

# DIGITAL APPLES AND ORANGES: A COMPARATIVE ANALYSIS OF INTERMEDIARY COPYRIGHT LIABILITY IN THE UNITED STATES AND EUROPEAN UNION

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Two recent European cases highlight how copyright holders in the European Union (“EU”) benefit from a higher level of protection than copyright holders in the United States. Particularly, the EU places a higher burden on online intermediaries,<sup>1</sup> like internet service providers (“ISPs”) and online content curators, to stop and prevent copyright infringement. The goals of this Note are to show the differences in intermediary liability that have caused European intermediaries to face higher legal uncertainties and compliance costs than their U.S. counterparts, and to highlight how different lobbying efforts by copyright holders and online intermediaries may account for these differences.

For the unfamiliar reader, Part I provides a summary overview of the EU legislative and judicial systems. Part II briefly reviews the World Intellectual Property Organization (“WIPO”) copyright treaties, the Digital Millennium Copyright Act (“DMCA”) and Europe’s Copyright and E-Commerce Directives, and the U.S. and EU responses to these treaties. Copyright holders in the United States had to negotiate with online service providers (“OSPs”) in order for the DMCA to become law, whereas involvement of OSPs in the corresponding European legislative process is not as readily apparent. Part III and Part IV review the line of European cases on intermediary liability leading up to the two recent cases

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1. Online intermediaries (online service providers or “OSPs”) are entities that communicate or facilitate the transmission of information and include internet service providers (“ISPs”) and content platforms such as Google, Facebook, YouTube, Blogspot, and others. Whether a business is an online intermediary under the law is not always clear and subject to debate. For example, Myspace may be a content host in one jurisdiction, but a publisher in another.

*Svensson v. Retriever Sverige AB*<sup>2</sup> and *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*,<sup>3</sup> which potentially increase the burden of OSPs to prevent copyright infringement. Intermediaries may have to actively monitor that copyright holders did not change the availability of their online works and may have to block access to copyright infringing websites under unclear guidelines.

Next, Part V compares and contrasts intermediary liability in both copyright regimes. In the U.S. and European regimes, there is a realistic understanding that intermediaries, like ISPs, play an important role in preventing and stopping copyright infringement. While the United States has come to accommodate intermediaries more through DMCA safe harbor provisions,<sup>4</sup> EU law has focused more on the interests of authors and publishers by providing a high level of copyright protection. This has increased the burden on EU intermediaries to proactively prevent infringement and has created uncertainty as to the extent of reasonable and necessary measures.

## I. BRIEF OVERVIEW OF EUROPEAN UNION LAW

Before analyzing the differences between intermediary liability regimes in the United States and the EU, it is necessary to first understand the EU's supranational nature. To that end, this Part reviews the legislative process and the interplay of national courts and the European Court of Justice ("ECJ").

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2. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* (Feb. 13, 2014), <http://eur-lex.europa.eu/legal/content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

3. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* (Mar. 27, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0314&from=EN>.

4. 17 U.S.C. § 512 (2012). Service providers can also receive immunity for other causes of action, such as defamation and false information, as long as certain conditions are met. 47 U.S.C. § 230 (2012).

A. THE EUROPEAN UNION—LEGISLATIVE PROCESS AND ADJUDICATION

1. *Introduction*

One of the EU's key objectives is to develop a Union-wide, harmonized "single market"<sup>5</sup> which allows the free movement of people, goods, services, and capital.<sup>6</sup> The goal is to allow individuals to "live, work, study or retire" in any EU country ("Member State"), for consumers to benefit from increased competition and a wider choice of goods, and for businesses to operate easily and cheaply within the EU.<sup>7</sup> The EU has deemed the protection and harmonization of intellectual property rights an "essential element" to remove restrictions on the freedom of movement of goods and services and to reduce anti-competitive practices.<sup>8</sup> Therefore, the EU's single-market objective creates an incentive to reduce differences between copyright protection regimes of different EU nations and to "reduce barriers to trade and to adjust the framework to new forms of exploitation."<sup>9</sup> Under the EU Treaties, Member States must adopt, implement, and enforce all of the current EU rules, including "directives" on intellectual property law.

2. *EU Legislative Process—Creating Directives*

To understand the differences in intermediary liability, it is worth exploring the legislative process to enact directives, which serve as an important source of EU law and shape the drafting of laws at the national level. First, the national heads of all Member States, who form the European Council, set the EU's overall political direction. Three institutions create laws together: 1) The European Parliament ("Parliament"), directly elected by EU citizens; 2) the European Council of Ministers ("Council of Ministers"); and 3) the European Commission ("Commission"), which consists of Commissioners from each Member State. The EU can pass several types of binding legislative acts:

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5. Eur. Comm'n, *General policy framework*, THE EU SINGLE MARKET, [http://ec.europa.eu/internal\\_market/top\\_layer/index\\_en.htm](http://ec.europa.eu/internal_market/top_layer/index_en.htm) (last updated Oct. 10, 2014).

6. *Id.*

7. *Id.*

8. Eur. Comm'n, *Intellectual Property*, THE EU SINGLE MARKET, [http://ec.europa.eu/internal\\_market/intellectual-property/index\\_en.htm](http://ec.europa.eu/internal_market/intellectual-property/index_en.htm) (last updated Oct. 3, 2014).

9. Eur. Comm'n, *Copyright and Neighbouring Rights*, THE EU SINGLE MARKET, [http://ec.europa.eu/internal\\_market/copyright/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/index_en.htm) (last updated Oct. 3, 2014).

regulations, directives, and decisions.<sup>10</sup> These acts take precedence over national law and are binding on national authorities.<sup>11</sup> A directive is a legislative act that sets out a goal for EU countries to achieve. It “directs” Member States to achieve the result, but leaves it up to each Member State to determine how to implement the directive in national laws.<sup>12</sup>

The legislative process to pass a directive starts with the Commission, which creates and publishes Green Papers “to stimulate discussion on given topics at [the] European level.”<sup>13</sup> The Commission invites “relevant parties . . . to participate in the consultation process and debate.”<sup>14</sup> After input from the relevant parties, the Commission creates a draft of a directive and presents it to the Parliament.<sup>15</sup> If Parliament’s majority approves the draft, the Council of Ministers will then vote on it. If the Council of Ministers’ necessary majority approves the Parliament’s proposed act, it becomes a directive.<sup>16</sup> Otherwise, these two legislative bodies can adopt and modify the proposed directive through certain procedures until both agree on one version.<sup>17</sup>

Once the EU’s legislature adopts the directive, each Member State is responsible for implementing it within a certain timeframe. Due to each Member State implementing the directive separately, differences can exist

10. See *Regulations, Directives and other acts*, EUROPA, [http://europa.eu/eu-law/decision-making/legal-acts/index\\_en.htm](http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm) (last visited Jan. 23, 2015).

11. See Eur. Comm’n, *Monitoring the application of Union law*, EUROPEAN COMMISSION AT WORK, [http://ec.europa.eu/eu\\_law/introduction/treaty\\_en.htm](http://ec.europa.eu/eu_law/introduction/treaty_en.htm) (last updated Sept. 9, 2014).

12. EUROPA *Regulations*, *supra* note 10.

13. *Glossary—Green Paper*, EUROPA, [http://europa.eu/legislation\\_summaries/glossary/green\\_paper\\_en.htm](http://europa.eu/legislation_summaries/glossary/green_paper_en.htm) (last visited Mar. 20, 2015).

14. The relevant parties include Member States, public bodies, NGOs, companies, and citizens. See, e.g., Eur. Comm’n, *Public Consultation 2009 – 2010 Creative Content in a European Digital Single Market: Challenges for the Future*, AUDIOVISUAL AND MEDIA POLICIES, [http://ec.europa.eu/archives/information\\_society/avpolicy/index\\_en.htm](http://ec.europa.eu/archives/information_society/avpolicy/index_en.htm) (last updated Apr. 12, 2012). For a public consultation example, see *Public Consultations: Green Paper on copyright in the knowledge economy (16.07.2008)*, THE EU SINGLE MARKET (July 16, 2007), [http://ec.europa.eu/internal\\_market/copyright/copyrightinfo/index\\_en.htm#maincontentSec2](http://ec.europa.eu/internal_market/copyright/copyrightinfo/index_en.htm#maincontentSec2). For an example of a public hearing, see *Public Hearing On Private Copying Levies*, EUR. COMMISSION, [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/programme\\_hearing\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/programme_hearing_en.pdf). For an example of a stakeholder dialogue, see *Final Plenary Meeting*, LICENSES FOR EUROPE (Nov. 13, 2013), <http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting>.

15. KAREN DAVIS, UNDERSTANDING EUROPEAN UNION LAW 59-60 (4th ed. 2011).

16. *Id.*

17. *Id.*

between different EU countries. Questions may arise as to whether a national law or a national court's decision interpreting the law is in line with the goals of European directives, leading the ECJ to rule on the issue and create a uniform interpretation of EU laws.

### 3. *The ECJ in the Copyright Litigation Context*

As the highest court in the EU's judicial branch, the ECJ interprets EU law to create uniformity among all EU countries.<sup>18</sup> The Court rules on a variety of controversies, including requests for preliminary rulings that occur when a national court asks the ECJ to interpret a point of EU law.<sup>19</sup>

The reference (or request) for a preliminary ruling is open to all Member States' national judges. Although national courts are the first line of interpretation and protection of EU law, a national court may refer a case already underway nationally to the ECJ in order to question the interpretation or validity of a national law under European law. For example, a party to a national litigation can argue that a national law violates a European directive. The national court could then stay its proceedings and request a ruling from the ECJ concerning the interpretation of European law. The question is often specific, for example: "Is Article *X* of a Directive *Y* to be interpreted as prohibiting a national law to obligate a Member State's citizens to do *Z*?" The ECJ will then interpret European law. For example, it could answer, "Article *X* of Directive *Y* precludes a Member State from obliging its citizens to do *Z*." After the ECJ makes its findings, the national court will resume its case and take into account the answer to the question asked.<sup>20</sup>

## II. HOW THE EU AND UNITED STATES ATTEMPTED TO SOLVE THE SAME PROBLEM, UPDATING COPYRIGHT LAWS IN THE DIGITAL AGE, AND ARRIVED AT DIFFERENT OUTCOMES

To better understand today's divergences in intermediary liability, this Note first provides a quick overview of the WIPO treaties followed by a

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18. *Court of Justice of the European Union*, EUROPA, [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm) (last visited Jan. 25, 2015).

19. *The reference for a preliminary ruling*, EUROPA, [http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/114552\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114552_en.htm) (last updated Feb. 20, 2013).

20. See Davis, *supra* note 15, at 89 ("A referring national court will . . . be bound by the ruling of the Court of Justice and is obliged to apply the ruling obtained to the case before it.").

brief history of the DMCA and the EU's Copyright and E-Commerce Directives, prior to reviewing European and U.S. caselaw.

#### A. WIPO TREATIES ON COPYRIGHT

In 1989, WIPO,<sup>21</sup> the UN agency that promotes IP development around the world, decided to prepare a possible revision to one of the treaties it oversees, the Berne Convention.<sup>22</sup> Over the next few years, the form and objectives of this possible revision changed. Instead, WIPO drafted two new copyright treaties, which have dramatically influenced intellectual property laws throughout the world.<sup>23</sup>

##### 1. *WIPO Copyright Treaty*

The WIPO Copyright Treaty ("WCT") is important because it is the first treaty to tackle digital copyright protection. In 1996, WIPO's diplomatic conference began addressing copyright issues in the digital age.<sup>24</sup> While the WCT adopted provisions of previous copyright treaties, like requiring signatories to apply the Berne Convention with respect to points of attachment, national treatment, and subject matter, it also broadened copyrightable subject matter to include computer programs and compilations of data that constitute intellectual creations.<sup>25</sup> The WCT also expanded the scope of rights to adjust to modern business practices. Authors gained the exclusive right to exploit the commercial rental of their works and the exclusive right to authorize any communication to the public.<sup>26</sup> Perhaps most novel, the WCT was the first treaty that imposed

21. WIPO's mission is to "lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all." WIPO, *What is WIPO?*, INSIDE WIPO, <http://www.wipo.int/about-wipo/en> (last visited Mar. 20, 2015).

22. Ralph Oman, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 140-41 (1993). On the history of the Berne Convention, see PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 34-38, (3d ed. 2013). To learn more about the Berne Convention, see WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WIPO ("The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted . . ."), [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html) (last visited Mar. 20, 2015).

23. See GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 46.

24. See *id.* at 46, 60.

25. See WIPO Copyright Treaty, arts. 4-5, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 65 (1997) [hereinafter WCT].

26. See *id.* at arts. 6-9. This is most analogous to the U.S. copyright's public performance right. See, e.g., Jane C. Ginsburg, *U.S. Compliance With the International*

obligations concerning technological protection measures on its signatories. Signatories must provide adequate legal protection and remedies to prohibit circumvention of technological measures aimed at stopping infringement.<sup>27</sup>

## 2. *WIPO Performances and Phonograms Treaty*

Similar to the WCT, the WIPO Performances and Phonograms Treaty (“WPPT”) came into existence at a time when neighboring rights<sup>28</sup> treaties were inadequate to respond to the digital dissemination of works, as consumers started to use new forms of content delivery, particularly the internet.<sup>29</sup> The WPPT provides broad public distribution rights, including protection for fixed and unfixed performances.<sup>30</sup> In addition to the expansion of rights, Article 18 of the treaty requires signatories to provide “adequate legal protection . . . against the circumvention of effective technological measures that are used by performers . . . that restrict acts . . . which are not authorized by the performers[.]”<sup>31</sup> Furthermore, Article 19 of the WPPT, like Article 12 of the WCT, calls for enforcement of laws that prohibit inducement of actions prohibited in the previous article.<sup>32</sup> Particularly, both the WCT and the WPPT implicitly enforce a sort of intermediary liability to provide remedies against unauthorized distribution or communication to the public of copyrighted works.<sup>33</sup>

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*Right of Communication to the Public After Aereo: Who Is “the Public”?*, THE MEDIA INSTITUTE (Aug. 21, 2014), <http://www.mediainstitute.org/IPI/2014/082114.php>.

27. WCT, *supra* note 25, at art. 11.

28. Continental Europe’s civil law copyright regime initially required authorship to receive exclusive rights. Over time, it became difficult to grant rights to those involved in creating works, such as music producers, performers, and movie studios, since authorship was tied to an individual creator. Civil law copyright regimes thus adopted the concept of neighboring or related rights to grant those who are not authors certain exclusive rights. *See generally* Goldstein & Hugenholtz, *supra* note 22, at 21.

29. *See* GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 60.

30. WIPO Performances and Phonograms Treaty, arts. 8, 9, 12, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT].

31. *Id.* art. 18.

32. *Id.* art. 19.

33. “Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing [actions] that [] will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty[.]” WCT, *supra* note 25, at art. 8; WPPT, *supra* note 30, at art. 19.

B. IMPLEMENTING THE WIPO TREATIES—ADAPTATION OF  
COPYRIGHT TO THE DIGITAL AGE

While the United States and EU both implemented the WCT and WPPT, it appears that American online intermediaries were able to lobby more successfully for “safe harbors” than were their European counterparts. Both the WCT and WPPT partially addressed the effect of technological changes on copyright law at a time when U.S. and EU legislatures were looking to incorporate the digital revolution into their copyright regimes.

1. *Lobbying Efforts Behind the 1998 Digital Millennium Copyright Act*

Copyright holders may have dominated early lobbying efforts for strong intermediary liability under the DMCA, but after initial proposed legislation, opposition groups provided sufficient pushback, resulting in negotiations that led to safe harbors for OSPs.

In 1992, then-Patent Commissioner Bruce Lehman chaired a Working Group on Intellectual Property to make recommendations for copyright law changes due to the advent of the “Information Superhighway.”<sup>34</sup> Lehman, who had previously lobbied on behalf of the software industry, held public hearings and issued a draft “Green Paper”<sup>35</sup> that proposed strong rights for copyright holders. Notably, the report included finding copyright infringement whenever a copyrighted work is loaded into random-access memory without the copyright owner’s express permission, thereby making most transmissions of copyrighted works “public performances” and characterizing any transaction in which a user obtains a copy of copyrighted works a “distribution.”<sup>36</sup> Congress introduced legislation based on this Green Paper with bipartisan support.

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While supporters of the bills expected quick enactment,<sup>38</sup> OSPs, consumer organizations, hardware manufacturers, and telephone companies came out in strong opposition. Support soon began to dwindle,

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34. See JESSICA LITMAN, DIGITAL COPYRIGHT 89–90 (2001).

35. Green Papers are tentative government reports that address a specific issue, like copyright law in the twenty-first century, after taking input from relevant parties, their discussions, and their proposals. Other nations and supranational bodies, like the EU, also use Green Papers for similar purposes.

36. Litman, *supra* note 34, at 90–93.

37. *Id.* at 94.

38. *Id.* at 122.



and copyright holders began negotiating with those deemed necessary to appease.<sup>39</sup> These negotiations included the movie industry, the music industry, book and software publishers, OSPs, telephone companies, TV and radio broadcasters, and computer manufacturers.<sup>40</sup>

Eventually, copyright holders and service providers reached a deal: OSPs would not be liable for infringing transmissions made by customers as long as they had no reason to suspect infringement was taking place, and OSPs would shut down copyright violations once notified.<sup>41</sup> In turn, these OSPs would turn over identifying information of accused copyright violators.<sup>42</sup>

## 2. *EU Directives in Response to the Internet Age and Lobbying Efforts*

Two pieces of EU legislation are relevant to the adoption of copyright laws in the digital age: the E-Commerce Directive and the Copyright Directive. The E-Commerce Directive attempted to harmonize laws governing online services, and the Copyright Directive enacted the WIPO treaties.

### a) The E-Commerce Directive

In 2000, the European Parliament adopted Directive 2000/31/EC to regulate certain legal aspects of the newly-emerged digital age, particularly the development of electronic commerce.<sup>43</sup> Among other things, this directive harmonizes rules governing service providers that Member States previously regulated separately.<sup>44</sup> The directive extends safe harbor

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39. *Id.* at 122, 125–26.

40. *Id.*

41. *Id.* at 135.

42. *Id.* Under the DMCA, conduits (ISPs), online hosts, and linking and search engine tools fall within the safe harbor if conditions are met. 17 U.S.C. § 512 (2012).

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

44. Catherine Seville, EU Intellectual Property Law and Policy 47 (2009). The directive seeks to promote “information society services,” that is, any service normally provided for remuneration, at a distance, by electronic means. The directive notes that these services were hampered by a number of legal obstacles: divergences in national legislation and legal uncertainty as to which national rules apply. Thus, the directive creates a legal framework to ensure the free movement of these “information society services” between Member States. E-Commerce Directive, *supra* note 43, at pmb1., recitals 1–2, 5.

protections to ISPs when 1) the service provider is a “mere conduit,” on the condition that the provider does not initiate the copyright infringing transmission; 2) the service provider, in its role to transmit, caches the data for the sole purpose of making the transmission efficient; or 3) the service provider offers hosting services used to make protected works available online.<sup>45</sup>

There are differences, however, between the DMCA and the E-Commerce Directive.<sup>46</sup> The directive provides immunity to fewer online service providers than does the DMCA. Services covered include online information services (online newspapers), online sellers of products and services, and basic intermediary services, such as internet access, transmission, and web-hosting services.<sup>47</sup> Some Member States have refused to extend the directive’s safe harbor protection to search engines.<sup>48</sup> These discrepancies between Member States are due to the nature of directives: each Member State has to implement national legislation to achieve the goals of the Directive.<sup>49</sup> Unlike the DMCA, the directive immunizes service providers from monetary damages, but does not limit injunctive relief.<sup>50</sup>

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45. E-Commerce Directive, *supra* note 43, at arts. 12–14.

46. *See* Goldstein & Hugenholtz, *supra* note 22, at 342.

47. *See* Eur. Comm’n, *E-Commerce Directive: Introduction of the Directive*, EU Single Market, [http://ec.europa.eu/internal\\_market/e-commerce/directive/index\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm) (last updated Oct. 3, 2014).

48. *Metro. Int’l Sch. Ltd. v Design Technica Corp.*, [2009] EWHC 1765 (QB) (holding that while Google does not fall under the e-commerce directive safe harbor, it is nonetheless not liable for libel); *see also* Thibault Verbiest et al., *Study on the Liability of Intermediaries*, Service Contract ETD/2006/IM/E2/69.

49. The E-Commerce safe harbors provide protection for transmission, caching, or hosting. Since a search engine does not fall neatly within these safe harbors, it is left up to the Member States to interpret the potential search engine protections under the directive. Spain and Portugal have enacted legislation to extend the article 15 “hosting” protection to search engines, provided certain conditions are met. Austria and Bulgaria have extended search engines article 12 “mere conduit” safe harbor protections to search engines, provided certain conditions are met. The United Kingdom legislature has been silent on the issue and at least one UK court has refused to extend E-Commerce safe harbors to a search engine. *Metro. Int’l Sch. Ltd.*, [2009] EWHC (QB) 1765 at [100]–[113]. For a discussion of these divergences, *see* GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 341–43.

50. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 343; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10 [hereinafter Copyright Directive].

b) The 2001 Copyright Directive

The 2001 directive “on the harmonisation of certain aspects of copyright and related rights in the information society” also implemented the WIPO treaties.<sup>51</sup> This directive, which is the most-debated and most-lobbied directive to date<sup>52</sup> focuses on three basic exclusive rights, namely those of 1) reproduction, 2) communication to the public, and 3) distribution.<sup>53</sup>

In 1995, the Commission published a Green Paper discussing the new developments in the information society, concluding that a high level of intellectual property rights should be maintained.<sup>54</sup> Similar to copyright holders in the United States, copyright holders in the EU influenced the debate from the start. Corporate representatives for content owners participated in the working group and created the report that was subsequently incorporated in the Green Paper.<sup>55</sup>

Unlike the DMCA where finding a compromise was necessary for successful enactment, exclusive rights for copyright holders increased while the EU legislature debated the law, including the oft-cited objective to provide a high level of copyright protection.<sup>56</sup> “[L]obbyists representing the interests of users . . . found themselves outmatched by representatives of the entertainment industry.”<sup>57</sup> The increase of exclusive rights during the legislature’s debates, user interest groups being outmatched by copyright holder lobbyists, and lack of evidence of negotiations between copyright holders and OSPs indicate that no such negotiations were necessary to enact the Copyright Directive.

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51. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 70 n.301.

52. BENJAMIN FARRAND, NETWORKS OF POWER IN DIGITAL COPYRIGHT LAW AND POLICY: POLITICAL SALIENCE, EXPERTISE AND THE LEGISLATIVE PROCESS 38 (2014).

53. SEVILLE, *supra* note 44, at 51–52.

54. *Id.* at 50.

55. Farrand, *supra* note 52, at 93–94. *But see* David Coen, Lobbying the European Union: Institutions, Actors, and Issues § 14.3.2.2 (2009) (mentioning that the group consisted of telecom business groups, which may have had contrary interest to copyright holders).

56. Farrand, *supra* note 52, at 94; Copyright Directive, *supra* note 50.

57. Farrand, *supra* note 52, at 94.

### III. *SVENSSON*—LINKING TO A WEBSITE CAN BE A COMMUNICATION TO THE PUBLIC

The *Svensson* decision arguably falls in line with the Copyright Directive's goal of affording a high level of copyright protection. In its decision, the ECJ uses the "new public" concept, which is introduced in the following background case.

#### A. UNDERSTANDING THE "NEW PUBLIC"—*SGAE V. RAFAEL HOTELES*

In 2006, the ECJ held that a hotel violated copyright holders' exclusive communication to the public right by forwarding a TV signal to its hotel rooms; this transmission was seen as the hotel providing copyrighted works to a "new public," hotel patrons, without authorization.<sup>58</sup> In this case, plaintiff copyright holders filed suit in a Spanish court against a hotel chain, arguing that the use of TV sets in the hotel rooms were communications of copyrighted works to the public.<sup>59</sup> After receiving the case from the national court, the ECJ affirmed its previous definition of "public" as "an indeterminate number of potential viewers" and held that a large number of successive guests in multiple hotel rooms constituted the "public" within the meaning of the Directive.<sup>60</sup>

Next, the ECJ analyzed whether the plaintiff right holders had previously authorized broadcasting to this particular public.<sup>61</sup> Using the non-binding Guide to the Berne Convention,<sup>62</sup> the Court analogized the situation at hand to one previously covered in the Guide: when a copyright holder broadcasts his copyrighted work, he has a target audience in mind.<sup>63</sup> When an intermediary re-broadcasts the work to those that are not part of the original target audience, it is an independent act through which the broadcasted work is communicated to a "new public," thereby requiring another authorization by the copyright holder.<sup>64</sup> The ECJ found that plaintiffs did not target hotel guests as their audience, the hotel lacked

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58. Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA, 2006 E.C.R. I-11543, 11562.

59. *Id.* at 11552–53.

60. *Id.* at 11557.

61. *Id.* at 11558.

62. WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (1978).

63. *SGAE*, 2006 E.C.R. I-11543 at 11558.

64. *Id.* at 11558–59.

the authorization to communicate to this “new public,” and thus found infringement.<sup>65</sup>

B. *SVENSSON*—HYPERLINKS ARE AN ACT OF COMMUNICATION OF COPYRIGHTED WORKS

In *Svensson*, the ECJ held that providing a hyperlink to a copyrighted work is a “communication” within the Copyright Directive’s exclusive communication to the public right.<sup>66</sup> Defendant Retriever Sverige operated a website that charged its members a monthly fee for providing curated content.<sup>67</sup> That is, members could select topics, and the website would give each member a list of links based on the member’s specified interests.<sup>68</sup> When the user clicked on one of the links, he would be redirected to another site to access the content.<sup>69</sup> There was a question of fact as to whether a user would realize that the links redirected him to another separate page.<sup>70</sup> Plaintiffs were journalists for the *Göteborgs-Posten* whose articles were printed in the newspaper and available on the newspaper’s website for free, some of which were read by Retriever Sverige’s members.<sup>71</sup>

Plaintiffs brought a suit against Sverige before the Stockholm District Court to obtain compensation due to defendant’s unauthorized use of plaintiff’s copyrighted works.<sup>72</sup> The Stockholm District Court rejected the plaintiff’s application, and on appeal, plaintiffs argued that the website infringed their exclusive right to make their copyrighted works “available to the public” because defendant had enabled its members to access plaintiffs’ articles through its website.<sup>73</sup> Defendant took the position that providing a list of internet links to other websites was not a “transmission

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65. *Id.* at 11560–62.

66. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* ¶ 42 (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

67. *Id.* at ¶ 8.

68. *Id.*

69. *Id.*

70. *Id.* This is typically achieved through loading up another website within a “frame” of the current website (i.e. a page within a page). This is akin to Google’s framing of pictures located on other servers in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). See *infra* note 95 and accompanying text.

71. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* ¶. 8 (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>

72. *Id.* at ¶ 9.

73. *Id.* at ¶¶ 10–12.

of any protected work.”<sup>74</sup> Rather, it merely “indicat[ed] to its clients the websites on which the works that [were] of interest to them [could be] found.”<sup>75</sup>

The Swedish Court of Appeal stayed its proceedings and referred several questions to the ECJ.<sup>76</sup> In essence, the Swedish court asked if the act of providing a hyperlink to a website with copyrighted works would constitute a “communication to the public” of the copyright works on said website, an exclusive right granted to the copyright owner under Article 3(1) of the Copyright Directive.<sup>77</sup> Second, the Swedish court asked if there was a difference in outcome to the first question if the website with the copyrighted works made its content freely accessible without restrictions.<sup>78</sup> Third, the Swedish court asked if there would be any difference if after clicking on the link, the user saw the copyrighted works in such a way so as to give the impression that the works were part of the linking website.<sup>79</sup>

The ECJ addressed these three questions in a single analysis. It first noted that every act of communication of a work to the public has to be: 1) an “act of communication,” and 2) to the “public.”<sup>80</sup> With regard to the “act of communication” requirement, the ECJ cited prior case law specifying that this term must be construed broadly to comply with the Copyright Directive’s policy objectives, particularly the high level of protection for copyright holders.<sup>81</sup> Referring to its decision in *SGAE*, the ECJ stated that making content “available to the public” in such a way that members of the public could access the content if they so desired indeed constitutes an “act of communication.”<sup>82</sup> The ECJ then concluded that the

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74. *Id.* at ¶ 12.

75. *Id.*

76. *Id.* at ¶ 13.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at ¶ 16. In *ITV Broadcasting v. TV Catchup*, the ECJ held that defendant’s business, a service that lets UK TV subscribers receive live streams through the web, which the subscribers would receive through their TVs, was a communication to a new public because the retransmission by TV Catchup was a different company than the broadcasters, transmitting without the authorization of the broadcasters. Thus, each new type of transmission or retransmission must be authorized individually. Case C-607/11, *ITV Broad. v. TV Catchup* ¶¶ 21, 31 (Mar. 7, 2013), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0607&from=EN>.

81. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* ¶ 17 (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

82. *Id.* at ¶ 19 (citing Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 E.C.R. I-11543 ¶ 43).

scenario of this case did in fact constitute making content available to the public in this manner. “[T]he provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’,[sic] within the meaning of [Article 3(1) of the Copyright Directive].”<sup>83</sup>

The ECJ’s analysis implies that, unlike the facts in *SGAE*,<sup>84</sup> an act of communication exists even if no actual copyrighted work is transmitted.<sup>85</sup> Here, the hyperlinks pointed to the location of another website which the user could then access, assuming the other website made its content available to all users.<sup>86</sup> Yet, the ECJ found that hyperlinks made copyrighted works available within the meaning of an “act of communication.”<sup>87</sup>

The ECJ then examined the second element of the exclusive right, namely that the communication be made to a “public.” Following *SGAE*, the ECJ defined the term “public” as “an indeterminate number of potential recipients” implying a “fairly large number of persons.”<sup>88</sup> Applying this rule to the facts of the case at hand, the ECJ held that Retriever Sverige’s act of communication, providing links on its website, was aimed at all potential users of the website, and was therefore directed to “an indeterminate and fairly large number of recipients.”<sup>89</sup> However, in order to fall within the “communication to the public” right under Article 3(1) of the Copyright Directive, defendant’s communication would have to address a “new public,” that is “a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.”<sup>90</sup>

The ECJ then found that defendant’s hyperlinks addressed exactly the same public the plaintiffs contemplated, since the original content from the *Göteborgs-Posten* news website was available to all members of the

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83. *Id.* at ¶ 20.

84. *SGAE*, 2006 E.C.R. I-11543 at 11552; Case C-607/11, *ITV Broadcasting v. TV Catchup* ¶¶ 10-13 (Mar. 7, 2013), <http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62011CJ0607&from=EN>.

85. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* ¶ 12 (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

86. *Id.* ¶ 8.

87. *Id.* ¶ 20.

88. *Id.* ¶ 21.

89. *Id.* ¶ 22.

90. *Id.* ¶ 24.

public who wished to access the website and its copyrighted works.<sup>91</sup> Furthermore, the ECJ held that a user's belief or disbelief that copyrighted works were housed on the same website as the links was irrelevant in determining whether or not the linking website had communicated copyrighted works to a new public.<sup>92</sup> However, if the copyright holder at a later time restricted access to its website, making it no longer available to the public and the defendant continued to provide the works to its members, then the members would constitute a new public, fulfilling both elements of a "communication to the public."<sup>93</sup>

The ECJ thus ruled that "Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website [did] not constitute an act of communication to the public[.]"<sup>94</sup>

C. COMPARISON TO THE UNITED STATES—*PERFECT 10, INC. V. AMAZON.COM*

The U.S. case most analogous to *Svensson* is *Perfect 10, Inc. v. Amazon.com*, best known for holding that displaying thumbnail images in Google search results did not infringe the copyright of the original images because Google's use of the images was "highly transformative" and therefore fell within the fair use exception.<sup>95</sup> In *Perfect 10*, the Ninth Circuit also upheld the lower court's decision that in-line links and framing did not constitute a violation of plaintiff's right to perform or display a work publicly.<sup>96</sup> Specifically, the Ninth Circuit found that, in providing in-line links to images on another server and framing around these images, "Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself."<sup>97</sup> According to one commentator, the Ninth Circuit thus endorsed the view

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91. *Id.* ¶ 27–28.

92. *Id.* ¶ 29.

93. *Id.* ¶ 31.

94. *Id.* ¶ 32.

95. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163, 1168 (9th Cir. 2007).

96. *Id.* at 1160. *But see* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000) (holding that defendants knowingly linking to sites that automatically commence the process of downloading the circumvention software where a user is transferred by defendants' hyperlinks would amount to "transferring" the software to the user themselves, since the website had no other content except for the circumvention software).

97. *See Perfect 10*, 508 F.3d. at 1161 n.7.



even though framing of and deep linking to these images made it appear as if Google was hosting them, these practices do not constitute infringement of the copyright in the full-sized images.<sup>98</sup>

#### IV. *UPC TELEKABEL*—ISP CAN BE ORDERED TO BLOCK INFRINGING WEBSITES

In *UPC Telekabel*, the ECJ upheld a national law requiring ISPs to block infringing websites by balancing the rights of the participants: the ISP, the copyright holders who seek to stop infringement, and internet users who use the ISP to connect to the internet. To better understand the Court's analysis, the following two ISP liability cases shed light on the interplay of the parties' "fundamental rights."<sup>99</sup>

##### A. PREVIOUS ISP LIABILITY CASES ON BALANCING FUNDAMENTAL EU RIGHTS

###### 1. *Courts Must Balance Fundamental EU Rights*—Promusicae de Música de España (Promusicae) v. Telefónica de España

In *Productores de Música de España (Promusicae) v Telefónica de España SAU*, the ECJ held that ISP customers' right of privacy could outweigh a copyright holder's right to ISP customer information to file civil suits against individual infringers.<sup>100</sup> Spanish copyright holder collective Promusicae brought an action against ISP Telefónica to obtain its customers' personal information with the goal of filing lawsuits against internet users who infringed Promusicae members' copyrights by downloading music through file-sharing software KaZaA.<sup>101</sup>

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98. For the "server theory" in this case, see Jane C. Ginsburg, *Take Down/Stay Down: RIP in France? But Little Solace for Google...*, THE MEDIA INSTITUTE (Aug. 6, 2012), <http://www.mediainstitute.org/IPI/2012/080612.php>. Professor Ginsburg argues that the Ninth Circuit implicitly endorsed the view that there cannot be infringement when the copyrighted work is not copied to the OSP's server, but rather, the OSP merely loads the images into the user's browser directly from the copyright holder's authorized server. *Id.*

99. See generally Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1. This charter articulates the universal values, such as dignity, solidarity, freedom, and equality, on which the EU is founded. *Id.* Relevant rights include the protection of personal data, freedom to conduct a business, and the right of property, including intellectual property. *Id.*

100. Eur. Comm'n, *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU*, judgment of 29 January 2008, SUMMARIES OF IMPORTANT JUDGMENTS (last updated July 2008), [http://ec.europa.eu/dgs/legal\\_service/arrets/06c275\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/06c275_en.pdf).

101. *Id.*

The ECJ held that it was “necessary to reconcile the requirements of the protection of different fundamental rights in the case, . . . the right to the protection of personal data and an effective remedy [to protect the copyright owner’s fundamental right to property].”<sup>102</sup> Thus, the ECJ assigned the task of balancing these conflicting rights, protection of personal data and the effective remedy of IP rights, back to the national court.<sup>103</sup>

2. *Internet Users’ and ISP’s Rights Can Outweigh Copyright Holder Rights*—SABAM v. Scarlet Extended

In *SABAM v. Scarlet Extended*, the Court held that a national court could not order an ISP to monitor all data in its network and filter any copyright-infringing content because it was not a fair balance of the fundamental rights in question.<sup>104</sup> Copyright collection society SABAM sued Belgian ISP Scarlet Extended to stop its clients’ current copyright infringement and to prevent future infringement by blocking the transmission of files containing copyrighted musical works through peer-to-peer software.<sup>105</sup> Specifically, SABAM sought an order requiring Scarlet to make it impossible for its customers to send or receive such files and for Scarlet to provide SABAM details of the measures it would apply to comply with the judgment.<sup>106</sup> The Belgian court in the first instance ruled for SABAM, finding that internet users had infringed the plaintiff’s copyrights and appointed an expert to investigate plaintiff’s proposed technical solutions.<sup>107</sup> Scarlet appealed, and the national court referred the case to the ECJ, asking whether the ISP’s or the ISP customer’s fundamental rights would be violated if the ISP had to implement a system to monitor all communication of all its customers in order to prevent copyright infringement.<sup>108</sup>

The ECJ held that a court order requiring an ISP to pay, implement, and maintain a costly system which indiscriminately filters all electronic communications passing through its services to identify and block the

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102. *Id.*

103. *Id.*

104. Case C-70/10, *Scarlet Extended SA v. Société Belge des auteurs, compositeurs et éditeurs (SABAM)*, 2011 E.C.R. I-12006, 12028.

105. *Id.* at 12017–18. Specifically, under Belgian law a national court may issue an injunction against intermediaries whose services are used by a third party to infringe a copyright. *Id.*

106. *Id.* at 12018.

107. *Id.* at 12019. While the ISP did not infringe plaintiff’s copyright, under the E-Commerce Directive the ISP may have to provide injunctive relief. *Id.*

108. *Id.*

unlawful transmission of copyrighted works would infringe the ISP's fundamental freedom to conduct its business.<sup>109</sup> Second, the ECJ held that such a filtering system could infringe the ISP's customers' fundamental rights to protection of personal data and the right to receive or impart information, since such a system could easily identify individual customers.<sup>110</sup> Third, the injunction in question could "potentially undermine freedom of information" as the filtering system could potentially block lawful communications.<sup>111</sup>

B. *UPC TELEKABEL*—ISPs HAVE A DUTY TO BLOCK INFRINGING WEBSITES

In 2010, film production companies Constantin Film Verlei and Wega filed suit in Vienna's Commercial Court against Austrian ISP UPC Telekabel ("UPC").<sup>112</sup> The plaintiffs sought a preliminary injunction ordering UPC to block its customers' access to a website, Kino.to.<sup>113</sup> The website in question made copyright protected movies available for download and streaming without the authorization of the copyright-holding plaintiffs.<sup>114</sup> Although it was not known how many, if any, UPC users accessed the website, the Commercial Court nonetheless ordered UPC to block the site's "domain name and current IP . . . address and any other IP address of that site of which UPC Telekabel might be aware."<sup>115</sup>

On appeal, the Higher Regional Court in Vienna partially upheld the order of the lower court, finding that "Article 81(1a) of the [Austrian copyright law] had to be interpreted in light of Article 8(3) of the

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109. *Id.* at 12026–27.

110. *Id.* at 12027.

111. *Id.* at 12027–28.

112. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ¶ 8 (Mar. 27, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0314&from=EN>.

113. *Id.* Under § 81(a1) of Austria's copyright law, if the infringer uses the services of an intermediary, the intermediary shall also be liable to an injunction. *Id.*

114. *Id.* ¶ 11.

115. *Id.* ¶ 12. For example, when a user types in the domain name "berkeley.edu" the user's browser connects to a Domain Name Server that translates these human-readable addresses (domain names) to the actual address, an IP address such as 134.97.0.178. Thus, even if UPC blocked access to "Kino.to," users would still be able to type in the IP address directly. That may be the reason the Commercial Court enjoined UPC to block to domain name and all IP addresses that derive from the domain name through domain name servers.

Directive 2001/29.”<sup>116</sup> The appellate court held that UPC was an “intermediary whose services were used” to infringe a copyright of another, allowing plaintiffs to request injunctive relief, as long as the ISP could choose the means to block access to the copyright infringing website.<sup>117</sup> UPC appealed to the Austrian Supreme Court, arguing that it could not be an intermediary under Article 8(3) of the Copyright Directive because it had no business relationship with the infringing website, nor was there any proof that UPC subscribers actually visited the website.<sup>118</sup> The Supreme Court stayed its proceedings and requested a ruling from the ECJ.<sup>119</sup>

The ECJ first addressed whether a copyright infringing website is “using the service” of the ISP under Article 8(3) of Directive 2001/29, making the ISP an intermediary.<sup>120</sup> If the ECJ found the ISP to be an intermediary, then injunctive relief would be possible under the directive.<sup>121</sup> The ECJ broadly defined an intermediary as “any person who carries a third party’s infringement of a protected work or other subject-matter in a network.”<sup>122</sup> Next, the ECJ stated that policy considerations behind Directive 2001/29 “to guarantee rightholders a high level of protection” would require including within this definition situations where a copyright infringer places content on the internet.<sup>123</sup> The ECJ found that ISPs were “inevitable actor[s] in any transmission of infringement over the Internet between one of its customers and a third party . . .”<sup>124</sup> Therefore, “an internet service provider . . . is an intermediary whose services are used to infringe a copyright . . . within the meaning of Article 8(3) of Directive 2001/29.”<sup>125</sup> Furthermore, to “exclude internet service providers from the

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116. *Id.* ¶ 14; see Copyright Directive, *supra* note 50, at art. 8(3) (stating that “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”).

117. *UPC Telekabel*, Case C-314/12 ¶ 14.

118. *Id.* ¶¶ 15–16.

119. *Id.* ¶ 17.

120. *Id.* ¶ 23.

121. *Id.* ¶ 26.

122. *Id.* ¶ 30.

123. *Id.* ¶ 31.

124. *Id.* ¶ 32.

125. *Id.* (citing Case C-557/07, *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecomm. GmbH*, 2009 E.C.R. I-1227). *LSG-Gesellschaft* held that an ISP is indeed an intermediary and subsequently found that Member States could require ISPs to give copyright owners contact information of infringing customers for civil litigation purposes, as long as Member States interpret the

scope of Article 8(3) . . . would substantially diminish the protection of rightholders sought by that directive . . .”<sup>126</sup> The ECJ also looked to the text of the directive, stating that nothing in Article 8(3) indicated a requirement of a specific relationship between the infringer and the intermediary.<sup>127</sup>

The ECJ also addressed the issue of lack of proof that UPC customers actually accessed the infringing website. The court clarified that seeking injunctive relief under Article 8(3) does not require the copyright holder to show that some of the intermediary’s customers actually accessed an infringing website, since the Copyright Directive’s purpose includes the prevention of infringement.<sup>128</sup> As the ECJ previously noted in *SABAM*, the key factor was not actual dissemination of copyrighted works, but that the copyrighted work was *made available* to the public.<sup>129</sup>

The other question the ECJ analyzed was whether an injunction requiring an ISP to block access to an infringing website (without specifying the measures the ISP has to take) would violate EU fundamental rights.<sup>130</sup> The fundamental rights at issue here were: 1) the right to conduct a business and freely use one’s own economic, technical, and financial resources under Article 16 of the Charter; 2) “the freedom of information of internet users[,]” protected by Article 11 of the Charter; and 3) the copyrights and related rights protected by Article 17(2) of the Charter.<sup>131</sup>

The ECJ acknowledged that the injunction in question would restrict the ISP’s free use of resources since the ISP would have to take potentially expensive compliance measures that could have a considerable impact on the business.<sup>132</sup> “However, such an injunction [would not] infringe the very substance of the freedom of an internet service provider . . . to conduct a business”<sup>133</sup> because the ISP could choose how to implement the injunction, and the ISP could avoid liability by showing that it had taken

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relevant directives in a way that is a fair balance struck between the different fundamental rights in question. *LSG-Gesellschaft*, 2009 E.C.R. I-1227 ¶ 47.

126. *UPC Telekabel*, Case C-314/12 ¶ 35.

127. *Id.*

128. *Id.* ¶ 36; *see also SABAM*, 2011 E.C.R. I-12006 at 12028 (holding that the infringement occurred by having the TV sets *available* to the public patrons of the hotel).

129. *UPC Telekabel*, Case C-314/12, ¶ 36.

130. *Id.* ¶ 42.

131. *Id.* ¶ 47.

132. *Id.* ¶ 50.

133. *Id.* ¶ 51.

“all reasonable measures.”<sup>134</sup> The ECJ reasoned that, since the ISP is merely the intermediary used by the infringing website, it should not be required to make “unbearable sacrifices.”<sup>135</sup> Rather, it must be possible for an addressee of such an injunction to make a showing that “all measures taken were indeed those which could be expected of him to prevent the proscribed result.”<sup>136</sup>

Second, the ECJ considered the freedom of access to information of internet users, stipulating that whatever measure an intermediary decided to adopt, it would have to strictly target the infringing website without affecting users who use the ISP for lawful access to information.<sup>137</sup> The ECJ further held that national courts must be able to verify that intermediaries are not interfering with the user’s right to freedom of information, and internet users must be able to assert their rights before the national court once the ISP’s measure have taken effect.<sup>138</sup> Third, citing *SABAM*, the ECJ acknowledged that although intellectual property rights were protected under Article 17(2) of the Charter of Fundamental Rights of the European Union, that right was not absolute, and injunctions need not stop infringement altogether.<sup>139</sup> Rather, an injunction would be sufficiently effective if it discouraged users to access the infringing website.<sup>140</sup>

The ECJ concluded that an intermediary, such as the ISP in this case, could be enjoined from making an infringing website accessible, even if some users could circumvent the access restrictions, so long as users are not deprived of their fundamental right to lawfully access information.<sup>141</sup>

C. COMPARISON TO THE UNITED STATES—VIACOM INTERNATIONAL INC. V. YOUTUBE, INC.

While no U.S. case is similar to *UPC Telekabel, Viacom International Inc. v. YouTube, Inc.* shows the burdens copyright holders face when arguing that DMCA safe harbor provisions should not apply, and illustrates their duty to send take-down notices to intermediaries, and the lack of injunctive relief available. In this Second Circuit case, content owner Viacom filed an infringement action against YouTube, which

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134. *Id.* ¶ 53.

135. *Id.* ¶¶ 53–54.

136. *Id.*

137. *Id.* ¶¶ 55–56.

138. *Id.* ¶ 57.

139. *Id.* ¶ 61.

140. *Id.* ¶ 62.

141. *Id.* ¶ 66.

allows users to upload videos on its website for public viewing.<sup>142</sup> The court overturned the lower court's grant of summary judgment, finding that a factual issue existed as to whether YouTube had actual knowledge of specific infringing activity, which would disqualify YouTube from the DMCA safe harbor.<sup>143</sup> On remand, Viacom argued that YouTube bore the burden of proving that it did not receive adequate takedown notices for copyright-infringing material on its website. Citing the DMCA statute, the lower court held that the burden of proving knowledge or awareness of specific infringing acts was plaintiff's responsibility.<sup>144</sup>

It is worth highlighting that YouTube had begun experimenting with a content identification and filtering system in 2007 which would automatically detect infringing content during the upload procedure.<sup>145</sup> The content identification process became available a few years later to all content owners. Viacom only attempted to collect damages for infringements prior to the roll-out of this system, which may have indicated to observers and the court that previous intermediary liability issues were drastically reduced, maybe even ceased to exist, because of the new filtering system.<sup>146</sup>

## V. ANALYSIS OF DIFFERENCES BETWEEN THE U.S. AND EU REGIMES

While both the United States and the EU passed laws to adjust copyright laws to the digital era, the high level of protection sought under the Copyright Directive and the comparatively weaker safe harbors under the E-Commerce Directive than those under the DMCA may cause European courts to afford European copyright holders stronger protections than their American counterparts. These stronger protections in turn create a higher burden for intermediaries under the European regime. The desired high level of protection may also explain broader,

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142. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

143. *Id.* at 32.

144. *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013), *appeal withdrawn* Mar. 19, 2014.

145. David King, *Latest content ID tool for YouTube*, GOOGLE OFFICIAL BLOG (Oct. 15, 2007), <http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html>.

146. See generally Peter S. Menell, *Assessing the DMCA Safe Harbors: The Good, the Bad, and the Ugly*, MEDIA INSTITUTE (Aug. 31, 2010), <http://www.mediainstitute.org/IPI/2010/090110.php>. Content ID filtering automatically detects infringing content being uploaded and allows the copyright holder to either block the video, or generate revenue through ads surrounding the video.

copyright holder friendly interpretation of the rights, like the different outcomes regarding hyperlinks in *Svensson* and *Perfect 10*, potentially leaving European fundamental rights as the backstop of intermediary liability.<sup>147</sup>

Both regimes also understood the importance of intermediaries to stop and prevent the new ways the internet could enable copyright infringement, even if the magnitude of the world wide web was not fathomed when enacting the DMCA or the directives. The question thus was not whether intermediaries could be held liable for infringement, but to what degree intermediaries ought to play a role in copyright enforcement. The outcome was similar systems where intermediaries were granted safe harbors under certain conditions, though differences exist as to how to qualify for safe harbor protection and what protections safe harbors provide.

A. POST-*SVENSSON* AND *UPC TELEKABEL*, A “HIGH LEVEL” OF PROTECTION CONTINUES TO BENEFIT COPYRIGHT HOLDERS IN THE EU

1. *Copyright Holders Benefit From Strong Protection Under the Copyright Directive*

As previously stated, these strong exclusive rights may be in part the result of 1) copyright holders participating in the drafting process of Copyright Directive, and 2) more lopsided lobbying efforts while the European Parliament considered the draft of the directive.<sup>148</sup> By comparison, the DMCA stalled despite early progress by copyright holders, because opposition groups created an effective counter lobby. The success of these opposing groups eventually forced negotiations between these competing interests, creating more robust safe harbors for intermediaries.<sup>149</sup>

In the EU, however, the Copyright Directive provides copyright holders the ability to enforce their rights even if the OSPs bear the costs: “Member States shall ensure that rightholders are in a position to apply for

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147. See generally P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use In Europe: In Search Of Flexibilities* (Nov. 14, 2011), available at <http://ssrn.com/abstract=1959554>. Hugenholtz and Senftleben argue that a measure of flexibility should be (re)introduced in national copyright systems in Europe. *Id.* Furthermore, while legal doctrines external to copyright, such as freedom of expression and information, can be used as a limit on copyrights, the permitted exceptions to the Copyright Directive should provide ample flexibility when implemented nationally. *Id.*

148. See *supra* Section II.B.

149. See *id.*



an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”<sup>150</sup> At the same time, the E-Commerce Directive leaves open the possibility for Member States to require OSPs to stop or prevent an infringement. Each of the safe harbor provisions—for the “mere conduit,” “caching,” and “hosting” scenarios—states that “[t]his Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.”<sup>151</sup>

Thus, the EU copyright regime operates under two relevant directives, one which seeks a high level of protection and requires a Member State to provide injunctive relief to copyright holders against intermediaries, and the other which allows for such relief within its safe harbor provisions. A plausible interpretation may therefore be that the strong wording of the Copyright Directive and the E-Commerce Directive’s permission for granting injunctive relief to copyright owners add up to more duties for entities that fall within these safe harbor provisions. A study on the implementation and effect in Member States’ laws of the Copyright Directive adds support, showing that the directive offers rights holders a “higher level of protection than is required under the international treaties that bind Member States.”<sup>152</sup>

*Svensson* and *UPC Telekabel* seem to confirm such an interpretation by finding that hyperlinks can constitute copyright infringement and by finding ISPs liable for blocking access to copyright infringing websites. In comparison, the court in *Perfect 10* concluded that hyperlinks are not a communication of copyrighted works, and copyright holders cannot compel ISPs to block the access to copyright infringing websites. Rather,

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150. Copyright Directive, *supra* note 50, at art. 8(3).

151. E-Commerce Directive, *supra* note 43, at arts. 12(3), 13(3), 14(3).

152. Lucie Guibault, Guido Westkamp, and Thomas Riber-Mohn explain:

The Directive offers right holders in the European Union a higher level of protection than is required under the international treaties that bind the Member States. The reproduction right is wider in its definition than it internationally is for authors (in the Berne Convention) and holders of related rights (WPPT, Rome Convention, TRIPS). The making available right conforms to WCT and WPPT norms, albeit that those instruments do not recognize a making available right for broadcasting organisations and producers of first fixations of films.

LUCIE GUBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECTS IN MEMBER STATES’ LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION 165 (2007).

under the DMCA the right holder must contact the website host, which could be outside any U.S. court's jurisdiction, to take down the infringing content.<sup>153</sup> However, this is not to say that the U.S. legislature has not contemplated increasing ISP liability.<sup>154</sup>

*2. Fewer Entities Qualify for the EU's Online Service Provider Safe Harbors Than for Those of the DMCA*

While Article 2(b) of the E-Commerce Directive defines a "service provider" as "any natural or legal person providing an information society service," that definition does not automatically cover "information location tools" (search engines) as does the DMCA.<sup>155</sup> Some Member States enacted legislation to give search engines the E-Commerce Directive's safe harbor protections while other Member States' national courts found that search engines do not qualify for such protection.<sup>156</sup>

As the internet and user behavior evolve, newly emerging intermediaries like content curators may find themselves with fewer protections in the EU than the United States.<sup>157</sup> *Svensson* may have given us a glimpse.<sup>158</sup> At no point in time did the defendant argue nor did the Court consider, that a content curator could be a new type of OSP,

153. 17 U.S.C. § 512 (2012). If the website host is outside U.S. jurisdiction, copyright holders have little opportunity to stop the infringement because they cannot seek an injunction against ISPs. This focus on hosts has led to increased bilateral agreements between the United States and other countries. For example, torrent website Demonoid was arguably taken down by Ukrainian authorities to better relationships with the United States. *See Ukraine Takes Down Demonoid As A Gift To The US Government*, TECHDIRT (Aug. 6, 2012, 2:35 PM), <https://www.techdirt.com/articles/20120806/12575219946/ukraine-takes-down-demonoid-as-gift-to-us-government.shtml>.

154. Mark Hachman, *New Bill Would Require U.S. ISPs to Block Pirate Sites*, PCMAG.COM (Sept. 20, 2010, 4:21 PM), <http://www.pcmag.com/article2/0,2817,2369402,00.asp> (describing Senator Patrick Leahy's efforts to introduce the new legislation to block access to websites by ordering domestic ISPs to block infringing websites).

155. 17 U.S.C. § 512; *see also* GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 342.

156. GOLDSTEIN & HUGENHOLTZ, *supra* note 22, at 342. Some member states have categorized search engines as "Online Service Providers" (OSPs) within the meaning of the E-Commerce Directive, giving them access to safe harbor protections. *Id.* at 342-43.

157. *See, e.g.*, Steve Rosenbaum, *User-Generated Content Is Dead - As Video Evolves*, FORBES (July 14, 2014, 3:57 PM), <http://www.forbes.com/sites/stevenrosenbaum/2014/07/14/user-generated-content-is-dead-as-video-evolves/>.

158. *See generally* Case C-466/12, *Nils Svensson v. Retriever Sverige AB* (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

deserving access to safe harbor protections.<sup>159</sup> The internet now contains more information than could be parsed by any one person and continues to add more information daily.<sup>160</sup> Content curators are arguably becoming increasingly important middle-men to give users actual access to online content, finding the relevant needle in the virtual haystack. Although no U.S. case is directly on point, projecting the court's rationale in *Perfect 10* and arguing that content curators like Google are OSPs, future content curators may indeed find themselves with safe harbor protections in the United States but not in the EU.<sup>161</sup>

3. *Even With Safe Harbor Protection, EU Intermediary Liability is Broader Than in the United States*

Even with safe harbor protections under the E-Commerce Directive, an OSP's affirmative duty to stop and prevent infringement creates increased liability for European OSPs than their counterparts face in the United States.

While *SABAM* may have at first appeared to be a victory for intermediaries, the ECJ's focus on fundamental rights, as opposed to the E-Commerce Directive's safe harbor provisions, impacted the scope of the analysis with regards to ISPs. The analysis now depends on the balancing of the fundamental rights of the stakeholders: 1) the ISP, 2) the copyright holders, and 3) the users.<sup>162</sup> Compared to *SABAM*, it may have been easier for the Court in *UPC Telekabel* to put the burden of preventing

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159. That is not to say that such an argument was not tried during the national court proceedings.

160. See generally *Total number of Websites & Size of the Internet as of 2013*, FACTSHUNT (Jan. 2014), <http://www.factshunt.com/2014/01/total-number-of-websites-size-of.html>; Christopher Roberts, *The size of the Internet – and the human brain*, TECHNOLOGY BLOGGERS (May 28, 2013), <http://www.technologybloggers.org/science/how-many-human-brains-would-it-take-to-store-the-internet/>. It is quite difficult to estimate the size of the internet. First, one has to decide for a metric. Is it number of webpages? The number of domains? If so, would a Facebook page count? Is it the number of bytes? If so, does it account for increasingly better compression technology? Is a movie adaptation equal to the book even if the size of each is vastly different? Using bytes as a crude approximation, Eric Schmidt indicated that the size of the internet in 2004 was roughly five exabytes (or five billion gigabytes). This number is approximated to be around one Yottabyte (or one quadrillion gigabytes) today.

161. That is not to say that the national courts would not consider the fundamental rights of these companies. After all, the goal of the single market is to increase competition and consumer choice.

162. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ¶ 46 (Mar. 27, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0314&from=EN>.

infringement on the ISP because the burden was lower. In *SABAM*, the injunctive relief order required the ISP to track all data packages and filter those with copyright infringing material, creating a huge burden on the ISP to finance and implement such a technology, potentially interfering with the ISP users' right to communicate with one another. In *UPC Telekabel*, the rights of the users were less relevant, since the infringing website at issue only provided unauthorized access to copyrighted movies.<sup>163</sup> UPC was merely ordered to block access to a website which made available copyrighted works without authorization. Second, in *SABAM* the injunctive order required the ISP to give the plaintiff the information of users who infringed the plaintiff's copyrights, which the ECJ found as a violation of the users' fundamental right of privacy. In contrast, the plaintiff in *UPC Telekabel* made no such requests. In short, *UPC Telekabel* shows that fundamental rights of stakeholders draw the current limits on intermediary liability.<sup>164</sup>

European ISPs likely face increased costs, such as costs to study and implement technological measures to follow court orders, legal costs, and legal uncertainty. In comparison, a U.S. ISP has yet to be ordered to block access to a website due to copyright infringement.<sup>165</sup> While American ISPs have engaged in voluntary efforts to curb copyright violation through peer-to-peer file sharing, they have not faced court orders to prevent access to copyright infringing websites.<sup>166</sup> *UPC Telekabel* and previous cases demonstrate European ISPs do not share the same fortune. Since injunctive relief is possible despite the E-Commerce Directive's safe-harbor, the question turns on whether the fundamental rights of the relevant parties are properly balanced. The high level of protection in the Copyright Directive makes it seem that the balancing analysis might add some weight on the side of the copyright holders and therefore against the intermediaries. Unlike ISPs in the United States, European ISPs may

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163. *Id.* ¶¶ 51-54.

164. *Id.* ¶ 66.

165. No U.S. lawsuit seeking to injunctive relief to block a website due to copyright infringement was found.

166. American ISPs worked with copyright holders to implement the "Copyright Alert System" to curb online infringement. See generally Ctr. for Copyright Info., *The Copyright Alert System*, THE CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.org/the-copyright-alert-system/> (last visited Mar. 11, 2015).

therefore have the additional burden to implement measures to protect copyright holders.<sup>167</sup>

The complication that arises for European ISPs lies in determining which block requests are permissible in light of the relevant fundamental rights. For example, a national court could order an ISP to block a website that streams infringing movies but also contains non-infringing information regarding an upcoming election. Even if the ISP complies, under *UPC Telekabel*, national courts must be able to check that intermediaries are not interfering with their users' right to freedom of information.<sup>168</sup> In other words, a national court may find a particular injunction to be a fair balance of the relevant fundamental rights and order the ISP to implement measures to satisfy the injunction. Even if the ISP complies with the injunction, "national procedural rules must provide a possibility for internet users to assert their rights before the court . . ." <sup>169</sup> The ISP therefore faces additional uncertainty. It may have to prove in subsequent litigation that its measures do not unduly interfere with users' fundamental rights.

Since *UPC Telekabel* affords internet users the ability to challenge an ISP's measures to comply with an injunction before the national courts, the ISP's costs could increase even further if the national court changes its order due to such challenges.<sup>170</sup> Using the previous hypothetical, if the ISP blocks access to an entire domain which has links to copyright infringing movies but which also contains information on candidates in an upcoming election, a court may find a block on the entire domain a violation of the users' fundamental right to access information. Thus, the ISP first expended resources to comply with the initial court order when a copyright holder sought injunctive relief, then expended resources to justify its measures when an internet user challenged the order, only to change or undo its actions because the court in the second proceeding finds that the ISP users' rights have been violated. Essentially, *UPC Telekabel* creates legal uncertainty as to whether a block order will remain valid, since a party beyond the right holder and the intermediary, namely

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167. Assuming the injunctive relief strikes a fair balance between the fundamental rights of the parties, including those of the users.

168. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ¶¶ 56–57 (Mar. 27, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0314&from=EN>.

169. *Id.* ¶ 57.

170. *Id.*

an ISP customer, could challenge an ISP's actions in response to court orders.

Finally, the court in *UPC Telekabel* gave little guidance on the measures an ISP must take to comply with an injunction. Although the court may have been motivated by a desire not to constrain ISPs excessively, this lack of guidance burdens ISPs with further uncertainty. Using the previous hypothetical, does the ISP have to block individual pages of a website, even if the costs are substantially higher than those of blocking the entire domain? The only guidance the ECJ provided on this point is that ISPs may argue that a block order would violate its fundamental rights, by showing that it undertook all reasonable steps. The court acknowledged that a block order could be circumvented and accepted such a result as long as the measures "have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users" to access a copyright infringing website.<sup>171</sup> However, the opinion lacks clarity as to how difficult an ISP must make user access to an infringing website. Is a blocking of infringing websites sufficient? Or must the ISP also block access to VPN servers and services known to connect to infringing websites?<sup>172</sup> What if only part of a website contains infringing content, and other parts provide non-infringing content? Here, the lack of minimum standards for ISPs to achieve when they receive a block order, combined with the lack of safe harbors to protect them, creates legal uncertainties that U.S. ISPs may never face because they cannot be ordered to provide injunctive relief once all safe harbor conditions are met.

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171. *Id.* ¶ 66.

172. For example, both Netflix.com and Hulu.com (which show copyright protected movies and TV shows) are only available to U.S. customers. A VPN connection allows a user from Europe to see Netflix content. Some users have reported that Hulu has blocked the IP addresses of well-known VPNs, making the streaming of its content to a European user less likely. This shows that stronger protection, blocking of well-known VPN IP addresses, is indeed possible and utilized. *See, e.g., Hulu Is Now Detecting PLA VPN Addresses*, PRIVACY ONLINE FORUMS (Oct. 2014), <https://www.privateinternetaccess.com/forum/discussion/2980/hulu-is-now-detecting-pia-vpn-access>.

B. BROAD COMMUNICATION TO THE PUBLIC RIGHT INCREASES  
THE BURDEN ON INTERMEDIARIES

1. *Allowing Hyperlinks to be a Communication to the Public Increases  
the Burden on European Intermediaries*

The ECJ in *Svensson* articulated that a hyperlink to copyrighted material is a communication of those works and can violate the copyright holder's communication to the public right if the hyperlink targets a "new public."<sup>173</sup>

One could regard the "new public" requirement as a safety net for intermediaries, since a publication on the internet and subsequent linking, as in *Svensson*, did not constitute copyright infringement.<sup>174</sup> After all, the ECJ ruled in favor of the content curator, not the copyright holder.<sup>175</sup> However, several aspects of the *Svensson* decision create the potential for increased duties for intermediaries. First, the ECJ equated a hyperlink with providing direct access to works.<sup>176</sup> Second, the ECJ noted that if a copyright holder, after making its content available to all internet users, decided to restrict access to its website, making its content no longer available to the public, and the intermediary circumvented the restricted access, the "new public" element would be met. The intermediary would then infringe the copyright holder's exclusive right to "communicate to the public."<sup>177</sup> Unfortunately, the ECJ did not specify what restrictions would suffice to change the intended target public, nor elaborate what circumvention means.

For example, a newspaper website uses a portal that requires visitors to provide their email address to access online articles, without requiring any sort of authentication if someone accesses the article's webpage directly.<sup>178</sup> Thus, if someone knows the URL of an individual article webpage, the

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173. Case C-466/12, *Nils Svensson v. Retriever Sverige AB* ¶ 31 (Feb. 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0466&from=EN>.

174. *Id.* ¶¶ 27–28.

175. *Id.* ¶ 42.

176. *Id.* ¶ 18.

177. *Id.* ¶¶ 31–32.

178. There are several ways to avoid search indexing. Adding a robots.txt file is commonly to the root of one's domain (e.g. [www.btlj.org/robots.txt](http://www.btlj.org/robots.txt)) would prevent Google search crawlers to parse the contents. Another way is to use a portal or online database since search engine crawlers cannot reach information behind query forms or online databases. See Rand Fishkin, *12 Ways to Keep Your Content Hidden from the Search Engines*, THE MOZ BLOG (Jan. 15, 2008), <http://moz.com/blog/12-ways-to-keep-your-content-hidden-from-the-search-engines>.

article could be accessed without entering through the portal. And assume that a content curator uses the website portal to access the articles and creates hyperlinks to the article pages. From the perspective of the newspaper, these articles were never searchable and can only be accessed through the website's portal, arguably restricting the intended "public" of these articles to those who agreed to share their email address with the newspaper. Would the content curator's linking to URLs constitute a "new public"? Here, an argument is conceivable that the content curator circumvented restrictions. Arguably, the content curator was aware of such a portal and should have known better. But what if the newspaper website, initially portal-free, decided to later create a portal to collect its readers' email addresses. If the hypothetical content curator linked to the individual webpages prior to the implementation of the portal, an argument is conceivable that the content curator circumvented added restrictions without even knowing of their existence. In contrast, not only did the Ninth Circuit in *Perfect 10* adopt a "server theory" that found no infringement for linking to images on another server for commercial gain, but the court also found that use of thumbnails stored on local servers qualified as fair use.<sup>179</sup>

But, it would be inaccurate to depict the United States as an intermediary haven. Under current interpretations of the DMCA, any "effective" access-prevention measure could potentially trigger anti-circumvention provisions of the DMCA.<sup>180</sup> Yet, there has been no case decided where the copyright holder introduced weak restrictions after the initial linking. Using our previous hypothetical—an online newspaper that initially published all articles online and then implemented weak access controls—it is conceivable that a U.S. content curator could fall into a similar "trap" like its hypothetical European counterpart.

## 2. *Post-Svensson, Internet Archives and Libraries Could Face Liability*

Post-*Svensson*, non-profit organizations like archive.org, which seek to create an internet library to offer permanent access to websites for researchers, historians, and scholars, may be held liable for copyright infringement. The purpose of these archiving organizations is to preserve online content that may otherwise disappear due to lack of maintenance by website owners.

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179. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

180. *See* 17 U.S.C. § 1201 (2012).



For example, a newspaper website initially offers all of its article webpages without any restrictions and without any measures to block indexing. Over time, archive.org's web-crawlers parse the newspaper's article webpages and store them for the future. If the newspaper decides to create a "paywall" that only allows paying members to see these previously freely-available article pages, then archive.org may instantly infringe the newspaper's exclusive right of communication to the public in the EU. After all, archive.org makes its content available to all internet users, even those who do not pay the newspaper website to access its contents.

In contrast, in the United States, archive.org's actions may fall under the fair use exception.<sup>181</sup> In the United States, fair use of a copyrighted work depends on 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the work as a whole; and 4) the effect of the use upon the potential market or value of the copyrighted work.<sup>182</sup> First, the non-profit character of internet archives and libraries may tilt the purpose and character factor in favor of the archiving non-profits. The second factor could help either side, though Congress seems open to idea of preservation regardless of the type of works.<sup>183</sup> The third factor would likely weigh against fair use, since these archives attempt to create a snapshot of the entire internet. The fourth factor, often deemed the most important factor, is difficult to assess. If every user starts using archives.com to locate articles that have recently been put behind paywalls, it would certainly impact the market for these articles. However, if archives are used similar to the use of newspaper on film in libraries, the market may not be impacted at all. Due to the vague nature of the fair use doctrine and lack of case law on internet archives, it is difficult to provide a definitive answer.

## VI. CONCLUSION

*Svensson* and *UPC Telekabel* highlight the European copyright regime's focus on a high level of protection, thereby imposing a higher burden on European intermediaries than their U.S. counterparts. Likely affected by the more successful lobbying efforts of copyright holders, European

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181. Whether online archives fall under the fair use exception is beyond the scope of this Note. For an introduction on this subject, see Mary Minow, *Digital Preservation and Copyright*, COPYRIGHT & FAIR USE (Nov. 10, 2003), [http://fairuse.stanford.edu/2003/11/10/digital\\_preservation\\_and\\_copyr/](http://fairuse.stanford.edu/2003/11/10/digital_preservation_and_copyr/).

182. 17 U.S.C. § 107.

183. See Minow, *supra* note 181.

copyright laws appear to be more willing to enlist the help of intermediaries to combat copyright infringement. Although both the U.S. and EU copyright regimes provide safe harbors for OSPs, fewer intermediaries fall within the definition of an OSP under European law than under the DMCA, potentially increasing the intermediary's cost of doing business in the EU. Even with safe harbor protections, European OSPs are only safe from damages and must comply with injunctive relief, like blocking infringing websites, thereby leading to added costs and uncertainty. Finally, the high level of protection under the EU Copyright Directive allows for a more expansive reading of the exclusive rights granted to copyright owners, allowing hyperlinks to potentially infringe exclusive rights.