concluded that it is unclear what is necessary to substantially comply with the notice provisions. This makes it less clear for providers to know when they can successfully plead immunity and this can result in providers adopting technology, so that they can evoke immunity. The thesis highlighted how the adoption of intrusive technology has an extremely negative effect on end users, particularly the rights to online privacy and access to information. Therefore, the thesis argued that courts should adopt a strict

interpretation, so that a fair balance is struck for all the parties involved in the digital transmission.

In addition, chapter 4 concluded that courts have to interpret the “*expeditiously*” and “*diligently*” requirements and clarify what an “*expedient*” and “*diligent*” response is by a service provider. This again causes uncertainty, as courts have to assess on each occasion whether the online providers’ response was insufficient and liability should therefore be imposed. The issue is that neither the statutes, nor case law interprets the terms.

Further, chapter 4 analysed Articles 171 & 172 of the EIP and concluded that the Egyptian delegations at the Joint Committee neglected to spell out in which circumstances an internet service provider can plead immunity. As a result, service providers are directly liable for all infringements of the digital communication right, so long as copyright holders have not authorised the use of their works. The thesis therefore recommends that the Egyptian legislator amends the EIP in such a way that it is expressly set out when providers can successfully plead immunity. The new immunity system should only adopt the actual knowledge requirement, so that providers cannot be held liable for only being aware, on the basis of wilful blindness or the diligent economic operator standard.

The Egyptian legislator should adopt the notification requirements listed in section 512(a)(b)(c)(d) of the DMCA and these elements should be strictly enacted. The thesis suggested that the principles developed by US courts, especially in the American *Hendrickson* and *CCBill* cases, should be followed, as they are very good guidelines for stringently enforcing the notification requirements. Finally, the thesis adopted a proposal for a new notice-and-take-down mechanism. The aim of this new mechanism is to avoid any drawbacks of the old notice-and-take-down system and to prevent that no harm is caused by the willful blindness doctrine and the diligent economic operator standard.

With regards to the rights of online end users, chapters 5 explored how the rights of end users and the scope of service providers liability are interrelated and

concluded that, unlike in Europe, providers can only evoke the safe harbor provisions under section 512(i) if service providers terminate the access to the account of “*repeat infringers in appropriate circumstances.*” The thesis discussed that it is difficult to define who a repeat infringer is. Unfortunately, both the DMCA and the American cases do not answer this question. Providers may therefore not know how to comply with this requirement, so that they can plead immunity. As a result, providers may invest heavily in intrusive technology and dedicate time to identifying repeat infringers, but this erodes the online privacy of end users.

However, as explained in chapter 5, in Europe, except in France, no policy has been adopted to terminate access of accounts of repeat offenders due to the principles contained in Articles 6 and 8(1) of the ECHR, Article 4 of Directive 2009/136 and Article 15(1) of Directive 2000/31. The thesis explained and analysed all the substantive rules imposed on the telecommunication sector to protect the online privacy of end users. In this context, the thesis highlighted that the main principles of these Articles are that providers must, without undue delay, notify personal data breaches to the competent authority and to the subscriber or those individuals, who have been affected by the breach, if the personal data breach is likely to adversely affect their personal data or privacy. Providers must also adopt a policy, so that personal data is securely processed on their system, and they must implement strong measures to prevent any incidents, which could lead to a security breach.

Further, chapter 5 examined the scope of the injunction measures, which copyright holders can request from national courts against service providers to prevent illegal acts. The thesis analysed Articles 12-15, 18 and 19 of Directive 2000/31 and Articles 2(3)(a) & 11 of Directive 2004/48 and Recital 24 of the Preamble of Directive 2004/48 and the recent Court of Justice *L’Oreal* and *SABAM* cases. It was explained that under Article 15 of Directive 2000/31 injunctive relief can be granted to prevent infringements from reoccurring. The chapter concluded that national courts when issuing injunctions have to take into account that injunctions cannot be infinite and only relate to specific infringements. However the thesis concluded that under the diligent economic

operator test developed by the Court of Justice, even after the *SABAM* case, service providers are required to technologically manage their system to prevent any illegal activities, even if such management violates end users' right to evoke the fair use doctrine or their right to privacy.

As for Egypt, the previous chapter analysed Article 179 of the EIP and the CCP Law and discussed the procedural conditions, which a copyright holder has to satisfy for the competent courts to issue injunctions. The most indispensable element, which courts should evaluate before issuing injunctions, is how urgent the demand is. The paper made clear that, contrary to French law, Egyptian courts do not assess the merits, but leave this determination entirely to the substantive trial. Recourse was made to French law to explain how the urgency element could also be adopted by Egypt and it was recommended that the Egyptian legislator adopts the French concept in this regard.

Also, the chapter defined the scope of the injunction measures under Article 179 of the EIP and concluded that this Article is structured in a way, which allows copyright holders to request any injunctions against service providers. However, at present injunctive relief can only be granted in respect of already committed infringements, but not imminent copyright infringements. The thesis explored the important rules for issuing injunctions and recommends that the legislator adds a new subparagraph to Article 179 of the EIP, so that judges can also issue injunctions in respect of imminent infringements. The thesis suggested that the legislator adopts the *quia timet injunction* test adopted by UK courts when drafting this new subparagraph.

Chapter 5 also explained why copyright owners have not yet requested injunctive relief in Egypt because of the last subparagraph of Article 179 of the EIP, which requires copyright holders to refer the substantive dispute to trial within 15 days from being granted the injunction, as otherwise the injunction measure becomes invalid. As discussed, no secondary liability can be currently imposed on service providers, so that copyright holders will not request injunctions until the Egyptian civil system adopts a liability mechanism for service providers.

The thesis also suggested that the rule in section 512(i) of the DMCA, which requires online service providers to adopt a policy to block the account of end users, should not be adopted, but instead the fundamental principles regarding access to information and online privacy should be implemented. The Egyptian legislator should also add a new Recital to Article 179 of the EIP and adopt similar principles to those contained in Article 15 of Directive 2000/31 and should also mention the objectives of Directive 2009/136. The Egyptian legislators should also adopt the principles developed in the *L'Oreal* and *SABAM* cases as best practice guidance when revising this Article.

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