UNIVERSITY OF SZEGED

Faculty of Law and Political Sciences

Baiyang Xiao

Regulating Online Piracy

A Comparative Study of Intermediary Copyright Liability in the U.S., EU, and China

Doctoral Dissertation

Supervisor:

Prof. Dr. Peter Mezei

Szeged, Hungary

October 2024

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I. Introduction

1. Setting the Scene

Intermediaries occupy a central role in modern commerce, social and political life, and the dissemination of information. Particularly, intermediaries have evolved from passively displaying offers to becoming sophisticated, central facilitators in the Internet economy, serving as conduits for all electronic transmissions, custodians of data, and gatekeepers of global information and knowledge.[1] Simultaneously, intermediaries have been in the focus of international policy and norm-setting forums due to their role as a hotbed for various illegal materials. As the SCOTUS put it, the internet allows its users to engage in activities 'on topics as diverse as human thought.'[2] The diversity of online information means that, alongside a wealth of important, useful, and entertaining content, the internet also hosts some of the worst products of human thought, including various types of content that violate the law, ranging from hate speech, discrimination, copyright violations and counterfeits.[3] Among others, copyright piracy is one of the most difficult, yet important, transnational problems in the twenty-first century.[4]

While there is consensus on the necessity for intermediaries to tackle copyright-infringing content, identifying and effectively addressing the responsible parties is often likened to a challenging 'whack-a-mole' problem.[5] Attention then shifts to intermediaries, who, with their deep pockets and identifiable presence, are better positioned to monitor and address copyright infringements due to their financial resources and technological capabilities.[6] Liability actions against intermediaries not only offer a cost-effective means of enforcing copyright but also encourage intermediaries to play a more active role in combating piracy.[7] Additionally, enforcement costs are transferred to intermediaries, as they may be required to implement detection and prevention measures by court order or adopt more cautious practices following an adverse ruling. For these reasons, regulators worldwide have introduced intermediary liability rules through various approaches, yet within a nearly identical framework by harmonizing standards for intermediary liability, granting immunities to intermediaries under

[1] Angelopoulos C (2016).
[2] Packingham v. North Carolina, 137 U.S. 1730, 1735 (2017).
[3] Wilman F (2020) 1.
[4] Yu PK (2003).
[5] Van Eecke P (2011) 1455; Edwards L (2016); Frosio G & Husovec M (2020); Pappalardo K (2023) 3.
[6] Elkin-Koren N (2014).
[7] Dinwoodie GB (2017) 17.

certain conditions, and ensuring that intermediaries are not obligated to monitor their users' activities. More importantly, such a framework successfully builds fundamental right safeguards into intermediary liability rules. For the past two decades, the intermediary liability rules arguably fostered thriving the digital economy.

Three particular forces, law, technology, and markets, gradually shape the emergence and evolution of intermediary liability rules. The landscape of intermediaries has transformed quite significantly since the adoption of DMCA and E-Commerce Directive (ECD). Not only does the safe harbor immunities turn out to be ineffective in combating online piracy, intermediaries and rightsholders constantly try to adopt advanced technology to counter piracy under new business environment. Users, intermediaries, and copyright owners, representing divergent interests, are the central stakeholders in this area, each advocating for policies and regulations that best serve their needs. Establishing an effective and prompt regulatory framework to combat the dissemination of illegal and harmful online content, while safeguarding fundamental rights and fostering innovation, is an inevitable but challenging task for regulators worldwide.

At the global level, policymakers have engaged in debates over whether intermediaries should be excluded from first-generation safe harbors and be subjected to enhanced liability and promote a shift from intermediary liability to intermediary responsibility. The latest endeavor, encapsulated in the controversial Art.17 of the Copyright Directive of the Digital Single Market (DSMD),[8] imposes a proactive obligation upon online content-sharing service providers (OCSSPs) to identify and block access to content that is identical to works claimed by copyright holders.[9] Moreover, the Digital Services Act (DSA), to a certain extent aimed at complementing the ECD, sets clear responsibilities for intermediaries, encouraging content moderation and due diligence obligations to protect users' rights while preserving the key pillars of the ECD.[10] U.S. copyright industry remains in a desperate search for effective solutions to block unauthorized flows of copyright infringing content.[11] Additionally, Chinese courts have increased the burden on intermediaries by adopting broader interpretations of duty of care and undefined necessary measures in judicial practices. Simultaneously, Chinese

[8] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[9] Rojszczak M (2022) 10; Ginsburg JC (2020).
[10] Quintais JP & Schwemer SF (2022).
[11] Elkin-Koren N et al. (2020) 10.

regulators have initiated an ambitious 'gatekeeper' legislative project aimed at imposing comprehensive and tightened 'primary responsibility' on major intermediaries. Some Chinese scholars and policymakers propose that China should repel the current DMCA-style safe harbor rules and impose a copyright filtering obligation on intermediaries. Meanwhile, Chinese copyright administrations have launched a series of administrative actions to combat online piracy with cooperation from intermediaries.

2. Research Questions

This thesis primarily examines the conditions under which intermediaries are held liable for copyright infringements committed by their users through the use of their services. It aims to address several key questions: When should intermediaries be held liable for users' copyright infringements in the three selected jurisdictions? What are the latest legal developments in intermediary copyright liability rules across these jurisdictions? What are the key features and shortcomings of the most recent EU copyright regulations on intermediary liability? How does administrative copyright enforcement contribute to combating online piracy? Should Chinese Copyright Law incorporate Art.17-style copyright filtering obligations?

Additionally, the thesis examines the implementation of intermediary liability in the U.S., EU, and China, analyzing national legislation, court rulings, and policy documents from both supportive and critical perspectives. Furthermore, it critically assesses the voluntary measures taken by intermediaries to detect and prevent copyright infringements, exploring their potential impact on users' fundamental rights, competition, and innovation. Finally, the thesis seeks to delineate the role and impact of intermediary liability within the broader context of internet copyright enforcement, discussing its potential role in governance and possible future developments in China.

The selection of this theoretical issue is motivated not only by the escalating urgency of online piracy in practice but also by significant contradictions within the current theoretical discourse in Chinese academia regarding intermediary liability. Without a clear and compelling rationale for this foundational question, any solutions proposed to address the rapidly evolving and intensifying problem of online piracy are likely to be piecemeal and reactive, leading to significant theoretical inconsistencies and limited practical enforcement. This ultimately hampers effective governance of online copyright infringements. Enacted nearly two decades

ago, the CDA, DMCA, ECD, and China's safe harbor rules aimed to balance competing interests,[12] and this research seeks to evaluate whether that balance remains appropriate today considering subsequent developments and the practical experience gained from these laws' application. To this end, the key questions this project sought to investigate through comparative legal analysis are:

1. How does the current legal framework in the U.S., EU and China regulate the copyright liability of intermediaries?

2. What are the underlying rationales and the potential impacts of the emerging trend toward shifting from reactive to proactive intermediary liability in the U.S., the EU, and China?

3. How do the DSMD and the DSA regulate intermediary copyright liability in the EU, and what are the potential positive benefits and negative impacts on users' fundamental rights, market competition, and innovation?

4. How do intermediaries voluntarily implement automated copyright content moderation under current intermediary liability regime?

5. How do state actors intervene and cooperate with intermediaries to combat online piracy through administrative enforcement?

6. How can China draw on the lessons and experiences of the EU and U.S. in intermediary liability norm-setting to better balance the interests of copyright owners, users, and intermediaries within its own legal framework?

3. Terminologies

3.1 Intermediary

The study of intermediary liability cannot be undertaken without a prior definition of the object of the inquiry. However, analyzing intermediary liability within the context of different cultures and regulatory frameworks immediately presents fundamental challenges of semantic interoperability. Proposing a clear definition for 'intermediary' and differentiate its different types is challenging due to the lack of consensus on a single definition across technology, economics and legal domains.[13] In practice, the lexicon of terms used in a variety of ways to describe the diverse types of intermediary services providers, like the Internet itself, is large and constantly evolving.

[12] 47 U.S.C. §230(c); 17 U.S.C. §512(c)(1)(A) (2012); Art.14 ECD; Art.1197 Chinese Civil Code.
[13] Gasser U & Schulz W (2015); Dinwoodie GB (2017) 4.

In the early days of the Internet, distinctions typically were drawn between content providers who made available content, and information and access providers who offered connectivity to the Internet.[14] By the mid-1990s, as major access service providers began offering online content and hosting services like personal homepages, the distinction between access and content providers blurred, making it less meaningful in assessing liability.[15] As the line between access and content or service began to blur, an alphabet soup of acronyms emerged, which often were used interchangeably, such as Online Intermediaries/Intermediaries,[16] OSPs (Online Service Providers)/ISPs (Internet Service Providers),[17] ICPs (Internet Content Providers), Online Platforms/Platforms.[18] In general, the intermediaries are involved in the flow of information at all layers of the digital sphere's pyramid, and thus they function as the 'valves' that control the traffic of content in their respective 'pipelines.'[19]

On the one hand, the lack of uniformity in both statutory and vernacular terminology reflects the dynamic nature of cyberspace and the challenge of defining categories of providers in a medium where business models and technologies are continually evolving.[20] Intermediaries differ pursuant to various criteria, including the activities and functions they serve, the actors they interact with and how they interact with them, their sources of revenue and associated business models, and the level of control they exercise over users' activities.[21] In practice, intermediaries often perform multiple roles simultaneously, making it challenging to precisely define their scope, and due to the vague definition of hosting intermediaries and the wide range of middleman functions online, numerous complex boundary cases arise. Particularly, first movers are gradually morphing from 'intermediary' to 'Everything Platform,' meaning that any number of interactions could take place in one centralized marketplace.[22] China's super intermediary WeXin is the best example of 'Everything Platform/APP.' By filling a social economic contextual need, this comprehensive intermediary has become a ubiquitous part of

[14] Elkin-Koren N (2005).
[15] Dinwoodie GB (2017).
[16] Cotter TF (2005); Perset K (2010) 9.
[17] Elkin-Koren N (2005)); Section 512(k)(1) of the DMCA.
[18] Gorwa R (2019b); Cohen JE (2017) 143; Scientific Foresight Unit (STOA) (2021) III.
[19] Fischman-Afori O (2021) 354.
[20] Elkin-Koren N (2005)
[21] Wilman F (2020).
[22] Heath A, 'Elon Musk's "everything app" plan for X, in his own words' (The Verge, 31 Oct 2023) <https://www.theverge.com/23940924/elon-musk-x-twitter-all-hands-linda-yaccarino-super-app>. All online resources cited in this thesis were accessed on 2 Sept 2024.

daily life in China since its launch by tech giant Tencent in 2011.[23] WeXin combines literally every aspect of our digital life, including social networking, social media, digital payments, internet browsing, livestreaming, medical services and more, into one single application through features and mini programs.[24]

On the other hand, investigating the notion of intermediary primarily requires interpreting definitions found in various legislation.[25] However, the terminology used to refer to different types of intermediaries has become complicated over the years because policymakers and regulators in different jurisdictions have adopted varied definitions in various regulations, policy documents and reports related to Internet governance.[26] As Dinwoodie suggests, even in ostensibly harmonized immunity frameworks, such as the implementation of the ECD in the EU Member States, there is variation in the interpretation of who qualifies under the definition or the safe harbor, which is often a fact-specific determination varying from case to case.[27] In addition, an initial literature review suggests that research on intermediaries is conducted across various disciplines and perspectives, each likely to frame their definitions differently.[28] Within individual domains or disciplines, the connotation of 'intermediary' may also vary when framed with different topics.[29]

3.2 Intermediary Copyright Liability

In general, the legislative framework for intermediary copyright liability is shaped by a combination of primary and secondary liability rules, available injunctions, and liability exemptions with their conditions, which collectively provide the basis for their operational boundaries. In addition, the legislative framework is complemented by another strain of norms that further define the regulatory environment for intermediaries, such as binding rules and non-binding sets of recommendations encouraged or induced by regulators, industry self-regulation or best practices, and terms and conditions set on the individual corporate level.[30]

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[23] Hoskins P & Wang F, 'WeChat: Why does Elon Musk want X to emulate China's everything-app?' (BBC, 30 Jul. 2023) <https://www.bbc.com/news/business-66333633>

[24] Yang Z, 'The dark side of a super app like WeChat' (MIT Technology Review, 18 Oct 2022) <https://www.technologyreview.com/2022/10/18/1061899/dark-side-super-app-wechat/>

[25] Wright S (2009).

[26] Angelopoulos C (2016).

[27] Dinwoodie GB (2017) 5.

[28] From a legal perspective, see Wielsch D (2019); from an economic perspective, see Sarkar MB et al. (1995); from a cultural perspective, see Maguire JS & Matthews J (2010); from a political perspective, see Tyllström A & Murray J (2021).

[29] Kuczerawy A (2015).

[30] Schwemer SF (2021) 379-80.

The commonly used term ‘secondary liability’ encompasses various types of claims and lacks an international consensus in the literature, thereby creating terminological challenges for comparative analysis. Other common terms are employed in order to define the concept of liability for third parties’ misconduct,[31] including ‘third-party liability,’[32] ‘contributory liability,’[33] ‘accessory liability,’[34] ‘indirect liability,’[35] ‘joint liability,’[36] ‘intermediary liability,’[37] or ‘intermediary copyright liability,’[38] and so forth.[39] In common law countries, secondary liability generally involves holding one party responsible for harm caused by the wrongful conduct of a third party.[40] That said, secondary liability is a third-party liability that is derivative or indirect in nature.[41] Some civil law countries have also adopted formulations that emphasize the indirect or derivative nature of liability, such as ‘joint liability’ or ‘indirect liability.’[42] Obviously, the adjectives in such terminologies indicate the derivative nature of the liability in relation to the primary misconduct. As Dinwoodie suggests, the formulations in civil law countries ‘emphasize the same elements that have been characterized in common law countries as contributory infringement.’[43]

Yet, these terms do not necessarily trigger the same outcomes.[44] Riordan succinctly suggests that ‘[m]uch of the confusion that has bedeviled this area stems from the use of undefined, inconsistent or misleading terminology.’[45] The diverse terminologies for secondary liability are primarily due to the dynamic nature of cyberspace, evolving business models and technologies, and varying legal traditions that impose different requirements to trigger secondary liability rules for users’ actions.[46] Indeed, the diversity of definitions in secondary liability adds

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[31] Dinwoodie GB (2017) 17.
[32] Yen AC (2006); Brunner L (2016).
[33] Grossman CA, (2005).
[34] Angelopoulos C (2021); Davies PS & Arnold R (2017).
[35] Dinwoodie GB (2017) 8; Menell PS (2008).
[36] Art.1197 Chinese Civil Code.
[37] Frosio G (2018a); Kuczerawy A (2015); Frosio G (2020a).
[38] Amirmahani A (2015); Angelopoulos C (2020).
[39] Glatstein BH (2004); Zittrain J (2006).
[40] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) (‘the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individually accountable for the actions of another’).
[41] Riordan J (2016).
[42] Dinwoodie GB (2017) 10.
[43] Ibid. 10.
[44] Ibid. 8.
[45] Riordan J (2016).
[46] See Chapter I.3.1.

complexity for comparative study and creates confusion for scholars. As Dinwoodie observes, finding an equivalent secondary liability doctrine for each jurisdiction is complex, making it challenging for scholars to conduct a comparative analysis between different legal systems.[47] Particularly, the secondary liability doctrine is not harmonized at the EU level, and is even under-analyzed in many national jurisdictions.[48]

3.3 Internet Regulatory Theories

In complex legislative environments that encompass hard law, soft law, informal mechanisms, and self- or co-regulatory initiatives, the distinct structures of legislation, monitoring, and enforcement interact with regulatory targets in diverse and often intricate ways.[49] These interactions are influenced by the specific organizational structures and differing motivational processes of the entities involved.

3.3.1 State-regulation

In the context of intermediary liability, the state is the only legal authority that has 'the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling.'[50] Generally, under this command-and-control regulatory mode, regulations are specified, administered and enforced by the state.[51] Indeed, regulation is not per se a legislative act: any intervention that 'links ordering processes with explicit objectives and measures' may be considered regulation.[52] In a narrow sense, regulation or regulatory frameworks that are 'issued for the purpose of controlling the manner in which private and public enterprises conduct their operations'[53] are usually associated with legislative or state authorities' interventions, as distinguished from forms of self-regulation and private ordering.[54]

State regulations, typically in the form of specific legislation, offer legal certainty by enabling individuals to predict both human behavior and institutional responses while protecting against

[47] Dinwoodie GB (2017) 6.
[48] Angelopoulos C (2016) 19; Wilman F (2020) 18.
[49] Hagemann R et al. (2018).
[50] Black J (2001) 106.
[51] Bartle I & Vass P (2005).
[52] Hofmann J et al. (2017).
[53] Majone G (2002) 9.
[54] Schulz W & Held T (2004).

the arbitrary exercise of state power.[55] Meanwhile, legislation can promote a certain level of homogeneity, as seen in European legislation, where Directives establish minimum standards to harmonize policy across EU Member States, ensuring consistent rules across different jurisdictions.[56]

The legislator's authority is broad and comprehensive, yet it is guided and constrained, at least theoretically, by individual rights, civil liberties, and constitutional principles, which can have a wide scope and thus limit the legislator in establishing laws and the authorities in enforcing them.[57] In particular, these perspectives are shaped by liberalism, which sees the nation state as the guarantor of individuals' fundamental rights and interests.[58] However, direct government intervention into the online expression and user behavior will raise more legitimacy contestations and dilemmas for both private gatekeepers and end users.[59] Moreover, legal uncertainty also arises as state regulation may struggle to keep pace with technological advancements in some cases.[60] As Husovec observes, 'any statutory schemes are quickly outdated, and very slow to deploy.'[61] Technology-neutral legislation is indeed desirable,[62] but the persistent challenge remains that regulations usually fails to treat different technologies fairly and effectively as they evolve.[63] Additionally, as disruptive technologies emerge more frequently and rapidly, state regulatory interventions lack necessary flexibility as it may either stifle or distort technological development if imposed too early, or fail to address critical issues if implemented too late due to a lack of effective oversight.[64] Notably, over the last decade, EU regulators ambitiously attempted to impose enhanced responsibilities on intermediaries to address illegal content online through a sector-specific approach, ultimately leading to a fragmented and unharmonized regulatory landscape.[65] Thus, the complex decision-making procedures involved in state regulations can pose significant obstacles to the effective protection and enforcement of rights.[66] Therefore, given the complexity of internet regulation, regulatory bodies often become overwhelmed with work and typically encourage industry self-

[55] Lifante-Vidal I (2020) 456-7.
[56] Kurcz B (2001); Dougan M (2000).
[57] Koop C & Lodge M (2017).
[58] Moravcsik A (1997).
[59] Wei L (2018).
[60] Moses LB (2007); Fenwick M et al. (2016).
[61] Husovec M (2017).
[62] Koops BJ (2006); Reed C (2007).
[63] Greenberg BA (2015); Marchant GE (2011).
[64] Kaal WA & Vermeulen EPM (2016) 571-2.
[65] Rojszczak M (2022).
[66] Krokida Z (2022) 31.

regulation, which urges actors to resolve issues internally before seeking intervention from the state regulator.[67]

3.3.2 Self-regulation

Black distinguished self-regulation from state regulation by arguing that self-regulation naturally fits within the new 'decentered' regulatory landscape, as it is inherently contextual and responsive, operating without direct government intervention.[68] Self-regulation most often takes the form of industry groups promulgating voluntary codes of conduct that members agree to adhere to.[69] Scholars argue that '[s]elf-regulation is a norm setting an enforcement by private actors, without the intervention of the state.'[70] However, this description does not fully capture the complexity of self-regulation, as state actors may also participate in self-regulatory practices. When the self-regulation is structured by the State without its direct involvement, it is referred to as 'regulated self-regulation.'[71] In practice, state regulation is often accompanied by self-regulation, conducted under the 'shadow of the State,' where all parties recognize that government intervention may occur if a compromise is not achieved or if public interests are at serious risk.[72]

On one hand, self-regulation offers legal flexibility, allowing rules to be updated or revised by industry players within shorter timeframes, without the lengthy legislative procedures typically required by state authorities.[73] Compared to state regulation, a greater extent of flexibility allows decentralized self-regulation initiatives to adapt technological progress more easily.[74] Under self-regulatory regime, private entities may possess extensive resources, necessary expertise, and highly trained staff to achieve a higher degree of compliance.[75] Particularly, the principles and standards for enforcement are often established through voluntary codes of conduct that members agree to follow, thereby ensuring consistency is maintained.[76] Therefore, self-regulatory instruments would allow a certain degree of cooperation in identifying shared

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[67] Kleinsteuber HJ (2014).
[68] Black J (2001) 113.
[69] Rubinstein IS (2018); Krokida Z (2022) 33-7.
[70] Hugenholtz PB (2010) 307.
[71] Kleinsteuber HJ (2014).
[72] Ibid; Hagemann R et al. (2018).
[73] Murray A (2023); Donelan E (2022).
[74] Donelan E (2022).
[75] Krokida Z (2022) 35. Hagemann R et al. (2018).
[76] Krokida Z (2022) 35-6.

responsibilities and adequate solutions and enhance intermediaries' responsibility without hampering innovation.

One major weakness of self-regulation is the potential for collusion and anti-competitive behavior, along with the risk of regulatory capture, where regulation is controlled by parties not acting in the public interest, often resulting in closed processes with minimal outside participation and limited accountability through democratic channels.[77] Unlike the 'laissez-faire' self-regulation, modern self-regulation faces significant challenges regarding public accountability, effectiveness, efficiency, and legitimacy, making it more likely to be linked with public processes to ensure these objectives are met.[78] Thus, self-regulation is likely to serve as an alternative mechanism within modern regulatory tools under specific circumstances, frequently complemented by various forms of governmental regulation as needed. In terms of intermediary liability, public sector objectives do not always align with those of private companies, making reliance on self-regulation alone potentially inadequate for achieving public regulatory goals. Furthermore, the effectiveness of self-regulatory tools is significantly constrained by factors such as limited participation, vaguely defined commitments, lack of clear objectives and measurable progress indicators, the voluntary nature of agreements, and the absence of strong incentives.[79] Additionally, diverse self-regulatory initiatives by intermediaries may also accelerate the fragmentation of intermediary governance.[80] As a result, these limitations hinder the proper management of illegal and harmful content by intermediaries and their ability to protect users' fundamental rights and freedoms.

3.3.3 Co-regulation

Co-regulatory frameworks usually combine regulatory frameworks and state oversight with self-regulation or private ordering.[81] Co-regulation can be regarded as 'a pragmatic response to the common perception that regulatory frameworks must quickly adapt and continually be optimized to maintain relevance and effectiveness in rapidly evolving markets.'[82] Under a co-regulatory framework, government bodies and intermediaries collaborate to achieve optimal regulatory solutions, such as through governmental involvement in supervising and enforcing

[77] Bartle I and Vass P (2005).
[78] Angelopoulos C et al. (2015).
[79] Scientific Foresight Unit (STOA) (2021).
[80] Krokida Z (2022) 37.
[81] Schulz W & Held T (2004).
[82] Krokida Z (2022) 38.

self-regulatory tools, or by creating regulatory sandboxes that allow firms to test solutions, according to plans agreed upon and monitored by a competent authority. These approaches ensure stronger public oversight of intermediaries' practices while allowing for flexible, industry-driven regulatory schemes that can be continuously updated and adjusted.[83]

Co-regulation represents a dialogic process among stakeholders, leading to a form of regulation that is neither traditional state command-and-control regulation, nor 'pure' self-regulation as seen in industry-led standard setting for Internet infrastructure.[84] Rules established by state regulation promote uniformity, predictability, and low decision costs but at the expense of rigidity, while self-regulatory standards allow for nuance, flexibility, and case-specific deliberation, albeit at the cost of uncertainty, higher decision costs, and potential risks to user freedoms/rights.[85] Thus, co-regulation appears to combine the advantages of state involvement in regulation with the industry expertise of self-regulation, resulting in legal rules that are easier to implement, more flexible, and faster, while also ensuring that all key actors are accountable for enforcing those rules.[86] More specifically, co-regulation can bridge different forms of governance by reconciling centralized and decentralized initiatives and policies developed through the frameworks of state regulation and self-regulation.[87] More importantly, a co-regulatory regime encourages shared responsibility among public and private stakeholders involved. In contrast to self-regulation, co-regulation involves collaboration between governmental actors and private entities, with both being accountable for their decision-makings in enforcing rights.[88] Meanwhile, it may also share the drawbacks of state regulation and self-regulation if implemented in an inappropriate way. Ideally, co-regulation serves as a finely balanced concept, a middle way between state regulation and 'pure' industry self-regulation.[89] However, the boundaries between co-regulation, state regulation, and self-regulation can become blurred, as the extent of involvement by the state and the industry may not always be equal or consistent. Thus, co-regulation can potentially shift towards either state regulation or self-regulation in practice, thereby compromising its flexibility and accountability.

[83] Scientific Foresight Unit (STOA) (2021).
[84] Kleinsteuber HJ (2014).
[85] Kaplow L (1989).
[86] Krokida Z (2022) 39, 43.
[87] Finck M (2018).
[88] Krokida Z (2022) 44.
[89] Kleinsteuber HJ (2014).

4. Methodology

Given the objectives and nature of the research topic, addressing the complex inquiry regarding the appropriate methodology to respond to the research questions outlined in this dissertation necessitates a multifaceted approach. Ultimately, the research objectives and the specific research questions will determine the selection of applicable and useful methodologies.[90] To this end, this research will utilize a combination of comparative legal study as its foundational methodologies. This choice is based on the understanding that a single methodological approach may be insufficient to fully capture the multifaceted dimensions of legal phenomena, particularly when these phenomena intersect with economic principles and vary across different jurisdictions.

In this thesis, comparative legal study serves as a crucial methodological approach, as it allows for an in-depth examination and comparison of legal systems, doctrines, and practices across three different jurisdictions, while also providing the opportunity to identify a 'better solution' and to reconstruct certain legal concepts and rules to better adapt to a specific legal system.[91] Furthermore, this research aims to foster the development of evolutionary and taxonomic research initiatives, thereby indirectly contributing to the study and harmonization of the identified legal frameworks.[92] The functional comparative law approach, in particular, enables a broader understanding of how different legal systems address similar legal issues, offering valuable insights into the effectiveness, efficiency, and equity of various legal frameworks. Through comparative analysis, this thesis seeks to identify best practices, innovative solutions, and potential areas for legal reform, thereby contributing to the advancement of legal scholarship and practice.

As Zweigert and Kötz succinctly put it, 'comparative lawyers compare the legal systems of different nations.'[93] Essentially, comparative legal studies begin with detailed research into foreign legal systems.[94] They focus on engaging with 'the foreign/other,' trying to reconstruct and understand the histories, ideologies, self-images and 'languages' that make up a legal system that is in multiple senses 'foreign' to the comparative observer.[95] The very location of

[90] Adams M & Bomhoff JA (2012).
[91] Zweigert K & Kötz H (1998) 15-6.
[92] Glenn HP (2006).
[93] Zweigert K & Kötz H (1998) 4.
[94] Kischel U (2019) 4.
[95] Adams M & Bomhoff JA (2012) 5.

comparative law at these disciplinary intersections may also prove fertile ground for methodological innovation, and offer exciting opportunities for answering new questions in new ways.[96] Foreign models are used as a means of developing one's own law with the intention of legal modernization or institutional reform.[97] Besides, comparative law invites lawyers to integrate and contextualize the new knowledge acquired from one legal system with their settled knowledge.[98] Through contrasting 'self' with 'other,' comparative law promises opportunities for better understanding one's own legal system and knowledge about possibilities of divergent solutions.[99] In contemporary doctrinal legal research, juxtaposing domestic law with its regulation in one or more foreign jurisdictions has become nearly indispensable.[100] Amidst the backdrop of multicultural societies and the advance of globalization, cross-jurisdiction comparative legal research has acquired significant breadth and potential.[101]

4.1 Macro- and Micro- Comparative Law

Traditionally, comparative legal study aims to explore different underlying understanding of what law is, means and does, typically through categorization, functional analysis, and the study of legal formants across diverse legal systems.[102] Following this conventional wisdom, a comparative analysis is employed to explore the scope and sources of recent divergences in intermediaries liability rules the U.S., the EU, and China. However, this research extends beyond classification and description of legal systems and mere comparison of legal rules and cases,[103] aiming to unearth the foundational perceptions of copyright law across various jurisdictions, acknowledging that issues legally addressed in one jurisdiction may be resolved through informal social norms or administrative authority elsewhere,[104] with the distinct approach to administrative copyright enforcement in China highlighting a divergent interpretation of copyright law relative to its counterparts.

[96] Riles A (2019) 811–2.
[97] Husa J (2018).
[98] Frankenberg G (1985) 413.
[99] Valcke C (2004).
[100] Reitz JC (1998); Siems M (2022).
[101] van Hoecke M (2015) 2.
[102] Ibid.
[103] Watson A (1993).
[104] Ali MI (2020).

Comparative law cannot be limited to a mere analysis of the legal institutions as revealed by legal texts, but rather should take into account the realities of law in action.[105] In addition, the micro-comparison, namely comparative law on the micro scale, is employed to study how the specific legal norms and institutions of the relevant legal systems address actual problems or particular conflicts of interest.[106] Micro-comparison in this research involves the investigation of different approaches to the regulation of online copyright infringement, be it judicial responses, administrative enforcement, or private ordering. To be specific, it uses doctrinal analysis method to explore the 'law-in-books' by mapping out emerging differences of China, U.S., and EU law: different standards establishing liability; the scope and eligibility of liability exemptions; the types of injunctions and other sanctions that rightsholders can obtain against online intermediaries, etc. Meanwhile, it aims to provide empirically grounded 'law-in-action' account of how intermediary liability actually affects intermediaries' practices and decision-making processes, users' exploitation of online copyrighted works and other subject matters.

4.2 Functional Comparative Law

Despite of the pervasive anti-functionalist tendency of much theoretical-critical comparative law scholarships,[107] the concepts of functional comparative law and functional equivalence still play a prominent role in comparative legal research.[108] Rules and concepts may be doctrinally different, but that most legal systems will eventually solve similar legal problems in a substantially similar way.[109] Instead of simply comparing conceptually similar legal institutions in different legal systems and listing their similarities and differences, functional method focuses on functional equivalents and differences in various legal systems.[110] As Kischel put it, 'legal institutions may seem to be identical on a superficial level in different jurisdictions, but often have completely different practical and systematic significance and completely different value.'[111] Thus, functional comparative law investigates the actual functions of legal norms in the specific context, taking into account both legal and extra-legal

[105] Ibid. 4.
[106] Zweigert K & Kötz H (1998) 5.
[107] Frankenberg G (1985); Legrand P (1997).
[108] Zweigert K & Kötz H (1998); Kischel U (2019) 7; Michaels R (2019).
[109] Michaels R (2019).
[110] van Hoecke M (2015) 9.
[111] Kischel U (2019) 7-8.

and cultural factors.[112] Therefore, the core commission of functional comparative law is always the comparison of solutions which different legal orders offer for specific practical problems.[113]

Adopting a functionalist approach, this comparative legal research commences with system-neutral themes and analogous specific issues, concentrating specifically on the varied solutions—legal, technological, and market-based—to a common challenge across all examined jurisdictions: online copyright infringements. The search for real solutions to real problems outside one's native legal system not only takes us beyond its limits and concepts, but it also brings to light factors such as the difference between law in books and law in action, the influence of legal culture, the understanding, significance, and a scope of a foreign solution to a legal problem, the possible importance of extra-legal factors which affect the solution to a real problem or which offer such solutions in the first place.[114]

As a result, a functional comparative legal study is necessary to examine how different legal systems address the same issue. In the context of this study, while the specific rules, procedures, and legal concepts of intermediary liability differ across countries, all jurisdictions face the common challenge of determining when and to what extent online intermediaries should be held liable for the unlawful conduct of third parties. A borderless problem, therefore, necessitates a borderless solution. The insights and knowledge gained from comparative studies of the EU and U.S. legal frameworks can significantly contribute to the improvement of the Chinese legal systems of intermediary liability.

4.3 Contextual Comparative Law

Meanwhile, countries adopt diverse approaches to address similar copyright-related challenges, employing legal measures, technological solutions, and private ordering. These differences stem largely from variations in cultural background, economic structures, political systems, and historical contexts. Thus, a contextual comparison is crucial for effectively analyzing similarities and differences, with an emphasis on relationships of agency rather than just institutional or structural frameworks. The adoption of copyright systems across different jurisdictions is shaped by their unique historical contexts, societal conditions, and environmental circumstances, highlighting the complex interplay between global legal norms

[112] Ibid. 8.
[113] Ibid; Adams M & Bomhoff JA (2012) 12-3; Michaels R (2019).
[114] Kischel U (2019) 8-9.

and local realities. By investigating different intermediary liability laws in their contexts respectively, we can develop a robust framework to better understand how legal rules and concepts function in varying socio-economic environments. In essence, the ultimate goal is to examine the underlying contexts of different legal systems, which are profoundly shaped by factors extending far beyond mere black-letter law.

To gain a comprehensive understanding of legal reality, comparative research should be supplemented by thorough analysis of legal texts and case law, as well as by legal sociological research and empirical observation. Moreover, conducting comparative research in the field of intermediary liability is both possible and valuable. Considering that a solid reading knowledge of the local language is essential for thorough comparative research, most legal texts are presented in English, and translations of legal texts into English are available for many countries. This accessibility makes it feasible to conduct comparative research across various countries and regions. Moreover, there are ample resources available to support a law-in-context approach, making the research plan both realistic and achievable.

Notably, this research recognizes that seeking a one-size-fits-all methodology for comparative law is unlikely to be successful. A single method cannot suffice because there is no uniform conception of 'law' and no singular comparative question.[115] In pursuing the identified objectives, van Hoecke's 'toolbox theory' is followed, which advocates for a flexible 'toolbox' approach over a rigid methodological roadmap, acknowledging the potential of diverse, yet often overlooked, research beyond traditional rule and case-oriented comparative law to offer varied approaches that can significantly enhance comparative research.[116]

Simultaneously, the law and economics methodology is employed for the systematic and qualitative analysis of the rationale behind different solutions to combat online piracy. Incorporating law and economics as a supplementary methodology enhances the research by providing an analytical framework that assesses legal rules, institutions, and practices through the lens of economic efficiency, cost-benefit analysis, and market principles. By applying economic theories and models, this research will examine the incentives generated by legal norms, the economic impact of legal decisions, and how law can be leveraged to optimize

[115] Adams M & Bomhoff JA (2012) 8.
[116] van Hoecke M (2015) 2.

social welfare. The synergy between comparative legal study and law and economics provides a comprehensive and nuanced methodology for addressing the research questions. Recognizing that legal systems are not isolated but are deeply interconnected with economic realities and shaped by comparative perspectives, this integrative approach enhances both the depth and breadth of the analysis, leading to a more holistic understanding of the legal phenomena under investigation.

5. Outline

This study discusses how the U.S., EU and China address online copyright infringements within their intermediary copyright liability frameworks, respectively. This is undertaken from a three-step investigation under the established analytical framework. First, this study investigates the similarities and differences of implementation of current knowledge-based intermediary copyright liability regime in the three selected jurisdictions. Then it explores the recent legal development regarding intermediary copyright liability in the three selected jurisdictions and offers a detailed analysis of their highlights and shortcomings. Finally, by referring to experiences drawn from the U.S. and EU intermediary copyright liability rulemaking, this study offers suggestions and recommendations for future Chinese lawmaking and explores the possibility of incorporation of fundamental rights protection into Chinese intermediary liability regime. Below is an outline of the structure of each chapter.

Chapter I serves as the foundation for the entire thesis, outlining the research questions that this dissertation aims to address. It also establishes the analytical framework that will guide the subsequent chapters. Additionally, it introduces the key terminologies and the comparative methodology employed in this study, encompassing macro and micro comparative law study, functional comparative legal study, and a contextual comparative legal study.

Chapter II contributes to an understanding of intermediary copyright liability as a balancing mechanism to prevent copyright harm, safeguard fundamental rights and promote innovation. Specifically, it investigates the rationales behind the rising tide of intermediary copyright liability in general. It then offers a detailed review of how the legislative framework for intermediary copyright liability is shaped by a combination of rules establishing liability (both primary and secondary), liability exemptions, and prohibitions on monitoring obligations,

along with their respective conditions. It also examines how intermediary copyright liability rules intersect with the fundamental rights of users, rightsholders, and intermediaries.

Chapter III focuses on highlighting key differences in the structural features of the three statutory regimes and their judicial interpretations, explaining how these differences have shaped the intermediary liability rules in the U.S., the EU, and China. The three statutory safe harbor regimes for intermediaries share many similarities. All three regimes provide intermediaries with a safe harbor from liability when they lack actual or constructive knowledge of copyright infringement and require them to remove or disable access to allegedly infringing material upon notification by a rights holder or their representative on an *ex post* basis. In recent years, differences in the scope of protection have emerged due to diverging judicial interpretations of lability standards and immunities by courts in the three jurisdictions. While three key forces—law, technology, and markets—gradually shape the evolution of intermediary liability in the three selected jurisdictions, there is a growing call to enhance the responsibility of intermediaries to moderate illegal online content, including copyright-infringing material.

Chapter IV identifies how the three selected jurisdictions have made efforts to impose proactive monitoring/filtering obligations on intermediaries to prevent copyright infringements. While the introduction of copyright filtering obligations faced strong opposition in the U.S., it was finalized by EU regulators through Art.17 DSMD, shifting the *ex post*, knowledge-reactive regime to one that imposes an *ex ante*, proactive duty on intermediaries to monitor and prevent infringement. Meanwhile, the DSA introduced additional gatekeeper obligations for intermediaries to enhance the effective supervision of their content moderation practices. At the same time, Chinese courts substantially imposed monitoring/filtering obligation on certain intermediaries through broad interpretations of duty of care and necessary measures. As a result, a significant divergence has emerged between the U.S., EU, and Chinese legal frameworks for intermediary liability concerning intermediaries that host user-generated contents (UGC). Notably, Chapter IV extends the research beyond statutory copyright content moderation, and examines how intermediaries' privatized content moderation practices in the three selected jurisdictions affect users' fundamental rights, particularly freedom of expression.

Chapter V primarily explores how administrative authorities in different jurisdictions enforce copyright in cooperation with intermediaries. It focuses on two types of enforcement tools—

graduated response and website blocking—considering them as examples of administrative copyright enforcement measures in the EU, and provides a detailed analysis of these methods. Meanwhile, unlike the more limited administrative measures in the EU, this study notes that Chinese copyright administrations possess greater competence in online copyright enforcement, employing a variety of enforcement tools. These include administrative dispute resolution procedures for copyright disputes and extra-judicial measures such as regulatory talks (*yuetan*) and campaigns, all aimed at addressing copyright infringements through intermediaries. The strengths and disadvantages of such administrative enforcement measures are further elaborated, respectively.

Chapter VI proposes several recommendations for future Chinese rulemaking regarding intermediary liability. It argues that a copyright legal system should combine the advantages of 'open' strategy and deterring effect of 'block' strategy. An open strategy provides users with multiple authorized channels for the consumption of legal content. Once the administrative copyright enforcement mechanism is properly adjusted and running smoothly, the copyright legal system can concentrate on improving online legal offerings, encouraging lawful consumption, and providing copyright-related services. Moreover, Chapter VI provides suggestions for improving the current Chinese intermediary liability regime by drawing on lessons learned from the U.S. and EU counterparts. Specifically, this study recommends maintaining the knowledge-based liability regime while rejecting the strict liability model, all-inclusive duty of care test, and general monitoring obligations, as these could undermine users' fundamental rights, stifle innovation, and hinder competition. Additionally, it suggests introducing targeted legislative interventions to further protect vulnerable users.

Chapter VII concludes the thesis, summarizing the arguments presented in the previous chapters and addressing the research questions formulated in Chapter I. This final chapter also outlines the recommendations, highlights the intellectual contributions, and discusses the social implications of the research.

II. The Rising Tide of Intermediary Copyright Liability

Today, online intermediaries represent a new type of powerful institution that shapes the public networked sphere and is subject to intense and often controversial policy debates.[117] Contrary to the notion of the internet as a lawless wasteland, it is now well recognized that the internet should be governed by the rule of law.[118] Regulators in various jurisdictions face the challenge of designing robust legal frameworks for intermediary liability that encourage intermediaries to prevent harmful uses of their technologies without creating disproportionate or chilling effects.[119] Intermediaries face specific liability risks due to their role in operating a service, but they may also benefit from certain exemptions and immunities that can limit their legal exposure.

When considering changes in liability for intermediaries, it is essential to question *why* intermediaries should be held accountable for content posted by third parties, as primary liability typically falls on users who upload and share illegal content. Yet this does not preclude intermediaries from bearing some responsibility to prevent harm arising from such activities.[120] Then, another tricky question arises: when intermediaries should be liable for the misconduct of third parties.

1. Defining Intermediaries

Indeed, the list of potential configurations of intermediaries can be essentially endless, depending on the degree of precision desired. A parallel multilingual terminological integration for expressing common ideas appears impractical due to the linguistic diversity of the jurisdictions examined. This study acknowledges that the role of intermediaries in copyright enforcement can be defined by various criteria, factors, and perspectives, and does not attempt to formulate a uniform definition for intermediaries. For reasons of brevity in this research, the broad term 'intermediary' is generally adopted throughout the research due to its common usage in the extensive literature; nevertheless, like other general concepts, it lacks a clear-cut, universally accepted and consistent definition.[121] Angelopoulos proposes a simple and broad definition for intermediaries as 'entities that facilitate, in any way, the use of the internet by

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[117] Van Dijk JAGM & Hacker KL (2018).
[118] Riordan J (2020).
[119] Keller D (2018)
[120] Buiten MC et al. (2020) 142.
[121] Stalla-Bourdillon S & Thorburn R (2020).

others to access content produced by third parties,' a role that places them between two parties and makes them particularly susceptible to secondary liability.[122] The OECD definition helps highlight what is common to all these terms: '[i]nternet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.'[123] The definition highlights two important aspects: (1) intermediaries come between and facilitate the connection of others; and (2) the content they transmit is produced by others. Noteworthy, service providers that produce and disseminate their own content should not be considered intermediaries as 'they are not middlemen bringing together two isolated communication endpoints but constitute the very origins of that information.'[124]

Moreover, to reduce the risk of misinterpretation, other terms will also be adopted in relation to the specific context. Comparative descriptions of existing legal solutions in a given legislation should primarily rely on original terms provided. For example, the term OCSSP will be adopted pursuant to the analysis of legislative framework introduced by the DSMD, and providers of hosting services are employed pursuant to analysis of intermediary liability introduced in the DSA. Noteworthy, the intention of this research is not to confine the subject matter to specific cases but rather to use them *pars pro toto* to distill the essential characteristics of intermediaries. Thus, a broad conception of internet intermediaries shall be adopted in the context of this cross-jurisdictional research, that encompasses all sorts of different kinds of providers.

2. Intermediary Copyright Liability: Primary liability, Secondary liability, and Liability Exemptions

In general, the legislative framework for intermediary copyright liability is shaped by a combination of liability rules (both primary and secondary), available injunctions, and liability exemptions with their conditions, which collectively provide the basis for their operational boundaries. In addition, the legislative framework is complemented by another strain of norms that further define the regulatory environment for intermediaries, such as binding rules and

[122] Angelopoulos C (2016).
[123] OECD, 'Internet intermediaries: Definitions, economic models and role in the value chain' (2011) <https://doi.org/10.1787/9789264115644-en>
[124] Angelopoulos C (2016).

non-binding sets of recommendations encouraged or induced by regulators, industry self-regulation or best practices, and Terms and Conditions (T&Cs) set on the individual corporate level.[125]

2.1 Primary Liability

Despite the prominent role of internet intermediary liability for copyright infringement in recent international trade agreements,[126] policy dialogues,[127] international best-practices guidelines,[128] and norm-setting efforts, its foundation within the international copyright framework remains surprisingly tenuous.[129]

Notably, there is no horizontal legal concept of 'secondary/intermediary liability' that delineates liability independently of the particular nature of the alleged primary liability. Clearly, liability rules should be in place against direct tortfeasors to discourage illegal activity. In the context of copyright law, primary infringement occurs where a defendant engages in an act restricted by one of the exclusive rights granted by copyright law.[130] However, this does not mean that the intermediary should be entirely free from responsibility.[131] Primary liability arises where the intermediaries provide their own content, or intermediaries are substantially involved with and exercise control over the content provided by their users.[132] Under those scenarios, intermediaries are no longer considered middleman, but infringers as they materially contribute to the content potentially giving rise to liability. Consequently, they are excluded from the safe harbor immunities for being actively and knowingly engaging in the illegal activities.

2.2 Intermediary Liability

Intermediaries have become central to enabling access to and exchange of information, facilitating the widespread distribution of both legal and illegal content, which raises pressing

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[125] Schwemer SF (2021) 379-80.
[126] Bridy A (2010a); Liu HW (2022); Liu HW (2023).
[127] OECD, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives' (14 Sept. 2011) <https://doi.org/10.1787/9789264115644-en>
[128] 'Manila Principles On Intermediary Liability' (2015) <https://manilaprinciples.org/>; 'The Santa Clara Principles On Transparency and Accountability in Content Moderation' (2018) <https://santaclaraprinciples.org/>
[129] Hinze G (2019) 27.
[130] Angelopoulos C (2021); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005); Wang Q (2023) 492-3.
[131] Buiten MC et al. (2020).
[132] Wilman F (2020) 6.

questions about their responsibility in preventing the dissemination, detection, and removal of unlawful content.[133] There is broad consensus on the necessity of addressing illegal online content through intermediaries, but identifying and effectively dealing with those responsible is often described as a challenging ‘whack-a-mole’ problem. This difficulty arises partly from the vast amount of both legal and illegal content available on the internet, as well as the anonymity it provides, allowing users to engage in unlawful activities from jurisdictions that are difficult to reach for enforcement.[134]

Consequently, intermediaries, being more easily identifiable and financially solvent than anonymous infringers, have become primary targets for legal action.[135] With their abundant financial resources and significant technological capacities, intermediaries are in the best position to monitor and address illegal online content.[136] A secondary infringement action may enhance efficiency by enabling the claimant to obtain relief against a party facilitating multiple wrongful acts by several primary tortfeasors in a single proceeding.[137] Secondary liability actions against intermediaries for copyright infringements are not only a cost-effective way to ensure more effective enforcement of rights but also aimed to involve them more actively in the fight against piracy.[138] Moreover, enforcement costs are shifted to intermediaries, as copyright holders can secure court-ordered relief requiring intermediaries to implement detection and prevention measures, or intermediaries may adopt more conservative practices following an adverse ruling.[139]

2.2.1 Terming Intermediary Liability

This study primarily focuses on the intermediaries’ liability and legal responsibility in respect of illegal content provided by third parties. Therefore, for the sake of clarity, this research adopts the broad and neutral term ‘intermediary liability’ to describe the same or similar liability of intermediaries for copyright infringement carried out by third parties. Of course, other local terms provided in given legislation will also be employed in the related context if necessary. However, to avoid an overly broad coverage at the expense of depth, this research

[133] Frosio G & Husovec M (2020).
[134] Wilman F (2020) 1.
[135] Elkin-Koren N (2014).
[136] Riordan J (2016) 2.
[137] Dinwoodie GB (2017) 17.
[138] Elkin-Koren N (2005) 16-17.
[139] Dinwoodie GB (2017) 17.

adopts a pragmatic approach by focusing specifically on the liability and legal responsibilities of intermediaries that provide services for storing content submitted by users at their request.

2.2.1 Differentiating Intermediary Liability

Scholars considered the litigation against intermediaries waged by entertainment industry a 'successful legal campaign' to combat online copyright infringements, as they persuade courts through a series of high-profile judicial decisions to embrace expansive interpretations of the doctrine of contributory infringement,[140] establish novel theories of copyright violation,[141] and apply broad constructions of statutory damage provisions.[142] However, empirical study shows that, even as the copyright industry has ramped up the level of deterrence, online copyright infringements continue unabated.[143]

Indeed, intermediary liability actions may enable claimants to influence the business models and technological development of intermediaries, thereby providing efficient enforcement benefits to rightsholders while also raising concerns about intrusive regulation of online intermediary businesses.[144] A higher standard for intermediary liability that is unlikely to be satisfied will cause copyright owners to push for the extension of the scope of primary liability; while the lower standard for intermediary liability that provides availability of intermediary liability claims might moderate the demand to hold intermediaries primary liable. Moreover, due to lack of effective practical and legal control of illegal content and activities online, unlimited liability might lead to significant negative impact on online industry and digital society.[145] Those risks have been acknowledged by legislatures through three approaches: (1) harmonizing standards establishing intermediary liability; (2) setting immunities for intermediaries provided certain requirements are met; (3) introducing provisions ensuring that intermediaries are not subject to a general duty to monitor their users' activities.

2.2.1.1 Positively and Negatively Defined Intermediary Liability

[140] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021-24 (9th Cir. 2001)
[141] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 936-7.
[142] Capitol Records, Inc. v. Thomas-Rasset 692 F. 3d 899 (8th Cir. 2012); Sony BMG Music Entertainment v. Tenenbaum, 719 F.3d 67 (1st Cir. 2013).
[143] Depoorter B et al. (2010).
[144] Kohl U (2012); MacKinnon R et al. (2015); Pappalardo K (2023).
[145] Edwards L (2016).

The standard for intermediary liability can be approached positively or negatively.[146] A 'positive' approach to intermediary liability entails investigating conditions under which intermediaries might effectively be held responsible for the wrongful conduct of third parties; while a 'negative' approach to intermediary copyright liability defines the circumstances under which an intermediary will be immune from liability. Among the legislation on intermediary liability, the approach of delineating zones of immunity has been more prevalent, as legislative activity has significantly focused on defining intermediary liability through this negative framework.[147] However, following a similar pattern, different jurisdictions have implemented various versions of intermediary liability limitations, yet no consensus on the parameters of these limitations has been reached at the international level.[148]

A) Standards Establishing Intermediary Liability

Courts have applied established principles of secondary liability from national private law to new online intermediaries, either through analogies to the offline world or by referencing broad policy considerations. Generally, the standard for holding intermediaries liable for copyright infringement based on conduct and knowledge has proved hard to satisfy.[149] Jurisdictions vary in their approaches to intermediary copyright liability, and the standards under which an intermediary will be held liable for third-party misconduct remain unclear.[150] The difficulty in identifying a clear standard is compounded by the fast-changing nature of intermediaries as well as doctrinal variance in diverse legal traditions.[151] Moreover, effective online copyright enforcement has largely depended on private ordering mechanisms in practice, limiting public guidance and scrutiny from national courts, and thus rendering judicial decisions on intermediary liability more as regulatory norms than assessments of individual private liability.[152]

B) Immunity Provisions Precluding Liability

U.S., EU, and Chinese laws exist that, provided certain conditions are met, shield online intermediaries from monetary liability for illegal content stored at the request of their users.[153] Such 'liability exceptions' serve as a reliable and expanding Internet infrastructure, not only

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[146] Ibid.
[147] Arts.12-15 ECD, Section 230 CDA, Section 512 DMCA, Art.1197 Chinese Civil Code.
[148] Seng D (2016).
[149] Dinwoodie GB (2017) 19.
[150] Wilman F (2020); Angelopoulos C (2016).
[151] Dinwoodie GB (2017) 18.
[152] Ibid, 19.
[153] See Chapter III.

promoting the growth and innovation of e-commerce and the digital economy, but also ensure adequate protection for users and their fundamental rights and freedoms.[154] Generally, intermediaries may be liable if they engage more actively with the content—such as authoring material themselves or assuming practical responsibility for user-posted content—thereby losing their immunity.[155] Moreover, intermediaries may also be liable if they have actual or constructive knowledge of the unlawful content and failed to act.[156] Under the negative approach, courts emphasize whether the intermediary has complied with legislated conditions for immunity, rather than focusing on whether the intermediary's conduct shows sufficient fault or the closeness of the relationship between the intermediary and the primary wrongdoer.[157] Typically, these immunities are introduced to shield intermediaries from monetary liability, but in most countries certain form of injunctive relief remains a possibility.[158]

Specifically, the three jurisdictions under examination in this research have implemented provisions granting immunity to intermediaries through either vertical (subject-specific) or horizontal manner. The safe harbors enshrined in the Section 230 CDA are horizontal in nature while safe harbors in the Section 512 DMCA seem to be vertical as they are restricted to copyright-specific claims.[159] The ECD aims to judge intermediary liability in a horizontal approach that applies to various categories of illegal content under the same criteria.[160] Instead of reinventing the wheel, China transplanted and incorporated safe harbor provisions for the first time in an Interpretation issued by the Supreme People's Court (SPC) in 2000,[161] and subsequently established it comprehensively within the 2006 Regulation by referring to Section 512 DMCA and Art.14 ECD.[162] Subsequent amendments to the 2006 Regulation (namely the

[154] Scientific Foresight Unit (STOA) (2021).
[155] CJEU, C-324/09, L'Oréal v eBay (2011) EU:C:2011:474, para.6; Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 40 (2d Cir. 2012); Art.3 of the Provisions by the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication to the Public on Information Networks [最高人民法院关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定] (2020 Provisions).
[156] Art.14(1)(a) ECD; 17 U.S.C. §512(c)(1)(A); Art.1197 Chinese Civil Code.
[157] Dinwoodie GB (2017) 19.
[158] Wilman F (2020); Angelopoulos C (2016); Krokida Z (2022).
[159] Mehra SK & Trimble M (2014); Goldman E (2020) 167-8.
[160] Goldman E (2020) 167-8; Wilman F (2020); Angelopoulos C (2016); Krokida Z (2022).
[161] Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases in Relation to Copyright Disputes over Computer Network 最高人民法院关于审理涉及计算机网络著作权纠纷案件适用法律若干问题的解释(Expired.)
[162] Regulations for the Protection of the Right of Communication through the Information Network 信息网络传播权保护条例(amended in 2013).

2013 Regulations), the Tort Law (2009) (coded in the Civil Code (2020))[163] and the E-Commerce Law (ECL 2018)[164] have not only further refined and improved the joint liability of intermediaries for contributory infringement, but also gradually expanded the applicability of the notice-and-takedown (NTD) mechanism to all civil law issues, including IP rights, defamation, unfair competition, and other types of infringement.[165] The above legal transplant of safe harbor rules remains incomplete in China, as the general monitoring obligation ban is absent from the relevant private law provisions.[166]

2.2.1.2 No General Monitoring Obligation

Monitoring obligations are not uncommon for intermediaries to oversee and regulate content on their service.[167] In general, monitoring obligations may emanate from explicit legislative mandates, such as Art.17 DSMD, or from the imposition of strict liability for UGC by judicial authorities, effectively necessitating that intermediaries actively monitor and moderate illegal content to circumvent liability.[168] It is worth noting that the prohibition of general monitoring obligations constitutes a critical complement to safe harbor immunity for intermediaries,[169] as it prevents conscripting intermediaries to act as unofficial censors.[170]

A) Prohibition of General Monitoring Obligation in the U.S. and EU

Section 512(m) DMCA specifically clarifies that an intermediary shall not be required to '[monitor] its service or affirmatively [seek] facts indicating infringing activity' to maintain their safe harbor immunity.[171] Art.15(1) ECD explicitly states that intermediaries are not mandated 'to monitor the information which they transmit or store,' nor 'to seek facts or circumstances indicating illegal activity.'[172] However, the ECD exempts intermediaries from general monitoring obligations, but leaves the discretion to national laws to provide for monitoring obligations 'in a specific case.'[173] Particularly in cases of alleged infringement of

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[163] Art.1194-1197 Civil Code (2020).
[164] Art.42-45 ECL 2018.
[165] Wang J (2021).
[166] Zhu D (2019).
[167] Mendis S & Frosio G (2020).
[168] Frosio G (2018a).
[169] Kuczerawy A (2015) 47.
[170] Thompson M (2020) 785.
[171] 17 U.S.C. §512 (c).
[172] Art.15(1) ECD.
[173] Frosio G (2017a) 41.

IP rights, the CJEU allowed specific monitoring measures when a fair balance between the fundamental rights of the different stakeholders was achieved.[174]

B) Prohibition of General Monitoring Obligation in China

Regarding the monitoring obligations of intermediaries, Chinese law adopts a dual-track approach that emphasizes the public and private distinction:[175] intermediaries are exempted from monitoring obligations in private law, while public law explicitly imposes statutory requirements on the monitoring obligations of intermediaries, requiring them to take on the role of gatekeepers who have a responsibility towards the public interest.[176] Under public law, the Chinese regulatory framework of content moderation consists of a vertical approach combining public intervention and self-regulation.[177] Intermediaries are required to review, monitor, and inspect information prohibited from being disseminated by laws and administrative regulations.[178]

3. Intermediary Copyright Liability and Fundamental Rights

Balancing of interests has engaged academic copyright debate as both an internal challenge and a long-term goal for copyright law.[179] By all counts, copyright law is designed to strike a delicate balance between the interests of all parties involved, including the rightsholders' exclusive rights and the user's access to knowledge and information.[180] Copyright law recognizes the need to incentivize authors by granting them exclusive control over the exploitation of their works. However, such control is far from absolute. Copyright law also recognizes the public's need to retain certain degree of freedom to use existing work to obtain information and knowledge.[181] Such a balance between fundamental rights and freedoms is achieved through several internal balancing mechanisms, including the protectable subject

[174] Art.15 (2) ECD. Case C-314/12, UPC Telekabel Wien v Constantin Film Verleih GmbH (2014) EU:C:2014:192 (elaborating detailed requirements for 'specific nature'); Case C-18/18, Glawischnig-Piesczek v. Facebook Ireland (2019) EU:C:2019:821.

[175] [2019]Z01MZ No.4286 (2019)浙 01 民终 4286 号民事判决书(Tencent must assume the monitoring obligation under public law even if it does not have a private law obligation.)

[176] Beijing Higher People's Court, Guiding Opinions on Several Issues Concerning the Trial of Copyright Disputes in the Network Environment 北京高院关于审理涉及网络环境下著作权纠纷案件若干问题的指导意见(19 May 2010).

[177] Shan Y (2022) 82-5.

[178] Art.47 of Cybersecurity Law; 'Accelerate the establishment of a comprehensive Internet governance system and comprehensively improve the level of Internet management and control capabilities.' (CAC, 9 Jun. 2022) <http://www.cac.gov.cn/2022-06/08/c1656303130339484.htm.>.

[179] Copyright in this context was an appropriate tool that guides how the interests of the three main stakeholder groups (the creative individual 'author,' the commercial intermediary 'representing the market' and the end user 'consumer') should be aligned. See Merges R (2011); Jütte J (2017); Sag M (2017).

[180] Geiger C (2010).

[181] Sony v. Universal (1984) 429.

matter, the requirement of substantial similarity in copying, the threshold of originality, term of protection, the idea/expression dichotomy, and mainly limitations and exceptions to exclusive rights.[182] Outside of copyright law, the fundamental right of copyright owners, namely the right to property, should be balanced with users' fundamental rights and freedoms, e.g. the freedom of expression and information, right to privacy and data protection, rights to assembly and association, and rights to effective remedies and fair trials, as well as the fundamental rights and freedoms of intermediaries, namely freedom to conduct business, through an external balancing mechanism.[183]

In China, in assessing the copyright liability of intermediaries, courts and academics usually refer to a vague and poorly defined internal 'balance of interests' test rather than an external 'balance of competing fundamental rights' test.[184] Moreover, despite the Chinese Constitution containing provisions for the protection of human rights,[185] the lack of judicial remedies for violations of citizens' fundamental rights and freedoms has been a longstanding subject of criticism both within China and internationally.[186] That said, constitutional fundamental rights are unlikely to be invoked to safeguard Chinese citizens in copyright cases. In the U.S., a balance of fundamental rights test is also rare in court decisions while citizens' freedom of speech is guaranteed by the First Amendment of U.S. Constitution.[187] Citizens may either assert an explicit First Amendment defense or persuade courts to interpret existing copyright law provisions broadly and pro-liberty to avoid conflicts with this constitutional guarantee.[188] And usually copyright looks to the First Amendment for guidance.[189]

In the EU, a meticulous assessment of the balance between competing fundamental rights is essential to ensure compatibility with the EU treaties and uphold the fundamental principles at the core of the EU's framework.[190] However, intermediary liability regulations have been

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[182] Sag M (2017) 501.
[183] Sganga C (2014).
[184] Feng X (2003); Feng X (2007); See [2020] Z0192MC No.8001 (2020)浙 0192 民初 8001 号('the principle of *balancing interests* should be upheld, which involves carefully considering the relationship between creation and dissemination, as well as the interests of copyright holders and the public, without adopting overly stringent standards.'); [2019] Z01MZ No.4268 ('it should comprehensively consider […] so as to achieve *a balance of interests* among the right holders, intermediaries and users.').
[185] Art.33(3) and 35 Chinese Constitution Law; Zhang Y & Buzan B (2020) 184.
[186] Jia M (2016a) 621; Cao G et al. (2023).
[187] Tehranian J (2015); Lessig L (2000).
[188] Griffiths J & Suthersanen U (2005) 69-70.
[189] Tehranian J (2015).
[190] van Deursen S & Snijders T (2018).

struggling to find a proper balance between competing rights that might be affected by intermediaries' activities and obligations.[191] Historically, the CJEU's case-law on intermediary liability has shaped this complex triangular relationship in terms of fundamental rights.[192] Moreover, the Charter of Fundamental Rights of the European Union (CFR), a contemporary human rights bill codifying approximately 50 different rights, granted the same legal status as the founding EU Treaties and has since become the primary fundamental rights instrument in the case law of the CJEU.[193] Copyright is safeguarded under the fundamental right to property enshrined in Art.17 CFR as a category of IPR.[194] Particularly, the InfoSoc Directive (ISD) grounds the rules of copyright in the fundamental principles of law requiring the protection of property, freedom of expression and the public interest.[195] Member States have to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the right to protection of property and to an effective remedy on the other.[196] From a legislative standpoint, fundamental rights have also been used as a justification for the adoption of instruments of EU secondary law.[197] When transposing those directives, Member States must interpret them in a way that ensures a fair balance between the various fundamental rights protected by the Community legal order, and when implementing these measures, their authorities and courts must not only ensure consistency with the directives but also avoid interpretations that conflict with fundamental rights or other general principles of Community law, such as proportionality.[198]

In the EU, to align copyright with societal and technological trends, certain limitations to copyright are interpreted through the lens of fundamental rights, as enshrined in human rights instruments and national constitutions.[199] Especially in terms of intermediary copyright liability regime, the safe harbors established in the ECD provide definite answers, but only within the limited parameters of their conditions that are subject to interpretation.[200] Thus, the CJEU has taken a step back and turned instead to the injection of fundamental rights into

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[191] Angelopoulos C & Smet S (2016); van Deursen S & Snijders T (2018).
[192] Geiger C & Jütte J (2021a) 520-21.
[193] Rendas T (2021) 19.
[194] Rendas T (2021) 21.
[195] Recital 3 of DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001on the harmonisation of certain aspects of copyright and related rights in the information society.
[196] Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU (2008).
[197] Art.17(10) and recitals 70, 84 and 85 DSMD.
[198] *Promusicae*.
[199] Chapman AR (2002); Yu PK (2018a).
[200] Angelopoulos C (2016) 69.

intermediary liability issues by employing to the 'constitutionalization' as a method of harmonization.[201] Notably, the resource to fundamental rights-based reasoning serves different functions in the CJEU's copyright case law, with the Court repeatedly affirming their horizontal effects and emphasizing that EU copyright *acquis* must be interpreted in light of the CFR to achieve a fair balance between competing fundamental rights.[202] More specifically, fundamental rights have been revealed as the driving force behind the harmonization of EU intermediary liability, and the rise of human rights rhetoric in IP enforcement is a constant trend in CJEU's case law dealing with the role of intermediaries in cases of copyright infringement.[203] Where the relevant secondary legislation falls short of achieving this fair balance, the need for such equilibrium remains and can independently justify the regulation of intermediary liability.[204]

In evaluating that balance, the CJEU has weighed a number of rights protected by the CFR in a variety of cases. Fundamental rights that are affected by intermediary liability laws include the freedom of expression and information,[205] freedom to conduct business and provide services,[206] right to property,[207] rights to privacy and data protection,[208] rights to assembly and association,[209] and rights to effective remedies and fair trials.[210] Specifically, in direct copyright infringement claims against individual users, the focus has been on reconciling the right to respect for private life and personal data protection with IP law, as identifying direct infringers requires intermediaries to disclose personal data to claimants.[211] In claims against intermediaries, either on grounds of secondary infringement or as injunctions against intermediaries as third parties, copyright law primarily clashes with intermediaries freedom to conduct business and the public's right to receive and impart information,.[212] Often in vague rulings, the CJEU set the balancing of fundamental rights as a fundamental principle of IP

[201] Griffiths J (2013); Angelopoulos C (2016) 89.
[202] Rendas T (2021) 19; Dreier T (2020); Garben S (2020); Jütte J & Quintais JP (2021); Jongsma D (2019); Griffiths J (2019).
[203] Angelopoulos C (2015); Griffiths J (2018); Keller D (2018) 292.
[204] Angelopoulos C (2016) 88.
[205] Art.11 CFR.
[206] Ibid. Art.15 and 16.
[207] Ibid. Art.17(2).
[208] Ibid. Art.7 and 8.
[209] Ibid. Art.12.
[210] Ibid. Art.47.
[211] *Promusicae*.
[212] Synodinou TE (2015) 58.

enforcement, emphasizing the protection of different fundamental right should be balanced with the right to protection of property.[213]

3.1 Freedom of expression and information

On an international law level, freedom of speech is proclaimed and guaranteed both under the Universal Declaration of Human rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), safeguarding 'the right to hold opinions without interference' and 'the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers' and through any medium.[214] UDHR may represent customary international law norms, or at least a source of inspiration for accepted moral standards.[215] Art.19 UDHR provides that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'[216] Art.19(2) ICCPR stipulates that 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[217] Art.27 UDHR proclaims that 'everyone has the right freely to participate in the cultural life of the community.'[218] This human right was further anchored in Art.15(1) ICCPR, which states that 'the States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.'[219] One of its significant milestones, the UN Commission on Human Rights submitted Special Rapporteur report on the promotion and protection of the right to freedom of opinion and expression in 2011, declaring that Internet access, in general, should be perceived as a human right and as part of the freedom of speech.[220] Thereafter, following documents elaborated various aspects of Digital Human Rights, including another significant report submitted in 2018 that focused on online content regulation,[221] and a nonbinding

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[213] Geiger C & Jütte J (2021a).
[214] G.A. Res. 217 (III) A, art. 19, UDHR.
[215] De Schutter O (2019).
[216] G.A. Res. 217 (III) A, art. 19, UDHR.
[217] G.A. Res. 2200 (XXI) art. 19(2), International Covenant on Civil and Political Rights (Mar. 29, 1967).
[218] G.A. Res. 217 (III) A, art. 27, Universal Declaration of Human Rights (Dec. 10, 1948), at 71.
[219] Art.15(1) of the International Covenant on Economic, Social, and Cultural Rights.
[220] Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression) Special Rep., para. 20, U.N. Doc. A/HRC/17/27, (16 May 2011).
[221] Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/38/35 (6 Jul. 2018).

resolution issued by United Nations Human Rights Council that anchored the right to Internet access as a basic human right.[222]

Art.11 CFR identifies two distinct and broad rights, namely freedom of expression and freedom and pluralism of the media. Art.11(1) provides that '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[223] Then Art.11(2) spells out the consequences of paragraph 1 regarding freedom of the media by stipulating that 'the freedom and pluralism of the media shall be respected.'[224] The Explanatory Note on Art.11 indicates that 'freedom of the media is a sub-set of freedom of expression,'[225] asserting that the media shall enjoy freedom of expression and Member States must ensure media pluralism.[226]

Freedom of expression is of fundamental importance, both in terms of an individual's development and with respect to democratic society. This point has been persistently underlined by both the CJEU and the ECtHR.[227] Freedom of expression encompasses several distinct elements: the right to hold opinions, the right to impart information and ideas, and the right to receive information and ideas.[228] Freedom of expression has also been recognized as a general principle of EU law by the CJEU as the case law on freedom of expression demonstrates a broad interpretation of the scope of EU law.[229] The scope of what constitutes interference with freedom of expression is broad, closely linked to determining who is a victim under Art.10 case law, and includes not only criminal penalties, fines, or awards of damages but also injunctions, bans, blocking and filtering measures, and takedown notices.[230] The ECtHR recognized that justified restrictions on the right to freedom of expression are permissible to protect the right to property, provided these restrictions are prescribed by law and necessary in a democratic society.[231]

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[222] Human Rights Council A/HRC/32/L.20 (June 30, 2016).
[223] Art.11(1) CFR.
[224] Art.11(2) CFR.
[225] Peers S et al. (2021) 334.
[226] Ibid, 351.
[227] Geiger C & Izyumenko E (2014).
[228] Peers S et al. (2021) 334.
[229] Case C-260/89 ERT; Case C-219/91 Ter Voort [1992] ECR I-5485 [35]; Case C-610/15 Stichting Brein v Ziggo, paras 36–38.
[230] Peers S et al. (2021) 350.
[231] Geiger C & Izyumenko E (2014).

Freedom of speech, that is protected under the U.S. Constitution's First Amendment, includes both active acts of expression and access to information, which are acknowledged as protected human rights.[232] For decades, the Free Speech Clause of the First Amendment has been one of the most robust and powerful mechanisms for protecting individual rights under the Federal Constitution.[233] Noteworthy, the First Amendment is not the only legal instrument protecting freedom of expression or the democratic values these rights uphold; a robust body of local, state, and federal laws also provides protections that the First Amendment alone does not.[234] In 2017, the U.S. Supreme Court, in its decision in the case of *Packingham v. North Carolina*, acknowledged access to online social media (such as Facebook) as part of the right to freedom of speech.[235]

3.2 Freedom to Conduct a Business

Art.16 CFR provides that '[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognized.' It guarantees the freedom to exercise an economic or commercial activity, recognizing this freedom in accordance with EU and national law and practices, and broadly prohibiting undue interference with companies' ordinary course of business.[236] By reflecting the close relationship of business freedom with rights to property and work,[237] the CJEU unfolded the freedom to conduct a business within a formulation designed to secure the human dignity of individual Europeans within the marketplace by guaranteeing their freedom to engage in commerce[238] and their contractual autonomy.[239] In assessing the violation of freedom to engage in commerce, the Court adopts the notion of an undue business burden[240] and the notion of market access, or the right of a business not to be hampered in their entry into a market,[241] into consideration. Contractual freedom is one of the general principles of Community law, which is inseparably linked to the freedom to conduct a

[232] Peled R & Rabin Y (2010).
[233] Lakier G (2020) 2301; Schauer F (2004) 1790.
[234] Lakier G (2020) 2302.
[235] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).
[236] Recital 48 ECD.
[237] Art.15 and 17 CFR.
[238] Case 4/73 Nold EU:C:1974:51, [1974] ECR 491, para 13; Case 230-78 SpA Eridiana and others EU:C:1979:216, [1979] ECR 2749; Peers S et al. (2021) 465-466.
[239] Case 151/78 Sukkerfabriken Nykøbing EU:C:1979:4, [1979] ECR 1; Peers S et al. (2021) 466.
[240] Case C-283/11 Sky Österreich v Österreichischer Rundfunk EU:C:2013:28, Opinion of AG Bot; Case C-70/10 Scarlet Extended EU:C:2011:771, [2011] ECR I-11959; Case C-360/10 SABAM v Netlog EU:C:2012:85.
[241] Case C-484/14, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH EU:C:2016:689; Peers S et al. (2021) 481.

business. However, it might be restricted following due legislative procedure. The decision was not 'unfair, but a completely lawful means by which the Commission pursues the legitimate aim of effectively protecting competition against distortion.'[242]

Considerations relating to intermediaries' freedom to conduct a business can be said to underlie the prohibition of imposing on intermediaries a general obligation of monitoring or active fact-finding, laid down in Art.15(1) ECD.[243] Additionally, recital 48 ECD also provides that any duty of care imposed on intermediaries storing user content under national law should remain limited to what can reasonably be expected from them, echoing the same emphasis on protection of intermediaries' freedom to conduct a business. Although not articulated in terms of intermediaries' freedom to conduct a business, the same guideline can be found in the corresponding provision of Section 512(m) DMCA.[244] Similarly, Section 512(j) DMCA imposes numerous conditions that must be met to grant injunctive relief against intermediaries, aiming to prevent or at least minimize the burdens placed on them.[245]

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[242] Peers S et al. (2021) 482.
[243] Wilman F (2020) 211.
[244] Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 93 (2d Cir. 2016).
[245] 17 U.S.C. §512(j)(1)(A)(iii), (j)(2)(A) and (j)(2)(D).

III. Same Problem, Different Outcomes: Intermediary Copyright Liability in the U.S., EU, and China

As the innovative business models bring together individuals from all walks of life, every user now has access to an ostensibly equal intermediary for expression, making content creation no longer the exclusive domain of professional authors but a widespread activity involving the general public.[246] In addition, fully digitized works are now readily available as creative materials for users. This mode of spontaneous and ubiquitous creation has driven transaction costs related to obtaining rights information and pre-negotiation to an unbearable level for all parties involved. Whether weakening the rights of copyright holders or increasing the duty of care for intermediaries, such changes would result in unpredictable transaction costs and potentially stifle the creativity unleashed by advancements in dissemination technology.[247]

1. Evaluation of the Current Knowledge-based Intermediary Copyright Liability Regimes

For the past two decades, knowledge-based liability has been the foundational principle for regulating the liability of intermediaries that store and disseminate UGC.[248] In the early days of the Internet, businesses in Europe and China were significantly influenced by the regulatory approach initiated by the U.S. And U.S. case law and legislation remained a key source of inspiration for conceptualizing responsibilities within this legal framework. The European, U.S., and Chinese regimes are all characterized as reactive rather than proactive, emphasizing the importance of timely deletion upon request under an NTD framework. Intermediaries typically only obtain 'knowledge' of specific infringements from valid notifications by rightsholders. In general, intermediaries are not required to monitor hosted content for illegality. However, early 2000s Directives like the ISD and the IPR Enforcement Directive (IPRED) laid the groundwork for measures that could be applied alongside safe harbors, diverging from the original DMCA model. Meanwhile, the Chinese legislators introduce various elements during the legal transplantation of safe harbor rules and the courts developed diverse approaches of intermediary liability. That said, although the three jurisdictions started with a quite similar legal baseline, they adopted different approaches to address the same problem of intermediary liability.

[246] Li Y & Huang W (2019); Solomon L (2015) 238, 250-51.

[247] USCO, 'Section 512 of Title 17:A Report of the Register of Copyright' (2020) <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>; Section 512 Report, 189.

[248] Wilman F (2021).

1.1 Intermediary Copyright Liability in the U.S.

1.1.1 Standards Establishing Liability

In the U.S., the issue of intermediary liability for third-party content predates the Internet, and the emergence of intermediaries initially blurred the boundaries between primary and secondary liability.[249] Judge Posner explained that direct infringements should merely be called 'infringements' because the law, for instance, also does not speak of 'direct negligence' versus 'contributory negligence.'[250] Generally, the term 'infringement' refers to violations of the exclusive rights granted to copyright owners and is sometimes called 'direct/primary infringement' to distinguish it from forms of indirect infringement or secondary infringement.[251] For secondary infringement to exist, another entity must have directly infringed the copyright, making secondary liability contingent upon the existence of direct/primary infringement.[252]

1.1.1.1 Primary Liability in the U.S. Copyright Law

Playboy Enterprises v. Frena dealt with the liability of a Bulletin Board System (BBS) operator for making available Playboy pictures that were uploaded to the BBS by its users.[253] The district court held that the operator had violated Playboy's copyright by supplying 'a product containing unauthorized copies of a copyrighted work';[254] and held the disputed intermediary liable as copyright infringers by stating that '[i]ntent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement'.[255] In other words, a strict liability was imposed on intermediaries to hold them liable as publishers of information for the content they distribute, regardless of their intent or knowledge of the infringing activity. Such a strict liability was also endorsed by Working Group on Intellectual Property Rights in the study of the application and effectiveness of IP rules in relation to the internet.[256]

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[249] Kulk S (2019) 239.
[250] Flava Works, Inc. v. Gunter, 689 F.3d 754, 760 (7th Cir. 2012).
[251] Kulk S (2019) 237.
[252] Matthew Bender & Co., Inc. v. West Pub. Co., 158 F.3d 693, 706 (2d Cir. 1998); A&M Records v. Napster (2001) 1013; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1147 (9th Cir. 2007); Flava Works, Inc. v. Gunter, 689 F.3d 754, 758 (7th Cir. 2012); Kulk S (2019) 238.
[253] Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993).
[254] Ibid. 1556.
[255] Ibid. 1559.
[256] 'THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS' (1995) <https://www.eff.org/files/filenode/DMCA/ntia_dmca_white_paper.pdf>, 116.

A turnaround came in *Netcom* that focused on the liability of a BBS operator and an internet access provider that provided the BBS with an internet connection.[257] After finding that copies had been made on the servers of the BBS provider and the internet access provider, the Court held that these intermediaries were not directly liable for such copying, as they had not taken affirmative action that directly resulted in the copying.[258] In other words, an internet access provider should not be directly liable for a subscriber's infringement of which it was unaware.[259] Thus, *Netcom* departed from the rigid application of the copying concept endorsed by earlier courts and shifted the focus from the infringing activity (copying) to the infringer (copier), offering a more normative and functional perspective on intermediary activities.[260] However, such a ruling did not mean that intermediaries are not completely free from liability just because they did not directly infringe plaintiffs' works; they may still be liable under secondary liability doctrine.[261] Regarding secondary liability, particularly contributory liability, the court determined that once RTC notified Netcom about infringing content on its service, Netcom had a duty to investigate and remove the infringing material if the claim was valid. Consequently, the court denied Netcom's motion for summary judgment, ruling that Netcom could be held contributorily liable for subscriber infringements if its failure to act on RTC's notice materially contributed to the subscriber's infringement.[262] Later, this ruling caused significant influence on the U.S. legislative debate over intermediaries liability rules, particularly the Section 512 DMCA.[263]

1.1.1.2 Intermediary Liability in the U.S. Copyright Law

In the U.S., the Copyright Act does not itself render anyone liable for infringement committed by another expressly, but the absence of express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity.[264] Since copyright infringement is a tort, it is natural that the general theories of secondary liability within tort doctrine would also apply to cases of copyright infringement.[265] Pre-DMCA, intermediaries faced inconsistent liability

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[257] Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F.Supp. 1361 (N.D. Cal. 1995).
[258] Ibid. 1368.
[259] Ibid. 1369-70.
[260] Kulk S (2019) 241.
[261] RTC v. Netcom (1995) 1373.
[262] Ibid. 1381.
[263] Bretan J (2003); Mcevedy V (2002).
[264] Gorman RA et al. (2017) 1150.
[265] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (noting that doctrines relating to secondary liability for copyright infringement emerged from common law principles and are well established in the law.)

under 'vicarious liability, contributory infringement, and inducement liability' theories for providing services that subscribers used to infringe copyrighted works.[266] Among others, two forms of secondary infringement are primarily recognized and developed by courts based on common law principles: 'vicarious liability is imposed across virtually all areas of law, with contributory infringement being a specific instance of the broader issue of determining when it is just to hold one party accountable for the actions of another.'[267]

A) Contributory Infringement

Contributory infringement stems from the notion that one who directly contributes to another's infringement should be held accountable.[268] Contributory infringement has been described as an outgrowth of enterprise liability, and imposes liability where one person knowingly contributes to the infringing conduct of another.[269] Contributory copyright infringement has long been based on whether the defendant, 'with knowledge of the infringing activity, induced, caused, or materially contributed to another's infringing conduct.'[270] Thus, the decision successfully established the concept of knowledge as the key objective assessment for contributory infringement. Such a standard is analogous to negligence-based liability, rather than the strict liability typically imposed on publishers.[271] Noteworthy, in *Gershwin*, the Court did not clarify the nature of its reference to knowledge: whether it was limited to 'actual knowledge' or also encompassed 'reason to know' or 'should have known.' Under contributory infringement doctrine, whether an intermediary should be held liable for its users' misconduct largely turns on the knowledge test, that is, whether the intermediary 'knew (actual knowledge) or had reason to know (constructive knowledge)' about the infringing content at issue.[272] As the Second Circuit noted in *Capital Records v. Vimeo*, 'the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.'[273] Despite the significance of the knowledge standard in establishing liability for contributory copyright infringement, case law has consistently lacked clarity on the connotation of 'knowledge.'[274] In

[266] Harris DP (2015).
[267] Sony v. Universal (1984).
[268] Gorman RA et al. (2017) 1146; RESTATEMENT (SECOND) OF TORTS §876(b) (AM. LAW INST. 1979).
[269] Gershwin v. Columbia (1971).
[270] Heymann LA (2020); Kulk S (2019) 246.
[271] Heymann LA (2020) 339.
[272] Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 933 (N.D. Cal. 1996); Schruers M (2002) 231-32.
[273] Capitol Records v. Vimeo (2016).
[274] Heymann LA (2020) 339.

addition, material contribution serves as the second requirement of contributory infringement. Notably, merely providing facilities or the site for an infringement might amount to material contribution,[275] though some courts emphasize that the contribution must be 'substantial,' thus holding that providing equipment and facilities for infringement alone is not determinative of material contribution.[276]

In *Sony*,[277] the U.S. Supreme Court assessed Sony's liability for copies made with its Betamax video recorder. In this case, it could be argued that Sony had constructive knowledge of the fact that 'its customers may use that equipment to make unauthorized copies of copyrighted material.'[278] The Court applied the 'staple article of commerce' defense from patent law, ruling that if an infringing article has 'substantial non-infringing uses,' it qualifies as a 'staple Art.of commerce' and is not liable for infringement.[279] As the Betamax had 'significant non-infringing uses,' Sony was not held liable for contributory infringement. The Sony doctrine is only one source of limitation on liability for copyright infringement.[280]

Later, the classic definition of contributory infringement has been 'refined' by the Ninth Circuit 'in the context of cyberspace to determine when contributory liability can be imposed on a provider of Internet access or services.'[281] The courts have justified applying secondary liability theories in the cases involving P2P services such as *Napster*,[282] *Aimster*,[283] and *Grokster*.[284] In *Napster*, the Ninth Circuit rejected the applicability of the Sony Test because of Napster's 'actual, specific knowledge of direct infringement' and the unlikelihood of non-infringing uses of Napster, and found Napster liable for both 'contributory infringement' and 'vicarious infringement.'[285] Addressing the contributory infringement claim, the court ruled that the 'law does not require knowledge of specific acts of infringement' and Napster had 'knowledge, both actual and constructive, of direct infringement' of infringing activity. In terms of knowledge test, the Court held that 'if a computer system operator learns of specific

[275] Fonovisa v. Cherry Auction (1996).
[276] Apple Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 625 (N.D. Cal. 1993).
[277] Sony v. Universal (1984).
[278] Ibid, 439.
[279] Ibid, 449-450.
[280] Lemley MA and Reese RA (2003) 1369.
[281] Perfect 10 v. Amazon (2007) 1171.
[282] A&M Records v. Napster (2001).
[283] In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).
[284] MGM Studios v. Grokster (2005)
[285] A&M Records v. Napster (2001) 1021.

infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.'[286] Intermediaries, such as access providers and video hosting providers, are unlikely to be held liable as contributory infringers as they generally lack specific knowledge of infringements.[287] Those intermediaries who remain 'willfully blind' to infringements can nevertheless be contributory infringers.[288]

One specific form of contributory infringement is the inducement of another's infringement. In *MGM v. Grokster*, the U.S. Supreme Court explained that 'one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.'[289] This inducement theory is used to hold liable those who may not have knowledge of or control over specific infringements, but who nevertheless aim to enable or encourage others to infringe copyrights. Although in *Grokster* the U.S. Supreme Court spoke of devices and products when it enunciated its inducement theory, the theory also applies to those providing services that are used to infringe copyrights. Not only can the providers of P2P file-sharing software be held liable under the inducement theory,[290] but also those who provide services such as the trackers that are needed for file-sharing over the BitTorrent protocol.[291]

In practice, copyright holders have argued that intermediaries should have been held to have had sufficient 'red flag' knowledge and the 'right and ability to control' the infringing activities of their users as they have had the capability and available technology resource to remove such material.[292] However, the courts have not imputed actual or 'red flag' knowledge to intermediaries simply for their voluntary implementation of content identification technologies or have had the technologies available and chose not to use them. In *Veoh*, the Ninth Circuit declined to attribute such knowledge to *Veoh*, emphasizing that 'the DMCA acknowledges that service providers who do not locate and remove infringing materials of which they are not

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[286] Ibid.

[287] UMG Recordings, Inc. v. Veoh Networks, 667 F. 3d 1022 (9th Cir. 2011); Viacom Int'l v. YouTube (2012); Luvdarts, LLC v. AT & T Mobility, LLC, 710 F.3d 1068 (9th Cir. 2013).

[288] Viacom Int'l v. YouTube (2012) 35.

[289] MGM Studios v. Grokster (2005) 936–937.

[290] Arista Records LLC v. Lime Group LLC, 784 F.Supp.2d 398 (S.D.N.Y. 2011).

[291] Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020, 1033 (9th Cir. 2013).

[292] Opening Brief for Plaintiffs-Appellants at 13, 37, 45, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2nd Cir. 2012) (No. 10-3270), 2010 WL 4930315; Brief of Plaintiffs-Appellees at 14, Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013) (No. 10-55946), 2011 WL 2191541; Appellants' Brief at 67, UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3706518.

specifically aware should not forfeit safe harbor protection.'[293] As the Second Circuit stated in another case, 'the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material.'[294] Courts have also required 'something more than the ability to remove or block access to materials posted on a service provider's website'[295] for a finding of the 'right and ability to control,' which, when combined with 'a financial benefit directly attributable to the infringing activity,'[296] would render intermediaries ineligible for the DMCA safe harbor.

B) Vicarious Infringement

Vicarious liability for copyright infringement is based on the principles of *respondeat superior*, a legal doctrine that holds an employer or principal legally responsible for the wrongful acts of an employee or agent if such acts occur within the scope of the employment or agency.[297] In contrast to contributory liability, this type of liability can be categorized as 'relationship-based liability,' as it does not depend on knowledge but rather on control over and financial interest in another person's infringement. The rationale behind vicarious liability is that it places responsibility on those who are in a position to effectively police the conduct of others.

In *Shapiro v. Green Company*, the Court sought to establish a principle for enforcing copyright against a defendant whose economic interests were intertwined with those of the direct infringer, despite not directly employing the infringer.[298] In deciding the liability of a chain store owner for a concessionaire selling unauthorized bootleg records, the Court applied the doctrine of *respondeat superior*, typically used in employer-employee relationships.[299] Thus, the Court imposed liability even though the defendant was unaware of the infringement, as the store proprietor not only had the power to cease the conduct of the concessionaire nut also derive an obvious and direct financial benefit from the infringement.[300]

In the latter case of *Gershwin*, the Second Circuit held Columbia Artists Management vicariously liable for the infringing conduct of artists who performed songs without Gershwin's authorization, despite the fact that the defendant lacked the formal, contractual ability to control

[293] UMG v. Shelter Capital Partners (2013).
[294] Viacom Int'l v. YouTube (2012).
[295] Ibid, 38.
[296] 17 U.S.C. §512(c)(1)(C) and (d)(2).
[297] Gorman RA et al. (2017) 1144.
[298] Shapiro v. Green (1963).
[299] Ibid.
[300] Ibid, 307-8.

the direct infringer.[301] Moreover, the Court articulated its test for vicarious liability by stating that ‘even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.’[302] In *Napster*, the Court ruled Napster vicariously liable as it stood to ‘benefit financially from the infringing activity,’ and that it had ‘materially contributed’ to the infringement by providing its software and services to the infringers.[303] In *Veoh*, the Ninth Circuit confirmed that Veoh’s adoption of technologies to identify and remove allegedly copyright-infringing material was ‘not equivalent to the activities found to constitute substantial influence’ on users’ activities and therefore did not constitute a ‘right and ability to control’ infringing activities.[304]

1.1.2 Immunity Precluding Liability: Safe Harbors under CDA Section 230

Section 230 CDA, long considered the ‘Magna Carta’ of the internet,[305] provides the strongest and most unconditional form of intermediary liability immunity with the broadest applicability.[306] In an effort to make the Internet off limits to adult speech,[307] U.S. Congress passed the CDA to immunize intermediaries for liability arising from significant amount of UGC. As part of that Act, Congress responded to concerns that intermediaries that took efforts to filter out objectionable content would render themselves liable for defamation as publishers by passing section 230 of the Act. Particularly in the legislative history, members of Congress endorsed the ‘marketplace of ideas’ metaphor[308] as the principal justification for Section 230’s broad immunity, believing it would foster and preserve the emerging network as engines for ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’[309] The two key provisions of the CDA work together to create immunity from liability for intermediaries. First, Section 230(c)(1) offers a ‘safe harbor’ by ensuring that interactive intermediaries are not treated as publishers or speakers of third-party content. Second, Section 230(c)(2), known as the ‘Good Samaritan

[301] Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971); Gorman RA et al. (2017) 1146.
[302] Gershwin v. Columbia (1971) 1162.
[303] A&M Records. v. Napster (2001) 1004.
[304] UMG v. Shelter Capital Partners (2013).
[305] Dimitroff K (2021).
[306] Kosseff J (2022); Lemley MA (2007).
[307] Gabison GA & Buiten MC (2019) 239; Citron DK & Franks MA (2020).
[308] Abrams v. United States, 250 U.S. 616 (1919); Napoli PM (1999).
[309] Communications Decency Act of 1996, Pub. L.104-104, tit.V, 110 Stat. 133.

Clause,' protects these intermediaries and users from liability when they voluntarily and in good faith restrict access to objectionable material.[310]

The CDA was quickly struck down as unconstitutional[311] while Section 230 successfully survived the judicial review.[312] In enacting these provisions, Congress aimed to encourage the development of the Internet without hindering future progress, freedom of speech, or intellectual activity.[313] Section 230 has been uniformly held to create absolute immunity from liability for anyone who is not the author of the disputed content, even after they are made aware of the illegality of the posted material and even if they fail or refuse to remove it.[314] Although often portrayed as antithetical, Section 230 and copyright law share a common objective: to foster a content-rich internet.[315] Section 230 has given intermediaries considerable latitude over how they manage hosted content, without worrying about the legality of the content others post or send through their system.[316] Some credit Section 230 with having enabled the growth of major intermediaries in the U.S., by freeing them from the costs associated with protecting against copyright liability.[317] Noteworthy, protection under the Section 230 is subject to a number of significant exceptions, such as for the enforcement of federal criminal law, IP law, and electronic communications privacy laws.[318] Particularly, the copyright law exception was found in the Section 512 DMCA. Additionally, in judicial practice, court have held that Section 230 does not apply to websites that 'materially contribute' to shaping the transaction,[319] or 'materially contribute' to the unlawfulness of the content.[320]

1.1.3 Immunity Precluding Liability: Safe harbors under DMCA

From the CDA to the DMCA, Congress has provided intermediaries with an affirmative defense against liability claims. The IP exemption from Section 230 CDA significantly undermines intermediary immunity, as intermediaries' potential liability for copyright-infringing content posted by third parties has been a contentious legal issue since the early days

[310] Rozenshtein AZ (2023).
[311] Flew T (2021) 46-7.
[312] Reno v. ACLU, 521 U.S. 844 (1997).
[313] 47 U.S.C. §230(1)-(3).
[314] Lemley MA (2007).
[315] Gabison GA & Buiten MC (2019) 241.
[316] Lee E (2008a); Chander A (2013) 653.
[317] Goldman E (2012); Citron DK & Wittes B (2018).
[318] 47 U.S.C. §230(e)(1)–(3).
[319] Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398, 417 (6th Cir. 2014) (holding Dirty World not liable because 'it did not materially contribute to the tortious content at issue').
[320] Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

of the Internet. As courts reached varying conclusions on the status of intermediaries,[321] the urgent need for legal certainty prompted Congress to enact the DMCA, addressing the gap that the CDA intentionally left in copyright law. Before the introduction of the safe harbors, case law regarding intermediary liability for third-party information was inconsistent, posing a genuine risk that these intermediaries could be held contributorily or vicariously liable for infringing materials they transmitted.[322] Simultaneously, the DMCA embodied a response from copyright owners who insisted that intermediaries meet specific conditions to benefit from limited liability and that a mechanism for the takedown of copyright-infringing material be established.[323] Congress established a system of copyright safe harbors in the Section 512 DMCA with the aim of providing legal certainty for intermediaries while offering rightsholders an expeditious mechanism to address online infringement.[324] The rationale for these immunities is sound: holding intermediaries liable for every instance of problematic content posted online would stifle the Internet due to the overwhelming threat of liability and the immense effort required for rights clearance.[325] Thus, the liability exemptions in the DMCA emerged from a bargaining process primarily involving the copyright industries and early internet intermediaries.[326]

Although Section 512 introduces many technical requirements for safe harbor eligibility, but the fundamental quid pro quo is well-situated in the NTD mechanism, which requires intermediaries to remove or block access to infringing material once they receive a specific notice from the copyright owner in exchange for immunity. What is more, the safe harbor mechanism provides rightsholders with an expeditious and extra-judicial method to address online copyright infringement cooperatively and efficiently, avoiding the costs and delays of federal court litigation.[327]

In practice, safe harbor provisions serve as an essential legal foundation to shield intermediaries from legal liability in moderating and managing content posted by users.[328] Besides, the

[321] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[322] Nimmer D (1996) 34.
[323] Mehra SK & Trimble M (2014) 688.
[324] 17 U.S.C. §512(a) to (d); Band J & Schruers M (2002) 303.
[325] Lemley MA (2007).
[326] Litman J (2006) 115.
[327] Bridy A (2016); Urban JM & Quilter L (2005).
[328] Chander A (2013).

DMCA rules incentivized intermediaries to cooperate in combating unauthorized use of copyrighted works, particularly through the NTD regime, which empowered copyright owners to address infringing uses of their materials.[329] The copyright-specific safe harbor provisions, centered around the NTD mechanism as well as the principle of prohibition on general monitoring obligations,[330] provide intermediaries with legal certainty and promote the development of the internet.[331] Although the unconditional immunity in Section 230 CDA did not garner much followership,[332] the Section 512 DMCA quickly became a legislative blueprint for the allocation for liability of intermediaries in other nations.[333] The safe harbors established in Section 512 not only directly shaped the online copyright enforcement, leading to the implementation of 'DMCA-plus' private agreements between rightsholders and intermediaries 'in the shadow of those safe harbors,'[334] but also ultimately resulted in automated copyright content moderation systems.[335]

1.1.3.1 Overview of Section 512 DMCA

It is worth noting that Section 512 does not itself define the requirements for establishing liability, but only provides immunity from monetary damages and injunctive relief for qualified intermediaries. The standard for establishing liability was intentionally left to the law on secondary liability doctrines in its 'evolving' state.[336] Moreover, the safe harbors do not imply that an intermediary is liable for conduct that is outside the scope of the safe harbors, nor does it affect other possible defenses against an infringement;[337] rather, it affects the remedies available for any infringement which might be found.[338] Section 512 provides safe harbors for intermediaries engaged in four types of activities, each with its own set of eligibility requirements.[339]

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[329] Kulk S (2019) 262.
[330] Chander A (2013) 639; (1998) R. REP. NO. 105-551, pt. 2, at 53.
[331] Chander A (2013) 661-2.
[332] Husovec M (2019).
[333] Stanford Law School Center for Internet and Society, 'World Intermediary Liability Map (WILMap)' <https://wilmap.law.stanford.edu>
[334] Sag M (2017).
[335] Such as YouTube's Content ID <https://support.google.com/youtube/answer/2797370?hl=en> or Meta's Rights Manager <https://rightsmanager.fb.com/>
[336] S. Rep. No. 105-190, Report of the Senate Judiciary Committee on S. 2037, the Digital Millennium Copyright Act (May 6, 1998) 19.
[337] 17 U.S.C. §512(l).
[338] Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146, 1179 (C.D. Cal. 2002).
[339] 17 U.S.C. §512(a)–(d).

Admittedly, the DMCA safe harbors are subject to a number of requirements and limitations. First, unlike section 230, the DMCA safe harbors bar *monetary relief* against ISPs,[340] while it does allow limited forms of injunctive relief, specified under Section 512(j).[341] This said, an intermediary that meets the eligibility criteria under one of the four safe harbors is not liable for monetary relief resulting from copyright infringement committed by its users and is subject to only limited injunctive relief.[342] Second, the safe harbors protect only specific activities or functions of intermediaries, as clarified in Section 512(n), and a single intermediary can qualify for all four safe harbors if it engages in all four activities specified in Section 512.[343] In other words, the DMCA safe harbors are primarily function-oriented immunities as they do not cover all classes of intermediaries, but only immunize intermediaries from monetary damages by reason of four different kinds of conduct: (a) providing Internet access, (b) system caching or temporary storage of material, (c) passive storage or hosting of material posted by users, and (d) providing location tools, such as links to content on other sites.[344] Third, intermediaries benefit from the safe harbor only if they establish, publicize, and implement both an NTD system for removing all content of which copyright owners complain and a system for identifying 'repeat infringers' and kicking them off the system,[345] and only if they accommodate technical protection measures.[346] Finally, where the provider has the right and ability to control such activity, it must not receive a financial benefit directly attributable to the infringing activity.[347]

Specifically, to qualify for the safe harbor for hosting, intermediaries must designate an agent to receive notifications of claimed infringements and make the agent's name, email address, and contact information available on their website. They must also notify the Copyright Office of the designated agent's contact information and keep this information up to date in the Copyright Office's directory of DMCA-designated agents on an ongoing basis.[348]

1.1.3.2 NTD Mechanism

[340] Ibid. §512(k)(2).
[341] Ibid. §512(j), emphasis added; Section 512 Report.
[342] Ibid. §512(b)–(d), (j); Kulk S (2019) 265.
[343] Ibid. §512(e) (2012).
[344] Ibid. §512(a), (b), (c), (d).
[345] Ibid. §512(c)(2)-(3) ("notice and takedown") and §512(i)(1)(A) ("repeat infringers").
[346] Ibid. §512(i)(1)(B).
[347] Ibid. §512(c).
[348] Ibid. §512(c)(2).

The DMCA introduces a procedure commonly known as NTD, which requires intermediaries to act expeditiously to remove or disable access to the claimed infringing material upon receiving notice from a right holder.[349] Intermediaries will not be held liable for the good-faith removal of materials 'claimed to be infringing or based on facts or circumstances from which infringing activity is apparent',[350] even if those materials are ultimately not found to be infringing. The mechanism operates on two premises: first, intermediaries lack the technical means to police third-party content they host or link to; second, even if intermediaries had those means, they cannot assess whether specific material infringes copyright due to a lack of basic information, including the current copyright owner and any existing licensing arrangements.[351] Additionally, these two premises support the requirement that intermediaries must lack a certain degree of knowledge about infringing activity, as possessing such knowledge disqualifies an intermediary from benefiting from the DMCA safe harbors.

a) Notice and counter-notice

The DMCA meticulously outlines the mechanism, specifying the notification content required from copyright owners for intermediaries to remove allegedly infringing material,[352] detailing counter-notifications that users may file to defend their uploads,[353] and outlining the actions intermediaries must take for takedown and reinstatement.[354] When an intermediary receives a valid notice from a copyright holder or its agent identifying specific allegedly infringing content uploaded to the hosti intermediary, or infringing material linked by a search engine or other location tool provider, the intermediary must act promptly to remove or disable access to the identified material.[355] Intermediaries are required to take action only upon receiving a valid notice that contains the information specified in Section 512 and sufficiently identifies the location of the alleged infringing content.[356] Notices that fail to identify the alleged infringing content with sufficient specificity will not be considered as providing the intermediary with the knowledge required to disqualify it from relying on the safe harbor.[357] For a notice to be

[349] Ibid. §512(c)(1); Seng D (2014).
[350] Ibid. §512(g)(1).
[351] Mehra SK and Trimble M (2014) 689.
[352] 17 U.S.C. §512(c)(3).
[353] Ibid. §512(g)(3).
[354] Ibid. §512(g)(2).
[355] Ibid. §512(c)(1)(C).
[356] Ibid. §512(c)(3).
[357] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007); UMG Recordings v. Veoh Networks (2009) 1108–09.

effective, the notice needs to be a written communication to the DMCA agent of the service provider, including substantially a series of formal requirements.[358]

A party whose content has been removed may send a counternotice to the intermediary, requesting that the content be reinstated. If the intermediary receives a valid counternotice, it can restore the removed content within 10–14 days without incurring liability, unless the copyright complainant files a lawsuit during that period.[359] The statutory requirement that intermediaries 'expeditiously' remove or disable access to infringing material upon becoming aware of it has been interpreted by the courts using a flexible approach that takes into consideration the varying circumstances of each case.[360] The U.S. Copyright Office (USCO) notes that the current statutory timeframes to resume providing access to content following receipt of a counter-notice ill serves both users and rightsholders given current business models and the realities of federal litigation.[361]

Empirical studies by Urban and Quilter indicates that while one third of the notifications were seriously flawed, in only a very few cases was a counter-notification filed.[362] A later empirical study by Urban, Karaganis and Schofield suggests that the counter-notification procedure is scarcely used as users generally do not have 'sophisticated knowledge of copyright law' and have little capacity to assess or to take the risks of filing a counter-notice.[363] Moreover, the mechanisms for submission of takedown notices, adopted in recent years by many of the larger intermediaries, are no longer in sync with the notice requirements set forth in section 512(c). The proliferation of new web-based submission forms and intermediary-imposed requirements for substantiation of takedown notices in order to ensure the efficiency of the process has had the effect of increasing the time and effort that smaller rightsholders must expend to send takedown notices.[364] At the same time, some of the current notification standards set forth in section 512(c) could be on their way to becoming obsolete. The USCO therefore recommends that Congress consider shifting the required minimum notice standards for a takedown notice

[358] 17 U.S.C. §512(c)(3)(A)(i) to (vi).
[359] Ibid. §512(g) (2)–(3).
[360] Hinze G (2019).
[361] Keller D (2018).
[362] Urban JM & Quilter L (2005) 679.
[363] Urban JM et al. (2017) 44-5.
[364] Section 512 Report.

to a regulatory process, enabling the USCO to set more flexible rules and 'future-proof' the statute against changing communications methods.[365]

For large companies, NTD operations often involve standardized intake forms, dedicated legal teams, and specialized tools for tracking and responding to notices, whereas smaller companies may handle take-down requests more informally or on an *ad hoc* basis.[366] However, academic studies show that intermediaries receive many inaccurate or bad faith removal requests, they comply with legally baseless requests all too often.[367] Abusive removal demands are a recurring issue in NTD systems, where ill-informed copyright owners and reporters often submit vague, ambiguous, and exploitative takedown requests.[368] What is even worse, abusive DMCA takedown requests in the form of copyright claims have also been used to silence public speech.[369] Regardless of one's views on the appropriate scope of legitimate delisting or removal requests, the issue of abusive requests remains problematic, as does the reliance on technology companies to resolve complex legal questions affecting fundamental rights of users, especially given the variability of laws across different countries.[370]

B) Good faith, accuracy and misrepresentation

A notification that fails to 'comply substantially' with the requirements cannot be considered to be actual knowledge or an awareness of facts or circumstances from which the infringement is apparent.[371] For a takedown notice to be valid, it must include a statement in good faith that the notifying party believes the materials are unauthorized, and must also include a statement confirming the accuracy of the notice and affirming that the notifying party is authorized to act on behalf of the copyright owner.[372] Given that fair use is a form of use that is 'authorized by…the law,' thus owners must consider whether the use in question is a fair use before sending a takedown notice copyright.[373] Even though courts have rightly interpreted this provision to require actual knowledge or willful blindness of falsity, rather than mere negligent or

[365] Ibid.
[366] Urban JM et al. (2017).
[367] Seng D (2014) 441; Seng D (2021).
[368] Keller D (2018) 291; Seng D (2014) 441.
[369] Cobia J (2009).
[370] Blythe SM (2019); Cobia J (2009).
[371] 17 U.S.C. §512(c)(3)(B)(i).
[372] Ibid. §512(c)(3)(A)(v)-(vi).
[373] Lenz v. Universal Music Corp. 801 F.3d 1126, 1132 (9th Cir. 2015).

unreasonable misrepresentation,[374] the USCO notes that many stakeholders have called for increased penalties for misrepresentations to enhance their deterrent effect.[375]

In addition, senders of both takedown notices and counter-notices are liable for damages if they make knowing material misrepresentations regarding whether the material to be taken down is infringing, or has been removed or disabled by mistake or misidentification.[376] In the Section 512 Report, the USCO questions the test for knowing misrepresentation under Section 512(f) adopted in *Lenz*, which had the effect of imputing the good faith requirement in Section 512(c)(3) for notice sending into the analysis of Section 512(f)'s knowing misrepresentation requirement.[377] Such an analysis could result in placing potential liability on rightsholders who fail to undertake a fair use inquiry before sending a takedown notification, without regard to whether or not the material is actually infringing.

1.1.3.3 Knowledge Test

To qualify for the safe harbors, intermediaries must not have actual knowledge that material or an activity using material on their system or network is infringing, or in the absence of actual knowledge, they must not be aware of facts or circumstances from which infringing activity is apparent.[378] Upon obtaining such knowledge or awareness, the intermediary must act expeditiously to remove, or disable access to, the allegedly infringing material.[379] Much DMCA-related litigation has focused on the gap between the knowledge that the DMCA requires intermediaries to lack and the knowledge intermediaries undeniably have once they receive a DMCA notification from a copyright owner. Section 512(c) DMCA only protects 'innocent' intermediaries that do not have actual or constructive knowledge of infringements taking place.[380] The U.S. legislator, by implementing this knowledge requirement, ensured that intermediaries would not be burdened with an active duty to monitor for infringing material while also preventing them from deliberately ignoring infringements.[381] In practice, the

[374] Chang L (2010); Sirichit M (2013)
[375] Section 512 Report.
[376] 17 U.S.C. §512(f).
[377] Lenz v. Universal Music (2015) 1154.
[378] 17 U.S.C. §512(c)(1)(A); §512(d)(1).
[379] Ibid. §512(c)(1)(A); §512(d)(1).
[380] H.R. Conf. Rep. No. 105-796, p.72 (1998).
[381] Kulk S (2019) 269.

interpretations of the Section 512 knowledge requirements for intermediaries may be narrower than Congress initially intended.[382]

A) 'Actual Knowledge' and 'Red Flag Knowledge'

The statute requires that, in order to qualify for the Section 512(c) or (d) safe harbors, an intermediary must both lack 'actual knowledge that material or activity on its service is infringing,' and 'red flag knowledge' that 'awareness of facts or circumstances from which infringing activity is apparent.'[383] In practice, U.S. courts have established a high threshold for what constitutes disqualifying knowledge, ruling that intermediaries will only be disqualified from safe harbor protections if they have actual knowledge or red flag awareness of 'specific and identifiable' instances of infringement.[384] The actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while 'red flag knowledge' does have an objective element as it turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.'[385]

In practice, proving actual knowledge is challenging due to the high standard required, and it 'does not reach an entity that willfully ignores blatant indications of infringement.'[386] As the NTD procedure serves as a reference to actual knowledge, some courts and commentators have interpreted the DMCA's provisions to create a 'notice equals knowledge' framework, wherein the notice from the copyright owner confers knowledge upon the intermediaries.[387] However, such 'notice equals knowledge' statement is not accurate. Congress expressly stated that 'actual knowledge or red flag knowledge could be obtained without receiving a takedown notice.'[388] As Congress recognized, intermediaries can obtain actual knowledge in a number of different ways: 'by personally using the service and uncovering infringing material or activity, having a monetizing system repeatedly identify a content match, or receiving an email that points out infringement of an unreleased work on the site, in the absence of undertaking to affirmatively

[382] Section 512 Report.
[383] 17 U.S.C. §512(c), (d).
[384] Viacom Int'l v. YouTube (2012) 31.
[385] Ibid. Columbia Pictures Industries v. Fung (2013) 1043.
[386] Nimmer D (2003) 358.
[387] Lee E (2009) 252. See counter argument in Heymann LA (2020) 370.
[388] S. REP. NO. 105-190, at 45 (1998); H.R. REP. NO. 105-551, pt.2, at 54 (1998).

monitor the service for infringements.'[389] Moreover, the statute's mention of 'facts or circumstances from which infringing activity is apparent' aligns with what the legislative history describes as a 'red flag' test, which encompasses 'information of any kind that a reasonable person would rely upon,' including a notice.[390] Intermediaries are not required to proactively monitor their services for evidence of infringing activity, but if they become aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.[391]

What qualifies as red flag knowledge, and how that differs from actual knowledge, thus has major significance. If the red flag standard is too low, intermediaries may not need to act to disable access or remove infringing content at any point short of developing actual knowledge; if the standard is too high, it may require intermediaries to respond any time they develop even an inkling that content could be infringing.[392] On the one hand, intermediaries prefer a scenario where no gap exists between the knowledge they are required to lack and the knowledge they possess, meaning they should not be imputed with any actual or 'red flag' knowledge unless they receive a proper DMCA notification from a copyright owner containing all the required information. On the other hand, copyright owners advocate for a substantial gap, arguing that intermediaries should be presumed to have sufficient knowledge of infringement even with a lower level of knowledge than that provided by a DMCA notification, thereby excluding intermediaries, from the DMCA safe harbor and holding them fully liable for secondary copyright infringement.[393]

In judicial practice, courts have determined that both red flag and actual knowledge under Section 512 require 'specific knowledge of particular infringing activity.'[394] In the landmark decision distinguishing red flag knowledge from actual knowledge, the Second Circuit clarified that actual knowledge is assessed by a subjective standard, while red flag knowledge is evaluated by both subjective and objective standards. Specifically, actual knowledge hinges on whether the provider genuinely or 'subjectively' knew of specific infringement, whereas red flag knowledge depends on whether the provider was subjectively aware of facts that would

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[389] Section 512 Report, 113.
[390] H.R. REP. No. 105-551, pt. 1, at 25 (1998); H.R. REP. No. 105-551, pt. 2, at 53 (1998); Lee E (2009) 252.
[391] H.R. REP. No. 105-551, pt. 2, at 53 (1998).
[392] Section 512 Report, 115.
[393] Mehra SK and Trimble M (2014) 690.
[394] Viacom Int'l v. YouTube (2012); Veoh IV, 718 F.3d at 1021.

have made the infringement 'objectively' obvious to a reasonable person.[395] The 'red flag' test incorporates both subjective and objective elements: the intermediary's subjective awareness of relevant facts or circumstances must first be assessed, and then an objective standard is applied to determine whether those facts or circumstances would have made the infringing activity apparent to a reasonable person in similar circumstances.[396] In a subsequent ruling, Ninth Circuit held that, with the general knowledge that one's services could be used to share infringing material, is insufficient to meet the actual knowledge requirement.[397] In *Capitol Records v. Vimeo,* the Second Circuit ruled that, to be disqualified from the statutory safe harbor based on red flag knowledge, an intermediary must have actual knowledge of facts that would make the claimed infringement objectively obvious to a 'reasonable person' who was not an expert in copyright law.[398] The Court determined that red flag knowledge involves a shifting burden of proof: once a defendant establishes compliance with the DMCA safe harbor as a defense, the burden shifts to the plaintiff to prove that the intermediary had actual knowledge or red flag knowledge of the infringement.[399] A mere showing that an intermediary's employee saw some part of a video uploaded by a user that included substantially all of a sound recording of a recognizable song was insufficient to meet the copyright owner plaintiff's burden of proof.[400] In contrast, the Second Circuit in *EMI v. MP3tunes* endorsed a lower threshold.[401] The court ruled that red flag knowledge existed based on categories of copyrighted works, determining that 'the CEO of MP3tunes was aware that major music labels had not generally authorized their music to be distributed in the MP3 format prior to 2007, and therefore could be assumed that he *knew* any MP3 version of the major music labels' works would be unauthorized.'[402]

B) Application of the 'Willful Blindness' Standard

The common law doctrine of 'willful blindness' examines whether an intermediary intentionally ignored the possibility of knowing about infringing activities by its users.[403] If an intermediary is found to have engaged in willful blindness, it is treated as having actual

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[395] Viacom Int'l v. YouTube (2012).
[396] S. REP. NO. 105-190, at 44 (1998)
[397] UMG v. Shelter Capital Partners (2013) at 1022.
[398] Capitol Records v. Vimeo (2016), citing Viacom II, 676 F.3d at 31.
[399] Ibid, 95.
[400] Ibid, 96–7.
[401] EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79, 91–92 (2d Cir. 2016).
[402] Ibid. Emphasis added.
[403] Case Comment on Viacom International. v. YouTube (2012) 645 (Willful blindness has long served as a substitute for the *mens rea* of knowledge in criminal law, and federal courts have also accepted willful blindness as knowledge in copyright, trademark, and patent cases.)

knowledge and consequently loses its safe harbor protection.[404] In general, an intermediary is considered to have engaged in willful blindness when it is 'aware of a high probability' of infringement and has 'consciously avoided confirming that fact.'[405] In *Viacom*, the Second Circuit ruled that the common law doctrine of willful blindness is applicable when assessing whether an intermediary lacks knowledge of infringing activity, 'to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.'[406] Then the Second Circuit specifically noted that the doctrine of 'willful blindness' cannot be construed as an affirmative duty to monitor, and therefore, it is not in conflict with Section 512(m).[407]

On remand, the district court further narrowed the willful blindness standard by conflating it with the red flag knowledge standard set forth by the Second Circuit, stating that 'under the DMCA, what disqualifies the [intermediary] from the DMCA's protection is blindness to *specific* and *identifiable* instances of infringement.'[408] Such a rigid reasoning was largely followed and reaffirmed by subsequent court decisions, which held that 'willful blindness ... require[s] a conclusion that consciously avoided learning about *specific* instances of infringement.'[409] That said, by requiring evidence of specific instances of infringing material rather than facts related to the infringement of specific copyrighted content, the courts have set a higher bar for demonstrating an intermediary's willful blindness.[410]

Overall, the courts have largely modified the common law standard for willful blindness traditionally applied in copyright cases, now requiring deliberate avoidance of specific instances of infringement rather than a general avoidance of infringing acts.[411] However, the Second Circuit's two-part definition of willful blindness risks being both overinclusive and underinclusive: a narrow interpretation could deprive courts of a crucial tool to address rogue intermediaries who strongly suspect they are hosting infringing content but avoid investigating to maintain plausible deniability, while a broad standard that relies on generalized knowledge or imposes monitoring obligations on intermediaries would directly contradict the statutory

[404] Viacom Int'l v. YouTube (2012).
[405] In re Aimster (2003).
[406] Viacom Int'l v. YouTube (2012) 35.
[407] Ibid.
[408] Viacom International, Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 117 (S.D.N.Y. 2013) (YouTube had not been willfully blind because there was 'no showing of willful blindness to specific infringements of clips-in-suit.')
[409] BMG Rights Mgmt. (U.S.) LLC v. Cox Commc'ns, Inc., 881 F.3d 293, 312 (4th Cir. 2018); Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 98-99 (2d. Cir. 2016).
[410] See Case Comment on Viacom International. v. YouTube (2012) 645.
[411] Section 512 Report, 125.

language of Section 512(m).[412] Put it simply, there is an inherent tension between the willful blindness doctrine and Section 512(m) and thus willful blindness must be tailored to specific instances of infringing content.[413] Moreover, the USCO also believes that the current articulation of the willful blindness standard is likely more narrow than appropriate.[414] It notes that Section 512 does not provide clear guidance on reconciling the inherent tension between the doctrine of willful blindness and the DMCA's explicit rejection of any affirmative duty for intermediaries to monitor user content, and courts have yet to establish a consistent standard on this issue.[415]

1.1.3.4 Financial Benefit and the Right and Ability to Control

Section 512(c)(1)(B) requires that the intermediary should not 'receive a financial benefit directly attributable to the infringing activity,' in a case in which the intermediary 'has the right and ability to control such activity.'[416] The U.S. legislator directed the courts not to adopt a formalistic approach, but rather a common sense and fact-based approach that focuses on where the financial benefits emanate from.[417] In general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity.' […] It would, however, include any such fees where the value of the service lies in providing access to infringing material.[418] In *CCBill*, the Ninth Circuit meant to go in holding that 'direct financial benefit should be interpreted consistent with the similarly worded common law standard for vicarious copyright liability.[419]

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[412] Ibid, 125-126; Case Comment on Viacom International. v. YouTube (2012) 650-51.
[413] Capitol Records v. Vimeo (2013) 523–24, citing Viacom v. YouTube (2013); Capitol Records, Inc. v. MP3tunes et al., 2013 WL 1987225 (S.D.N.Y. May 14, 2013).
[414] Section 512 Report, 127.
[415] Ibid, 126.
[416] 17 U.S.C. §512(c)(1)(B).
[417] Kulk S (2019) 272.
[418] S. Rept. 105-190, Report of the Senate Judiciary Committee on S. 2037, the Digital Millennium Copyright Act (May 6, 1998), p. 44.
[419] Perfect 10 v. CCBill (2007), 1118 (quoting H.R. Rep. 105-551 (II), at 54 (1998)).

Commentators have suggested that the DMCA has a huge loophole that carves out vicarious liability from the safe harbors entirely, thereby exposing Internet companies to potentially limitless liability for claims of vicarious infringement.[420] Section 512(c)(1)(B) provides that safe harbor is available only to an intermediary that 'does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity,'[421] which some commentators have equated as the exact same common law standard as vicarious liability.[422] They suggests that the language indicates that the safe harbor under section 512(c) leaves open a 'gaping loophole' as it only protects intermediaries against claims of direct and contributory infringement, rather than vicarious liability.[423] However, the legislative history suggests the opposite view that the bill would 'protect qualifying service providers from liability for all monetary relief for direct, vicarious, and contributory infringement.'[424] For the DMCA safe harbors, however, Congress did not include any such provision exempting vicarious liability.[425] Moreover, the plain language of the DMCA is not the same as the standard of vicarious liability. Edward Lee argues that the DMCA safe harbors do provide qualified or partial immunity to vicarious liability and the fundamental flaw of the 'loophole' reading is that it mistakenly treats one of the requirements in the DMCA safe harbor as exactly the same as the standard of vicarious liability, even though the language in the DMCA is slightly different from—and more restrictive than—the test for vicarious liability.[426]

Indeed, no court has ever used the exact language of the DMCA to describe the standard of vicarious liability under copyright law.[427] While similar, the traditional standard of vicarious liability holds that secondary liability attaches 'if the defendant has both the right and ability to supervise the infringing activity and a direct financial interest in it.'[428] Thus, the words of the DMCA's 'financial' requirement are different than the copyright standard of vicarious liability and the wording 'receive a financial benefit directly attributable to infringing activity' appears to be stricter than the common law standard 'having a direct financial interest in such

[420] Lemley MA (2007) 104. See contrary, Lee E (2008a).
[421] 17 U.S.C. §512(c)(1)(B)
[422] Wright CS (2000); Lemley MA (2007).
[423] Wright CS (2000); Lemley MA (2007); Giblin R (2008).
[424] (1998) S. Rep. 105-190, at 40; (1998) R. REP. NO. 105-551, pt. 2, at 50.
[425] Lee E (2008a).
[426] Ibid.
[427] Ibid.
[428] Shapiro v. Green (1963); A&M Records v. Napster (2001) 1022.

activity.'[429] As a result, mere similarity to a common-law doctrine does not justify applying the canon, especially when the statutory terms are worded differently from the common law.

On the other hand, copyright owners have pursued judicial interpretations of the DMCA's 'right and ability to control' prong, arguing that host intermediaries should be required to enforce a 'notice and stay down' policy using filtering technology to prevent the re-posting of infringing content that has been removed after notification by a copyright holder.[430] However, U.S. courts conclusively rejected this proposal on the basis of the structure, purpose, and legislative history of the DMCA.[431] Specifically, the 'right and ability to control' prong of the DMCA eligibility conditions requires 'something more' than having the ability to remove or block access to materials posted on a website and the contractual right and ability to terminate users' access.[432] To meet this standard, an intermediary must exert 'substantial influence' over its users, either through a high level of control, or by engaging in purposeful conduct that encouraged its users to infringe.[433]

1.1.3.4 No Monitoring Obligations

The DMCA includes a crucial limitation: eligibility for safe harbor protections cannot be conditioned on requiring an intermediary to monitor its service or actively seek out facts indicating infringing activity, except when consistent with a 'standard technical measure.'[434] This means that the DMCA's notification procedures place the responsibility for policing ongoing copyright infringement, namely identifying potentially infringing material and adequately documenting infringement, squarely on the copyright owners.[435]

Efforts to impose monitoring or notice-and-stay-down obligations on intermediaries have, however, emerged in various lawsuits. Notably, a series of lawsuits reflect a concerted effort to weaken the knowledge requirements central to the DMCA's statutory safe harbor regime, although most of these attempts were unsuccessful.[436] In these cases, rights holders sought

[429] Lee E (2008a).
[430] Hinze G (2019) 65.
[431] UMG v. Veoh (2009) 1108–09, *aff'd sub nom*. UMG v. Shelter Capital Partners (2011), *opinion withdrawn and suspended on rehearing*, 710 F.3d 1006, 1029–30 (9th Cir. 2013).
[432] Ibid.
[433] Ibid.
[434] 17 U.S.C. §512(m).
[435] Perfect 10 v. CCBill (2007) 1113.
[436] Hinze G (2019) 56.

more rigid interpretations of the eligibility conditions for safe harbor protection and required intermediaries to use filtering technology to create a *de facto* notice and stay down obligation, which, if accepted by U.S. courts, would have lowered the threshold for disqualifying intermediaries from this protection and potentially increased their obligations.[437] Moreover, policy consultations were held to explore the possibility of requiring intermediaries to adopt a notice-and-stay-down policy as a condition for safe harbor eligibility.

1.2 Intermediary Copyright Liability in the EU

Drawing a unified picture of EU intermediary liability regime is challenging. Husovec succinctly observes that 'the regulation of intermediary in Europe is a rather complicated jigsaw, composed of various puzzles from several pieces of Union law,' which must 'fit together with each other and build up a single undistorted picture.'[438] Given the sparse nature of EU law on online intermediaries and the lack of comprehensive harmonization of intermediary liability, the ECD was adopted to resolve that issue by introducing conditional liability exemptions for certain types of intermediary services involving claims for damages, as well as a prohibition on the imposition by Member States on intermediary service providers of general monitoring obligations.[439]

1.2.1 Primary Copyright Liability in the EU Copyright *Acquis*

Art.3(1)-(2) ISD harmonize the exclusive right to authorize or prohibit an act of communication or the making available of protected subject matter to the public.[440] Art.3(1) ISD grants authors the exclusive right of 'communication to the public' of their works, including the 'making available to the public' of those works in such a way that members of the public may access them from a place and at a time individually chosen by them. If a protected work is published online by a third party without the prior authorization of its author and is not covered by the exceptions and limitations set forth in Art.5 ISD, this constitutes an infringement of the exclusive right of 'communication to the public' conferred on the author by Art.3(1) ISD. However, due to the absence of a clear definition of 'communication to the public,' [441] this right has been shaped and refined by an expanding body of case law. According to the ISD and the

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[437] Capitol Records, Inc. v. Mp3tunes, LLC, 821 F. Supp. 2d 627 (S.D.N.Y 2011).
[438] Husovec M (2017) 50.
[439] Art.12-15 ECDECD.
[440] Koo J (2019) 84.
[441] *Ziggo*, para 21.

CJEU's case law, a communication to the public necessitates an act of communication[442] directed at the public[443], with the CJEU employing several normative evaluating criteria on a case-by-case analysis.[444] Indeed, while it was undisputed that sharing a protected work online through an intermediary constitutes 'making it available to the public' under Art.3(1) ISD, the question was who actually carried out that 'communication' and bore any potential liability for it: the user uploading the work, the intermediary, or both. Additionally, there was controversy over whether intermediaries could benefit from the copyright exemption pursuant to Art.14 ECD.

Notably, the Court's case law itself strangely oscillates between a strict doctrine of primary infringement and a flexible concept of intermediary liability, both being covered under an over-broad, unitary infringement concept with regard to Art.3 ISD.[445] Since the intermediary liability regime is not harmonized in EU law, the CJEU had to base its case law directly on Art.3 ISD instead of resorting to doctrines of intermediary liability. While a detailed examination of this case law is beyond the scope of this chapter, it is important to highlight some of the main conclusions from these judgments. Indeed, both European and national courts have increasingly imposed primary liability on intermediaries for hyperlinking to unauthorized content.[446] Although the case law trend towards primary liability has mainly addressed hyperlinking cases, this shift could be more broadly applied, including to instances where content is distributed on intermediaries without authorization.[447] Several notable cases at the European level, including *Svensson*,[448] *GS Media*,[449] and *Ziggo*,[450] demonstrate that the CJEU's endorsement of primary liability rules for host intermediaries that redirect users to unauthorized content via hyperlinks.

In *Svensson*, the CJEU concluded that hyperlinking constitutes communication to the public if two requirements are met: an act of communication and a new public, defined as a public not

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[442] YouTube and Cyando, Joined Cases C-682/18 and C-683/18 (2021) ECLI:EU:C:2021:503, para.66–68; Stamatoudi I & Torremans P (2021).
[443] Ibid.
[444] Quintais JP et al. (2022).
[445] Leistner M (2020) 9.
[446] Quintais JP (2018) 408.
[447] Krokida Z (2022) 122.
[448] Case C-466/12 Nils Svensson and Others v Retriever Sverige AB (2014) ECLI:EU:C:2014:76.
[449] Case C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others (2016) ECLI:EU:C:2016:644; Rosati E (2017a) 1242.
[450] *Ziggo*.

included in the initial transmission. Thus, if these requirements are fulfilled, a host intermediary can be held primarily liable for copyright infringement.[451] Such a stance was affirmed in *GS Media*, where the CJEU introduced two additional requirements for holding a host intermediary primarily liable: it targets a new public not considered by the rightsholders in the initial transmission, and the host intermediary is aware of the illegal nature of the link, particularly if it operates on a commercial basis. Thus, certain mental elements were imported into the assessment of 'act of communication' requirement of the concept of communication to the public.[452] Also, this ruling implies that the profit-making motive is crucial in determining whether the link provider is primarily liable for hyperlinking unauthorized content. If the link provider does not operate on a commercial basis, knowledge of the illicit activity is not presumed, meaning that linking is not considered a primary infringement, and the link provider is not liable for primary copyright infringement.[453] The CJEU noted that if the posting of links pursues financial gains, then the link provider 'should carry out the checks necessary to ensure that the work concerned is not illegally published. Therefore, it must be presumed that that posting has been done with the full *knowledge* of the protected nature of the work and of the possible lack of the copyright holder's consent to publication on the internet.'[454] Hence, in this case, hyperlinking amounts to an unauthorized act of communication to the public, unless the intermediary can prove that it does not pursue financial gains.

Similarly, the CJEU in *Ziggo* confirmed the requirements established in the *GS Media* case.[455] This case, referred by the Dutch Supreme Court, involved a dispute where Sichting Brein, an anti-piracy association, sought legal action against Ziggo, an internet access service provider, requesting it to block access to The Pirate Bay (TPB).[456] Again, the CJEU was asked whether hyperlinking constitutes an act of communication to the public within the meaning of Art.3(1) ISD. In interpreting the notion of 'communication to the public,' the CJEU emphasized 'the indispensable role' played by the user and 'the deliberate nature of his intervention.'[457] By rejecting the argument that TPB merely provides physical facilities for enabling or making a communication, the Court considered the operators of TPB as 'playing an essential role' by

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[451] *Svensson*.
[452] Rosati E (2017b).
[453] *GS Media*, paras 47–48; Rosati E (2017a) 1229.
[454] *GS Media*, para 51.
[455] Angelopoulos C, 'CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public' (Kluwer Copyright Blog, 30 June 2017) <copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>
[456] *Ziggo*, para.13.
[457] Ibid, para.26-29.

making the service available and managing it, thereby providing users with access to the works in question.[458] Moreover, the CJEU found that TPB's conduct intentionally aims at facilitating infringement,[459] as it introduced a specific design to induce copyright infringement, including advertisements or operators' comments on blogs and forums encouraging users to access and download infringing content.[460] Following the reasoning in *Svensson* and *GS Media*, the CJEU held that hyperlinking constitutes an act of communication to the public.[461] Therefore, the operators of TPB might be held primarily liable since they played an essential role in making the works in question available to the public.[462]

Scholars observed that most of the Court's interpretative activity expanding the scope of this exclusive right focuses on analyzing two separate criteria or sub-factors: the 'new public' and 'deliberate intervention.' Under the shadow of these criteria, the Court has steadily incorporated elements of knowledge, commerciality, and technological restrictions into the assessment of primary liability.[463] From a comparative perspective, although U.S. courts have declined to hold linkers directly liable for the infringement they facilitate, treating such claims as matters of 'secondary liability,' EU standards of direct liability for facilitating infringement appear to parallel U.S. standards of derivative liability.[464] Particularly, all the above EU rulings are controversial and have sparked heated debate, as they not only expanded the right of communication to the public by equating hyperlinking to an act of communication to the public,[465] but also introduced primary liability rules for hyperlinking that can extend to any online copyright infringements.[466] And the latter concerns have been confirmed with the DSMD that endorses a primary liability regime for OCSSPs for copyright infringements committed by their users.

Before the introduction of the special liability regime in Art.17 DSMD, the decision of *YouTube/Cyando* case is likely to have significant repercussions.[467] In *YouTube/Cyando*, the

[458] Ibid, para.37-38.
[459] Ibid, para.38.
[460] Ibid, para.45.
[461] Ibid, para.47.
[462] Ibid, para.48.
[463] Quintais JP et al. (2022); Hanuz B (2020).
[464] Ginsburg JC & Budiardjo LA (2017).
[465] *GS Media*, para 45; Rosati E (2017a) 1229; Leistner M (2019) 488.
[466] See *YouTube/Cyando*.
[467] Reda F & Selinger J, 'YouTube/Cyando – an Important Ruling for Platform Liability – Part 1' (Kluwer Copyright Blog, 1 Jul. 2021) <https://copyrightblog.kluweriplaw.com/2021/07/01/youtube-cyando-an-important-ruling-for-platform-liability-part-1/>

CJEU was asked whether the operators of a video-sharing intermediary (YouTube) and a file-hosting and sharing intermediary (Uploaded) carry out an act of 'communication to the public' within the meaning of Art.3(1) ISD when a user uploads a protected work to their services.[468] The CJEU responded that intermediaries such as YouTube and Uploaded are in principle not directly liable for copyright infringements resulting from uploads by their users. It further stated that operators do not themselves carry out an act of 'communication to the public' unless they, beyond merely providing the intermediary infrastructure, contribute to giving the public access to the protected content, thereby infringing copyright rights. Instead, an individual assessment must be made, taking into account 'several complementary criteria, which are not autonomous and are interdependent' and must be 'applied both individually and in their interaction with each other,'[469] in particular that the operator acts 'deliberately,' meaning that the operator of an intermediary intervenes in 'full knowledge of the consequences' with the aim of giving the public access to copyright-protected works.[470] To this end, the CJEU did not delve into whether Art.3(1) ISD regulates only primary liability, or also the potential intermediary liability of those facilitating third parties in committing illegal acts of 'communication to the public'.[471] Instead, it provided a non-exhaustive list of factors that can be considered by the national courts to assess whether the intermediary operator acted deliberately. Namely, (1) when, despite having knowledge of the illegal provision of the protected content, the operator refrains from promptly removing it or blocking access to it; (2) when, despite knowing or having reason to know that users of the intermediary generally make protected content available to the public illegally, the operator refrains from implementing appropriate technical measures that could be expected from a diligent operator to effectively combat copyright infringements on the intermediary; (3) when the operator participates in the selection of protected content communicated illegally to the public, provides tools on the intermediary specifically intended for the illicit exchange of such content, or knowingly promotes such exchange. Evidence of this could be the fact that the adoption of an economic model by the operator that encourages users to illegally communicate protected content to the public on the intermediary. The CJEU does not specify the precise application and weighting of these criteria in individual cases but leaves it to the referring court to apply these factors.[472]

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[468] *YouTube/Cyando*, para.102.
[469] Ibid, para. 67.
[470] Ibid, para. 83.
[471] AG Opinion in *YouTube/Cyando*, points 65 and 94–103 (indirect liability is not actually harmonized in EU law and therefore would be governed by the rules on civil liability provided in the law of the Member States.)
[472] See *YouTube/Cyando*.

It emphasizes that abstract knowledge of users illegally making content available and the profit-making nature of an intermediary are insufficient to prove a deliberate intervention.[473]

1.2.2 Intermediary Liability under the ECD

It is important to note that the legal regime established in Art.14 ECD is ultimately voluntary, as it encourages but does not mandate intermediaries to comply with the conditions specified therein.[474] Moreover, the ECD provides legal certainty for intermediaries by adopting a harmonized standard for a liability exemption at the EU level, especially at a time when national rules and case law were increasingly divergent.[475] In addition, they also promote the growth of e-commerce in Europe by enhancing legal certainty regarding the roles of actors involved and ensuring that host intermediaries were not obligated to monitor the contents and activities hosted on their services,[476] a task that would have only prohibitively expensive and prong to fundamental rights violations.[477] However, the interpretation of this constellation of provisions is incredibly complex and remains far from settled.[478]

Under the ECD, a host intermediary can be immune from 'monetary'[479] liability for illegal material uploaded by users if it lacks actual or constructive knowledge of the illegality or, upon obtaining such knowledge, acts expeditiously to remove or disable access to the infringing material.[480] The ECD provides definition of host intermediary' liability from a negative perspective. Art.14(1) does not define the standard for establishing liability for host intermediaries from a positive perspective but outlines the 'conditional liability-free zone' under which intermediaries are not to be held liable.[481] Establishing positive definition of liability of host intermediary is a matter of Member State law. In Angelopoulos's words, host intermediaries' liability is defined in the current legal framework in an 'evasive, negative fashion, dictating only when Member States [cannot] impose liability for intermediary activities, not when they can.'[482] Several rulings have confirmed the 'negative' interpretation of host intermediary's liability under Art.14(1) ECD, establishing that the absence of

473 Ibid, paras 85ff.
474 Wilman F (2020) 19.
475 Art.12-14 ECD.
476 Art.15 ECD; Ullrich C (2017).
477 Frosio G (2017b).
478 Angelopoulos C and Senftleben M (2021).
479 *Mc Fadden*, para. 75.
480 Angelopoulos C (2016).
481 Husovec M (2017) 50.
482 Angelopoulos C (2016) 254.

knowledge and the prompt removal of infringing content upon notification serve as defenses against liability.[483] Notably, the ECD's liability provisions mandate that Member States ensure a minimum level of protection for intermediaries, while allowing them to adopt exemptions for intermediary activities that fall outside the directive's scope.[484] Thus, the ECD inherently allows for heterogeneity and diversification in the liability status of intermediaries among various Member States within the flexibility allowed by the minimum harmonization.[485]

1.2.3 Active and Passive/Neutral Intermediary

The safe harbors in the ECD do not apply to services provided by all intermediaries, but only to intermediary that qualify as 'information society services.'[486] 'Information society service' refers to 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.'[487] Recital 18 clarifies that the definition for 'information society services' in the e-commerce area covers services provided for free by stipulating that 'in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data.'[488]

Art.14(1) ECD provides that host intermediaries are not liable for the content that they store for users unless they obtain knowledge of the illegality of the content and fail to act expeditiously by removing the content.[489] Initially, the Commission asserted that the directive contains 'precisely defined' liability exemptions, but later acknowledged considerable uncertainty regarding which entities can benefit from these immunities.[490] Here the concept of 'hosting' refers to the storage by an intermediary of content provided by and stored at the request of users of the service in question,[491] covering services including 'online storage and distribution,' 'networking, collaborative production and matchmaking,' and 'selection and

[483] Krokida Z (2022) 68.
[484] Kulk S (2019) 107.
[485] Dougan M (2000) 854-5; Král R, (2016) 238.
[486] Art.2(a), 12 to 15, and recital 17 of ECD.
[487] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1–15. Art.1(1)(b).
[488] Recital 18 ECD; Case C-291/13, Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others EU:C:2014:2209.
[489] Art.14 ECD.
[490] Wilman F (2020) 25.
[491] *L'Oréal*, para.110; Polański PP (2018).

referencing.'[492] A broad range of services could qualify as 'hosting' services within the meaning of Art.14(1).[493] The CJEU has interpreted Art.14 ECD in its case law to encompasses activities by search engine's advertising service,[494] social media companies like Facebook,[495] online marketplaces like eBay,[496] and video-sharing intermediaries like YouTube.[497]

In judicial practice, the availability of the liability exemption depends on whether the role of intermediary is classified as 'passive/neutral' or 'active': where the intermediary is predominantly passive or neutral, it may benefit from the hosting safe harbor; where it is active, it will lose that immunity and its role shall be assessed according to national intermediary liability regimes.[498] The conceptual distinction between passive and active roles of an intermediary has been developed by the CJEU through its interpretation of recital 42 ECD, based on the Directive's wording.[499]

In simple words, the exemptions from liability established in the ECD are only available in relation to activities of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. Obviously, the wording clearly indicates that this recital aims at mere conduit and caching intermediaries, rather than host intermediaries. The same point was affirmed by AG Jääskinen in his Opinion in *L'Oréal*.[500] Still, the CJEU interpreted recital 42 ECD as referring not only to the liability exemptions for mere conduit and caching of Art.12 and 13, but also to hosting within the meaning of Art.14.[501] That said, an activity only qualifies as hosting if the activity is carried out in a manner that is merely technical, automatic and passive in nature.[502] Such an interpretation seems unconvincing since the condition of 'a mere technical, automatic and passive nature' is more applicable to mere conduit and caching activities,[503] as host intermediaries inherently possess a basic level of control over the stored

[492] Van Hoboken J et al. (2019).
[493] *Scarlet Extended* and *Mc Fadden*.
[494] *Google France*.
[495] *Glawischnig-Piesczek*.
[496] *L'Oréal*.
[497] *YouTube/Cyando*.
[498] Wilman F (2020) 28.
[499] Ibid; Recital 42 ECD.
[500] AG Opinion in L'Oréal, paras 138-141, maxime 141.
[501] *Google France*, para.113-4.
[502] Wilman F (2020) 28.
[503] Ibid, 29.

content, either due to owning the hosting infrastructure or the possibility of identifying illegality and subsequently taking action against the content.[504] Thus, when the CJEU argues in *Google France* that 'in the case where the intermediary has not played an active role of such a kind as to give it knowledge of, or control over, the data stored,' it clearly refers to a level of control beyond the basic control inherent in providing on-demand data storage.[505] The notion of 'control' in recital 42 ECD could potentially be related to the notion of control in Art.14(2), which clarifies that the safe harbor 'shall not apply when the recipient of the service is acting under the authority or the control of the provider.' In light of the wording of Art.15, a more persuasive interpretation of Art.14 is that the 'control' element emphasized by the CJEU in its case law must relate specifically to control over the *illegality* of the content. Such interpretation would lead back to the knowledge requirement already present in the conditions to the safe harbor, adding clarity to the hosting safe harbor regime by avoiding the reliance on confusing and potentially diverging notions.[506]

In *L'Oréal*, the CJEU turned to the opposite direction of the point made in *Google France*, by holding that the availability for immunity stipulated in Art.14 ECD depends on whether the intermediary 'plays an active role of such a kind as to give it *knowledge* of, or *control* over the content that it stores for the users.'[507] Thus, the CJEU's emphasis on supposed neutrality, while moving away from 'strict passivity test' in relation to Art.14 ECD, appropriately acknowledges the unique characteristics of 'hosting' services.[508] Folkert argues that the issue is correctly framed by questioning whether an intermediary can reasonably be considered as such under the ECD, noting that if an intermediary's involvement with the content is so extensive that the content should be 'co-attributed' to the provider rather than being considered 'user content,' the provider can no longer reasonably be considered an 'intermediary.'[509] However, such reading might blur the distinction between whether an intermediary remained 'neutral' and whether the content in question was user-generated or constituted the intermediary's 'own' content.[510] Nevertheless, the *L'Oréal* test established the threshold condition for the availability of safe harbor immunities by determining whether a given service provider is indeed a neutral intermediary in respect of the user content that it stores. That said, for Art.14

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[504] AG Opinion in C-484/14, para.100.
[505] *Google France*, para. 120.
[506] Van Hoboken et al. (2019).
[507] *L'Oréal*, para 113. Emphasis added.
[508] Rosati E (2016).
[509] Wilman F (2020) 30-31.
[510] Husovec M (2017) 55-7.

to apply it must be established that the service provider in question (1) provides an *information society service* which (2) consists of *hosting* within the meaning of Art.14 and that (3) acts as a *neutral* intermediary when providing that service.[511]

The CJEU also identified factors to guide the assessment of the nature of intermediaries' activities. In *L'Oréal*, the mere fact that eBay 'sets the terms of its service, is remunerated for that service, and provides general information to its customers' does not constitute an active role; however, if eBay assists users in 'optimizing the presentation of the offers for sale or promoting those offers,' it must be considered an 'active' intermediary.[512] That said, an intermediary can be actively involved when it comes to its '*own*' activities as an intermediary, but it cannot get actively involved in the '*relationships between its users*.'[513] Examples of activities that indicate an intermediary is too active to be considered a 'passive/neutral' intermediary, and thus ineligible for safe harbor protection under Art.14, include altering the content, altering the content's presentation, and promoting content, as these actions pertain to the intermediary's involvement with individual items of user-stored content rather than the general framework of service provision.[514] Thus, a certain degree of active involvement by the intermediary in storing user content is permissible, as the CJEU focuses less on the nature of the involvement and more on whether the involvement results in the intermediary gaining knowledge of or control over the content.

1.2.4 The Knowledge Test

The intermediary liability regime established in ECD can be categorized as a negligence regime based on actual or constructive knowledge.[515] Art.14(1) ECD contains two distinct knowledge standards, with reference to the illegal activity or information stored: (i) 'actual knowledge' and (ii) 'constructive knowledge,' namely 'awareness of facts or circumstances' from which the illegality is 'apparent.'[516] Hence, the relevant type of knowledge pertains to the illegality of the content, serving as a key factor in determining whether an intermediary's role is active or passive. Upon obtaining actual knowledge or constructive knowledge, an intermediary has to act 'expeditiously' to take down the illegal content in order to benefit from the safe harbor.

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[511] Wilman F (2020) 35.
[512] *L'Oréal*, para. 115-6; *Google France*, para.118.
[513] Wilman F (2020) 33.
[514] Ibid.
[515] Baistrocchi P (2002) 114.
[516] Angelopoulos C (2016) 113.

1.2.4.1 Actual Knowledge

The test for whether an intermediary has 'actual knowledge' is inherently subjective, focusing on what the specific intermediary knew in the specific situation at hand. However, it is less clear if the provision refers to 'general' or 'specific' knowledge of the illegal activity or information stored at the request of a recipient of the service. In this context, 'general' would refer to knowledge about the use of the service to host illegal content, whereas 'specific' would relate to knowledge of the illegality of particular items of hosted content. Many intermediaries will have general knowledge that their service is used for the communication of illegal content, but lack the specific knowledge of concrete infringements, unless notified to that effect.

European courts have interpreted 'actual' knowledge as meaning 'specific' knowledge. An illustration of this approach is found in *L'Oréal*, where the CJEU indicated that a notification of illegal content hosted must be sufficiently precise and adequately substantiated for it to yield actual knowledge of the infringement for the host provider.[517] Despite this, some authors have noted a shift towards a more 'general' knowledge-based approach.[518] For example, it can be argued that an intermediary does not have to know the identity of the infringer or the infringed copyright-protected work in order to take down the content: more "general" knowledge of the infringement would suffice in this case.[519]

1.2.4.2 Awareness

The test to determine whether an intermediary is 'aware' of illegal activity or information is principally objective. Using the concept of 'awareness' as constructive knowledge in connection with damages claims aligns with the general requirements for liability in damages, such as those stipulated in Art.13 IPRED, which mandates that damages for IP infringements are due only when the infringing party acted 'knowingly, or with reasonable grounds to know.'[520]

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[517] *L'Oréal*, para. 122.
[518] Angelopoulos C (2016) 274; Nordemann JB (2018) 11-2.
[519] Angelopoulos C (2016) 277.
[520] Art.13(1) IPRED.

Differently from knowledge, the CJEU had provided some guidance in *L'Oréal* on what constitutes 'awareness' within the meaning of Art.14 ECD.[521] An intermediary has awareness 'if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realized' that the content was unlawful and did not act expeditiously to take it down.[522] Thus, the awareness test implies that the facts and circumstances in question must make the illegality clear and perhaps even obvious to meet the requirement of being 'apparent.'[523] Stalla-Bourdillon argues that the content in question should be *manifestly illegal* for it to be actionable under Art.14.[524] As previously analyzed, the language of Art.15 ECD suggests that the illegality of the content should be rather clear; otherwise, intermediaries risk being generally obliged to engage in active fact-finding, which would be contrary to Art.15(1). Moreover, awareness standard should be interpreted in light of the model of good faith hosting provider endorsed in recital 46 ECD, thus allowing courts, on the merits of each case, to refuse safe harbor protection to 'bad faith' or 'non-sufficiently collaborative' host intermediaries whose business model relies on fostering infringement by their users.[525] Therefore, a clear, obvious or manifest infringement is required for a takedown notice to be capable of leading to actual knowledge or awareness on the side of the intermediary receiving it.[526]

1.2.4.3 Obtaining Knowledge

In general, two methods to obtain knowledge (both actual and constructive) exist: the proactive method, resulting from intermediaries' own initiative investigations aimed at detecting and tackling certain types of illegal content, [527] and the reactive method, resulting from information supplied by third parties.[528] The intermediaries' own initiative investigations to which the Court referred are likely voluntary in the absence of an explicit duty and in light of the ECD's Art.15(1) ban against imposing a general obligation of active fact-finding. Scholars argue that there are fewer incentives for intermediaries to engage in proactive efforts to ascertain the illegality of content. Such proactive measures may create a Good Samaritan paradox, shifting intermediaries away from the 'passive/neutral' status to active host intermediaries, thereby

[521] *L'Oréal*, para.122.
[522] Ibid, para. 124.
[523] Wilman F (2020) 38.
[524] Stalla-Bourdillon S (2012) 162.
[525] Nordemann JB (2018) 12-3.
[526] Wilman F (2020) 39.
[527] *L'Oréal*, para.122.
[528] *Google France*, para.109.

risking the loss of safe harbor protection.[529] Indeed, certain measures for proactively obtaining knowledge of illegal activities and content may contravene the prohibition on imposing general monitoring obligations in Art.15.[530] Nevertheless, some intermediaries voluntarily conduct independent inquiries, even in the absence of legal mandates. Specifically, they often do this for business or public relations reasons, aiming to shield users from harmful content like child abuse material or hate speech.

Hence, it appears that knowledge can be obtained most commonly from reactive methods, especially in the form of take down notices from third parties. From this standpoint, the legal framework incentivizes the adoption of NTD procedures, as host intermediaries must remove illegal content upon proper notification to retain the benefit of the safe harbor immunity. Receiving a takedown notice generally results in the intermediary gaining, if not actual knowledge, at least an awareness of the illegal nature of the user content identified in the notice.[531] However, not every notification of illegal content received by the intermediary automatically leads to loss of safe harbor protection in the absence of expeditious action by the intermediary.

1.2.5 NTD Mechanism

For years, scholars have advocated for EU-wide rules on NTD and counter-notice procedures, highlighting a long-standing gap in EU law for a comprehensive horizontal system.[532] As Van Eecke mentioned, 'the [NTD] procedure is one of the essential mechanisms through which the ECD achieves a balance between the interests of rightsholders, online intermediaries and users.'[533] The Commission also attempted to propose binding regulation for notice-and-action procedures at the EU level, but it emerged that while there was a 'general consensus in favor of developing a harmonized EU [NTD] procedure, but much less agreement on the precise contours of those rules.'[534] Noteworthy, the NTD procedures are sometimes also referred to as 'notice and action' procedures, given that 'takedown' is not necessarily the only consequence

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[529] Van Hoboken J et al. (2019).

[530] See *Scarlet Extended* and *Netlog*.

[531] *L'Oréal*, para. 122.

[532] Senftleben M et al. (2018) 150; Kuczerawy A (2018a) 298; Sarto G (2017) 30; Dinwoodie GB (2017) 43; Angelopoulos C (2017) 44; Frosio G (2016) 573; Kuczerawy A (2015) 46; Van Eecke P (2011) 1485.

[533] Van Eecke P (2011) 1479-80.

[534] European Commission, 'Summary of the results of the public consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)' (undated) 10.

of a notice being submitted.[535] Particularly, the ECD also provides that the directive 'should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information.'[536]

2.2.4.1 Notice

L'Oréal indicates that a notification may be 'insufficiently precise or inadequately substantiated' to establish actual knowledge or awareness on the intermediary's side,[537] leaving it to national courts to determine whether the intermediary can still rely on Art.14 ECD under largely non-harmonized national rules or doctrines.[538] The *L'Oréal* ruling implies that intermediaries, as 'diligent economic operators,' must evaluate the substance of infringement allegations in takedown notices they receive, ensuring that the provided arguments are reasonably sufficient to justify action against the identified user content.[539] In turn, such requirements may indicate that takedown notices should enable intermediaries to make 'an informed and diligent decision' regarding the illegality and the precise indication of the location of the activities and content in question. The Commission advocates for the establishment and use of mechanisms that allow users to submit notices that are sufficiently precise and adequately substantiated.[540]

Noteworthy, the CJEU in *Glawischnig-Piesczek* held that intermediaries storing user content should not be required to make an 'independent assessment' of such content.[541] One might argue that this judgment supersedes the *L'Oréal* ruling regarding the 'sufficient precision' requirements for intermediaries to evaluate the substance of infringement allegations in takedown notices. However, such holding in *Glawischnig-Piesczek* cannot simply be transposed to the present context because the context here differs from that of *L'Oréal*. The latter concerns not the voluntary assessment by intermediaries of takedown notices under Art.14(1) ECD, but rather the compatibility with Art.15(1) ECD of obligations imposed on

[535] European Commission, 'Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online' C/2018/1177, OJ L 63, 6.3.2018, p.50–61, Recital 11.
[536] Recital 40 ECD.
[537] Supra note 535, Chapter III Point 6.
[538] *L'Oréal*, para.122.
[539] Ibid.
[540] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms, Brussels, 28 September 2017, COM(2017) 555 final, Points 5–6.
[541] *Glawischnig-Piesczek*, para.45.

intermediaries through injunctions issued by courts or administrative authorities.[542] In the former context, if intermediaries do not conduct 'independent assessment,' the likely alternative is to accept the allegations of infringement made in takedown notices at face value. Since these allegations are made by other private parties who may not always be objective, there is a significant risk of errors and abuse, potentially leading to false positives.[543]

2.2.4.2 Takedown

It remains unclear what is the precise meaning of 'expeditious' action to remove or to disable access to the illegal information. The directive stipulates two general principles for intermediary action: first, the action must involve either removing or disabling access to the contentious content; second, the action must respect the fundamental right to freedom of expression and comply with any relevant national procedures.[544] Since there is no fixed timeframe within which intermediaries must address user content for their actions to be considered 'expeditious,' the connotation of 'expeditious' should likely be determined on a case-by-case basis, considering factors such as the precision and substantiation of the notice, the illegality of content at issue, and the obviousness and gravity of the infringement, as illustrated by various examples.[545] In its Communication on Tackling Illegal Content Online, the European Commission does not propose specific timeframes for expeditious action, but states that, in general, notices by 'trusted flaggers' should be addressed more quickly than others through fast-track procedures.[546] Additionally, the Commission recommends implementing a counter-notice mechanism, enabling affected users to contest takedown decisions, and requiring intermediaries to 'take due account' of counter-notices and reverse their decisions if the content is subsequently found to be legal.[547]

1.2.6 Injunctions

Safe harbors do not preclude intermediaries from being required to take measures against the infringement of third-party rights, either through injunctions ordered by a court or duties of care imposed by the legislator, as stipulated by various provisions in the ECD and other legal

[542] Ibid.
[543] Wilman F (2020) 42.
[544] Ibid, 43; Recital 46 ECD.
[545] Kuczerawy A (2015) 51.
[546] Supra note 540, under 4.1.
[547] Supra note 535, Points 9-12 .

instruments.[548] Specifically, Art.14(3) ECD specifies that the liability exemption set out in Art.14(1) does not preclude the possibility for a court or administrative authority to require the intermediary to terminate or prevent an infringement, thereby allowing intermediaries to be subject to injunctions despite the liability exemption.[549] Again, the issue of whether and to what extent injunctions can be issued against intermediaries under Art.14(3) is not regulated by the ECD and is thus left to the domestic laws of the Member States. Yet, certain rules on injunctions that may be issued against intermediaries can also be found in Art.18(1) ECD. The provision requires Member States to ensure that 'court actions available under 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.'[550] In *Glawischnig-Piesczek*, the CJEU stated that for the purposes of the implementation of the measures referred to in Art.18(1) 'no limitation on their scope can, in principle, be presumed'.[551]

Crucially, the possibility of injunctions against intermediaries is independent of their liability for monetary relief or any wrongdoing as injunctions are not intended as penalties but are based on intermediaries' optimal position to take action against infringements.[552] Art.8(3) ISD explicitly requires Member States to 'ensure that right-holders 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.'[553] In addition, the injunctive relief referred to in Art.11 IPRED can be issued against 'innocent' intermediaries, as the liability of the intermediary concerned for the infringement in question is irrelevant.[554] This possibility is best understood as a sort of 'right to assistance' that right holders can invoke in respect of intermediaries.[555] Some other provisions targeting innocent intermediaries are included in Art.8, Art.9(1)(a),[556] and Art.10 IPRED.[557] Notably, an injunction must strike a fair balance between conflicting fundamental rights: to copyright as property and to the protection of personal data and privacy of users, their

[548] Art.12(3), 13(2),14(3), 18 and recitals 45 and 48 ECD; Husovec M (2017).
[549] Wilman F (2020) 22; Art.18 and recital 52 ECD.
[550] Art.18(1) ECD.
[551] *Glawischnig-Piesczek*, para.30.
[552] Angelopoulos C (2016) 61.
[553] Art.8(3) and recital 59 ISD.
[554] *Tommy Hilfiger*, para. 22; *L'Oréal v. eBay*, para.127
[555] Husovec M (2017) 110; Art.11 IPRED.
[556] Art.9(1)(a) IPRED.
[557] Husovec M (2017) 41.

freedom to receive and impart information, and intermediary service provider's freedom to conduct a business.[558]

Since intermediaries are legally bound to comply with such injunctions, they are accordingly not awarded 'full-proof' legal protection against all legal claims, even where they meet all relevant conditions for the applicability of the liability exemption.[559] The injunctions enabling intermediaries to 'terminate or prevent an infringement' differ from the takedown notices that they may receive, which are ultimately no more than mere requests to act against the content identified therein.[560] Edwards suggests that Art.14(2) expressly maintains the right of parties to seek injunctive relief to 'terminate or prevent an infringement,' and in practice, this provision is 'increasingly (and controversially) invoked as a means by which courts in Europe may impose prior monitoring or filtering' on intermediaries, despite of Art.15's apparent intent to restrain such actions.[561] Nevertheless, the practical consequences of an injunctive order are especially severe when the order aims to prevent, rather than merely terminate, an infringement, echoing the same concerns regarding preventive duties of care and future-oriented interpretations of notice-and-take-down procedures.[562] Importantly, although it is up to national law to determine the scope and procedures to seek injunctions, injunction claims are limited by Art.15 and as a result of fundamental rights safeguards in the CFR.[563]

1.2.7 Duties of Care

Member States might impose duties of care on intermediaries. These duties must be (i) reasonable, (ii) specified by national law, and (iii) limited to detection and prevention of certain types of illegal activities.[564] The ECD gives no further indications on the content or purpose of these duties of care that may be provided for in national law. Thus, according to national law and legal traditions, legal uncertainties arise as what exactly constitutes a duty of care .[565] Where such a duty of care applies, intermediaries may still not be held liable for stored user

[558] Respectively, Arts.7, 8, 11 and 16 CFR; Husovec M (2017).
[559] *Glawischnig-Piesczek*, para. 25.
[560] Wilman F (2020) 22.
[561] Edwards L (2016) 10.
[562] Angelopoulos C (2016) 62.
[563] *Scarlet Extended*, para.36 ff; *Mc Fadden*, para.87.
[564] Recital 48 ECD.
[565] Kuczerawy A (2018a) 64.

content, but they can nonetheless be 'at fault' in the sense of them failing to take the measures required to meet their duty of care.[566]

Undoubtedly, the duties of care provided in national laws have to be compliant with the liability exemption of Art.14(1), as well as with the prohibition of imposing general obligations to monitor or to engage in active fact-finding laid down in Art.15(1). Among scholars, there has been discussion on the precise meaning of such duties of care in relation to the ECD. For example, Edwards argues that the general assumption is that such duties pertain to obligations imposed by criminal or public law and do not extend to private law duties, like helping to prevent copyright infringement, as this would undermine the purpose of Art.15 and, indeed, Art.14 more broadly.[567] While Folkert notes that a 'duty of care' within the meaning of recital 48 can entail is 'an obligation on intermediaries to take certain measures to help terminate, discourage, limit or prevent the storage and dissemination of illegal content involving the use of their services, without however implying an absolute requirement in terms of the results to be achieved.'[568] Still, the interpretation of the recital 48 raises challenges, particularly in distinguishing statutory-type duties of care from the liability of intermediaries for third-party infringement, especially when the latter is established on the basis of negligence in some national laws.[569] As stated in a letter from Director General of the Internal Market to an MEP on this topic, recital 48 only 'aims at explaining the content of Art.15 and its implications for Member States,' and does not allow the imposition of obligations contrary to the prohibition contained in Art.15.[570]

Duties of care may relate to *ex ante* or *ex post* measures. Ex post measures regard the removal or disabling of content after obtaining knowledge of the same, as in the context of an NTD system. Such duties follow naturally from the regime of Art.14(1) ECD and, as such, do not appear to be per se problematic. Conversely, ex ante measures concern duties of care as obligations on the intermediary to prevent infringement prior to obtaining knowledge or awareness of the same. Such proactive measures are difficult to reconcile with the prohibition to actively to seek facts or circumstances indicating illegal activity in Art.15.[571]

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[566] Wilman F (2020) 22.
[567] Edwards L (2016) 10.
[568] Wilman F (2020)53.
[569] Angelopoulos C (2016) 94-5.
[570] European Commission, 'Letter of John F. Mogg to Mrs Cederschild' (Brussels 13 Jun. 2000) <https://www.asktheeu.org/en/request/2250/response/7914/attach/2/letter%20Mogg%20to%20MEP.pdf.>
[571] Angelopoulos C (2016) 94-5.

For this reason, some scholars argue for a restrictive interpretation of the scope of such duties. One avenue to do so is by restricting their application to public law.[572] However, this does not seem to have been the intention of the EU legislator, as expressed in the above-quoted letter. Another approach is to limit, the application of duties of care to obligations outside those set forth in Art.14 ECD, concerning the removal and disabling of infringing information.[573] That is to say, hosting providers that comply with Art.14 cannot be held liable in any case for the information stored. Still, Member States may freely impose duties of care on intermediaries regarding other aspects, such as duties of information that concretize the obligations mentioned in Art.15(2).[574] From a teleological perspective, and resorting to the letter quoted above, arguably, the legislator's intention was somewhat different than these approaches. Namely, what was apparently envisaged were more narrow duties of care that could assist and concretize the concepts of removal and disabling of access to infringing information, predominantly related to ex post reactive measures.[575]

1.2.8 Monitoring Obligation: Between 'General' and 'Specific'

The ECD allows the imposition of injunctions and duties of care on intermediaries in order both to terminate and to prevent infringements.[576] Yet the prohibition on general monitoring obligations of Art.15(1) further limits the permissible scope of the measures that can be imposed on intermediaries for the enforcement of third-party rights.[577] A particular point of contention regarding the application of Art.15 relates to stay-down obligations or automatic re-upload filters as duties of care or injunctions. The imposition of such measures typically requires filtering all content to identify specific pre-identified unlawful items, effectively translating into a general monitoring obligation.[578] The key term in this provision is the adjective 'general,' as this prohibition concerns only the imposition of a *general* oversight obligation on service providers, without affecting the possibility of establishing *specific* content control requirements.[579] However, a definition of 'general monitoring' is absent in this directive.

[572] Edwards L (2016).
[573] Angelopoulos C (2016) 95.
[574] Ibid.
[575] Ibid.
[576] Recital 45 and 48 ECD.
[577] Art.15(1) ECD.
[578] Angelopoulos C (2016) 27. Contra: Nordemann JB (2018) 17.
[579] Oruç TH (2022).

Pursuant to recital 47, a distinction is made between 'general' and 'specific' monitoring obligations, the first being prohibited and the second allowed under Art.15. Still, the boundary between 'general' and 'specific' monitoring obligations remains a contested area, leaving a significant scope for the latter and potentially admissible injunctions and duties of care in light of Art.15.[580] Since the general monitoring prohibition determines the permissible scope of preventive measures that can be imposed on intermediaries against illegal content, this ambiguity is likely to cause practical problems. Riordan offers a good starting point by suggesting that monitoring becomes 'general' when it involves 'systematic,' 'random,' or 'universal' inspection rather than focusing on 'individual notified instances,' such as judicial or administrative orders that require monitoring a specific site for a given period to prevent specific tortious activity.[581] However, such a proposal necessitates greater detail to balance the aggressive and lax enforcement of copyright,[582] a challenge aptly compared by AG Jääskinen to 'Odysseus' journey between the two monsters of Scylla and Charybdis.'[583]

On a case-by-case analysis, the CJEU has provided limited guidance and clarification as to what constitutes 'general,' and therefore inadmissible, monitoring.[584] Senftleben and Angelopoulos summarized the CJEU's interpretation options on the meaning of 'general monitoring' into three main schools of thought: (1) 'basic' interpretation, meaning the ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary *in general*,' and any filtering measures would be incompatible with the general monitoring prohibition even if they concern a specific, pre-identified right; (2) 'basic single minus' interpretation, meaning 'the ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary only in order to detect and prevent any unlawful activity *in general,* but filtering obligations ordered by a court to address a 'specific' kind of illegality are permissible; and (3) 'basic double minus' interpretation, meaning the ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an

[580] Ibid.
[581] Riordan J (2016) 85.
[582] Angelopoulos C (2016) 64.
[583] AG Opinion in Case C-129/14, para. 171; Angelopoulos C & Senftleben M (2020).
[584] Magyar Tartalomszolgáltatók Egyesülete (MTE) v. Hungary, App. No.22947/13, Eur.Ct.H.R.135 (2016); Delfi AS v. Estonia, App. No. 64569/09, Eur. Ct. H.R. 586, para.115 (2015); *Scarlet Extended* at para.52; *Netlog* at para.50; *UPC Telekabel Wien*, para.47 and 63; *Mc Fadden*, para.96.

intermediary only in order to detect and prevent any unlawful activity *in general,* but monitoring of all of the information handled by the intermediary may still be 'specific', as long as there is a court order or rightsholder notification identifying pre-identified specific illegality.[585] And the case law of the CJEU on Art.15(1) ECD had appeared to unambiguously embrace the 'basic' interpretation, denying the possibility of monitoring all content on the intermediary.[586]

Starting with *L'Oréal*, the CJEU holds that Art.15 ECD prohibits 'active monitoring of all the data of each of [an intermediary's] customers in order to prevent any future infringement.'[587] Meanwhile, in interpreting Art.3 IPRED, the CJEU acknowledged that preventive measures are certainly in the abstract permissible, but emphasized that a general monitoring obligation would fail to meet the conditions of fairness, proportionality, and affordability.[588] Specifically, the Court stated 'the measures required of the online service provider […] cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of IP rights via that provider's website.'[589] Inspired by the 'double requirement of identification' analysis provided by AG Jääskinen,[590] the CJEU provides two possible examples that would both prevent future infringement and respect the limitations set by EU law: the suspension of the perpetrator of the infringement of IP rights in order to prevent further infringements of that kind by the *same person* in respect of the *same right* and the adoption of measures to make it easier to identify users.[591]

Later, the same 'double identification' requirement was further developed in the *Scarlet Extended* and *Netlog* cases, where the Court determined that injunctions requiring contested filtering system to actively monitor 'almost all the data relating to all of its service users in order to prevent any future infringement of IP rights' would constitute prohibited general monitoring under Art.15(1) ECD.[592] Particularly, in *Scarlet Extended*, the Court held that 'preventive monitoring of this kind would thus require active observation of all electronic

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585 Angelopoulos C and Senftleben M (2020) 8.
586 Ibid, 9.
587 *L'Oréal*, para.139.
588 Ibid. Angelopoulos C (2016) 64.
589 *L'Oréal*, para.139.
590 AG Opinion in *L'Oréal*.
591 *L'Oréal*, para.142.
592 *Netlog*, para 38; *Scarlet Extended*, para.40.

communications [...] and, consequently, would encompass all information to be transmitted and all customers using that network,' and thus it would amount to general monitoring.[593] The scope of filtering injunctions was *general* with regard to three different perspectives: *ratione temporis* (they applied for an unlimited period), *ratione materiae* (they applied to all content) and *ratione personae* (they applied to all end users).[594] Such a holding implies that the prohibition against general monitoring in the ECD should be understood as relating to the *type* of information being processed rather than the *quantity* of information being monitored.[595] The CJEU considered the blanket monitoring of all activity by all users as general monitoring regardless of whether such monitoring is targeting only the infringements of specific rights. Consequently, even efforts to identify or block a small, clearly defined piece of information by searching within the service provided must be considered general monitoring.[596] Subsequently in *Mc Fadden*, the Court rejected filtering injunctions from the outset as contrary to Art.15(1) ECD by noting that such measures would necessitate 'monitoring all of the information transmitted.'[597] Even though the CJEU distinguished between monitoring of unlawful network communications in general and monitoring focused on the specific phonogram in question, it rejected the contested filtering measure concerned as banning infringing traces of the pre-identified phonogram would require checking all network communications.[598] Therefore, the CJEU's findings in all these cases suggest that the permissible specific monitoring under Art.15(1) would be a filtering system targeting specific, pre-notified infringements within the content posted by a specific group from among all of an intermediary's users who are pre-identified as likely to share infringing content.[599]

However, in *Glawischnig-Piesczek*, the Court faced the problem of applying a standard it had developed through IP cases in disputes concerning the protection of personal rights, including the right to dignity. The Court held that 'ensuring the effective protection of a victim's rights requires that an injunction issued by the court covers not only the wording used in the content found to be unlawful, but also information, the content of which, whilst essentially conveying the same message, is worded slightly differently, because of the words used or their

[593] Ibid, para 39.
[594] AG Opinion in *Scarlet Extended*, paras.53-9.
[595] Rojszczak M (2022). Emphasis added.
[596] *Mc Fadden*, para.101.
[597] Ibid, para. 87.
[598] Angelopoulos C & Senftleben M (2020) 13.
[599] Ibid.

combination.'[600] By interpreting the concept of 'information with an equivalent meaning,' the Court considered it permissible for an injunction issued by a national court to also cover the obligation to block that type of pre-identified infringements.[601] In any event, differences in the wording of the content cannot require an intermediary to make an independent assessment of that content, since such an obligation would directly contravene the prohibition laid down in Art.15(1) ECD.[602] The Court held that a search for content of an equivalent nature does not oblige the host intermediary to make an independent assessment of the information just because it has 'recourse to automated search tools and technologies.'[603] Thus, the *Glawischnig-Piesczek* case represents a departure from the earlier 'basic' interpretation to 'basic single minus' interpretation, by carving out room from the general monitoring prohibition for injunctive orders to monitor all the content handled by the intermediary.[604] In other words, in defamation cases, an injunction requiring a host intermediary to remove content identical or equivalent to that previously declared unlawful by a court would be compatible with Art.15(1) ECD, provided the monitoring and search for *equivalent*[605] or *identical*[606] content cover only essentially unchanged content, thus not necessitating an 'independent assessment' of its legality by the host intermediary. Notably, it is unclear whether and to what extent the reasoning in *Glawischnig-Piesczek* applies to copyright law, especially given the differences in assessing defamation via a short textual post on a social media network versus audiovisual material on a video-sharing intermediary.[607]

Later this broad interpretation was supported and the permissible scope of monitoring was further extended to copyright infringements. In *YouTube/Cyando*, AG Saugmandsgaard Øe affirmed the 'basic single minus' interpretation by stating that filtering would be problematic in the context of a notice-and-stay-down system but acceptable when imposed on providers by means of injunctions.[608] While the Court concludes that injunctions can be imposed on

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[600] *Glawischnig-Piesczek*, para.40.
[601] Ibid, para 41; Keller D (2020); Rosati E (2019).
[602] *Glawischnig-Piesczek*, para.45.
[603] Ibid, para 45-46; AG Opinion in *Glawischnig-Piesczeck*, paras.62-5.
[604] Angelopoulos C and Senftleben M (2020) 13-4.
[605] *Glawischnig-Piesczeck*, para.35; AG Opinion in *Glawischnig-Piesczeck*, para.59-60.
[606] *Glawischnig-Piesczeck*, para.46.
[607] Angelopoulos C & Senftleben M (2020) 13-4; Oruç TH (2022) 191.
[608] AG Opinion in *YouTube/Cyando*, para.195; Angelopoulos C, 'YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement?' (Kluwer Copyright Blog, 9 Aug. 2021) <https://copyrightblog.kluweriplaw.com/2021/08/09/youtube-and-cyando-injunctions-against-intermediaries-and-general-monitoring-obligations-any-movement/>

intermediaries even if they fulfil the conditions of the hosting safe harbor, provided that rightsholders must notify a host intermediary of infringements on their services.[609] However, the Court does not rely on *Glawischnig-Piesczek* for its interpretation on general monitoring obligations,[610] but restates the jurisprudence of previous *Scarlet Extended* and *Netlog* rulings and concludes that measures that consist in requiring an intermediary to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of IP rights is incompatible with Art.15(1) ECD.[611] On this basis, the CJEU concludes that the current German law, which conditions the obtaining of an filtering injunction under the national version of Art.8(3) ISD, is valid, provided that rightsholders notify a host intermediary of infringements on their services, and the intermediary fail to intervene expeditiously to remove and/or block access to the infringing content and to ensure that such infringements do not recur.[612] Hence, the Court has embraced the 'Basic Single Minus' interpretation and allows court orders against 'interferer' intermediaries requiring them to employ filtering measures to prevent the recurrence any infringement which is identical at its core to a pre-identified infringement, without constituting a general monitoring obligation.[613] To reconcile this copyright ruling with the previous interpretation in *Glawischnig-Piesczek*, AG Saugmandsgaard Øe concluded that 'identical content means the content that contains the exact use of the same copyright-protected work which was previously found to be infringing, whereas equivalent content includes identical files that use the same work in the same way but which may have been uploaded in a different format.'[614] Notably, the Court further concludes that this law strikes a fair balance between competing fundamental rights, provided the conditions at issue do 'not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightsholder,' a determination left to the national court.[615]

After all, in line with the AG opinion in both *Poland v Parliament and Council* and *Youtube/Cyando*, the CJEU seems to agree that any obligation to impose filtering obligations against 'manifestly' illegal content, the illegal nature of which either is 'clear' and 'obvious'

[609] *YouTube/Cyando*, para.131.
[610] Angelopoulos C, supra note 608.
[611] *YouTube/Cyando*, para. 135.
[612] Ibid, para.136.
[613] Ibid, paras.136-7; Angelopoulos C, supra note 608.
[614] AG Opinion in *YouTube/Cyando*.
[615] *YouTube/Cyando*, para.140.

to a reasonable person or has been previously determined by a court, which do not warrant an additional independent assessment of its legality, does not constitute general monitoring obligation.[616] Additionally, any obligation to intermediaries requiring filtering all the information on their services to detect and remove the illegal content must be effective,[617] reasonable[618] and proportionate,[619] as well as be supplemented with an appropriate complaint and redress mechanism for users.[620]

Through briefing the above cases, it is clear that the CJEU abandoned the 'basic interpretation' that 'monitoring all or most of the information handled by an intermediary amount to general monitoring,' but embraced the 'Basic Single Minus' interpretation option, shifting from banning monitoring of all information to allowing the same practices for specific infringements. Additionally, the CJEU seem to limit the scope of proactive preventive measures against 'manifestly' illegal content, which do not require the intermediary to conduct any 'independent assessment.' These measures are only allowed to be imposed on financially and technically resourceful intermediaries that have influence over the curation of content rather than merely hosting it.[621]

1.2.9 Good Samaritan Paradox

The ECD creates a 'Good Samaritan paradox,' as intermediaries might risk losing the benefit of the liability exemption for even bona fide voluntarily introduced proactive measures.[622] The 'Good Samaritan' paradox relates to the lack of incentive for host intermediaries to take proactive measures against infringements on their services for fear of assuming too 'active' role and, as a result, risk losing benefit of the safe harbor protection.[623] Relatedly, Art.15 ECD allows both for the possibility of 'specific' monitoring obligations and the adoption of voluntary measures for monitoring and filtering unlawful content.[624]

[616] Oruç TH (2022) 182-3.
[617] *L'Oréal*, para.136, 141; *Glawischnig-Piesczek*, para.46; *UPC Telekabel Wien*, para.64.
[618] *L'Oréal*, para.141, 144; *UPC Telekabel Wien*, paras.53, 59.
[619] *L'Oréal*, para.141; *UPC Telekabel Wien*; AG Opinion in *YouTube/Cyando*, para.113-5, 128 and 145; Art.3 IPRED.
[620] *UPC Telekabel Wien*.
[621] Oruç TH (2022) 190.
[622] Wilman F (2020) 45.
[623] Nordemann JB (2018) 10; Angelopoulos C (2017); Wilman F (2020) 45; Van Hoboken J et al. (2019).
[624] Art.15 ECD.

Scholars are divided on whether the legislative framework should be amended to provide protection to Good Samaritan providers.[625] However, in its Communication of September 2017 on tacking online content, the Commission considers that voluntary proactive measures to detect and remove illegal content online 'do not in and of themselves lead to a loss of the liability exemption, in particular, the taking of such measures need not imply that the [intermediary] concerned plays an active role which would no longer allow it to benefit from that exemption.'[626] The same or similar point was upheld by national courts in the EU,[627] and also reiterated in the subsequent Recommendation.[628] The main argument in support of this position is based on the holding of *L'Oréal*, where the Court held that intermediaries can take certain active measures relating to the 'general framework' for the provision of 'hosting' services without necessarily losing the benefit of the liability exemption.[629] Even if such 'active-yet-general' measures result in obtaining knowledge or awareness of illegality, the host intermediary retains 'the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness.'[630]

Yet, the Commission's point is, though not legally binding, problematic for host intermediaries as it does not provide a true 'Good Samaritan' protection.[631] The Good Samaritan Clause in Section 230(c)(2) CDA protects intermediaries from liability when they make their best efforts to moderate offensive speech, even if they fail to identify and address all illegal content.[632] Under the current ECD framework, intermediaries are exposed to a high risk of liability when implementing *bona fide* voluntary measures.[633] The proactive approach presents a challenge, as increased monitoring for illegal content raises the likelihood of awareness of 'facts or circumstances from which the illegal activity or information is apparent,' and any failure to address such content adequately can result in the intermediary losing its safe harbor protection

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[625] Angelopoulos C (2017) 43-4. See contrary: Nordemann JB (2018) 10-11.
[626] Supra note 540, 10-12.
[627] Van Hoboken J et al. (2019).
[628] Supra note 535, recitals 25-6.
[629] *L'Oréal*, para.115-6.
[630] Supra note 540.
[631] Kuczerawy A, 'The EU Commission on voluntary monitoring: Good Samaritan 2.0 or Good Samaritan 0.5?' (CITIP Blog, KU Leuven, 24 Apr. 2018) <https://www.law.kuleuven.be/citip/blog/the-eucommission-on-voluntary-monitoring-good-samaritan-2-0-or-good-samaritan-0-5/>; Van Hoboken J et al. (2019).
[632] 47 U.S.C. §230(c)(2).
[633] Commission, 'Online Services in the Single Market' (Staff Working Document) SEC (2011) 1641, 35. For the 2015–16 consultation, Commission, 'Online Platforms and the Digital Single Markets' (Communication) COM (2016) 288 final, 9; Commission, 'Mid-term Review on the Implementation of Digital Single Market Strategy' (Staff Working Document) SWD (2017) 155, 28.

due to its now ‘active’ role.[634] That said, intermediaries might be disqualified a priori from the scope of liability exemptions due to their active voluntary initiative investigation. Thus, under the Commission’s ‘Good Samaritan 0.5,’ a proactive stance increases the probability that the host intermediary acquires knowledge of the illegal status of the content it hosts and, by extension, its exposure to liability.[635]

1.2.10 An Outdated Liability Regime?

The liability regime under ECD is far from perfect as it typically lacks detailed procedural rules, and the protections created by the ‘knowledge’ standard and restriction of mandatory monitoring have been undercut by some courts and lawmakers.[636] This outdated framework does not offer adequate protection for IP holders’ rights, while at the same time it subordinates internet users’ interests and host intermediaries’ business operations.

As an EU-wide law, the ECD sets shared rules to be implemented in the national laws of Member States. Thus, the ECD carries out minimum harmonization, which leaves Member States room to choose the form and method of implementation of the Directive, so long as they abide by the result that the Directive seeks to achieve.[637] That said, the ECD mandates that each Member State grants special immunities to intermediaries and permits additional immunities at their discretion; it also encourages the adoption of specific NTD procedures by affected parties and Member States.[638] Due to lack of guidance on interpreting the concept of ‘knowledge’ and the term ‘expeditious’ included in Art.4(1) ECD, the immunities have been inconsistently applied across the EU with conflicting outcomes.[639]

Moreover, while the ECD harmonized liability exceptions for three main types of intermediaries, it left the complex task of establishing liability to individual national Member States.[640] Since ‘secondary liability’ is not harmonized at the EU level, national courts have applied heterogeneous tortious secondary liability doctrines, resulting in persistent fragmentation and significant disharmonization of substantive intermediary liability rules

[634] Kuczerawy A, supra note 631.
[635] Ibid.
[636] *Delfi*; *MTE v. Hungary*.
[637] Art.288 TFEU.
[638] van Hoboken J (2009) 8–12; Recitals 40, 46 ECD.
[639] Schroff S (2021) 1262.
[640] Krokida Z (2022) 10.

within Europe.[641] Therefore, the question of ECD's intermediaries' asylum still remains enigmatic for national courts, both in respect of the question of liability and of the injunctions against intermediaries as third parties.[642] Consequently, legal fragmentation in implementing and interpreting safe harbors, alongside developments in national and EU-level frameworks, has undermined the goal of legal certainty and the advancement of the EU Digital Single Market.[643]

Furthermore, a number of European policy documents reflect disappointment with the regulatory framework for host intermediaries' activities as outlined in Art.14(1) of the ECD, with various stakeholders, including right holders, civil society organizations, and intermediary associations, expressing their dissatisfaction: online piracy is rife, traditional commercial intermediaries are squeezed, new entries do not play by established rules and the rights of the consumer have been hallowed out, while the financial position of the individual author has further deteriorated.[644] Besides, research reveals that the safe harbors can be understood to incentivize host intermediaries to remain passive in relation to infringing activities, instead of addressing these issues to the extent technically possible and consistent with service offerings.[645] Concerns were also raised regarding the principle of intermediaries, rather than courts or administrative authorities, deciding on the legality of online content, the potential for abusive takedown notices, and the associated risks of unduly restricting users' freedom of expression.[646] Meanwhile, academics voiced that the ECD has been inconsistently interpreted in ways that erode its free expression protections.[647] After all, disillusionment on all sides is fueled by reforms being continuously falling short of expectations. In the light of the unsatisfactory effect of safe harbor system, commentors suggest reforming or even abolishing the current safe harbor and embracing heightened liability for intermediaries.

[641] Angelopoulos C (2013); Synodinou TE (2015).
[642] Synodinou TE (2015).
[643] Van Hoboken J et al. (2019).
[644] Husovec M & Leenes R (2014); European Commission, 'Results of the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy' (26 Jan. 2016) <https://digital-strategy.ec.europa.eu/en/library/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>
[645] Van Hoboken J et al. (2019).
[646] Wilman F (2020) 50.
[647] Horton M, 'Content "Responsibility": The Looming Cloud of Uncertainty for Internet Intermediaries' (6 Sept. 2016, Center for Democracy & Technology) <https://cdt.org/insights/content-responsibility-the-looming-cloud-of-uncertainty-for-internet-intermediaries/>

1.3. China: Intermediary Copyright Liability under Civil Code, E-Commerce Law, and Copyright Law

In China, the rules for intermediary liability were introduced in the field of copyright law;[648] subsequently, the Tort Law (codified in the Civil Code) established specific provisions for internet infringement liability, clarifying the rules for the indirect liability of intermediary;[649] then the ECL 2018 also designed the indirect liability rules for e-commerce intermediaries based on these provisions.[650] China's current laws on intermediary liability are largely based on relevant U.S. regulations, particularly the 'safe harbor' provision from the DMCA. Particularly, Articles 1194 to 1197 Civil Code designate a special joint liability regime for intermediaries. However, judicial precedents and mainstream academic opinion typically analyze these cases through the lens of contributory infringement.[651] Judicial decisions and academic scholarship interpret the special joint liability as contributory infringement, arguing that if intermediaries 'know or should know' about third-party's infringing activities and fail to take necessary measures, thus breaching their duty of care, they are engaging in contributory acts within joint infringement and should bear joint and several liability for the infringement.[652] These provisions, heavily influenced by the U.S. model, reflect the prevailing view in Chinese academia and practice that intermediary liability is founded on the principle of contributory infringement.[653]

However, in practice, intermediary liability rules in China have essentially deviated from the basic principle of contributory infringement, evolving into a form of liability of non-feasance.[654] That said, intermediaries are held liable for infringement due to their failure to fulfill obligations arising from prior conduct. Thus, the principle of contributory infringement no longer provides theoretical support for the transformed rules of intermediary liability.[655]

1.3.1. Primary Liability

[648] Art.22-25 of 2013 Regulation; Art.7-14 of 2020 Provisions.
[649] Art.36(2) and (3) of Tort Law (codified into Civil Code); Art.1197 Civil Code.
[650] Art.38, 41-45 ECL 2018.
[651] Zhu D (2019) 1341; Wang Q (2023) 501-503.
[652] Zhu D (2019) 1341.
[653] Art.7(3) of 2020 Provisions; Wu H (2011) 39; Zhang X (2010) 168; Chen J (2014) 230; Cui G (2014) 720.
[654] Zhu D (2019) 1341.
[655] Ibid.

Art.1194 Civil Code specifies that 'network users and internet service providers who infringe upon the civil rights of others through the internet shall bear liability for such infringement, unless otherwise provided by law.'[656] This provision establishes primary/direct liability rule that intermediaries are independently liable for their own infringing actions. In judicial practice, direct infringement by intermediary is determined through either direct recognition based on the service's characteristics and functions or through indirect inference. Under these scenarios, the intermediary may be held primarily liable because they substantially contribute to the copyright infringement rather than merely proving intermediary services.[657]

Moreover, when the service's characteristics and functions of certain intermediary are unclear, direct infringement can be inferred based on evidentiary rules. According to the 2020 Provisions, if the plaintiff provides preliminary evidence that the intermediary offered related subject matters, but the intermediaries proves they only offered network services without fault, the court should not find them liable for infringement.[658] The Copyright Trial Guidelines details the evidentiary responsibilities of intermediaries.[659] According to Art.9.2, if the plaintiff presents preliminary evidence that the disputed content can be accessed through the defendant's website, and the defendant asserts they did not provide the content, the burden of proof shifts to the defendant. Intermediaries must demonstrate both the specific technical services they offered and identify the entity that provided the content.[660] Art.9.3 requires the defendant to provide evidence regarding the entity providing the content, or their relationship with that entity.[661] Art.9.10 further stipulates that if the defendant claims to solely provide information storage space services, they must provide evidence showing that the content on their site was clearly marked as user-provided, including details such as the uploader's username, registration and upload IP addresses, registration and upload times, contact information, and other relevant data.[662] In practice, courts have held intermediaries solely liable for infringement by presuming them to be the actual infringers when they fail to meet their evidentiary burden.[663]

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[656] Art.1194 Civil Code.

[657] Art.3 and 5 of 2020 Provisions.

[658] Ibid, Art.6.

[659] Beijing High People's Court Copyright Trial Guidelines 北京市高级人民法院侵害著作权案件审理指南 <https://www.beijing.gov.cn/zhengce/fygfxwj/202308/t20230817_3224608.html>

[660] Ibid, Art.9.2.

[661] Ibid, Art.9.3.

[662] Ibid, Art.9.10.

[663] [2019]J0491MC No.39992 (2019)京 0491 民初 39992 号民事判决书; [2017]J0108MC No.51249 (2017)京 0108 民初 51249 号民事判决书.

Intermediaries may also be held joint liable for joint provision of works. Art.4 of the 2020 Provisions states, '[i]f there is evidence proving that an intermediary, in collaboration with others, jointly provides works, performances, or audio-visual content in a manner constituting joint infringement, the people's court shall order them to bear joint liability.'[664] Intermediaries do not directly provide the works but collaborate with the direct provider, and are thus legally recognized as engaging in joint provision of works.[665] Referring to Art.9.6, para 2 of the 'Copyright Trial Guidelines,' if the defendants and others have a cooperative intent to jointly provide disputed works, performances, or audio-visual content, and undertake corresponding actions to achieve this intent, it can be recognized as a joint provision of works. Consequently, if the parties demonstrate such cooperative intent and actions, without permission or other legal exemptions, they will be recognized as engaging in collaborative joint infringement and will bear joint liability.[666] In practice, courts generally determine that the parties have a cooperative intent to jointly provide the disputed works based on evidence such as agreements that reflect a collaborative intent, or proof of close connections between the parties in areas such as content cooperation and profit sharing.[667]

1.3.2 Intermediary Liability

Art.52 CCL enumerates actions that constitute copyright infringements, but none of these listed actions pertain to indirect infringement. In practice, Chinese courts referred to general torts doctrines to address copyright indirect infringements. When users engage in infringing activities using services provided by intermediaries, intermediaries may be held liable as indirect infringer for users' infringing activities under a complex web of indirect liability rules.

1.3.2.1 Civil Code 2020

Art.1197 Civil Code stipulates that, '[an] internet service provider, who *knows* or *should know* that a network user has infringed upon the civil-law rights and interests of another person by using its network services but fails to take necessary measures, shall assume joint and several

[664] Art.4 of 2020 Provisions.
[665] Kong X (2015) 163-164.
[666] Art.9.6 para 2 of the Beijing High People's Court Copyright Trial Guidelines.
[667] [2020]Y73MZ No.574 (2020)粤 73 民终 574 号民事判决书; [2018]J0491MC No.935 (2018)京 0491 民初 935 号民事判决书.

liability with the network user.'[668] Thus, an intermediary may bear joint liability for its subjective fault and failure to take necessary measures.

1.3.2.2 E-Commerce Law 2018

Art.45 ECL 2018 provides that '[i]f an e-commerce platform operator *knows* or *should know* that an in-platform operator[669] on its platform is infringing IP rights, it shall take necessary measures such as deletion, blocking, disconnection of links, and termination of transactions and services; if it fails to take these necessary measures, it shall bear joint and several liability with the infringer.'[670]

1.3.2.3 Regulations and Judicial Interpretations

Art.7 para. 1 establishes investigate infringement and contributory infringement by providing that '[i]f an internet service provider *instigates* or *assists* network users in committing acts that infringe upon the right of communication to the public on information networks while providing network services, the people's court shall hold the network service provider liable for the infringement.'[671] In terms of investigate infringement, Art.7 para 2 adds that '[i]f an internet service provider *induces* or *encourages* network users to infringe upon the right of communication to the public on information networks through *verbal guidance*, *promotion of technical support*, or *reward points*, the people's court shall determine that it constitutes instigation of infringement.'[672] In terms of contributory infringement, Art.7 para 3 of the 2020 Provisions stipulates that '[i]f an internet service provider *knows* or *should have known* that network users are using the network service to infringe upon the right of communication to the public on information networks and fails to take *necessary measures* such as deletion, blocking, or disconnection, or provides technical support or other assistance, the people's court shall determine that it constitutes contributory infringement.'[673] On determining whether an intermediary shall be held liable for investigate infringement or contributory infringement, Courts have to assess the intermediary's subjective fault, including whether the intermediary

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[668] Art.1197 Civil Code.

[669] The term 'in-platform operators' as used in this law refers to 'e-commerce operators who sell goods or provide services through e-commerce platforms.'

[670] Art.45 ECL 2018, emphasis added.

[671] Art.7 para 1 of 2020 Provisions, emphasis added.

[672] Ibid, Art.7 para 2, emphasis added.

[673] Ibid, Art.7 para 3, emphasis added.

knew or *should know* about the network user's infringement of the right of communication to the public on information networks.[674]

In simple terms, the standard for establishing indirect liability of intermediaries is defined by their knowledge of third-parties' infringing activities and failure to take necessary measures to prevent such infringement.[675] Based on the judicial experience from the U.S. case law and the existing Chinese laws and regulations, Chinese scholars argue that intermediary copyright liability encompasses two scenarios. First, intermediary's actions continue or prepare for another's infringement, such as assisting or enabling direct infringement by storing infringing copies for sale, rental, or exhibition, or providing facilities for infringing performances. Second, where an individual, despite not committing any infringing acts themselves; second, intermediary is legally required to bear responsibility for another's infringement due to specific social relationships, such as an employer being liable for an employee's infringing acts within the scope of their duties, or a principal being liable for an agent's infringing acts executed under a contract.[676] Indeed, such a summary echoes with Dinwoodie's classification of participation-based intermediary liability and relationship-based intermediary liability.[677] However, systemic inconsistencies remain unaddressed between these legal frameworks, resulting in a coexistence of differences that influence one another, particularly in terms of the fault-based liability of intermediaries for indirect infringement.

1.3.3 Elements for Determination of Intermediary Liability

1.3.3.1 Knowledge Test

Chinese law takes a knowledge-based approach to intermediary liability that rests precisely on the knowledge of intermediaries. Indeed, the knowledge requirement for intermediary liability immunity is articulated slightly differently from the provisions in the U.S. and EU. Both Art.7 para 3 of the 2020 Provisions and Art.1197 Civil Code adopt the terms 'know' and 'should know,'[678] while Art.22 of the 2013 Regulations requires the host intermediary neither 'know' and 'should have known for any justified reasons.'[679] From a linguistic perspective, the

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[674] Ibid, Art.8 para 1, emphasis added.
[675] Ibid, Art.7 para 2; [2011]HYZMW(Zhi)ZZ No.40 (2011)沪一中民五(知)终字第 40 号民事判决书.
[676] Wu H (2011) 39.
[677] Dinwoodie GB (2017).
[678] Art.7 para.3 of 2020 Provisions, emphasis added.
[679] Art.22 of 2013 Regulation.

standard ‘should have known for any justified reasons’ seems to blend both the ‘reason to know’ and ‘should have known’ standards. At an early stage, some have argued that the standard ‘should have known for any justified reasons’ should be interpreted as ‘reason to know’ under U.S. law. However, after considerable intensive debate, the more widely accepted view is that the standard ‘should have known for any justified reasons’ is considered equivalent to ‘should know.’[680] After all, the indirect liability of intermediaries in China did not follow the ‘have reason to know’ terminology adopted in U.S. case law, but rather opted for the terminology ‘should know.’

Under Chinese law, an intermediary’s actual knowledge of infringement can rarely be proved, except where it receives proper notice from the rightsholder. Art.13 of the 2020 Provisions provides that an intermediary is considered to have actual knowledge if it fails to take necessary measures such as removal, blocking, and removal of links in a timely manner after receipt of a notice submitted by the right holder by letter, fax, email or any other means.[681] While a clear definition of the term ‘should know’ is also absent in relevant legislation, scholars and courts have interpreted ‘should know’ as a broad concept covering both ‘constructive knowledge (have reason to know)’ and ‘negligence (should have known but did not).’

Art.9 of the 2020 Provisions enumerates a set of factors to be considered when determining whether the intermediary ‘should know’ an infringement based on a clear fact that a network user has infringed upon the right of communication to the public on information networks.[682] Those factors includes: (1) the intermediary’s *capability* of information management, as required according to the nature of services provided, manners of provision of services, and possibility of infringement attributable thereto; (2) the *type* and *popularity* of the communicated content and the *level of obviousness* of the infringing activities; (3) whether the intermediary has, on its own initiative, chosen, edited, modified, recommended or otherwise dealt with the content; (4) whether the intermediary has proactively taken r*easonable measures* to prevent infringement; (5) whether the intermediary has set up any convenient programs to receive a notice of infringement and make reasonable response to the notice of infringement in a timely manner; (6) whether the intermediary has taken reasonable measures against a user’s repeated infringements; and (7) other relevant factors. Generally, the second and third factors

680 Zhu D (2019) 1342-4.
681 Art.13 of 2020 Provisions.
682 Ibid, Art.9.

are directly relevant to the knowledge of intermediaries, while the others require intermediaries to fulfill certain duty of case so as to reduce infringement.[683] In practice, there is no dispute that an intermediary's explicit editorial actions entail liability for copyright infringement. However, considering the commonly used technical methods of intermediaries today, the question whether algorithmic recommendation and ranking based on popularity constitute editorial behavior of the intermediary remain controversial.[684]

In addition, Art.10 provides that when an intermediary recommends popular movies and TV shows through ranking, cataloging, indexing, descriptive paragraphs, or brief introductions, thereby enabling the public to directly access these works, the intermediary may be considered to have constructive knowledge of the infringement.[685] Particularly, Art.12 stipulates that a host intermediary may be considered 'should know' the infringement if (1) it places a popular movie or TV play in a position where it is easily appreciable to an intermediary, such as a homepage or any other main page; (2) it actively chooses, edits, organizes, or recommends the themes or contents of popular movies and TV plays or establishes a dedicated ranking for them; (3) it fails to take reasonable measures where the provision of the alleged content without consent is readily apparent.[686]

Under the first scenario, it is reasonable to assume the intermediary have reason to know the infringements without need of further investigation, when hot-play and popular content are freely available on the own homepage and other main pages. Obviously, the above circumstances demonstrate concrete examples fulfilling the 'red flag' awareness in the DMCA.[687] The infringements are so readily apparent that intermediaries can easily obtain knowledge of such specific illegality. Under the second scenario, the intermediaries no longer simply offer information storage or technical channels, but actively participate in organizing and curating content, thereby incentivizing users to upload high-quality, influential content through internal rewards mechanism. Thus, the intermediaries can obtain knowledge of illegality of infringing activities and content through its editorial actions. Under the third scenario, intermediaries are mandated to take actions to tackle apparent copyright

[683] Wang J (2018) 90.
[684] Certain courts ruled that algorithmic recommendation does not entail knowledge of illegality. See [2023]J73MZ No.742 (2023)京 73 民终 742 号民事判决书; [2023]H0110MC No.21690(2023)沪 0110 民初 21690 号民事判决书.
[685] Art.10 of 2020 Provisions.
[686] Ibid, Art.12.
[687] 17 U.S.C §512(c).

infringements; otherwise they are presumed to have knowledge of the illegality because of it 'willful blindness.'

Notably, where an intermediary directly obtains any economic benefits from copyrighted content provided by a user, the people's court shall determine that the intermediary has a '*higher duty of care*' for the user's infringement of the right of communication to the public on information networks. Such direct economic benefits include any benefits from inserting advertisements into specific copyrighted content or any economic benefits otherwise related to the communicated copyrighted content, but exclude the general advertising and service charges, among others, collected by an intermediary for providing network services.[688]

1.3.3.2 Duty of Care

In this comparative legal study, the concept 'duty of care' is prone to have contested contours. It supports a mechanism for defining negligence in private relationships, but seldom has precise definitions of its own. In the safe harbor regimes that exist in global internet law, duties of care are established within the dynamics of interpreting the exemptions of liability provided for by the regime, such as the ECD leaving the possibility for Member States to impose reasonable duties of care on service providers 'in order to detect and prevent certain types of illegal activities.'[689]

In China, the relevant provisions primarily adopt a negative approach by focusing on how to determine when an intermediary has breached its duty of care, rather than explicitly defining the duty of care itself in a positive way. Instead, the current legal framework infers the duty of care by specifying scenarios in which intermediaries are considered to have committed joint infringement. Admittedly, there is no clear explanation of the nature of the duty of care, the boundaries between the duty of care and monitoring obligations, or the degree of duty of care different intermediary should assume in various circumstances. Consequently, the specific connotation and application standards for the duty of care that intermediary should fulfill are left to courts to determine on a case-by-case basis, leading to inconsistent standards in practice.

1.3.3.3 Necessary Measurements

[688] Art.11 of 2020 Provisions.
[689] Recital 48 ECD.

The concept of 'takedown' in the NTD mechanism has gradually evolved into 'necessary measures,' diversifying and adding flexibility to how intermediaries handle complained content. An intermediary's ability to avoid potential liability depends on whether it takes necessary measures, which involve two key aspects: timeliness and effectiveness. Determining what constitutes necessary measures should consider the infringement context and industry characteristics, adhering to principles of caution, reasonableness, and appropriateness to balance copyright protection and the interests of internet users.

Upon receiving a valid notice, the necessary measures taken by intermediaries are influenced by factors such as the type of intermediary service and the specific rights claimed by the rights holders. Regulations provide an open-ended list of necessary measures while allowing intermediaries the flexibility to take other appropriate actions.[690] In judicial practice, intermediaries are not uniformly required to take immediate and severe measures like deletion but should implement actions that align with their technical management capabilities and functions, based on the information provided in the notice and a reasonable general judgment derived from it.[691]

1.3.3.4 No General Monitoring Obligations

Unlike the U.S and EU, the principle of prohibition of general monitoring obligations is absent in Chinese private law legislation. Art.36 Tort Law, which addresses online infringement, is a manifestation of the legal transplantation of the safe harbor rules delineated in Section 512 DMCA. Although this provision does not explicitly require intermediaries to bear monitoring obligations, the Legislative Affairs Commission referred to international conventional wisdom and clarified that 'intermediaries that provide technical services are not subject to general monitoring obligations.'[692] After seven years, the legislative Affair Commission reiterated the same principle in its authoritative interpretations of Art.1197 Civil Code.[693] Moreover, the Chinese jurisprudence also recognizes the prohibition of general monitoring obligations under private law but does not preclude the possibility of monitoring obligations of a specific

[690] Art.1197 Civil Code.
[691] [2017]J73MZ No. (2017) 京 73 民终 1194 号民事判决书.
[692] Wang S (2013) 218.
[693] Huang W (2020) 695.

nature.[694] In addition, according to Art.8(2) of the 2020 Provisions, the SPC clarifies that the court shall not determine an intermediary is at fault where it fails to conduct proactive monitoring regarding a user's infringement.[695] Art.8(3) further states that 'where an intermediary can demonstrate that it has employed reasonable and efficacious technical measures, yet remains unable to identify a user's infringement […], the court shall ascertain that the intermediary is not at fault.' In another Guiding Opinion, the SPC explicitly stated that '[courts shall] not impose a general obligation of prior review and a relatively high degree of duty of care upon the intermediaries […].'[696] The same point can be found in judicial interpretations of Beijing Higher People's Court.[697] Also, courts all across the country also confirm the principle of no general monitoring obligations in numerous cases.[698] Notably, the rationale behind Chinese courts' denial of a general monitoring obligation is primarily based on a cost-benefit analysis, in contrast to the CJEU's reliance on a fundamental rights test.[699]

1.3.4 Safe Harbor Rules under Chinese Law

1.3.4.1 Safe Harbor Rules under Civil Code 2020

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[694] [2019]MZ No.4709 (2019)苏 05 民终 4709 号民事判决书 (intermediaries are required to monitor copyright infringing content uploaded by third parties through targeted measures under specific circumstances); [2008[LMSZZ No.8 (2008)鲁民三终字第 8 号民事判决书(intermediaries are not subject to an ex ante general motoring obligation, but should bear certain ex post monitoring obligation).

[695] Art.8(2) of 2020 Provisions.

[696] SPC, Notice of the Supreme People's Court on Issuing the Opinions on Issues concerning Maximizing the Role of IP Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of Economy 关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见(16 Dec. 2011).

[697] Art.17 of the 'Guiding Opinions on the Trial of Copyright Disputes in the Network Environment (I) (Provisional) 关于审理涉及网络环境下著作权纠纷案件若干问题的指导意见(一)(试行)' (issued by Beijing Higher People's Court); Art.2 of the 'Answers to Several Issues Concerning the Trial of E-Commerce IP Infringement Dispute Cases by the Beijing High People's Court 关于审理电子商务侵害知识产权纠纷案件若干问题的解答.'

[698] The prohibition of general monitoring obligation has been endorsed by different courts across China, See [2013]LMSZZ No. 178 (2013) 辽民三终字第 178 号民事判决书 (denying proactive monitoring obligation of intermediaries); [2019]Z01MZ No.4268 (2019)浙 01 民终 4268 号民事判决书 (denying ex ante monitoring obligation of intermediaries); [2019]J 0491MC No.22238 (2019)京 0491 民初 22238 号民事判决书 (intermediaries are not subject to proactive, general monitoring obligation); [2020]H0104MC No.8302 (2020)沪 0104 民初 8302 号民事判决书 (intermediaries are not subject to general proactive monitoring obligation, and it is practically difficult to conduct comprehensive and active monitoring of a large number of short videos, or to block keywords in advance); [2020]H73MZ No.103 (2020)沪 73 民终 103 号民事判决书(The court held that an intermediary's general duty to review short video content is limited to filtering for content related to pornography, violence, and illegal activities, and does not extend to reviewing whether the content infringes copyright.); [2023] H73MZ No.287 (2023) 沪 73 民终 287 号民事判决书 ('intermediaries have limited capacity to proactively review the vast amount of content uploaded by users on their services to detect infringing content. Therefore, these intermediaries do not have an obligation to proactively monitor user-uploaded content.').

[699] [2020]H0115MC No.14922 (2020)沪 0115 民初 14922 号民事判决书 (it would be overly burdensome to require the platform to individually review the vast number of short videos uploaded by numerous users); [2020]H0104MC No.8795 (2020)沪 0104 民初 8795 号民事判决书 ('Given that short videos are brief and may involve editing, splicing, or even re-creation, it would be overly difficult to require the platform to bear the responsibility of proactively reviewing such content.')

Under Art.1195 and 1996 Civil Code, where a network user commits a tortious act through using the network service, the rightsholder is entitled to notify the intermediary to take such necessary measures as deletion, block, or disconnection. The notice shall include the preliminary evidence establishing the tort and the real identity information of the rightsholder. After receiving the notice, the intermediary shall *timely* forward the notice to the relevant user and take *necessary measures* based on the preliminary evidence establishing the tort and the type of service complained about. Failing to take necessary measures in time, the intermediary shall assume joint and several liability for the aggravated part of the damage with the user. In terms of erroneous notices, the rightsholder who causes damage to the user or intermediary due to erroneous notification shall bear tort liability, unless otherwise provided by law.[700]

Meanwhile, after receiving the forwarded notice, the user may submit a declaration of non-infringement to the intermediary, which shall include the preliminary evidence of non-infringement and the real identity information of the network user. After receiving the declaration, the intermediary shall forward it to the right holder who issues the notice and inform him that he may file a complaint to the relevant department or file a lawsuit with the people's court. The intermediary shall *timely* terminate the measures taken where, within a reasonable period of time after the forwarded declaration reaches the right holder, it fails to receive notice that the right holder has filed a complaint or a lawsuit.[701]

1.3.4.2 Safe Harbor Rules under E-Commerce Law 2018

Moreover, Art.42-44 ECL 2018 introduce a safe harbor mechanism for e-commerce operators, outlining the requirements for the 'notice-necessary measures-counternotice process,' the liability for erroneous notices and malicious erroneous notices, and the complaint and redress mechanism. Specifically, Art.42 introduces a 'notice (rightsholders)-necessary measures (intermediary)-forward notice (intermediary)' procedure. Rightsholders who believe their rights have been infringed are entitled to submit a notification containing preliminary evidence of the infringement to the intermediary, requiring it to take necessary measures such as deletion, blocking, disconnection, termination of transactions, and services.[702] Upon receiving the notice, the intermediary must promptly take the necessary measures and forward the notice to the operator within the service. Failure to take timely measures makes the intermediary jointly

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[700] Art.1195 Civil Code, emphasis added.
[701] Ibid, Art.1196, emphasis added.
[702] Art.42 para.1 ECL 2018.

liable with the within-intermediary operator for any additional damage incurred.[703] If the notice is erroneous and causes damage to the operator within the intermediary, the notifier bears civil liability. In cases of maliciously issuing an erroneous notice that causes losses, the notifier must pay double compensation.[704] Art.43 further establish a 'counternotice (the operator)-forward counternotice (the intermediary)-re-notice (rightsholders) process. Upon receiving a forwarded notice, the within-intermediary operator may submit a declaration to the intermediary stating that no infringement has occurred, which should include preliminary evidence supporting this claim. After receiving the declaration, the intermediary must forward it to the rightsholders who issued the notice and inform them that they can file a complaint with the relevant authorities or initiate a lawsuit with the people's court. If the intermediary does not receive notification within fifteen days that the rightsholder has filed a complaint or lawsuit, it must promptly cease the measures taken.[705] In addition, the intermediary shall promptly disclose the notices, statements, and handling results received.[706]

1.3.4.3 Safe Harbor Rules under Copyright Law and Regulations

A) NTD Mechanism

To address the urgent issue of copyright protection in the internet domain, the 2013 Regulations systematically detailed the NTD mechanism in Articles 14 to 17. Notably, the 2013 Regulations establishes a 'notice (rightsholders) – takedown (intermediaries) – forward notice (intermediaries) – counter notice (disputed user) – restore the content and forward counter notice (intermediary)' procedure. Rightsholder may submit a written notice to the intermediary, requiring it to remove or delink the copyright-infringing content.[707] Upon receiving the notice, the intermediary shall immediately remove or delink the infringing content, and forward the notice to the user who provides the infringing content. If the network address of the user is unclear and the notice cannot be forwarded, the intermediary shall announce the content of the notice on the information network.[708] After receiving the forwarded notice from the intermediary, if the user believes that the disputed content does not infringe upon others' rights, they may submit a written explanation to the intermediary, requesting the restoration of the

[703] Ibid, Art.42 para 2.
[704] Ibid., Art.42 para 3.
[705] Ibid., Art.43.
[706] Ibid., Art.44.
[707] Art.14 of 2013 Regulation.
[708] Ibid, Art.15.

removed content or the removed link.[709] Upon receiving the written explanation from the user, the intermediary shall immediately restore the removed content or link to the content, and forward the written explanation from the user to the rightsholder. The rightsholder shall not submit a notice again to the intermediary to require removal of the content or link to it.[710] When a notice from a right holder leads to an intermediary wrongfully removing content or the link to the content, causing loss to its users, the right holder shall be liable for damages.[711] In other words, the intermediaries are not liable for wrong removal by carrying out the rightsholders' notices. Notably, the widespread adoption of algorithmic technologies has transformed copyright protection of digital works into an automated system, where infringing content is detected, reported, and removed through algorithmic enforcement, shifting the traditional 'notice–takedown' mechanism to an 'algorithmic notice–algorithmic takedown' model, with some systems even preventing the upload of potentially infringing content in the first place.[712]

Interestingly, Art.13 of 2013 Regulations specifies that, for the purpose of investigating and addressing infringing activities, copyright administrations may require intermediaries to provide information on users suspected of infringement, such as their names, contact methods, and network addresses.[713] If an intermediary refuses or delays in providing the requested information without a justified reason, the copyright administrative department shall issue a warning and, in serious cases, may confiscate computers and other equipment primarily used to provide network services.

B) Liability Exemptions

Art.20-23 of 2013 Regulations provides specific liability exemptions for intermediaries providing, automatic network access services,[714] automated storage services,[715] information storage spaces services,[716] and search or linking services.[717] Among the four categories mentioned above, the application of liability exemptions to intermediaries providing information storage space services (host intermediaries), which is central to the analysis of this research, attracts the most intense debates. Host intermediaries are immune from monetary

[709] Ibid, Art.16.
[710] Ibid, Art.17.
[711] Ibid, Art.24.
[712] Jiao H (2023) 188.
[713] Art.13 of 2013 Regulation.
[714] Ibid, Art.20.
[715] Ibid, Art.21.
[716] Ibid, Art.22.
[717] Ibid, Art.23.

liability under five cumulative conditions: (1) it has clearly indicated that the information storage spaces are provided to the users, and published the name, contact person, and network address of the intermediary; (2) it has not altered the content provided by users; (3) it neither *knows* nor *should have known for any justified reason* that the content provided by its users are infringing; (4)) it has not directly obtained any economic benefits from its users' provision of the content; and (5) after receiving notices from the right holders, it has removed the infringing content claimed by the right holders in accordance with the provisions of this Regulation.[718]

1.3.4.4 Legal Transplantation of DMCA Safe Harbors: A Problematic Reverse-engineering?

In China, intermediaries may be held liable for contributory infringement due their knowledge of third parties' infringing activities and failure to take necessary measures. It is widely believed that the intermediary liability rules in China are outcome of legal transplant of contributory infringement in the U.S.[719] However, scholars argue that the existing specific rules for intermediary liability, particularly in terms of substantial divergences in the subjective and objective criteria for establishing indirect liability for intermediaries, differ significantly from those of contributory infringement.[720] More importantly, these distinctions exemplify the variations that occur during the process of legal transplantation, impacting the fundamental structure of intermediary liability and contributing to numerous theoretical and practical debates.

A) Converting Liability Exemptions into Liability Standard

China's rules on indirect liability for intermediaries are transplanted from the 'safe harbor' provisions of Section 512(c) DMCA. However, unlike the U.S. approach, China has reinterpreted these rules from a different perspective, using the liability exemption provisions of Section 512(c) as a basis to establish the constitutive elements of indirect liability for intermediary. Such an approach was first adopted in the 2000 Interpretation which explicitly stipulates that intermediary 'who knowingly allow users to infringe others' copyrights through the network, or who, after receiving a credible warning from the copyright holder, fail to remove the infringing content to eliminate the infringement consequences, shall be held jointly liable with the user for the infringement.'[721] This provision has had a profound impact, establishing the fundamental logic of using the elements of safe harbor as critical components

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[718] Ibid, Art.22.
[719] Wu H (2011); Wang Q (2023) 499-500.
[720] Zhu D (2019) 1341.
[721] Art.5 of 2000 Provisions (abolished).

in determining the liability of intermediaries. As a result, although the 2006 Regulation adhered to the basic model of the safe harbor as a liability exemption rule in its provisions, some scholars still argue that, within the framework of China's civil liability legislation, these provisions should be viewed as a reverse articulation of the indirect liability of intermediaries.[722] The latter Civil Code also incorporate the elements of safe harbor in Art.1197 to establish indirect liability of intermediaries.[723]

The approach of converting liability exemptions into liability standard is tied to the differing legal frameworks of China and the U.S., based on the implicit assumption of a corresponding and convertible relationship between the two. However, the examination of the U.S. model indicated that there are, in fact, certain distinctions between the safe harbor as a liability exemption rule and the elements establishing contributory infringement. The standard for establishing indirect liability of intermediaries in China exhibit unique characteristics due to insufficient attention to the above differences. Specifically, the rightsholder's notification, which is essential for determining an intermediary's subjective awareness of a user's infringing activities, is treated as an element establishing liability. Consequently, this has led to a regulatory structure where the notification rule serves as the general rule for the indirect liability of intermediaries, whereas the knowledge test is considered an exception to the notification rule. Moreover, the crucial objective factor of whether the fact of infringement by users is apparent, as indicated in the 'red flag' test, has been omitted. Instead, it is replaced by the broader subjective standard of whether the intermediary 'knows' or 'should know' about the existence of the infringing activities. Furthermore, the requirement to take necessary measures to prevent infringement is considered an objective element for establishing the indirect liability of intermediaries.

B) Negligence-based Knowledge Test

Generally, the subjective element for establishing the indirect liability of intermediaries is defined as their *knowledge* of users engaging in infringing activities through their services, which includes both *actual knowledge* and *constructive knowledge*. However, most Chinese regulation adopt the terminology 'should know,' which, based on the interpretation of many scholars and courts, covers both 'reason to know' and 'should have known.'[724] Therefore, it

[722] Wang Q (2011) 276.
[723] Art.1197 Civil Code.
[724] Wu H (2011).

seems that the Chinese courts and scholars share a different understanding of 'constructive knowledge.' Generally, under Chinese tort law, in terms of the subjective state of mind, actual knowledge implies *intent*, whereas constructive knowledge implies *negligence*.[725] Negligence refers to the subjective state of mind wherein an individual should foresee and has the potential to foresee a specific harmful outcome, yet fails to behave with the level of care that a reasonable person would have exercised under the same circumstance.[726] Therefore, requiring intermediary to have knowledge of the infringing activities of users is essentially a specific expression of the subjective fault. According to this interpretation, the subjective element of indirect liability for intermediaries is no different from that of general tort liability, as both require the presence of fault on infringer. This understanding raises no doubts under the broad rules of joint liability, as it is commonly accepted that having a shared intention is just one manifestation of joint liability, and negligence can also constitute joint liability, but there are a number of evils in the details.

In the U.S., contributory infringement is rooted in common law and based on whether the defendant, 'with knowledge of the infringing activity,' induced, caused, or 'materially contributed' to another's infringing conduct.'[727] In terms of subjective state of mind, a contributory infringer must either *know* (actual knowledge) or *have reason to know* (constructive knowledge) of the specific infringing activity.[728] 'Reason to know,' exists when 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.'[729] As Simons has noted, 'reason to know' requires the actor to have 'actual subjective awareness of circumstances from which he should infer the fact in question.'[730] While actual knowledge is a purely subjective standard, having reason to know introduces an objective standard in assessing the individual's state of mind; actual knowledge involves a degree of subjective intent or malice, whereas having reason to know does not consider whether the contributory infringer possesses subjective intent or

[725] Feng S (2016) 180.
[726] Cheng X (2015) 271.
[727] Heymann LA (2020); Kulk S (2019) 246; Gorman RA et al. (2017) 1146; RESTATEMENT (SECOND) OF TORTS §876(b) (AM. LAW INST. 1979) (noting that 'one is subject to liability for harm resulting to a third person from another's tort if that person 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'); Gershwin v. Columbia (1971) 1159.
[728] Fonovisa v. Cherry Auction (1996).
[729] RESTATEMENT (SECOND) OF TORTS §12(1) (AM. LAW INST. 1965).
[730] Simons KW (2006) 1095.

malice.[731] The standard of 'have reason to know' primarily considers the contributory infringer's awareness of a third party's infringing activity, rather than focusing on the contributory infringer's subjective state of mind or whether they actively pursued or were indifferent to the infringing behavior, which distinguishes it from the traditional concept of intent in the civil law system.[732]

Noteworthy, the subjective requirement for contributory infringement under U.S. law does not include 'should know/should have known.' While most Chinese legislation adopts the terminology 'should know,' which covers both 'reason to know' and 'should have known.' On one hand, Art.10 and 12 of 2020 Provisions provide examples for the determination of 'reason to know' as they detail scenarios that are apparent for intermediaries to obtain knowledge of infringing activities.[733] Meanwhile, Art.9 lists series of factors for determining whether the intermediary 'should know' the specific infringements. Particularly, when assessing the knowledge of intermediary, courts have to consider whether the intermediary has proactively taken *reasonable measures* to prevent infringement.[734] On the other hand, courts have relied on general tort doctrine to interpret 'should know,' thereby subtly incorporating 'should have known (negligence)' as a form of subjective fault into the framework of indirect liability for intermediaries.[735] Following this understanding, the 'should know' standard compels intermediaries to undertake certain duties of care to take measures to cease and prevent infringements. In numerous cases involving online copyright infringement, courts tend to focus on whether the involved intermediary had a duty of care and whether they fulfilled that duty of care to determine if they were at fault.[736] As the infringement by users is often not 'readily apparent' in many cases, courts do not always adhere strictly to Art.9 to assess the intermediary's subjective knowledge of the infringement, but rather relied on imposition of duty of care on intermediaries.[737] Thus, the Chinese legal system has effectively combined a compulsory 'duty of care' with the reactive 'notice-and-necessary measures' model, furthering enhancing the burden of intermediaries and creating headaches for courts.

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[731] Högberg SK (2006) 927; Heymann LA (2020) 347.
[732] Dong Zhu (2019) 1345.
[733] Art.10 and 12 of 2020 Provisions.
[734] Ibid, Art.9.
[735] Some courts have explicitly stated that 'should know' refers to the situation where, although there is no direct evidence proving explicit knowledge, the existing evidence reasonably suggests that the intermediary should have been aware that the dissemination activities of the linked website were unauthorized by the rightsholders. [2015]JZMZZ No.2430 (2015)京知民终字第 2430 号民事判决书; Dong Zhu (YEAR) 1351.
[736] Zhu D (2019); Wu H (2011); Wang Q (2023).
[737] Feng S (2016) 182.

Furthermore, the standards 'reason to know' and 'should have known' differ in whether a duty of investigation is required, as the former 'implies no duty of knowledge on the part of the actor' whereas the latter 'implies that the actor owes another the duty of ascertaining the fact in question.'[738] Thus, an actor governed by a 'reason to know' standard is assessed based only on the information the actor had at the time, while an actor governed by a 'should have known' standard is required to pursue the inquiry to some objectively determined point, at which stage the actor's knowledge is assessed based on the information thus acquired.[739] In a nutshell, 'reason to know' presumes knowledge based on specific facts without imposing any cognitive duty on the actor,[740] whereas 'should have known' does not consider whether the actor actually knew the facts but imposes a cognitive duty on the actor, and violating this duty is essentially considered negligence.[741] Therefore, 'reason to know (constructive knowledge)' and 'actual knowledge' both constitute forms of awareness, differing primarily in their evidentiary requirements, while 'should have known (negligence)' and 'actual knowledge' represent distinct cognitive states: the former requires the imposition of an additional substantive obligation, namely the duty to recognize specific tortious acts, to engender legal consequences commensurate with those of actual knowledge. Thus, excluding the 'should have known' standard indicates that negligence is not part of the subjective criteria for contributory infringement under U.S. law, which fundamentally distinguishes it from the subjective criteria for intermediary liability in China.

C) Red Flag Test

Indeed, the DMCA safe harbor provisions are primarily intended to exempt intermediaries from potential direct, vicarious, or contributory infringement liability and associated damages through clear statutory provisions. Nevertheless, in practice, the safe harbor provisions have effectively excluded the application of direct liability rules to intermediaries in the realm of copyright infringement while substantially retaining the rules of secondary liability, thus limiting the liability of intermediaries.[742] Notably, this does not necessarily mean that elements of the safe harbor rules align with the requirements for establishing secondary liability in the U.S.

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[738] RESTATEMENT (SECOND) OF TORTS §12 cmt. a (AM. LAW INST. 1965).
[739] Heymann LA (2020) 343.
[740] RESTATEMENT (SECOND) OF TORTS §401 cmt. a (AM. LAW INST. 1965) ('The words "reason to know" do not impose any duty to ascertain unknown facts...') *cf* Heymann LA (2020) 343, ft 55.
[741] Farmer v. Brennan, 511 U.S. 825 (1994).
[742] Reese RA (2008) 429.

In terms of subjective state of mind, the safe harbor rules require that intermediaries do not have actual knowledge of specific infringing activities by users, nor are they aware of any facts that would make the infringement apparent.[743] Regarding 'actual knowledge,' the safe harbor rules offer a negative formulation of the actual knowledge standard, which is a key subjective requirement for contributory infringement. A copyright holder's infringement notice serves as a crucial method for establishing that the intermediary had actual or 'subjective' knowledge of the specific infringement. However, the DMCA safe harbor rules do not directly adopt the concept of having 'reason to know' but instead establish the red flag test. The similar wording was incorporated into the Art.14(1)(a) ECD.[744]

The red flag test, incorporating an objective standard,[745] means that when the facts or circumstances of the copyright infringing activity is so apparent that a reasonable person would recognize it, the intermediary cannot claim lack of knowledge of the infringement to avoid liability. In other words, the red flag test turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person.[746] It is precisely by emphasizing the logic of presuming an intermediaries' awareness of user infringement based on specific facts that the DMCA further clarifies the exemption of proactive monitoring obligations for intermediaries.[747]

Nonetheless, red flag awareness is definitely not the same as constructive knowledge. The fundamental structure of the red flag test is consistent with the 'reason to know' standard, as both use an objective approach to determine the subjective state of mind of the actor. However, the red flag test focuses solely on the objective factor of whether the infringement by the user is apparent, excluding other potential facts that could lead to the presumption of the intermediaries' awareness of the user's infringements. In doing so, the safe harbor effectively narrows the scope of 'reason to know,' thereby reducing the copyright infringement liability of intermediaries.

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[743] 17 U.S.C. §512 (c)(1)(A) (i)-(ii) and 512 (d)(1)(A)-(B).
[744] Art.14(1)(a) ECD.
[745] Viacom Int'l v. YouTube (2012).
[746] The USCO recently recommended clarifying the relationship between red flag knowledge and the prohibition of general monitoring, advocating for a broader notion of knowledge that is not limited to 'specific' infringing content. See Section 512 Report.
[747] 17 U.S.C. §512(c)(m).

2. Time to Reform the Current Intermediary Liability Regime?

Copyright law grapples directly with new economic models and technological progress.[748] Rapid technological developments continue to transform how works and other subject matter are created, produced, distributed, and exploited, leading to the emergence of new business models and new actors.[749] At the same time, relevant legislation needs to be adaptive so as 'not to restrict technological development' and innovation.[750] These three particular forces, law, technology, and markets, gradually shape the emergence and evolution of intermediary liability. As of late, the landscape of intermediaries has transformed quite significantly since the adoption of the DMCA and the ECD. Not only does the safe harbor immunities potentially apply to a much larger set of services, the economic and societal relevance of the social, cultural, economic, and political processes that are covered have increased significantly.[751]

2.1 Legal Perspective: Safe Harbors in Deep Water[752]

In the examined three jurisdictions, a knowledge-based liability exemption framework was introduced to ensure that intermediaries are exempted from liability relating to the content that they store for their users, provided they do not have knowledge of the content's illegality and act expeditiously to remove the content once they obtain such knowledge.[753] However, in recent years, the conditions for applying the safe harbor provisions have significantly evolved due to advancements in dissemination technologies and business models, particularly the explosive growth in the number and variety of online services based on copyrighted content.[754] The scale and scope of online copyright-related activity, both legitimate and illegitimate, has far surpassed what policymakers could have imagined. With those changes has come widespread debate over the question whether the initial balance designated in Section 512 DMCA was working for all concerned parties in the 21st century. Thus, safe harbor systems require re-examination, reconsideration, and careful delineation of their scope, as they are currently applied to fundamentally different types of intermediary services.[755] In fact, in the U.S., EU, and China, the practical application of the safe harbor mechanism has increasingly

[748] New technologies often lead to novel uses of copyrighted works that hold economic value, which are then appropriated by third parties, unfairly depriving the rightsholders of their due rewards. See Mezei P (2010); Savelyev A (2018).
[749] Patry W (2012).
[750] Recital 3 DSMD.
[751] Van Hoboken J et al. (2019).
[752] Montagnani ML & Trapova AY (2018).
[753] See Chapter III.
[754] Samuelson P (2020).
[755] Polański PP (2018) 871.

struggled to keep pace with new industry and technological developments, highlighting the urgent need for reform and adjustment to the safe harbor regime.

First of all, the legal uncertainties of safe harbor rules result in inconsistent implementations in practice.[756] As online activity and third-party use of creators' content have increased, the pressure on the NTD system to meet the needs of all stakeholders has also intensified.[757] As shown in the previous sections, given the inherent legal uncertainty in all safe harbor rules, intermediaries may minimize their efforts to combat infringing content by presenting themselves as 'mere conduits' to benefit from liability exemptions, thus restricting their actions to adjusting their T&Cs and ensuring formal compliance with information duties and other relevant obligations.[758] Moreover, the outdated safe harbor rules constantly falls short of copyright holders' expectation as they provide no sufficient incentives for intermediaries to innovate and deploy technology in the detection of allegedly copyright infringing material.[759] Although copyright owners agreed with the intermediaries that combating copyright infringement online would need to be a team effort by intermediaries and copyright owners, they wanted more responsibility to be shifted to intermediaries and the legislation to incentivize intermediaries to innovate.[760] Rightsholders have to rely on automated processes to search for unauthorized material and generate takedown notices on an unprecedented scale, yet they continue to express concerns about the impact of infringement on their revenue.[761]

The outdated NTD mechanism also disadvantages rightsholders in copyright enforcement.[762] Recently, intermediaries had either enhanced or bypassed traditional NTD processes by licensing content or developing custom systems that enable larger copyright owners to identify and manage their content. In contrast, smaller creators report spending significant time and resources identifying instances of their content online and sending takedown notices with little effect.[763] Similarly, some smaller intermediaries express concern about handling an increasing number of takedown notices without the technological resources available to larger

[756] Urban JM et al. (2017) 28-36; Wang J (2021).
[757] Section 512 Report, 28-31.
[758] Shikhiashvili L (2019); Urban JM et al. (2017).
[759] Krokida (2022) 102; Xiong (2022) 98.
[760] Mehra SK and Trimble M (2014) 691.
[761] Section 512 Report; Urban JM et al. (2017) 31-6.
[762] Section 512 Report, 28-31.
[763] García K (2020a).

intermediaries.[764] While the traditional DMCA-style NTD mechanism mainly relies on self-regulation, cooperation between copyright holders and intermediaries to combat piracy is inefficient and costly.[765] Copyright holders must monitor targeted intermediaries for infringing content, send infringement notices, and track the intermediaries' responses, either manually or with technological assistance. Intermediaries then manually receive, review, and remove infringing content or disconnect infringing links.[766]

On the one hand, copyright holders often face the challenge of dealing with numerous major websites, which frequently experience massive user infringement activities, necessitating continuous issuance of infringement notices.[767] For many small-scale, dispersed copyright holders, this process is time-consuming, exhausting, and unprofitable. On the other hand, intermediaries also incur significant human resource costs when manually processing a large volume of infringement notices within a short timeframe.[768] For time-sensitive content like sports events and popular movies, the NTD mechanism is fundamentally ineffective, as the damage is often irreparable by the time infringement is discovered. If intermediaries deliberately delay the process for their benefit, the consequences are even more severe.[769] Under pressure from major copyright industry groups, large intermediaries like YouTube have developed or licensed automated content recognition technologies to align with their business models and better support the copyright ecosystem.[770]

Furthermore, throughout the 2010s, intermediaries are subject to increasingly critical public sentiment and political scrutiny as rising 'anti-platform' sentiments coincide with a growing suspicion of digitization and foreign domination.[771] Intermediaries have been harshly criticized for allegedly enabling the worrying proliferation of unlawful and otherwise unwanted content,[772] from piracy to fake news, thus triggering calls to reform the safe harbor system.[773] Besides, larger intermediaries opt for an 'over-compliance' strategy by increasing the

[764] Section 512 Report, 10-11; Wang J (2021).
[765] Bar-Ziv S & Elkin-Koren N (2018) 5; Frosio G (2016); Wang J (2021).
[766] Frosio G (2018a); Xiong Q (2023) 122.
[767] Urban JM et al. (2017), 46-9.
[768] Ibid. Xiong Q (2023) 122.
[769] Wang W (2024); Blythe SM (2019).
[770] Perel M & Elkin-Koren N (2016) 512.
[771] Flew T (2021) 48; Ananny M & Gillespie T (2016); Elkin-Koren N et al. (2020) 4; Gillespie T (2018).
[772] Citron DK and Wittes B (2017) 402-4.
[773] Rice WE (2021); Elkin-Koren N et al (2020).

effectiveness of content removal without adequate contextualization or allowing for counter-notices and rectification.[774] Yet the increasing reliance on automation may render the NTD mechanism more susceptible to errors and abuses that chill lawful online speech.[775] What is more, courts often endorse an active role for intermediaries since they are now more active in the dissemination of content throughout their services.[776] Governments, rightsholders, and users around the world are pressing intermediaries to hone their gatekeeping functions and censor controversial content.[777] Critics even call to repel the existing safe harbors as the they provide excessive protection to favor intermediaries unfairly, reducing their incentives to address online piracy.[778] Given the advancement in technology and the rapid economic growth of intermediaries in recent years, courts no longer find the reasons for a lack of technical capacity and the desire to avoid deterring a developing industry to be valid.[779] As a result, the public scrutiny has led to the need to reassess the adequacy and efficiency of the extant legal framework, in particular with respect to the liability exceptions.

Gradually, the safe harbor rules have become central to the debate over their suitability for regulating the increasingly complex phenomenon of illegal content online, particularly in light of the evolving nature of intermediaries and the multiplicity of services and functions they provide.[780] On the one hand, by excluding proactive general monitoring obligations, it has failed to effectively curb staggeringly large-scale infringements.[781] On the other hand, the burden of the NTD procedure has introduced significant uncertainties into the evolution of business models within the internet industry.[782] Ultimately, dissatisfaction from both rightsholders and intermediaries caused copyright industry groups to urge legislators to stiffen the existing rules and propose new legislation to put more responsibility on intermediaries to thwart infringements.[783]

2.2 Market Perspective: Emerging User-creators and the Value Gap

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[774] Scientific Foresight Unit (STOA) (2021).
[775] Blythe SM (2019) 70; Kuczerawy A (2020).
[776] UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1020 (9th Cir. 2013); *Ziggo*; *GS Media*; [2014]GMZZ No.2045 (2014)高民终字第 2045 号民事判决书.
[777] NetzDG [The Network Enforcement Act]; Doyle B (2022); Elkin-Koren N and Perel M (2020) 669-678.
[778] Omer C (2014) 294; Helman L & Parchomovsky G (2011) 1200.
[779] See Chapter IV.
[780] Elkin-Koren N (2014) 29; Sag M (2017).
[781] Frosio G (2017b).
[782] Marsoof A (2015).
[783] Montagnani ML & Trapova AY (2018).

Copyright law has continuously evolved in response to emerging technologies, addressing the challenges and opportunities they present not only for creators but also for intermediaries and consumers.[784] Since the beginning of the 21st century, streaming media has become the primary driver of growth in the digital industry, with content consumption gradually shifting from an ownership model to an access-based model.[785] The development of digital technologies has transformed the internet into the main market for acquiring and distributing copyrighted content, with a significant portion of this distribution occurring through OCSSPs.[786] Users, intermediaries, and copyright owners, representing divergent interests, are the central stakeholders in this area, each advocating for policies and regulations that best serve their needs.

2.2.1 User as Creators

Users are now active participants in content creation and dissemination, and their involvement has intensified concerns about online piracy.[787] Particularly, the participative online business modes transformed formerly passive users into active contributors to an open, democratic exchange of views and ideas via online discussion and news fora, social media and content repositories.[788] Billions of internet users download, modify, mix, upload audio, video, and text content, and engage in collective creation on social networks.[789] As a result of these large-scale collective creation activities, UGC has become not only a mass cultural phenomenon, but also a key factor in the evolution of the modern, participative web.[790] Today, internet users post billions of authorized and unauthorized photos, videos, sound recordings, and other works on a daily basis.[791] In turn, intermediaries attract large numbers of users through content upload services and generate economic benefits by optimizing the presentation, organization, and promotion of copyrighted works or other content.[792]

These developments have done much to advance the goals of the copyright system: authors have new tools to produce original works and to reach wide audiences; creative industries have built a host of groundbreaking distribution and licensing models; and the public can access

[784] Bently L et al. (2010).
[785] Ginsburg JC (2003); Efroni Z (2011); Favale M (2012); Quintais JP (2017).
[786] Elkin-Koren N et al. (2020) 10.
[787] Arewa OB (2010); Kohl U (2012).
[788] Lee E (2008b) 1506-13; Füller J et al. (2014).
[789] Tan C (2018).
[790] Blank G and Reisdorf BC (2012).
[791] Ceci L, 'Hours of Video Uploaded to YouTube Every Minute as of February 2022' (STATISTA, 11 April 2024) <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/>
[792] Ye H et al. (2021).

more copyrighted content, through a greater number of lawful channels, than at any other time in history.[793] Traditional copyright law, crafted for professional creators and distributors, often requires prior consent for UGC. This has placed many acts of dissemination in a legal gray area, leading to frequent and widespread infringements.[794] Many scholars have noted that the shift from professional to end-user infringement has made copyright enforcement in the digital environment an 'enforcement failure,'[795] as the substantial costs of identifying, gathering evidence, and initiating legal proceedings against myriad individual infringers, each engaging in small-scale copying but collectively inflicting significant financial loss, have rendered such legal actions economically inefficient.[796] Earlier, 'commercial users' are often tolerated by rightsholders, but with the condition that if ContentID identifies a significant identical or derivative use in an upload, the entire monetization of the concerned upload will be distributed through preset contractual arrangements.[797] The emergence of innovative business models backed by technological advancements has further diminished rightsholders' tolerance toward piracy.[798] Besides, copyright holders also sought alternative paths for copyright enforcement, such as targeting manufacturers of devices capable of circumventing the encryption of copyrighted materials,[799] as well as initiating strategic litigation against developers and distributors of devices that enable copying and distribution of infringing materials.[800] Nevertheless, neither of these approaches has proven sufficiently effective in combating the widespread prevalence of online copyright infringements.[801]

2.2.2 The 'Value Gap'

Meanwhile, copyright holders have been trying to draw intermediaries back into the legal scene, seeking to engage them in actively addressing online piracy.[802] The current digital landscape sees a significant number of users constantly uploading unauthorized copyrighted content, which severely undermines copyright holders' control over their works and their ability to

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[793] Section 512 Report, 9.
[794] Ashley DE (2009).
[795] Lemley MA & Reese RA (2003) 1373–9; Yu PK (2005); Depoorter B et al. (2010).
[796] Fagundes D (2012); Bridy A (2010b); Elkin-Koren N (2014); Rognstad OA & Poort J (2018) 150; Schroff S (2021) 1267.
[797] Solomon L (2015); García K (2020b); Quintais JP et al. (2023b).
[798] Boroughf B (2015).
[799] Lemley MA & Reese RA (2003).
[800] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.,180 F.3d 1072 (9th Cir. 1999); A&M Records v. Napster (2001); In re Aimster (2003).
[801] Giblin R (2011).
[802] Edwards L (2016); Bridy A (2010b); Gabison GA & Buiten MC (2019).

receive appropriate compensation.[803] Users frequently upload a vast amount of copyrighted material to online intermediaries without obtaining proper authorization from the rightsholders, allowing intermediaries to profit by providing storage and public access to these works, primarily generating revenue through advertising.[804]

Moreover, dominant intermediaries have amassed significant competitive advantages through first-mover benefits, lock-ins, and network effects, enabling them to amass monopolistic and oligopolistic economic power.[805] Wu succinctly asserts that 'the most visible manifestations of the consolidation trend sit right in front of our faces: the centralization of the once open and competitive tech industries into just a handful of giants.'[806] Thus, most copyright holders often encounter a 'take it or leave it' approach, forcing them to either accept the artificially low profits offered by the intermediaries or continue sending notices for each instance of end-user infringement.[807] Copyright holders argue that the safe harbor rules are often misused to protect intermediaries, allowing them to either effectively avoid regular licensing or dictate low royalties to copyright holders, making it difficult for copyright holders to receive fair compensation for the online use of their works.[808]

As a result, a 'value gap' emerges from the apparent disparity between the market value of creative content and the revenues returned to the content industry, which serves as the most significant obstacle to sustainable revenue growth for artists and record labels.[809] The content industry 'has deployed endlessly the rhetoric of the "digital threat" in order to demand harsher measures against digital piracy,'[810] and has called for legislative solutions to ensure that intermediaries, who allow public access to user-uploaded unauthorized content, are imposed more intermediary liability and required to obtain authorization from copyright holders.[811] Moreover, services providing access to large amounts of content would also have to prevent

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[803] 'EPP Alternative COMPROMISE AMENDMENTS on the Value Gap' (May 2017) <https://juliareda.eu/wp-content/uploads/2017/05/arimont-alternative-compromise-1.pdf.>

[804] Gabison GA & Buiten MC (2019); Shikhiashvili L (2019).

[805] Flew T (2021) 17; Gillespie T (2017).

[806] Wu T (2020) 21.

[807] IFPI Global Music Report 2016 <https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/Global-Music-Report-2016.pdf>, 5, 8, 22-24; Husovec M & Leenes R (2014) 15, 23; Mezei P & Harkai I (2022) .

[808] IFPI, IFPI Global Music Report 2017 (10 May 2017) <https://www.musikindustrie.de/fileadmin/bvmi/upload/06Publikationen/GMR/GMR2017press.pdf#page=2.49> 24; Shikhiashvili L (2019); Sag M (2017).

[809] Bridy A (2019); Lawrence DL (2019).

[810] Frosio G (2016).

[811] Shikhiashvili L (2019); LaFrance M (2019); Cui G (2017).

the upload of unauthorized content, thereby reinforcing the importance of fair licensing when a service seeks to offer access to music.[812] European institutions, after investigating the relevant market, have recognized the 'value gap' as a market distortion that needs to be addressed through copyright reform.[813]

2.3. Technological Perspective: Advancement of Filtering Technology

The relationship between law and technology is dialectic as the law not only responds to new technologies but also shapes and influences their design and architecture. In turn, emerging technologies are challenging the existing legal regime, creating a need for legal reform.[814] Recently, the proliferation of affordable computing and networking technologies has democratized communication and information dissemination, breaking the monopoly of a few commercial entities and fostering interactive communication at the individual level,[815] but also facilitating rampant online piracy by increasing the efficiency of unauthorized copying.[816] Meanwhile, several larger intermediaries that host UGC have voluntarily implemented advanced automated content filtering systems to help identify copyrighted material uploaded by users.

2.3.1 Calls for Filtering Obligations

In the early stages of the Internet, although restrictions on users' access to online content typically focused on filtering material deemed pornographic, constituting hate speech, promoting terrorism, or infringing copyright,[817] attempts to regulate online content access often faced significant pushback in liberal democratic societies with a strong civil society.[818] Moreover, during the legislative process of DMCA, regulators have argued that intermediaries are ill-suited to identify and remove allegedly infringing content due to their lack of sufficient information, privacy concerns, the danger of over-enforcement, and the technological

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[812] IFPI, 'IFPI Global Music Report 2017' (10 May 2017) 27 <https://www.musikindustrie.de/fileadmin/bvmi/upload/06Publikationen/GMR/GMR2017press.pdf#page=2.49>
[813] Gabison GA & Buiten MC (2019); Shikhiashvili L (2019).
[813] Quintais JP (2020).
[814] Litman J (1995); Goldstein P (2019).
[815] Wu Y & Zhu F (2022); Waldfogel J (2017)
[816] Atanasova I (2019); Choi DY & Perez A (2007).
[817] Zittrain J (2005).
[818] Australian Law Reform Commission, 'Classification: Content Regulation and Convergent Media: Final Report' (Feb. 2012) <https://www.alrc.gov.au/wp-content/uploads/2019/08/finalreport118forweb.pdf>

limitations.[819] Especially in the days when technology was still in its nascent stage, mandating an intermediary to monitor content for allegedly copyright-infringing material was neither technically and legally feasible, nor economically reasonable.[820]

Nonetheless, novel technologies, while transforming communication modalities, have also intensified inherent conflicts between the internet industry, acting as 'service providers,' and the copyright industry, serving as 'content providers.'[821] The Internet industry argues that the copyright system has undermined the benefits of online dissemination efficiency by requiring authorization from rights holders for numerous uses, resulting in transaction costs that offset or even exceed the savings from new technologies, leading them to seek the alternative solutions outside traditional copyright system. Conversely, on the one hand, the copyright industry not only asserts that new technologies have enhanced users' ability to distribute works independently, diminishing rights holders' revenue from the online market, and therefore demands an expansion of copyright protection.[822] On the other hand, they have accused intermediaries of deliberately avoiding or delaying the deployment of technologies to attract users by enabling copyright-infringing activities and have consequently campaigned for greater responsibility in combating infringements and for mandating the use of available technologies to identify and remove infringing content.[823]

2.3.2 The Advancement of Filtering Technology

Common filtering technologies primarily included metadata-based filtering, hash-based filtering, and fingerprinting. Metadata represent structured information about the associated media resource, summarizing basic information about the content, such as its title, data, file size, length, encoding rate.[824] Metadata-based filtering content can be both simple and efficient as accurate content descriptions enable easier searches for specific content on the internet without directly analyzing the content itself. Empowered by automated technology, metadata-based filtering is more efficient for quick search of vast files for specific metadata matching

[819] Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1145 Before the S. Comm. on the Judiciary, 105th Cong. 32 (1997) (statement of Roy Neel, Pres. and CEO of the U.S. Telephone Association).
[820] Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1145 Before the S. Comm. on the Judiciary, 105th Cong. 28 (1997) (statement of George Vradenburg, III).
[821] Sag M (2017).
[822] Dusollier S (2007) 1392-3; Efroni Z (2011).
[823] Mehra SK & Trimble M (2014) 693.
[824] Engstrom E and Feamster N (2017) 11.

the target copyrighted works and mark files accordingly for removal requests.[825] However, since different content can share the same metadata metadata-based filtering may often subject to false positives and false negatives. Additionally, converting a media file from one format to another can often alter or eradicate metadata, making metadata-based filtering inaccurate or otherwise impractical. [826]

Hash-based filtering is another approach to automated content identification, involving the input of a specific file into a hashing algorithm to generate a unique numerical representation that identifies the file. The cryptographic hashing function scrambles and mixes the original data, creating a short, random string of letters and numbers known as a hash value, which uniquely identifies the original content. Unlike metadata-based filtering technology, common hashing algorithms ensure that each hash value is unique, preventing 'hash collisions.' Even minor adjustments to the input data produce entirely different hash values, making hash-based authentication akin to a 'fingerprint' for the original content.[827] Hence, automated search and identification can be achieved by computing the hash value of a piece of content and comparing that hash value against a database of hash values corresponding to copyrighted content.[828] However, a simple hash-based comparison also has multiple drawbacks as altering the original file can change its hash value. Just as modifying a file's metadata compromises the accuracy of metadata-based filtering, any minor adjustments or modifications to content or sharing a different file with the same material render hash filtering technology ineffective in automatic detection.[829]

Digital fingerprinting technology examine the characteristics of the content itself for identification. The advantage of fingerprinting technology is that even if the original work is edited, covered, or converted into a different file format, as long as the digital characteristics remain unchanged, the mature algorithm can still match the target work to the original.[830] For example, using Automatic Content Recognition, Audible Magic matches audio and video files uploaded to the intermediary against files registered in its database. If a match is found, the database provides the intermediary with ownership information and the owner's usage

[825] Ibid.
[826] Ibid, 12.
[827] Ibid.
[828] Ibid.
[829] Ibid, 13.
[830] Ibid, 14.

specifications for the file.[831] This service, utilized by intermediaries such as SoundCloud, Facebook, Vimeo, Twitch, and Dailymotion, can facilitate direct licensing agreements between copyright owners and intermediaries. Since fingerprinting technology relies on algorithms that identify the content characteristics of specific files, its application is naturally limited to certain types of copyrighted content. For instance, while audio fingerprinting algorithms can recognize audio frequency values in song files, they cannot identify pictures or software programs that do not contain audio frequency values.[832] As a result, intermediaries increasingly rely on a combination of different digital filtering technologies, machine learning, and human decision-making to moderate various types of content.[833]

2.3.3 Private Ordering Regime Backed by Filtering Technology

In practice, while intermediaries were not required to develop or deploy proactive monitoring or filtering techniques, they soon adopted some 'DMCA-Plus' measures anyway as a strategy for defusing public controversy and forestalling direct regulation.[834] In addition, the need to maintain good relations with content providers has driven intermediaries to voluntarily cooperate with copyright owners, prompting continuous innovation in automated content identification and proactive measures to combat copyright infringement that exceed the black letters of the safe harbor rules.[835] Other motivations for developing content identification technologies, along with copyright owners' lawsuits and investments in intermediaries, also drive their widespread adoption. [836]

Some larger intermediaries have adopted voluntary filtering systems to detect potentially infringing material uploaded to their services, with YouTube's Content ID being one of the most sophisticated.[837] This system scans uploaded videos against a database of files provided by participating content owners. Upon identifying a match, the content owner is notified and can choose to block the video, monetize it through advertisements, or track its viewership statistics.[838] Users who believe a claim against an uploaded file is invalid or that their video

[831] Audible Magic, 'Automatic Content Recognition (ACR) & Rights Management Solutions' < https://www.audiblemagic.com/?page_id=369>
[832] Engstrom E and Feamster N (2017) 14.
[833] Bloch-Wehba H (2020) 66; Engstrom E & Feamster N (2017) 11-12.
[834] Harris DP (2015); Bridy A (2016); Urban JM et al. (2017) 55.
[835] Bridy A (2016); Bridy A (2015); Bridy A (2010c).
[836] Mehra SK and Trimble M (2014) 691.
[837] Urban JM et al. (2017) 57-8.
[838] YouTube, 'How Content ID Works' <https://support.google.com/youtube/answer/2797370>

was misidentified can dispute the claim, making the video temporarily available on YouTube until the content owner responds. If the owner upholds the claim, the user can appeal again. At any stage, the owner can bypass this process by issuing a Section 512 takedown notice.[839] In addition to using automated content identification technology, YouTube has entered into DMCA-Plus agreements that grant contractual takedown rights, allowing contract parties to remove content directly on copyright or non-copyright grounds, regardless of whether the uploaded content matches the Content ID copyright reference database.[840] Notably, in 2017, 98 percent of claims were triggered by Content ID automatically detecting infringing content and enforcing the copyright owner's chosen action, with fewer than one percent of these claims being disputed.[841] Even though some stakeholders complain that this policy unfairly excludes smaller copyright owners and prone to false positives and cannot properly take fair use considerations into account,[842] others praise Content ID for automating rights management and creating an entirely new revenue stream.[843]

In China, various content recognition and filtering technology have been widely adopted by intermediaries. Sohu's 'Video Gene Comparison Technology' is designed to work across various intermediaries, making it a versatile tool for protecting content across multiple channels. It generates a unique fingerprint or 'gene' for each piece of copyrighted video by extracting its key frames and MD5 values. This technology continuously scans the internet, comparing video content against its database to identify and flag unauthorized copies. It supports real-time monitoring of live streams and video uploads, enabling immediate action against unauthorized content distribution. Once detected, the system can automate the process of issuing takedown notices to intermediaries hosting the infringing material, thus minimizing the time the content remains available.[844] ByteDance has independently developed the 'Lingshi System' for video copyright protection, using innovative fingerprinting technology to automatically identify infringements. When video content is uploaded to the service, it receives a unique 'content fingerprint' file, which the system then compares with other uploaded videos; if an infringement is detected, the copyright holder can immediately take down the infringing

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[839] Dispute a Content ID Claim, YOUTUBE HELP <https://support.google.com/youtube/answer/2797454>
[840] Urban JM et al. (2017) 29.
[841] Google, 'How Google Fights Piracy' (Nov. 2018) 24-25, 28 <www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf>
[842] Section 512 Report, 43-4.
[843] Ibid, 43.
[844] NCAC, 'Video gene comparison technology leaves no place for piracy to hide' (12 Oct. 2015) <https://www.ncac.gov.cn/chinacopyright/contents/12222/341128.shtml>

video.[845] Digital fingerprinting, which has gradually evolved based on AI technology, can efficiently identify various features of texts, images, audio, and video works through deep learning.[846] Furthermore, the National Copyright Administration of China (NCAC) actively engages in the construction of innovative infrastructure for IPRs to further enhance IP public services. The integration of big data and blockchain technology enhances copyright administrations' capability in both law enforcement and public services, exemplified by the China Copyright Chain launched by the NCAC.[847] Such blockchain-based intermediary aims to document proof of digital assets, monitor copyright infringement activities, collect evidence online, issue notices to remove piracy products and help courts and copyright administrations settle copyright-related disputes.[848]

[845] 'Zhang Fuping, Editor-in-Chief of ByteDance: Protecting Short Video Copyrights Requires Ideological Progress, Technological Innovation, and Industry-Wide Self-Regulation' (China Daily, 28 Apr. 2019) <https://ex.chinadaily.com.cn/exchange/partners/82/rss/channel/cn/columns/sz8srm/stories/WS5cc53980a310e7f8b1579aa1.html>
[846] Aberna P & Agilandeeswari L (2024).
[847] China Copyright Blockchain <https://www.zbl.org.cn/officialHome>
[848] Pan D 'China Launches Copyright Protection Blockchain' (CoinDesk, 4 Jun. 2021) <https://www.coindesk.com/policy/2021/06/04/china-launches-copyright-protection-blockchain/>

IV. From Reactive to Proactive Intermediary Liability

As of late, online tech powerhouses often find themselves in the eye of the storm due to their unprecedented power to proactively control the flow of information within society.[849] The radical paradigm shift in the digital services landscape has fundamentally altered the supply chain ecosystem and facilitated the unprecedented massive spread of illegal and harmful content, posing potential risks to market growth and industry sustainability.[850] Establishing an effective and prompt regulatory framework to combat the dissemination of illegal and harmful online content, while safeguarding fundamental rights and fostering innovation, is an inevitable but challenging task for regulators worldwide.[851]

Against this backdrop, one compelling proposal is to redefine the intermediary liability framework by lifting the ban on monitoring obligations, thereby requiring intermediaries to act as gatekeepers who proactively monitor and control the dissemination of illegal content on the Internet.[852] Policymakers have engaged in debates over whether intermediaries should be excluded from first-generation safe harbors and be subjected to enhanced liability.[853] This push has been justified by a somewhat blurry concept of the legal, societal, political, and even moral 'responsibility' of intermediaries, reflecting a shift from intermediary liability to intermediary responsibility.[854] At a global level, regulators are imposing obligations on intermediaries to act responsibly by addressing specific problems or promoting voluntary measures by intermediaries to curb undesirable conduct and speech online, thereby expanding intermediary liability and narrowing intermediary immunity.[855] The potential result, could 'represent a substantial shift in intermediary liability theory,' signaling a 'move away from a well-established utilitarian approach toward a moral approach by rejecting negligence based intermediary liability arrangements,' practically leading to a 'broader move towards private enforcement online.'[856]

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[849] Amy K (2020).
[850] Frosio G (2017c); Bridy A & Keller D (2016); Keller D (2021).
[851] Supra note 535; DSA Inception Impact Assessment 2020 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-internal-market-and-clarifying-responsibilities-for-digital-servicesen>
[852] NetzDG; Griffin R (2022).
[853] Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA, H.R. 1865) <https://www.congress.gov/bill/115th-congress/house-bill/1865>; 'Online Platforms and the Digital Single Markets' (Communication) COM (2016) 288 final, 9; Xiong Q (2022).
[854] Helberger N et al. (2017).
[855] Frosio G (2017c) 574; Gorwa R (2024) 147-8.
[856] Frosio G & Husovec M (2020).

The latest endeavor, encapsulated in Art.17 DSMD, imposes a proactive obligation upon OCSSPs to identify and block access to content that is identical to works claimed by copyright holders.[857] Moreover, the DSA, to a certain extent aimed at complementing the ECD, sets clear responsibilities for online intermediaries, encouraging content moderation and due diligence obligations to protect users' rights while preserving the key pillars of the ECD.[858] Additionally, Chinese courts have increased the burden on intermediaries by adopting broader interpretations of the all-inclusive duty of care and undefined necessary measures in judicial practices. Simultaneously, Chinese regulators have initiated an ambitious 'gatekeeper' legislative project aimed at imposing comprehensive and tightened 'primary responsibility' on major intermediaries.

1. US: Fine-tuning Knowledge-based Liability Regime

In the U.S., intermediaries and copyright interests have clashed repeatedly both in the courts and in Congress, and intermediaries' interests often have gotten the upper hand. From the beginning, new intermediary-based technologies for storing, finding, and sharing information seemed to frustrate efforts to block unauthorized flows of infringing content. The push for new mandates reached its peak in 2011, when proposed legislation aimed at establishing new procedures for blocking access to domains hosting infringing content and cutting them off from their payment providers began to move swiftly through Congress and was widely expected to pass. On one hand, in 2011, U.S. Representative Lamar Smith introduced SOPA, which, among other provisions, sought to provide additional tools for copyright holders to combat piracy.[859] The SOPA allows copyright holders to seek an injunction requiring intermediaries such as online service providers, internet search engines, payment network providers, and internet advertising services to block access to piracy websites and cut off their sources of financing.[860] In the same year, U.S. Senator Patrick Leahy introduced a similar Act, the PIPA, which would enable rights holders to obtain an injunction against a non-domestic domain name registrant, owner, or operator, requiring them to cease and desist the operation of an internet site dedicated to infringing activities.[861]

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[857] Rojszczak M (2022) 10; Ginsburg JC (2020).
[858] Quintais JP & Schwemer SF (2022).
[859] Stop Online Piracy Act (SOPA), H.R.3261, 112th Cong. (2011).
[860] Ibid.
[861] Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA), S.968, 112th Cong. (as amended, 26 May 2011).

On the other hand, intermediaries flexed their newfound political muscle in a novel way, repurposing their access protocols to coordinate a massive mobilization of the online community that effectively shut down many of the Internet's most popular sites.[862] In fact, these two proposed Acts would have allowed copyright owners to obtain injunctions requiring U.S.-based intermediaries and payment processors to block offshore 'rogue' websites, thereby indirectly curbing rampant piracy activities both domestically and abroad.[863] However, the two Acts divided opinions, receiving criticism from intermediaries and welcome from copyright holder groups, but neither gathered sufficient support to get passed.[864] Still, the copyright industry remains in a desperate search for effective solutions block unauthorized flows of copyright infringing content. In litigation, the copyright industries argued that the intermediaries' business model fell outside the scope of the statutory safe harbors that comply with the NTD process. In Congress, they advocated for the imposition of affirmative filtering obligations and other new mandates.[865]

For the moment, efforts to implement a solution similar to Art.17 DSMD have largely failed,[866] in part due to skepticism surrounding its adoption and its roll out in Europe, which has already included a challenge on its validity on fundamental rights grounds.[867] Section 230 CDA, on the other hand, has faced much more persistent frontal attacks, including in ongoing U.S. Supreme Court litigation and calls for reform with bipartisan support, even if on different grounds.

1.1 Reform on Section 512 DMCA

Section 512 is not a model legislation for clarity as the scope and application of the safe harbor have long been considered controversial.[868] Lemley argues that the existing safe harbors form a confusing and illogical patchwork: for some claims, the safe harbors are absolute; for others, they preclude damages liability but not injunctive relief; and for still others, they depend on the implementation of an NTD system along with various other technical measures.[869] Moreover,

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[862] EFF, 'SOPA/PIPA: Internet Blacklist Legislation' <https://www.eff.org/issues/coicainternet-censorship-and-copyright-bill.>
[863] Lev-Aretz Y (2013) 220–26.
[864] Ibid. Reid A (2019).
[865] Cohen JE (2017) 172.
[866] Samuelson P (2020) 299.
[867] Bridy A (2019).
[868] Medenica O & Wahab K (2007) 252-5.
[869] Lemley MA (2007).

given the technological and business model changes that have occurred over the years, Section 512 both provided critical guideposts for the expansion of the internet and produced widespread disagreement over its operation.[870] Criticisms from the copyright industry regarding the DMCA safe harbors also influenced the USCO's decision to initiate a policy study of these rules in late 2015.[871]

1.1.1 Balancing the Unbalanced NTD Mechanism

In response to the call for a comprehensive reassessment of the effectiveness of Section 512, the USCO initiated a public formal study of Section 512 to 'evaluate the impact and effectiveness of the DMCA safe harbor provisions, along with potential improvements.'[872] Within this study, the USCO sought to consider the 'practical costs and burdens of the NTD process on large- and small-scale copyright owners, online service providers, and the general public,' as well as 'how successfully Section 512 addresses online infringement and protects against improper takedown notices.'[873]

The Section 512 Study began with a notice of inquiry published in the Federal Register in December 2015. In this notice, the USCO requested written comments on thirty questions across eight categories, receiving over 92,000 responses from various stakeholders.[874] In May 2016, the USCO held two public roundtables to provide stakeholders with more opportunities to share their views. Afterwards in November 2016, the USCO published a second notice, seeking further public input and empirical research on the operation of the safe harbor provisions.[875] Through these efforts, the USCO found differing views on whether Section 512 has achieved its intended balance. Intermediaries see it as a success, allowing growth and public service without excessive lawsuits,[876] while rightsholders are concerned about creators' ability to address copyright infringement effectively and the 'whack-a-mole' problem of infringing content reappearing after removal.[877] Finally, the USCO held its final roundtable meeting for the Section 512 Study in April 2019, with over fifty representatives from various

[870] Elkin-Koren N et al. (2020) 10.
[871] Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862 (Dec. 31, 2015).
[872] Ibid.
[873] Section 512 Study: Request for Additional Comments, 81 Fed. Reg. 78636 (8 Nov. 2016).
[874] U.S Copyright Office, 'Section 512 Study' <https://www.copyright.gov/policy/section512/>
[875] Section 512 Study: Announcement of Public Roundtables, 81 Fed. Reg. 14896 (18 Mar. 2016).
[876] Section 512 Report, 73-76.
[877] Ibid, 77-82.

companies and organizations participating in discussions on domestic case law and international legal and policy developments since 2017.[878]

On February 11, 2020, the U.S. Senate Committee on Intellectual Property held a hearing on modernizing the DMCA, discussing its legislative intent, operational challenges, and possible reforms to the safe harbor provisions.[879] Subsequently, on 21 May 2020, the USCO issued its long-awaited study report on Section 512, which recommended several significant changes to existing safe harbor rules.[880] In it, the USCO is not recommending wholesale changes to Section 512 but suggests that Congress may want to fine-tune its current operation to better balance the rights and responsibilities of intermediaries and rightsholders.[881] Rather, the USCO reiterated that legislative decisions are in the hands of Congress and it makes no recommendations with respect to such legislative questions about possible future balancing approaches.

The hearing and report suggest that U.S. legislative and enforcement bodies believe the courts have taken a lenient approach to interpreting the safe harbor provisions, expanding liability exemptions for intermediaries beyond the original legislative intent.[882] The Senate Committee on Intellectual Property hearing emphasized that intermediaries lack incentives to prevent online copyright infringement due to economic reasons and liability concerns, making them unwilling to proactively address violations. The hearing noted that the 'red flag' test is ineffective, and the NTD rule has resulted in repeated infringements, creating a 'whack-a-mole' issue.[883]

Furthermore, the USCO concludes that the balance Congress intended with Section 512 safe harbor system has become skewed.[884] However, it provides recommendations on how intermediaries should qualify for the four safe harbors, how the various knowledge requirements function in practice, and how the NTD system operates.[885] Additionally, the

[878] Section 512 Study: Announcement of Public Roundtable, 84 Fed. Reg. 1233 (1 Feb. 2019).
[879] U.S. Senate Committee on the Judiciary, 'The Digital Millennium Copyright Act at 22: What is it, why was it enacted, and where are we now' (11 Feb. 2020) <https://www.judiciary.senate.gov/committee-activity/hearings/the-digital-millennium-copyright-act-at-22-what-is-it-why-it-was-enacted-and-where-are-we-now>
[880] Section 512 Report.
[881] Ibid.
[882] Ibid.
[883] Ibid, 197.
[884] Ibid.
[885] Ibid.

USCO identifies several non-statutory opportunities to enhance the efficacy of the Section 512 system, recommending increased stakeholder and government focus on education, voluntary cooperation, and the implementation of standard technical measures.[886]

This Report criticized courts for having granted intermediaries too much leeway in formulating and enforcing repeat infringer policies.[887] Therefore, the Study suggested that larger intermediaries hosting user-uploaded audiovisual works, particularly those with a history of hosting infringing content, 'may need to implement costly filtering technologies,' while smaller services 'might only need to assign content review to an existing employee.'[888] In addition, although Section 512(m) states that intermediaries are not obligated to monitor their sites for infringing materials, the Study concluded that intermediaries should nonetheless monitor their sites and have a duty to investigate further if their staff encounters potentially infringing content.[889] Failure to do so could justify a finding of willful blindness to infringement.[890]

Unfortunately, the Study itself is imbalanced, relying on an oversimplified duality between intermediaries and copyright industries.[891] While intermediaries may think Section 512 works reasonably well, but the copyright industries disagree. The near-unanimous dissatisfaction of one of the two main groups meant to benefit from the law suggests that some of its goals are not being met.[892] However, despite the copyright law's intent to promote public interests, little attention has been given to the majority of users and creators of UGC.[893] Moreover, the proposed changes would, in many respects, lead to a radical alteration of the DMCA safe harbors, potentially making the situation worse for most intermediaries than even Art.17 DSMD.[894] Even though the Section 512 Study suggested that smaller entities might face lesser burdens when monitoring user-uploaded content, the greater obligations proposed would apply to all intermediaries,[895] whereas Art.17 DSMD applies only to a specific subcategory of host intermediaries.

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[886] Ibid.
[887] Ibid. 95.
[888] Ibid. 123-24.
[889] Ibid.
[890] Ibid. 126-127.
[891] Samuelson P (2020) 330.
[892] Ibid. 83.
[893] Samuelson P (2020) 337.
[894] Ibid. 333.
[895] Section 512 Report, 123-4.

1.1.2 Cautious in Adopting Copyright Filtering Obligations

The imposition of 'filtering obligations' on intermediaries has been a highly debated topic among U.S. academics. Various scholars propose different methods to increase intermediaries' responsibility for copyright infringements, particularly by imposing mandatory filtering obligations. Harris suggests a duty-based regime requiring intermediaries to take reasonable efforts to prevent infringements, including the use of filtering technology for monitoring their sites.[896] Helman and Parchomovsky advocate for a monitoring duty on intermediaries, mandating the use of the 'best technology available' to detect and filter infringing materials.[897] Another proposal involves an opt-in regime managed by the USCO, which would provide a filtering and monitoring system to compare user content against a copyright database.[898]

However, the USCO recommended several significant changes to these rules, but it did not endorse an Art.17-like notice-and-stay down regime, as some copyright industry representatives had urged.[899] Under a notice-and-stay down framework, a takedown notice from a rightsholder generally triggers a duty for the intermediary to proactively identify and remove all instances of the infringing content and prevent future uploads. Intermediaries have depended on technology, such as various filtering systems, in order to meet the obligations under this duty.[900] Copyright experts expressed their criticism against 'stay down' obligations and explained why Art.17 DSMD should not serve as a model for any Congressional reconsideration of the DMCA safe harbors.[901]

Rightsholders' main argument for adopting a stay down requirement is that it is essential to address the 'whack-a-mole' problem: the reappearance of content on an online service that has already been the subject of a takedown notice. This issue arises when the same content is repeatedly uploaded by multiple users to a single website, both before and after a takedown notice has been issued. Such activity is, to some extent, an inevitable consequence of millions of users uploading hours of content daily without some form of filtering technology or active

[896] Harris DP (2015).
[897] Helman L & Parchomovsky G (2011) 1207.
[898] Arsham BE (2013) 792.
[899] Section 512 Report, 186–93.
[900] Ibid. 54.
[901] Statements of Professor Daphne Keller, Professor Pamela Samuelson, and Professor Justin Hughes for Subcommittee on Intellectual Property, 'Time Change: Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy? (10 Mar. 2020) <https://www.judiciary.senate.gov/committee-activity/hearings/copyright-law-in-foreign-jurisdictions-how-are-other-countries-handling-digital-piracy>

monitoring by the intermediary.[902] Most commentators during the Study assumed that intermediaries could address the 'whack-a-mole' issue and comply with a 'stay down' requirement through technological means, either by developing a proprietary content filtering system, like YouTube's ContentID, or by using off-the-shelf filtering technologies, such as those offered by Audible Magic. Since many infringement problems are technology-driven, technology-based solutions are widely regarded as the most effective approach.[903]

Opponents of a 'stay down' system, including intermediaries and user advocacy groups, raise several concerns, chief among them being the potential impact of such filtering technologies on freedom of expression and fair competition. Technology cannot determine whether the use of rightsholders' material in uploaded content is authorized by a license or constitutes fair use. In contrast to the EU 'gatekeeper' regulation, opponents argue that even if such technological capabilities were developed, a stay down requirement would effectively turn intermediaries into 'gatekeepers' of online speech.[904] Indeed, intermediaries had already become gatekeepers due to systems like Section 512 and DMCA-plus technologies like ContentID, which they argue often sweep up content that makes fair use of third-party materials along with infringing content. Critics believe these systems should be scaled back, even from current standards.[905] Moreover, another frequently expressed concern is that mandating filtering technology could create an anti-competitive barrier to entry, effectively entrenching the market dominance of existing intermediaries that have already invested significant time and money in developing proprietary filtering technologies like ContentID. The likelihood of filters becoming an anti-competitive barrier to entry depends, in part, on the market availability of third-party filtering technologies offered at a reasonable price and on non-discriminatory terms.[906] Some small U.S.-based intermediaries expressed their concerns in a letter to members of the EU Parliament regarding the DSMD's proposals, stating, '[a]ny reform of copyright laws must consider the impact it will have on small [intermediaries] like ours and the creators that depend on us.'[907]

After considering arguments from both sides, the USCO advises caution in adopting a general stay-down requirement for intermediaries, as implementing such a measure, whether it includes

[902] Section 512 Report, 187.
[903] Ibid. 187-8.
[904] Ibid. 188.
[905] Ibid. 189.
[906] Ibid. 190.
[907] 'Letter from Online Creator Platforms on Art.13' (Engine, 10 Sept. 2018) <https://www.engine.is/news/category/creatorplatformsarticle13>

mandatory filtering or not, would represent a significant shift in U.S. intermediary liability policy.[908] Unlike the EU regulators' confidence in embracing the 'value gap' narrative, the USCO particularly notes that there is currently no empirical evidence from countries that have adopted a broadly applicable stay down requirement similar to what many rightsholders advocate. This lack of data makes it challenging to assess the effectiveness of such a system or to evaluate the potential speech and competition externalities that could arise from a widespread filtering requirement.[909] Meanwhile, the USCO also observed that while several decisions by the CJEU have supported some form of a stay down requirement when it meets the proportionality test, the CJEU has explicitly rejected a broadly applicable filtering requirement for intermediaries.[910]

For these reasons, the USCO believes that a general stay down requirement and/or mandatory intermediary filtering should only be adopted, if at all, after extensive additional study, including an examination of non-copyright implications, and particularly advises waiting until the DSMD has been implemented in many EU member states to assess the real-world impacts.[911] Overall, the USCO expressed significant caution in assessing the Art.17-like stay down obligations. This cautious approach aligns with Easterbrook's suggestion that regulatory errors pose a substantial risk in addressing rapidly evolving technology, urging policymakers to avoid the 'struggle to match an imperfect legal system to an evolving world that we understand poorly.'[912]

1.2 Reform on Section 230 CDA

Often referred to as 'the twenty-six words that created the Internet,'[913] Section 230 CDA reflects the history of balancing competing interests while fostering the growth of the then-nascent Internet.[914] Despite its straightforward language, Section 230 is a profoundly ambiguous statute, with this ambiguity arising from a series of recurring errors made by Congress, lower courts, and the Supreme Court during its drafting, enactment, and early judicial interpretation.[915] It is striking that nearly 30 years after the enactment of Section 230

[908] Section 512 Report, 191.
[909] Ibid, 191.
[910] Ibid, 191-2.
[911] Ibid, 193.
[912] Easterbrook FH (1996) 215.
[913] Kosseff J (2019).
[914] van Hoboken J & Keller D (2020); Kosseff J (2010) 144–5; Bloch-Wehba H (2020) 49.
[915] Candeub A & Volokh E (2021).

CDA, fundamental questions about its meaning and scope remain unresolved. This issue holds significant practical importance for intermediaries and is far from a minor aspect of intermediary liability, yet several justices have expressed uncertainty and confusion in applying Section 230 to this key issue.[916] Particularly, many critics have argued that courts' overly broad interpretation of Section 230 has provided excessively strong incentives for allowing or even encouraging online content to go unmoderated, thereby creating a lawless environment for chaos and harmful speech.[917] By putting the intermediary to the choice between voluntary moderation and immunity, the regulator runs the risk that the intermediary will choose to give up its voluntary moderation efforts.[918] Thus, broad immunity fails to protect the victims of online abuse with no recourse against the intermediaries, whose profit maximizing business models facilitate the harmful activities.[919] In response to ongoing criticism of Section 230, recent court opinions indicate a clear trend toward a narrower interpretation of the statute,[920] although Section 230 still provides immunity to intermediaries in a wide range of cases.[921] Meanwhile, scholars and politicians across the political spectrum are proposing to further limit Section 230's immunity and mandate them to take certain actions with various legislative initiatives.[922]

Nowadays, Section 230 is the biggest target of regulatory reform regarding intermediary liability.[923] Senators on both sides have proposed to repeal or revise Section 230 to remove or condition the immunity of intermediaries from liability and to change how intermediaries moderate content.[924] Eliminating Section 230 appears to be the rare issue that unites people across the political spectrum: Democrats aim to reform Section 230 to encourage intermediaries to more rigorously police their content by removing false information and hate speech,[925] while Republicans seek to reform it by conditioning immunity from liability on

[916] Rozenshtein AZ (2023) 61 (Citing Transcript of Oral Argument at 72, 64, 34, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No. 21-1333)).
[917] Citron DK (2014) 61; Citron DK & Wittes B (2017) 403; Kosseff J (2019); Grimmelmann J & Zhang P (2023) 1043.
[918] Grimmelmann J & Zhang P (2023) 1043.
[919] Citron DK and Wittes B (2018).
[920] Gonzalez v. Google LLC, 598 U.S. 617 (2023); Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).
[921] Kosseff J (2016) 39.
[922] Lemley MA (2021); Dimitroff K (2021) 158.
[923] Smith J (2023); Yoo CS & Keung T (2022).
[924] EARN IT Act of 2020, S.3398, 116th Congress; PACT Act of 2020, S.4066, 116th Congress; Dimitroff K (2021); Dickenson GM (2021).
[925] Citron DK & Wittes B (2017) 418–23.

intermediaries acting as common carriers who do not block any third-party content.[926] Nevertheless, all of them have come together to criticize Section 230's protection of 'bad Samaritans.'

1.2.1 Proposals for Section 230 Reform

In discussions of potential Section 230 reform, some scholars advocate for the imposition of strict liability,[927] enterprise liability,[928] even product liability[929] and criminal liability,[930] for 'bad' intermediaries that have been facilitating and profiting from certain kinds of illegal activities. Particularly, these reform proposals focus on an intermediary's intentionality but seek to exclude from immunity not only those intermediaries that intentionally facilitate unlawful conduct but also those that intentionally form cooperative, and often profitable, relationships with third-party wrongdoers.[931] These approaches broaden potential liability beyond the most egregious abuses while still limiting the moderation burden on entities by permitting liability only when an entity has a heightened mental state of intentionality, either regarding the wrongful conduct itself or the cooperative relationship that led to it.[932] Given the complexity of this task, many reform proposals have focused on narrow carve-outs that address Section 230's treatment of specific categories of particularly problematic claims.[933] For example, a Department of Justice review of Section 230 recommended adding a general 'Bad Samaritan' carve-out to the statute.[934] Some proposals are more radical, seeking to repeal Section 230 wholesale and replace it with nothing.[935] Yet such calls for statutory reform of Section 230 to require an intermediary to take steps to address 'unlawful uses of its services' seem to be overly optimistic about the ability of intermediaries to make efficient and correct legal judgments about each of the thousands (if not millions) of complaints they receive.[936] Establishing a carve-out from Section 230 immunity for intentional wrongdoing would still fail

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[926] Kelly M, 'Internet Giants Must Stay Unbiased to Keep Their Biggest Legal Shield, Senator Proposes' (The Verge, 19 Jun. 2019) <https://www.theverge.com/2019/6/19/18684219/josh-hawley-section-230-facebook-youtube-twitter-content-moderation>; Ending Support for Internet Censorship Act, S. 1914, 116th Congress (2019).
[927] MacCarthy M (2010) 1043.
[928] McPeak A (2021); Sylvain O (2018) 276–7.
[929] Kim NS (2008) 117.
[930] Radbod ST (2010).
[931] McPeak A (2021).
[932] Dickinson GM (2021b) 383.
[933] Allow States and Victims to Fight Online Sex Trafficking Act, H.R. 1865, 115th Cong. (2018).
[934] U.S. Department of Justice, 'Section 230: Nurturing Innovation or Fostering Unaccountability?' (2020) 14–15 <https://www.justice.gov/file/1286331/download>
[935] Abandoning Online Censorship Act, H.R. 8896, 116th Cong. (2020) (authored by Representative Louie Gohmert (R-TX)); A Bill to Repeal Section 230 of the Communications Act of 1934, S. 5020, 116th Cong. (2020).
[936] Citron DK & Wittes B (2017) 419.

to address the special treatment of online entities facing claims based on strict liability, as it is difficult for a single rule to cover the full range of legal standards across all areas of law.[937] Ideally, if an intermediary could distinguish between harmless and harmful content without incurring costs, strict liability would be efficient, as it would allow the intermediary to separate and remove only the harmful content. However, due to imperfect information, intermediaries cannot consistently identify which content is harmless and generates net positive externalities and which is harmful and generates net negative externalities. As a result, under strict liability, intermediaries tend to over-moderate, removing more harmless content than is optimal from society's perspective.[938] In other words, the combination of positive externalities and imperfect information compels intermediaries subject to strict liability to engage in collateral censorship, by removing more content than an omniscient regulator would consider necessary.[939]

Even for those who think Section 230 should be changed, however, there is little agreement on particular legislative or regulatory changes. Proposals are driven by concerns that Section 230 provides excessive protection to intermediaries, but they vary in the types of misconduct they address and the enforcement mechanisms they propose. One collection of proposals seeks to limit Section 230's scope by removing its liability bar in some contexts, through different manners. Lichtman and Posner suggest a conditional immunity rule in which intermediaries would be held liable for infringing content only if they fail to implement reasonable measures to prevent or deter infringement.[940] In a similar way, Citron and Wittes proposed to restrict the scope of Section 230 by imposing a reasonableness requirement that would require intermediaries to 'made reasonable efforts to address online abuse' to qualify for immunity and that lawmakers should clearly define the obligations associated with this duty of care.[941] With modest adjustments to Section 230, whether through judicial interpretation or legislation, a robust online culture of free speech can be maintained while ensuring that intermediaries intentionally designed to host or deliberately hosting illegal content are not shielded from liability.[942] Correspondingly, a common suggestion is to align it with Section 512(c) DMCA by adopting knowledge-based liability as the basic principle.[943] That means, intermediaries that continue to provide access to unlawful content or facilitate unlawful behavior despite having

[937] Dickinson GM (2021b) 386.
[938] Grimmelmann J & Zhang P (2023) 1039-41.
[939] Wu F (2013).
[940] Lichtman D & Posner EA (2006) 251–54.
[941] Citron DK & Wittes B (2017) 419; Citron DK & Wittes B (2018) 455–6; Citron DK (2023).
[942] Citron DK & Wittes B (2017); Citron DK (2023).
[943] Balkin JM (2018).

actual knowledge of it would be deprived of Section 230 immunity.[944] Likewise, Won also argues that the Reasonableness Standard Amendment, that imposes a duty of care requirement on intermediaries before they can enjoy Section 230's immunity, provides a promising roadmap to a workable solution that recalibrates both the needs of intermediaries and the safety of their users.[945] While Dickinson proposes refining online immunity by limiting it to claims that would impose a content-moderation burden on internet defendants,[946] allowing plaintiffs to seek relief for claims that could be addressed through alternatives like redesigning an app or website.[947] Another collection of proposals aims to combat the online dissemination of specific harmful and offensive material, such as political misinformation, hate speech, child pornography, and content promoting violent extremism, thus incentivizing intermediaries to police content by withholding Section 230's protections unless they actively bar certain types of speech and activity.[948]

1.2.2 Reforming Section 230 Safely

Amid the fierce criticism from Congress, courts, academia and the public, Silicon Valley has spent billions of dollars on lobbying efforts to maintain the status quo.[949] Industry leaders, supported by prominent legal scholars, have collectively warned that changes to the statute could undermine the American tech industry and fundamentally alter the internet as we know it.[950] Some argue that the flaws of Section 230 are exaggerated, that changes could do more harm than good, and that the statute should remain unchanged.[951] Given the critical role Section 230 plays in protecting fundamental rights, a crucial preliminary question before considering possible reforms is whether Section 230 can be reformed without undermining the essential protections it offers.

Nonetheless, a substantial reform on Section 230 appears inevitable, legislators should be cautious as minor changes in this broad statute could have major effect on the U.S. tech industry

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[944] Citron DK & Wittes B (2018) 455–56.
[945] Won S (2022).
[946] Dickinson GM (2021b) 391.
[947] Ibid, 390-95.
[948] Holding Sexual Predators and Online Enablers Accountable Act of 2020, S.5012, 116th Cong. (2020); Curbing Abuse and Saving Expression in Technology Act (CASE-IT Act), H.R. 285, 117th Cong. (2021).
[949] Swindells K & Clark L, 'Big Tech Lobbying: The US Bills Tech Giants Targeted in 2020' (TECHMONITOR, 15 Feb. 2021) <https://techmonitor.ai/boardroom/big-tech-lobbying-2020>
[950] Kosseff J (2010) 126; Kosseff J (2019).
[951] Goldman E (2019a).

and potentially undermine the statute's speech-enhancing objectives.[952] As Section 230 continues to face criticism in Congress and the courts, intermediaries can no longer be certain that its broad protections will continue to apply. Even if Section 230 remains on the books, it may face further amendments to deal with illegal content, and courts may continue to narrow their readings of its immunity.[953] Yet there is little consensus on the specific regulatory changes needed, the underlying protection of free speech should be maintained during the upcoming inevitable reform of Section 230. Indeed, Section 230 is not a moral principle; it is an affirmative defense to litigation that has been expanded beyond its original intent through decades of judicial interpretation.[954] Holding online entities liable for UGC would incentivize them to censor user speech on their services, thereby stifling free expression on the internet.[955] Kosseff also warns that, if Congress were to significantly weaken or eliminate Section 230, intermediaries would likely have less protection against claims arising from user content.[956] Although there may be First Amendment, statutory, or common law protection for content distributors, it is far less comprehensive than the broad immunity provided by Section 230 due to their limited scope and strength.[957]

2. EU: Greater Liability Under the DSMD and the DSA

2.1. From Safe Harbors to Primary Liability: OCSSPs under Art.17 DSMD

Intermediary liability for UGC was among the most contentious issues in the EU copyright reform debate, as it plays a crucial role for intermediaries and copyright holders and shapes the EU's online information infrastructure.[958] From a broader perspective, sectoral rules and co-/self-regulatory measures have effectively introduced filtering obligations for intermediaries to prevent particularly illegal content, thereby further complementing the baseline regime of the ECD.[959] In terms of copyright law, the European legislative agenda has increasingly scrutinized intermediary liability, particularly though Art.17 DSMD. It represents a controversial effort by the EU legislator to reconstruct the existing liability regime for host intermediaries within copyright law and curtail the 'broad' scope of the hosting safe harbor at the EU level.

[952] Dickinson GM (2021b) 385; Ohm P (2016).
[953] Kosseff J (2019).
[954] Dimitroff K (2021).
[955] Dickinson GM (2021b) 380.
[956] Kosseff J (2022).
[957] Kosseff J (2019) 3.
[958] Senftleben M (2019).
[959] Buiten MC et al. (2020) 146-8.

Meanwhile, the DSA introduces a new model for regulating online services that allow users to post content. Similar to the DSMD, it sets of rules attempt to use tiers to distinguish among types of services, generally imposing fewer obligations on smaller or less-commercial endeavors.

2.1.1. The Making of Art.17 DSMD

Following the 2014 Public Consultation on the Review of EU Copyright Rules,[960] the European Commission unveiled its Digital Single Market Strategy in 2015, aiming to build 'a connected digital single market' by 'bringing down barriers to unlock online opportunities'.[961] This DSM Strategy includes various initiatives across multiple sectors, including the proposed reform of the EU copyright framework.[962] Particularly, the Commission proposed to clarify the rules on the activities of intermediary in relation to copyright-protected content[963] and re-consider the ECD horizontal intermediary liability regime to establish a 'fit for purpose' regulatory environment.[964] The subsequent Communication *Towards a Modern, More European Copyright Framework* provided further detail on the previously outlined areas of intervention, highlighting the need to adapt copyright rules to new technological realities to ensure they continue to meet their objectives.[965] Specifically, it proposed addressing a wide range of topics, including 'follow the money' strategies, commercial-scale infringements, application of provisional and precautionary measures, injunctions, notice and action mechanisms and the 'take down and stay down' principle.[966] Moreover, the Commission initiated two public consultations examining IP enforcement and intermediary responsibilities, seeking input on potential reforms to the existing intermediary liability regime.[967]

Consequently, on 14 September 2016, the Commission issued the DSMD Proposal, which comprised twenty-four articles and forty-seven recitals, accompanied by an Explanatory

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[960] European Commission, '2014 Report on the responses to the Public Consultation on the review of the EU copyright rules' (July 2014) < https://digital-strategy.ec.europa.eu/en/library/modernisation-eu-copyright-rules-useful-documents>
[961] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM/2015/0192 final.
[962] Ibid, section 1.
[963] Ibid, section 2.4.
[964] Ibid, section 3.3.
[965] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Modern, More European Copyright Framework (COM/2015/0626 final), section 1.
[966] Ibid, 22-3.
[967] Frosio G (2017c) 566.

Memorandum and an Impact Assessment detailing the reasons for reform and outlining the Commission's approach.[968] Moreover, the Proposal also aimed to establish rules to adapt exceptions and limitations to the digital and cross-border environment, improve licensing practices and ensure wider access to content, and achieve a well-functioning marketplace for copyright.[969] The proposal was endorsed in the aftermath of the impact assessment on the enforcement of copyright rules in the digital ecosystem, where rightsholders expressed concerns about fair remuneration and control of the circulation of their works.[970] In particular, under the assumption of closing a 'value gap' between rightsholders and intermediaries allegedly exploiting protected content, [971] Art.13 of the Proposal introduced a provision on the use of protected content by information society service providers storing and giving access to large amounts of works and other subject matter uploaded by their users.[972] Art.13 stipulated that when a host provider stores and provides public access to a substantial quantity of user-uploaded works, it constitutes an act of communication to the public as defined in Art.3(1) ISD. With an 'active' role,[973] the host providers are not eligible for the liability immunities set out under Art.14(1) ECD but would be not only obliged to conclude a licensing agreement with rightsholders and collecting societies, but also imposed on an obligation to implement 'effective content recognition technologies' to prevent the availability of infringing content.[974]

However, the legislative process was contentious and heavily influenced by lobbying efforts from multiple stakeholders.[975] Art.13 DSMD Proposal has been the most debated provision in the entire Proposal, attracting a significant deal of attention from general media outlets and academic circles.[976] Known as the 'upload filter' provision,[977] Art.13 has faced widespread

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[968] European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market (COM/2016/0593 final - 2016/0280 (COD)).
[969] Ibid.
[970] European Commission Staff Working document, 'Executive summary of the impact assessment on the modernisation of EU copyright rules' (2016) SWD/2016/0302 final. European Commission, 'Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age' (15 April 2019) <europa.eu/rapid/press-releaseIP-19-2151en.htm>
[971] Bridy A (2019) 333.
[972] Art.13(1) DSMD Proposal.
[973] Montagnani ML & Trapova AY (2018) 302-3.
[974] Art.13 DSMD Proposal.
[975] Colangeno G & Maggiolino M (2018).
[976] Samuelson P, 'The EU's Controversial Digital Single Market Directive – Part I: Why the Proposed Internet Content Filtering Mandate Was So Controversial' (Kluwer Copyright Blog, 10 July 2018) <https://copyrightblog.kluweriplaw.com/2018/07/10/eus-controversial-digital-single-market-directive-part-proposed-internet-content-filtering-mandate-controversial/>; Doctorow C, 'Artists Against Art.13: When Big Tech and Big Content Make a Meal of Creators, It Doesn't Matter Who Gets the Bigger Piece' (EFF, 24 Feb. 2019) <https://www.eff.org/deeplinks/2019/02/artists-against-article-13-when-big-tech-and-big-content-make-meal-creators-it>
[977] Moreno FR (2020); Spoerri T (2019); Frosio G (2020b).

criticism for potentially having a 'chilling effect' on online expression,[978] as it would require intermediaries to adopt so-called effective but unsophisticated content recognition technologies to prevent users from uploading copyrighted content without authorization.[979] While an alternative option of obtaining licensing agreements seems an 'impossible feats' for host intermediaries, given the undue financial and operational burdens of licensing all the works,[980] academic groups and organizations urged EU legislators to comprehensively re-assess the compatibility of the upload filter provision with the ECD, the settled CJEU case law and the CFR.[981] What is more, scholars argued that the 'value gap' echoes a rhetoric almost exclusively fabricated by assumptions of the music and entertainment industry rather than empirical evidence, which seems scarcely grounded in any solid scientific evidence.[982] Instead, the literature has shown a consistent degree of added value in promoting content rather than focusing on closing a value gap.[983] While creators might have legitimate claims regarding a drop in their revenues,[984] misleading rhetoric that remains unchecked might lead to misguided policy.[985] Moreover, a novel notion of communication to the public and the direct liability for intermediaries might also bring substantial interpretative difficulties for courts.[986] Amid the fierce criticism from all sides, the lobbying by rightsholders' representatives appears to have been the most intense and effective, often outweighing empirical research supporting opposing views.[987]

After a series of delays and intense debates,[988] the more detailed and complex Directive, composed of thirty-two articles and eighty-six recitals, was finally adopted by the Parliament and the Council formally on 17 April 2019, and entered into force on 7 June 2019.[989] Later, the

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[978] Spoerri T (2019); Montagnani ML (2019).
[979] Frosio G (2019).
[980] Reda F, 'The text of Art.13 and the EU Copyright Directive has just been finalised' (Felix Reda's website, 13 Feb. 2019) < https://felixreda.eu/2019/02/eu-copyright-final-text/>
[981] Stalla-Bourdillon S et al. (2017); Senftleben M et al. (2017); Angelopoulos C (2017).
[982] Bridy A (2019); Quintais JP and Poort J (2018b) 57; Frosio G (2017c) 568; Frosio G (2018b).
[983] Frosio G (2016); Quintais JP 'The New Copyright Directive: A tour d'horizon – Part I' (Kluwer Copyright Blog, 7 June 2019) <https://copyrightblog.kluweriplaw.com/2019/06/07/the-new-copyright-directive-a-tour-dhorizon-part-i/>
[984] 'Copyright Directive: how competing big business lobbies drowned out critical voices' (Corporate Europe Observatory, 10 Dec. 2018) <https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>
[985] Elkin-Koren N et al.(2020).
[986] Frosio G and Geiger C (2017).
[987] 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices' (Corporate Europe Observatory, 10 Dec. 2018) <https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>
[988] See Krokida Z (2022) 119; Rosati E (2021) 308-313.
[989] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Commission issued its guidance on Art.17 to ensure a 'correct and coherent transposition of Art.17 across the Member States.'[990] Then Art.17 survived an action for annulment with the CJEU.[991] In sum, Art.17 remains controversial for not only the ambiguous newly adopted ambiguous terminologies and internally contradictory logic, but also its complex nature during national implementation processes.[992] Also, the provisions adopted by the EU in 2019 were implemented in varied ways across Member States.[993]

2.1.2 An Anatomy of Art.17 DSMD

The DSMD represents a significant modernization of EU copyright law and is the most important international breakthrough in addressing new challenges in the digital economy and copyright enforcement since the DMCA. With Art.17 DSMD, the European legislators aimed to close the 'value gap' resulting from OCSSPs generating profits by providing and giving access to copyrighted works or other protected subject matter without ensuring that the content is duly licensed.[994] Notably, Art.17 is part of a broader EU policy initiative aimed at increasing the liability and responsibility of intermediaries, which comes largely at the expense of the prohibition on general monitoring obligations and individuals' freedom to engage with online content.[995]

Although the implication of Art.17 has not yet been fully tested in practice, a cluster of significant legal uncertainties have already been identified.[996] An anatomy of Art.17 is necessary as it is an extremely complex legal provision, characterized by both its 'size and hazardousness.'[997] In fact, this legal regimes tend to 'favor agreements between the large intermediaries and large rightsholders at the expense of individual end-users' interests and partly also at the expense of the authors of individual works and other "small-scale"

[990] European Commission, 'Communication on the Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (2021) COM/2021/288 final.
[991] Case C-401/19, Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:297.
[992] Dusollier S (2020) (describing Art.17 as the 'monster provision' of this Directive 'both by its size and hazardousness.') Leistner M (2020); Geiger C & Jütte J (2021b); Samuelson P (2020) 304.
[993] Angelopoulos C, 'Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report' (Dec. 2023) <https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-Dr-Angelopoulos.pdf>.
[994] Grisse K (2019) 888; Angelopoulos C and Senftleben M (2021).
[995] Quintais JP, 'The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap)' <https://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/>
[996] Quintais JP et al. (2019); Husovec M & Quintais JP (2021a); Geiger C & Jütte J (2021a); Moreno FR (2020); Dusollier S (2020); Quintais JP & Schwemer SF (2022).
[997] Dusollier S (2020).

rightsholders.'[998] The new authorization and liability regime established by Art.17 resolves legal uncertainty for rightsholders to a certain extent but simultaneously creates legal uncertainty for intermediaries and users. First, Art.17 addresses the liability of a new category of host intermediaries, namely OCSSPs, introducing a primary/direct liability regime that conflicts with the secondary liability rationale set forth in Art.14(1) ECD.[999] Second, Art.17 introduces a licensing mechanism for OCSSPs and a notice-and-stay-down mechanism, potentially raising significant concerns about balancing the interests of copyright holders, internet users, and host intermediaries.[1000] Third, a series of mitigation measures and safeguards was introduced, including (1) the requirements of a proportionality assessment and the identification of relevant factors for preventive measures,[1001] (2) a special regime for small and new OCSSPs,[1002] (3) a set of mandatory exceptions akin to user rights or freedoms, designed as obligations of result expressly based on fundamental rights,[1003] (4) a clarification that Art.17 does not entail general monitoring,[1004] and (5) a set of procedural safeguards, including an internal complaint and redress mechanism and rules on out-of-court redress mechanisms.[1005] Lastly, Art.17, as a *lex specialis* to Art.14(1) ECD,[1006] creates a problematic intersection with the ECD by establishing a dual liability regime that may lead to a fragmented copyright law framework, split existing European case law, impede innovation, and foster a monopolistic market among OCSSPs.[1007]

2.1.2.1. New Definition of OCSSPs

First of all, Art.17 DSMD introduces a new definition for intermediaries that host copyright content online into the regulatory framework of intermediaries. Earlier in the Art.13 of the Council's compromised text, the Council adopted the novel term OCSSPs to cover a sub-set of host intermediaries as set forth in Art.14(1) ECD.[1008] This terminology was followed by the finalized text, with Art.2(6) defining an OCSSP as 'a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large

[998] Leistner M (2020).
[999] Senftleben M et al. (2023) 938.
[1000] Senftleben M (2019); Quintais JP (2020).
[1001] Art.17(5) DSMD.
[1002] Art.17(6) DSMD.
[1003] Art.17(7) DSMD.
[1004] Art.17(8) DSMD.
[1005] Art.17(9) DSMD.
[1006] Commission Art.17 Guidance.
[1007] Krokida Z (2022) 115.
[1008] Ibid; See also the Council Text.

amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.'[1009] The Commission also confirms that Member States cannot alter the definition of OCSSP during the implementation process.[1010]

To fall within the notion of OCSSP, a set of cumulative conditions should be satisfied: (1) the provider at hand is an information society service; (2) the provider stores and give access to the public to a large amount of copyright works or other protected subject matter uploaded by its users, as its main or one of its main purposes; (3) the provider organizes and promotes for profit-making purposes the content referred to above. Besides, a non-exhaustive list of intermediaries is excluded from the definition of OCSSP in Art.2(6), such non-profit intermediaries, online marketplaces, and cloud services.[1011] Clearly, the scope of Art.17 is tailored to cover YouTube and similar UGC intermediaries, as online marketplaces and cloud services that store and provide access to copyrighted content are not supposed to fall within the scope of OCSSPs. In this regard, recital 62 explains that only online services that play an important role in the online content market by competing with other online content services for the same audiences shall fall within the definition of OCSSP.

Arguably, despite the Commission's Guidance, legal uncertainty regarding the definition of an OCSSP and the scope of Art.17 arises from the use of vague terms in the definition itself.[1012] In particular, the vague qualitative and quantitative elements combined in the definition of OCSSPs warrant further clarifications. For example, the DSMD does not define 'large amount,' but only clarifies that the service of ISSPs shall be reviewed on a case-by-case basis taking into account a combination of various elements, including but not necessarily limited to the audience of the service and the number of files of protected subject matter uploaded.[1013] Moreover, recital 62 stipulates that the definition of OCSSP 'should target only online services that play an *important role* on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences,' but it leaves open to interpreters what constitutes an 'important role.'[1014] Since Member States are

[1009] Art.2(6) DSMD.
[1010] Spindler G (2019).
[1011] Art.2(6) and recital 62 DSMD. This exemption does not apply to cloud services that allow users to upload content for other uses. See *YouTube/Cyando*.
[1012] Samuelson P (2020) 322-25.
[1013] Recital 63 DSMD.
[1014] Recital 61 DSMD, emphasis added; Schwemer SF (2020).

obliged to explicitly set out in their implementing laws the definition of OCSSP 'in its entirety' and not allowed to alter the scope of Art.17,[1015] open-ended terms like 'main purpose,' 'large amount,' 'profit-making purposes,' and 'important role' shall solely be determined by national courts on a case-by-case basis.[1016] Even if an intermediary falls within the scope of the legal definition, it might remain unclear for which specific services this applies, potentially subjecting the same intermediary to Art.17 for certain services and the pre-existing regime for others, thereby complicating the determination of liability regimes.[1017]

2.1.2.2. Introduction of Primary Liability for OCSSPs

Art.17 collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of intermediaries that encourage or contribute to infringing activities.[1018] Specifically, it marks the shift from secondary to primary liability by stating, 'Member States shall provide that an [OCSSP] performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.'[1019] In other words, by definition, OCSSPs communicate copyright-protected subject matter uploaded by users simply by providing the service and access. Art.3 ISD and Art.17 DSMD are thus interrelated. Indeed, the introduction of primary liability rules for OCSSPs has sparked extensive debate, focusing on the legal uncertainties and the concurrent application of these new rules alongside the notion of 'communication to the public' under Art.3 ISD and the secondary liability regime outlined in Art.14(1) ECD.

On the one hand, recital 64 notes that one of the objectives of Art.17 is to 'provide clarification' on the existing EU *acquis* regarding host intermediaries' liability.[1020] While commentors argue that Art.17 departs from the existing safe harbors by fundamentally changing the law, establishing strict primary liability as its foundation.[1021] Even AG Saugmandsgaard Øe advised the CJEU to regard the regime of Art.17 as a *change*, not a clarification, of the pre-2019 EU

[1015] Commission Art.17 Guidance.
[1016] Rosati E (2021) 320; Commission Art.17 Guidance, 4; Senftleben M et al. (2023) 939; Quintais JP et al. (2024) 161.
[1017] Quintais JP et al. (2022).
[1018] Senftleben M et al. (2023) 945.
[1019] Art.17(1) DSMD.
[1020] Recital 64 DSMD; E Commission Art.17 Guidance.
[1021] Bridy A (2019) 358; Quintais JP, supra note 995 ('Contrary to what is stated in Recital 64, the provision does not clarify existing law.'); Grisse K (2019) 889 ('The word "clarification" is however rather misleading.')

copyright *acquis*.[1022] With that said, Art.17 would be a novel regime, which does not have retroactive application.[1023] However, the Commission confirmed that Art.17 does not introduce a new right of communication to the public under EU copyright law in its Guidelines.[1024] That means, Art.17 does not foresee a specific *sui generis* regime for OCCSPs and its coverage is within the pre-existing scope of the right of communication to the public in Art.3 ISD.[1025] Art.17 functions as a specific form of subsidiarity, outlining the conditions and liability for a particular type of communication to the public under the CJEU's case law related to Art.3 ISD, insofar as the provision's scope of application extends.

On the other hand, Art.17(3) explicitly declares Art.14(1) ECD inapplicable to OCSSPs liable under Art.17(1) DSMD. Commentors argue that the notion of 'safe harbor' pertains to insulation from liability for third-party illegal activities, while Art.17(4) DSMD addresses the OCSSP's own actions rather than those of third parties. Thus, Art.17(4) should be more accurately described as a mitigated liability regime, or as recital 66 refers to it, 'a specific liability mechanism,'[1026] which follows a 'tripartite regime: license, block, or takedown/stay down.'[1027] Other scholars argue that Art.17 should be considered a *lex specialis* for Art.14(1) ECD.[1028] This interpretation was supported by recital 62, which references a 'liability exemption mechanism provided for in this Directive,' stating that an OCSSP is exempted from liability if it complies with the duties of care specified in this provision.[1029] Later, the Commission states that 'Art.17 DSMD is a *lex specialis* to Art.3 ISD and Art.14 ECD.'[1030] Therefore, if Art.17 does not apply to host intermediaries like online market retailers, then Art.14 ECD continues to apply. If host intermediaries provide services similar to those offered by YouTube and are not explicitly excluded non-exhaustive list of carve-outs, then the stricter Art.17 DSMD liability regime applies. Therefore, Art.14(1) ECD serves as the general rule and covers a broad spectrum of intermediaries that host and store content online.[1031]

[1022] AG Opinion in *Poland v Parliament and Council*, footnote 36.
[1023] Rosati E (2021) 310.
[1024] Commission Art.17 Guidance; Husovec M & Quintais JP (2021a); Grisse K (2019) 890.
[1025] Commission Art.17 Guidance; Leistner M (2020) 22 (Art. 17 does not introduce a *sui generis* regime in European copyright law.)
[1026] Recital 66 DSMD.
[1027] Rosati E (2021) 336; Grisse K (2019) 892; Ginsburg JC (2021).
[1028] Quintais JP & Schwemer SF (2022); Grisse K (2019) 890.
[1029] Schwemer SF (2020); Husovec M (2019) 23ff.
[1030] Commission Art.17 Guidance, 2; Geiger C & Jütte J (2021c).
[1031] Commission Art.17 Guidance.

2.1.2.3 A Two-level Approach: Licensing and Filtering obligations

As a result, deprived of the safe harbor for host intermediaries and exposed to direct liability for infringing user uploads, OCSSPs are presented with two 'complicated and hybrid'[1032] options to avoid such primary liability: licensing and filtering of content posted by users. First, they need to make best efforts to obtain authorizations from rightsholders to communicate/make available the content uploaded by users. Second, if they fail to obtain such authorizations, they need to take a set of steps to be exempted from liability, such as actively carrying out prior checks on users' uploads for possible infringements.

A) Licensing Obligation

Art.17(2) introduces the rights clearance obligation that follows from the licensing approach. Leistner argues that the structure of Art.17(4) implies that OCSSPs are obliged to actively investigate infringing content and make best efforts to obtain licenses for the relevant works and subject matter, and that they cannot remain passive but must actively engage with rightsholders to secure the necessary authorizations.[1033] Such a license can be obtained directly from the copyright holders or through collective licensing. An OCSSP seeking to license UGC confronts an immense rights clearance challenge, as the license must ideally encompass the entire range of potential user uploads, despite the unpredictability of user content, which, while ensuring their activities are non-infringing, places an almost unmanageable rights clearance burden on intermediaries.[1034] Senftleben suggests that collecting societies appear to be natural partners in developing the necessary comprehensive licensing solution, but they must offer a deal that includes content from both their members and non-members.[1035] Otherwise, the licensing effort would be ineffective, failing to cover all types of user uploads as envisaged in Art.17(2), thereby posing significant challenges for both OCSSPs and copyright holders.[1036]

In addition, Art.17(4)(a) also requires OCSSPs to demonstrate that they have made 'best efforts' to obtain an authorization if no authorization is granted. This requirement ensures that the liability exemption mechanism does not apply to intermediaries primarily engaged in or

[1032] Leistner M & Ohly A (2019).
[1033] Leistner M (2020) 23.
[1034] Husovec M & Quintais JP (2021a); Leistner M (2020); Angelopoulos C & Quintais JP (2019); Senftleben M (2018) 141-2.
[1035] Senftleben M (2019) 4.
[1036] Grisse K (2019) 892.

facilitating copyright piracy, as they will not make genuine efforts to obtain authorization.[1037] According to the Commission, the obligation of 'best efforts' to obtain authorization in Art.17(4)(a) requires case-by-case analysis of actions of OCSSPs to seek out and/or engage with rightsholders. A minimum threshold of that obligation is that OCSSPs proactively engage with easily identifiable and locatable rightsholders, notably those with broad catalogues, such as collective rights management organizations (CMOs). Conversely, OCSSPs should not be expected to proactively seek out rightsholders who are not easily identifiable by any reasonable standard.[1038] Given that OCSSPs cannot predict which works users will upload, it would be unreasonable to require them to trace every copyright holder globally, including those of lesser-known works.[1039] Licensing agreements should ideally cover a rightsholder's entire repertoire, including future works, and concluding such agreements with collecting societies for their full repertoire is a favorable solution, provided the rightsholders are willing to grant these licenses.[1040] A strictly pro-active duty of the OCSSPs to search for and negotiate with relevant rightsholders, even in cases of small-scale content, is impractical. Thus, a reasonable and proportional approach to 'best efforts' standard is necessary.[1041] Best efforts may involve contacting major labels and CMOs and being prepared to secure authorization for their entire repertoire, including all existing and future works.[1042]

Given the unavailability of umbrella licenses in many EU Member States and the highly fragmented landscape of collecting societies,[1043] the implementation of the DSMD, with its harmonized rules on extended collective licensing, will determine whether broader and more flexible licensing solutions can be established.[1044] Therefore, unless EU-wide licensing options are significantly expanded, a UGC licensing mechanism with a limited repertoire will likely fail to sustain the participative web 2.0, resulting in EU citizens losing the freedom to upload remixes and mash-ups of various pre-existing materials.[1045] In the absence of a pan-EU umbrella license mechanism covering all kinds of UGC, OCSSPs will have to restrict the content spectrum to licensed material and territories. Consequently, users will be limited to

[1037] Recital 62 DSMD; Schwemer SF (2020).
[1038] Commission Art.17 Guidance, 9.
[1039] Husovec M (2019) 529.
[1040] Senftleben M et al. (2023) 947.
[1041] Grisse K (2019) 892; Leistner M (2020) 13.
[1042] Metzger A et al. (2020).
[1043] Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, recital 35.
[1044] Senftleben M (2019) 4; Husovec M & Quintais JP (2021a).
[1045] Senftleben M (2019) 4.

uploading content covered by the licensing agreements that OCSSPs have secured with copyright holders and collecting societies, significantly reducing in the content diversity available and the possibility of EU citizens to actively participate in online content creation and dissemination.[1046]

As a result, it is evident that obtaining the required authorizations for potentially millions of user-uploaded works will be nearly impossible, even with voluntary or extended collective licensing, particularly for types of content other than online music, where collective rights management is most advanced in law and practice.[1047] Therefore, even though the Commission Art.17 Guidance notes that 'the more authorizations granted under Art.17(1) and (2), the less frequent the recourse to the mechanism in Article17(4) will be,'[1048] OCSSPs will likely resort to the second option to avoid liability, which involves meeting several cumulative conditions outlined in the Art.17(4).

B) Filtering Obligation

Art.17(4) offers an alternative solution if OCSSPs fail to perform the above licensing obligation despite best efforts, which offers UGC intermediaries the prospect of a reduction of the liability risk in exchange for content filtering. OCSSPs can avoid liability for unauthorized acts of communication to the public or making available to the public when they manage to meet three cumulative conditions: (a) they 'have made their best efforts to obtain an authorization,'[1049] (b) they 'have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information,'[1050] and they have acted expeditiously to disable access to or remove unauthorized protected content from their service upon receiving a substantiated notice from a rightsholder, and made best efforts to prevent their future uploads thereafter.[1051] In simple words, OCSSPs have to comply with certain pro-active and reactive duties of care in regard to blocking, takedown and stay down of infringing content, which undeniably seems typical for a duty of care based intermediary liability approach.[1052]

[1046] Senftleben M (2018) 141-2; Senftleben M et al. (2023) 947.
[1047] Husovec M (2019) 535; Schwemer SF (2019).
[1048] Commission Art.17 Guidance.
[1049] Art.17(4)(a) DSMD. See analysis in this section 3.1.2.3(a).
[1050] Art.17(4)(b) DSMD.
[1051] Art.17(4)(c) DSMD.
[1052] Leistner M (2020); Leistner M (2019).

'Best efforts' are also required to ensure the unavailability of works and other subject matter for which the copyright holders have provided the OCSSPs with the relevant and necessary information. Art.17(4)(b) further adds that the 'best efforts' should be put in place 'in accordance with high industry standards of professional diligence,'[1053] which implies that OCSSPs should make a case-by-case analysis of licensing options. The duties established require the active cooperation of rightsholders. Given the lack of well-established rights and rights holders' databases, it is practically essential for rights holders to provide 'relevant and necessary information.'[1054] If rightsholders do not provide the necessary information on specific content that an OCSSP should keep unavailable on its service, the OCSSP, after making best efforts to obtain authorization, is not liable if that content appears on the service.[1055] At this level, after having made best efforts to obtain authorization, liability for content uploaded by users also requires the positive knowledge of the subject matter which a rightsholder does not want to be available on the service.[1056]

And 'in any event,' according to Art.17(4)(c), the OCSSP needs to demonstrate to have 'acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).' All these efforts are directed at works notified to the OCSSP, without imposing a general monitoring obligation.[1057] In *L'Oréal*, the CJEU ruled out that 'insufficiently precise or inadequately substantiated' requests would impose an obligation to the receiving provider to 'act expeditiously.'[1058] In *Glawischnig-Piesczek*, a 'stay-down obligation' is not necessarily limited to content identical to that in respect of which the notice was submitted: it may also encompass equivalent content, insofar as the receiving intermediary is not required to carry out 'independent assessment' of the content.[1059] However, the CJEU ignored the state of the art and real-world operations of automated search tools and technologies tools and underestimated

[1053] Art.17(4)(b) DSMD.
[1054] Art.17(4)(b) DSMD.
[1055] Recital 66(5) DSMD.
[1056] Grisse K (2019) 894.
[1057] Art.17(8) DSMD.
[1058] *L'Oréal*, para 122.
[1059] *Glawischnig-Piesczek*, paras.41-6.

how screening efforts by intermediaries could easily become excessive, thus undermining users' fundamental rights.[1060]

Evidently, the three cumulative criteria are designed to allow for a flexible assessment of specific circumstances, rather than establishing a rigid regime, but this flexibility comes at the cost of legal certainty.[1061] European legislators introduced neutral terminologies to shape this alternative option in this provision,[1062] but legal uncertainty still remained as it is unclear in which way the 'unavailability of specific works and other subject matter' can be achieved.[1063] At the outset, compliance with this obligation revolves around adhering to industry standards, exercising professional diligence, and making best efforts to meet high standards of professional diligence. Nonetheless, Art.17 leaves the question unanswered in which way the legislator seeks to prevent excessive content filtering as Art.17(4)(b) refers to imprecisely defined 'high industry standards of professional diligence.'[1064] Given the significant quantity of works uploaded by users every day, the adoption of automated recognition and filtering tools to prevent unauthorized copyrighted content from populating UGC intermediaries seems unavoidable.[1065] In doing so, this alternative option encourages OCSSPs to adopt algorithmic copyright enforcement mechanism to ensure the unavailability of specific works and other subject matter, thus remarkably transforming copyright law into a censorship and filtering instrument.[1066] Indeed, OCSSPs remain free to engage in proactive monitoring and filtering.[1067] Despite the directive explicitly rejecting this outcome in Art.17(8), it is hard to see how these obligations will not lead to the adoption of 'upload filters' and, ultimately, result in general monitoring.[1068]

Moreover, Art.17(5) accounts for OCSSPs' freedom to conduct a business by subjecting the 'best efforts' required under Art.17(4) to the principle of proportionality and provides a non-

[1060] Keller D (2020); Krokida Z (2022) 134.
[1061] Schwemer SF (2020).
[1062] Krokida Z (2022) 129.
[1063] Recital 68 presumes that OCSSPs could take 'various actions.' They must, according to Art.17(8), provide information on their practices upon the request of rightsholders.
[1064] Rosati E (2021) 330-33.
[1065] Senftleben M et al. (2023) 940, 954; *Poland v Parliament and Council*; Quintais JP (2020); Bridy A (2019); Senftleben M (2019); Geiger C & Jütte J (2021a); Schwemer SF (2020); Krokida Z (2022) 135.
[1066] Senftleben M (2019) 5; Angelopoulos C & Senftleben M (2021).
[1067] Rosati E (2021) 330.
[1068] Masnick M, 'After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters' (techdirt, 28 March 2019) <https://www.techdirt.com/2019/03/28/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters/>

exhaustive list of relevant criteria to consider when assessing. A set of elements should be taken into account, such as 'the type of service offered,' 'the audience and the size of the service,' 'the type of works or other subject matter concerned,' as well as 'the availability of suitable and effective means and their cost for service providers.'[1069] Additionally, recital 66 supplements that 'account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorized works [...] taking into account best industry practices and the effectiveness of the steps taken [...] as well as the principle of proportionality.'[1070] However, these elements send confusing messages to OCSSPs, as it seem to encourage the adoption of lower-cost and unsophisticated filtering technologies that might lead to excessive content blocking, even though Art.17 as a whole clearly aims to avoid overblocking.[1071] Even though the principle of proportionality is a cornerstone of European law,[1072] discrepancies may arise in its application when assessing such 'best efforts.'[1073] Unfortunately, as the Directive vaguely mentioned proportionality, neither the text nor the recitals provide guidance about how the substance of proportionality principle should be interpreted in relation to intermediaries.[1074] Also, the availability of suitable and effective means and their costs for OCSSPs matter in the assessment.[1075] The criterion of the high industry standards initially creates legal uncertainty, but it is open to development through interpretations by courts. These somewhat ambiguous criteria provide courts the opportunity to reach fair outcomes in individual cases and situations, with the expectation that the CJEU will address several related questions and establish guidelines for Member State courts. In addition, Art.17(6) excludes some of these onerous obligations in regard to certain OCSSPs 'with small turnover and audience.' Those small- and medium-sized start-up OCSSPs are also subject to the requirements of Art.17(4) but benefit from mitigated obligations in order to qualify for the liability exemption mechanism.[1076] Specifically, if they are less than 3 years old and have an annual turnover below EUR 10 million, or do not exceed an average number of 5 million monthly unique visitors,[1077] they are only

[1069] Art.17(5)(a) and recital 66(2) DSMD.
[1070] Recital 66 DSMD.
[1071] Senftleben M et al. (2023) 955.
[1072] Harbo TI (2010).
[1073] Riordan J (2016) 98; Krokida Z (2022) 132-3.
[1074] Samuelson P (2020) 316.
[1075] Art.17(5)(b) DSMD.
[1076] Art.17(6) and recital 67 DSMD.
[1077] Scholars share concerns regarding the methods of counting users: Husovec M (2023); Tushnet R (2023) 922-5.

subject to the NTD obligation in Art.17(4)(c).[1078] This provision may benefit new starters, but its limited application over a three-year period means its impact should not be overestimated,[1079] as it merely allows them to delay investments in staff and equipment necessary to comply with paragraph (4).[1080]

Furthermore, Art.17(4) refers to the concept of 'best efforts' without providing a specific definition. As a result, national transpositions will need to give a concrete shape to this new and unclear liability regime, raising serious concerns that divergent transpositions may fail to achieve a harmonized legal framework.[1081] While the Commission Art.17 Guidance acknowledges that 'best efforts' is an 'autonomous concept of EU law,'[1082] its implementation in national laws varies due to differing subjective and objective interpretations of the concept.[1083] Art.17 also does not allow for completely alternative solutions such as circumventing the 'best efforts obligations' by implementing a broad exception for UGC into national law.[1084] Ideally, when interpretating the 'best effort criterion,' it is appropriate to take the principle of proportionality, the fundamental freedom to conduct a business, and the obligation under Art.17(9) into consideration.[1085] Through a case-by-case basis against the high industry standards of professional diligence, the evaluation of whether the efforts made by an OCSSP are the 'best' shall depend on the type of content at issue, market practices, and the reference industry.[1086]

2.1.2.4. Mandatory Limitations and Exceptions as 'Users' Right'

Copyright content moderation often requires the use of automatic content recognition and filtering tools. Existing tools are efficient at identifying content, but incapable of understanding the context in which content is used and, therefore, often fail to recognize perfectly legitimate

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[1078] In both scenarios these obligations must be assessed considering the principle of proportionality in Art.17(5). See Commission Art.17 Guidance, 17.
[1079] Samuelson P (2020) 315.
[1080] Scholars also express doubt regarding the lack of evidence supporting these particular thresholds: Quintais JP, supra note 995; Krokida Z (2022) 134.
[1081] Keller P, 'Divergence instead of guidance: the Art.17 implementation discussion in 2020 – Part 2' (Kluwer Copyright Blog, 22 Jan. 2021) <https://copyrightblog.kluweriplaw.com/2021/01/22/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-2/>
[1082] Commission Art.17 Guidance.
[1083] Rosati E (2021) 330.
[1084] Senftleben M (2020c); Leistner M & Metzger A (2017).
[1085] Grisse K (2019) 892-93; Rosati E (2021) 330.
[1086] Rosati E (2021) 330.

uses, such as quotations and parodies.[1087] In order to mitigate the risks to freedom of expression and the right to information,[1088] the European legislature established certain *ex-ante* and *ex-post* safeguards in Art.17(7) to (9) to counterbalance negative effects on users' legitimate rights and interests.[1089]

Although the CJEU briefly noted that filtering algorithms might inadequately distinguish lawful from unlawful content, potentially leading to the blocking of lawful content, and addressed this issue in the context of a general monitoring obligation, it is an independent concern that should be assessed within the framework of Art.17(7) and (9).[1090] In order to mitigate potential false positive of filtering measures, Art.17(7)(1) provides a general rule that '[t]he cooperation between [OCSSPs] and rightsholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.'[1091] In addition, to guarantee internet users' freedom of expression and freedom of art in the context of UGC,[1092] Art.17(7)(2) stipulates a specific rule that 'Member States must ensure that users can rely on the exceptions or limitations of '(a) quotation, criticism, review' and '(b) use for the purpose of caricature, parody or pastiche' when uploading and making available UGC. Contrary to the merely optional exceptions under Art.5 ISD, Art.17(7) effectively introduces mandatory exceptions which cannot be overridden by contract or otherwise.[1093] Affirmed by the Commission Art.17 Guidance and the CJEU, the mandatory limitations and exceptions, coupled with the safeguards in paragraph (9), are 'user rights,' rather than mere defenses.[1094] Users are not restricted to rely solely on these exceptions and limitations; rather, according to Art.17(7), they may invoke any exception or limitation that has been implemented in national law. Within the context of Art.17(9) on dispute resolution mechanisms, the Directive reiterates that it 'shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law,' and further mandates that OCSSPs must inform their users in their terms and conditions about their ability to use

[1087] Lambrecht M (2020).
[1088] Geiger C (2018); Geiger C (2007).
[1089] Recital 70 and 84 DSMD.
[1090] Grisse K (2019) 897.
[1091] Art.17(7)(1) DSMD.
[1092] Recital 70 DSMD.
[1093] Leistner M (2020) 37.
[1094] Schwemer SF & Schovsbo J (2020); AG Opinion in *Poland v Parliament and Council*, para 193.

works and other subject matter under these exceptions or limitations to copyright and related rights as provided for in Union law.[1095]

However, it is important to note that existing content recognition technologies are limited in their ability to accommodate dynamic and context-specific exceptions, resulting in the blocking of many lawful uses, contrary to the DSMD's requirements. Additionally, the mandated complaint and redress mechanisms for users in Art.17(9) are unlikely to effectively address these concerns, nor will the other rules mentioned. Moreover, the DSMD fails to provide guidance on legal remedies for non-compliance with Art.17(7) by either the OCSSP or the rights holder. A different question, of course, is how an OCSSP can practically comply with the obligations set out in Art.17(4)(b) while also adhering to the duties under Art.17(7) and (9), given the highly complex and context-dependent nature of determining whether a work is covered by an exception or limitation.

2.1.2.5. The Death of No General Monitoring Obligation?[1096]

As noted in Chapter III, the ECD and CJEU case law prohibit Member States from requiring intermediaries to actively monitor all user data to prevent the transmission of unlawful content, including copyright infringements.[1097] More precisely, the CJEU has grounded its case law on the prohibition of general monitoring obligations not only in secondary EU law but also in a proportional balance of the fundamental rights involved. [1098] Art.17(8) DSMD reaffirms that the content moderation obligations arising from Art.17(4)(b) and (c) must be reconciled with the prohibition of general monitoring laid down in this provision.[1099] This stands in stark contrast to the DSMD Proposal, which explicitly called for the use of automated content recognition technologies designed to monitor every upload to an intermediary's site to prevent copyright infringement.[1100] However, during the legislative process, several commentators have raised the concern that Art.17(4) results in a general monitoring obligation, despite the fact that Art.17(8) stipulates that the application of Art.17 shall not do so.[1101] Thus, this conflict with Art.15 ECD may generate more 'systemic inconsistency' with other provisions of the EU

[1095] Art.17(9) DSMD.
[1096] Frosio G (2017b).
[1097] Section 1.2.8 in Chapter III.
[1098] *Netlog*, para 26; *Scarlet Extended*, para 29.
[1099] Art.17(8) DSMD.
[1100] Art.13(1) DSMD Proposal.
[1101] Stalla-Bourdillon S et al. (2017); Krokida Z (2022) 130; Metzger A et al. (2020).

acquis.[1102] Hence, the question arises whether the obligations established in Art.17(4) DSMD are contradictory to the prohibition of general monitoring in Art.17(8), and how to reconcile the meaning of 'general monitoring' in Art.15(1) ECD with Art.17(8) DSMD.[1103]

Commentors suggest that, as a way out of the dilemma, Article17(4) does not, at least in theory, entail general monitoring obligation, as it merely imposes the monitoring of uploaded data for *specific* subject matter.[1104] The filtering obligation is limited to a mere matching between specific content notified to the OCSSP by the copyright holder and the upload files,[1105] distinguishing it from the filtering systems in *SABAM*, which aimed to impose a general monitoring duty for any copyright-infringing content in SABAM's repertory, both present and future.[1106] In the same vein, Eleonora Rosati argues that the 'best efforts' referred in Art.17(4)(b) and (c) appear to entail *specific* monitoring obligations on the side of OCSSPs.[1107] The CJEU confirmed the possibility of specific monitoring obligations under EU law.[1108] In its case law, the CJEU has explored the distinction between prohibited 'general' monitoring and permissible 'specific' injunctions, as seen in *L'Oréal*, where the Court endorsed preventive duties targeting specific IP-infringing activities by the same person concerning the same right,[1109] and in *Glawischnig-Piesczek*, where the CJEU permitted court orders requiring the prevention of infringing activities 'identical' or 'equivalent' to a previously determined infringement.[1110]

In terms of the scope of permissible *ex ante* filtering, the Commission Art.17 Guidance states that automated filtering and blocking measures are 'in principle' only admissible for 'manifestly infringing' and 'earmarked' content that 'could cause significant economic harm.'[1111] While in *Poland v Parliament and Council*, AG Saugmandsgaard Øe relies on the judgment in *Glawischnig-Piesczek* to argue that any filtering must be 'specific' to the content and information at issue, meaning it must be applied only to 'manifestly' infringing or

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[1102] Frosio G (2018b) 332.
[1103] Quintais JP et al. (2022); Angelopoulos C & Senftleben M (2021).
[1104] Grisse K (2019) 897, emphasis added. Leistner M (2020) 15-6.
[1105] Art.17(4)(b) DSMD.
[1106] *Scarlet Extended* and *Netlog*; Leistner M (2020) 15.
[1107] Rosati E (2021) 354-355.
[1108] *Glawischnig-Piesczek*, para.47.
[1109] *L'Ore al*, para.139, 141-2.
[1110] *Glawischnig-Piesczek*, paras.35, 45-7.
[1111] Commission Art.17 Guidance, 22.

‘equivalent’ content.[1112] Then the CJEU states unequivocally that only filtering/blocking systems that can distinguish lawful from unlawful content without the need for its ‘independent assessment’ by OCSSPs are admissible.[1113] That is, only content that is ‘obviously’ or ‘manifestly’ infringing, or equivalent content, may be subject to *ex ante* filtering measures.[1114] Keller notes that the definition of ‘independent assessment’ largely collapses the difference between ‘equivalent’ and ‘identical’ content, as ‘both must be identified in the injunction with *sufficient specificity* to allow automated search tools and technologies to reliably carry out a court’s order.’[1115] Basically, both the Commission and the CJEU agreed that upload filters can be compatible with Art.17(8) as long as the scope of filtering measures is limited to specific infringement identified by courts or rightsholders and which is specific enough to be detected by automated tools.[1116] Interpreting the CJEU’s ruling in the context of copyright content moderation, the monitoring obligations under Art.17(4) are not precluded by Art.17(8) if they are limited in the sense that the OCSSP has been provided with ‘relevant and necessary information’ regarding the infringing content and can search and filter for ‘identical or essentially identical (equivalent)’ content on the basis of automated search tools and technologies and consequently without having to carry out an ‘independent value based contextual assessment.’[1117]

Yet, Art.17 deviates from the not thoroughly established CJEU case law on interpretation of ‘general monitoring.’[1118] Through deliberated language, this legislature ‘walks the fine line of distinguishing between monitoring all UGC in search of a whole repertoire of works, and monitoring all UGC in search of specific, pre-identified works.’[1119] Art.17(4)(b) and (c), read in combination with Art.17(1) and 17(4)(a), suggest that OCSSPs are required to monitor uploads for all works and other subject matter for which no authorization could be obtained through agreement with the relevant rightsholders. Referring to Senftleben and Angelopoulos’ summary of different interpretation options of ‘general monitoring,’ Art.17(4)(b) and (c) risk going beyond the previous interpretations by attempting to codify the ‘Basic Double Minus’ interpretation. This interpretation option allows for filtering obligations relating to all content,

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[1112] AG Opinion in *Poland v Parliament and Council*, paras. 196, 200-201, and 222; Peukert A et al. (2022) 368.
[1113] *Poland v Parliament and Council*, para.85–86, 90-92, applying inter alia by analogy *Glawischnig-Piesczek*, para.41–46.
[1114] Quintais JP et al. (2022).
[1115] Keller D (2020) 621, emphasis added.
[1116] Oruç TH (2022) 194.
[1117] Leistner M (2020) 16.
[1118] Quintais JP et al. (2022).
[1119] Senftleben M et al. (2023) 950.

not only on the basis of *court orders* but also on the basis of *rightsholders notifications*.[1120] In other words, the monitoring obligation resulting from Art.17 can be regarded as 'specific' as they currently only require a qualitative and quantitative matching with regard to concrete information on copyright protected content which has been provided by the rightsholders.[1121] In the view of proponent of 'Basic Interpretation' option, filtering obligations would be incompatible with the general monitoring prohibition even if they concern a specific, pre-identified right.[1122] A prohibited general monitoring obligation might arise whenever content must be identified through screening the content in its *entirety*, regardless of how specifically it is defined in rightsholder notifications received under Art.17(4)(b) or (c).[1123] Thus, Art.17(8) may be understood as being of 'a merely declaratory nature' vis-a-vis the obligation of Art.15 ECD.[1124] Without adequate limitations on filtering based on rightsholders' notifications, a snowball effect could overwhelm OCSSPs with a volume of notified works that effectively imposes a general monitoring duty that violates fundamental rights.[1125]

2.1.2.6 Complaint and Redress Mechanism As Ex Post Safeguards

Conceptually it appears that not only the copyright-internalized system of checks and balances with limitations and exceptions but also the 'somewhat externalized system of procedural safeguards' is seen as means of mitigating negative impact on fundamental rights.[1126] Legislators acknowledge that automatically distinguishing copyright infringements from legitimate uses will be a challenging exercise in practice. Considering this, Art.17(9) provides that an OCSSP needs to 'put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.'[1127] To avoid potential over-blocking, 17(9) para 2 further defines that complaints firstly have to be processed 'without undue delay' and secondly that 'decisions to disable access to or remove uploaded content shall be subject to human review.'[1128] Furthermore, the DSMD also puts a duty on rightsholders to 'duly justify the reasons for their requests.'[1129] Admittedly, this

[1120] Ibid.
[1121] Leistner M (2020) 17.
[1122] Angelopoulos C & Senftleben M (2021).
[1123] Angelopoulos C & Senftleben M (2021).
[1124] Quintais JP et al. (2024) 160; Commission Art.17 Guidance; Senftleben M (2020b) 312.
[1125] Angelopoulos C & Senftleben M (2021).
[1126] Schwemer SF & Schovsbo J (2020); Stamatoudi I & Torremans P (2021), 17.267.
[1127] Art.17(9) and recital 70 DSMD.
[1128] Art.17(9) para 2 DSMD. The elastic timeframe has been criticized by Senftleben M (2019) 9.
[1129] Art.17(9) para 2 DSMD.

mitigates the risk of wrongful or abusive notices, but it has been noted that the underlying legal assessment by the OCSSP is likely to be 'cautious and defensive,'[1130] thus risking overenforcement. After all, it is this mechanism that will provide the teeth to Art.17(7) and that will ensure respect for the limitations and exceptions and the proper balance of rights and interests.[1131]

Art.17(9) para 2 proposes the introduction of an alternative dispute resolution mechanism to users. Relatedly, Member States are left a considerable amount of discretion when implementing the procedural safeguards, which might also be informed by the stakeholder dialogues and the Commission's Guidance. Notably, the existence of these specific safeguards relating to the institutional setting in Art.17(9) can be interpreted as an attempt to create procedural transparency and safeguards for the enforcement of user rights vis-à-vis content moderation practices.[1132] However, this initiative risks being ineffective without clear identifying criteria for its operation: it is crucial to define the principles guiding this impartial body to ensure the validity of its decisions, as a lack of accountability, legitimacy, or proportionality could undermine its mission and fail to protect the fundamental rights of internet users.[1133]

2.1.3 An Increased Role of Fundamental Rights

Art.17(10) stipulates that, in stakeholder dialogues seeking to identify best practices for the application of content moderation measures, 'special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations.'[1134] Moreover, the CJEU has stated explicitly that in transposing EU directives and implementing transposing measures, 'Member States must […] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.'[1135] Having those said, in the case of content sharing restrictions following from the employment of content moderation tools, OCSSPs are bound to safeguard the fundamental rights of users. Although the frequent reference to 'fundamental rights' in Art.17 indicates an increased role of fundamental rights in

[1130] Senftleben M (2019) 9.
[1131] Stamatoudi I & Torremans P (2021), 17.267.
[1132] Quintais JP et al. (2022)
[1133] Krokida Z (2022) 137.
[1134] Art.17(10) DSMD.
[1135] *Promusicae*, para.68.

intermediary liability, it does not precisely determine the balance between the various fundamental rights affected, nor does it ensure effective harmonization.[1136] In fact, Art.17 has come under heavy critique, notably for the negative impacts it is likely to have on various fundamental rights.[1137] The problem with content filtering obligation and the right to freedom of expression is that automated content filtering systems' inability to distinguish between lawful and unlawful uses inevitably results in the blocking of lawful speech without an initial judicial determination. Meanwhile, interpreting the scope of general monitoring compromises the very essence of freedom of expression and information and right to privacy of users.[1138]

In light of CJEU jurisprudence, the filtering obligation inferred from Article17(4)(b) is problematic regarding the protection of fundamental rights, specifically users' freedom of expression and information, right to privacy and data protection, and the provider's freedom to conduct business and freedoms guaranteed under Articles 8, 11, and 16 CFR. [1139] Scholars have also identified concerns about rights to a fair trial and effective remedy for people whose online expression and participation are 'adjudicated' as legal violations and terminated by intermediaries.[1140] Indeed, noting that *Sabam/Netlog* involved a prohibited general monitoring obligation for all types of uploaded content, the drafter of DSMD attempted avoid the infringement of fundamental rights by introducing an obligation to filter 'specific content', defined as 'specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information.'[1141] In addition, the principle of 'no general monitoring obligation' established in Art.15 ECD is reiterated verbatim in Art.7(8) DSMD. However, adding up all the 'specific works and other subject matter' included in right holder notifications, it may become apparent that Art.17(4)(b) *de facto* results in a comprehensive filtering obligation similar to the measures the CJEU prohibited in *Sabam/Netlog*.[1142]

The controversy that revolves around the DSMD led Poland to file a challenge before the CJEU for annulment under Art.263 TFEU. Concerns about overbroad inroads into freedom of

[1136] Geiger C & Jütte J (2021a).
[1137] Leistner M (2020); Reda J et al. (2020); Angelopoulos C & Senftleben M (2021).
[1138] *Scarlet Extended* and *Netlog*.
[1139] *Poland v Parliament and Council*; Keller D (2020) 616-7.
[1140] Angelopoulos C et al. (2015).
[1141] Angelopoulos C and Senftleben M (2021).
[1142] Senftleben M (2019).

expression and information formed the basis for this annulment claim.[1143] The CJEU recognized that the filtering regime in Art.17(4)(b) and (c) DSMD imposed a restriction on the ability of users to exercise their right to freedom of expression and information guaranteed by Art.11 CFR and Art.10 of the ECHR.[1144] But the Court was satisfied that the limitation arising from the filtering obligations in Art.17(4)(b) and (c) could be deemed appropriate and necessary to achieve the legitimate objective of ensuring a high level of copyright protection to safeguard the right to IP enshrined in Art.17(2) CFR.[1145]

Specifically, the Court held that certain safeguards in Art.17 DSMD serve as appropriate countermeasures to withstand Poland's annulment action by providing sufficient assurance that freedom of expression and information would not be unduly restricted.[1146] First, the Court held that there is a clear and precise limit on the types of measures acceptable since the Art.excludes measures that block lawful content when uploading.[1147] Second, in line with earlier decisions, the CJEU confirmed that copyright limitations supporting freedom of expression, such as quotation, criticism, review, caricature, parody, or pastiche, constituted 'user rights,' and can be applied by users.[1148] The CJEU recognizes that Art.17(7) includes an 'obligation of result,' meaning that Member States must ensure that these exceptions and limitations are respected despite the preventive measures in Art.17(4), which are qualified as mere 'best efforts' obligations. This distinction, underscored by the fundamental rights basis of the exceptions, indicates a normative hierarchy between the higher-level obligation in Art.17(7) and the lower-level obligation in Art.17(4).[1149] This point is reinforced by the Court's recognition that the mandatory E&Ls, coupled with the safeguards in Art.17(9), are 'user rights,' not just mere defenses.[1150] Third, The Court emphasized that the filtering mechanisms would only be activated if rightsholders supplied OCSSPs with the 'undoubtedly relevant and necessary information' regarding protected works that should not be accessible on the UGC intermediary; without this information, OCSSPs would not be prompted to restrict content.[1151] Fourth, the CJEU highlights the prohibition of general monitoring obligation and OCSSPs cannot make an

[1143] *Poland v Parliament and Council*, para.24
[1144] Ibid, para.55, 58, 82.
[1145] Ibid, para.69.
[1146] Ibid, para.98.
[1147] Ibid, para.85, 86.
[1148] Ibid, para.87.
[1149] Angelopoulos C and Senftleben M (2021).
[1150] Quintais JP et al. (2022).
[1151] *Poland v Parliament and Council*, para.89.

'independent assessment' of the content in order to determine their lawfulness.[1152] Fifth, procedure safeguards like the complaint and redress mechanism and out-of-court redress procedure allow users to challenge unjustified content blocking and prevent over-blocking.[1153] Finally, the Court recalled that Art.17(10) tasked the European Commission with organizing stakeholder dialogues to ensure a uniform mode of OCSSP/rightsholder cooperation across Member States and establish best filtering practices in the light of industry standards of professional diligence and publish the Commission Art.17 Guidance based on these talks.[1154]

Senftleben argues that the CJEU in this case accepted not only the broader regulatory design but also its individual elements, yet failed to expose the outsourcing and concealment strategy and address human rights deficits.[1155] More importantly, Art.17(1) clearly gives OCSSPs a very strong impulse to implement automated filtering systems regardless of their capacity to distinguish between lawful and unlawful content, as over-blocking allows them to escape direct liability under Art.17(1) and avoid lengthy and costly lawsuits. Yet, it does not clarify what kind of risks intermediaries face when their use of upload filters violates users' freedom of expression.[1156] Adopting an excessive filtering approach, they only have to deal with user complaints which are unlikely to come in large numbers. Practically speaking, the implementation of an under-blocking approach to safeguard freedom of expression and information is thus unlikely.[1157]

2.2. Intermediaries as Gatekeepers: A Co-regulatory Framework in the DSA

Acknowledging that a strict and narrow interpretation of the prohibition of general monitoring obligations could be a barrier to effectively tackling illegal online content,[1158] EU regulators repeatedly emphasized the adoption of 'effective proactive measures to detect and remove illegal content online' in multiple policy documents.[1159] Moreover, the CJEU departed from

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[1152] Ibid, para. 90; Art.17(8) DSMD; Art.8 and recital 30 DSA.
[1153] Ibid, para. 94; Art.17(9) DSMD.
[1154] Ibid, paras. 96–97.
[1155] Senftleben M (2023).
[1156] COMMUNIA Association, 'A closer look at the final Commission guidance on the application of Art.17' (COMMUNIA, 4 Jun. 2021) <https://communia-association.org/2021/06/04/a-closer-look-at-the-final-commission-guidance-on-the-application-of-article-17/>
[1157] Senftleben M et al. (2023) 954.
[1158] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventing the dissemination of terrorist content online A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM(2018)640, Recital 19.
[1159] Supra note 540, 3;Supra note 535.

the earlier broad interpretation of the concept of general monitoring obligations,[1160] it rather acknowledged that preventive measures targeting illegal content are ineffective without prior monitoring of all the content transmitted.[1161] Besides, various national-level initiatives have imposed more stringent obligations on intermediaries, requiring them to combat the spread of specific types of illegal content.[1162] However, they further add normative fragmentation and legal uncertainty to the already complex EU regulatory landscape, particularly impeding small providers' ability to effectively compete in the market.[1163]

In response to the controversial discussion on the need for proactive monitoring obligations,[1164] the European lawmakers have introduced several sector-specific rules and guidelines for host intermediaries, most recently the introduction of specific liability rules on video-sharing intermediaries in cases of hate speech,[1165] terrorist content,[1166] and copyright.[1167] Those scattered regulations echo the hardly contested prohibition of general monitoring obligations,[1168] and introduce a *lex specialis* model to general requirements of the ECD.[1169] The above legal instruments could constitute a solid ground for the introduction of various preventive content moderation measures to monitor specific or even the entirety of users' activities and uploaded content. The vagueness, complexity and opaqueness inherent to the wordings of regulations bring more legal uncertainty to the effective protection of fundamental rights throughout the process of moderating illegal content, especially in terms of obligations, responsibilities and regulatory oversight.[1170] After all, the goal of all initiatives indicates a good intention to protect online users; the result, however, is rather bad to some extent, particularly with regard to the fundamental rights of users.

[1160] *L'Oréal*; *Scarlet Extended*; *Netlog*; and *Mc Fadden*.
[1161] *Glawischnig-Piesczek*; *Youtube/Cyando,* 33; AG Opinion in *YouTube/Cyando*, 221; *Poland v. European Parliament and Council*; Rauchegger C & Kuczerawy A (2020) 1505.
[1162] NetzDG; French 'Avia' Law 2020-766 of 24 June 2020 on online hateful content.
[1163] Buri I & van Hoboken J (2021) 5.
[1164] Spoerri T (2019) 174; Angelopoulos C & Quintais JP (2019) 147.
[1165] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, PE/33/2018/REV/1, OJ L 303, 28.11.2018, p. 69–92, Art. 28b.
[1166] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21; Kuczerawy A (2018b).
[1167] Moreno FM (2020); Angelopoulos C and Senftleben M (2021).
[1168] Art.17(8) DSMD; Art.5(8) of Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, PE/19/2021/INIT, OJ L 172, 17.5.2021, pp.79–109.
[1169] Rojszczak M (2022) 5.
[1170] Ibid.

As a result, there was an urgent need for new legislation to upgrade the liability rules for intermediary services while effectively protecting the fundamental rights enshrined in the CFR in the EU's internal market.[1171] Pursuing to consolidate various separate pieces of EU legislation and self-regulatory practices addressing online illegal and harmful content, the DSA retains the conditional immunity and the prohibition of general monitoring obligations but uses size-based tiers to delineate the different levels of obligation imposed on various services and further lays down horizontal rules on wide-ranging transparency and due diligence obligations for intermediaries.[1172] Specifically, it establishes numerous due diligence obligations for intermediaries regarding all types of illegal information, including content that infringes copyright. More importantly, based on a co-regulatory approach, intermediaries would undertake a number of responsibilities and the state would step in the EU regulatory framework with the establishment of a proposed supervisory authority.

2.2.1. Reinforcing the ECD Liability Regime

Given that additional measures proposed in the DSA, such as the diligence obligations or reinforced enforcement powers, are generally not meant to replace, but rather to come on top of the current rules, the former should be designed to build on the latter's strengths and address their shortcomings. As William puts it, in many respects those parts cannot properly function, or be properly understood without having regard to the foundation that the principle of knowledge-based liability provides.[1173]

Key principles like safe harbors for intermediaries and the prohibition of general monitoring obligations laid down in the ECD remain unaffected, even though the corresponding provisions are slightly amended and transplanted into the DSA instead.[1174] This preservation is justified, according to recital 16 of the DSA, both by the legal certainty provided by such a framework and by the case law of the CJEU, which must be duly observed.[1175] In particular, Art.6 provides that providers of hosting services would be exempt from liability if they are not aware, or do not have actual knowledge, of the illicit activity, or if they expeditiously remove the infringing

[1171] Art.1(1) DSA; Frosio G and Geiger C (2023).
[1172] Ibid.; Quintais JP et al. (2023a); Peukert A et al. (2022).
[1173] Wilman F (2021) 319.
[1174] Art.4-6 DSA.
[1175] Recital 16 DSA.

content upon being notified.[1176] Therefore, it appears that the principle of knowledge-based liability for intermediaries regarding UGC is, and will likely remain, a key component of the liability regimes in the EU.[1177] Obviously, the relevant provisions absorb the understanding interpreted in the CJEU case law. Recital 22 specifies that actual knowledge shall be correlated with a specific infringement[1178] and uses the concept of the 'diligent economic operator' in order to assess the knowledge of the providers of hosting services. Specifically, it points out that the provider can obtain such actual knowledge or awareness of the illegal nature of the content through its own-initiative investigations or through notices submitted by individuals or entities in accordance with the DSA, provided these notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess, and, where appropriate, act against the allegedly illegal content.[1179]

Again, Art.8 DSA confirms the prohibition of general monitoring obligations and active fact-finding obligations, and recital 28 confirms that obligations imposed on providers to monitor in specific cases are not against the general monitoring obligations ban.[1180] Like the ECD, the DSA avoid defining 'general monitoring' and clearly delineating the boundary between general and specific monitoring, leaving this determination largely to the CJEU, as has been the practice thus far. This provision also connects the case law of the CJEU regarding general monitoring obligations: obligations to monitor all content for an indefinite period of time qualifies as a prohibited general obligation,[1181] while an obligation to detect and remove specific identical or equivalent content that contains specific elements pre-identified by a national court is not covered by the prohibition.[1182]

2.2.2. Different Terms for Host Intermediary

Art.3 DSA retains the definition of 'information society services' of the ECD that underpins the notion of an information society service provider. For the purposes of due diligence obligations, it differentiates three categories of intermediary services:[1183] (1) 'hosting' service,

[1176] Art.6 DSA.
[1177] Wilman F (2021) 319; European Commission, 'Staff working document on executive summary of the impact assessment report' (2020) SWD 349 final 2.
[1178] AG Opinion in *YouTube/Cyando*.
[1179] Recital 22 DSA.
[1180] Peukert A et al. (2022) 367, fn 45.
[1181] *Scarlet Extended*; *Netlog*.
[1182] *Glawischnig-Piesczek*; Oruç TH (2022).
[1183] Art.3(g) DSA.

consisting of the storage of information provided by, and at the request of, a recipient of the service;[1184] (2) 'online platform' means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates information to the public';[1185] and (3) 'Very Large Online Platforms (VLOPs),' referring to 'online platforms' which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.[1186] Considering their 'systemic role' played in 'amplifying and shaping information flows online' and the fact that 'their design choices have a strong influence on user safety online, the shaping of public opinion and discourse, as well as on online trade,' VLOPs are subject to the highest number of cumulative obligations.[1187] The terms entailed in the DSA are already used in other legislative tools, but their definitions differ. Thus, many closely related definitions in different instruments may become too cumbersome from a compliance perspective, imposing additional costs on companies and consumers.[1188] Literally, the term VLOPs is a subcategory of 'online platforms.' Obviously, regulators assumed that 'the internet' largely behaved like YouTube and Facebook.

Online platforms and OCSSPs are providers of intermediary services (the parent category); in particular, they fall under the general category of providers of 'hosting service', that is, the storage of information provided by, and at the request of, a recipient of the service. Online platforms can be considered OCSSPs when they play an important role in the online content market by competing with other online content services for the same audiences and additionally give the public access to a large amount of copyright-protected content, which is organized and promoted for profitmaking purposes.

2.2.3. A Good-Samaritan Clause?

Art.7 DSA incorporates a Good Samaritan clause, promising that intermediaries will not automatically lose immunity from liability 'solely' because they carry out voluntary measures aimed at detecting and removing illegal content in good faith, or take the necessary measures to comply with the requirements of Union law.[1189] The Good Samaritan protection also applies

[1184] Art.3(g)(iii) DSA
[1185] Art.3(i) DSA.
[1186] Art.33(1) DSA.
[1187] Art.33-43 DSA.
[1188] Krokida Z (2022) 161.
[1189] Peguera M (2022); Recital 25 DSA.

to 'measures taken to comply with the requirements of Union law, including those set out in this Regulation as regards the implementation of their terms and conditions.'[1190]

Noteworthy, there is a major difference between the Good Samaritan Clause in the CDA and the DSA. The former regulation provides intermediaries with full protection when they do not act against illegal content covered by Section 230(c), regardless of whether they have knowledge of it or not.[1191] In another words, Section 230 not only protects intermediaries from liability for failing to remove harmful or illegal content, but it also protects them from liability for engaging in the removal of potentially harmful or illegal content, provided the measures are taken in good faith.[1192] The Good Samaritan Clause under the CDA aims 'to encourage telecommunications and information service providers to deploy new technologies and policies' to block or filter offensive material.[1193] Hence, with this absolute assurance, Good Samaritans are incentivized to adopt voluntary monitoring measures and engage in self-regulation.[1194] However, Section 230 is not a perfect piece of legislation, as it may be overprotective in some respects and under-protective in others.[1195] By tracing the historical background of CDA, Kosseff summarized two enduring purposes of Section 230 as 'providing [intermediaries] with the flexibility to moderate' and 'promoting free speech and online innovation by helping [intermediaries] to flourish.'[1196] Scholars also suggest that an overbroad reading of Section 230 gives free passes to ignore abusive Bad Samaritans' illegal activities while ensuring that abusers cannot be identified, thus devaluing the efforts of the latter purpose,[1197] and at the same time may result in excessive removal on intermediaries' own initiatives in practice.[1198]

In a different way, the European Good Samaritan Clause may also lead to certain disadvantages. Recital 25 states that 'any such activities and measures that a given provider may have taken should not be taken into account when determining whether the provider can rely on an exemption from liability.' Having said that, adopting voluntary measures in good faith and in

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[1190] Ibid.
[1191] Goldman E (2020) 167-68.
[1192] Johnson A & Castro D, 'How Other Countries Have Dealt With Intermediary Liability' (Information Technology and Innovation Foundation, 2021) <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability/>
[1193] S. Rep. NO.104-23, 59 (1995).
[1194] Gabison GA & Buiten MC (2019) 242.
[1195] Balkin JM (2008) 434.
[1196] Kosseff J (2023).
[1197] Citron DK and Wittes B (2017) 423.
[1198] Volpe B (2019); Horton B (2021).

a diligent manner neither guarantees nor precludes neutrality, and they may still lose immunity.[1199] The question of whether the unsuccessful outcome of voluntary actions undertaken by providers would fall into the scope of 'diligent manner' under this provision remains unclear and needs to be determined on a case-by-case basis.[1200] Furthermore, recital 22 states that intermediaries' own-initiative investigations could trigger actual knowledge or awareness of illegal content, thus resulting in losing safe harbor protection.[1201] In other words, implementing proactive monitoring measures strengthens providers' capability to discover illegal content, which in turn further increases the probability of their exposure to liability.

2.2.4. Obligations for Host Services and VLOPs

Aiming to modernize the existing legal framework for digital services laid down by the ECD, the DSA introduces a general framework for the provision of intermediary services.[1202] The DSA abandoned the 'one size fits all' ideology but embraces a 'one size fits some' design, requiring all providers of intermediaries services to bear basic due diligence obligations,[1203] and adopting a tiered structure with four horizontal layers[1204] targeting different types of obligations on different types of providers of intermediary services, namely intermediaries, hosting providers, online platforms, and VLOPs.[1205]

For the widest subcategory, all intermediaries are subject to general due diligence obligations, including establishing a single point of contact or designating a legal representative,[1206] incorporating certain information in the provider's terms and conditions[1207] as well as complying with transparency reporting duties.[1208] Notably, Art.14 DSA allows powerful intermediaries to suppress legal content based on their T&Cs, thereby vesting the power of formulating adequate rules for online communication in the intermediaries.[1209] The DSA also positions intermediaries at a 'gordian knot' of fundamental rights and public interest pertaining

[1199] Kuczerawy A, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act' (Verfassungsblog, 12 January 2021) <https://verfassungsblog.de/good-samaritan-dsa/>
[1200] Ibid.
[1201] Van Hoboken J et al. (2018).
[1202] Wilman F (2022).
[1203] Art.11-15 DSA.
[1204] Art.33 and recital 76 DSA.
[1205] Peukert A et al. (2022).
[1206] Art.12 and 13 DSA.
[1207] Art.15 DSA.
[1208] Art.13, 23, 33 DSA.
[1209] Janal R, 'Eyes Wide Open' (Verfassungsblog, 7 Sept. 2021) <https://verfassungsblog.de/power-dsa-dma-15/>

to various affected stakeholders, namely users, content providers, intermediaries, and states.[1210] Particularly, Art.14(4) requires intermediaries to apply the above restriction 'in a diligent, objective and proportionate way' that respects the 'fundamental rights of the recipients of the service as enshrined in the Charter.'[1211]

In addition, Art.16 requires providers of hosting services, including online platforms, to implement an easily accessible and user-friendly notice-and-action mechanism, that allows any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Although there is no notification requirement before acting against high-volume commercial spam, intermediaries must provide redress systems even when action is taken against such spam. Additionally, intermediaries' decisions on complaints cannot be based solely on automated means.[1212] Moreover, regarding additional obligations applicable to online platforms, the DSA upgrades the internal complaint-handling mechanism and reporting obligations to supervisory authorities.[1213] Art.21 introduces out-of-court dispute resolution mechanisms, including the introduction of trusted flaggers and precautions against the abuse of complaints. Noteworthy, a carve-out exception is provided for micro and small enterprises, which means these additional obligations shall not apply to them.[1214] For VLOPs, they have to not only undertake the abovementioned obligations, but also obligations with regard to risk management, data access, compliance, and transparency, as well as the implementation of an independent audit.[1215]

Notably, intermediaries must bear all fees charged by the out-of-court dispute settlement body if the decision is in favor of the user. Conversely, the user is not required to reimburse any of the intermediaries' fees or expenses if they lose, unless the user has manifestly acted in bad faith. Furthermore, Art.23 prescribes a specific method to address repeat offenders who submit manifestly unfounded notices: initially issuing a warning explaining the issue with the notices, followed by a temporary suspension if the behavior persists, without imposing additional constraints on bad-faith offenders.[1216] The intermediary must provide the notifier with the redress options identified in the DSA, and although intermediaries may implement stricter

[1210] Ibid.
[1211] Art.14(4) and recital 22 DSA.
[1212] Art.20 DSA.
[1213] Ibid.
[1214] Art.19 DSA.
[1215] Art.33-43 DSA.
[1216] Art.23 DSA.

measures for manifestly illegal content related to serious crimes, they are still required to uphold these procedural rights. Despite the supposed limits on bad faith, it is possible to misuse the procedural mechanisms to harass other users and burden intermediaries by filing notices and appealing the denial of notices.[1217] Thus, the mandated one-size-fits-all due process in the DSA might be problematic, as full due process for every moderation decision benefits larger companies while hindering new market entrants by increasing their costs of growth or limiting their growth potential.[1218]

2.2.5 Blurred Intersection with Art.17 DSMD

Both Art.17 DSMD and multiple provisions of the DSA impose additional liability and obligations on intermediaries for the illegal content they host, as the former specifically targets copyright-infringing content in a more targeted, sector-specific manner and the latter generally focuses illegal content in a horizontal approach.[1219] Importantly, the specific rules and procedures contained in Art.17 DSMD for OCSSPs are considered *lex specialis* to the DSA.[1220] That means the OCSSP liability regime and procedures under Art.17 DSMD should remain unaffected by the DSA.[1221] Thus, the DSMD and the DSA complement each other.[1222] The DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by Art.17 DSMD and specific rules on matters where Art.17 DSMD leaves a margin of discretion to Member States.[1223] On the one hand, it is clear that the notion of OCSSP covers at least certain online platforms and VLOPs. The special 'copyright' regime for OCSSPs only relates to the copyright-relevant portion of an intermediary that qualifies as an OCSSP. On the other hand, the DSA regulation is complementary to Art.17 and imposes a number of additional obligations on intermediaries that qualify as OCSSPs. Such *lex specialis* does not preclude the application of the DSA in certain cases to copyright content-sharing intermediaries whether or not they qualify as OCSSPs.[1224]

Since Art.17(3) para 2 DSMD states that the hosting safe harbor of Art.14 ECD (correspondingly Art.6 DSA) still applies to OCSSPs 'for purposes falling outside the scope of

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[1217] Tushnet R (2023) 928.
[1218] Ibid, 929.
[1219] Peukert A et al. (2022).
[1220] Quintais JP & Schwemer SF (2022) 204.
[1221] Recital 10 and 11 DSA.
[1222] Recital 9 DSA.
[1223] Quintais JP & Schwemer SF (2022) 204; Quintais et al. (2024) 162; Peukert A et al. (2022) 361.
[1224] Peukert A et al. (2022) 361-362.

this Directive,' Art.17 DSMD applies if the relevant information or content hosted by the intermediary relates to copyright, while the DSA applies if the relevant content hosted by the intermediary relates to hate speech or any other illegal information. That means, the liability rules and exemptions outlined in Art.17 DSMD are specialized for OCSSPs and fall under vertical regulation, differing from the framework introduced in Art.14 ECD and upheld in Art.6 DSA, which follow a horizontal regulatory model. In simpler terms, the DSA rules apply universally to all types of content and liability across various legal areas, such as IP, defamation, and online hate, except when it comes to the protection of copyright and related rights in the Internal Market.[1225] Despite the legal uncertainty in this regard, OCSSPs are subject to both provisions in the DSA's liability framework and due diligence obligations as regards the substance of notices, complaint and redress mechanisms, trusted flaggers, protection against misuse, risk assessment and mitigation, and data access and transparency. Although the regimes have similarities, their structural differences and the lack of harmonization may lead to further fragmentation.[1226] Thus, the Commission should clarify in its Guidance that the obligations of Art.14 DSA apply to OCSSPs, particularly the obligation in para (4) to apply and enforce content moderation restrictions with due regard to the fundamental rights of the service recipients, such as freedom of expression.[1227]

3. China: Backdoors for Filtering Obligations

Arguably, the modifications made during China's transplantation of DMCA safe harbors have influenced courts to shift from a contributory infringement framework toward a 'nonfeasance liability' model, where intermediary liability is based on the failure to fulfill specific duties. In practical terms, these changes have made the indirect liability of intermediaries in China more flexible, breaking away from the rigidity of the U.S. safe harbor rules and allowing possibility for enhanced liability. However, this increased flexibility has come at the expense of weakening the role of contributory infringement and the safe harbor rules in limiting the liability of intermediaries. Indeed, expansive interpretations of duty of care by courts increase intermediaries' vulnerability to liability and further blur the line between duty of care and general monitoring obligations. In addition, judicial rulings and administrative regulations are

[1225] J Quintais JP & Schwemer SF (2022).
[1226] Peukert A et al. (2022).
[1227] Quintais JP et al. (2024) 174.

increasingly requiring intermediaries to assume proactive obligations for monitoring and filtering content, gradually expanding the scope of necessary measures.[1228]

3.1. All-inclusive Duty of Care

As previously noted, China has reinterpreted the Section 512(c) DMCA as a basis to establish the constitutive elements of indirect liability for intermediary during the transplantation process. Moreover, courts interpreted the term 'should know' as 'have reason to know' and 'should have known,' thus imposing on host intermediaries certain duties of care to cease and prevent infringement. As a result, the primary factor in determining the indirect liability of intermediaries is whether they have fulfilled their duty of care. However, since Chinese legislation lacks clear provisions on duty of care, and courts offered diverse interpretations of the duty of care in judicial practice, thereby further blurring the lines between the duty of care and the monitoring obligation.

3.1.1 Expansive Duty of Care

The various deviations that occurred during the transplantation of laws regarding the indirect liability of intermediaries in China have led to significant differences in the basic logic and approach to the application of law in such cases compared to the U.S. model, ultimately undermining the role of contributory infringement as the foundation for the indirect liability of intermediaries. Nevertheless, the indirect liability of intermediaries has evolved into a form of negligence-based liability, where the duty arises from the intermediaries' prior act of offering internet services in violation of their duty of care.

The introduction of the concept of negligence with the 'should have known' standard has fundamentally changed the way the subjective state of mind of intermediaries is determined in cases of indirect liability in China. As previously mentioned, under U.S. law, both the 'reason to know' and the 'red flag' standards emphasize presuming an intermediary's knowledge of user infringement based on specific facts without imposing any duty on the provider.[1229] However, negligence, as the subjective element of tort liability, typically occurs as the duty-bearers breach their duty of care.[1230] With the introduction of negligence into the assessment of whether intermediaries have knowledge of users' infringing activities, Chinese courts

[1228] Xiong Q (2023) 123.
[1229] Heymann LA (2020) 343.
[1230] Goldberg JCP and Zipursky BC (2010) 72-3.

commonly examine whether these intermediaries have fulfilled their duty of care regarding such infringing activities. Once they fail to perform their duty of care, it is deemed that they are subjectively at fault.[1231]

This duty-of-care-centric legal reasoning is fundamentally different from the U.S. and EU models. Under the guidance of the duty of care, the factors considered in determining the subjective fault of intermediaries have been expanded in practice. Regarding how to determine the duty of care for intermediaries, Chinese scholars generally advocate for the introduction of the abstract 'diligent operator' standard from tort doctrines.[1232] In judicial practice, Chinese courts have gradually clarified the main factors to consider when determining the duty of care for intermediaries. For example, in copyright infringement cases, the SPC had stated that 'consideration should be given to the characteristics of the internet and the works disseminated online, the services and behaviors provided, the works involved, and the current state of technology.'[1233] Apart from the factor of whether users' infringing activities are apparent, other flexible criteria for determining whether an intermediary 'should know' about infringing activities are also considered, such as the business model of the intermediary, its capability of information management, the feasibility and reasonableness of preventive measures, and whether the provider profits from the infringement.[1234] This broad standard for determining whether an intermediary 'should know' not only retains relevant factors from contributory infringement but also incorporates considerations originally related to inducement and vicarious liability under U.S. case law.[1235] Legislators also warn that, 'in judicial practice, courts should exercise caution when determining that an intermediary "should know" that users were using its services to commit infringement. If the standard for this determination is too broad, it could effectively impose a general monitoring obligation on intermediaries.'[1236] Interestingly, although commentors note that incorporating the duty of care as the standard for determining 'should know' standard allows the subjective element of intermediary liability in China to largely move away from the red flag test, thereby avoiding the rigid limitations of the safe harbor rule,[1237] the expansive nature and over-inclusive of duty of care in judicial practice may cause unbearable costs to intermediaries.

[1231] [2014] GMZZ No.2045.
[1232] Wu H (2011) 42.
[1233] [2009] MSZZ No.2.
[1234] Art.9-12 of 2020 Provisions.
[1235] Zhu D (2019) 1353.
[1236] Huang W (2020) 2321.
[1237] Zhu D (2019) 1353.

Moreover, intermediaries are subject to 'a higher duty of care' that 'aligns with their information management capabilities' under certain circumstances.[1238] This means that when intermediaries possess the capacity and technological resources to identify and prevent copyright infringement at a reasonable cost, it is reasonable to require them to fulfill a higher level of duty of care to monitor user uploads.[1239] Recently, as algorithms increasingly enhance the efficiency of content recommendation on intermediaries, both the judiciary and academia have argued that these algorithmic tools not only improve recommendation accuracy but also significantly bolster the intermediaries' information management capabilities, thereby necessitating a corresponding elevation in the intermediaries' standard of care.[1240] Additionally, the 2020 Provisions impose a heightened duty of care on intermediaries in specific scenarios, such as repeated infringements or cases where they derive direct financial benefits from the infringements, a principle demonstrated in judicial cases like *Shanghai Kuanyu v. Xingguang Lianmeng*[1241] and *Han Han v. Baidu*.[1242] With that said, most Chinese commercial intermediaries are subject to a higher duty of care. As a result, the trend towards expanding the duty of care to resemble a monitoring obligation has led to conflicts, primarily due to the high duty of care's ambiguous boundaries as noted in judicial documents and case rulings. Courts, aiming to enhance online copyright protection, frequently find intermediaries liable for infringement by not meeting this heightened duty of care, without clearly specifying its content and scope, thereby often imposing a 'general' monitoring obligation.[1243] Consequently, the practical expansion and theoretical ambiguity of the duty of care leave room for the imposition of copyright filtering obligations in judicial practice. Since China is not a common law jurisdiction, previous similar cases do not set binding precedents,[1244] and each judge determines the duty of care for intermediaries based on their own interpretation of the 'due diligent operators' standard.

[1238] Xiong Q (2023) 122; Wang J (2020); Si X (2018); [2016] J0108MC No.25234 (2016)京 0108 民初 25234 号民事判决书 (Upon receiving a warning notice from the rights holder, the intermediary should assume a duty to prevent infringement that is commensurate with its capabilities.)

[1239] Li C (2019); Tian X & Guo Y (2019).

[1240] [2018] J0108MC No.49421(2018)京 0108 民初 49421 号民事判决书; Cui G (2017) 237.

[1241] [2016] H73MZ No.300 (2016)沪 73 民终 300 号民事判决书.

[1242] [2012] HMCZ No.5558 (2012)海民初字第 5558 号民事判决书 (for infringing documents that Baidu 'should have been aware of' due to obvious factors, it must not only fulfill its general duty of care but also take a more *proactive* approach by exercising *a higher duty of care*.)

[1243] Ibid.

[1244] Even though judges agree that the guiding cases are binding previous court decisions as precedents, but scholars always argue that guiding cases are not 'common-law precedents.' See Jia M (2016b). While Finder shares a slightly different point by arguing the 'soft precedent' value of previous cases. See Finder S (2016).

3.1.2 Interpreting Duty of Care as Monitoring Obligations

Incorporating the duty of care into the subjective knowledge elements of intermediary liability has notably influenced judicial practice. Although Chinese private law legislation does not explicitly prohibit general monitoring obligations, Chinese jurisprudence has generally accepted this principle within the private sphere, permitting certain monitoring obligations in specific instances.[1245] This has further blurred the distinction between the duty of care and monitoring obligations in judicial practice. Although some scholars argue that the duty of care and the monitoring obligations are distinct,[1246] the practice of considering whether preemptive monitoring was performed as a significant factor in determining whether an intermediary has breached its duty of care suggests a potential conflict between the two.[1247]

In academic research, normative texts, and judicial practice, there is often no clear distinction made between the monitoring obligation and the duty of care for intermediaries, and sometimes the two are even conflated. In academic research, there are instances where the monitoring obligation and the duty of care are used interchangeably.[1248] Moreover, Art.29 of the 'Guiding Opinions on the Trial of Network Copyright Infringement Disputes' issued by the Zhejiang Higher People's Court states, '[g]enerally, intermediaries do not have the capability to monitor whether the provided information is infringing, nor are they obliged to proactively examine or monitor all the information they provide for infringement. However, intermediaries should bear a certain duty of care regarding the legality of the provided information.'[1249] It is still unclear how to distinguish the duty of care regarding the legality of the information and the monitoring obligation.

Chinese courts have not entirely adhered to the general monitoring obligation ban. Instead, they have adopted expansive interpretation of the duty of care, thus imposing certain levels of monitoring obligations (arguably with a general nature) on intermediaries based on the specific facts of each case.[1250] In some cases, courts may explicitly treat duty of care and monitoring/filtering obligation alike. Scholars also observe that, the duty of care, as evolved

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[1245] See Chapter III at Section 1.3.3.4.

[1246] Hu K (2009) 78; Liang Z (2018) 308-310.

[1247] Feng S (2016) 190-193; [2019]J0491MC No.22238 (2019)京 0491 民初 22238 号民事判决书 (intermediaries are not subject to proactive, general monitoring obligation);

[1248] Qi L (2009); and Song Y (2013); Xu W (2014) 165,171.

[1249] Zhejiang Higher People's Court, 'Guiding Opinions on the Trial of Network Copyright Infringement Disputes.'

[1250] [2009]MTZ No.17 (2009)民提字第 17 号民事判决书; [2015]JZMZ No.2430 (2015)京知民终字第 2430 号民事判决书.

through judicial practice, effectively equates to a general monitoring obligation.[1251] For example, the Shanghai Pudong New Area People's Court opined that 'even if the involved works are indeed stored on third-party websites, the linking website should bear a duty of care to examine the legality of the linked web page's content due to the cooperative relationship between the linking website and the third-party website.'[1252] In *Zhong Qing Wen v. Baidu*, the Beijing Higher People's Court held that information storage space providers, knowing that certain highly read documents are not authorized by the rights holders, are subject to a higher duty of care. This requires the involved intermediary to actively contact the uploaders, verify whether the documents are original or legally authorized, and take effective measures to prevent or stop copyright infringement.[1253] In *Tencent v. Douyin*, the court held that when an intermediary directly obtains financial benefits from infringing activities, it should bear a higher duty of care and should proactively review user-uploaded videos using reasonable and effective technology.[1254] In *Tencent v. Weibo*, the court further emphasized that an intermediary's management of infringing activities should not be limited to implementing an NTD system; instead, the court interpreted duty of care as proactive filtering obligations by stating that 'the intermediary should also involve a reasonable duty of care to adopt more proactive management, filtering, and review measures.'[1255] What is even worse, unlike the CJEU, the Chinese courts did not specify the 'general' and 'specific' nature of monitoring obligations in their legal reasoning.

3.1.3 A Higher Duty of Care Arising From Public Law Monitoring Obligations

In practice, the monitoring obligations under public law conflict with 'no general monitoring obligations' principle under private law when intermediaries conduct content moderation on their services. Specifically, the courts misinterpreted the monitoring obligation set by an explicit statutory requirement of public law as a duty of care, thus turning the safe harbor into an empty shell. In addition, fulfilling public law monitoring obligations may expose intermediaries to civil liability due to their actual knowledge concerning the existence of infringing content.

[1251] Yu T (2019) 128.
[1252] [2011]PMS(Zhi)CZ No. 134 (2011)浦民三(知)初字第 134 号民事判决书. In another case, the same court held that the defendant, as a video-sharing website, should have a higher duty of care to examine the films uploaded by users to its website. [2008]PMS(Zhi)CZ No. 440 (2008)浦民三(知)初字第 440 号民事判决书.
[1253] [2014]GMZZ No.2045.
[1254] [2019]Y0192MC No.1756 (2019)粤 0192 民初 1756 号民事判决书.
[1255] [2021]S01ZMC No.3078 (2021)陕 01 知民初 3078 号民事判决书.

On the one hand, monitoring obligations established in public law conflict with the 'no general monitoring obligations' principle in private law. Public law monitoring obligations encompass not only content that violates public law norms, but also content that violates private law norms.[1256] Under private law, infringing content is subject to NTD mechanism, it may, however, violate 'Eleven Boundaries' stipulated in administrative regulations and thus fall within the scope of the public law monitoring obligation. In fact, the overinclusive monitoring obligations under public law have given rise to legal conflicts that unfairly distorted the knowledge-based standards establishing intermediary liability. In judicial practice, courts directly interpreted the public law monitoring obligation into a duty of care and determined that intermediaries failed to fulfill its duty of care where they failed to perform public law monitoring obligations against online illegal content.[1257] The logic behind such legal reasoning indicates that, by virtue of their public law monitoring obligation, intermediaries are presumed to have a corresponding monitoring obligation under private law. More importantly, courts implied that intermediaries should bear civil liability if they failed to perform their monitoring obligations. Such unreasonable decisions not only imposed unduly heavy-headed burdens on intermediaries but also eroded the distinction between public law monitoring obligations and private law monitoring obligations.

On the other hand, in certain exceptional circumstances, the level of duty of care for intermediaries may be significantly elevated, resulting in constructive knowledge with regard to potential infringements.[1258] For example, an intermediary providing the information storage space service has constructive knowledge of a user's infringement of the right of communication to the public on information networks, if the intermediary substantially accesses the disputed content or establishes a dedicated ranking for them on its own initiative.[1259] When performing their public law monitoring obligations, whether an intermediary would be considered to have substantially accessed third-party content by monitoring or reviewing it, and thus be required to assume a higher level of duty of care, remains unanswered in this judicial interpretation.

[1256] Art.15 of Administrative Measures for Internet Information Services.
[1257] [2004]SZMSCZ No.098 (2004)苏中民三初字第 098 号民事判决书; [2008]SZFMSZZ No.119 (2008)穗中法民三终字第 119 号民事判决书.
[1258] The 2020 Provisions.
[1259] [2021]J73MZ No.220 (2021) 京 73 民终 220 号民事判决书.

However, Chinese courts have held that, when reviewing the legality of uploaded contents, the human reviewer can make preliminary judgments on whether the content infringes on the rights of others by drawing upon their common sense and professional expertise.[1260] The Beijing Internet Court ruled that, in order to comply with the monitoring obligation set in administrative regulations, the defendant, a video sharing provider, is obliged to monitor and review the uploaded content to prevent the dissemination of illegal content. The court further explained that, 'although such monitoring does not directly target copyright infringing content, it is not difficult for a professional video sharing provider, to be aware that uploading a whole movie to its website has a high risk of infringing upon others' copyright.'[1261] Therefore, the court held the defendant liable as it had constructive knowledge of the infringement and failed to perform its duty of care. The legal reasoning in this decision implies that, since intermediaries must fulfill their public law monitoring obligations by monitoring illegal content, they should also be aware of potential copyright infringement within the content being monitored.

The current legal framework generally dictates that an intermediary's knowledge of infringing content triggers liability, creating an incentive structure where systematic content monitoring results in increased responsibility. Therefore, intermediaries are faced with the dilemma that, if they fail to fulfill their monitoring obligation set by public law, they are deemed to have committed a fault that contributes to the occurrence of the infringement, for which they must assume administrative liability.[1262] At the same time, they need to conduct ex ante monitoring of content uploaded to fulfill the monitoring obligation set by public law, which means they have had constructive knowledge of the existence of infringing content and thus may bear a higher level of duty of care. Upon the existence of infringing content on an intermediary, there is a high probability that it will be considered to have constructive knowledge regarding the existence of such content and thus be held liable. That said, intermediaries risk losing their safe harbor protection if they take proactive measures to address illegal and harmful content.

3.2. Undefined Necessary Measures: Backdoor for Monitoring Obligations

'Measures' is a term of art which includes a range of steps that can be taken as a form of governance or regulation, usually in relation to specific kinds of content or conducts. Under

[1260] [2008] HGMS (Zhi) ZZ No.62 (2008) 沪高民三(知)终字第 62 号民事判决书.
[1261] [2019] J0491MC No.16240 (2019)京 0491 民初 16240 号民事判决书.
[1262] Art.20 of Provisions on the Administration of Private Network and Targeted Communication Audiovisual Program Services.

the Civil Code,[1263] ECL,[1264] and copyright-related judicial interpretation,[1265] after obtaining knowledge of the infringement, intermediaries should take 'necessary measures' to cease copyright infringements. The interpretation of 'necessary measures' is of great importance as it delineates the scope of liability for intermediaries. However, the relevant laws do not specify the particular measures constituting 'necessary measures,' leaving it to the courts to interpret and apply 'necessary measures' based on the facts of individual cases.

3.2.1 Introducing Monitoring Obligations Through 'Necessary Measures'

As previously mentioned, general monitoring under private law is prohibited under current Chinese copyright law. Art.8 para 2 of 2020 Provisions confirms that where an intermediary fails to conduct proactive examination regarding a user's infringement of the right of communication to the public on information networks, the people's court shall not determine on this basis that the intermediary is at fault.[1266] In addition, where an intermediary proves that it has taken reasonable and effective technical measures but still finds it difficult to detect a user's infringement of the right of communication to the public on information networks, the court shall determine that the intermediary is not at fault.[1267] Particularly, the Civil Code inherits the spirit of the above judicial interpretation by not requiring intermediaries to undertake a general monitoring obligation.

On the one hand, according to Art.1195 Civil Code, upon receiving a notice, the specific 'necessary measures' are determined based on 'preliminary evidence' and the type of 'service provided.'[1268] This does not exclude the possibility that, in individual cases, proactive measures amounting to general monitoring, such as filtering and blocking, could be deemed 'necessary.' In fact, the obligation to take 'necessary measures' to stop or prevent the infringement is indeed considered a legally mandated duty of care for intermediaries in judicial practice. For example, Beijing Higher People's Court concluded that intermediaries should bear 'nonfeasance liability' for infringement if they knew or should know of users' infringing activities and failed to promptly take necessary measures to prevent the infringement.[1269]

[1263] Art.1195 Civil Code.
[1264] Art.42 ECL 2018.
[1265] Art.7 of 2020 Provisions.
[1266] Art.8 para 2 of 2020 Provisions.
[1267] Ibid., Art.8 para 3.
[1268] Art.1195 Civil Code.
[1269] [2014]GMZZ No.2045.

On the other hand, state authorities have demonstrated some openness towards the implementation of copyright filtering measures as a means of addressing online piracy. The NCAC requires cloud storage service providers to 'implement robust monitoring mechanisms, including advanced technologies like automated content recognition and filtering systems, to detect and prevent the uploading and sharing of infringing content.'[1270] Specifically, cloud storage service providers must take effective measures to prevent users from illegally uploading, storing, and sharing 'works that have been removed based on rightsholders' notices, works for which the rightsholder has sent a notice or declaration to the providers, and works identified as priority for regulation by the copyright administration authorities.'[1271] Additionally, effective measures should also be employed to prevent users from illegally uploading, storing, and sharing unauthorized works that are currently trending or popular, unauthorized works published or produced by professional entities such as publishing houses, film studios, and music companies, or works that are clearly identifiable as unauthorized.[1272] According to the Notification, it is clear that to effectively prevent the dissemination of illegal content, cloud storage service providers should conduct an *ex ante* review of user uploads to determine if they fall into any of the six specified categories of works. That is to say, cloud storage service providers are imposed a *general* monitoring obligation to review the legality of *all* content uploaded by users.[1273] Therefore, this Notification, as a departmental rule, significantly deviates from the principle prohibiting general monitoring obligations established in the 2020 Provisions, effectively introducing proactive general monitoring obligations for cloud storage service providers. Apart from the above monitoring measures, those intermediaries must establish mechanisms to address infringing users, including actions such as blacklisting, suspending, or terminating services based on the severity of the infringement.[1274]

In summary, this Notification expands the scope of 'necessary measures' by designating 'monitoring' as a type of 'necessary measure' for detecting and preventing the future uploading

[1270] Art.2 of Notification on Regulating Copyright Order for Cloud Storage Services; NCAC, 'The National Copyright Administration released the "Notification on Regulating Copyright Order for Cloud Storage Services" to further strengthen copyright regulation of cloud storage services' (20 Oct. 2015) <https://www.ncac.gov.cn/chinacopyright/contents/12227/345248.shtml>

[1271] Ibid, Art.5

[1272] Ibid, Art.6.

[1273] Angelopoulos C & Senftleben M (2021), emphasis added.

[1274] Art.10 of Notification on Regulating Copyright Order for Cloud Storage Services.

of infringing content, while incorporating various measures to restrict users' ability to disseminate such content. The NCAC reiterated these points in its 2016 'Notification on Strengthening the Copyright Management of Online Literary Works,' emphasizing that 'cloud storage service providers offering information storage space must comply with the Notification by proactively blocking and deleting infringing literary works, and preventing users from uploading, storing, and sharing such infringing content.'[1275] During the 2018 Sword Net Campaign, the NCAC explicitly required all local copyright administrations to actively leverage the technical advantages of internet operators and copyright monitoring agencies to enhance the efficiency of detecting, analyzing, and addressing online piracy.[1276] Moreover, copyright administrations are increasingly seeking to impose greater responsibilities on intermediaries through extra-legal approaches, requiring them to implement measures to prevent piracy.[1277]

3.2.2 Filtering as A Necessary Measure in Judicial Practices

The concept of 'necessary measures' is inherently indeterminate, and the extent to which 'necessary measures' should be applied must be determined based on practical needs. Under the guidance of the 'duty of care,' Chinese courts are granted a vast discretion to assess whether the specific measures taken by intermediaries are necessary, determining if they fulfill legal duty of care requirements based on the case's actual circumstances, thus allowing for potential increases in intermediary liability.[1278] In particular, courts held that, in addition to promptly disconnecting links, intermediaries should actively take other reasonable measures to prevent infringement, based on a series of open-ended factors including 'the nature and manner of the services they provide, the likelihood of infringement, and their information management capabilities.'[1279] In a notice regarding trial of IP cases involving e-commerce intermediaries, the SPC also contended that, 'if an e-commerce intermediary knows or should know that a business on its service is infringing IP rights, it must promptly take necessary measures based on the nature of the rights, the specific circumstances of the infringement, and the available

[1275] NCAC, 'Notification on Strengthening the Copyright Management of Online Literary Works' (14 Dec. 2016) <https://www.gov.cn/xinwen/2016-11/14/content5132402.htm>

[1276] NCAC, 'Notification from the National Copyright Administration on Launching the "Sword Net 2018" Special Action to Combat Online Infringement and Piracy' (20 Jul. 2018) <https://www.ncac.gov.cn/chinacopyright/contents/12548/351273.shtml>

[1277] See Chapter V Section 2.3.2; CAC, 'The NCAC had regulatory talks with 15 short video platform companies' (15 Sep. 2018) <http://www.cac.gov.cn/2018-09/15/c_1123432727.htm>

[1278] Zhu D (2019) 1354.

[1279] [2020]J73MZ No.155 (2020)京 73 民终 155 号民事判决书.

technical conditions, as well as preliminary evidence of the infringement and the type of service provided. The necessary measures should adhere to the principle of *reasonable prudence*, which may include, but are not limited to, actions such as deleting, blocking, or disconnecting links.'[1280] Specifically, in cases involving intermediaries providing information storage spaces services, judicial precedents have surpassed the NTD mechanism, adopting 'proactive filtering' as a more stringent 'necessary measure' based on specific facts of individual cases.

While courts may not explicitly mandate intermediaries to implement filtering measures when interpreting the 'necessary' requirement, they have significantly expanded the scope of what constitutes 'necessary' measures in judicial practice. In *iQIYI v. Douyin*, courts held that whether necessary measures were taken should be evaluated based on both formal criteria (reasonable methods and approaches) and substantive criteria (achieving the intended effect and purpose).[1281] In this case, although Douyin carried out actions such as deletion and blocking, meeting the formal requirements, these actions did not fulfill the substantive requirement of effectively preventing and stopping infringement. Therefore, the court determined that the measures taken by Douyin in this case did not reach the 'necessary' level.[1282] In *Yuan v. Baidu*, the Chengdu Intermediate People's Court held that Baidu directly obtained financial benefits from the infringing content, and therefore, should bear a higher duty of care regarding the user's infringement. Since Baidu provides information storage space for user-uploaded files and supports paid viewing and downloading features, which significantly increase the likelihood of infringement, and given that Baidu has previously been sued under similar circumstances and should have the capability to manage such information, its heightened duty of care should extend beyond the NTD post-facto remedy to include proactive 'necessary measures' to prevent copyright infringements.[1283]

In some cases, courts explicitly considered the filtering measure as a 'necessary' measure. In a case concerning pre-litigation act preservation, the Chongqing First Intermediate People's Court issued a civil ruling, ordering the defendant Weibo Shijie to take effective measures to delete all videos infringing on the right of communication to the public on information

[1280] Art.3 of 'Supreme People's Court's Guiding Opinions on the Adjudication of Civil Cases Involving IP on E-Commerce Intermediaries 关于审理涉电子商务平台知识产权民事案件的指导意见' (10 Sept. 2020), emphasis added.
[1281] [2018]J0108MC No.49421.
[1282] Ibid.
[1283] [2020]C01MC No.8628 (2020)川 01 民初 8628 号民事判决书.

networks of the *Douluo Dalu* anime on Douyin.[1284] Referring to Douyin's published '2020 Douyin Safety Annual Report,' the court concluded that the technology for filtering and blocking infringing videos is currently available and that the intermediary possesses the necessary technical capabilities. The court further noted that 'the definition of "necessary measures" is closely linked to technological advancements, and when a particular technology becomes feasible and affordable, it is reasonable to expect intermediaries to assume the obligations of filtering and blocking, in addition to removing existing infringing videos.'[1285] Similarly, the Qingdao Intermediate People's Court ordered Bilibili to immediately take effective measures to filter and block user-uploaded videos infringing on the right of communication to the public on information network of *Yu Lou Chun* upon receipt of the ruling.[1286] The court explained that while it is reasonable for intermediaries to argue that they are not obligated to substantively filter and review content in cases involving general infringing material, this defense does not hold when considering factors such as the popularity of the infringed content, the significant investment by the rightsholders, the timely warnings and notifications from the rightsholders, and the impact on the supply of cultural products. In such cases, the intermediary's management of infringing content should not be limited to merely implementing the NTD mechanism but should also include a higher duty of care to actively manage, filter, and review the content.[1287]

Additionally, in *Kuaile Yangguang v. Kuaishou*, the court held that if the duty of care for intermediaries is limited to the NTD obligation, it creates a repetitive cycle of 'infringement-notice-removal-reinfringement-renotice-reremoval,' leaving rightsholders powerless against the frequent and widespread infringement by users within this loop. Thus, the court ruled that, upon receiving a notice, intermediaries should, based on the nature and manner of the services they offer, the likelihood of infringement, and their information management capabilities, take reasonable measures beyond merely disconnecting links to prevent repeated and ongoing infringement, thereby effectively curbing infringement and protecting rightsholders' copyright.[1288] Specifically, the court suggested that the disputed intermediary should employ

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[1284] [2021]Y01XB No.1 (2021)渝 01 行保 1 号民事裁定书.
[1285] Ibid.
[1286] [2021]L02XB No.1 (2021)鲁 02 行保 1 号民事裁定书.
[1287] Ibid.
[1288] [2021]X01MZ No.10636 (2021)湘 01 民终 10636 号民事判决书. The same was proposed by the court of first instance, [2020]X0121MC No.10977 (2020)湘 0121 民初 10977 号民事判决书.

filtering measures, such as keyword filters, to identify and remove other related infringing short videos on the service.[1289]

In the above cases, rightsholders demonstrate that under specific context, merely taking measures such as ‘deletion, blocking, or disconnection’ is insufficient to promptly stop the infringement, and therefore, these actions do not satisfy the requirement of ‘necessary measures.’ Moreover, if the infringed works are highly popular or timely, and the infringement is malicious, repetitive, or frequent, then these measures are likely inadequate for timely stopping the infringement. In such instances, ‘proactive filtering’ may be required as the necessary measure to effectively prevent further infringement.[1290] Furthermore, ‘proactive filtering’ can be considered necessary if implementing filtering measures is technically feasible and would not impose unreasonable costs on the intermediary.[1291] After all, the necessity of the measures requires not only examining whether the intermediary has ceased providing services for specific infringing activities but also considering whether these measures can effectively prevent future infringements.

In a recent case, the Guangdong Higher People’s Court ruled that the standard for determining whether cloud storage service providers have taken necessary measures is based on ‘Two Stops, One Prevention’: ‘stopping the specific infringing activity, stopping other identical infringing activities, and preventing future identical infringing acts.’[1292] The specific measures to implement the ‘stopping and preventing’ standard should vary according to the severity of the infringement. For a large number of lesser-known, non-popular works that are not on the priority protection watchlist, disabling the ‘share’ functionality of the files linked to the infringing content is typically sufficient to achieve the desired effect of stopping and preventing further infringement, but not sufficient for known, popular works on the priority protection list.[1293] The court held that ‘an important standard for evaluating “necessary measures” is whether a balance of interests can be achieved among rightsholders, intermediaries, and users while effectively protecting copyright.’ ‘Necessary measures’ generally refer to actions sufficient to stop the infringing activity in question and prevent the further spread of harm

[1289] [2021]X01MZ No.10636.
[1290] [2021]Y01XB No.1; [2021]L02XB No.1.
[1291] [2021]Y01XB No.1 (‘the defendant possesses the capability to filter and block infringing videos and has not provided evidence that the costs associated with using this technology are unsustainable’)
[1292] [2022]YMZ No.59 (2022)粤民再 59 号民事判决书. First instance: [2017]Y0106MC No.25288 (2017)粤 0106 民初 25288 号民事判决书; Second instance: [2019]Y73MZ No.3881 (2019)粤 73 民终 3881 号民事判决书.
[1293] [2022]YMZ No.59.

caused by the infringement, without causing disproportionate harm to intermediaries or users.[1294] However, in cases of 'obvious infringement,' such measures may also include actions to prevent others from committing similar infringing acts and to prevent the recurrence of such acts, including suspending or terminating the repeated infringers' accounts or implementing copyright filtering measures for popular shows with initial evidence of infringement.[1295] In this case, the intermediary merely deleted the infringing link without disabling the associated file-sharing functionality, thereby failing to meet the required standards for stopping and preventing infringement and rendering the measures insufficient and unreasonable.[1296]

In summary, the cases discussed reflect a general trend in which courts broadly interpret the open-ended term 'necessary measures,' taking into account the nature and manner of the services provided by intermediaries, the likelihood of infringement, and the intermediaries' information management capabilities. By emphasizing the need for 'necessary measures' to 'stop and prevent' infringing activities, courts often consider filtering measures as 'necessary,' thereby imposing *de facto* 'filtering obligations' on intermediaries in judicial practice. In practice, the NTD mechanism has evolved into a 'notice-and-block' mechanism due to the widespread use of algorithmic filtering technology by Chinese intermediaries.[1297]

3.3 Call for Copyright Filtering Obligations in China

A central debate in the third amendment to the Copyright Law of the People's Republic of China ('2020 CCL') and the ongoing intermediary liability reforms concerns the potential introduction of mandatory copyright filtering obligation and substantial modifications to safe harbor rules.[1298] The rising frequency of copyright infringement on content-sharing platforms has led to widespread concern that existing safe harbor provisions are ineffective and are being exploited by intermediaries to avoid responsibility.[1299] Some scholars suggested that China should decisively abandon the American-style safe harbor rules and impose a copyright filtering obligation on intermediaries.[1300] That means, intermediaries should be imposed a

[1294] Ibid.
[1295] Ibid, 83.
[1296] Ibid.
[1297] Zhang H (2024) 143.
[1298] Zhang J & Tian X (2019).
[1299] Liu Y & Li Y (2023) 138.
[1300] Cui G (2017).

mandatory copyright filtering obligation, using content identification and filtering technologies to prevent the spread of infringing content before they are uploaded.[1301]

Proponents argue that advances in copyright filtering technology now enable efficient and cost-effective automated prevention of infringing uploads, offering a superior alternative to manual content review.[1302] The specific obligations could include filtering obligations upon the rightsholder's request,[1303] proactive ex-ante filtering obligations,[1304] or a hybrid model requiring both request-based filtering and proactive screening of manifestly infringing content.[1305] However, other scholars caution against hastily imposing *ex ante* filtering obligations on intermediaries and oppose codifying mandatory copyright filtering mechanism into the law.[1306] While opposing a statutory filtering obligation for intermediaries, some scholars advocate for the introduction of a 'right clearance obligation' and a 'filtering *mechanism*' for intermediaries to better support the evolving Chinese content industry.[1307]

Later, during the 2022 Two Sessions,[1308] several NPC deputies and CPPCC members proposed reinforcing the 'primary responsibility' of intermediaries by enhancing their technical capabilities and review mechanisms. They advocated for stricter proactive measures against copyright infringements, urging legislation to explicitly mandate short video intermediaries to conduct pre-upload content reviews.[1309] Furthermore, recent local legislation in Beijing and Guangdong Province explicitly requires intermediaries to implement 'preventive measures against infringement that are commensurate with their technological capabilities, business scale, and service types.'[1310] Critics contend that the broad concept of 'preventive measures

[1301] Ibid.
[1302] Ning Y (2020) 156.
[1303] Feng X & Xu Y (2020).
[1304] Chu M (2020); Yu T (2019) 3; Zhang X & Shangguan P (2021).
[1305] Cui G (2017); Zhang Y (2023).
[1306] Tan Y (2019); Wan Y (2021).
[1307] Xiong Q (2023).
[1308] Two sessions are the 'annual sessions of the National People's Congress (NPC)' and 'the National Committee of the Chinese People's Political Consultative Conference (CPPCC).' See NPC&CPPCC Annual Sessions 2022 <http://en.people.cn/102775/417253/index.html>
[1309] 'NPC deputies and CPPCC members are focusing on short video copyright infringement and have suggested increasing penalties for such violations' (GMW.cn, 15 Mar. 2022) <https://m.gmw.cn/baijia/2022-03/15/35588784.html>
[1310] 'Beijing IP Protection Regulations' (effective on 1 Jul. 2022) <http://www.bjrd.gov.cn/zyfb/zt/fzxcjyzl/fgtl/bjszscqbhtl/tlyw/>, Art.28(2); 'Guangdong Province Copyright regulation' (effective on 1 Jan. 2023) <https://www.cnbayarea.org.cn/policy/policy%20release/policies/content/post_1025093.html>, Art.22.

against infringement' provides legal grounds for implementing filtering obligations, addressing the previous lack of statutory basis for imposing such duties through judicial interpretation.[1311]

Moreover, in December 2021, the China Netcasting Services Association introduced industry self-regulation standards requiring short video intermediaries to review the legality of copyrighted content.[1312] Specifically, this self-regulation standards requires short video intermediaries to proactively monitor short videos copyright infringements, mandating content moderation for derivative audiovisual works and prohibits 'unauthorized editing or adaptation of movies, TV shows, online dramas, and other audiovisual programs or segments.'[1313] Interestingly, it builds upon two existing public laws: the ten standards listed in Art.16 of Administrative Provisions on Internet Audiovisual Program Service (2015) and 94 standards listed in Art.7-11 of Chapter IV of the General Provisions on Reviewing of Content in Online Audiovisual Programs.[1314] The coverage of content moderation is jaw-dropping expansive, including short video programs, along with their titles, names, comments, Danmaku, and emojis, and language, performance, subtitles, scenery, music, and sound effects.[1315] The 2021 White Paper on Copyright Protection for Short Videos in China also emphasizes that short video intermediaries should fulfill their primary responsibilities by establishing a database for audiovisual works and advancing copyright filtering and review mechanisms.[1316] Meanwhile, some large intermediaries have begun voluntarily exploring proactive regulatory mechanisms or adopting filtering technologies for *ex-ante* copyright review. For instance, Douyin's 2021 Q4 Safety Transparency Report mentioned that it has introduced two security features, namely 'Fan Removal' and a 'Homogenized Content Blacklist,' targeting suspected plagiarized content designed to attract attention. Relatedly, these features are part of an effort to establish a database for intelligent analysis and real-time monitoring of homogenized content.[1317]

Overall, despite the lack of explicit legal requirements for copyright filtering in China, intermediaries have voluntarily implemented filtering technologies to combat infringement—

[1311] He L & Dai X (2024).
[1312] China Netcasting Service Association, 'Standards and Detailed Rules for the Review of Online Short Video Content (2021) 网络短视频内容审核标准细则(2021)' (16 Dec. 2021) <http://www.cnsa.cn/art/2021/12/16/art_1488_27573.html>
[1313] Ibid, Art.93 under section 21 of Chapter II.
[1314] Ibid.
[1315] Ibid.
[1316] 12426 Copyright Monitoring Center: 2021 White Paper on Copyright Protection for Short Videos in China (2021 年中国短视频版权保护白皮书) <https://mp.weixin.qq.com/s/OaQ8E4QkUB9ALa3rrOfvLQ>
[1317] 'Douyin Safety Center: 2021 Q4 Douyin Safety Transparency Report' <https://mp.weixin.qq.com/s/QYZlY9VKDYUxQipwfr_t-A>

a practice that has gained growing support from both courts and regulators. Since 2020, there has been a growing call at the policy level in China to 'strengthen the responsibilities of large intermediaries' and enforce their 'primary responsibilities,' positioning intermediaries as gatekeepers for legal intervention and oversight in various governance issues at all stages—before, during, and after they arise.[1318]

4. Copyright and Algorithmic Censorship Cross Path?

When traditional legal channels prove ineffective in resolving conflicts between intermediaries and copyright industries, these power struggles often shift to less transparent venues such as intermediary self-regulation.[1319] Both the DSMD and DSA impose heightened obligations on intermediaries, but simultaneously grant them with unprecedented powers to moderate content online. Such powers have a double-edged nature, being both necessary and potentially dangerous.[1320] The recent EU regulations, which effectively outsource fundamental rights obligations to intermediaries, are likely to lead to human rights violations rather than enhance fundamental rights protection. The shift toward voluntary filtering gives intermediaries significant control over information flow, making their content decisions less transparent and harder to contest.[1321] In addition, algorithmic copyright content moderation, conducted under 'secret rules' and through behind-the-scenes policymaking, is problematic due to its inherent opacity, which often results in collateral censorship.

4.1. Algorithmic Content Moderation through Copyright?

Content moderation is a standard practice in the business operations of intermediaries across all three jurisdictions examined. As Gillespie notes, moderation is a commodity that intermediaries offer, providing users with 'a better experience of all this information and sociality: curated, organized, archived, and moderated.'[1322] Moderation is integral to intermediaries' operations, often representing a significant portion of their work in terms of

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[1318] National Development and Reform Commission, 'Opinions on Promoting the Standardized, Healthy and Sustainable Development of the Platform Economy 关于推动平台经济规范健康持续发展的若干意见(发改高技[2021]1872 号); Cyber Administration of China, 'Opinions on Further Compacting the Main Responsibility of Information Content Management on Website Platforms 关于进一步压实网站平台信息内容管理主体责任的意见'; State Administration for Market Regulation, 'Guidelines on the Implementation of the Main Responsibility of Internet Platforms (Draft for Public Comments)国家市场监督管理总局《互联网平台落实主体责任指南(征求意见稿)'; Xin D (2023).

[1319] Cohen JE (2017) 184.

[1320] Chander A (2023) 1086-87.

[1321] Cohen JE (2017) 175.

[1322] Gillespie T (2018) 13.

personnel, time, and cost.[1323] Grimmelman also observes that '[n]o community is ever perfectly open or perfectly closed; moderation always takes place somewhere in between.'[1324] In fact, intermediaries have expanded their filtering practices both to maintain user engagement and to defuse public criticism and regulatory intervention.[1325] By defining the boundaries of participation within a community and imposing sanctions on those who violate the conditions of membership, moderation rules are central to online communities' ability to self-regulate and shape the conditions for free expression.[1326] Copyright content moderation is a significant issue within the legal framework of content regulations as research shows that '[e]mpirically, copyright law accounts for most content removal from [intermediaries], by an order of magnitude.'[1327] Nonetheless, copyright content moderation by intermediaries is not a new experience for creators. To avoid litigation stemming from NTD procedures, intermediaries like YouTube and Meta had already established their own robust copyright moderation systems well before the implementation of Art.17.[1328]

In recent years, policy discourse has shown a shift from a *laissez-faire* approach with minimal legal provisions and liberal governance strategies back to stronger, more legislation-focused, and stringent forms of intermediary regulation,[1329] with the EU serving as the most prominent example. EU policymakers have introduced an additional layer of copyright protection in DSMD, aiming to incentivize certain intermediaries to utilize automated copyright moderation through a top-down regulatory approach.[1330] Additionally, the DSA also introduces greater procedural obligations for content moderation to enhance transparency in content curation and foster a more harmonized approach across Europe.[1331] Today, the access and dissemination of creative content in Europe is governed by, on one hand, 'a complex web of legislation, sectoral self- and co-regulatory norms,' on the other hand, the 'private norms defined by contractual agreements' and 'informal relationships between users and intermediaries.'[1332] Content creators on intermediaries must navigate an algorithmic environment that influences not only

[1323] Ibid; Roberts ST (2019) 33.
[1324] Grimmelmann J (2015) 109.
[1325] Cohen JE (2017) 174.
[1326] Grimmelmann J (2018) 224; Bloch-Wehba H (2020) 48.
[1327] Peukert A et al. (2022) 359.
[1328] Klonick K (2018) 1616-7; Ammori M (2014) 2260; Chander A (2012) 1809-12; Daskal J (2019); Rozenshtein AZ (2018); Gillespie T (2018); Citron DK (2018); Langvardt K (2018); Urban JM et al. (2017).
[1329] Heldt A and Dreyer S (2021) 271.
[1330] Cunningham S & Craig D (2019).
[1331] European Commission, 'How the Digital Services Act enhances transparency online' (Shaping European's Digital Future) <https://digital-strategy.ec.europa.eu/en/policies/dsa-brings-transparency>
[1332] Quintais JP et al. (2023b).

the visibility and distribution of their content but also involves increasing levels of algorithmic and human moderation, especially concerning copyright.[1333]

4.1.1 Statutory Copyright Content Moderation

In both China and the U.S., the increasing complexity, potential overlaps, and interplay of statutory laws and house rules regarding copyright content moderation are leading to the emergence of a loosely interconnected multilevel regulatory framework for intermediaries' content moderation practices.[1334] Interestingly, the approaches to intermediary liability regulation in China and the U.S. can be seen as representing opposite ends of the policy spectrum. Meanwhile, recent developments demonstrate the EU's compromise approach, which maintains the existing liability regime while introducing more institutionalized and stringent oversight of intermediaries content moderation and operational activities.[1335] Specifically, the EU's copyright reform represents the first comprehensive attempt to regulate intermediaries' copyright content moderation practices at the European level.[1336]

In the EU, the relevant rules regarding intermediary content regulation are contained in Art.17 DSMD (and its national implementations), the ECD's framework for intermediary liability exemptions in Articles 12-15, replaced and amended by the DSA. As previously explained, Art.17(4) DSMD sets out a liability exemption mechanism for OCSSPs which requires them to make best efforts to license user-uploaded content, as well as to deploy *preventive* and *reactive* measures to avoid copyright infringement. Depending on the scale of the task, the review of user uploads requires the employment of automatic recognition and filtering tools to comply with the 'best efforts' copyright filtering obligations arising from Art.17(4)(b) DSMD.[1337] This provision is a complex mixture of *ex ante* preventive obligation and *ex post* notice-and-take-down measures, while still operating under the prohibition on general monitoring obligations.[1338] Even though Art.17 adopted substantially different wording regarding the imposition of 'upload filters,'[1339] legislators attempted to whitewash statutory content moderation obligations, which resemble *de facto* general monitoring obligations, by

[1333] Gray JE & Suzor NP (2020); Dergacheva D & Katzenbach C (2023).
[1334] Goldman E (2021); Li L & Zhou K (2024).
[1335] Frosio G and Geiger C, (2023) 33-4.
[1336] Quintais JP et al. (2022).
[1337] See Chapter III at Section 2.1.2.3.B).
[1338] Peukert A et al. (2022) 368.
[1339] Romero JD (2024) 89.

adding reassuring terms such as ‘diligence,’ ‘best efforts,’ and ‘proportionality’ to convince the public that algorithmic filtering measures will be implemented with sufficient care and caution to avoid the erosion of human rights.[1340] Then the legislators handed the baton to the CJEU, leaving the Court with the challenging task of harmonizing and interpreting these laws.

4.1.1.1 Copyright Content Moderation under Art.17 DSMD

The ‘safe harbor’ rules for intermediaries hosting UGC presume that UGC is non-infringing until the intermediary receives a substantiated notice of infringement from copyright holders, at which point the contested content must be promptly removed. In contrast, the default presumption of automated filtering systems is that every upload is suspicious and that copyright owners are entitled to *ex ante* control over the sharing of creative content.[1341] Theoretically, once the algorithmic enforcement system detects traces of protected source material in a user upload, the content is prevented from appearing online.[1342] In terms of Art.17, to avoid risk of primary liability, OCSSPs may systematically prevent the availability of all content reproducing works for which they have received the ‘relevant and necessary information’ or a ‘sufficiently substantiated notice’ from rightsholders, including content that does not infringe their rights, without a detailed legal examination. This is particularly so because, under Art.17(4), OCSSPs bear the burden of proof to demonstrate that they have made ‘best efforts’ to prevent infringing content from being uploaded. Moreover, the technological limitations and the anticipated volume of ‘manifestly’ and ‘earmarked’ content as well as user complaints raise concerns about whether the mechanisms required under Art.17 can adequately protect users’ rights, casting doubt on the feasibility of OCSSPs implementing technological solutions that both prevent the upload of infringing content and allow for sufficient human review.[1343] Simultaneously, in practice, the concern of systematic automated over-enforcement is prominent when taking down ‘as much as possible’ vis-à-vis ‘as much as necessary,’[1344] as OCSSPs are prone to excessive blocking to escape direct liability and avoid lengthy and costly lawsuits. After all, the direct liability for infringing user uploads stipulated in Art.17(1) hangs over the head of OCSSPs like the sword of Damocles.[1345]

[1340] Senftleben M et al. (2023) 940.
[1341] Ibid.
[1342] Senftleben M (2019) 6.
[1343] Geiger C & Jütte J (2021b).
[1344] Schwemer SF (2020).
[1345] Senftleben M et al. (2023) 955.

Given the historical background of the DSMD and the ambiguity surrounding the achievement of the goals set out in Art.17(4), it appears that proactive technological measures, such as content recognition algorithms, are the implicit means envisioned by the legislator.[1346] As Schwemer notes that 'large parts of Art.17 have nothing to do with substantive copyright law but are home in the arena of internet law,[1347] particularly content regulation. Precisely, it introduces a content moderation obligation in the field of copyright law.[1348] Unsurprisingly, laws or injunctions compelling host intermediaries to proactively search for or filter out illegal material uploaded by their users is not uncommon within the EU jurisdiction.[1349] Therefore, Art.17 DSMD constitutes a substantial shift in copyright enforcement and the broader intermediary law principles from reactive to proactive.[1350] Despite the fact that Art.17 imposes a *de facto* content moderation obligation on OCSSPs, the CJEU made efforts to add further limitation to *ex ante* filtering/blocking measures if the content moderation systems can distinguish lawful from unlawful content without the need for its 'independent assessment' by the OCSSPs.[1351] In Poland's challenge, the CJEU limited the filtering obligation to instances in which very specific targeted filtering is possible, even though it still remains unclear what 'targeted' filtering means and what type of information rightsholders have to provide OCSSP with in order to have infringing content removed and blocked.[1352]

4.1.1.2 Copyright Content Moderation under DSA

Relatedly, the DSA adopts the concept of 'content moderation' and introduces a comprehensive legal framework to regulate it for the first time.[1353] Specifically, it sets out an even more elaborate system concerning the use of automated means by various intermediaries in the context of notice-and-action mechanisms of providers of hosting services, including online intermediaries,[1354] internal complaint handling systems of online intermediaries,[1355] transparency reporting obligations of online intermediaries,[1356] and risk assessments by VLOPs

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[1346] Quintais JP et al. (2024); Schwemer SF (2020).
[1347] Schwemer SF (2020).
[1348] Senftleben M & Angelopoulos C, 'The Implementation of Art.17 CDSMD in EU Member States and the Evolution of the Digital Services Act: Why the Ban on General Monitoring Obligations Must Not Be Underestimated' (The IPKat, 18 Nov. 2020) <https://ipkitten.blogspot.com/2020/11/guest-post-implementation-of-article-17.html>
[1349] Mendis S & Frosio G (2020).
[1350] Schwemer SF (2020).
[1351] Quintais JP et al. (2024).
[1352] *Poland v Parliament and Council*, para.8.
[1353] Art.3(t) DSA.
[1354] Art.16 DSA.
[1355] Art.20 DSA.
[1356] Art.24 DSA.

and VLOSEs.[1357] Comparing to Art.17 DSMD, the DSA focuses more on transparency of content moderation practices, obligating providers of intermediary services to make information on content moderation 'policies, procedures, measures and tools' available to users, in 'clear, plain, intelligible, user-friendly and unambiguous language.'[1358] Intermediaries are required to 'act in a diligent, objective, and proportionate manner' when applying and enforcing content restrictions, ensuring that they respect the rights and legitimate interests of all parties involved, including the fundamental rights of service recipients.[1359] In particular, all intermediaries are mandated to make easily comprehensible reports on their content moderation activities publicly available in a machine-readable format and in an easily accessible manner.[1360]

Under the DSA, preventive measures, including the use of automated content moderation tools, are crucial to the specific due diligence obligations outlined for VLOPs. Under Art.34 DSA, VLOPs and VLOSEs are required to identify, analyze, and assess any systemic risks arising from the operation and use of their services within the EU.[1361] This implies that content-sharing services and search engines would be obligated to assess copyright infringements as part of their risk management responsibilities. As a result, intermediaries are encouraged to identify both the risks of under-blocking and over-blocking within the same assessment and to implement 'reasonable, proportionate, and effective mitigation measures' tailored to the specific systemic risks.[1362] Such measures, while adhering to the prohibition on general monitoring obligations and fundamental rights protection, include adjustments of T&Cs, recommender systems, improving internal processes, strengthening alternative dispute resolution systems, improving awareness of users, or cooperation with other intermediaries.[1363] From the copyright perspective, scholars observe that Art.35 DSA provides the Commission with a tool to address copyright infringement risks while minimizing the negative impact of interventions that could stifle creativity; however, it may also have significant spillover effects on private enforcement measures.[1364]

[1357] Art.34 DSA.
[1358] Art.14(1) DSA.
[1359] Art.14(4) DSA
[1360] Art.14(1) DSA
[1361] Art.34(1) DSA.
[1362] Art.35(1) DSA.
[1363] Art.35(1)(a)-(k) DSA.
[1364] Peukert A et al. (2022) 368-9.

4.1.2 Shaping Law Enforcement Through Privatized Content Moderation

The regulation of content moderation serves as a policy lever for public authorities to gain control over tech powerhouses, while simultaneously empowering intermediaries with significant authority to substantially mitigate illicit online content.[1365] Content moderations motivated by fear of potential liability are in this sense different from the ones many intermediaries carry out based on their own self-regulation initiatives.[1366] In practice, intermediaries have adopted a systematic and proactive approach to improving their overall informational environment for users, often by extending the scope of content moderation well beyond just copyright-infringing content.[1367] However, this has accelerated the fragmentation of online law enforcement and generated the need for algorithmic recommendation and filtering systems.[1368] Such practices can fully empower themselves with greater control over content and information on the internet from the perspectives of moderation technology and norm-making.[1369] Meanwhile, emerging types of moderation measures over copyright-protected content are mostly unregulated in the copyright *acquis*, especially as regards visibility and monetization.[1370] In addition, multiple sources of opacity, be it institutional, legal and technological, that make it difficult to evaluate automated private regulatory systems.[1371] Thus, those giant intermediaries 'give people the power to build community'[1372] but rule this community under their own opaque arbitrary power.

4.1.2.1 Diverse Toolkits for Content Moderation

In business practice, in the overly inclusive T&Cs and Community guidelines, a vast space is left for intermediaries to apply alternative mechanisms, which are often not transparent and not subject to external oversight, to moderate content.[1373] Copyright has historically been one of

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[1365] Annual Online Content Governance Research Group, 'Element-based Governance and Relationship Coordination: Online Content Governance Report 2021 要素治理与关系协调–2021 年网络内容治理报告' (2022) <https://jil.nju.edu.cn/DFS//file/2022/01/25/20220125152613006 2qxi84.pdf>

[1366] Gorwa R (2024); Kuczerawy A (2017); De Gregorio G (2021).

[1367] Bloch-Wehba H (2019) 27; Gillespie T (2018); Klonick K (2017); Roberts ST (2019); Heldt A & Dreyer S (2021).

[1368] He T (2022a); Gillespie T (2018); Gorwa R et al. (2020).

[1369] Tushnet R (2007).

[1370] Quintais JP et al. (2023b).

[1371] Gray JE & Suzor NP (2020) 7.

[1372] Lepore J, 'Facebook's Broken Vows How the company's pledge to bring the world together wound up pulling us apart' (The New Yorker, 26 Jul. 2021) <https://www.newyorker.com/magazine/2021/08/02/facebooks-broken-vows>

[1373] Klonick K (2017); Gillespie T (2018).

the first, if not the very first, domains where strong economic interests have driven the demand for AI technologies to moderate online content.[1374]

Specifically, intermediaries adopt more diverse measures to conduct content moderation, both preventive (*ex ante*) and reactive (*ex post*). Reactive measures such as region- and service-specific methods are employed to control the availability, visibility and accessibility of certain content, or restrict users' ability to provide information, independently or in response to government mandates.[1375] However, most of the above content moderation measures remain unregulated in the copyright *acquis*.[1376] Meanwhile, preventive content moderation, which aims to make content contingent on the prior consent of a designated public authority, usually takes the form of automated content filtering of unpublished content.[1377] Furthermore, scholars differentiate between 'hard' measures like blocking and removal, and 'soft' measures such as downranking and flagging content, as well as between technological approaches that involve 'matching' (identifying additional copies of known content) and 'prediction' (extrapolating features from known to unknown content).[1378] Among them, two types of measures, automated content filtering (*ex ante*, hard, and matching)[1379] and visibility remedies (*ex post*, soft, and prediction),[1380] need to be highlighted.

Major intermediaries implement *ex ante* algorithm-based filtering mechanisms as a regular weapon to define the scope of visibility of content on their services.[1381] Visibility restriction features based on algorithm-based filtering are present on major intermediaries, often with a more extensive list of unlawful and undesirable content other than copyright-infringing content.[1382] The increased danger of false positives and false negatives is the most evident drawback of automated content filtering.[1383] The facilitation of large scale and effortless removal of allegedly infringing content is an extensively examined consequence of the

[1374] Gorwa R et al. (2020); Frosio G (2020c).
[1375] NCAC 'NCAC and Other Three Authorities Launched 'Jianwang 2020' Campaign' (16 Jul. 2020) <https://en.ncac.gov.cn/copyright/contents/10373/339825.shtml>
[1376] Senftleben M et al. (2023) 977-78.
[1377] Bloch-Wehba H (2021); Llansó EJ (2020).
[1378] Gorwa R et al. (2020) 4; Llansó EJ (2020).
[1379] Elkin-Koren N (2020); Gillespie T (2020).
[1380] West SM (2018).
[1381] Zeng J and Kaye DBV (2022); Bishop S (2019).
[1382] Community Guidelines of Weibo (effective on 27 May 2021) <https://service.account.weibo.com/roles/gongyue?from=10B5395010&wm=9006_2001&weiboauthoruid=7504817032>
[1383] Elkin-Koren N (2020).

traditional NTD process, ultimately resulting in a substantial chilling effect on users' freedom of expression.[1384]

Moreover, intermediaries adopt 'shadow banning'[1385] to set an output-based form of visibility restriction on user content, which gives the user the false impression that the content can still be posted, while in fact it is not visible to other users.[1386] Leerssen succinctly suggests that shadow banning is used to manage new controversies which often fall short of violating established laws.[1387] Shadow banning usually takes a subtler form as the complement to conventional moderation practices, making affected users struggle to ascertain whether or not they have been sanctioned.[1388] Even though shadow banning appears less restrictive than removal and blocking, it may have a greater impact on users' freedom of expression and privacy due to a lack of transparency and proportionality.[1389] The shadow banning not only challenges the predictability of the procedures of content moderation, but also practically precludes possibilities for individual or collective resistance.[1390]

4.1.2.2 Constantly Widening Scope of Content Moderation

Much of the power held by these intermediaries stems not only from their technologies and processes adopted but also from the house rules they have crafted themselves.[1391] House rules, consisting of substantive norms voluntarily adopted by companies to regulate content and activities on their services,[1392] act as a critical supplement to state legislation by restricting otherwise-legal content or activities based on their idiosyncratic editorial policies. Usually, the house rules that determine which content can be published and disseminated on the intermediaries are not established by users but rather unilaterally decided by the intermediaries.[1393] Particularly in EU law, this would include what is covered by the definition of T&Cs in the DSA.[1394] While copyright law includes limitations and exceptions that allow access to copyrighted works for certain sanctioned purposes, in practice, it is the house rules

[1384] Urban JM et al. (2017).
[1385] Recital 55 DSA.
[1386] West SM (2018); Leerssen P (2023).
[1387] Ibid. 4.
[1388] Gillespie T (2022).
[1389] Schwemer SF & Schovsbo J (2020); West SM (2018); Heldt A (2020); Zeng J & Kaye DBV (2022).
[1390] Jennifer C (2021).
[1391] Katzenbach C (2017).
[1392] Goldman E (2021) 8; Belli L & Venturini J (2016).
[1393] Ibid.
[1394] Quintais JP et al. (2023a).

of intermediaries, along with the business rules set by copyright holders and CMOs, that determine the accessibility, visibility, and availability of copyrighted content on these intermediaries. As a result, the development and deployment of automated content identification and rights management systems by these intermediaries have largely supplanted the application of substantive copyright law in their operations.[1395]

Typically, house rules of major Chinese intermediaries classify all the illegal, harmful and undesirable content as prohibited content, and ignore the distinction between prohibited content and undesirable content made in relevant administrative regulations.[1396] Likewise, most U.S.-based intermediaries adopted a crafty approach by introducing more blurred and abstract concepts to explain the ambiguous language of legislation with 'complex and greatly varying documentation,' thus worsening the predictability of house rules.[1397] Although commentators voice concerns about legal 'uncertainty' deriving from ambiguous rules, the intermediaries seem willing to regard them as 'flexibility.'[1398] For example, most Chinese intermediaries emphasize the general principle of copyright protection in their house rules, but do not provide any further clarification or explanation on how to tackle online piracy within their services.[1399] That means, how copyright content moderation works remains largely a mystery, resulting in unpredictable assumptions about legitimate and illegitimate behavior in specific communities.[1400] Similarly, inconsistent content moderation policies and erratic, opaque decision-making by U.S.-based intermediaries have long been subject to intense criticism.[1401] Users confused by the basis of the content moderation decisions are directed to Facebook's brief and vague Community Guidelines, while the content moderators' actual rulebook has been treated as a trade secret for undisclosed reasons.[1402] While an intermediary's T&Cs and Community Guidelines are publicly accessible, the internal implementation standards and protocols, which consist of specific, confidential, and ever-changing instructions and standards

[1395] Hinze G (2019).
[1396] Xiao B (2023) 3-5.
[1397] Mezei P & Harkai I (2022).
[1398] Zhang H (2024) 146-7.
[1399] WeChat Service Agreement: Standards of Weixin Account Usage (腾讯微信软件许可及服务协议) (updated: 28 October 2022) <https://weixin.qq.com/cgi-bin/readtemplate?&t=page/agreement/personal_account&lang=en_US&head=true>
[1400] Xiao F (2024); He R & Tian H (2023); Zhao A & Hu L (2023).
[1401] Langvardt K (2017) 1355-56; Citron DK (2017).
[1402] Wijeratne Y, 'Facebook, language, and the difficulty of moderating hate speech' (LSE Blog, 23 Jul. 2020) <https://blogs.lse.ac.uk/medialse/2020/07/23/facebook-language-and-the-difficulty-ofmoderating-hate-speech/>

for (algorithmic) moderators, make it impossible to comprehensively assess the intermediary's content moderation rules.[1403]

Moreover, intermediaries are strongly incentivized to engage in some level of moderation, as certain content is genuinely harmful to both users and the intermediaries themselves.[1404] Thus, intermediaries may encode *infrastructural values* in both house rules and content moderation enforcement.[1405] Content moderation decisions are neither based on a determination of the illegality of the content posted nor in accordance with any specific provision of the community guidelines but driven by the intermediaries' self-interest and the eagerness to appease popular public sentiments. Under a parental state like China, other than illegal materials like copyright-infringing content, other types of political heterodox speeches,[1406] legal speeches that violate widely held social norms and moral beliefs,[1407] or infrastructural values of the intermediary,[1408] are removed or blocked in practice in the name of 'relevant state provision.' This is just as 'necessary' in China as it is in the West, but it can obscure the fact that the same mechanisms used to ensure online content complies with political imperatives are also employed to remove content that is excessively violent, obscene, or harmful to minors.[1409]

On the one hand, by embracing an expansive scope of monitoring and an erratic and opaque decision-making process, mega intermediaries may exercise much stronger control over the flow of information, regardless of more serious consequences that impact the fundamental rights of users.[1410] Smaller intermediaries may outsource their moderation to third-party services via the same software and human teams. Nevertheless, these standards deployed for content moderation often share a high level of similarity to house rules phrased by U.S.-

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[1403] Cornils M, 'Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries' (Algorithm Watch, 20 May 2020) 59 <https://algorithmwatch.org/en/wp-content/uploads/2020/05/Governing-Platforms-legal-study-Cornils-May-2020-AlgorithmWatch.pdf>

[1404] Grimmelmann J & Zhang P (2023) 1043.

[1405] Klonick K (2017); Dergacheva D & Katzenbach C (2023) 4; Community Self-Discipline Convention of Douyin (抖音社区自律公约)<https://www.douyin.com/rule/policy>

[1406] 'China to Cleanse Online Content That 'Bad-Mouths' Its Economy' (Bloomberg, 28 Aug. 2021) <https://www.bloomberg.com/news/articles/2021-08-28/china-to-cleanse-online-content-that-bad-mouths-its-economy?leadSource=uverify%20wall>; Li L & Zhou K (2024).

[1407] McMorrow R, 'China launches internet "purification" campaign for lunar new year' (Financial Times, 25 Jan. 2022) <https://www.ft.com/content/285059f7-3f0e-4083-b01f-02e48eccff88>

[1408] Shen X, 'Weibo will cap share counts to fight fake traffic (but government accounts are exempt)' (South China Morning Post, 9 January 2019) <https://www.scmp.com/abacus/culture/article/3029087/weibo-will-cap-share-counts-fight-fake-traffic-government-accounts>; Xiao F (2024).

[1409] Li L & Zhou K (2024).

[1410] He T (2022a) 86-88.

domiciled mega intermediaries.[1411] On the other hand, anticipating punishments from intermediaries due to copyright concerns and the inability to effectively use appeal processes has directly influenced cultural production, forcing creators to engage in self-censorship, avoidance, and content adjustments in their work before posting.[1412]

4.2. Collateral Surveillance Through Intermediaries

Automated content moderation also affects online creative expression and are rightly scrutinized by internet rights advocates, opens up new avenues for surveillance. They typically provoke the same concern of 'collateral censorship'[1413] driven by state action, which is a central issue in intermediary liability law.[1414] Through private ordering, intermediaries shape networked spaces where users engage in diverse activities, structuring these spaces for ease of use through their house rules, technologies, and processes.[1415] House rules, often presented in the form of T&Cs and Community Guidelines, serve a dual role – facilitating access while also acting as points of contact for the exercise of technological and political authority on users.[1416] While intermediaries also govern the networked space through certain technological code and process, such as in the case of algorithmic moderation systems.[1417]

4.2.1 Intermediaries' Concentrated Power Over Content

While treating state regulation of creative expression with suspicion is prudent, it would be unwise to overlook the comparable power amassed by private intermediaries.[1418] The legal frameworks in all three examined jurisdictions allow significant discretion for large-scale intermediaries to engage in private ordering, particularly in shaping their relationships with users regarding copyright-protected expressions.[1419] Even in the EU, where Art.17 DSMD establishes a new framework for intermediaries in the field of copyright, these intermediaries still retain broad discretion in deciding how to comply with the rules and in determining how content is uploaded, exploited, and moderated on their services.[1420]

[1411] Gillespie T et al. (2020) 5.
[1412] Dergacheva D & Katzenbach C (2023).
[1413] Balkin JM (2014) 2309.
[1414] Keller D (2018) 296.
[1415] Quintais JP et al. (2023b).
[1416] Cohen JE (2017) 144.
[1417] Gorwa R et al. (2020) 5
[1418] Theil S (2022) 649.
[1419] Quintais JP et al. (2023b); Tang X (2022); Frosio G (2023); Wang J (2018).
[1420] Quintais JP et al. (2023b).

In practice, a minority of giant intermediaries, often positioned as private actors, have managed to concentrate power in an unprecedented way by unilaterally defining, altering and enforcing the parameters of permitted behaviors for their users through contractual control obtained from house rules and technical control gained from technology deployment,[1421] often exercised without any meaningful independent oversight.[1422]

Meanwhile, the constantly expanding content moderation practices are characterized by *quasi-legislative* (T&Cs and Community Guidelines), *quasi-executing* (content moderation measures), and *quasi-judicial* (determination of illegal and harmful) natures. Under the top-down collateral censorship mechanism, intermediaries try to adopt various stricter content moderation measures and further extend the scope of moderation to eliminate potential uncertainties and risks.[1423] In terms of copyright content moderation, there is no effective regulation over intermediaries' power in visibility restriction, allowing them to set and unilaterally adjust the rules for managing user-uploaded content, as well as in content monetization, determining how their programs operate, which user-creators are eligible, and how they are remunerated.[1424]

4.2.2 Voluntary Private-Public Algorithmic Surveillance

Although intermediaries have amassed unprecedented power, they are not the only entities seeking to exploit this situation. Nation-states are increasingly attempting to subsume these powers by encouraging or compelling intermediaries to monitor online activity,[1425] restrict certain content, and even dictate which technologies may be used to access content.[1426] This incorporation into the state apparatus further consolidates the power of intermediaries, delegating them as the 'new governors' of the private networked spaces.[1427] And voluntary measures make intermediaries prone to serve governmental purposes under vague, privately enforced standards, rather than transparent legal mandates.[1428] Previous studies indicate that

[1421] Bloch-Wehba H (2019); Rozenshtein AZ (2018); Stalla-Bourdillon S (2013).
[1422] Haggart B & Keller CI (2021).
[1423] Balkin JM (2014) 2309-10.
[1424] Quintais JP et al. (2023b).
[1425] Bloch-Wehba H (2019); Rozenshtein AZ (2018); Bambauer DE (2015) 57; Perel M (2020) 4.
[1426] Kreimer S (2006).
[1427] Klonick K (2017).
[1428] Frosio G (2017c) 574.

delegating public powers to private actors using proprietary technology is often opaque and difficult to oversee, as these processes are effectively 'black-boxed.'[1429] The 'new normal' in the intermediary information ecosystem is characterized by 'privatized, fiat-based prohibitions on information flow' that are becoming both increasingly routine and increasingly opaque.[1430] Commentators evaluating the complex behaviors of intermediaries have disagreed on whether to view intermediaries as civil libertarians,[1431] obstructors of justice,[1432] or privatized extensions of the surveillance state.[1433]

As a result of this concentration of power, it becomes essential to find ways to frame and limit this regulatory authority, as its frequent opacity and discretion can undermine users' fundamental rights.[1434] However, the current regulatory toolkit is poorly suited for scrutinizing algorithmic models and methods, and the techniques of machine learning and AI, which intermediaries increasingly rely on, are even less conducive to explanation and oversight.[1435] Although major intermediaries widely publicize information about takedown notices they receive from copyright owners and, where permitted, government requests for data, they offer no comparable public transparency regarding the specifics of their own algorithmic content moderation practices.[1436] In addition, path-dependent approaches to framing regulatory discussions tend to favor governance through voluntary 'best practice' standards, which in turn reduce the incentive to develop new and appropriately rigorous methods of public oversight.[1437] Furthermore, the internet is global, and intermediaries operate across borders, but its regulation is confined to national or regional jurisdictions.[1438] Rules or principles for content regulation and frameworks to promote cooperation between regulators at the global level have proved to be limited and poorly designed.[1439]

Generally, the relationship between intermediaries and users is largely unbalanced: intermediaries have the power to enforce rules and shape users' communicative behavior and

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[1429] Pasquale F (2015) 8; Perel M & Elkin-Koren N (2016) 482; Pere M & Elkin-Koren N (2017) 183.
[1430] Cohen JE (2017) 175.
[1431] Klonick K (2017).
[1432] Rozenshtein AZ (2018).
[1433] Citron DK (2017); Balkin JM (2018); Bambauer DE (2015) 57-8; Bambauer DE (2012).
[1434] De Gregorio G (2020).
[1435] Kroll JA et al. (2017); Coglianese C & Nash J (2017); Gorwa R (2019); Gorwa R et al. (2020).
[1436] Cohen JE (2017) 174-75.
[1437] Ibid, 191.
[1438] Kohl U (2015).
[1439] Radu R (2019) 90-92.

exercise of rights, while users, being the weakest player in the triangle,[1440] have limited resources to confront the serious consequences of collateral censorship.[1441] In practice, fundamental rights violations resulting from excessive content moderation are usually left to user activism through complaint-and-redress mechanism.[1442] This is particularly relevant given the recent EU regulations on intermediaries, which reveal a prevailing preference for solutions based on *outsourcing* (passing on human rights responsibilities to private entities) and *concealment* (relying on user complaints to remedy human rights deficits).[1443] Such outsourcing and concealment strategy is nothing new in major intermediaries' daily business practices.[1444] In China, most intermediaries even ignore due process and transparency since no laws or regulations mandate them to disclose how they put their content moderation policies and procedures into everyday practice.[1445] Besides, affected parties are absent in the negotiation stage during the making of house rules. Contending that house rules are inequitable under the abusive clauses in relation to standard terms or asserting that sanctions are unwarranted due to excessive contractual breach liabilities, is generally improbable to garner legal backing.[1446]

4.3.1 Letting the Fox Safeguarding the Hen House?

The DSA expressly aimed to regulate an online environment 'where fundamental rights enshrined in the CFR are effectively protected.'[1447] Specifically, the DSA has included the impact of digital services on the exercise of fundamental rights protected by the CFR as a category of systemic risks that should be assessed in depth by VLOPs and VLOSEs.[1448] The DSA obliges intermediaries to apply content moderation systems in a 'diligent, objective, and proportionate manner,'[1449] and emphasizes that 'online platforms' must filter contents with due

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[1440] Balkin JM (2018).
[1441] Heldt A & Dreyer S (2021) 279.
[1442] Oliva TD (2020).
[1443] Senftleben M et al. (2023); Frosio G & Geiger C (2023); Senftleben M (2023).
[1444] Goldman E (2021).
[1445] 'Transparency Report of Quarter 3 of 2022' <https://www.douyin.com/transparency>.
[1446] Announcement of the State Administration for Industry and Commerce on Issuing the Guidelines for Regulating the Standard Terms of Online Trading Platform Contracts (工商总局关于发布网络交易平台合同格式条款规范指引的公告) (30 Jul. 2012).
[1447] Art.1(1) DSA.
[1448] Art.31(4)(b) DSA.
[1449] Art.14(4) DSA.

regard to users' fundamental rights.[1450] In sum, 'intermediaries and other key private entities become more independent regulators.'[1451]

It may seem plausible to impose on intermediaries the obligation to safeguard users' fundamental rights, as they are closest to users and arguably best equipped to address complex infringement issues swiftly on a case-by-case basis.[1452] Nevertheless, unlike public bodies and the judiciary, these private entities are not inherently motivated to safeguard the fundamental rights and freedoms of parties involved.[1453] Although compliance to 'diligence' and 'proportionality' requirements are mandated by Art.17(4)(b) DSMD and Art.14(4) DSA, the balancing of competing fundamental rights during content filtering decision-making is 'outsourced' to industry cooperation,[1454] where economic cost and efficiency considerations are likely to take precedence than the abstract societal objectives.[1455] In fact, the intermediaries that control the 'infrastructure of free expression' offer only weak protections when a government leverages that infrastructure, or its limitations, for regulation or surveillance.[1456] Empirical study shows that 'users' creative expressions are not only commodified and potentially commercially exploited but also shaped and limited by business purposes, primarily focused on profit maximization.'[1457] As Mylly has observed, 'when legislatures shift decision-making power to intermediaries, they try to maintain some of the safeguards of traditional law and write *wish-lists* for private regulators.'[1458]

4.3.2 Counting on User Activism

Under the DSMD and DSA, *users* are expected to play an active role in policing content moderation systems and preserving their fundamental rights and freedoms. Art.17(9) DSMD stipulates that OCSSPs shall inform their users 'in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.' Art.14(1) DSA provides that users shall receive information on upload and content sharing restrictions arising from the employment of content moderation

[1450] Ibid.
[1451] Mylly T (2021) 71.
[1452] Senftleben M et al. (2023) 943.
[1453] Geiger C & Izyumenko E (2016); Senftleben M et al. (2023) 951.
[1454] Senftleben M (2024) 350; Bloch-Wehba H (2020) 68.
[1455] Senftleben M et al. (2023) 951, 954.
[1456] Balkin JM (2014) 2303.
[1457] Quintais JP et al. (2023b).
[1458] Mylly T (2021) 71.

tools. In the event of disputes over content restrictions, Art.17(9) DSMD and Art.20 DSA ensure that users can avail themselves of the option to instigate complaint and redress procedures at internal level and, ultimately, file litigation to the court.

In essence, EU regulators place the responsibility for addressing human rights violations on users, relying on complaint and redress mechanisms. Theoretically, a free, expeditious, straightforward, and efficient complaint and redress mechanism should be beneficial and attractive to users. However, in practice, such mechanisms often merely pay lip service to users' expectations regarding the protection of their fundamental rights.[1459] Evidence from the U.S. indicates that users are unlikely to file complaints initially,[1460] a trend confirmed by data from recent transparency reports of the largest UGC intermediaries.[1461] Particularly in the context of UGC, if the complaint and redress mechanism ultimately determines that a lawful content remix or mash-up has been blocked, the critical moment for the affected quotation or parody may already have passed, raising concerns about the flexible timeframe for complaint handling specified as 'shall be processed without undue delay.' [1462] Since Art.17(9) DSMD also requires human review, it may take quite a while until a decision on the infringing nature of content is taken. In cases where the contentious content generates a very dynamic attention curve, re-uploading the blocked content may simply be too late to have the desired impact.[1463] With lengthy waits for the examination of the counter-notifications, an overly cumbersome complaint and redress mechanism relying on user initiatives will likely be incapable of offering access to justice for affected internet users, and 'may thwart user initiatives from the outset.'[1464] As Bloch-Wehba points out, '[b]y creating a system in which takedowns are automated, but appeals are manual, Art.17 ensures that while takedowns occur at scale, appeals almost certainly cannot.'[1465] Considering these features, the complaint and redress option may appear unattractive to users.

Moreover, a relatively low number of user complaints might be mistakenly viewed as evidence that content filtering rarely infringes on freedom of expression and information, even though limited user activism could be attributed to overly slow and cumbersome procedures. By doing

[1459] Elkin-Koren N (2017) 1087; Homar P (2023) 266.
[1460] Urban JM et al. (2017).
[1461] Senftleben M et al. (2023).
[1462] Perel M & Elkin-Koren N (2016) 473.
[1463] Urban JM et al. (2017).
[1464] Senftleben M et al. (2023) 959.
[1465] Bloch-Wehba H (2020) 68.

so, the fundamental rights deficits can be ‘concealed’ through an outsourcing strategy that depends on user activism to safeguard freedom of expression.[1466] Apart from being ineffective in remedying fundamental rights violations, the mechanism may enable public authorities to obscure human rights deficits by relying on a lack of user activism, as users might refrain from complaining due to its perceived cumbersomeness and slowness.[1467] In these circumstances, only legislative countermeasures by Member States and content moderation assessments in audit reports offer some hope that human rights violations might finally be prevented, despite the corrosive outsourcing and concealment scheme underlying content moderation regulation in the EU.

4.3.3 Diligence and Proportionality Test: Mission Impossible

The EU regulators attempt to justify statutory content moderation obligations by framing them with diligence and proportionality requirements, reassuring itself that these drastic measures will be implemented with sufficient care and caution to prevent the erosion of fundamental rights.[1468] In particular, invoking diligence and proportionality is too weak as a mitigating factor for potential excessive content moderation actions. It is important to note that while proportionality and diligence obligations are directly applicable to the copyright content moderation process, intermediaries are likely to prioritize cost and efficiency in implementing these content filtering systems, rather than accepting higher costs and reduced profits to mitigate the corrosive effects on freedom of expression and information.

An intermediary aiming to minimize liability is likely to succumb to the temptation of over-blocking, as filtering more than necessary poses less risk than limiting filtering to only clear-cut cases of infringement.[1469] As Senftleben posits, a proportionality test will likely remain secondary unless the least intrusive measure proves most cost-effective, while a professional diligence standard is unlikely to prompt the adoption of costlier yet less intrusive content moderation systems without commensurate increases in user engagement and revenue to justify the investment.[1470] In practice, intermediaries may deploy the ‘best available technology’[1471] for large users (rightsholders), while equally discriminate small users.

[1466] Senftleben M et al. (2023).
[1467] Senftleben M (2019).
[1468] Senftleben M (2024) 351.
[1469] Lefouili Y & Madio L (2022).
[1470] Senftleben M (2024) 351.
[1471] Helman L & Parchomovsky G (2011).

Despite all references to diligence and proportionality as mitigating factors, the outsourcing strategy in the DSMD and the DSA is deeply problematic. Rather than safeguarding human rights, this regulatory approach is likely to result in human rights violations.[1472] Thus, for regulators, clearer recognition of the inevitable ambiguities and errors inherent in intermediary regulation can improve system design more effectively than regulators' *ad hoc* acceptance of failure to achieve the unachievable, and certainly more than lenience alone.[1473]

4.4 Regulating Copyright Content Moderation

The drawbacks of algorithmic copyright content moderation are well-documented, but developing regulatory remedies has proven challenging. Copyright content moderation by intermediaries is a complex issue with multiple facets, making it impossible to address with a one-size-fits-all solution. Despite the prominent concerns regarding private censorship,[1474] the content moderators' work is indispensable for the Internet; without it, social media users would drown in spam and disturbing imagery.[1475] Nevertheless, it appears unrealistic to expect intermediaries to consistently or accurately moderate content without errors.[1476] Indeed, current algorithms inherently struggle to make proper substantive contextual and qualitative decisions regarding fair use justification, even for the future, often resulting in the removal of legitimate content or undue remuneration.[1477]

Currently, the ability of algorithms to identify infringing content depends on the accuracy and veracity of information provided by rightsholders; therefore, the use of these tools may result in unjustified complaints based on incorrect or improper reference information.[1478] Additionally, despite YouTube's assertions that filtering software works satisfactorily,[1479] there are numerous instances where such software has restricted users' lawful activities.[1480] Empirical studies show that these 'context-blind' filtering systems still perform poorly for the detection of infringements that contain the same, previously notified copyright-protected

[1472] Senftleben M et al. (2023) 955.
[1473] Tushnet R (2023) 932.
[1474] Theil S (2022).
[1475] Langvardt K (2017).
[1476] Gorwa R et al. (2020).
[1477] Montagnani ML (2019); *Glawischnig-Piesczek*; Elkin-Koren N (2017); Husovec M (2018).
[1478] Leistner M (2020).
[1479] ART.19, 'Freedom of Expression Unfiltered: How blocking and filtering affect free speech' (2016) at 7 <https://www.article19.org/data/files/medialibrary/38586/Blockingandfilteringfinal.pdf>
[1480] Brøvig-Hanssen R & Jones E (2023).

work.[1481] In addition, due to the 'black box' problem of filtering algorithm,[1482] automatic filtering systems remain opaque, unaccountable and poorly understood.[1483] The opaque nature of filtering leaves space for potential abuses which could be used by states or private entities in order to satisfy their own interests.[1484]

Furthermore, intermediaries have the freedom to monitor and control information flow through their platforms.[1485] However, while expected to serve as public interest gatekeepers, they often operate 'without any legal infrastructure.'[1486] In particular, legal attempts to claim that these intermediaries are subject to some 'must-carry' obligations, given their major role in the digital speech environment, has failed in the U.S.[1487] Similarly, appropriate legal governance for intermediaries regarding content moderation in the private sphere is absent in the Chinese legislation, leaving these issues to intermediaries' self-regulation.[1488]

In contrast, the EU is more willing and proactive to accept the introduction of fundamental rights safeguards and transparency into the governance of content moderation.[1489] Although scholars have highlighted the potential negative impact of copyright content moderation obligations on fundamental rights protection, the DSMD and the DSA have introduced a set of norms governing intermediaries' content moderation decision-making, significantly advancing the legal governance of content moderation compared to the laissez-faire approach taken by China and the U.S. If implemented properly, these regulations would hold intermediaries accountable for their content moderation decision-making, both substantively and procedurally.

Leistner argues that an NTD system is not inherently more effective in safeguarding fundamental rights than a system relying on preemptive technological measures. This is especially true when the NTD system involves frequent automated notifications, which can lead to numerous unjustified actions. By contrast, a system developed through an open, transparent process that considers users' collective interests may provide better protection of

[1481] Gray JE & Suzor NP (2020); Seng D (2021).
[1482] Liu HW et al. (2019) 2; Elkin-Koren N & Chagal-Feferkorn KA (2021).
[1483] Gorwa R et al. (2020).
[1484] Bloch-Wehba H (2019); Maroni M & Brogi E (2021).
[1485] Fischman-Afori O (2021).
[1486] Ibid.
[1487] Keller D (2019) 11-3.
[1488] Xiao B (2023).
[1489] Fischman-Afori O (2021).

these rights.[1490] The shift to technology-based enforcement may be supported by adopting quantitative benchmarks that, to some extent, substitute for qualitative criteria,[1491] allowing algorithms to approximate cases where fair use is 'overwhelmingly likely.'[1492]

Therefore, while a comprehensive and conclusive *ex ante* copyright exceptions check seems nearly impossible in the context of large-scale infringement notifications (and would impose prohibitive costs on rightsholders), an *ex ante* plausibility check using automated tools is undoubtedly feasible.[1493] Therefore, the real challenge with today's legal frameworks, particularly with the Art.17 enforcement regime, is not about optimizing, standardizing, or controlling algorithmic technology to make substantive decisions about copyright exceptions. Instead, it lies in effectively integrating relatively simple algorithmic tools, which are capable of quantitative plausibility checks and pre-selecting seemingly clear-cut cases, with accountability, transparency, and human oversight and input throughout the entire enforcement process.[1494] Admittedly, the Art.17-like 'stay down' obligation is not a perfect model, but it offers valuable insights for future copyright legislation in the U.S. and China, particularly in establishing a new regulatory framework for OCSSPs to design and implement content moderation that preserves fundamental rights, and in defining their contractual relationships with users, including creators.

[1490] Leistner M (2020) 46.
[1491] Helman L & Parchomovsky G (2011) 1231; Perel M & Elkin-Koren N, (2016) 495.
[1492] Leistner M (2020) 48.
[1493] Sag M (2017) 531.
[1494] Leistner M (2020) 50.

V. Tightened Copyright Enforcement Through Intermediaries

Intermediaries' liability for users' copyright infringements is gradually expanding, potentially encompassing not only civil liability but also administrative and even criminal liability. What unities these new mechanisms are that they are state-sponsored and often centered around particular administrative enforcement techniques. Unlike private ordering, the states play an active role in shaping and deciding upon the remedies and these can be then challenged before the administrative courts. Although these state efforts have yielded mixed results and faced heavy criticism, the industry remains in a desperate search for effective and more publicly acceptable solutions to combat widespread online piracy.[1495]

Due to the remarkable difficulties that the governance of intermediaries faces in a digital environment, numerous jurisdictions have opted for the involvement of the public administration in copyright enforcement.[1496] Public enforcement, lacking the technical knowledge and resources to tackle the unprecedented challenge of global human semiotic behavior, has increasingly outsourced online copyright enforcement to private intermediaries through various administrative mandates.[1497] As an exhaustive analysis of administrative copyright enforcement across the three jurisdictions under examination exceeds the parameters of this thesis, it deliberately narrows its focus to investigate how copyright-related administrative bodies leverage intermediaries in their enforcement strategies.

1. Administrative Copyright Enforcement through Intermediaries in EU

In the last few decades, the role of administrative bodies in copyright enforcement has expanded across several Member States. EU countries like Spain, Italy and Greece have opted for the administrative copyright enforcement, empowering administrative, non-jurisdictional bodies to take measures intended to combat online piracy.[1498] Specialized administrative authorities are installed with a specific mandate to handle online copyright enforcement. These administrative authorities, while sometimes working in coordination with national courts, may act separately from the courts as an alternative or parallel track for enforcement.[1499] In a broader

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[1495] Bridy A (2010a); Yu PK (2010); Giblin R (2013).
[1496] Cogo AE & Ricolfi M (2020) 587; Copyright Alternative in Small – Claims Enforcement Act of 2020 (CASE Act of 2020); Samuelson P & Hashimoto K (2018).
[1497] Frosio G (2021).
[1498] Cogo AE & Ricolfi M (2020).
[1499] Bulayenko O et al. (2021).

sense, the expansion of administrative intervention can also be found in the DMA, which expands the range of social goals that can be legitimately pursued by administrative action.[1500] Nevertheless, among the various administrative interventions that Member States may adopt to combat online piracy, this chapter focuses exclusively on the two most significant examples involving intermediaries: the graduated response mechanism and website blocking injunctions.

1.1 Graduated Response: An Unsuccessful Attempt?

So-called 'graduated response' regulations are meant to block out household Internet connections of repeat infringers. One of the most well-known examples of this type of legislation is the French Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d'auteur sur Internet (HADOPI-1), which established a 'graduated response' system for internet access providers.[1501] This system provides an alternative enforcement mechanism, through which intermediaries can take actions after giving users two warnings about their potentially illegal online filesharing activities, including suspension and termination of service, capping of bandwidth, and blocking of sites, portals, and protocols.[1502] After the French Constitutional Council struck down part of the law as unconstitutional, the legislature quickly enacted a replacement law (HADOPI-2) introducing an additional judicial process, which has now entered into effect with the Council's approval.[1503] Many jurisdictions have enacted laws imposing varying levels of responsibility on intermediaries to monitor user infringements.[1504] Initially, copyright industries lauded graduated response as an efficient solution to online piracy. For example, the IFPI's 2007 report claimed that intermediary cooperation and disconnecting serious offenders could significantly reduce global content piracy.[1505]

Under HADOPI-2 law, accredited copyright owner representatives submitted infringement allegations to the copyright administration, Hadopi.[1506] The Commission for Protection of Rights, an autonomous body within Hadopi responsible for implementing the graduated response, reviewed these allegations, verified ownership, and identified individuals by

[1500] Petit N (2021).
[1501] Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, <https://www.legifrance.gouv.fr/>
[1502] Giblin R (2013); Geiger C (2012).
[1503] Yu PK (2010) 1376.
[1504] Giblin R (2013); Bridy A (2010c).
[1505] International Federation of the Phonographic Industry, 'Digital Music Report 2007' (IFPI, 2007) <https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/DMR/ifpi_digital-music-report-2007.pdf>
[1506] Strowel A (2010) 149.

requesting subscriber data from intermediaries.[1507] The Commission could then warn users via their intermediary that their internet access should not be used for infringement, notifying them of potential consequences and legitimate alternatives. If a second allegation was made within six months, another notice was sent, followed by a registered letter. A third allegation within a year prompted an investigation and a report on whether the subscriber's internet connection should be suspended.[1508] Through an expedited criminal procedure, a judge can impose a suspension of internet access for up to one year, along with a fine up to 1500€ and a prison sentence up to a year, depending on the severity of the breach and the circumstances.[1509] Account holders who are not found guilty of illegal file sharing but repeatedly fail to secure their Internet access may face losing their access for up to one month, along with a fine and a potential prison sentence.[1510]

When presenting HADOPI's first activity report in September 2011, the agency president described the graduated response system as 'effective and well-accepted by Internet users.'[1511] However, the Lescure report, published in May 2013, concluded that graduated response mechanism had failed to achieve its objectives, noting that while it may have slightly reduced P2P infringements, the traffic had simply shifted to other infringing sources rather than the legitimate market.[1512] Later in July 2013, the French government passed a decree, informally referred to as 'HADOPI-3' which eliminated internet suspension as a penalty for a subscriber's negligent failure to secure their connection.[1513] The Culture Minister further announced that Hadopi would be abolished and its remaining responsibilities reassigned. The announcement clarified that suspension was no longer considered an appropriate remedy, and that the government's enforcement efforts would shift focus to combating *commercial* piracy.[1514]

As a result, the graduated response mechanism may reduce the intensity of illegal file sharing in the short term,[1515] but it has had no significant deterrent effect.[1516] Yet the graduated response mechanism has been broadly questioned for their negative implications on users'

[1507] Ibid; Meyer T (2012) 115.
[1508] Strowel A (2010) 149-50.
[1509] Meyer T (2012) 116.
[1510] Ibid, 116.
[1511] Meyer T (2012) 117.
[1512] Giblin R (2013) 154-5.
[1513] Ibid, 155.
[1514] Ibid, 156. Emphasis added.
[1515] Ibid, 195.
[1516] Arnold M et al. (2014).

rights, and their limited positive externalities in curbing piracy.[1517] In fact, due to their lack of effectiveness, graduated response strategies have lost much of their original appeal. In 2021, a new department has been established as an 'anti-piracy agency,' merging the previously existing Hadopi and Conseil supérieur de l'audiovisuel.[1518] Interestingly, Hadopi's broad mandate includes establishing a system particularly responsive to 'mirror' sites, often used to perpetuate infringements after a blocking order has already been issued against one or more infringing sites.[1519] Furthermore, the graduated response mechanism potentially conflicts with fundamental rights, particularly the rights to privacy and data protection. In a recent case, La Quadrature du Net, a digital rights group, brought a case challenging the compatibility of the graduated response mechanism, arguing that Hadopi's massive access to four million source IP addresses of users accused of illegally sharing protected materials occurs without prior authorization from a national court or an independent administration.[1520] However, the CJEU ruled that the general and indiscriminate retention of IP addresses for the purpose of combating online counterfeiting does not inherently violate fundamental rights to privacy and data protection, provided that such retention is proportionate and accompanied by adequate safeguards to ensure compliance with privacy protections.[1521] By allowing the general and indiscriminate retention of source IP addresses, the Court aimed to balance users' fundamental rights with the public interest in prosecuting serious online offenses where such data might be the only means of investigation. However, this approach risks chilling fundamental rights like freedom of expression and access to information, as it makes no distinction between serious crimes and minor offenses.[1522]

Notably, fighting online piracy directly at the source is only one task of HADOPI laws. The graduated response mechanism also aims to *educate* internet users and *dissuade* them from unlawfully downloading or sharing copyrighted content.[1523] Although the ultimate outcome of the three-stage process involves punitive sanctions, its primary purpose is to change consumer

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[1517] Giblin R (2013) 208.
[1518] Law No. 2021-1382 of 25 October 2021 [France], Chapters 1-7.
[1519] Ibid, Art. L. 331-27.-I.
[1520] Case C-470/21, La Quadrature du Net and Others v Premier ministre and Ministère de la Culture, EU:C:2024:370, para.51.
[1521] Ibid, para.161.
[1522] EDRi, 'A complete U-turn in jurisprudence: HADOPI and the future of the Court of Justice of the European Union's authority' (7 Feb. 2024) <https://edri.org/our-work/a-complete-u-turn-in-jurisprudence-hadopi-and-the-future-of-the-cjeus-authority/>
[1523] 'Interview: Hadopi is about education, not repression' (Managing IP, 5 Jul. 2011) <https://www.managingip.com/article/2a5c9t35gir0pb671jbwg/interview-hadopi-is-about-education-not-repression?TopicListId=473>

behavior regarding copyright.[1524] In particular, the educational component of HADOPI seems to be effective, despite its treatment of violations as misdemeanors, leading to the conclusion that online education is more successful in curbing infringement than imposing large statutory damages.[1525] A 2017-survey reveals that approximately two-thirds of those interviewed who are exposed to a graduated response procedure, either personally or in their immediate circle, report that they have decreased their illicit consumption following the receipt of a recommendation.[1526] Thus, despite its unsuccessful attempts to reduce copyright infringements and expand the legitimate market, the educational impact of intermediaries' warnings could still inspire regulators, as a system that does not allow infringers to learn from their mistakes would be inadequate.[1527]

1.2 Website Blocking Injunctions

Indeed, the efficacy of direct enforcement against copyright infringers is often hampered by two key factors: the anonymity afforded to users through pseudonymous online identities,[1528] and the extraterritorial origin of illegal content.[1529] Thus, 'bringing actions against individual users is expensive,' while 'regulating access via intermediaries is more cost-effective.'[1530] Recently in the EU, website blocking injunctions have gained popularity because pursuing direct infringers has proven ineffective and disproportionate, while targeting website operators is also challenging, as they often operate from different jurisdictions, frequently change locations, or conceal their identities.[1531] In practice, access to websites may be blocked by various technological means that differ in their technical and policy limitations, as well as in their consequences.[1532] Website blocking is a widely used tool to combat online copyright infringement,[1533] with the ISD[1534] and the IPRED[1535] providing blocking injunctions as a

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[1524] Hyland M (2020) 36.
[1525] Yu PK (2010) 1420; Rosenblatt B, 'The Future of HADOPI' (Copyright and Technology, 16 Oct. 2012) <https://copyrightandtechnology.com/2012/10/26/the-future-of-hadopi/>
[1526] Spitz B, 'Survey shows that the French graduated response fights online copyright infringement efficiently' (Kluwer Copyright Blog, 17 Apr. 2018) <https://copyrightblog.kluweriplaw.com/2018/04/17/survey-shows-french-graduated-response-fights-online-copyright-infringement-efficiently/>
[1527] Yu PK (2010) 1422.
[1528] Geiger C & Izyumenko E (2016) 44.
[1529] Perel M (2020) 317.
[1530] Lindsay D (2017) 1507.
[1531] Husovec M (2017); Geiger C & Izyumenko E (2020) 566.
[1532] Perel M (2020) 23.
[1533] Husovec M (2017); Marsoof A (2015); Riordan J (2017) 275; Angelopoulos C (2014); Arnold R (2015); Blythe A (2017); Rosati E (2017c).
[1534] Art.8(3) ISD.
[1535] Art.11 IPRED.

remedy, although implementation and application vary among Member States. Additionally, website blocking measures are incorporated into national law through administrative regulations that grant authorities powers to block websites under specific conditions.[1536]

1.2.1 Legal Basis for Website Blocking Injunctions

Art.18(1) ECD instructs Member States to ensure the availability of court actions against information society service providers' activities to terminate any alleged infringement and prevent further impairment of interest involved.[1537] Meanwhile, the ECD also limits the scope of its liability exemptions by providing that the exemptions 'shall not affect the possibility for a *court or administrative authority* [...] of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'[1538]

The ISD clarifies that the availability of these injunctions is necessary since '[i]n many cases, such intermediaries are best placed to bring such infringing activities to an end.'[1539] Thus, the ISD provides that 'Member States shall ensure that rightsholders 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.'[1540] The limited scope of the injunctions is, then, extended to IPR enforcement at large by the IPRED.[1541]

The EU legislation also imposes certain limitations on website blocking injunctions. Significantly, an injunction may require an intermediary to implement measures to prevent future infringements, but it cannot violate Art.15(1) ECD.[1542] In addition, the EU fundamental rights also set important limitations on website blocking injunctions.[1543] In particular, the overarching principles derived from the CFR constitute a 'maximal admissible ceiling' for the application of national rules.[1544]

[1536] Cogo AE & Ricolfi M (2020) 586-610; Kaleda SL (2017) 217.
[1537] Art.18(1) ECD.
[1538] Art.14(3) ECD. Emphasis added.
[1539] Recital 59 ISD.
[1540] Art.8(3) ISD.
[1541] Art.11 IPRED.
[1542] Art.15(1) and recital 47 ECD.
[1543] Lindsay D (2017) 1514.
[1544] Husovec M & Peguera M (2015) 17.

Moreover, the DSA states that intermediary service providers, including also access providers who are the target of blocking injunctions, must specify to the judicial or administrative authority the action taken and the moment it was taken, when receiving an order to act against illegal content.[1545] The order should be harmonized by including, inter alia, a reference to the legal basis, a statement of reasons for deeming the content illegal under EU or national law, identification of the issuing authority, clear details to locate the illegal content, information on available redress mechanisms for both the intermediary and the content provider, and, if applicable, details on the authority to be informed about the enforcement of the order.[1546] In addition, the DSA establishes a system of national Digital Service Coordinators (DSCs), requiring that the DSC from the Member State where the judicial or administrative authority issued the order must promptly transmit a copy to all other DSCs.[1547]

1.2.2 Implementation of Website Blocking Injunctions

In accordance with Art.14(3) ECD, some European jurisdictions, including Greece, Italy, Lithuania, and Spain, have adopted enforcement models where administrative authorities are empowered to issue website blocking orders.[1548] In Italy, website blocking was assigned to the Autorità per le Garanzie nelle Comunicazioni (AGCOM), which is responsible for issuing blocking orders to access providers concerning targeted websites.[1549] Through the website blocking injunction ordered by administrative authorities, intermediaries are directly engaged in the prevention of online piracy. In Italy, website blocking injunctions have resulted in more than 700 domain names being blacklisted as of 2019, a number expected to grow rapidly, particularly since the 2018 amended Regulation allows AGCOM to issue dynamic blocking orders.[1550]

The CJEU explicitly recognized the compatibility of website blocking injunctions with EU law in its 2014 decision in *UPC Telekabel Wien*.[1551] Significantly, the CJEU's approval of website blocking injunctions grants legitimacy to this specific IP remedy across Member States.[1552] Notably, although administrations were not involved in the website blocking decision in this

[1545] Art.9(1) DSA.
[1546] Art.9(2) DSA.
[1547] Art.9(3)-(5) DSA.
[1548] Frosio G & Bulayenko O (2021) 1130.
[1549] Ibid.
[1550] Cogo AE & Ricolfi M (2020) 607.
[1551] *UPC Telekabel Wien*.
[1552] Hyland M (2020) 51.

ruling, the guidance provided by the CJEU may also be applicable to injunctions issued by copyright administrations. The Court ruled that a national court may issue website blocking injunctions, even if the injunctions do not specify the exact measures the access provider must take, and the provider can avoid coercive penalties by demonstrating that it has taken all reasonable measures.[1553] A fundamental right balancing test is established, which must be met for the blocking order to be deemed acceptable. The injunction is valid provided that (i) the measures do not unnecessarily prevent internet users from lawfully accessing information, and (ii) the measures effectively prevent or at least significantly hinder unauthorized access to the protected content, while discouraging users from accessing infringing material.[1554] The CJEU stressed that the blocking should be 'strictly targeted,' meaning that the measures adopted by the intermediary must specifically aim to end a third party's infringement of copyright or related rights.[1555] The choice of specific website blocking methods can be left to intermediaries, but they must select measures that do not unnecessarily restrict users' lawful access to online information.[1556]

The open-textured injunction outlined in *UPC Telekabel Wien* grants intermediaries significant discretion regarding the measures they can take. The rationale for this flexibility is straightforward: specifying blocking measures within the injunction would limit the intermediary's adaptability ability to effectively respond to rapidly changing IP addresses or domain names and potentially stifle creative solutions.[1557] Moreover, the CJEU suggested that result-tailored injunctions are less intrusive on the freedom to conduct a business than specific injunctions, as long as they allow intermediaries to make enforcement choices freely. They must determine the degree or level of blocking, a task that requires balancing effectiveness, extensiveness, intrusiveness, and expense. Legal uncertainty arises when an open-textured or generic injunction places the intermediary in the difficult position of having to speculate about the court's or the administrative authority's intended requirements regarding effectiveness.[1558]

In fact, the CJEU shifted a considerable part of the fundamental-rights-sensitive enforcement choices onto the intermediaries, taking a rather delicate policy decision in *UPC Telekabel*

[1553] *UPC Telekabel Wien*, para.52.
[1554] Ibid, para.66.
[1555] Ibid, para.56.
[1556] Jütte J (2016) 17.
[1557] Hyland M (2020) 55.
[1558] Hyland M (2020) 55.

Wien.[1559] An open-ended, flexible injunction ordered by the court or the administrative authority may create a dilemma for intermediaries. If they choose a mild blocking measure to protect users' fundamental rights, they may risk facing coercive penalties; however, opting for more severe blocking measures could lead to legal disputes with users.[1560] Moreover, Member States typically do not require intermediary 'contributory' liability to impose blocking injunctions on intermediaries, following the principle that these measures apply to so-called 'innocent third parties.'[1561] Administrations may exploit intermediaries' ability to discover, identify, and manage illegal content by assigning them the proactive role of engaging in collateral censorship through vague and unspecified website blocking orders. Given these concerns, to eliminate the intermediaries' dilemma and further limit abuse of power, injunctive orders should precisely define the exact measures intermediaries must implement.

Overall, website blocking orders are generally effective and, comparatively speaking, more effective than other regulatory interventions currently available to rightsholders to combat commercial-scale copyright infringement.[1562] The effectiveness of website blocking has also drawn the attention of some Chinese scholars, who suggest introducing website blocking injunctions into the Chinese copyright law.[1563] While technologically savvy individuals may always find ways to circumvent website blocking, this should not detract from the relative usefulness and effectiveness of website blocking orders.[1564] Nonetheless, website blocking is also an invasive enforcement tool, which requires the adoption of rigorous procedural safeguards including transparency and effective judicial review mechanism, particularly when it is used in the context of copyright enforcement.[1565]

2. Administrative Copyright Enforcement Through Intermediaries in China

Administrative enforcement has assumed a pivotal role in the remedying IP infringements, especially copyright, as is evident in China's legal practice and has long been controversial as an approach with Chinese characteristics.[1566] In particular, the copyright administrative enforcement refers to a series of administrative measures addressing copyright infringements

[1559] Geiger C & Izyumenko E (2020).
[1560] AG Opinion in *UPC Telekabel Wien*, para 89. Hyland M (2020) 56-7; Geiger C & Izyumenko E (2020) 573.
[1561] Husovec M (2017).
[1562] Hyland M (2020) 48; Meale D (2016) 821; Rosati E (2017c).
[1563] Peng X & Zhang C (2023); Hu K (2017); Zhou P (2019).
[1564] Hyland M (2020) 48.
[1565] Kaleda SL (2017) 225.
[1566] Tang GH (2010) 408; Shan H (2014).

for which there is no obvious parallel in other jurisdictions.[1567] In instances where copyright infringements harm the public interest, copyright administrations proactively safeguard the legitimate rights of the rightsholder, maintain market order and foster the incentive to innovate.[1568] This protective stance involves a range of administrative measures including administrative penalties, mediation and adjudication.[1569] Meanwhile, special extra-judicial administrative actions, namely regulatory talks (*yuetan*) and campaigns, are also employed to address copyright infringements and maintain market stability.

2.1 Administrative Copyright Enforcement in Chinese Law

When a copyright infringement harms the public interest, a copyright administration shall enforce its power by issuing an order to cease infringement and warnings, confiscating unlawful gains and tools. Moreover, copyright administrations are granted the power to impose a fine of one to five times unlawful gains exceeding RMB 50,000, and up to RMB 250,000 in cases where there is no unlawful gain or an unlawful gain that is difficult to calculate or less than RMB 50,000.[1570] Interestingly, Art.53 of the 2020 CCL deleted the modal auxiliary verb ‘may,’ which indicates that all infringements detrimental to the public interest must be subject to administrative intervention, thereby further intensifying copyright administrative enforcement.[1571] Furthermore, Art.55 entrusts the copyright administrations with the power to investigate suspected copyright infringement, such as questioning the relevant parties, investigating circumstances related to suspected unlawful acts, conducting on-the-spot inspections, checking and reproducing contracts, invoices, account books, and other materials, and sealing or seizing the premises and articles of suspected unlawful acts.[1572] Additionally, Art.84 ECL 2018 sets out administrative liability for e-commerce business operators that fail to promptly perform a ‘notice and take down’ obligation and take necessary measures against an IPR infringement on their services.[1573]

2.2 Extra-Judicial Copyright Administrative Enforcement Against Online Piracy

[1567] Kur A et al. (2019).
[1568] Tang GH (2010).
[1569] Xiong Q & Zhu R (2020).
[1570] Art.53 CCL.
[1571] Ibid.
[1572] Art.55 CCL.
[1573] Art.84 of ECL 2018; Feng S et al. (2019); Huang W & Li X (2019).

Based on the intensity of administrative intervention, administrative enforcement in the copyright domain can be roughly categorized into five groups: administrative penalty, administrative adjudication, administrative mediation, regulatory talks, and campaigns. Much has been written, and much is understood, about how copyright administrations investigate and deter copyright infringements through administrative penalties in the offline world. Far less has been written and is understood about extra-judicial enforcement measures carried out by copyright administrations, namely regulatory talks and campaigns, to address copyright infringements on the various intermediaries.

2.2.1 Regulatory Talks (*Yuetan*)

Regulatory talks, or '*yuetan*' are often regarded as a pragmatic administrative regulatory measure in the face of lax or weak regulations, particularly when addressing regulatory challenges in economic and social sectors.[1574] By engaging in scheduled talks with relevant stakeholders, be they citizens, legal entities, or other organizations, administrative organs order self-inspection and rectification to foster legal compliance.[1575] This proactive approach seeks to guide the parties concerned towards voluntary actions or inaction, and mitigate potential legal infractions, thereby safeguarding the overarching public interest.[1576]

In recent years, regulatory talks have been frequently employed in the regulation of online intermediaries and the burgeoning sharing economy.[1577] Regulatory talks have proven highly efficient in rectifying copyright infringements on intermediaries, offering timely oversight and producing immediately discernible results.[1578] The NCAC has initiated several regulatory talks to assert its regulatory stance, urging intermediaries to moderate copyright-infringing

[1574] Calhoun G, 'Why China Stepped On The Ant Group (Part 1): To Stop A Bubble' (Forbes, 8 Nov. 2020) <https://www.forbes.com/sites/georgecalhoun/2020/11/08/why-china-stepped-on-the-ant-group-part-1-a-bubble-looming/?sh=1facb1642054>; CAC, 'CAC had regulatory talks with 3491 platforms in the first half of 2022 regarding information security' (31 July 2022) <http://www.news.cn/2022-07/31/c_1128878986.htm>
[1575] Qiang X (2019).
[1576] Meng Q (2015); Wang H (2018).
[1577] McMorrow R & Sender H, 'Beijing summons Jack Ma over $37bn Ant IPO' (Financial Times, 2 Nov. 2020) <https://www.ft.com/content/ea298d72-aa5d-4c4b-b74d-e255f579ab98>
[1578] Shen W & Jiang D (2021).

content,[1579] maintain the order of the copyright industry,[1580] fight against online piracy,[1581] and so forth.[1582] In 2018, in a specific manifestation of administrative governance, the NCAC collectively initiated regulatory talks with 15 short video intermediaries, demanding that they investigate and rectify outstanding copyright issues that existed on their intermediaries. As a result of these interviews, the intermediaries have banned or downgraded 140,000 infringing accounts, dealt with more than 470,000 infringing works, and taken down 570,000 infringing short videos.[1583] Simultaneously, under the auspices of the NCAC, over 30 mainstream financial media outlets established the 'China Financial Media Copyright Protection Alliance,' and online marketplaces entered into cooperative agreements regarding copyright protection for books with prominent publishing presses.[1584]

2.2.2 Campaigns

Unlike *yuetan*, which often take the form of scheduled talks and guide the parties concerned towards voluntary actions or inaction, campaigns in China are short-term, intensive sets of collaborative administrative actions routinely deployed to 'address perceived crises arising out of shortcomings in the legal regulatory regime and to deal with problems that regular enforcement strategies have failed to address adequately.'[1585] In order to regulate the extent of coupling between central and local governments, the top-down campaign-style mobilization was activated from time to time in the practice of China's governance in different fields, from political rectification to economic development.[1586]

[1579] CAC, 'The NCAC had regulatory talks with 15 short video platform companies' (15 Sep. 2018) <http://www.cac.gov.cn/2018-09/15/c_1123432727.htm>

[1580] NCAC, 'The NCAC had regulatory talks with digital music-related enterprises, promoting the construction of a good digital music copyright ecology' (6 Jan. 2022) <https://www.ncac.gov.cn/chinacopyright/contents/12227/355756.shtml>; NCAC, 'The NCAC had regulatory talks with 13 Online Service Providers to regulate online reprinting' (29 Sep. 2019) <https://www.gov.cn/xinwen/2018-09/29/content_5326839.htm>

[1581] Caxin, 'NCAC had regulatory talks with 13 online service providers and prohibited the content spinning, distortion and alteration of headlines' (30 Sept. 2018) <https://companies.caixin.com/2018-09-30/101331460.html>

[1582] 'NCAC had regulatory talks with major online music service providers, asking for full authorization to widely disseminate musical works' (China Daily, 4 Sept. 2017) <http://cn.chinadaily.com.cn/2017-09/14/content_31981732.htm>

[1583] NCAC, 'Reports on the Results of the Special Action Sword Net 2018' (27 Feb 2019) <https://www.ncac.gov.cn/chinacopyright/contents/12384/350238.shtml>

[1584] Lai M, 'NCAC Releases Ten Major Events in China's Copyright in 2018' (People.cn 19 March 2019) <http://ip.people.com.cn/n1/2019/0319/c179663-30983268.html>

[1585] Zhou X (2021); Biddulph S et al. (2012); Xu D et al. (2019).

[1586] Zhou X (2022) 5, 20; Heilmann S & Perry E (2011) 14.

Campaigns are characterized by a centralized approach of a 'planned' nature:[1587] with clear goals for a set time window, campaigns are launched through large-scale organizational mobilization which involves interagency bureaucratic mobilisation at multiple levels of government,[1588] specifying strict and detailed accountability mechanisms and evaluation of required performance.[1589] Notably, their multi-departmental participation and cross-domain joint enforcement, backed by the state's centralized authority, confer the advantages of a broad coverage and potent effectiveness in addressing local government's laxity in law enforcement,[1590] as well as alleviating the information asymmetry problem.[1591] Optimally, the short-term achievements and lessons learned from campaigns may pave the way for future legislative initiatives for long-term governance.[1592]

Statistically, the top-down 'campaign-style' copyright administrative enforcement measures, represented by the intensified and focused annual 'Sword Net Campaign,' have played a significant role in combating and deterring online copyright infringement since 2005.[1593] In cooperation with the other three departments, the NCAC launched the 18th round of Sword Net Campaign against online piracy from September to November 2022.[1594] Through this special operation, the NCAC investigated and handled 1,180 cases of online copyright infringement, removed 840,000 infringing links, shut down 1,692 infringing websites and applications, and disposed of 15,400 infringing accounts.[1595] Such joint copyright enforcement initiatives with multi-departmental participation achieved notably positive outcomes in curbing online piracy, reflecting China's intensified efforts in law enforcement and its resolute stance on cracking down on copyright infringements.

2.2.3 Legal Challenges of Extra-Judicial Enforcement

The NCAC, along with other central administrative bodies, leverages potent 'soft' regulatory instruments, such as regulatory talks and campaigns, to address a substantial volume of online

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[1587] NCAC, 'Notification on the Special Action against Online Copyright Infringement and Piracy Sword Net Campaign 2016' (12 Jul 2016) <https://www.ncac.gov.cn/chinacopyright/contents/12548/351268.shtml>
[1588] Biddulph S et al. (2012).
[1589] Liu N et al (2015); Zhou X (2021).
[1590] Liu N et al (2015); Jia M (2024).
[1591] Wang F et al. (2022); Zhou X (2021) 21–2.
[1592] Xu D et al. (2019) 7.
[1593] Chen Z (2021).
[1594] NCAC, 'NCAC and four other departments to launch the 'Sword Net 2022' special campaign' (9 Sep 2022) <https://www.gov.cn/xinwen/2022-09/09/content_5709237.htm>
[1595] State Council, 'Press Office of the State Council Holds Conference on Annual Report on China's Efforts to Combat Infringement and Counterfeiting (2022)' (26 Apr. 2023) <https://www.gov.cn/lianbo/2023-04/26/content_5753432.htm>

copyright violations.[1596] However, these extra-judicial tools often involve fundamental flaws such as a lack of proportionality, legal certainty, and due procedures, undermining the expected predictability and stability of copyright regulations.[1597]

Admittedly, such extra-judicial administrative actions lack long-term impacts due to their responsive nature.[1598] Under this top-down mechanism, many regulatory problems do not receive adequate attention from the top leadership until they begin to spiral out of control.[1599] This policy control mechanism fluctuates from a previously lax to a strict and harsh enforcement, resulting in a transient effect.[1600] Although the effects of the 2018 Sword Net Campaign were evidently positive, another report still indicated the emergence of 7.54 million new infringing short video links in 2019 from video-sharing intermediaries operated by Baidu, Tencent and ByteDance.[1601] After a pattern of intensified and focused selective enforcement against the most significant illegal activities, the market descended back into chaos with massive copyright infringements 'bouncing back.'[1602]

Moreover, such extra-judicial enforcement is in conflict with China's commitment to the rule of law. When a crisis looms, the top leadership quickly mobilizes all administrative resources and propaganda to initiate actions against specific entities, regardless of administrative procedural constraints,[1603] although both copyright law and administrative law fail to explicitly define whether those administrative actions fall within the ambit and procedure of administrative power.[1604] Given the undefined 'public interest,' courts have confirmed that 'the determination of whether a copyright infringement concurrently harms the public interest should be made by the copyright administration.'[1605] Thus, administrations breach the above constraint by either broadly interpreting public interest[1606] or relying on general premises such as upholding a 'good market order' and promoting the 'healthy development of the

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[1596] Zhang AH (2022) 500.
[1597] Biddulph S et al. (2012); Zhou X (2021) 20.
[1598] Van Rooij B (2016); Van Rooij B et al. (2018); Dimitrov M (2007).
[1599] Zhang AH (2022) 465, 471.
[1600] Hurtado A (2018).
[1601] Dou X, 'Online Copyright Monitoring Report: Piracy Socialization and Mobilization Trend is Obvious' (IPRCHN, 21 Apr. 2020) <http://www.iprchn.com/cipnews/news_content.aspx?newsId=122123>
[1602] Hurtado A (2018); Xu D et al. (2019).
[1603] Zhang AH (2022) 495.
[1604] Articles 53 and 55 of 2020 CCL, 2017 *Administrative Procedure Law*; 2021 *Administrative Penalty Law*.
[1605] [2016]YXZ No.492 (2016)粤行终 492 号行政判决书.
[1606] Dong T (2022).

industry.'[1607] As a result, those being regulated struggle to anticipate the objectives and extent of such administrative actions.[1608] Zhang observes that, due to the absence of a transparent enforcement process subject to strong judicial oversight, aggressive agency interventions and heavy-handed approaches create the risk of over-enforcement and administrative power abuse.[1609] Deeply ingrained in its authoritarian governance system, an extra-judicial approach that is coloured by the interests of political leaders in achieving their political goals and by the bureaucratic inertia of the regulators, may reinforce the lack of a rule-of-law tradition.[1610]

Furthermore, the strong administrative intervention in the copyright market contravenes the National IP Strategy's call for 'the leading role of judicial protection of IPRs.' The escalating intensity of administrative interventions, exemplified by the serial regulatory talks and 'Sword Net Campaign,' has garnered increased societal resonance, fostering a climate where copyright owners are more accustomed to administrative enforcement over judicial protection.[1611] The excessive reliance on massive administrative interventions, epitomized by regulatory talks and campaigns, has culminated in conflicts between administrative and judicial powers and at the same time has marginalized judicial protection to a certain extent.[1612] This has, to a degree, decelerated the transition toward making judicial protection the predominant method of copyright protection in China.

Finally, considering the conflicts between the centralized policy-making process and fragmented power within the Chinese bureaucracy,[1613] such extra-judicial administrative enforcement generates unintended consequences and poses significant risks. Possible negative impacts on administrative capacity-building and policy-making quality, such as rent-seeking, corruption and local protectionism, may stem from the biased priority setting and undue administrative discretion in extra-judicial administrative enforcement.[1614] Administrative agencies have an incentive to over-enforce in order to 'broaden their turf' and expand their

[1607] NCAC, 'NCAC, MIIT, PBS and Launch the Special Action Sword Net 2022' (9 Sept. 2022) <https://www.gov.cn/xinwen/2022-09/09/content_5709237.htm>; Xinhua, 'Central Propaganda Department Announces that China Will Further Strengthen Copyright Supervision in Key Areas of the Internet This Year' (27 Apr. 2022) <https://www.gov.cn/xinwen/2022-04/27/content_5687429.htm>

[1608] Xiong Q & Zhu R (2020).

[1609] Zhang AH (2022).

[1610] Liu N et al. (2015).

[1611] Tang GH (2010) 414.

[1612] Xiong Q (2018).

[1613] Mertha A (2009) 996.

[1614] Heilmann S & Perry E (2011) 494; Tang Z (2019).

influence,[1615] while targeted intermediaries rarely challenge such administrative interventions due to the omnipresent power imbalance between government and business.[1616] As a result, excessive campaigns maintain social stability and amass popular support on the one hand, but undermine the central government's goal of fostering economic growth and innovation on the other hand.[1617]

[1615] Zheng W (2015).
[1616] Zhang AH (2021) 68.
[1617] Ibid; Zhang AH (2022) 8–9.

VI. Block or Open: Alternative Solutions to Regulate Piracy in China

At the end of the 20th century, intermediaries were granted a certain degree of immunity from liability, based on a consensus to maintain technological progress, whether through the broad immunity or the conditional safe harbors. These legal protections allowed intermediaries to emerge from the early chaos of the web, develop, and ultimately become the driving force behind digital economies worldwide.[1618] However, intermediaries are currently facing a global legal crisis: court systems are overburdened, regulatory bureaucracies are struggling to keep up with rapidly evolving technological and business developments, and new institutions for resolving trade disputes and setting network standards are skillfully navigating around various legal obstacles, including conflicting national laws and international human rights mandates and goals.[1619]

Throughout this process, the chaos gradually returned to the intermediaries, leading to increasing social clamor from various groups. In the U.S., political and legal circles have consistently called for holding intermediaries accountable on various fronts, advocating for the introduction of a conditional duty of care.[1620] In Europe, it has been proposed that intermediaries offering 'core platform services' should assume 'gatekeeper responsibilities,' reflecting a more stringent regulatory approach.[1621] At the same time, China is also proposing a comprehensive paradigm of 'primary responsibility' for intermediaries, positioning large intermediaries as critical regulatory 'choke point,' and subjecting them to a regime of *ex ante* and *ex post* legal and moral responsibilities.[1622]

Whether we like it or not, algorithmic copyright enforcement will continue to expand, driven by support from both copyright holders and intermediaries, largely because of the efficiency and effectiveness that automation offers.[1623] Policymakers' trust in the power of private

[1618] Chander A (2013); Cohen JE (2017).
[1619] Cohen JE (2017) 176-9.
[1620] Citron DK (2023).
[1621] European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>
[1622] The State Administration for Market Regulation, 'The Announcement for Public Comments on the 'Guidelines for Categorization and Grading of Internet Platforms (Draft for Comment)' and the 'Guidelines for Implementing Primary Responsibilities on Internet Platforms (Draft for Comment)' (关于对《互联网平台分类分级指南（征求意见稿）》《互联网平台落实主体责任指南（征求意见稿）》公开征求意见的公告) (29 Oct. 2021) <https://samr.gov.cn/hd/zjdc/202110/t20211027336137.html>
[1623] Yu PK (2020) 341.

innovation is perhaps most evident in situations where statutes mandate technology companies to invest heavily in new, untested moderation technologies, and in court rulings that assume intermediaries possess technical capabilities that have not been demonstrated.[1624] However, this confidence in technology may be misplaced and can lead to damaging consequences.

Instead, the employment of algorithmic content moderation by intermediaries must be treated with prudence: the algorithmic decision-making systems employed by intermediaries must be transparent as much as possible, the fundamental rights of users must be fairly respected, and remedies must be provided for concerned users. The experiences of the EU and U.S. provide valuable insights for Chinese regulators in response to emerging calls for the introduction of copyright filtering obligations. While recognizing the optimistic view of intermediaries' enhanced information management capabilities, it is equally crucial to critically examine the inherent limitations of filtering technologies, along with their potential negative impact on the protection of users' fundamental rights. Overstating the effectiveness of algorithmic filtering and embedding it into a legal framework could not only hinder lawful online expression and UGC, but also create market barriers for service providers who lack the capability to develop or afford such algorithmic technologies.[1625]

Overall, the Chinese internet policy should continue to be pro-competitive and pro-innovation, while strengthening safeguards for users. An 'open' strategy focused on providing more legal channels for online uses may offer a better solution to the current dilemma. Copyright owners who have relied on a 'preventative' approach like introducing website-blocking measures have struggled to keep pace with technological advancements and have often overlooked or suppressed the growing demand for content consumption.[1626] Simply preventing the unauthorized distribution and acquisition of copyrighted works on the internet does not directly increase the consumption of those works.[1627] Aggressively pursuing every ambiguous case of infringement risks stifling new creativity while offering minimal protection to the copyright holder's legitimate interests.[1628] Additionally, recent preventative measures like content filtering and website blocking often result in the removal of illegal content, but they also

[1624] Bloch-Wehba H (2020) 83. See also Chapter IV.
[1625] Section 512 Report, p.189.
[1626] Ginsburg JC (2001).
[1627] Giblin R (2013) 198.
[1628] Balganesh S (2013) 729.

suppress public access to information on the internet, thereby significantly impacting users' fundamental rights.[1629] In contrast, providing users with authorized channels to access and use works actually encourages the consumption of legal content. The ‘open’ copyright protection model prioritizes facilitating legal access by creating various methods to authorize online use of works. Sustainable and robust copyright protection should be grounded in this ‘authorization’ model, which involves organizing a well-functioning market through the development of effective business models, offering authorization channels for online use, and enhancing the copyright collective management system to ensure that copyright owners receive proper incentives and effective, convenient authorization.

Meanwhile, the ‘preventive’ model should function as a supplementary approach: by reasonably employing preventive measures like website blocking and targeted filtering, the overall difficulty of committing copyright infringement can be increased, thereby striking a fair balance among the interests of users, intermediaries, and rightsholders. Most importantly, severe administrative enforcement measures like Internet disconnection and blocking entire websites should be used only as a last resort, reserved for the most egregious cases.[1630] Thus, a proportionality test should be applied when copyright administrations enforce copyright online. Once the administrative copyright enforcement mechanism is properly adjusted and functioning on the right track, the copyright legal system can then focus on enhancing online legal offerings, encouraging lawful consumption, and providing copyright-related services. This balanced approach promotes and guides users toward legal services, curbs the development of illegal services, and supports the successful operation of authorized business models.

1. Cooperation Between ‘Open’ Strategy and ‘Block’ Strategy

In recent decades, regulation has moved away from command-and-control models toward more participatory and collaborative modes of rulemaking, compliance, and enforcement. Under the co-regulatory approach to intermediary governance, multiple stakeholders—including government, industry, and society—are viewed as partners in the legal process and are encouraged to share responsibility for achieving policy goals.

[1629] Geiger C & Izyumenko E (2020); Geiger C & Jütte J (2021a).
[1630] Yu PK (2010) 1429.

1.1 Encourage Authorization: Provide Legal Channels for Online Uses

When considering the application of filtering technologies by Chinese intermediaries, it is crucial to note that both the U.S. voluntary copyright content moderation mechanisms and the copyright content moderation obligations established by Art.17 of the DSMD are fundamentally based on cooperation between copyright holders and intermediaries concerning copyright authorizations. The comprehensive rights clearance mechanism, based on cooperation between rights holders and intermediaries, forms the essential foundation for effective content matching and filtering. Therefore, Chinese regulators should further enhance the copyright collective management mechanisms to encourage intermediaries to obtain authorizations from rightsholders as much as possible.

1.1.1 Encourage Copyright Authorizations for Lawful Uses

The operation of filtering mechanisms depends on copyright holders supplying intermediaries with specific databases of works and detailed information to enable accurate content matching. This process involves frame-by-frame comparisons between user-uploaded content and the information provided by copyright holders, which necessitates a prior agreement between the parties on the ownership, scope of rights, and content of the works. Notably, the provision of these work databases necessitates a specific agreement between copyright holders and intermediaries,[1631] rather than being imposed by legislation or judicial decisions. Moreover, filtering mechanisms extend beyond merely blocking content, encompassing a diverse range of rights clearance and authorization processes.

Unlike the EU, the formation of China’s CMOs is a product of administrative intervention, without an industry-driven process of interest distribution coordination through stakeholders negotiation. CMOs are not large-scale licensing bodies, but rather transaction regulatory agencies assisting the competent administrative authorities. Not only must their establishment be approved by the regulatory authorities before taking effect, but also entities outside the CMOs are not empowered to undertake any form of large-scale licensing.[1632] As a result, China faces significant challenges in both negotiating licensing agreements with intermediaries and providing content databases for comparison.[1633] Chinese CMOs are well-suited to meet the

[1631] Art.17 DSMD; Rosati E (2021).
[1632] Xiong Q (2018) 128.
[1633] Wan Y (2021) 194.

needs of the 'professionalized' community of authors, who depend on creating and disseminating works as their primary occupation and income source, as well as the 'commercialized' group of users, typically represented by professional distributors like publishing houses and broadcasting organizations, whose role is to acquire and utilize works in a centralized fashion.[1634] However, when dealing with UGC that involves copying, collaging, and mixing different works to create new ones, traditional CMOs face considerable challenges. They struggle to manage the highly dispersed network of individual users effectively, and they are also unable to meet the rapidly increasing demand for self-expression and easy access to materials in the mobile internet environment at a reasonable cost.[1635] What is more, China's copyright CMOs already lack sufficient representativeness in large-scale licensing within the internet domain, further complicating the process of authorization.[1636] Furthermore, the only musical CMO in mainland China, Music Copyright Society of China (MCSC), functions more like an 'administrative' management agency than a traditional CMO that advocates for its members and protects their rights.[1637] This means that copyright licensing in China does not entirely function within a market-economy framework; rather, administrative intervention has diminished the role of copyright holders and music users in the collective management of copyright.[1638]

To ensure that intermediaries can implement large-scale licensing, including sub-licensing, it is necessary to adjust the traditional approach in Chinese copyright law that upholds the 'national' and 'exclusive' status of CMOs, allowing entities outside CMOs to participate in copyright collective licensing. Historically, administrative forces were needed to establish market order and maintain the authority and monopoly of CMOs due to the underdeveloped copyright industry. However, in the current stage of 'full digitalization' of the copyright industry and the highly market-driven nature of the internet industry, this institutional arrangement now appears to do 'more harm than good.'[1639] With the help of digital technology, intermediaries have greatly lowered the transaction costs related to identifying ownership and calculating usage frequency, while also enabling the development of new business models for copyright holders, thereby rendering collective management no longer the exclusive means for

[1634] Xiong Q (2023) 128.
[1635] Ibid, 128-9.
[1636] Xiong Q (2016).
[1637] Xu Q (2021) 94.
[1638] Xiong Q (2016) 104; Xu Q (2021) 94
[1639] Xiong Q (2023) 131-2.

large-scale licensing. The history of copyright licensing shows that CMOs were originally private entities created to facilitate large-scale licensing, reducing transaction and regulatory costs for both copyright holders and users.[1640] If intermediaries can achieve the same goals at lower costs, they should be allowed to assume the role of copyright collective licensing.

1.1.2 Ensure Fair Renumeration for Rightsholders and User-creators

Historically, each technological advance has created new ways to distribute and consume copyrighted content, prompting copyright owners to seek legal inclusion of these uses to share revenues with new distributors—a pattern that continually repeats with emerging technologies. Users have primarily been largely marginalized as passive consumers, receiving content produced by authors and distributed by intermediaries, and have largely been excluded from the copyright 'cake-cutting' game.[1641] However, such a cycle can be disrupted by the rising power of users creating content in the UGC era. The rapid development of user-friendly content creation tools, the interconnectivity of the Internet, and the increasing amount of leisure time have transformed a large number of content consumers into content producers who actively engage in amateur (re)creation, self-publication and peer distribution.[1642] When users widely disseminate works online, it causes copyright owners to lose control over distribution channels and revenue, further disrupting the traditional copyright revenue distribution system.[1643] Despite creating content, users are not given the opportunity to decide how copyright revenue from their work is allocated. Instead, intermediaries have taken control of revenue distribution, once again marginalizing users in the copyright 'cake-cutting' process and subjecting them to unfair exploitation.[1644] In particular, the legitimate rights and interests of users are absent in the 'value gap' narrative, as dispersed users lack the bargaining power to challenge other stakeholders. In fact, intermediaries hosting UGC have become the primary beneficiaries of this legal loophole: they increasingly profit from UGC without sharing revenue with its creators while enjoying safe harbor exemptions that shield them from liability for copyright infringements related to UGC.[1645]

1.1.2.1 Filtering as the Norm?

[1640] Xu Q (2021) 94.
[1641] Li Y & Huang W (2019).
[1642] Ibid.
[1643] Elkin-Koren N (2009) 19.
[1644] Li Y & Huang W (2019).
[1645] Ibid.

The longstanding rationale for the necessity and feasibility of copyright filtering rests on two premises: on one hand, from a technical standpoint, filtering algorithms are widely viewed as enhancing information management capabilities in practice. In the early stages of implementing copyright filtering systems, Chinese courts held that intermediaries should bear a heightened duty of care and proactively adopt reasonable automatic filtering measures, especially for 'well-known works by prominent authors' that are frequently subject to repeated infringement complaints.[1646] As algorithms and business models have evolved, the courts have maintained the view that technical capability is synonymous with information management ability. In cases involving algorithmic recommendations, courts have asserted that intermediaries employing such algorithms, which facilitate precise and efficient user recommendations, should be subject to an even higher duty of care.[1647] Relevant judicial interpretations have also emphasized that this duty of care should correspond to the intermediaries' 'expected information management capabilities.'[1648] In essence, Chinese courts no longer restrict their assessment of intermediaries to those offering basic services like storage, search, or linking under the safe harbor rule; instead, they impose a higher duty of care to prevent repeated infringements.

On the other hand, the role of copyright filtering mechanisms is primarily seen as a means to address the shortcomings of the safe harbor regime. The design of joint copyright infringement rules for intermediaries in Chinese law is modeled after the globally accepted NTD rule, which emerged during the early days of the internet. This rule requires intermediaries to remove allegedly infringing content upon receiving a valid notice from rightsholders. Although subsequent legislation has elevated the standard from NTD to 'notice-and-take necessary measures,' thereby increasing the obligations of intermediaries upon receiving such notices, the framework remains largely within the confines of the 'safe harbor' rule.[1649] However, as filtering algorithms have become integral to intermediaries' business models and UGC has rapidly proliferated in the mobile internet environment, the balance of interests between copyright holders, intermediaries, and users has become increasingly difficult to maintain due to rising regulatory and enforcement costs. Consequently, the filtering mechanism is now

[1646] [2012] HMCZ No.5558.; [2014] GMZZ No.2045.
[1647] [2018] Jing 0108 Min Chu No.49421 Civil Judgment.
[1648] Art.9(1) of 2020 Provisions.
[1649] Xue J (2020) 140.

considered to be an ideal way to raise the standard of care and expand the scope of necessary measures.[1650]

In other words, Chinese courts view the filtering mechanism as a practical and feasible alternative to address the ineffectiveness and inefficiency of the NTD mechanism. However, this does not necessarily imply that regulators should take the additional step of fully institutionalizing the copyright filtering mechanism as a statutory obligation. If Chinese regulators and courts continue to follow the existing legislative approach of simply strengthening intermediaries' liability by heightening the duty of care and expanding the scope of necessary measures, it will only further increase costs for all parties involved. Particularly, a statutory copyright filtering obligation would further undermine users' fundamental rights and stifle competition and innovation. Most critically, combining such a statutory filtering obligation with the existing public law monitoring obligations would effectively transform Chinese intermediaries into gatekeepers of a digital panopticon.

Under Art.17 DSMD, absent a licensing market, filtering becomes the norm.[1651] That being said, this copyright mechanism continues the previous '*ex ante* permission' approach, which favors cooperation between large intermediaries and major rightsholders[1652] but fails to achieve a proper balance among all stakeholders, particularly users. Such a 'blocking' strategy neither addresses users' surging need to access copyrighted content, nor brings additional revenue to medium- and small copyright owners. As a result, user creativity is stifled, and copyright owners' royalties are diminished due to insufficient use.

1.2.1.2 'Authorize' Unauthorized Use

In response to large-scale and repeated infringement issues, the lack of consensus on legislative revisions has led to reliance on individualized negotiations governed by privately created contractual rules, which adjust the rights and obligations of the three parties involved, effectively surpassing the limitations of inflexible state regulations.[1653] Both copyright holders and intermediaries, after incurring significant costs in legal proceedings, ultimately chose to

[1650] Cui G (2017) 216-9.
[1651] Frosio G (2020b) 711.
[1652] Husovec M & Quintais JP (2021b).
[1653] Xiong Q (2023) 126.

adopt ‘algorithmic filtering’ to address ‘technological challenges’ and shifted from competition to collaboration in their business models, driven by a growing trend of industrial cooperation.[1654] Copyright filtering is essentially a privately established rule centered on ‘notice-and-*choice*,’ functioning not merely as a filtering tool but as a comprehensive digital management system, which encompasses rights clearance, licensing, and infringement management, offering online users who share content a diverse range of options. Unlike the statutory filtering obligations envisioned by many Chinese scholars,[1655] filtering mechanisms adopted under private ordering are built on the collaboration between rightsholders and intermediaries. The operation of these mechanisms relies on rightsholders providing intermediaries with specific databases of works and detailed information to ensure the accuracy of content matching. Moreover, these filtering mechanisms are not simply limited to blocking or removing content; rather, they encompass a diverse system of rights recognition and licensing. Furthermore, these mechanisms offer alternatives to the traditional NTD mechanism, providing different options for online users. In light of the above, the idea of incorporating ‘filtering obligations’ into statutory intermediary liability rules should be reconsidered. Instead, ‘filtering mechanisms’ should be recognized as an independent self-regulation practice in China, separate from the safe harbor rule, with greater emphasis on rights clearance and authorization within these mechanisms, as well as on the mutually beneficial relationship between intermediaries and copyright industries.

In contrast to a mandatory copyright filtering obligation, the voluntary filtering mechanism of the Content ID system makes monetizing user content the norm, with blocking as a rare exception.[1656] Content ID system is the result of collaboration between copyright holders and intermediaries, allowing private parties to implement enforcement methods and standards that tailored to their respective needs. This collaboration not only avoid the inflexibility of mandatory filtering obligations in state legislation but also facilitates dialogues between stakeholders, thus laying the groundwork for the legitimization of UGC. More importantly, the Content ID system offered multi-faceted approach empowers content owners to tailor their response to suspected infringement based on their individual preferences and

[1654] Lobato R & Thomas J (2012) 612.
[1655] Chapter IV Section 3.3.
[1656] Ruse-Khan HG (2021).

circumstances.[1657] Rightsholders are allowed to set certain parameters, telling the system to automatically claim videos based on for instance geography, match type, or match amount.[1658]

Particularly, the last option effectively monetizes what might otherwise amount to infringement. This strategy of 'monetizing infringement,' [1659] which functions as a real-time license, transforms unauthorized use into a licensing opportunity, creates a mutually beneficial situation for both rightsholders and intermediaries. Monetized infringement shares some features with the sort of 'tolerated uses.'[1660] The monetization of infringement goes further than toleration to actively monetize infringement.

For rightsholders who rely on copyrighted content to generate revenue, it is crucial to prioritize licensing efficiency, ensuring the extraction of economic value from every use and distribution of works, irrespective of the technological conditions. [1661] Their ability to monetize infringement challenges long-standing but flawed assumptions about both rightsholder preferences and the optimal policy for addressing copyright infringement.[1662] Traditional NTD mechanisms often fall short in turning the costs of infringement prevention into economic gains for rightsholders. By implementing filtering mechanisms within a self-regulatory framework, as seen with Content ID, the issue of low return on investment in statutory enforcement is addressed, thereby maximizing revenue potential.

For intermediaries, an efficient matching and filtering mechanism offers substantial incentives for rightsholders to negotiate licensing agreements, thereby equipping intermediaries with a potent mechanism for securing more comprehensive licenses. In fact, copyright holders effectively grant prior consent for intermediaries to exercise certain rights on their behalf, creating a legal relationship between the copyright holders and the s intermediaries similar to that between copyright holders and CMOs, with the key difference being that the role of the specialized CMO is assumed by the intermediary. To ensure that intermediaries can implement

[1657] YouTube, 'How Content ID Works' <https://support.google.com/youtube/answer/2797370>
[1658] YouTube, 'Upload and match policies' <https://support.google.com/youtube/answer/107129>
[1659] García K (2020a).
[1660] Wu T (2007) 619.
[1661] Xiong Q (2023) 127.
[1662] García K (2020a).

large-scale licensing, Xiong suggests adjusting the traditional approach established in the CCL by allowing entities outside of these organizations to participate in collective licensing.[1663]

User experience is enhanced by the significant reduction of instances of unexpectedly 'vanished' uploads, thus preserving a greater volume of content available for public consumption.[1664] Thus, monetization can be viewed as a form of automated licensing for copyrighted material that users incorporate into their videos and other created content, making it a more user-friendly alternative to large-scale takedowns for dealing with infringing user content.[1665] Overall, the potential benefit of this tailored mechanism is that it may permit greater use of content than the statutory regime would allow, as leaving the enforcement decision to rightsholders–who might choose to monetize infringement–aligns with copyright's goal of incentivizing creation.[1666]

1.2.1.3 Protect Users in Automated Monetization

However, even though copyright filtering mechanisms under self-regulatory framework offer many advantages, they cannot fully resolve the inherent conflicts between the copyright industry and the internet industry. In practice, statutory rules must not only provide protection for the three layers of legal relationships—rights clearance, authorization, and infringement management—within these filtering mechanisms but also curb unfairness that may arise from unequal bargaining positions.

As these automated tools become increasingly central to enforce copyright online, it becomes even more critical to adopt a nondiscriminatory approach to eligibility.[1667] In its current form, ContentID is not equally available to all users but is instead limited to those who meet certain criteria. YouTube tailors its tools to meet the diverse needs of copyright owners, primarily based on the volume of their content shared on the service. Whereas YouTube's webform is open to all users, Copyright Match is available to those that are members of the YouTube Partner Program or 'demonstrate short history of takedowns,' and Content ID is only available to users with a '[d]emonstrated need of scaled tool, understanding of copyright, and resources

[1663] Xiong Q (2023)130.
[1664] García K (2020a) 288.
[1665] Ruse-Khan HG (2021).
[1666] García K (2020a) 319-20.
[1667] Ruse-Khan HG (2021).

to manage complex automated matching system [...]'.[1668] This logic effectively serves the needs of large copyright holders, so-called 'enterprise partners' like 'movie studios, record labels, and collecting societies.'[1669] For smaller, independent content creators, access to the tool is limited, if available at all, and is typically managed by intermediaries who oversee their rights within the system.[1670] Despite the system's safeguards, smaller creators often struggle to monetize their 'transformative' uses of third-party content, even when such uses might fall under freedom of expression-based user rights.[1671] Instead, smaller content owners are left to the relatively inefficient NTD regime.

Additionally, the monetization practices may be problematic due to the lack of a proper legal basis for the monetization of transformative UGC by third-party rightsholders and the absence of remuneration for user creativity.[1672] The remix culture of users has been transformed into a profit-driven enterprise for intermediaries and content owners, who collaborate to exploit the users' 'digital labor' involved in creating and sharing content,[1673] whereas UGC creators hardly receive any share of the revenue relating to their own creative contributions.

Thus, certain external oversight may address the dilemma of such self-regulatory practices. The creative users should be considered relevant stakeholders who must participate in the 'quasi-legislative' process of automated monetization system design. Scholars also suggest the introduction of collective licensing schemes with unwaivable remuneration rights for individual UGC creators.[1674]

Another significant drawback of monetizing UGC is the lack of transparency. As previously discussed in Chapter IV, content moderation mechanisms are notoriously opaque and can potentially undermine users' freedom of expression.[1675] Additionally, without proper oversight, intermediaries' automated private ordering may circumvent statutory mandates and run the risk of placing a potentially disproportionate share of power in the hands of already dominant

[1668] YouTube, 'YouTube Copyright Transparency Report H1 2022' (YouTube 2022) Copyright Transparency Report <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf>
[1669] Ruse-Khan HG (2021); Quintais JP et al. (2023b).
[1670] Ibid.
[1671] Ibid.
[1672] Senftleben M et al. (2023) 974.
[1673] Soha M & McDowell ZJ (2016).
[1674] Senftleben M et al. (2023) 1010.
[1675] See Chapter IV Section 4.2.

players. Providing enforcement tools of varying effectiveness amounts to administering selective justice without a compelling justification, particularly disadvantaging less powerful and economically weaker parties, who are left with inefficient tools, while scalable and automated systems prone to abuse are placed in the hands of major copyright holders.[1676] In this regard, legislation should mandate that automated copyright content moderation be more transparent and understandable by requiring that machine-generated outcomes are accompanied by clear explanations, showing affected users how copyright eligibility, infringing use, and exceptions and limitations have been considered.[1677] In addition, users are entitled to effective human review and judicial review regarding disputes over automated monetization.

1.2 From Enhanced Administrative Enforcement to Effective Administrative Governance

Empirical studies on the interplay between enforcement and public attitudes indicate that a deterrence-based approach may ultimately be futile and even counterproductive to the goals of copyright holders, as stringent sanctions not only have a modest deterrent effect on file-sharing behavior but also increase anti-copyright sentiments among frequent offenders.[1678] Moreover, strong administrative intervention not only brings a transient effect but obfuscates the flexible and rapid transmission of information in the copyright market.[1679] Therefore, to achieve a long-term effect, some substantive changes in copyright law may be necessary, alongside the development of innovative business practices and the improvement of administrative copyright protection. Specifically, copyright administrations should employ diverse alternative dispute resolutions, and endeavor to develop a co-regulatory framework by collaboration between state intervention and industry expertise. Moreover, copyright administrations may delegate their enforcement responsibility to specialized law enforcement entities and focus on the development of service-oriented copyright administrative protection.

1.2.2.1 Intermediary-Oriented Co-Regulatory Framework

A heavy-handed 'top-down' approach not only results in potential over-enforcement on emerging intermediaries, but also stifles alternative regulatory dynamics within and between

[1676] Ruse-Khan HG (2021).
[1677] Ibid.
[1678] Depoorter B et al. (2010).
[1679] Zhang AH (2022).

digital actors, particularly the private institutions.[1680] Meanwhile, self-regulation might entail flaws, such as a lack of accountability and transparency, and arbitrariness in decision-making, which might lead to a potential under-enforcement.[1681] Nevertheless, the co-regulatory approach, distinguished by its greater flexibility to context and less intervention of state, offers a balanced solution. This pragmatic solution reconciles the collaboration between state intervention and industry expertise, thereby shifting the governance paradigm from centralized dispute resolution to diverse alternative mechanisms.[1682]

In China, a market-oriented paradigm of the state-market relationship was adopted to promote a better combination of 'efficient markets' and 'responsive government.'[1683] To break down local protectionism and market segmentation, the Chinese government opines that 'it's imperative to allow the market to play a decisive role in resource allocation,' and concurrently calls for strengthened governmental oversight, emphasizing 'the necessity of refining macro-policy interventions to foster a structured progression of capital.'[1684] A co-regulatory framework resonates with the call for a combination of an 'efficient market' and 'responsive government' by respecting the laws of the market and industrial practices while retaining macro-policy interventions to maintain effectiveness in rapidly evolving markets.

On one hand, the diverse forms of copyright administrative enforcement have their respective functions and characteristics, serving as supportive measures to judicial protection. In practice, copyright administrations typically favor stronger administrative penalties and extra-judicial enforcement over gentler approaches like mediation and adjudication when handling copyright disputes. These 'milder' enforcement measures offer rightsholders a quicker and more cost-effective way to address copyright violations under administrative oversight.[1685] For example, during administrative mediation, copyright administrations endeavor to harmonize the ostensibly conflicting interests of copyright proprietors and purported infringers, thereby maintaining a benign collaborative and competitive equilibrium.[1686] In addition, administrative

[1680] Lessig L (2006); Marsden CT (2011); Van Dijck J et al. (2018).
[1681] Krokida Z (2022) 36–37.
[1682] You CC (2020) 12.
[1683] Central Committee of the CPC and the State Council, 'Opinions on Accelerating the Construction of a Unified Domestic Market' (10 Apr. 2022) <https://www.gov.cn/zhengce/2022-04/10/content_5684385.htm>
[1684] Huld A, 'China's "National Unified Market": Standardizing the Domestic Market to Spur Internal Circulation' (China Briefing,14 Apr. 2022) <https://www.china-briefing.com/news/chinas-national-unified-market-standardizing-the-domestic-market-to-spur-internal-circulation/>
[1685] Marsoof A (2021) 230.
[1686] Li Y et al (2020).

mediation for those less intricate copyright disputes offers efficient resolution while reducing court caseloads, leading to more effective allocation of judicial resources.[1687]

On the other hand, intermediaries are encouraged to explore diverse approaches to address copyright violation through private ordering.[1688] Through informal governance mechanisms, intermediaries wield quasi-governmental powers in online copyright enforcement, combining legislative, administrative, and judicial functions.[1689] Intermediaries serve a dual role: they are both subjects of copyright administrative oversight and active participants in regulatory governance.[1690] Prominent e-commerce intermediaries, including Tencent and JD.com, offer professional services for complaints and redress mechanisms.[1691] Certain specialized intermediaries have also commenced offering online evidence collection and notarization services for IP disputes.[1692] Moreover, diversified enforcement measures are deployed by intermediaries, including restrictions on the availability, visibility and accessibility of disputed content.[1693] Under administrative guidance, intermediaries have deployed AI-powered algorithms to detect infringement. In turn, this algorithmic governance helps authorities identify suspicious activities and gather electronic evidence, creating a partnership in online copyright enforcement.[1694] Hence, within a co-regulatory framework, while enforcement bodies can leverage the intermediaries' control over online information for efficient copyright enforcement, the intermediaries' exercise of power remains under the vigilant oversight and guidance of the administrative agencies.[1695]

1.2.2.2 Service-Oriented Copyright Administrative Protection

In practice, the primary bodies responsible for copyright enforcement are the copyright administrations at all levels, who also engage in copyright administration such as registration and authorization.[1696] Within a rule-of-law framework, copyright administrative enforcement

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[1687] He L & Deng W (2023).
[1688] Belli L & Venturini J (2016); Quintais JP et al. (2023b).
[1689] Ibid.
[1690] Ibid.
[1691] JD.com IPRs Protection Guidelines <https://help.jd.com/user/issue/343-1066.html>; Tencent IPRs Protection Guidelines <https://ipr.tencent.com/complain>
[1692] China IP Notarization Service Platform <https://www.ipnotary.com/>
[1693] Ulbricht L & Yeung K (2022); Gillespie T (2020).
[1694] People.cn, 'SAIC disclosed Alibaba's administrative guidance white paper and pointed out Taobao's 5 major problems' (28 Jan. 2015) <http://finance.people.com.cn/n/2015/0128/c1004-26463776.html>
[1695] However, a co-regulatory approach risks becoming a top-down collateral censorship mechanism. Klonick K (2017); Balkin JM (2013) 2309–10.
[1696] Art.12, 30, 53 and 55 of 2020 CCL.

mandates qualified legally authorized entities devoid of vested interests to ensure due process and strengthen public trust.[1697] Hence, from a long-term perspective, the onus of bolstering copyright administrative enforcement should primarily lie with dedicated professional enforcement agencies like the Public Security Bureau and Customs Office, under judicial oversight to minimize potential administrative local protectionism.[1698] Notably, copyright administrations may implement more flexible administrative measures, which primarily manifest themselves as service-oriented administrative activities, such as administrative guidance, administrative rewards, administrative subsidies, and information disclosure to the public.[1699]

On one hand, the CNIPA fully supports the construction of municipal-level comprehensive IP public service institutions covering various services including information search and retrieval, business consultation, and promotional training.[1700] For example, the NCAC has spearheaded the establishment of an increasing number of IP Rights Assistance Centers to help rights holders to safeguard their legitimate rights and interests.[1701] These IP-related public service intermediaries, can offer various mechanisms for copyright adjudication consultations, swift administrative mediation, copyright violation reports and complaints. On the other hand, it also involves the construction of an innovative infrastructure for IPRs to further enhance IP public services. The integration of big data and blockchain technology enhances copyright administrations' capability in both law enforcement and public services, exemplified by the China Copyright Chain launched by the NCAC.[1702] Such blockchain-based intermediaries aim to document proof of digital assets, monitor infringement activities, collect evidence online, issue notices to remove piracy products and help courts and copyright administrations settle copyright-related disputes.[1703]

[1697] Li S (2015).
[1698] Hurtado A (2018).
[1699] CNIPA, 'Notification of CNIPA on Accelerating the Implementation of IP Policies to Increase Efficiency and Promote the Stable and Healthy Development of the Economy' (30 May 2022) <https://www.gov.cn/zhengce/zhengceku/2022-06/12/content_5695335.htm>
[1700] CNIPA, 'Notification of CNIPA on the Issuance of the Fourteenth Five-Year Plan for IP Public Services' (31 Dec. 2021) <https://www.gov.cn/zhengce/zhengceku/2022-01/09/content_5667251.htm>
[1701] China Intellectual Property Rights Aid Network <http://www.ipwq.cn/>
[1702] China Copyright Blockchain <https://www.zbl.org.cn/officialHome>
[1703] Pan D, 'China Launches Copyright Protection Blockchain' (CoinDesk, 4 Jun. 2021) <https://www.coindesk.com/policy/2021/06/04/china-launches-copyright-protection-blockchain/>

Though acknowledging the high efficiency of copyright administrative enforcement, the short-lived outcomes are at the cost of a failure to develop regular enforcement that follows legal procedures. In addition, its aggressive expansion inevitably undermines regular legal procedure and contravenes the principle of the rule of law. In light of the prevailing context, eschewing copyright administrative enforcement in China appears untenable; instead, integrating heightened transparency and adherence to due process within the enforcement mechanism emerges as a pragmatic and optimal approach to enhance regular enforcement capacity.

2. Taming Chinese Digital Gatekeepers: Design Principles for Intermediary Liability Rules

Generally, if intermediaries fear being held liable, they are likely to err on the side of caution and remove allegedly illegal material without proper review.[1704] This points to the need for the careful design of intermediary liability standards, including effective safeguards for the fundamental rights of internet users.[1705] In addition to the challenges posed by current legal standards, there is a longstanding practice among governments of using the threat of regulation to encourage further self-regulatory measures and co-regulatory agreements. This strategy, often referred to as regulation by 'raised eyebrows,' is particularly common in the area of intermediary liability.[1706]

Well-designed intermediary liability rules are essential for fostering open intermediaries and the speech they facilitate, enabling private intermediaries to support public participation and expression on an unprecedented scale.[1707] Even though several concepts concerning crucial obligations adopted remain vague, and guidance on enforcement remains unmentioned,[1708] the recent EU legislative initiatives, the DSA in particular, offer thought-provoking and practical insights to improve content governance in China, including the introduction of a Good Samaritan clause and transparency obligation, a human rights-centric regulatory system, tiered obligation regimes for intermediaries, and so forth.

[1704] Urban JM et al. (2017).
[1705] Angelopoulos C and Smet S (2016).
[1706] Recent EU policy documents, including the 2017 Commission Communication on Tackling Illegal Content Online and the Commission Recommendation on measures to address illegal content, mention the possibility of regulation. Supra note 535 and 540.
[1707] Keller D (2018).
[1708] Turillazzi A et al. (2023); Buiten MC (2021).

2.1 Reject Strict Liability: Repositioning Knowledge-Based Copyright Liability

Although it may appear counter-intuitive, there are justifiable reasons for maintaining the essential aspects of the existing knowledge-based liability framework, which conditionally protects intermediaries from liability for their users' infringements. The most important aspect of this system is its ability to strike a fair balance between the conflicting rights and interests of the parties involved – not only intermediaries and users, but also those aggrieved by the content.[1709] Thus, when reconsidering the safe harbors for intermediaries, policymakers should, alongside the interests of the major copyright industry, give due consideration to the interests of UGC creators and the audiences they engage. A negligence-based system would serve better the delicate balance between protection of copyright, access to information, and freedom of expression that the intermediary liability conundrum online entails.[1710]

2.1.1 Balancing Mechanism in Knowledge-based Liability Regime

Theoretically, knowledge-based liability regime, particularly the liability exemption scheme, attempts to balance the competing fundamental rights at stake.[1711] For example, the ECD established (replaced by the DSA) a conditional liability exemption regime grounded in two fundamental rights-friendly principles, namely the 'knowledge'-and-take-down mechanism and the prohibition of general monitoring obligations.[1712] On one hand, the ECD establishes a 'negligence-based system' that compels intermediaries to consider the actual use of protected works, aiming to limit overblocking and the chilling effects on privileged uses, such as those covered by exceptions and limitations.[1713] By operating *ex post* rather than *ex ante*, hosting safe harbors advance the policy goal of minimizing chilling effects, particularly considering the critical role of virality in disseminating information online.[1714] On the other hand, the CJEU has drawn a line (although a blurred one) between prohibited general monitoring measures and permissible specific monitoring measures, in particular in case of suspected violation of copyright, which are allowed when they achieve a fair balance between the fundamental rights of the different stakeholders.[1715] Overall, intermediary liability laws protect users' fundamental

[1709] Wilman F (2021).
[1710] Frosio G (2017c) 572.
[1711] Wilman F (2021).
[1712] Art.14-15 ECD; Van Eecke P (2011) 1479–80.
[1713] Geiger C et al. (2020).
[1714] Van Eecke P (2011) 1479-1480; Keller D (2018) 306.
[1715] *UPC Telekabel Wien*.

rights by reducing the incentives intermediaries would otherwise have to interfere with users' expression and access to information.[1716]

However, intermediaries are becoming increasingly active in managing user content, particularly by improving accessibility and moderating content in line with innovative business models.[1717] At the same time, technological advancements have enhanced intermediaries' ability to gain knowledge of or control over the content they store.[1718] Recently, giant intermediaries have amassed unprecedented power over the content they host, further tilting the balance established by legislators in the safe harbor rules.[1719] The knowledge-and-takedown system primarily relies on notices for intermediaries to gain knowledge of and act against illegal content, making it inherently dependent on the notifying parties. Moreover, scholars argued the knowledge-and-takedown system is purely focused on combating the symptoms (illegal content) rather than addressing the root of the problem (users providing illegal content).[1720] Thus, voices calling for a more robust regulatory paradigm, including mandating of a more proactive role of intermediaries in combating infringing content and imposing an increased responsibility for illegal content hosted have become more frequent.[1721] Art.17 DSMD represents a significant shift in copyright enforcement and broader intermediary law principles, moving from a reactive to a proactive approach.[1722] Unfortunately, instead of redistributing resources to creators, Art.17 could dismantle the traditional NTD system, impose increased liability on certain host intermediaries, potentially harm competition, and incentivize proactive censorship.[1723] More importantly, the strict liability regime established by Art.17 favors cooperation between large intermediaries and major copyright owners at the expense of the fundamental rights of SMEs and small and medium rightsholders, thereby tilting the balance of fundamental rights among the parties involved.[1724]

Against this background, this thesis finds that a knowledge-based liability system for intermediaries would be the preferred approach in China for a number of reasons. A full

[1716] Keller D (2018) 306.
[1717] See Chapter III, Section 2.2.
[1718] See Chapter III, Section 2.3.
[1719] See Chapter IV, Section 4.
[1720] Wilman F (2021) 329.
[1721] Ullrich C (2017).
[1722] Mendis S & Frosio G (2020).
[1723] Frosio G (2020b).
[1724] Senftleben M (2019).

liability exemption is inappropriate because intermediaries should be incentivized to cooperate in detecting and removing illegal activities on the Internet. Shielding them from all liability, even if they fail to cooperate, would not achieve this goal. Conversely, a strict liability rule places an excessive burden on intermediaries to 'police the Internet,' which is not only inefficient but also raises concerns about excessive monitoring and unduly restrictions on fundamental rights.[1725] Stronger copyright protection does not necessarily lead to increased revenues, and replacing the safe harbor with a strict liability regime could potentially backfire. While amending copyright law to provide appropriate incentives to authors might be necessary, it is unclear whether abolishing the safe harbor is either necessary or beneficial.[1726] What is more, an Art.17-style strict liability regime could have significant consequences for competition and innovation, particularly by creating substantial market entry barriers for intermediaries.[1727] The Commission's primary objective with Art.17 appears to have been to enable EU rightsholders to extract rents from established U.S.-based mega-intermediaries, rather than to incentivize the development of new EU-based intermediaries or encourage innovation that could challenge these U.S.-based intermediaries.[1728]

Under strict liability, intermediaries are required to compensate right holders for any infringements committed by users, whereas under full liability exemption (zero liability), enforcement is entirely dependent on the voluntary actions of the intermediary. The knowledge-based liability model aims to strike a middle ground between a zero liability and strict liability by avoiding the negative consequences of stricter liability that would impact both intermediaries and their users, while still allowing aggrieved parties to seek recourse from the intermediary when their rights are at risk.[1729] In addition, as Zittrain concludes, the U.S. regulators and courts made a deliberate policy choice to limit the use of gatekeeper liability when drafting the *ex post* conditional liability immunity framework, despite its enforcement potential, in order to preserve space for innovation in the emerging online sector.[1730] Under the knowledge-based liability regime, these intermediaries are not required to actively monitor their users' activities, but if an issue is brought to their attention, they can remove the content and without fearing copyright liability.

[1725] Buiten MC et al. (2020) 161.
[1726] Elkin-Koren N et al (2020) 5.
[1727] Spoerri T (2019).
[1728] Samuelson P (2020) 337.
[1729] Wilman F (2021) 323.
[1730] Zittrain J (2006) 257.

Moreover, knowledge-based liability regime generally offers aggrieved parties a realistic prospect of redress as submitting a takedown notice typically requires relatively little effort and expense from them and can lead to swift results.[1731] Particularly, empirical study shows that the NTD process is burdensome for small and medium-sized companies, yet their staff members diligently review each notice individually and comply with valid takedown requests, as required by law.[1732] In general, the *ex post* 'knowledge-and-take-down' mechanism should generally be favored over proactive, *ex ante* content moderation due to its stronger protection for users' fundamental rights and relatively less burden for SMEs.

Furthermore, it appears that the EU Commission never seriously questioned the continued validity of the principle of knowledge-based liability as it stated that the current liability regime is 'by now established as a foundation of the digital economy.'[1733] Instead of a wholesale change to the current liability regime, the DSA provides for a range of new measures by largely reproducing liability exemptions in ECD and leaving them essentially unaltered. In particular, the DSA further incorporates various institutional safeguards to ensure the balance of fundamental rights that the ECD seeks to achieve.

2.1.2 Against Institutionalized Algorithmic Copyright Content Moderation

Chinese courts have shifted their evaluation of intermediaries utilizing algorithms, no longer limiting them to the 'safe harbor' rules. Instead, they now recognize the need to impose a higher duty of care on them to prevent repeated infringements.[1734] Noteworthy, copyright filtering mechanisms are primarily considered a means to address the deficiencies of the 'safe harbor' rule, with the 'filtering obligation' viewed as a method for raising the standard of care and broadening the scope of necessary measures.[1735] In practice, intermediaries take voluntary measures to remove illegal material to avoid stricter regulations, driven by both profit-maximizing incentives and a sense of public obligation or reputation management. In light of the above, Chinese scholars strongly suggest the full institutionalized copyright filtering

[1731] Kuczerawy A (2017).
[1732] Urban JM et al. (2017).
[1733] European Commission, 'Explanatory memorandum DSA proposal' COM(2020) 825, 3.
[1734] See Chapter IV, Section 3.1 and 3.2.
[1735] Xiong Q (2023) 124.

obligations in Chinese copyright law to provide a solid legal basis for copyright content moderation practices.[1736]

Admittedly, as intermediaries become more active and capable in managing the content they host, the application of intermediary liability rules becomes more complex and may be less justified.[1737] If intermediaries benefit from illegal content and activities they have the ability to control, it stands to reason that they should also bear responsibility if their business model causes harm.[1738] In addition, from the cost-and-benefit perspective, the intermediary liability rules should aim to minimize the costs of preventing, detecting, and removing illegal material, thereby placing the burden of prevention and removal on least-cost-avoiders.[1739]

However, this does not indicate that the current Chinese intermediary liability regime is outdated and a statutory copyright filtering obligation is necessary. Theoretically, the intermediary liability regime should be principles-based to ensure it can easily and flexibly adapt to rapidly evolving technologies and business models, which often change in unpredictable ways. The Chinese duty-of-care-centric intermediary liability regime provides significant flexibility by considering technology-focused, open-ended factors when determining an intermediary's duty of care.[1740] With clear standards and conditions for its application, filtering measures can be considered not only 'necessary' but also 'reasonable.' Ideally, Chinese regulators should clarify conditions for establishing liability and qualifying liability immunities under the current legal framework, by adopting the interpretations and practices developed through SPC's guiding case system. Clear standards may provide greater certainty and safety for intermediaries, users and society alike, in a more effective manner than a general duty of care entails. More specifically, providing clear guidance and clarification on the interpretation of duty of care could help prevent the encroachment of public monitoring obligations into the private sphere.

Retaining the knowledge-based liability regime does not imply that the current liability framework should remain static and unchanged. Moreover, this does not imply that voluntary monitoring should be prohibited in all cases. NTD procedures remain highly useful, but

[1736] See Chapter IV Section 3.3.
[1737] van Hoboken J et al. (2018) Frosio G (2020a); Wang J (2018); Shikhiashvili L (2019); Kosseff J (2017).
[1738] Buiten MC et al. (2020) 149.
[1739] Gabison GA & Buiten MC (2020).
[1740] See Chapter IV, Section 3.1.

filtering technology can certainly offer valuable additional support in this context.[1741]However, this thesis advocates for voluntary over mandatory filtering obligations for intermediaries, as they offer greater flexibility to accommodate the diverse needs of different rightsholders. Meanwhile, a series of checks and balances should be imposed on intermediaries to limit the scope of filtering and monitoring, thus preventing excessive practices and the encroachment of fundamental rights.

2.2 Reject All-inclusive Duty of Care

Before the DSA, most legislative initiatives to regulate content moderation reasonably targeted large intermediaries like Meta and Alphabet, however, in practice, these initiatives apply to all types of intermediaries and services.[1742] The power of the largest intermediaries will be further consolidated, since only the largest intermediaries have the resources to meet the requirements crafted.[1743] Moreover, large intermediaries may be able to save on costs of detection, monitoring and removal because of economies of scale.[1744] Therefore, it is always a challenging task for regulators to ensure that the rules are both effective in combating illegal content online while remaining achievable by intermediaries of all sizes.

2.2.1 With Great Scale Comes Great Responsibility[1745]

Art.17 DSMD serves as a clear example of the inefficiency of one-size-fits-all regulation. Prompted by complaints primarily concerning major streaming intermediaries like YouTube, the EU called for comprehensive changes to the intermediary liability for the entire internet.[1746] Regulators frequently draft intermediary regulations with major companies like Facebook and Google in mind, assuming that all services share similar features and issues; however, this approach neglects the fact that many widely used services operate differently and may not conform to these assumptions, even with carefully crafted carve-outs and exemptions.[1747] Ideally, the cost-benefit analysis of copyright filtering differs based on the type of intermediaries and works involved, with lower costs for intermediaries handling specific content, and negotiating with individual creators being simpler than with content industries like

[1741] He T (2022a) 90.
[1742] Gillespie T et al. (2020); Keller D, 'The EU's new Digital Services Act and the Rest of the World' (Verfassungblog, 7 Nov. 2022) <https://verfassungsblog.de/dsa-rest-of-world/>
[1743] Kosseff J (2023).
[1744] Buiten MC et al. (2020) 153.
[1745] @ThierryBreton, X platform (25 Apr. 2023, 6:30 AM) <https://twitter.com/ThierryBreton/status/1650854765126107136>.
[1746] Moody G (2022).
[1747] Tushnet R (2023) 931.

music labels, which involve more complex agreements.[1748] However, the DSMD mandates seeking license from organizations representing all types of rightsholders, operating under the assumption that licensing bodies will function uniformly regardless of the type of work involved. In fact, the more complex the regulation, the greater the need to manage intricate regulatory interactions.[1749]

Given the varying costs and benefits associated with controlling illegal content online across different intermediaries and types of content, a one-size-fits-all liability rule is untenable. Generally, distinctions in the size, reach, technical design and business model of the intermediary as well as the type of illegal material necessitate distinct liability guidelines. Theoretically, any meaningful reform of intermediary liability rules should consider the interests of a wide range of stake holders.[1750] The duty of care ascribed to online intermediaries should be nuanced, with consideration given to the type of illegal material and the type of harm it generates.[1751]

Regarding the size of intermediaries, the tiered system of obligations adopted in the DSA indicates that, with greater economic power and societal influence, come more additional responsibilities. Previous empirical study suggested that the size and resources of intermediaries could influence their ability to maintain safe harbor eligibility, with smaller intermediaries potentially at risk of losing protection due to increasing notice volumes and the rising normative expectations set by larger intermediaries' adoption of costly automated notice processing and content filtering technologies.[1752]

The future Chinese regulations may follow this approach and adopt tailored obligations on different intermediaries in accordance with the types and scale of services. Even though it might be a complicated task to figure out which type of intermediary should bear what obligations, more clearly articulated obligations will prevent abuse of power to a certain degree. In addition to the reasonable number of monthly active users, other factors that reflect intermediaries' power and influence on flow of information should also be taken into

[1748] Ibid, 932.
[1749] Leistner M (2020).
[1750] Samuelson P (2020).
[1751] Buiten MC et al. (2020) 153.
[1752] Seng D (2014); Urban JM et al. (2017).

consideration when determining the threshold for large or small intermediaries. To foster market entry and growth for SMEs, any new obligations imposed on intermediaries should be carefully calibrated to align with their scale, reach, and technical and operational capabilities.[1753]

Detailed procedural steps will waste resources that could better be spent elsewhere, and burden smaller intermediaries to a degree that effectively sacrifices competition and pluralism goals in the name of content regulation.[1754] Moreover, effective content moderation requires more investment in knowledge and expertise, and the spectacular failures of some small intermediaries and startups suggest that this knowledge is often gained too late, or not at all.[1755] Thus, a cost-and-benefit analysis should be adopted when assigning obligations to intermediaries. For example, those costly responsibilities, including public law monitoring obligations, shall not apply to smaller providers, as they are unable to afford the cost of additional responsibility and might be kept from competing in markets.[1756]

2.2.2 Proportionality Test in Determining Necessary Measures

In China, the Civil Code has transformed the NTD rule into a 'notice-and-necessary measures' rule, expanding the scope of necessary measures that intermediaries must take upon receiving a notice, using a non-exhaustive approach. Meanwhile, judicial decisions and administrative enforcement have increasingly required intermediaries to fulfill a duty of care 'commensurate with their information management capabilities,' and in some cases, even to proactively block or remove infringing content.[1757] In contrast, the U.S., after a comprehensive review of the 'safe harbor' rules, acknowledged that while the existing framework did not anticipate the current scale and frequency of infringements, the fundamental principles of the rule should remain intact, with only minor adjustments needed.[1758] The USCO, after considering arguments from both the content industries and intermediaries, advises caution in adopting a general stay-down requirement for intermediaries. Implementing such a requirement,

[1753] Recital 39 DSA.
[1754] Keller D, 'The DSA's Industrial Model for Content Moderation' (Verfassungsblog, 24 Feb. 2022) <https://verfassungsblog.de/dsa-industrial-model/>
[1755] Gillespie T et al. (2020) 10-11.
[1756] Janal R, supra note 1209.
[1757] Chapter IV, Section 3.2.
[1758] Section 512 Report, 84-89, 157-159.

especially if it includes a mandatory filtering obligation for all intermediaries, would represent a significant shift in U.S. intermediary liability policy.[1759]

In contrast to the EU regulators' confidence in embracing the 'value gap' narrative, the USCO highlights the absence of empirical evidence from countries that have implemented a broadly applicable stay-down requirement similar to what many rightsholders advocate. This lack of empirical evidence makes it difficult to assess the effectiveness of such a system or to evaluate the potential speech and competition externalities that could result from a widespread filtering mandate. This cautious approach serves as an inspiration for Chinese regulators and courts. Whether the adoption of algorithmic filtering can be equated with the intermediary's information management capability to 'effectively prevent future infringements' requires not only reliable empirical data demonstrating the technology's accuracy in identifying infringing content on the service but also careful consideration of the legitimate rights that users should enjoy, such as copyright exceptions and freedom of expression. Simply equating the use of algorithmic filtering with information management capability could result in imposing greater duties of care on intermediaries that actively develop more advanced algorithms, an outcome that would conflict with the legislative intent of the safe harbor rule, which aims to encourage the growth of the internet industry.

Moreover, the extent to which necessary measures are expanded, or even elevated from *ex post* to *ex ante*, largely determines the cost structure of the business models for intermediaries. Regarding the relationship between algorithmic filtering and necessary measures, courts should follow a proportionality test to determine whether filtering measures are 'necessary' in a certain case based on the evidence and information available. Considering fundamental rights protection and the prevention of censorship, policymakers should exercise a 'proportionality' test in entrusting and burdening private parties with such an extensive 'policing' role through imposing filtering measures. Although scholars propose that the overarching principles of proportionality and reasonableness are theoretically sound, they offer little practical guidance for real-world application.[1760] However, these principles do help narrow the scope of potential obligations by suggesting a 'golden mean' for copyright enforcement measures, even if they do not provide concrete advice on how to achieve that balance.[1761]

[1759] Ibid, 191.
[1760] Husovec M & Peguera M (2015).
[1761] Angelopoulos C (2016) 63.

Furthermore, the implementation of such filtering measures should be considered sufficient only if they can prevent the further dissemination of content within the technical capabilities available. Given the limitations of algorithmic filtering in distinguish lawful and unlawful content, it should not be *directly* regarded as a technology capable of fully preventing the further spread of content. Ideally, the filtering measures should be better placed on financially and technically resourceful intermediaries who have substantial influence over the curation of content, as opposed to simply hosting them.[1762] Additionally, intermediaries should be encouraged to adopt less restrictive measures, such as labeling, providing contextual information in relation to disinformation, and de-monetization.[1763]

2.3 Reject Collateral-censorship Through Copyright

In a blizzard of press releases and media interviews, and in a variety of more formal interventions ranging from conference remarks to congressional testimony, copyright industries equated online copyright infringement with theft, piracy, communism, plague, pandemic, and, notably, with terrorism.[1764] They lobbied strenuously for the enactment of new legislative protections and also filed high-profile lawsuits against third-party service and equipment providers that they viewed as culpable facilitators.

2.3.1 No general monitoring obligation

Although the Chinese private law judicial interpretation and guiding opinions have reached a consensus that provides that intermediaries are not subject to a general monitoring obligation, a clause expressly stipulating the prohibition of general monitoring obligations is still missing in private law legislation. The consensus is far less solid than a piece of legislation. Consequently, some courts may implement the judicial interpretation based on interpretations that are different or even opposite to the general monitoring obligations ban, thus leading to misunderstandings and chaotic applications in practice.

2.3.1.1 Incorporating Prohibition of General Monitoring Obligation into Chinese Law

[1762] Reda J et al. (2020); Geiger C & Jütte J (2021a).
[1763] Quintais JP et al. (2023b).
[1764] Cohen JE (2006) 24-5.

On the one hand, to better clarify the standpoint of the Legislative Affairs Commission and lessen legal uncertainty, a clause regarding the prohibition of general monitoring obligations should be explicitly introduced in the form of a judicial interpretation by the SPC. On the other hand, monitoring obligations under public law should be further limited to ensure the fundamental rights of users and avoid overly intrusive interference by authorities. Considering the distinctive dual-track approach concerning monitoring obligations, private sphere should be excluded from the scope of public law monitoring, while public law monitoring obligations are applicable merely to public law issues, namely the illegal content listed in 'Eleven Boundaries.'[1765] In addition, the scope of monitoring should be refined to the extent that the standards for determining illegality are distinct and practical to meet current available technology.[1766] That is to say, the permissible monitoring must not require intermediaries to assess the legality of content and should target online content that has been previously identified as illegal by courts or administrative authorities or is 'manifestly illegal' for a reasonable person.[1767]

2.3.1.2 Differing Regulatory Approaches for Illegal Content

Apart from illegal content, there is plenty of harmful content spreading over the internet, ranging from discriminatory speech to medical misinformation.[1768] In principle, illegal content could be subject to legal removal or blocking obligations, lawful but harmful (awful) content cannot be filtered just because it makes the audience uncomfortable.[1769] The DSA choses the right policy approach by not regulating 'harmful' content, but rather harmonizing rules for tackling illegal content.

In particular, measures for content moderation introduced by the DSA apparently apply to illegal content only, which is defined as 'any information that, in itself or in relation to an activity […] is not in compliance with Union law or the law of any Member State which is in compliance with Union law.'[1770] Instead, potentially 'harmful' or 'awful' content would not be specifically addressed by the DSA, which is a constructive approach considering the

[1765] Art.6 of Provisions on the Ecological Governance of Network Information Content (网络信息内容生态治理规定).
[1766] Quintais JP et al. (2022); Quintais JP et al. (2024).
[1767] Mendis S & Frosio G (2020); AG Opinion in *Poland v Parliament and Council*.
[1768] Gillespie T (2018); Goldman E & Miers J (2021).
[1769] Frosio G and Geiger C (2023).
[1770] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL)), point 3; REPORT on the Digital Services Act and fundamental rights issues posed (2020/2022(INI)), point 5.

importance of ensuring that content, even if controversial, shocking, or offensive, is not prohibited by law merely because of its uncomfortable existing.[1771] The DSA also introduces the concept of 'manifestly illegal content,' though its definition is somewhat circularly defined as content that is evidently illegal 'to a layperson, without any substantive analysis.'[1772] This category imposes a specific obligation on intermediaries to temporarily suspend their services, after providing a prior warning, to users who repeatedly post manifestly illegal content.[1773] Within this framework, the DSA paves the way for a more nuanced strategy by applying distinct regulatory approaches to different categories of content, including manifestly illegal content, simply illegal content, and other types of content.[1774] Noteworthy, while the DSA provides a definition for 'illegal content,' it could have been further strengthened by offering a specific definition for 'manifestly illegal content.' Furthermore, the Commission should clearly delineate what qualifies as 'manifestly illegal' to avoid ambiguities, and a clear distinction between illegal and merely harmful content would have added valuable clarity to the regulatory framework.[1775]

A proportionality test is essential to ensure that the extent of an intermediary's liability corresponds to the harm caused by the illegal content or activity, while also balancing the public interest in the content and the intermediary's level of culpability. When interpreting 'manifestly illegal' content, clear-cut copyright-infringing content should never be classified as manifestly illegal offenses that cause severe harms to private and public interests. Moreover, removal of content should not be the only possible remedy, but rather the intermediaries should encourage more proportional responses with a range of remedial actions available, including greater user choice regarding the content they see, intermediaries' flagging of inappropriate/harmful content, users' flagging or other counter-speech measures. Those measures can be complemented by self-regulation through user regulation, where users flag breaches of content rules, such as YouTube's Trusted Flagger program, assisting with enforcement of YouTube's

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[1771] Wingfield R, 'The Digital Services Act and Online Content Regulation: A slippery slope for human rights?' (The GNI Blog, 15 July 2020) <https://medium.com/global-network-initiative-collection/the-digital-services-act-and-online-content-regulation-a-slippery-slope-for-human-rightseb3454e4285d>

[1772] Recital 63 DSA.

[1773] Art.23 DSA.

[1774] Wingfield R, 'The Digital Services Act and Online Content Regulation: A slippery slope for human rights?' (The GNI Blog, 15 July 2020) <https://medium.com/global-network-initiative-collection/the-digital-services-act-and-online-content-regulation-a-slippery-slope-for-human-rightseb3454e4285d>

[1775] 'Art.19's Recommendations for the EU Digital Services Act' (Art.19, 21 Apr. 2020) <https://www.article19.org/wp-content/uploads/2020/04/ARTICLE-19s-Recommendations-for-the-EU-Digital-Services-Act-FINAL.pdf>

community guidelines.[1776] To refine future reforms, clearer and more stringent definitions for all types of 'manifestly illegal content' should be established and interpreted strictly to ensure clarity and precision in regulatory enforcement.

2.3.2 Specific Monitoring Obligations

Monitoring obligations with a specific nature are allowed in both China and the EU, while neither offered a clear clarification on distinguishing 'general' and 'specific.'[1777] Art.17 DSMD aims to address the uncertainty around interpretations of 'general monitoring' by incentivizing proactive preventive measures to curtail copyright infringement within certain constraints; however, this new regime does not necessarily add clarity to this complex issue. Arguably, Art.17(4)(b) and (c) opens the door to filtering based merely on rightsholders' notifications, and without adequate limitations, this could trigger a significant snowball effect that overwhelms OCSSPs with a volume of notified works, effectively imposing a general monitoring duty that infringes on fundamental rights.[1778]

Thus, a certain degree of specificity should be further introduced. Based on the DSMD and the CJEU case law, the distinction between general monitoring and specific monitoring does not hinge on whether all uploaded content is monitored, but rather on whether the entity responsible for fulfilling the obligation, the applicable targets, and the scope of application are clearly *specific*. Otherwise, the distinction between general and specific filtering becomes a false dichotomy, as the purpose of monitoring cannot be achieved without a comprehensive review of all content. Indeed, both Art.17 and the CJEU case law interpreting the distinction of 'specific' and 'general' monitoring offer valuable insights for Chinese courts to implement more effectively 'specific monitoring obligations' in judicial practice.

2.3.2.1 Make the Bad Law into A Good One

Art.17 DSMD's wording allows for the potential introduction of a 'double specificity' requirement within the new content filtering obligations. Specifically, Art.17(4)(b) obliges rightsholders to provide 'relevant and necessary information' to ensure the unavailability of notified works, while Art.17(4)(c) mandates a 'sufficiently substantiated notice' of an existing infringement. It can be argued that, given the potential risks to fundamental rights, the 'best

[1776] 'YouTube Trusted Flagger program' <https://support.google.com/youtube/answer/7554338?hl=en.>
[1777] See Chapter III at Section 1.2.8 and Section 1.3.3.
[1778] Angelopoulos C & Senftleben M (2021).

efforts' required under Art.17(4)(b) and (c) should be interpreted as applying only to efforts based on notifications that clearly identify both the *specific work* and the *infringer*, without affecting other content and users. That means, an OCSSP is therefore entitled to reject any notification that fails to provide the necessary specificity regarding both the copyrighted work and the potential infringers.[1779]

This interpretation of 'specific monitoring obligation' still leaves the question unanswered of which *degree of specificity* rightsholder notifications must offer regarding the identification of infringer. In this regard, it is important to take into account the division of tasks between Art.17(4)(b) and (c). In this context, it is crucial to consider the distinction between Art.17(4)(b) and (c). Art.17(4)(c) addresses 'stay-down' obligations that are triggered once an infringement has been reported to an OCSSP, while Art.17(4)(b) imposes filtering obligations in a broader, preventive capacity, allowing rightsholders to establish a duty for the intermediary to prevent future uploads of infringing content, even in the absence of a specific infringement incident.

The 'double specificity' requirement, which addresses repeat infringements by the same person concerning the same right, cannot be applied without modifications in cases where there are no prior instances of infringement. In such situations, it is unreasonable to expect rightsholders to precisely identify the infringing user in their notification. The proportionality factors outlined in Art.17(5) provide guidance in addressing this issue. Specifically, Art.17(5)(a) mandates an assessment of the efforts made by OCSSPs, considering 'the type, the audience, and the size of the service, as well as the type of works or other subject matter uploaded by the users of the service.' Consequently, it can be inferred that the EU legislator does not anticipate OCSSPs to process every notification of specific works received under Art.17(4)(b). 'Best efforts' to ensure the unavailability of notified works can only be expected when the notification is specifically tailored to a concrete infringer who can clearly be distinguished from the general audience of the intermediary at issue. Scholars suggest that the only 'admissible' filtering measure would be 'one limited to monitoring content posted by a pre-identified sub-group of users, such as those who have previously engaged in infringing activities and are thus considered more likely to do so again.'[1780] With the reference to 'relevant and necessary information', 'sufficiently substantiated notice' and 'best efforts' in Art.17(4)(b) and (c) and

[1779] Ibid.
[1780] Ibid.

the inclusion of ‘the audience’ and ‘users of the service’ in the proportionality factors in Art.17(5), the new copyright legislation, thus, offers starting points for an interpretation of content filtering duties that is in line with CJEU’s case law.

2.2.2.1 Specific Monitoring Obligations under Chinese Law

Under Art.17, a specific monitoring obligation may result from a *court order* and a *substantiated rightsholders notification*. It is clear that filtering injunctions issued by a court or an administrative order are unlikely to reach the scale of filtering obligations that can be imposed through mere notifications, whose scope rightsholders can determine without judicial oversight. Given an intermediary’s natural incentive to err on the side of deletion, a preferred liability scheme should avoid assigning the intermediary an adjudicative role and should impose filtering obligations only after a court’s judgment or copyright administration’s order.

Thus, Chinese courts or copyright administrations may impose specific monitoring obligations with further specificity requirements on intermediaries to prevent future copyright infringement. When it comes to monitoring, the *degree of specificity* in identifying both the infringer and the infringement is crucial. For court- or administration-ordered specific monitoring, the scope of monitoring should be specifically tailored to a concrete infringer who can clearly be distinguished from the general audience of the intermediary at issue. The SPC could provide detailed guidance on the specificity of monitoring, including the responsible entity, applicable targets, and scope of application, through judicial interpretation or guiding cases.

The entities responsible for implementing filtering mechanisms should be limited to intermediaries with sufficient information management capabilities. This includes dominant market players like Douyin, whose market position, type of service offered (content sharing services), size of users (with 755 million monthly active users),[1781] type of works or other subject matter concerned (mostly UGC), availability of suitable and effective means and their cost for service providers (already adopted content recognition and filtering system) obligate them to take on greater responsibility for managing copyrighted content.

[1781] ‘Number of monthly active users of Douyin in China from December 2022 to February 2024’ (Statista, 13 Jun. 2024) <https://www.statista.com/statistics/1361354/china-monthly-active-users-of-douyin-chinese-tiktok/#:~:text=Douyin%2C%20TikTok's%20sister%20app%2C%20is,active%20users%20in%20the%20country>

Given that intermediaries have already been required to implement filtering mechanism, the criteria for determining the content to be filtered should draw upon factors such as the type of uploaded content, its notoriety, and the obviousness of the infringing information, as outlined in the Art.9(2) of 2020 Provisions.[1782] However, the determination of well-known works still involves significant uncertainty, [1783] making it difficult to provide clear, preemptive guidelines. Therefore, in line with practical approaches, these popular well-known audio-visual works should be further limited to those included in the 'Key Works Copyright Protection Watchlist.'[1784] For older audiovisual works, factors such as annual viewership, search volume, and user ratings can be used as reference points. Additionally, the online popularity of these works, particularly on short video platforms, should be taken into account. For music works, considerations like the performer's popularity, music charts, and play counts should guide the assessment of the need for protection.

Courts should weigh whether the content in question requires filtering mechanism and whether extending such protection to similar works would unduly burden the operation of intermediaries. While it is undeniable that filtering technology is effective in screening and blocking repeated infringing content, preventing its continuous dissemination, its scope is highly limited in practice. The SPC's Guidelines state that e-commerce intermediaries may be considered as 'should know' of infringement if they fail to use effective measures to filter or block links to products labeled as 'knock off' or 'counterfeit,' or to infringing products re-listed after an upheld complaint.[1785] This provision limits the requirement for intermediaries to filter and block infringing product links to those containing specific terms, which reflects an acknowledgment of the inherent limitations of filtering technology.

2.3.3 Regulate Self-regulation

The DSA did not require intermediaries to moderate lawful but harmful content by prescribing new content prohibitions, but rather regulated the systems and processes by which

[1782] Art.9(2) of 2020 Provisions.
[1783] Courts typically recognize a heightened duty of care for well-known works involved in a case. [2020]J03MZ No.3912 (2020)津 03 民终 3912 号民事判决书. For highly popular series, intermediaries are expected to exercise a reasonable duty of care by implementing more proactive management, filtering, and review measures. [2021]S01ZMC No.3078 (2021)陕 01 知民初 3078 号民事判决书.
[1784] NCAC, 'Key Works Copyright Protection Watchlist' <https://www.ncac.gov.cn/chinacopyright/channels/12547.shtml>
[1785] Supra note 1280, Art.11(3).

intermediaries enforce their own house rules.[1786] That is to say, intermediaries are regarded as a mini-government assigned with the power to define and moderate harmful content within their house rules.[1787] Since substantiated notices constitute actual knowledge for the purposes of the hosting immunity under Art.5 DSA, intermediaries have a strong incentive to remove content upon effective notices.

However, entrusting content moderation to private actors with market influence may not always be an optimal choice, given the significant concentration of power over internet users' speech that this entails.[1788] Scholars criticize legal frameworks in the EU and U.S. for overly emphasizing the protection of a private sphere of social and legal autonomy from state interference, while neglecting the potential threats within that sphere. Instead, fundamental rights law should more seriously address the potential threats posed by private intermediaries, while still preserving the important distinction between the obligations of private actors and those of the state.[1789] In China, mega intermediaries, empowered by content moderation authority rooted in public law, have extended their monitoring scope from illegal content as defined by administrative laws to also include undesirable content under their house rules, raising significant legal concerns, including the disproportionate undermining of freedom of expression, access to information, and media pluralism.[1790] In turn, the Chinese experience may serve as a warning for EU and U.S. regulators that discretion and power over fundamental rights granted to intermediaries should be limited.[1791]

2.3.3.1 Restrict Intermediaries' Concentrated Power over Speech

Lessig's 'code is law' still reflects the normative power of intermediary architecture;[1792] however, while this concept remains relevant, lawmakers no longer rely solely on intermediaries to create rules within a self-regulatory framework. Trust in self-regulation has diminished over the years, and lawmakers all over the globe are increasingly drafting

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[1786] Keller D, 'The EU's new Digital Services Act and the Rest of the World' (Verfassungblog, 7 Nov.2022) <https://verfassungsblog.de/dsa-rest-of-world/>; Heldt A (2022).
[1787] Janal R, supra note 1209.
[1788] Keller D, 'Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users' (28 Jun. 2022) <https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/>
[1789] Theil S (2022) 649.
[1790] PEN America, 'FORBIDDEN FEEDS: Government Controls on Social Media in China' (PEN American Center, 2019) 21-22 <https://policycommons.net/artifacts/1736566/forbidden-feeds/2468203/>
[1791] Chander also warns that the DSA can be abused by determined actors. See Chander A (2023).
[1792] Lessig L (2006).

regulatory frameworks with ‘clear’ rules and ‘hard’ consequences.[1793] For today’s major intermediaries, despite the differing governance approaches in the U.S., EU, and China,[1794] all three jurisdictions are moving towards increased regulatory oversight of intermediaries’ self-regulation practices, reflecting a general trend towards more stringent regulation.

Any regime that imposes liability on speech intermediaries should comply with constitutional and fundamental rights safeguards.[1795] Intermediary liability laws’ restrictions on core democratic freedoms such as freedom of communication, speech, and association, as well as the right to privacy, must be necessary, proportionate, and provided for by law.[1796] Rather than imposing stringent liability on intermediaries for UGC or mandating comprehensive content monitoring, intermediary regulation ought to concentrate on establishing norms for intermediaries’ operational procedures, including modifications to T&Cs and algorithmic decision-making processes.[1797] Accountable governance, such as necessary notifications and disclosures to users whenever intermediaries change their T&Cs, can help reduce the information asymmetry between users and powerful gatekeeper intermediaries.[1798] Meanwhile, users should be empowered to better understand how they can notify intermediaries about both problematic content and problematic takedown decisions and should be informed about how content moderation works in practice.[1799] An institutionalized system of checks and balances should be established, incorporating procedural safeguards and redress mechanisms within the intermediary’s internal processes, but under judicial or administrative oversight.[1800] Moreover, privacy by default, improved transparency can help to ensure the protection of fundamental rights online.[1801]

2.3.3.2 Public Participation in Self-governance Practices

The filtering algorithm’s rules of thumb may yield biased outcomes since the system’s foundational parameters are negotiated between large rightsholders and major intermediaries, leaving private authors. Small rightsholders and users are largely unrepresented in shaping the

[1793] De Gregorio G (2020); Cammaerts B and Mansell R (2020) 142-143.
[1794] Gorwa R (2019) 6.
[1795] Gillespie T et al. (2020) 5; Keller D, ‘The EU’s new Digital Services Act and the Rest of the World’ (Verfassungblog, 7 November 2022) <https://verfassungsblog.de/dsa-rest-of-world/>
[1796] Douek E (2021).
[1797] Gillespie T (2018).
[1798] Keller D & Leerssen P (2020) 224.
[1799] Leerssen P (2020).
[1800] Schwemer SF & Schovsbo J (2020).
[1801] De Gregorio G (2020); De Gregorio G (2021); Quintais JP et al. (2023a).

mechanism's core functions.[1802] Without mandatory, state-supervised representation of users' interests, there is a significant risk that solutions will disproportionately favor large intermediaries and major rightsholders.[1803] Although market-based self-regulation initiatives like ContentID are efficient, they do not necessarily ensure a balanced and proportionate enforcement system that adequately considers the interests of all individual users and rightsholders.[1804]

Indeed, while filtering technology is necessary, its parameters should be carefully defined,[1805] particularly through cooperation and negotiation among all parties involved. Despite the potential danger of 'industry capture,' stakeholder dialogues appear to be a worthwhile alternative for Chinese regulators, aiming to introduce supervised specification of effective technological cooperation within a process of *regulated self-regulation*.[1806] While the stakeholder dialogue mechanism is not a perfect model, it does offer a certain degree of transparency within a structured and regulated process, which should be accessible to all rightsholders on non-discriminatory terms.

In fact, public participation in lawmaking through a one-stage disclosure and comment process is now routine in China.[1807] The NPC, China's top legislative body, highlighted that public consultation on draft laws has become a significant channel for citizen participation in lawmaking, with over 380,000 public opinions collected over the past decade.[1808] However, the absence of well-established participation mechanisms and the low quality of engagement and discourse continue to pose significant challenges for users and rightsholders in the copyright law-making process.[1809] In light of the ongoing copyright reform, legislative authorities should enhance the national legislative 'notice-and-comment procedure' by creating open channels for public input, thereby encouraging broader stakeholder participation in the legislative process. Additionally, administrative authorities could promote public participation

[1802] Quintais JP et al. (2023b).
[1803] Quintais JP et al. (2023a).
[1804] Montagnani ML (2019).
[1805] He T (2022a) 90.
[1806] Leistner M (2020) 53. Emphasis added.
[1807] Zhu X & Wu K (2017).
[1808] 'Public consultation enables people's direct participation in law making: China's top legislature' (Global Times, 29 Jun. 2022) <https://www.globaltimes.cn/page/202206/1269361.shtml>
[1809] Li R (2019).

in copyright enforcement by initiating regular stakeholder dialogues to oversee intermediaries' self-regulation practices.

2.3.4 A conditional Good Samaritan Clause

The DSA clarifies that intermediaries' voluntary own-initiative investigations and other activities aimed at detecting and removing illegal content or ensuring compliance with EU law do not forfeit their liability exemptions, provided these actions are conducted in good faith and in a diligent manner.[1810] This provision appears to definitively resolve the longstanding 'Good Samaritan paradox,'[1811] specifically the question of whether voluntary content moderation measures could classify intermediaries as active rather than passive or neutral, with the answer being in the negative.

On one hand, it is designed to encourage voluntary and proactive filtering by confirming that such actions do not strip intermediaries of their immunity. However, on the other hand, this clarification could have negative externalities on freedom of expression, potentially leading to overenforcement, as intermediaries might increasingly remove content to avoid liability.[1812] Moreover, adopting voluntary measures in good faith and in a diligent manner neither guarantees nor precludes neutrality, and they may still lose immunity.[1813] The question of whether the unsuccessful outcome of voluntary actions undertaken by providers would fall into the scope of 'diligent manner' under this provision remains unclear and needs to be determined on a case-by-case basis.[1814]

Considering the reality of the Chinese internet industry, this thesis argues that powerful intermediaries no longer need that strong protectionism once needed in the earlier stage of internet development.. That is, the scope of Good Samaritan Clause should not be overbroad. An intermediary may lose its Good Samaritan immunity when it engages in bad faith or fails to conduct diligent self-regulation.[1815] Section 230 CDA provides broad immunity for intermediaries against liability for third-party content, reflecting a policy choice in favor of free

[1810] Art.7 DSA.
[1811] Nordemann JB (2018) 10; Angelopoulos C (2017); William F (2020) 45.
[1812] Frosio G and Geiger C (2023).
[1813] Kuczerawy A, supra note 1199.
[1814] Ibid.
[1815] Sevanian AM (2014).

speech over other competing values.[1816] Nonetheless, limiting the application of Section 230 to Good Samaritans, understood as intermediaries that take reasonable steps to remove illegal content when warned, would be consistent with the original purpose of Section 230.[1817]

Therefore, when intermediaries undertake voluntary monitoring measures or fulfills their public law monitoring obligation in good faith and in diligent manner, its private law duty of care should not be affected and the legitimate safe harbor protection should not be deprived. It should be clarified that intermediaries should not be liable for good-faith unsuccessful monitoring, either voluntarily or to perform public law monitoring obligations. However, if they intentionally or knowingly promote, endorse, or maintain manifestly illegal content that they actually know or have awareness of, Good Samaritan immunity should not be extended to them. Of course, rulemaking authorities need to provide more specific details about the connotations of 'good faith' and 'diligence.' Moreover, to strike a fair balance between the interests of intermediaries and users, the above liability exemption under the Good Samaritan clause should be limited to monetary damages, while affected users could still require intermediaries to stop infringing activities.

2.4 Add Transparency in Algorithmic Content Moderation

Transparency is one of key concepts that guide the debate on intermediary governance and its sustainability.[1818] Access to information about intermediaries' functionalities, policies, and enforcement is essential for enabling the public, governments, and other stakeholders to effectively assess their performance.[1819] Greater transparency provides users crucial information about the scope of the intermediaries' cooperation with the authorities, including in ways that aid content moderation and compromise users' privacy. As tech companies advocate for openness and free access to information, and intermediaries create new opportunities for whistleblowing and initiating societal debates, transparency has gained renewed momentum in social media ecologies.[1820]

There is still significant room for improvement regarding transparency practices of intermediaries. Better quality and standardization of transparency practices by intermediaries

[1816] Liu HW (2023) 378.
[1817] Citron DK (2023); Citron DK & Wittes B (2017).
[1818] Gorwa R & Ash TG (2020).
[1819] Gillespie T et al. (2020); MacCarthy M (2020).
[1820] Gorwa R & Ash TG (2020).

would be crucial for a better understanding and assessment of their copyright content moderation and, as a result, for evidenced-based policymaking in this area.[1821] Empirical study reveals a high share of blocked and deleted content and a general decrease of diversity with regard to available content within the EU jurisdiction.[1822] Another empirical study shows that creators engage in self-censorship, refrain themselves from posting certain content or adjusting it in advance in order to cater to the perceived functioning of intermediaries' algorithmic content moderation.[1823] Since the regulative dimension of algorithmic copyright moderation is opaque, anticipation of 'punishments' directly influenced the cultural products that they produced.[1824] This is particularly true for Chinese content creators, as they have to guess which practices are accepted and which are not under the elusive and unpredictable content moderation rules.[1825] Addressing this bleak situation would require significantly greater transparency in intermediary governance from both policymakers and tech giants as part of their relationships with cultural content creators on social media intermediaries. Despite that its implementation still presents many challenges, the DSA offers a promising regulatory framework for advancing transparency and accountability among intermediaries. Meanwhile, experience from the self-regulation of U.S.-based intermediaries may also shed light on how to better improve transparency practices.

2.4.1 Untransparent Transparency Reports by Chinese Intermediaries

In China, Douyin has already begun voluntarily publishing transparency reports that include the number of illegal and harmful posts and accounts it has addressed, as well as the number of warnings issued by its safety center.[1826] Besides, Douyin registers an official account for its safety center, intensively posting content illustrating how Community Standards applies on a case-by-case analysis.[1827] However, Douyin's transparency report in mainland China is of lower quality compared to its overseas counterpart TikTok. The latter provides a more comprehensive and detailed account of information requests, removal requests, and government requests for access to user data on a regular basis.[1828] The DSA appears to have

[1821] Quintais et al. (2024) 170.
[1822] Dergacheva D & Katzenbach C (2024).
[1823] Dergacheva D & Katzenbach C (2023); Cook P & Heilmann C (2013).
[1824] Dergacheva D & Katzenbach C (2023).
[1825] Li L & Zhou K (2024).
[1826] 'Douyin Releases Q2023 Security Transparency Report Penalizes 2,900 Accounts for Posting Inaccurate Information' (Xinhua Net, 23 May 2023) <http://www.news.cn/tech/20230523/22ba28f6599545b0989839ec92e763b3/c.html>
[1827] Douyin Safety Center Official Account, Douyin ID: DYin110, can be accessed at <https://www.douyin.com/user/MS4wLjABAAAAY0vomT6bkKwbinBMqboF-bWq5RAou4YxOGojm3GS7PY>
[1828] 'TikTok Reports' <https://www.tiktok.com/transparency/en/reports/>

exerted a *de facto* Brussels Effect,[1829] influencing how Chinese social media intermediaries moderate content abroad, though not domestically.

A transparency report that only reports takedown numbers does little to foster a truly transparent internet ecosystem. The Douyin Safety Center's posts are a positive step, but they fall short of providing comprehensive clarity, as their piecemeal nature increases the burden on users to fully understand the standards for content moderation. Nonetheless, understanding individual decisions is insufficient to understand the massive systems of content moderation.[1830] At the same time, other major intermediaries like Weibo and WeXin do not publish a comprehensive transparency report on how their content moderation processes internally.

2.4.2 Does High-level Transparency Principles Help?

Scholars suggest that establishing a set of high-level principles could encourage companies to voluntarily report on the content moderation practice in a consistent manner.[1831] In practice, such non-standardized voluntary enforcement may lose credibility without stakeholder input and government oversight.[1832] Despite the increasing transparency in content moderation practices disclosed by intermediaries, meaningful comparisons remain challenging due to inconsistencies in their reporting practices and methodologies.[1833] The gap between the ideal of transparency and the reality of intermediary operations is further exacerbated by growing evidence that authorities, in both democratic and authoritarian contexts, increasingly misuse content moderation for censorship purposes.[1834]

Empirical studies reveal significant discrepancies in the data disclosed by various intermediaries, with none of the reports fully adhering to the recommendations set forth by the Santa Clara Principles.[1835] Given the current level of transparency, verifying the data is often challenging, as the reports are largely shaped by the selective disclosure and interpretation of information by the companies, which reflects their agenda-setting in related discussions.[1836]

[1829] Bradford A (2020).
[1830] Suzor NP et al. (2019).
[1831] Sander B (2019).
[1832] Suzor NP et al. (2019) 1529; Urman A & Makhortykh M (2023).
[1833] Urman A & Makhortykh M (2023).
[1834] Clark JD et al. (2017); De Giovanni G (2020); Gorwa R (2024); He T (2022a) 92.
[1835] Urman A & Makhortykh M (2023).
[1836] Ibid.

Moreover, concerns regarding 'under reporting'[1837] and 'transparency washing'[1838] have further undermined the already limited effectiveness of transparency reporting as a mechanism for accountability.

Given this context, implementing a *mandatory* transparency reporting obligation for intermediaries appears essential to enhance transparency and accountability in their internal processes.[1839] To enhance transparency in transparency reports, several valuable lessons can be drawn from the EU regulation on transparency reporting obligations. The DSA offers an attempt to balance private technological power with democratic oversight.[1840] It mandates intermediaries to implement a broad range of measures aimed at ensuring transparency, including the submission of annual transparency reports, which must be made available in a publicly accessible database.[1841]

These reports are required to include details on the use of automated means for content moderation, covering (i) a qualitative description of the tools used, (ii) the specific purposes for which they are employed, (iii) indicators of their accuracy and potential error rates, and (iv) any safeguards that have been implemented.[1842] Since most algorithms used by intermediaries primarily focus on similarity rates generated through matching processes, it is feasible to require intermediaries to disclose or explain their algorithmic decisions.[1843]

In the Chinese context, transparency reports should function as a tool for intermediaries to inform users about their daily content moderation practices, rather than as a means for governments to ensure that intermediaries are meeting the growing demands for surveillance. To this end, a user-friendly transparency report should require intermediaries to share information with users about *how*, *when*, *where*, and *why* they deploy *ex ante* automated filtering of UGC. Such information may include copyright owners' requests, the parameters used by the algorithm, the matching results and their percentages, similar cases, records of correct and error rates, and (if necessary) relevant judgments from Chinese courts.[1844]

[1837] Akpinar NJ et al (2024).
[1838] Zalnieriute M (2021).
[1839] He T (2022a) 89.
[1840] Chander A (2023).
[1841] European Commission, 'How the Digital Services Act enhances transparency online' (27 Jun. 2024) <https://digital-strategy.ec.europa.eu/en/node/12419/printable/pdf>
[1842] Art.15 DSA.
[1843] Edwards L & Veale M (2017) 58-9.
[1844] He T (2022a) 91.

Additionally, other specific and concise reporting obligations, along with harmonized procedural accountability rules, should be implemented to expose follow-up results on removal decisions, preventing over-removal and excessive burdens on users. Content management policies and mechanisms of large intermediaries could also be subjected to public review and advisory oversight. For example, intermediaries that employ automated content filtering mechanisms should review and audit their algorithms and datasets on a regular basis.[1845] Additionally, certain regulations on AI may also apply to algorithmic content moderation to ensure more robust transparency practices. Entities deploying and providing AI systems should be required to complete *ex-ante* algorithm registry[1846] and security self-assessments,[1847] while also subjecting them to ex-post scrutiny and inspection by competent regulatory authorities on a regular basis.[1848] Moreover, while protecting trade secrets of intermediaries' algorithmic moderation systems is crucial, meaningful transparency in both human and algorithmic copyright content moderation by intermediaries may require legislative intervention to conditionally exempt these algorithmic systems from trade secrets protection, at least for data access and scrutiny by researchers and policymakers.[1849]

3. Preserve the Balance of Interests

Copyright law pursues the dual objectives of protecting copyright and safeguarding the public interest: the former is achieved by granting copyright holders exclusive rights over their creations, while the latter is realized by ensuring that certain information remains freely available for public use.[1850] This publicly accessible information includes topics not covered by copyright, unexpressed ideas, fair use material, non-original expressions, and works that have exceeded their protection period—collectively forming the public domain. However, algorithmic privatized enforcement, while efficiently handling infringing content, often mistakenly treats these borderline materials as infringing content, thereby eroding the public domain.

[1845] Bloch-Wehba H (2020) 89.
[1846] Art.19 of Deep Synthesis Regulation; Art.24 of Algorithmic Recommendation Regulation; Art.17 of Generative AI Regulation.
[1847] Art.20 of Deep Synthesis Regulation; Art.27 of Algorithmic Recommendation Regulation; Art.17 of Generative AI Regulation.
[1848] Art.21 of Deep Synthesis Regulation; Art.28 of Algorithmic Recommendation Regulation; Art.19 of Generative AI Regulation.
[1849] Quintais JP et al. (2024) 175.
[1850] Boyle J (2010); Yu PK (2007).

3.1 Internal Balancing Mechanism: Limitations and Exceptions to Copyright

With the widespread adoption of filtering technologies by Chinese intermediaries to prevent copyright infringements, rightsholders' ability to enforce copyright has been significantly enhanced, while 'public domain' has been increasingly constrained by algorithmic copyright enforcement.[1851] Specifically, the algorithmic private ordering has also eroded the copyright public domain[1852] by shrinking the space for 'private use,'[1853] depriving opportunities for 'proper quotation,'[1854] obstructing 'scientific research,'[1855] and undermining users' right to send 'counter-notice.'[1856] Thus, the adoption of filtering technology has effectively expanded the scope of online copyright enforcement but has also negatively impacted copyright exceptions[1857].

The focus on recognizing and enforcing the owner's copyright in the new technological context is oversimplified as users' interests are not only shaped by the rightsholders' exclusive rights to own, control, and access information, but also limitations and exemptions to those exclusive rights.[1858] In response to the shifting dynamics of information, creativity, technological change and communication, copyright law's allocation and enforcement of copyright should be seamlessly balanced with the legitimate rights and interests of public through a continuous process of 'equilibrium adjustment'.[1859] Striking an effective balance between right holders and users therefore requires a broader approach, combining a consistent solution to the design of exclusive rights, exemptions and their interaction.[1860]

In general, the term 'user rights' describes the interest of users of copyrighted works to exercise their fundamental rights to use and consume content and engage online without the interference of others. In the context of copyright law, user rights are connected to the use of copyrighted works, which fall within the scope of statutory exceptions and limitations.[1861] Countries that choose to enhance copyright flexibilities for such creative endeavors will likely be better

[1851] He T (2022a) 84.
[1852] Jiao H (2023).
[1853] Art.22(1)(1) CCL.
[1854] Art.22(1)(2) CCL.
[1855] Art.22(1)(6) CCL.
[1856] Art.1195 Civil Code.
[1857] Yu PK (2016) 327.
[1858] Elkin-Koren N (2016); Craig CJ (2017).
[1859] Craig CJ (2016) 603.
[1860] Aufderheide P & Jaszi P (2018).
[1861] Brieske J (2024) 28-9.

positioned to harness the full potential of new communication technologies.[1862] Therefore, a shift toward a more user-friendly interpretation of copyright exceptions, coupled with greater awareness of the impact that strong copyright protection has on the creative use of works, could help prevent the erosion of the public domain in China.

In the U.S., the Ninth Circuit has clarified that rightsholders must assess whether the allegedly infringing material qualifies as fair use before issuing a notice to the intermediary, as failure to do so could result in a claim of 'misrepresentation' for not meeting the 'good faith' standard.[1863] Yet the Section 512 Report asserted that copyright owners should not be required to consider whether a use constitutes fair use before sending takedown notices to intermediaries, a conclusion that directly contradicts the Ninth Circuit decision.[1864] Such an assertion seems untenable: without this safeguard on copyright owner discretion, the abuse of takedown notices is likely to become an even greater problem than it already is.[1865] Art.17(7)(2) DSMD introduces mandatory exceptions for users when uploading and making available UGC. In particular, the Commission Art.17 Guidance and the CJEU considered the mandatory limitations and exceptions as 'user rights,'[1866] which go beyond their function as a privilege or defense against infringement claims of the copyright holders.

Although algorithmic enforcement faces challenges related to the 'complexity of infringement determinations and the limitations of algorithmic technology'[1867] when dealing with limitations and exceptions under CCL,[1868] this does not render the integration of considerations of limitations and exceptions into algorithmic design unfeasible.[1869] While current state of algorithms does not support perfect automated limitations and exceptions determination, it is possible 'to deploy algorithms to a more limited extent.'[1870] While automated copyright enforcement can be empowered by AI and machine learning, intermediaries may be able to develop systems that are more accommodating of copyright exceptions by 'learning patterns of fair use instances through the study of existing fair use decisions.'[1871] Noteworthy,

[1862] Yu PK (2022).
[1863] Burk DL (2019); Lenz v. Universal (2015).
[1864] Section 512 Report, 148–49.
[1865] Samuelson P (2020) 333.
[1866] Schwemer SF & Schovsbo J (2020); AG Opinion in *Poland v. Parliament and Council*, para 193.
[1867] Jiao H (2023) 197.
[1868] He T (2020); Wang J & He T (2019); He T (2022b); Yu PK (2018b).
[1869] Lambrecht M (2020).
[1870] Yu PK (2020) 339.
[1871] Elkin-Koren N (2017) 1097.

overconfidence in technical solutions can have damaging effects.[1872] As Yu suggests, the deployment of algorithms to promote copyright exceptions should involve taking 'incremental steps,' initially 'focusing on the minimum essentials' before gradually expanding coverage to leverage technological advancements and increased technical resources.[1873]

Maintaining a 'free zone' or an 'enforcement equilibrium' for users is essential.[1874] Incorporating copyright exceptions into algorithm design serves to prevent the negative effects of over-deterrence in automated enforcement while also educating users on copyright law compliance. Even when it is determined that the allegedly copyright-infringing material is 'substantially similar' to a copyrighted work, the rightsholder cannot immediately issue a takedown notice to the intermediary, nor can the intermediary promptly remove the material; instead, they must first further examine whether the allegedly infringing material falls within the scope of limitations and exceptions. When necessary, algorithmic enforcement should be supplemented by human review to minimize the erosion of the public domain. Specifically, blocking measures for content that does not clearly infringe should only be taken after human review, as this approach will improve the efficiency and accuracy of content filtering and reduce the risk of excessive blocking from the outset.

3.2 External Balancing Mechanism: Taking Fundamental Rights Safeguards Seriously in Copyright Content Moderation

Notably, all of the powers that the DSA grants seem worthy and well-intentioned, designed to respond to the critical role of intermediaries in our daily lives. However, such designed powers can be abused.[1875] Especially, automated content moderation often serves as an appealing mechanism for regulators to 'sanitize' the online environment.[1876] The increased use of content blocking for private enforcement heightens the need for procedural protections, which the DSA addresses through comprehensive fundamental rights safeguards. Notably, the DSA operates within a European legal framework that is interpreted by an independent judiciary, and evaluating its rules in isolation fails to account for the constraints imposed by other sources of law within the EU. When 'transplanting' the DSA in foreign jurisdictions, it is unlikely that

[1872] Bloch-Wehba H (2020) 82.
[1873] Yu PK (2020) 339-40.
[1874] He T (2022a) 85.
[1875] Chander A (2023) 1085.
[1876] Bloch-Wehba H (2019).

the same protective legal framework will be present,[1877] as legal transplants do not automatically include the institutions, practices, and cultural context of their origin.[1878]

Art.17 DSMD and the DSA introduce 'enhanced' responsibility for intermediaries, characterized by additional liability and obligations regarding the content they host and services they provide, as well as an increased role of fundamental rights in the legal framework.[1879] Unlike the First Amendment approach in the U.S. and the fundamental rights test in the EU that safeguard users' freedom of speech, Chinese online users lack appropriate protections or remedies to counter intermediaries' self-imposed filtering actions at the constitutional level. Although freedom of speech is recognized as a constitutional right for citizens, it is not explicitly included within the scope of civil rights, making civil remedies for infringements on free speech exceptionally rare.[1880] Although the Chinese Constitution is officially the fundamental and supreme law of China, it has historically played a peripheral role in daily governance and law-making, as it cannot be cited in court cases.[1881] Additionally, Chinese private intermediaries are mandated by public law to enforce monitoring obligations within the private sphere, yet many of the traditional principles of administrative law and constitution law do not apply. Moreover, while fundamental rights are rarely invoked as the basis for legal challenges against acts that violate citizens' rights, they should be effectively safeguarded by incorporating them into procedural protections, such as redress mechanisms, external oversight, and transparency requirements. In this context, although granting Chinese users the same level of constitutionalized fundamental rights protection as EU and U.S. users may seem unlikely, Chinese regulators could consider the DSA as an example of how to incorporate fundamental rights protection into procedural safeguards.

In order to respect fundamental rights and ensure algorithmic accountability, the DSA provides guidance regarding: (1) the right to issue a notice and the form of notices;[1882] (2) procedural safeguard for processing notices and for final decision-making,[1883] with a special regime that might be applied to trusted flaggers;[1884] (3) safeguards against the abuse of the system allowing

[1877] Chander A (2023) 1085.
[1878] Miller JM (2003); Palmer VV (2005).
[1879] Quintais JP et al. (2024) 159-160.
[1880] Cui G (2017) 236.
[1881] Li S (2020).
[1882] Art.16(1) DSA.
[1883] Art.16(6) DSA.
[1884] Art.22 DSA.

to sanction parties that systematically and repeatedly submit wrongful notices (or manifestly illegal content);[1885] (4) transparency reports;[1886] (5) access to internal complaint mechanisms that should be transparent, effective, fair and expeditious;[1887] as well as (6) the possibility to resort to out-of-court dispute settlement mechanisms and judicial redress.[1888]

3.2.1 Counter Notice Mechanism

Both intermediaries and regulators might consider adopting more robust procedural safeguards to protect users who contest filtering decisions. Enhanced procedural guarantees for content moderation, such as appeal mechanisms and judicial review requirement, better safeguard fundamental rights. Since this filtering process is initiated by the intermediary rather than triggered by a copyright holder's notice, there is no procedure in place for the intermediary to forward the copyright holder's notice to the user, as occurs under the NTD mechanism. Consequently, users are unable to counteract or seek redress by submitting a counter-notice, effectively depriving them of their right to send counter-notice under the NTD mechanism. To restore the balance of interests disrupted by the algorithmic filtering system, a procedure should be established to allow users to appeal potential erroneous filtering decisions. To this end, the DSMD requires OCSSPs to create an appeal mechanism for users to contest the removal of their content.[1889]

In this context, establishing an efficient notice-and-action mechanism is essential for safeguarding fundamental rights online, with procedural safeguards in place for notifiers, content providers whose content is 'flagged,' and other interested parties. Indeed, the 'notice (rightsholders) – takedown (intermediaries) – forward notice (intermediaries) – counter notice (disputed user) – restore the content and forward counter notice (intermediaries)' procedure established in the 2013 Regulations not only allows immediate putback in response to a valid counter notice, but also enables the swift reinstatement of content that has been unjustly removed. Flagged content should remain accessible while its legality is under review, unless a judicial or administrative order mandates its removal; during this assessment period, intermediaries should be exempt from liability for choosing not to remove the content in good faith.

[1885] Recital 57, Art.16(2)(d) and Art.23(1)–(2) DSA.
[1886] Art.15, 24, and 42 DSA.
[1887] Art.20 DSA.
[1888] Art.21 DSA.
[1889] Art.17(9) DSMD.

Noteworthy, in the U.S., the counter-notice mechanism has largely failed, and intermediaries are often reluctant to offer guidance to targets trying to determine whether a takedown claim is valid.[1890] To improve NTD for groups involved, scholars suggest that shared investment in creating and providing information resources for senders to access before submitting notices and for targets to review before responding would enhance the NTD process for both groups, with intermediaries linking to these resources and encouraging their use.[1891] Thus, with the assistance of intermediaries, copyright administrations could leverage its blockchain-based services to publish shared information including copyright law and its exceptions, how the NTD process reflects these rules, and guidelines for notice-and-necessary measures process.

3.2.2 External Oversight

Facebook Oversight Board (OB) is perhaps the most prominent self-regulative attempt to formulate a 'supreme court' for evaluating the content decisions and an external oversight body of one company.[1892] Generally, the OB empowers independent experts with decision-making authority to resolve disputes related to Facebook's content decisions and to provide recommendations and advisory opinions aimed at improving policies and content moderation practices.[1893] During its short life, the OB has aimed at having an impact beyond the very few cases it can decide. Its recommendations have included improvements in the internal process for users to report content and appeal the company's decisions, extensive suggestions on advance the calls for more transparency and due process and how to strengthen transparency reporting, new forms of engaging with civil society, and measures to improve the available information about the intermediary.[1894]

Despite of its inherent drawbacks, the OB offers an option for independent scrutiny and redress, aiming to ensure that intermediaries' operations align with International Human Rights Law principles while providing users with a mechanism for accountability and transparency.[1895] Other alternative multi-stakeholder approaches to private regulation, such as Social Media

[1890] Urban JM et al. (2017).
[1891] Ibid, 138.
[1892] Klonick K (2019).
[1893] Dvoskin B (2023).
[1894] Ibid.
[1895] Pour HN (2024).

Councils, may also help address the imbalance between intermediaries and users.[1896] In particular, the Chinese major intermediaries should be encouraged to establish external multi-stakeholder oversight body, to provide recommendations for them, particularly oriented towards increasing the available information about their operations. Through its recommendations and dialogue with intermediaries, the external oversight body can produce new information and enriching the public debate about content moderation. With massive public participation, the OB may be expected to better contribute to fundamental rights protection. By making recommendations that comprise large aspects of the moderation system, the external oversight body can show that it might be able to have a more significant influence than initially thought.

The entitlement to challenge filtering decisions, both within internal complaint and redress procedures and before an external authority, is addressed by Art.21 DSA.[1897] It further specifies aspects of the settlement procedure, such as accessibility and cost-bearing, and clarifies that the settlement body does not have the power to impose a binding resolution on the parties. The non-binding nature of these settlements, while potentially weakening their effectiveness, does not prejudice users' rights to seek judicial remedies.[1898] Instead, it provides an additional forum for users to challenge filtering decisions without limiting their access to the courts.

3.2.3 Restrictions on Rightsholders Notification

In all the three examined jurisdictions, the present legal situation is characterized by a significant number of unjustified (algorithmic) infringement notifications by the rightsholders.[1899] In the U.S., to filter unjustified takedown requests, the complaining party is required to provide a statement that it 'has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'[1900] Intermediaries face general liability for copyright infringement and potential damages claims if they fail to comply with an unjustified infringement notification.[1901] However, unjustified takedown normally will only be contested through the Section 512(g)(3) DMCA redress procedure without a significant risk of damages claims by the users against the

[1896] Donahoe E et al. (2019).
[1897] Art.21(1) DSA.
[1898] Art.17(9) DSMD; Art.21(1) DSA.
[1899] Blythe SM (2019) 78-82.
[1900] 17 U.S.C. §512(c)(3)(A)(v).
[1901] Ibid, §512(c)(1)(C).

intermediary.[1902] In China, intermediaries face liability if they fail to comply with infringement notifications within the specified timeframe, but they are only required to restore wrongfully deleted content without concern for potential damage claims. The above systems, therefore, create biased incentives for intermediaries to take down borderline content as much as possible. Under the DSMD, a similar or potentially worse situation appears likely for OCSSPs: while non-compliance with the duties outlined in Art.17(4)(b) and (c) will result in copyright infringement and damages claims, 'over-compliance' will typically only lead to an obligation to restore the content, without necessarily incurring damages claims, depending on the underlying contractual situation. Such liability for wrongful request can usually also be derived according to the Member States' laws, but seems rarely practiced.[1903] Against this background, copyright holders driven by malicious competitive motives usually deliberately send false notification to intermediaries in practice.[1904] Moreover, cynical uses of copyright law have become a favored tool for would-be censors to silence opposing viewpoints and to suppress content they wish to keep from public scrutiny.[1905]

3.2.3.1 Notice based on 'Good Faith' Standard

Copyright claimants, who bear the burden of proving infringement in court, should be required to stand by their substantive claims, which could encourage copyright holders to validate their complaints before sending and incentivize improvements in automated infringement detection systems.[1906] In a reply issued on 24 August 2020, addressing legal issues in online IP infringements, the SPC stated that if a rightsholder proves in litigation that an erroneous notice was submitted in good faith, the court may exempt them from liability.[1907]

Moreover, to ensure that rightsholders adhere to 'good faith' standard,[1908] it is essential to impose effective sanctions on reckless notifications that disregard the ex-ante requirements to properly identify infringing content and to conduct a plausibility check on the strong likelihood of limitations and exceptions. Reasonable and proportionate standards should be established

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[1902] Ibid, §512(g)(1).
[1903] Husovec M (2018) 58.
[1904] Urban JM et al. (2017) 127-9; Jiao H (2023).
[1905] Tehranian J (2015) 251, 262-266.
[1906] Urban JM et al. (2017) 128.
[1907] Art.5 of 'The Supreme People's Court's Reply on Several Legal Issues Concerning Online IP Infringement Disputes 最高人民法院关于涉网络知识产权侵权纠纷几个法律适用问题' (24 Aug. 2020) <http://gongbao.court.gov.cn/Details/1e25d4d7107b8c691497c1ed531adb.html>
[1908] Urban JM et al. 127-29.

for providing relevant information and infringement notices, along with effective yet proportionate sanctions for submitting incorrect information or unjustified notices. Rightsholders who act with gross negligence by providing incorrect information or issuing mistaken infringement notices, despite clear indications of applicable copyright exceptions, should be liable for damages incurred by affected users and intermediaries, as this would not only help balance the interests of all parties but also reduce the risk of unjustified notifications.[1909] To improve compliance, intermediaries could provide senders with educational materials and clear guidance on appropriate copyright takedown requests, while also offering targets educational resources and an easy-to-use counter-notice function.[1910]

3.2.3.2 Punitive Damages for Malicious Unjustified Notices

In China, the widespread use of algorithmic notification systems has enabled copyright holders and their agents to increasingly exploit these systems by sending large volumes of 'spam notices' for illegitimate gains, even leading to the formation of black-market industries centered around malicious false notifications.[1911] Although both the Civil Code,[1912] and the 2013 Regulation[1913] impose compensatory liability for wrongful notifications, this liability is primarily restorative, making it challenging to effectively deter and punish deliberate or malicious false notifications. Therefore, it is recommended to introduce punitive damages for such malicious conduct.

Notably, the ECL introduced not only compensatory damages for unjustified notices but also punitive damages for maliciously unjustified notices.[1914] As a result, rightsholders who maliciously send wrongful notices that lead intermediaries to mistakenly moderate content should be subject to punitive damages. Meanwhile, the SPC also stated that, 'if a malicious submission of a statement leads an e-commerce intermediary to terminate necessary measures, thereby causing harm to the rightsholders, the people's court may support the rightsholders' claim for punitive damages in accordance with the law.'[1915] That said, targeted parties may face punitive damages if their malicious submission of erroneous notices to intermediaries causes

[1909] Leistner M (2020) 49.
[1910] Urban JM et al. (2017) 137-38.
[1911] Jiao H (2023) 199.
[1912] Art.1195(3) para 1 Civil Code.
[1913] Art.24 of 2013 Regulation.
[1914] Art.42(3) ECL 2018.
[1915] Supra note 1907, Art.4.

an e-commerce intermediary to terminate necessary measures, resulting in harm to rightsholders.[1916] Given that malicious notifications in the copyright field are fundamentally similar to malicious complaints in e-commerce, it is recommended that punitive damages be imposed for such malicious notifications.[1917]

3.2.4 Content Moderation under Human Review

Content filtering decisions often involve complex legal issues that require expert evaluation. While comprehensive human review by legal specialists is ideal, high volumes may necessitate random sampling of filtering decisions for expert assessment. The value of human review is fully realized only when the reviewer possesses the ability to contextualize and assess complex situations in relation to their legality.[1918] Therefore, a copyright expert group designated by the external oversight body could be well-suited to conduct contextual human reviews. Alternatively, the emphasis on specialized legal expertise might be most effectively utilized within the framework of out-of-court dispute settlements, as outlined in Art.21 DSA.[1919] In both scenarios, specialized legal professionals could be engaged to ensure that complex legal considerations are thoroughly addressed, thereby safeguarding the integrity of the review process and protecting the fundamental rights of all parties involved.[1920]

3.2.5 Trusted Flaggers Mechanism

Building on years of voluntary cooperation between intermediaries and trusted partners, trusted flaggers form a crucial part of the DSA's strategy to tackle illegal content online.[1921] Trusted notifier-models can both be seen as extension of the existing NTD regimes and an additional voluntary expedited-enforcement layer.[1922] Chinese scholars have also proposed the introduction of a trusted flagger provision in future lawmaking.[1923] However, the implementation of trusted flagger mechanism requires meticulous consideration by Chinese regulators.

[1916] [2018]Z8601MC No.868 (2018)浙 8601 民初 868 号民事判决书.
[1917] Supra note 1280, Art.6.
[1918] Frosio G & Geiger C (2023) 70.
[1919] Ibid.
[1920] Geiger C & Mangal N (2022).
[1921] European Commission, 'Trusted flaggers under the Digital Services Act (DSA)' <https://digital-strategy.ec.europa.eu/en/policies/trusted-flaggers-under-dsa>
[1922] Schwemer SF (2019b) 11.
[1923] Wang T (2023); Yao Z & Li Z (2023).

Under the DSA, designated trusted flaggers are responsible for notifying intermediaries of illegal material on their services, and the intermediaries are required to act on those notices 'without undue delay.'[1924] That said, trusted flaggers are more equal than others with the certain privileges in flagging. Given the significant power trusted flaggers have to rapidly suppress online speech, the selection of entities entrusted with this authority and its claims of representativeness is critically important. As privileged third parties in the flagging process,[1925] trusted flagging can involve the government to greater or lesser degrees, ranging from co-regulatory to legislative efforts.[1926] Thus, governments can exploit flagging arrangements to outsource or 'privatize' their regulation of speech through private intermediaries.[1927] Moreover, given the broad room of autonomy that the trusted flaggers provision leaves to private parties, As Chander warns, the trusted flaggers provision—intended to enable public scrutiny of intermediary actions through external research—could be weaponized to enhance government control.[1928]

[1924] Art.22(1) DSA.
[1925] Schwemer SF (2019b) 12.
[1926] Appelman N & Leerssen P (2022).
[1927] Schwemer SF (2019b) 9.
[1928] Chander A (2023) 1080.

VII. Conclusion

For a long time, the conventional view holds that infringement must be curtailed or punished to ensure that copyright achieves its intended goals of incentivizing creation and ensuring access to works.[1929] Copyright infringement has long been portrayed as the enemy of cultural production and human flourishing, with its deterrence being a primary focus of both popular and scholarly discourse.[1930] Both regulators and the copyright industry have sought to leverage so-called 'efficient' preventative measures to curb rampant online piracy. In China, copyright administrations have even launched extensive administrative enforcement measures against online piracy in cooperation with intermediaries. Several EU Member States also empower administrative bodies to take measures intended to combat online copyright infringement. At the same time, intermediaries also joined anti-piracy campaigns by introducing voluntary filtering mechanism. At first glance, it may appear that a copyright filtering mechanism, supported by cooperation between the state, the copyright industry, and intermediaries, could serve as an effective tool to combat online piracy, with administrative interventions further deterring potential infringers. However, the potential negative impact of copyright filtering mechanisms, particularly in the form of mandatory filtering obligations, is significant. By employing automated content filtering mechanisms, states, copyright industries, and intermediaries achieve optimal outcomes, yet these practices pose a significant threat to social values and users' fundamental rights.[1931] Excessive administrative interventions in the copyright market may stifle competition and undermine regulation based on the rule of law.

Moreover, users' interests and fundamental rights should be respected in the policy marking process. Litman cautions that copyright reform has long been dominated by lobbying efforts from cultural and high-tech conglomerates. This has, in turn, made copyright law overly obscure and complex, creating uncertainty for both users and creators.[1932] Copyright policy is driven by a small group of concentrated players to the detriment of the more dispersed interest of smaller players and the public at large, while creators have been playing a very minor role in present copyright policy, which is distributor-centered, rather than author-centered.[1933] Such a biased understanding is obvious in the Section 512 Report. Although commentators argue

[1929] García K (2020a).
[1930] Bracha O and Goold PR (2016) 1065-66; Rendas T (2015).
[1931] Bloch-Wehba H (2020) 87.
[1932] Litman J (2001); Litman J (2010) 3-5.
[1933] Ginsburg JC (2002).

that UGC creators are just as deserving of copyright protection as the creators of Hollywood movies, top-selling sound recordings, and best-selling novels, the Section 512 Study chose to reshape the safe harbors to provide significantly greater protection to copyright industries, neglecting to consider the interests of UGC creators as part of the overall balance.[1934] In the ongoing copyright reform, while large intermediaries and the copyright industry can have a seat at the decision-making table, vulnerable internet users and 'user-creators' are on the menu. Moreover, overprotection of copyright could threaten democratic values and impact on social justice principles by unreasonably restricting competition, innovation and creativity. Much of the literature argues that users have lost out and are not receiving the attention they deserve,[1935] an argument that has led to a mobilization of the public against expanding copyright policy.[1936]

Furthermore, in addition to ensuring strong protection for rightsholders' copyrights, special attention should be given to social welfare and cultural diversity to better foster a thriving UGC environment.[1937] Indeed, this 'prevention-oriented' view is flawed, as it overlooks the fact that some rightsholders not only tolerate infringement but actually encourage it, both explicitly and implicitly, in various situations for a common reason: they benefit from it.[1938] The internet has connected people from all walks of life, giving every user equal access to channels for expression and making content creation accessible to everyone, not just professionals. Digitized works have become easily accessible resources for users to incorporate into their creations.[1939] However, this instant and widespread mode of UGC creation has greatly increased the transaction costs of acquiring rights information and negotiating in advance, making it unsustainable for all parties involved. In the UGC era, effective intermediary governance requires balancing the divergent interests of key stakeholders. Rather than crafting the law in a way that incentivizes online gatekeepers to proactively prevent, block, filter, and sanitize such everyday digital creativity, the legislators should amend the law to make it legal and easier for users to engage in 'commonplace' activities.[1940] In addition, the market should adapt to users' urgent needs, offering new and more affordable ways to enjoy creativity while moderating user uploads in a transparent way to safeguard fundamental rights.

[1934] Samuelson P (2020) 338.
[1935] Sterk SE (1995); Nadel MS (2004); Cohen JE (2005); Mezei P (2022).
[1936] Nattrass W, 'The Remarkable Rise of the Czech Pirate Party' (The Spectator, 23 Feb. 2021) <https://www.spectator.co.uk/article/theremarkable-rise-of-the-czech-pirate-party>
[1937] Senftleben M (2019); Senftleben M (2020a).
[1938] García K (2020a).
[1939] Kaplan AM & Haenlein M (2010).
[1940] Frosio G (2020b) 731.

All in all, considering the global economic strength of their internet industries and the similar attitudes of their respective governments toward innovation, U.S. copyright laws and policies are more applicable for China to emulate than those of the EU. Therefore, China might benefit more from aligning its copyright practices with those of the U.S. rather than the EU.[1941] After considering input from both the copyright industry and intermediaries, the U.S. has opted not to introduce mandatory filtering obligations into its copyright law, instead focusing on fine-tuning the existing safe harbor regimes.[1942] Similarly, China need not adopt the EU's approach of imposing unbearable and costly obligations on intermediaries but should instead make substantial adjustments to its current intermediary liability rules to better align with its industrial realities. However, this does not imply that the US model is a perfect solution, as it has flaws such as ignoring the interests of SMEs and users.

When proposing any changes to the current intermediary liability regime, apart from the concerns of major copyright industries and large intermediaries, Chinese regulators should adopt a balanced approach that takes into account the industrial realities, the needs of startups and SMEs, the interests of the billions of users and individual creators. Regulatory regimes should be understood as interconnected sets of rules shaped by industry structures, norms, and social goals, carefully considering the diverse interests at stake to offer plausible solutions for all parties involved and thereby safeguard fundamental rights.[1943] Particularly, mega-intermediaries are almost certain to adapt to any content hosting rules that are mandated. In fact, their dominance could be further solidified if new regulations disadvantage SMEs or force them to shut down.[1944]

Noteworthy, empirical studies indicate that global online copyright piracy has been on a downward trend over the past few years. This decline is largely attributed to the increasing availability of free or affordable legal content, rather than the implementation of enforcement measures. In other words, when legitimate content is offered at reasonable prices, in a convenient manner, and with sufficient diversity to meet consumer demand, consumers are

[1941] Wan Y (2021) 195.
[1942] Section 512 Report.
[1943] Lobel O (2016) 143.
[1944] Bloch-Wehba H (2020).

willing to pay for it.[1945] These findings suggest that the approach of combating internet piracy through the introduction of filtering obligations or other enhanced enforcement measures might be misguided. The situation in China mirrors this global trend. On one hand, as Chinese internet users increasingly demonstrate a willingness to pay for content, driving a significant portion of the online content industry, major intermediaries have responded by ramping up their investment in acquiring high-quality copyrighted material and producing original content.[1946] Those who failed to offer high-quality service based on copyrighted content had already be knocked out of the highly competitive market.[1947] On the other hand, China's online copyright environment has significantly improved. A decade ago, 99% of China's digital music was pirated, but now most Chinese consumers listen to licensed music. Notably, in terms of digital music revenue, China ranked second only to the U.S., with US$2 billion in sales last year, and that figure is expected to exceed US$3 billion by 2024.[1948] According to a report released by the IFPI in early October 2018, 96% of digital music consumers in China listen to licensed music and 89% of music consumers in China listen to licensed audio streaming, surpassing the global average of 62%.[1949] Meanwhile, the NCAC 2023 report suggests that the ongoing collaboration among government, enterprises, and stakeholders in promoting software legalization and strengthening copyright protection has significantly contributed to the growth and innovation of China's software industry.[1950]

Under a balanced intermediary liability regime, consumption of licensed content will become the new norm in China. On the one hand, providing users with multiple authorized channels for accessing and using works promotes the consumption of legal content. Sustainable and robust copyright protection can be achieved by establishing a well-functioning market through the development of effective business models, providing authorization channels for online use, and improving the copyright collective management system to ensure that copyright holders

[1945] Quintais JP and Poort J (2018a) 876.

[1946] NCAC, 'China's Internet Copyright Industry Development Report (2021)' (5 Dec. 2023) <https://www.ncac.gov.cn/chinacopyright/upload/files/2023/12/4cfd17206060e246.pdf>

[1947] Zhang J & Pan C, 'What the demise of music streaming platform Xiami says about China's internet industry' (South China Morning Post, 16 Jan. 2021) <https://www.scmp.com/tech/apps-social/article/3117931/what-demise-music-streaming-platform-xiami-says-about-chinas?module=inline&pgtype=article>

[1948] Ip C, 'How did China's digital music industry become the second largest in the world?' (South China Morning Post, 28 Nov. 2021) <https://www.scmp.com/economy/china-economy/article/3157517/how-did-chinas-digital-music-industry-become-second-largest>

[1949] IFPI, 'Music Consumer Insight Report' (2018) <https://www.ifpi.org/wp-content/uploads/2020/07/091018_Music-Consumer-Insight-Report-2018.pdf>

[1950] NCAC, 'Report on Innovative Development of Software Legalization in the New Era 新时代软件正版化创新发展报' (28 Feb, 2023) <https://www.ncac.gov.cn/chinacopyright/contents/12227/357292.shtml>

receive appropriate incentives and effective, convenient authorization. On the other hand, by implementing reasonable preventative measures such as website blocking and targeted filtering, the difficulty of committing copyright infringement can be increased, resulting in a fair balance between the interests of users, intermediaries, and rightsholders. Once the administrative copyright enforcement mechanism is properly adjusted and running smoothly, the copyright legal system can concentrate on improving online legal offerings, encouraging lawful consumption, and providing copyright-related services.

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