



Undergraduate School

Degree Program in Business Administration

Course of Intellectual Property Rights

Legal Structure and Market Organization of
the Music Industry:
Enforcement and the Sony v. Cox Case

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Academic Year 2025/2026

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INTRODUCTION

This work tries to analyze the legal structure and the market organization of the music industry, with a particular attention to the questions of enforcement and to what happened in the case of Sony Music Entertainment against Cox Communications.

The starting point is copyright law, which is not something new, but something that has been building up for centuries and that today finds itself in front of a reality, the digital one, that it was certainly not designed for. The thesis moves through three main chapters, each of which tries to explore one layer of this complexity.

The first chapter is dedicated to the foundations: why copyright exists, who it protects, and how the rights in the music industry are organized in practice. The distinction between the author's right tradition of continental Europe and the utilitarian approach of the United States is not only a theoretical one, because it has very concrete consequences on the way in which the law is structured and on the space that it leaves to moral rights, to collective management, and to the transfer of economic rights to publishers and phonogram producers. The dual structure of music rights, between copyright in the composition and related rights in the sound recording, is in this sense one of the most important elements to understand, because it shapes the entire market and the way in which revenues are distributed among all the subjects involved.

The second chapter moves into the territory of intermediary liability, which is where most of the real legal battles of the digital age have been fought. The American system, built on the common law doctrines of contributory and vicarious liability and on the safe harbor regime of the DMCA, follows a predominantly reactive logic: intermediaries are not required to monitor, but they must act when they receive knowledge of specific infringements. The European system, starting from the E-Commerce Directive and passing through the DSM Directive and the Digital Services Act, has been moving in a progressively more interventionist direction, asking platforms to take a more active role and, in some cases, to put in place preventive measures. The Italian experience of the Piracy Shield system, which was introduced in 2023 and became operational in 2024, represents in this context one of the most radical experiments in automated copyright

enforcement, and also one that has raised the most serious concerns, including at the level of the European Commission.

The third chapter, which is the one that in a certain sense brings together all the threads of the previous ones, is dedicated to the case of Sony against Cox. This case is important not only for what it decided, but also for what it revealed: that a system in which 163,148 infringement notices were sent to a single internet service provider over a period of two years, and in which that provider terminated only 32 subscribers for copyright infringement while terminating hundreds of thousands for non-payment, is a system that has a problem. The Supreme Court, in its 2026 decision, chose to narrow the standard for contributory liability and to refuse to extend it to mere knowledge and inaction. This decision is legally coherent with the precedents that were established in the *Betamax* and *Grokster* cases. But it also confirms that the enforcement of copyright in the digital environment is still, in very many ways, an unfinished story.

What this thesis ultimately tries to argue is that the gap between what the law says and what the digital reality looks like is not a gap that any single court decision or directive can close on its own. The international dimension of the problem, the structural difficulty of calibrating enforcement in a world where infringement happens at massive scale and through infrastructure that also serves entirely legitimate purposes, and the risk of over-enforcement that comes with every attempt to make the system faster and more automated, are all elements that point in the same direction: toward the need for a more honest and more coherent conversation about what copyright is actually for, and about what kind of role we want intermediaries to play in the cultural ecosystem of the digital age.

CHAPTER I

Copyright and the Allocation of Rights in the Music Industry

1.1 Rationale for Copyright in Creative Industries

Creative industries have always relied on legal rules in order to protect intellectual works. The basic idea is very old: the person who creates a work should keep a certain degree of control over the way in which that work is copied or used for commercial purposes. However, this idea became more clearly shaped only at a later stage, with the development of modern copyright laws. Over time, copyright moved from a broader and more general form of protection, typical in common law systems, to a more detailed legal structure, where its scope, duration, and limits are defined in a clearer way.

The fact that copyright has remained important for such a long time shows that it is not a marginal element, but a fundamental mechanism. Creative works are different from ordinary goods because they require time, creative effort, and often an initial economic investment, while at the same time they can be reproduced at a very low marginal cost. This creates an obvious problem: other subjects may take advantage of the result without having borne the original costs of creation. Without legal protection, it would be easy to appropriate someone else's work and exploit it commercially, and this would end up discouraging investment in cultural production. For this reason, copyright was developed as a response to a specific economic problem, and it still performs this function today, allowing creators and investors to obtain returns from their work and making it possible to organize the market for cultural goods in a more stable way.¹

Traditionally, copyright law has been justified through two main theoretical approaches. The first one is the doctrine of the author's right, which considers the artistic work as an expression of the author's personality. According to this view, the creative work is not only an economic good, but also a personal manifestation of creativity, identity, and of the author himself. This idea has its roots in the philosophy of natural rights and it has

¹ Kur, A., Dreier, T., and Luginbuehl, S. (2016). *European Intellectual Property Law: Text, Cases and Materials*, 2nd ed., Cheltenham: Edward Elgar Publishing.

been particularly influential in continental European legal systems, where the connection between the author and the work is put at the centre of the whole system of rights.²

The second approach is the utilitarian theory of copyright, which emphasizes the social function of the protection of intellectual property. In this perspective, the work is seen as the result of the author's labour, and copyright is justified not for reasons linked to personality, but because it serves to promote the progress of knowledge and culture. By granting exclusive rights for a limited period of time, the law aims to encourage creative production and, at the same time, to guarantee a certain access to the public. This approach has been especially influential in the United States, where copyright finds its constitutional foundation in the objective of promoting scientific and cultural progress.³

At the beginning, copyright was applied above all to traditional forms, such as books, theatre, music, and visual arts. However, with time it progressively expanded together with technological and social transformations. Today it also includes digital content, online distribution, and new forms of creativity connected to technology. At the same time, objects such as software and databases have entered this field, even if they are more functional in nature and based more on investment than strictly on authorship. This reflects the growing importance of intangible assets.

These dynamics become even more evident in the music industry. Digital technologies make the reproduction and distribution of works extremely easy and fast, and this happens on a global scale. For this reason, the way in which copyright is allocated and enforced has a direct impact on production models, contractual relations, and the distribution of revenues. Understanding the role of copyright is therefore not only a theoretical issue, but also something necessary in order to analyse how contemporary cultural markets work in practice and how rights are divided among authors, performers, producers, and intermediaries.

² Ibid.

³ Ibid., p. 3

1.1.1 European and U.S. Models

The utilitarian rationale of copyright is one that considers intellectual property not as a natural or moral entitlement of the author, but rather as a kind of policy instrument, the purpose of which is that of promoting social welfare in a broad sense. In this perspective, in fact, copyright protection finds its justification only in the moment in which it serves a public objective of a more general nature, that is to say the encouragement of the creation and the diffusion of creative works for the benefit of the society.⁴

This approach is the one that finds its clearest reflection in the United States, where the copyright system is constitutionally grounded in Article I, Section 8, Clause 8 of the U.S. Constitution, which gives to the Congress the power "to promote the progress of science and useful arts" by granting to the authors exclusive rights for limited times⁵. Already from the wording itself it is possible to perceive a utilitarian logic: copyright is not conceived as a natural right of the author, but rather as a means through which to achieve a broader social progress.

Beyond the United States, it must also be said that the utilitarian framework has exercised a significant influence on other common law jurisdictions, among which one can count the United Kingdom, Canada, Australia, and more generally the countries that belong to the Anglo-American legal tradition. Even in the cases in which these systems present some elements of a more author-centered protection, their underlying logic tends to privilege economic incentives, the organization of the market, and the efficient diffusion of works. In this sense, doctrines such as the fair use in the United States, or the more flexible fair dealing exceptions that exist in other jurisdictions, are particularly significant, because they reflect a pragmatic and functional approach to the regulation of copyright⁶.

The theoretical foundation of the utilitarian approach is to be found, more precisely, in the economic characteristics that are proper to the creative goods. The production of music, of books, of films, or of digital contents in general requires significant upfront

⁴ Ibid., p. 3

⁵ United States Constitution (1787) Article I, Section 8, Clause 8.

⁶ United States Code (1976) Title 17 – Copyrights, § 107 (Fair Use).

investments in terms of time, skills, and financial resources. However, once these works have been created, they can be reproduced at a marginal cost that is very low, or even negligible. It is precisely this asymmetry that generates a structural risk of free riding, since third parties find themselves in the position of being able to copy and distribute works without having to sustain any of the original costs of creation.⁷

In the absence of legal protection, the widespread copying would tend to push prices toward the level of marginal cost, with the consequence of reducing in a significant way the incentives to invest in creative production. For this reason, copyright, within the utilitarian framework, is justified as a mechanism that ensures what is called appropriability, that is to say the capacity of the creators to capture returns that are sufficient to sustain their investment over time⁸.

Exclusive rights are granted only for a limited duration, and this reflects the idea that copyright is not an end in itself, but rather a temporary instrument. Once the period of protection expires, in fact, the works enter in the public domain, where they can be freely accessed and reused by anyone. This structure aims at balancing two objectives that are not always easy to reconcile between them: on one side the need to encourage the long-term innovation, and on the other the guarantee of a future public access.⁹

The utilitarian approach, moreover, takes in consideration also the aspects related to transaction costs. In markets that are characterized by a great number of potential users and by complex distribution channels, the fact of assigning exclusive rights to the creators has the effect of reducing the costs of negotiation and enforcement. The centralization of the control over reproduction renders the market transactions more feasible and more predictable, thus facilitating the organization of a system of cultural production that is more efficient.¹⁰

⁷ Landes, W. M., & Posner, R. A. (1989). "An Economic Analysis of Copyright Law." *Journal of Legal Studies*, 18(2), 325–363.

⁸ Ibid.

⁹ Ibid., Kur, A., Dreier, T., and Luginbuehl, S. (2016)

¹⁰ Barker, G. R. (2018). *The Law and Economics of Copyright Law and Copyright Exceptions, Limitations, and Immunities*. SSRN Working Paper.

At the same time, however, this theory does not fail to recognize that an excessive level of protection may generate distortions, such as monopoly pricing or obstacles to the further innovation. For this reason, copyright protection must be calibrated and cannot be considered absolute: its legitimacy depends, in the final analysis, from whether it effectively contributes to the overall social welfare.

In contrast with the utilitarian approach that characterizes the Anglo-American tradition, the continental European model of copyright is one that is historically grounded in a different concept, which is that of the author's right, or *droit d'auteur* as it is known in the French tradition. In this framework, copyright is understood primarily as a right that derives from the personal relationship existing between the author and the work, and not simply as an incentive mechanism of an economic nature. Rather than being justified mainly on the base of its social utility, copyright protection is seen as the legal recognition of a right that originates directly from the act of creation itself.¹¹

The intellectual foundations of this approach can be traced back to the debates that surrounded the adoption of the first copyright laws during the period of the French Revolution, which developed themselves within a broader philosophical and political context in which natural rights were considered fundamental elements of the legal order. In particular, the Declaration of the Rights of Man and of the Citizen recognized property as a fundamental and "sacred" right, and this conception exercised a significant influence also on the way in which authors' rights were understood in the first discussions around copyright protection¹².

This perspective differs in important ways from the constitutional rationale that is at the base of copyright law in the United States. The continental European tradition, in fact, tends to put a greater emphasis on the personal entitlement of the author to control the exploitation of the work. In this sense, copyright is not conceived only as a policy instrument aimed at encouraging cultural production, but also, and perhaps above all, as

¹¹ Ibid., Kur, A., Dreier, T., and Luginbuehl, S. (2016)

¹² Ginsburg, J.C. (1990). A Tale of Two Copyrights: Literary Property in Revolutionary France and America. *Tulane Law Review*, 64, pp. 991–1031.

a recognition of the moral and proprietary relationship that exists between the author and the work¹³.

The author-centered nature of this model has important implications at the doctrinal level, since legal systems influenced by the concept of *droit d'auteur* have traditionally recognized that creative works incorporate elements of the personality and of the intellectual effort of the author. This has supported the development of moral rights, among which one can count the right of attribution and the right of integrity, which aim at protecting the reputation of the author and at preserving the work in its original form. By contrast, these forms of protection have historically been less central in the Anglo-American system, where the legal framework has been more strongly concentrated on the dimension of economic incentives.¹⁴

1.2 Concept of authorship

The concept of authorship occupies a central position in the modern copyright law. While contemporary debates tend often to emphasize markets and consumers, copyright systems find their origin, in the last analysis, in the act of human creation. As it has been highlighted by Jane C. Ginsburg, authors remain the intellectual and normative foundation of copyright protection¹⁵. In a similar way, other scholars have put in evidence that copyright law should primarily encourage the act of creative authorship, since the production of literary and artistic works benefits, in an ultimate sense, the society as a whole¹⁶. Copyright, in fact, is not merely a temporary barrier that delays the entry of works into the public domain, nor is it only an economic mechanism designed to encourage investment in the dissemination. Rather, its deeper justification is to be found in the recognition and in the encouragement of human creativity¹⁷.

From an historical point of view, this focus on authors represents a significant legal transformation. Before the adoption of the Statute of Anne in 1710, protections of a

¹³ Ibid., Ginsburg, J.C. (1990).

¹⁴ Ibid.

¹⁵ Ginsburg, J. C. (2003), *The Concept of Authorship in Comparative Copyright Law*, DePaul Law Review.

¹⁶ Ng, L. (2008). *Authors and Readers: Conceptualizing Authorship in Copyright Law*. Legal Studies Research Paper No. 2008-05, SSRN.

¹⁷ Ginsburg, J. C. (2003)

copyright-like nature were typically granted to printers and publishers rather than to the creators themselves. The shift introduced by the Statute demonstrated that the society had started to promote knowledge and learning by encouraging the individuals to create. This author-centered logic remains embedded in the modern copyright systems across both common law and civil law traditions¹⁸.

It is important to note that there are not precise legal definitions of what an author is and of who can qualify as such, even if the question has a clear and concrete importance in practice. The Berne Convention, which represents the cornerstone of international copyright law, deliberately avoids to define authorship and leaves the determination of this concept to the national legal systems. It simply establishes a presumption according to which the person whose name appears on the work is to be considered the author, as established by Article 15¹⁹. National laws generally follow the same approach, often stating that the author is "the person who creates the work" without however clarifying what exactly constitutes creation. As a result of this, courts have been required to develop the concept of authorship on a case-by-case basis, which has led to a fragmented and sometimes not consistent doctrine across the different jurisdictions²⁰.

Nevertheless, it is possible to identify a common core concept across the legal systems. An author is generally understood as a human being who exercises a subjective judgment in the creation of a work and controls its execution. Authorship derives therefore from intellectual contribution, rather than from mechanical execution, technical assistance, or financial investment²¹.

This principle finds its reflection in several recurring criteria that have been developed in judicial practice for the purpose of determining authorship. A first principle is the distinction between conception and execution, often summarized with the expression "mind over muscle." Courts typically attribute authorship to the person who intellectually conceives the work and directs its realization, rather than to individuals who limit themselves to perform mechanical or technical tasks. Assistants, technicians, printers, or

¹⁸ Ginsburg, J. C. (2003)

¹⁹ Berne Convention for the Protection of Literary and Artistic Works, 1886.

²⁰ Ibid., Ginsburg, J. C. (2003)

²¹ Ibid., Ginsburg, J. C. (2003)

camera operators generally do not qualify as authors in the moment in which they simply follow instructions without exercising a creative autonomy of their own²².

A second principle concerns the relationship between human creativity and technological instruments, sometimes described as "mind over machine." The use of tools such as pens, cameras, or computer software does not in itself exclude authorship. However, courts examine whether the human creator has exercised meaningful creative choices that have contributed to shape the final result. In photography, for example, authorship is typically attributed to the photographer by reason of decisions that relate to lighting, angle, framing, and composition. On the contrary, purely automatic or mechanical reproductions may not succeed in meeting the threshold that is required for authorship²³.

A third principle puts in relation authorship with the concept of originality. In the majority of modern copyright systems, a work must be the result of an independent intellectual creation. Originality does not require novelty, artistic merit, or aesthetic value; rather, it requires that the work reflects the intellectual contribution that is proper to the author. In the United States, following the Feist decision, originality requires at least a minimal degree of creativity and explicitly refuses the so-called "sweat of the brow" doctrine, which protected works merely on the base of the effort made by the author²⁴. In the civil law systems, originality is often described as the imprint of the author's personality, even if this formulation is rarely explained in concrete terms. Within the European Union, the standard has been harmonized through the notion of the author's own intellectual creation, in particular in fields such as software, databases, and photography²⁵.

A contrasting approach can be observed in some common law jurisdictions, in particular the United Kingdom and Australia, where courts have in certain occasions protected works on the base of skill, labor, and effort, even in the absence of a genuine creativity.

²² Ibid., Ginsburg, J. C. (2003)

²³ Ibid., Ginsburg, J. C. (2003)

²⁴ Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

²⁵ Infopaq International A/S v Danske Dagblades Forening, Case C-5/08, Court of Justice of the European Union.

This "sweat of the brow" approach rewards the industriousness rather than the creative expression and may serve as a form of protection for the investment²⁶.

Another criterion that is object of debate concerns the intent to be an author. Some scholars sustain that authorship should depend from the intention to create an original work rather than to reproduce or restore an existing one. However, this view is controversial. Creative choices may emerge even in the moment in which the goal is that of a faithful reproduction, and copyright law recognizes also situations of accidental authorship, where creative outcomes arise without a deliberate intention to create. Consequently, intent may play a role in the resolution of disputes over co-authorship or ownership, but it is not decisive in the definition of authorship itself²⁷.

Finally, there are some legal systems that attribute authorship on the base of investment and control, in particular through the work-made-for-hire doctrine that exists in the United States. Under this approach, employers or commissioning parties may be legally designated as authors of works created by employees. This model finds its justification on pragmatic grounds, such as efficiency and the centralized management of rights. However, it has been strongly criticized for the fact of blurring the distinction between authorship and ownership and for weakening the human-centered foundation of copyright law²⁸. Civil law systems generally resist this approach by maintaining authorship as a status that is reserved to human creators, while allowing economic rights to be transferred or assigned.

In the final analysis, the prevailing view in modern copyright theory remains that authorship is fundamentally linked to human intellectual creativity. An author is a human creator who exercises at least a minimal personal autonomy in the shaping of a work. Because the author molds the work according to their intellectual vision, copyright law grants recognition, remuneration, and a certain degree of control over its use. If copyright protection were reduced solely to the protection of investment, its moral and legal legitimacy would be significantly weakened. For this reason, the concept of authorship

²⁶ Ibid., Ginsburg, J. C. (2003)

²⁷ Ibid.

²⁸ Ibid.

continues to represent the normative foundation upon which the modern copyright law is constructed²⁹.

1.3 Moral and Economic Rights

Copyright protection traditionally grants authors two main categories of rights: economic rights and moral rights. These two dimensions reflect different rationales within copyright law. Economic rights allow authors to commercially exploit their works and control their use in the market, while moral rights protect the personal and reputational bond between the author and the work. This dual structure is already reflected in international copyright law, particularly in the Berne Convention for the Protection of Literary and Artistic Works.

Economic rights allow authors to control and commercially exploit their works. One of the most important is the right of reproduction, which grants the author the exclusive power to authorize the making of copies of the work (Berne Convention, art. 9)³⁰. Authors also enjoy the right of translation, which allows them to authorize translations of their works (art. 8), and the right of adaptation, covering transformations such as arrangements or other alterations of the work (art. 12). In addition, copyright law recognizes the right of public performance (art. 11) and the right of communication to the public, including broadcasting and similar forms of transmission (art. 11bis). These rights enable authors to receive remuneration from the commercial exploitation of their works and are generally transferable to publishers, producers, or other intermediaries.

In addition to economic rights, copyright law recognizes also moral rights, which have the function of protecting the personal relationship that exists between the author and the work, and that is considered, in many legal traditions, as something that cannot be simply reduced to a question of economic nature. The Berne Convention recognizes explicitly moral rights in Article 6bis, granting to the authors the right of attribution, also known as the right of paternity, which consents to them to claim the authorship of the work, and the right of integrity, which consents to them to oppose any distortion, mutilation, or

²⁹ Ibid., Ginsburg, J. C. (2003)

³⁰ Berne Convention for the Protection of Literary and Artistic Works, 1886.

modification of the work that could result prejudicial to their honor or their reputation. Differently from economic rights, moral rights are generally considered as personal rights of the author, strictly linked to his personality and to his creative identity, and for this reason they are treated in a substantially different way with respect to the economic ones.³¹

Although both categories of rights find their existence in international copyright law, their importance varies in a significant way between civil law and common law systems, and this difference reflects, in a quite direct way, the different philosophical traditions that are at the base of the two models. In the civil law countries, and in particular in continental Europe, copyright law traditionally follows the author's rights tradition, known in the French system as *droit d'auteur*, which puts a strong emphasis on the personal connection that exists between the author and the work, and which tends to consider this connection as something that goes beyond the simple economic dimension. Within this framework, moral rights are considered fundamental and often inalienable, in the sense that the author cannot renounce to them even if he wanted to do so. Authors conserve these rights even in the moment in which economic rights are transferred to publishers or producers, and this means that the author remains closely connected to the work and conserves the capacity to protect both its integrity and its attribution, independently from who holds the economic rights on it.

In contrast with this, common law systems, such as those of the United States and of the United Kingdom, have historically developed copyright primarily as an economic regulatory mechanism, the principal aim of which was that of facilitating the diffusion of works and of promoting the efficiency of the market. As a consequence of this different starting point, these systems traditionally concentrate in a more strong way on economic rights and on the commercial exploitation of works, leaving to moral rights a space that is, in comparison, considerably more reduced. Moral rights have historically played a more limited role in common law jurisdictions and present often a more narrow scope if compared to what is foreseen in civil law systems, to the point that in certain cases their protection is practically inexistent or is left to other areas of the law, such as defamation

³¹ Ibid., p. 11

or contract law. In the United States, for example, moral rights protection exists only in limited contexts, as it is the case of the Visual Artists Rights Act, commonly known as VARA, which applies primarily to works of visual art and which, for this reason, leaves without protection the great majority of creative works.³²

The international harmonization and the influence exercised by the Berne Convention have contributed, in a gradual and not always linear way, to bring the two traditions closer between them. The majority of legal systems today recognizes both economic and moral rights, even if the balance between the two still reflects, in a more or less evident way, the different philosophical foundations that are at the base of civil law and common law copyright regimes. Civil law systems continue to put a strong emphasis on the personal connection of the author with the work and on the inalienable nature of moral rights, while common law systems maintain a stronger focus on the economic exploitation and on the market circulation of creative works, treating moral rights more as an exception than as a rule.³³

1.4 The Dual Structure of Music Rights: Copyright (©) and Related Rights

The legal framework governing the music industry is characterized by a dual structure of rights, which distinguishes between copyright in the musical work and related rights in the sound recording. This distinction reflects the collaborative nature of music production, where different actors contribute to the creation and dissemination of a musical product. As emphasized in the literature on the economics of copyright, the music sector involves multiple layers of rights associated with different stages of the creative and production process³⁴. A single piece of recorded music therefore incorporates at least two legally distinct elements: the musical composition, created by authors and composers, and the sound recording, produced through the performance and recording of that composition.

³² Visual Artists Rights Act 1990, 17 U.S.C. § 106A – Rights of certain authors to attribution and integrity.

³³ Ibid., p. 11

³⁴ Kur, A., Dreier, T., and Luginbuehl, S. (2016). *European Intellectual Property Law: Text, Cases and Materials*, 2nd ed., Cheltenham: Edward Elgar Publishing.

The first layer of protection concerns copyright in the musical work, which protects the underlying composition, including the melody, harmony and lyrics created by songwriters and composers. Copyright grants authors a set of exclusive economic rights that allow them to control the commercial exploitation of their works. These include the right of reproduction, which gives “the author the exclusive authority to authorize the making of copies of the work” (Berne Convention, art. 9), “the right of translation” (art. 8), “the right of adaptation or arrangement” (art. 12), as well as “the right of public performance and communication to the public, including broadcasting and other forms of transmission” (arts. 11 and 11bis).³⁵ Through these rights, authors can license the use of their works to publishers, producers, broadcasters, or digital platforms and receive remuneration in the form of royalties. Copyright in musical compositions plays a central role in the economic organization of the music industry because it creates incentives for creative production while enabling the market exploitation of musical works through licensing and collective management systems³⁶.

Alongside copyright in the composition, the legal framework also recognizes related rights, also known as neighbouring rights, which protect the contributions of other participants involved in the production and dissemination of music. Related rights were introduced to protect performers and producers whose creative and financial contributions are essential to the creation of recorded music but who are not the authors of the underlying work. International recognition of these rights developed through instruments such as the Rome Convention (1961) and later through the WIPO Performances and Phonograms Treaty, which establish protection for performers and producers of phonograms³⁷. Under this framework, performing artists are granted rights over their performances, including the right to authorize the recording and communication of their performances, while phonogram producers, typically record labels, obtain rights over the sound recordings they produce. According to WIPO, these rights are crucial to performers and producers to control the reproduction, distribution and making available of sound

³⁵ Ibid., p. 11

³⁶ Ibid., Kur, A., Dreier, T., and Luginbuehl, S. (2016)

³⁷ Ibid.

recordings, ensuring that they receive remuneration for the exploitation of recorded music in markets such as broadcasting, streaming, and public performance³⁸.

A practical way to understand the dual structure of rights in the music industry is through the distinction between song rights and master rights. Song rights refer to the copyright in the musical composition, which comprehends the melody, the harmony and the lyrics created by the songwriter or by the composer. These rights are typically owned or administered by music publishers, who manage the licensing and the royalty collection on behalf of the authors. Master rights, on the contrary, relate to the sound recording of that composition, which results from the performance and the recording of the musical work. These rights are generally owned by phonogram producers or record labels, who finance and organize the recording process. As a result, the commercial exploitation of a recorded song requires often the authorization of both the right holders: the copyright owner of the composition and the owner of the master recording. This distinction results particularly relevant in contexts such as streaming, synchronization licensing, broadcasting, and public performance, where separate licenses may be required respectively for the musical work and for the sound recording.

The coexistence of copyright and related rights reflects therefore the multi-layered structure that is proper to the creation and exploitation of music. While copyright protects the intellectual creation incorporated in the musical composition, related rights protect the artistic performance and the economic investment involved in the production of sound recordings. Together, these two forms of protection form the legal foundation of the modern music industry, guaranteeing that the different subjects involved in the creation, the performance and the production of music find themselves in the position of being able to receive legal recognition and an adequate economic compensation for their contributions.

From a regulatory perspective, the coexistence of copyright and related rights has also been a central issue in the European Union's effort to harmonize intellectual property law within the internal market. European policy has long recognized that differences in national copyright regimes could create obstacles to the free circulation of cultural goods

³⁸ WIPO Performances and Phonograms Treaty (WPPT), adopted 1996, arts. 7–14.

and information services. For this reason, EU initiatives have focused on harmonizing key rights such as the right of reproduction, the right of communication to the public, and the right of distribution, while also addressing the protection of performers and phonogram producers through specific rules on broadcasting and related rights.³⁹

1.4.1 Authors, Publishers, and Phonogram Producers

As it has been discussed in the previous sections, copyright law traditionally places the author at the center of the system of protection, recognizing authors as the original holders of rights in creative works. Copyright originates therefore from the act of intellectual creation and grants to authors exclusive rights that allow them to control the use and the exploitation of their works. However, the practical exploitation of creative works rarely occurs through authors alone. The production and the diffusion of cultural goods involves typically a series of intermediaries and market actors who contribute to the organization, the financing, and the distribution of creative contents.

In the music industry in particular, the exploitation of works involves usually both publishers and phonogram producers. Music publishers play a key role in the management and in the licensing of the copyright in musical compositions, administering often the economic rights of songwriters and composers through contractual agreements. At the same time, phonogram producers, typically represented by record labels, are responsible for financing and organizing the recording of performances and hold therefore the related rights in sound recordings. These subjects play a crucial role in transforming creative works into marketable cultural products, coordinating the processes of production, distribution, and commercialization of music.⁴⁰

In the music industry, *publishers* occupy a central position in the management and commercial exploitation of musical works. Differently from authors, they are not the original holders of copyright, but acquire rights through contractual agreements with songwriters and composers, which consent to them to administer and exploit musical

³⁹ Kur, A., Dreier, T., and Luginbuehl, S. (2016). *European Intellectual Property Law: Text, Cases and Materials*, 2nd ed., Cheltenham: Edward Elgar Publishing.

⁴⁰ Ibid.

compositions on their behalf. In this sense, music publishers operate as intermediary subjects, facilitating the circulation of musical works and putting in connection creators with users across different markets.

Traditionally, the activities of music publishers have concentrated on the administration of rights and on the generation of revenues deriving from the use of musical compositions. Their functions comprehend the licensing of the use of works, the monitoring of their exploitation, and the collection and distribution of royalties to the authors. Through these activities, publishers consent to songwriters to access a wide range of revenue streams linked to the commercial use of their works, among which one can count performances, broadcasts, and other forms of exploitation.⁴¹

The development of digital technologies has transformed in a significant way the environment in which music publishers find themselves to operate. The growth of streaming services and of online platforms has increased the scale and the complexity of music distribution, rendering licensing arrangements more central to the functioning of the market.

At the same time, the increasing importance of digital platforms has raised new challenges related to the allocation of revenues and the control over the use of musical content. As music consumption shifts toward digital channels, the role of publishers in administering rights and securing royalties has become even more relevant.

They contribute to the effective commercialization of creative output and to the economic sustainability of songwriting activities. This is permitted thanks to their acquiring and managing rights, licensing musical works, and collecting royalties.⁴²

The analysis of related rights in the music industry would be incomplete without considering the role of *phonogram producers*. While copyright law has traditionally focused on protecting the creative contribution of authors, the production and dissemination of recorded music depend on a wider set of actors whose role is primarily

⁴¹ Passman, D. S. (2019). *All You Need to Know About the Music Business* (10th ed.). New York: Simon & Schuster.

⁴² Ibid.

economic and organisational rather than purely creative. The modern music industry relies heavily on the process of recording performances and distributing sound recordings through physical media and digital platforms. As a result, international copyright law has progressively recognised a distinct category of protection for those who organise, finance and coordinate the production of sound recordings. Examining how the law recognises the rights of phonogram producers is useful for understanding the broader structure of copyright in the music industry and the balance it seeks to achieve between creative authorship and investment-based protection.

The legal recognition of phonogram producers within the framework of related rights originates in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations⁴³. The Convention explicitly distinguishes the protection granted to authors of musical works from the protection afforded to performers, phonogram producers and broadcasting organisations. In this system, the producer is not protected as the author of the underlying musical composition, but as the holder of a neighbouring right in the phonogram, that is, the sound recording itself.⁴⁴ Article 3(c) of the Convention defines the producer of phonograms as “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds”, while Article 10 grants producers the right to authorise or prohibit the reproduction of their phonograms. Moreover, Article 12 establishes that when a phonogram published for commercial purposes is used for broadcasting or communication to the public, performers and producers are entitled to receive a single equitable remuneration.⁴⁵

The international framework established by the Rome Convention was subsequently strengthened and adapted to technological developments through the WIPO Performances and Phonograms Treaty (WPPT) of 1996.⁴⁶ The WPPT refines the definition of producer by describing the producer of a phonogram as the person or legal entity that “takes the initiative and has the responsibility for the first fixation” of sounds (WPPT, 1996, art. 2(d)). This formulation is particularly significant because it highlights

⁴³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) (1961). Rome, 26 October 1961.

⁴⁴ Ibid.

⁴⁵ Ibid., p. 17

⁴⁶ WIPO (1996) WIPO Performances and Phonograms Treaty (WPPT). Geneva, 20 December 1996.

the entrepreneurial and organisational dimension of the producer's role within the music industry. In addition to clarifying the concept of producer, the treaty strengthens their legal protection by "granting a series of exclusive rights over phonograms, including the rights of reproduction" (Art. 11), "distribution" (Art. 12), "rental" (Art. 13), "and making available to the public in digital networks" (Art. 14). Article 15 also confirms the right to equitable remuneration when commercially published phonograms are used for broadcasting or communication to the public.⁴⁷

Beyond these formal legal definitions, the literature emphasises that the protection of phonogram producers reflects a specific policy rationale within copyright law. As Bonadio explains, sound recordings must be distinguished from the underlying musical composition.⁴⁸ While the composition protects the musical arrangement and lyrics created by the songwriter, the sound recording protects the fixation of a specific performance and the particular sonic characteristics that distinguish one recording from another, such as phrasing, tempo, timbre and orchestration⁴⁹. In this sense, the musical work and the sound recording can be understood as two complementary but also distinct objects of protection within copyright law.

The recognition of rights for phonogram producers is therefore not primarily based on the originality of the recording as an authorial work, but rather on the financial, technical and organisational investments required to produce and distribute recorded music. The production of sound recordings typically involves significant costs, including studio time, producers' fees, engineers' fees, mastering, and the coordination of musicians and technical personnel. For this reason, the related right granted to producers is often described as an entrepreneurial right, aimed at protecting the economic investment necessary to produce the first fixation of sounds and to make recorded music available to the public⁵⁰.

This investment-based rationale is also reflected in the structure of international and European copyright law, which generally does not require sound recordings to meet a

⁴⁷ WIPO (1996) WIPO Performances and Phonograms Treaty (WPPT). Geneva, 20 December 1996.

⁴⁸ Bonadio, E. (2022) Protecting Sound Recordings between Investments and Creativity.

⁴⁹ Ibid.

⁵⁰ Ibid., p. 19

standard of originality in order to obtain protection. Instead, the law focuses on safeguarding the economic infrastructure that enables the production and distribution of recorded music.

1.4.2 Collective Management and Market Organization

The functioning of the music copyright system cannot be understood without examining the role of collective management and the way in which rights are organized within the market. The very rationale of collective management lies in the structural difficulty of licensing musical uses on an individual basis. Musical works and related rights are exploited on a massive scale by a wide range of users, including broadcasters, digital platforms, venues, restaurants, clubs and other commercial actors. In such a context, the costs of identifying right holders, negotiating licenses, monitoring uses, enforcing rights and distributing royalties would often be prohibitively high if every transaction had to be managed individually. Collective management organizations therefore emerged as institutional mechanisms designed to reduce these transaction costs by centralizing licensing and royalty administration, thus creating a more workable system for both right holders and users.^{51 52 53}

From this perspective, collective management organizations perform a fundamental intermediation function. These organizations typically operate either as agents for their members or as assignees of rights, negotiating and granting licences, setting tariffs, collecting usage data and distributing royalties to right holders. They also make it possible for authors, performers, publishers and producers to maintain a degree of control over the use of their works in markets where individual management would be extremely difficult, particularly because music now circulates globally through digital platforms and social media at a very large scale⁵⁴. In practice, collective management organizations are responsible for licensing, monitoring the use of works, enforcing rights and allocating

⁵¹ Kretschmer, M. (2007) *Regulating the Collective Management of Copyright*.

⁵² Emokpae, M.E. (2018) *The Role of Collective Management Organizations in the Evolution of the Music Industry*.

⁵³ Priest, E. (2022) *The Future of Music Copyright Collectives in the Digital Streaming Age*.

⁵⁴ *Ibid.*, Emokpae, M.E. (2018)

and distributing royalties on behalf of creators and other right holders⁵⁵. In this sense, collective management is not merely an administrative convenience but a core component of the practical exercise of copyright and related rights in contemporary markets.

The traditional economic justification for collective management is closely linked to transaction-cost economics. Collective societies historically developed as an institutional response to the limitations of individual contracting in markets characterized by repeated, large-scale and fragmented uses of protected works⁵⁶. By offering a single point of licensing and a centralized monitoring service, collecting societies reduce information costs, contract costs, governance costs and enforcement costs for both right holders and users. Historically, collective rights management organizations have been considered efficient precisely because they reduce search and information costs, bargaining and decision costs, enforcement costs and adjustment costs, while also enabling large-scale licensing through centralized institutions. On this logic, collective management allows artists to focus primarily on creative activities while delegating complex licensing and administrative tasks to specialized institutions.⁵⁷

An important consequence of this institutional design is that collective management tends to create highly concentrated market structures. Collecting societies frequently operate in such environments and may function as “two fold monopolists”: on the one hand, they may be the only realistic supplier of licences to users within a given rights domain, and on the other hand, they may also be the only available provider of rights-administration infrastructure for right holders.⁵⁸ This concentration means that collecting societies can substantially influence both the conditions of access to repertoires and the distribution of royalties. For this reason, collective management has long raised competition-law concerns, particularly because it may resemble forms of collective selling or coordinated price setting. At the same time, this concentration also explains why collective management remains attractive from a policy perspective: it offers users a single point of access to protected content and provides creators, particularly those with weaker

⁵⁵ Kur, A., Dreier, T., and Luginbuehl, S. (2016). *European Intellectual Property Law: Text, Cases and Materials*, 2nd ed., Cheltenham: Edward Elgar Publishing.

⁵⁶ Kretschmer, M. (2007) *Regulating the Collective Management of Copyright*.

⁵⁷ *Ibid.* Kur, A., Dreier, T., and Luginbuehl, S. (2016).

⁵⁸ *Ibid.* Kretschmer, M. (2007)

bargaining power, with a collective mechanism through which to negotiate with powerful exploiters such as broadcasters, record labels and publishers.⁵⁹ This dual nature of collecting societies demonstrates why collective management is both economically useful and legally sensitive.

The organization of the market also depends on the reciprocal relationships among collecting societies operating in different territories. Reciprocal representation agreements allow a national collecting society to license not only its domestic repertoire but also foreign repertoires represented by partner societies, thereby enabling users to access a “world repertoire” through a single local licence^{60 61}. In practice, when works, performances or recordings circulate across borders, the relevant collecting society matches usage data with identification and ownership data, attributes revenues to the appropriate right holders and collecting societies, and subsequently transfers those revenues for distribution. This system plays a crucial role in enabling the functioning of international music markets. At the same time, it introduces significant complexity, since different collecting societies may rely on different monitoring techniques, surveys and data collection systems, while remaining subject to their respective national legal frameworks.⁶²

A further crucial development in the organization and regulation of collective management within the European Union is represented by Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use.⁶³ The directive was adopted with the objective of improving the governance, transparency and efficiency of collective management organizations operating in the European market, while also facilitating the development of cross-border digital music services. Prior to the adoption of the directive, the European system of collective management was largely based on nationally organized collecting societies operating within territorially fragmented licensing structures. Although this

⁵⁹ Ibid. Kretschmer, M. (2007)

⁶⁰ Ibid.

⁶¹ Ibid. Emokpae, M.E. (2018)

⁶² Ibid.

⁶³ European Union (2014) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. Official Journal of the European Union.

system historically functioned effectively for local uses of music, it became increasingly problematic in the digital environment, where online services often operate simultaneously across multiple jurisdictions.

Directive 2014/26/EU therefore introduces a harmonized regulatory framework aimed at strengthening the internal governance of collective management organizations and ensuring greater accountability toward their members and users. The directive establishes detailed rules concerning the organizational structure, transparency obligations, financial management and the distribution of revenues by CMOs. In particular, collecting societies are required to adopt clear governance mechanisms, ensure effective participation rights for members in decision-making processes, and distribute royalties accurately and without undue delay. The directive also imposes extensive transparency obligations, including requirements to publish annual transparency reports, disclose tariff structures and provide detailed information on the management and allocation of collected royalties.⁶⁴

A second key objective of the directive concerns the facilitation of multi-territorial licensing for online uses of musical works. In response to the new arising challenges, the directive establishes a framework enabling collective management organizations that meet specific technical and governance requirements to grant multi-territorial licences for online uses of musical works within the European Union. By promoting the development of centralized licensing mechanisms and improving data management capacities, the directive aims to facilitate the acquisition of licences covering multiple EU territories through a limited number of agreements with collective management organizations.⁶⁵

The Directive 2014/26/EU, by strengthening governance standards and facilitating multi-territorial licensing, addresses some of the structural challenges that emerged in the transition from territorially organized licensing systems to digital music markets. Nevertheless, regulatory reform alone does not fully resolve the broader economic

⁶⁴ Ibid., European Union (2014) Directive 2014/26/EU

⁶⁵ Ibid.

challenges affecting the organization of collective management in the digital environment.

The organization of collective management markets remains closely connected to the broader problem of cross-border licensing. In the digital environment, a central challenge lies in the ability of collective rights management organizations to capture and monetize newly emerging forms of online music consumption. Empirical comparisons between potential and actual digital music royalty markets in several EU Member States suggest that the level of online royalty collection has historically remained significantly below its potential. This gap does not necessarily indicate inefficiency in the distribution of collected revenues but rather highlights structural difficulties in organizing the market in ways that fully capture the economic value generated by digital music consumption.⁶⁶

The debate therefore increasingly concerns not whether collective management is necessary, but rather how it should be structured and regulated in the digital age. This perspective highlights the broader normative dimension of collective management. Collective management organizations can strengthen creators' rights by preventing infringements, collecting and distributing remuneration. They also preserve creators' control over their works in contexts where individual enforcement would be impractical. However, the dominant market position of CMOs may also generate risks for both users and creators if organizations lack transparency or accountability toward their members. For this reason, the evaluation of collective management systems should not be limited to their ability to reduce transaction costs but should also consider the fairness of their governance structures and the balance they achieve between access to cultural goods, remuneration of creators and participation of right holders in decision-making processes.⁶⁷

Music markets require institutional arrangements capable of handling mass licensing, global repertoire circulation and the distribution of royalties across countless uses. This has become even harder with the rise of digital technologies; although technological tools have reduced some transaction costs through improved data processing and monitoring

⁶⁶ Ghafele, R. (2014) A Comparison of Potential and Existing Digital Music Licensing Markets.

⁶⁷ Helfer, L.R. and Priora, G. (2023) Collective Management of Copyrights and Human Rights in an Age of Technological Automation.

systems, the digital environment has also exposed the limitations of territorially fragmented licensing systems and increased the demand for more multi-territorial licensing mechanisms. Collective management therefore remains a central component of the organization of music copyright markets, although it is crucial to adapt it, based on digital modes of exploitation, avoiding what can become a limitation.^{68 69 70}

⁶⁸ Kretschmer, M. (2007) Regulating the Collective Management of Copyright.

⁶⁹ Priest, E. (2022) The Future of Music Copyright Collectives in the Digital Streaming Age.

⁷⁰ Emokpae, M.E. (2018) The Role of Collective Management Organizations in the Evolution of the Music Industry.

CHAPTER II

Intermediary Liability in the Digital Music Market: U.S. and EU Legal Frameworks

2.1 Intermediary Liability in the United States

The definition of liabilities for intermediaries is something that has been going on since many years. In fact, it did not start only with the DMCA; here there is a general overview of how this evolution happened. The system is based on a strong protection, but also on some important gaps. Speaking about protection, the widest one comes from the Communications Decency Act, in particular from Section 230, which says that online intermediaries are not considered like publishers for content created by other people.⁷¹

This rule has been interpreted in a very broad way: it applies to many different subjects and gives an almost complete immunity, even when the intermediary knows that the content is illegal or does not remove it. The main limit of this protection is that it does not apply to intellectual property claims. To cover this missing part, the DMCA was introduced, giving safe harbors for copyright infringements.⁷²

The gaps become even more evident in other areas of intellectual property. For trademarks, there is the Lanham Act, which gives only a limited protection through concepts like the “innocent infringer”, but this protection is still too narrow and not used so much in practice.⁷³ For patents, trade secrets, and other rights, there is no explicit statutory safe harbor similar to the one that the DMCA gives for copyright.

Inside this fragmented background, the question of intermediary liability developed especially in the copyright field. In the United States, the issue of whether, and in which cases, online service providers can be considered liable for copyright infringements committed by their users has been one of the most discussed and litigated controversies of the digital era.⁷⁴

⁷¹ Lemley, M.A. (2007) *Rationalizing Internet Safe Harbors*. Journal on Telecommunications & High Technology Law, 6(1), pp. 101–128.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Lerner, J. (2020) *Secondary Copyright Infringement Liability and User-Generated Content in the United States*.

The analysis made by Jack Lerner of the University of California, Irvine, in his article *Secondary Copyright Infringement Liability and User-Generated Content in the United States*, included in the *Oxford Handbook of Online Intermediary Liability* (OUP, 2020), offers one of the most complete explanations of the situation in the United States.⁷⁵

This issue was addressed in two different ways. The first one was through the common law doctrine of secondary copyright infringement, as developed by the opinions of the United States Supreme Court in *Sony Corp. of America v. Universal City Studios*, where the Court said that manufacturers of recording devices are not liable for contributory infringement because the technology can have substantial non-infringing uses, and in *MGM v. Grokster*, where the Court said that a service provider can be liable for copyright infringement when it intentionally induces users to engage in infringing activities, creating the doctrine of inducement liability.⁷⁶ The second way was through the DMCA. In 1998, Congress introduced a statutory safe harbor as part of the Digital Millennium Copyright Act.⁷⁷ More specifically, Section 512 of the DMCA limits secondary copyright infringement liability for different kinds of online intermediaries.⁷⁸

During the following two decades, the entertainment industry and the technology industry fought long and important legal battles about the meaning of Section 512 and about the shape of the secondary infringement doctrine in common law.⁷⁹ Even if controversies about new business models and new market actors continue to come up, and probably will continue also in the future, and even if some uncertainty still remains, especially in relation to the doctrine of willful blindness, in the last ten years the situation has become more settled for intermediaries that host user-generated content.⁸⁰

In order to benefit from the safe harbor under Section 512, these intermediaries must comply with the many requirements of the section, for example terminating the accounts of repeat infringers, but they can also decide to take more active measures to identify and

⁷⁵ Lerner, J. (2020) *Secondary Copyright Infringement Liability and User-Generated Content in the United States*.

⁷⁶ Ibid.

⁷⁷ United States Copyright Office (1998) *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, Washington D.C.: U.S. Copyright Office, December 1998.

⁷⁸ Ibid., Learner

⁷⁹ Ibid.

⁸⁰ Ibid.

remove infringing content uploaded on their platforms.⁸¹ For this reason, private solutions such as YouTube's Content ID and Copyright Strikes programs have become very common.⁸² There have also been various attempts of reform, including the Stop Online Piracy Act of 2012 and related bills, but none of them produced concrete results.⁸³ It still remains an open question if the law really reaches the right balance between the prevention of copyright infringement and the protection of free expression and innovation, and, if this is not the case, which reforms should be adopted.⁸⁴

2.1.1 Secondary Liability: Contributory and Vicarious Infringement

The common law, with the Copyright Act, handles the secondary liability aspect. The Copyright Act does not expressly hold anyone liable for infringement committed by another, but the courts have developed two basic doctrines of secondary liability: vicarious infringement and contributory infringement. The first, vicarious liability, is based on the concept of respondeat superior, in which one with significant supervisory authority over another can be held liable for the subordinate's actions.⁸⁵ The elements are: the defendant (1) has the right and ability to control the infringer's conduct; and (2) receives a direct financial benefit from the infringement.⁸⁶ A traditional illustration used to explain vicarious liability is based on a distinction between situations in which an intermediary exercises a certain level of control over the infringing activity and at the same time derives an economic benefit from it, and other situations where these elements are not present.⁸⁷ In the first case, liability is generally recognized when the intermediary has both the possibility to supervise the infringing conduct and a financial interest connected to it. On the contrary, when a subject only provides access to a space or a service, without having knowledge of the infringing activity and without exercising any real control, courts tend to not impose liability.⁸⁸

⁸¹ Ibid., Lerner

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid. United States Copyright Office (1998) *The Digital Millennium Copyright Act of 1998*

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

The second doctrine, contributory liability, applies in those situations in which a subject, having knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.⁸⁹ A central case in this context is *Sony Corp. of America v. Universal City Studios*, commonly referred to as the Betamax case, decided by the United States Supreme Court in 1984.⁹⁰ The case concerned the production and commercialization by Sony of video tape recorders (VTRs), which were used by consumers also for recording television programs in order to watch them at a later moment, a practice defined by the Court as “time-shifting”.⁹¹

Drawing from patent law, in particular from the doctrine of the “staple article of commerce”, the Court established that the sale of a technology does not constitute contributory infringement if such technology is capable of substantial non-infringing uses.⁹² In this case, the Court considered that time-shifting was a widespread and generally accepted practice, and also qualified it as fair use. As a consequence, since the Betamax device was capable of significant lawful uses, Sony could not be held liable for contributory infringement.⁹³

This decision has been considered of extreme importance in the development of secondary liability, to the point that it has been sometimes described as a sort of “Magna Carta” for the digital era.⁹⁴ In particular, it created the idea that technological innovation should not be discouraged, as long as the product is not exclusively designed for infringing purposes.⁹⁵ However, this assumption was later challenged with the emergence of peer-to-peer file sharing technologies.

In 1999, Napster introduced one of the first large-scale peer-to-peer systems, allowing users to share music files directly through the Internet.⁹⁶ The platform maintained a central indexing system, which allowed users to locate files stored on other users’

⁸⁹ Ibid.

⁹⁰ *Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 U.S. 417.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Lerner, J. (2020) *Secondary Copyright Infringement Liability and User-Generated Content in the United States*.

⁹⁵ Ibid.

⁹⁶ Ibid.

computers.⁹⁷ Courts found that such systems could be held liable under both vicarious and contributory liability, especially considering the level of control exercised over the network and the awareness of the infringing activity.⁹⁸ In this sense, the situation was distinguished from the *Betamax* case, where the technology was more neutral and not directly linked to a centralized system of distribution.

The issue reached a further stage with *MGM Studios Inc. v. Grokster Ltd.* in 2005. In this case, Grokster distributed peer-to-peer software similar to Napster, but without maintaining a central server, and argued that it had no direct knowledge of the infringing activities carried out by users.⁹⁹ Many expected that the Court would reconsider the *Betamax* precedent; however, the Court decided to maintain it, while at the same time introducing a new form of liability, known as inducement liability.¹⁰⁰

According to the Court, a subject can be held liable when it distributes a technology with the intention of promoting its use for infringing purposes, as demonstrated by clear expressions or other concrete actions aimed at encouraging infringement.¹⁰¹ At the same time, the Court clarified that mere knowledge of possible infringing uses is not sufficient to establish liability, nor are ordinary activities related to the distribution of a product. What is required, instead, is a form of intentional and active encouragement of unlawful conduct. On this basis, Grokster was found liable.¹⁰²

For these reasons, the *Betamax* and *Grokster* decisions represent the two main reference points in the U.S. system of secondary copyright liability. They establish, on one side, the protection of technological innovation when a product has legitimate uses, and on the other side, the possibility to impose liability when there is a clear intention to promote infringement.¹⁰³

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, p. 27

⁹⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (2005) 545 U.S. 913.

¹⁰⁰ *Ibid.*, p. 27

¹⁰¹ *Ibid.* *Grokster*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, p. 27

2.1.2 The DMCA Safe Harbour Regime

The DMCA was approved by Congress in 1998, in a moment in which the relation between copyright law and the Internet was creating many new problems. One of the main concerns was that online service providers, without clearer rules on liability, could be discouraged from investing in the development of Internet infrastructure, especially in terms of speed and capacity..¹⁰⁴ For this reason, Congress decided to intervene. However, it did not choose to completely rewrite the doctrines of secondary liability. Instead, it preferred to leave those doctrines as they were developing through the courts and to create a system of safe harbors for some typical activities carried out by intermediaries. So, the DMCA does not remove contributory and vicarious liability, but limits them in some specific cases.¹⁰⁵

The reform moved in three main directions. First of all, it gave some protection to online service providers when infringing acts are committed by users, above all through the notice-and-takedown mechanism. Through this system, copyright owners can report infringing material and ask for its removal.¹⁰⁶ In the second place, the Act reinforced the position of copyright holders in the digital environment, especially against forms of unauthorized access to protected works, for example when technological protection measures are circumvented. Finally, it also introduced rules on copyright management information, making unlawful in some situations the provision of false information or the removal or alteration of that information.¹⁰⁷

Under Section 512, four main categories of activity can fall inside the safe harbor regime. The first one is transitory digital network communications, which basically concerns the simple transmission or routing of content through a network. Then there is system caching, meaning temporary storage. A third category is the storage of information on systems or networks at the direction of users, which in practical terms corresponds to

¹⁰⁴ U.S. Copyright Office (n.d.) *Section 512 of Title 17: Resources on Online Service Providers*.

¹⁰⁵ Ibid., p. 27

¹⁰⁶ Lerner, J. (2020) *Secondary Copyright Infringement Liability and User-Generated Content in the United States*.

¹⁰⁷ Ibid

hosting activities and user-generated content platforms. The last one is represented by information location tools, such as search engines and similar indexing services that direct users toward online material.¹⁰⁸

To obtain the benefit of these safe harbors, the intermediary has to satisfy some conditions. Before all, it must qualify as a “service provider” under the statutory definition. Also, it has to adopt a policy for terminating repeat infringers.¹⁰⁹ In hosting cases, there is one more requirement: the provider has to designate an agent for notifications and register this information with the competent authority.¹¹⁰

A central part of the DMCA system is the notice-and-takedown procedure. In substance, when the provider receives a valid notice, it must remove the content or disable access to it. Later, if a counter-notification arrives, the provider can restore the material, unless in the meantime the rightsholder starts a judicial action.¹¹¹ For the notice to be valid, some elements must be included. There must be the signature of the copyright owner or of an authorized person, the identification of the protected work, and if there are many works on one website also a representative list can be enough. The notice must also indicate the infringing material, or the relevant link or reference, together with enough information to allow the provider to locate it. Then there must be the contact details of the complaining party, a good faith statement saying that the contested use is not authorized, and another statement declaring that the information is accurate and that the sender is authorized to act on behalf of the copyright owner.¹¹²

After receiving a compliant notice, the online service provider has to act quickly. It must remove the material, or at least disable access to it, and after that it has to inform the user who uploaded it. If that user thinks the removal happened because of a mistake or a wrong identification, the user can send a counter-notice asking that the content is restored.¹¹³

¹⁰⁸ Ibid., Lerner

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid. United States Copyright Office (1998) *The Digital Millennium Copyright Act of 1998*

¹¹² Ibid.

¹¹³ Ibid.

Also the counter-notice has some formal requirements. It must contain the physical or electronic signature of the user, the identification of the removed material and of the place where it was before removal, and a statement under penalty of perjury in which the user says to have a good faith belief that the content was removed because of mistake or misidentification. In addition, the user has to provide name, address and telephone number, and must declare to accept the jurisdiction of the Federal District Court connected with the address, or, if the address is outside the United States, of any district where the service provider may be found. The user must also accept service of process from the person who sent the original notice, or from that person's agent.¹¹⁴

Once a compliant counter-notice is received, the provider cannot restore the content immediately. It has to wait a period of not less than ten and not more than fourteen business days. During this time, if the original complainant informs the provider that a court action has been filed against the user, the restoration will not take place. If this does not happen, then access to the material must be restored.¹¹⁵

The notice and counter-notice steps can be visualized as follows:



(U.S. Copyright Office)¹¹⁶

Seen in a simpler way, the mechanism works like this. First, the rightsholder sends a notice about infringing material that appears on the platform. Second, the provider removes the material or blocks access to it. Third, the uploader is informed. Fourth, the uploader can react through a counter-notice if he or she believes that the content was removed by mistake. Fifth, after ten to fourteen business days, the material goes back online unless the rightsholder has already started a court case.¹¹⁷

¹¹⁴ Ibid., p. 27

¹¹⁵ Ibid., p. 27

¹¹⁶ U.S. Copyright Office (n.d.) Section 512 of Title 17: Resources on Online Service Providers.

¹¹⁷ Ibid., p. 27

At the same time, Congress made clear that service providers do not have a general duty to monitor what happens on their platforms, and they are not obliged to actively search for infringements. Because of this, if a notification is not compliant with the formal requirements, this fact alone does not automatically create actual knowledge or awareness of infringement.¹¹⁸

The more difficult issues concern in particular hosting services and search engines. In these situations, the safe harbor is available only when the provider does not have actual knowledge of the infringement and is not aware of circumstances from which the infringement is evident. And if such knowledge is acquired, the provider has to act rapidly in order to remove the content.¹¹⁹ There is also another condition: the provider must not obtain a direct financial benefit from the infringing activity in cases where it has the right and ability to control that activity. These requirements created many interpretative problems, also because they are very close to the traditional elements of vicarious liability. For this reason, their practical application was often uncertain.¹²⁰

For platforms based on user-generated content, two appellate decisions had an important role in clarifying these points, even if not in a definitive way. One is *Viacom International Inc. v. YouTube Inc.* In that case, started in 2008, Viacom and a group including sports leagues, movie studios, television networks and music companies sued YouTube for direct and secondary copyright infringement, because clips belonging to Viacom and to other copyright holders were available on the platform. YouTube invoked the protection of Section 512. The Court of Appeals for the Second Circuit accepted the general interpretation of Section 512 adopted by the district court, but sent the case back for more fact-finding, especially on the question of what level of knowledge is necessary in order to lose the safe harbor.¹²¹

A similar issue emerged in *UMG Recordings Inc. v. Shelter Capital Partners*, where Universal Music Group and other music companies acted against Veoh Networks, operator of Veoh.com, again because of infringements committed by users. In this case,

¹¹⁸ Ibid., Lerner, J. (2020)

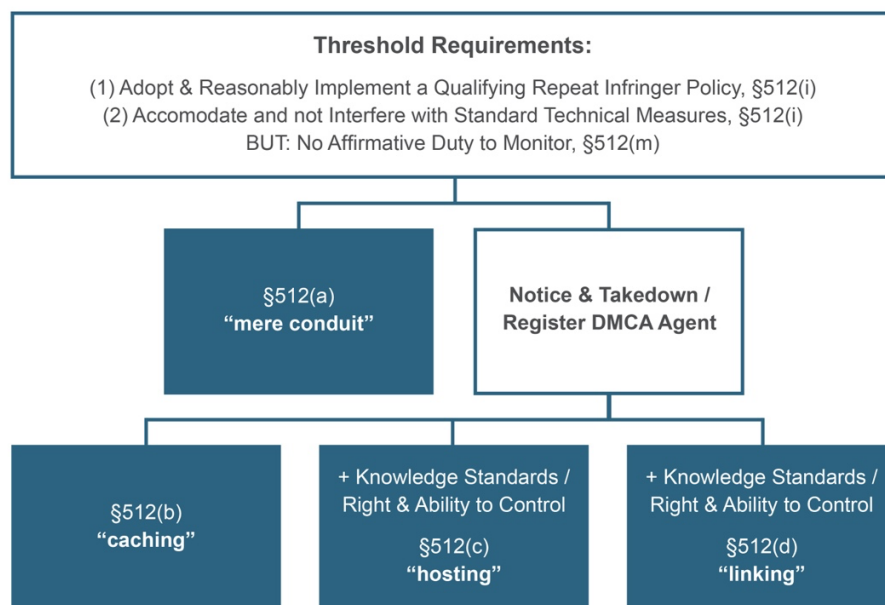
¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid., p. 32

the Court of Appeals for the Ninth Circuit confirmed the lower court decision granting summary judgment, and held that the defendants were protected by the safe harbor under Section 512(c).¹²²

These two decisions became important because they helped to explain better how the DMCA regime works for user-generated content platforms, especially in relation to knowledge and control. Before these cases, those elements were not very clear and had produced many doubts in the case law.



(U.S. Copyright Office)¹²³

The scheme mentioned above shows the general structure of the safe harbor regime under Section 512. What it makes clear is that the protection for service providers is not automatic, and not all activities are treated in the same way. At the upper level there are some threshold requirements, which must always be satisfied, no matter what type of activity the intermediary is carrying out.¹²⁴

¹²² Ibid., p. 32

¹²³ U.S. Copyright Office (n.d.) Section 512 of Title 17: Resources on Online Service Providers.

¹²⁴ Ibid., p. 33

After that, the different categories are separated. Section 512(a), often described as the “mere conduit” provision, concerns the provider that only transmits or routes data, without a real involvement with the content itself. In this area the protection is broader, exactly because the intermediary has less control over the material.¹²⁵

Then the scheme gives particular relevance to the notice-and-takedown mechanism and to the registration of a DMCA agent, because these aspects are central for platforms hosting user-generated content.¹²⁶ Through this mechanism, rightsholders can report infringing material, and the provider must react if it wants to keep the benefit of the safe harbor.

At the lower level, the scheme identifies three additional categories: Section 512(b), which concerns caching activities and involves the temporary storage of content; Section 512(c), which refers to hosting, meaning the storage of content at the direction of users; and Section 512(d), which concerns linking and information location tools, such as search engines.¹²⁷

For the last two categories, hosting and linking, the protection is subject to more complex conditions. In particular, the service provider must not have actual knowledge of the infringement, nor awareness of circumstances from which the infringement is apparent. In addition, once such knowledge is obtained, the provider must act quickly to remove the content.¹²⁸ Another important requirement is that the provider must not receive a direct financial benefit from the infringing activity in cases where it has the right and ability to control such activity.¹²⁹

The scheme shows that the DMCA does not provide a uniform or absolute form of protection, but rather a differentiated system, in which the level of liability depends on the type of activity carried out by the intermediary and on the presence of elements such as knowledge and control, which are particularly relevant especially in the case of user-generated content platforms.

¹²⁵ Ibid., Lerner

¹²⁶ Ibid.

¹²⁷ Ibid., United States Copyright Office (1998) *The Digital Millennium Copyright Act of 1998*

¹²⁸ Ibid.

¹²⁹ Ibid.

2.1.3 Knowledge Standards and Willful Blindness

One of the most delicate points inside the DMCA safe harbor regime is the meaning of the *knowledge standard*. For hosting platforms and, more in general, for intermediaries that store or organize content uploaded by users, the possibility to remain inside the protection of Section 512 depends also on what the provider knew, or can be considered to have known, about the infringing nature of that content. Because of this, the issue of knowledge became one of the central aspects in the interpretation of the statute.¹³⁰¹³¹

The main problem is to understand what kind of awareness is really required by the law. It is not enough to ask if the provider knew in a general sense that on the platform there was also unlawful material. The more difficult question is whether a generic awareness of infringement on the service can be sufficient, or if instead the statute requires a more precise connection with specific and identifiable infringements. This point is very important, because from it depends the real balance between the protection of copyright holders and the protection given to intermediaries.

In this context, Section 512 refers to two different forms of knowledge: actual knowledge and red flag knowledge. Even if both standards are mentioned by the statute, their exact meaning was not completely clear from the beginning, and for this reason they became the object of an important interpretative debate. The central issue was to understand whether these two standards refer to different levels of specificity, or if the real distinction has to be found somewhere else.¹³²

The interpretation that gradually emerged is that both actual knowledge and red flag knowledge require a link to specific infringing activity. In other words, it is not sufficient that the service provider knows, in a broad or abstract way, that infringing material is present on the platform in a significant quantity. What is required is awareness connected to particular content or to specific acts of infringement. This conclusion is strongly related to the logic of the notice-and-takedown system. If the provider has the obligation to act

¹³⁰ U.S. Copyright Office (1998) *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*.

¹³¹ Ibid., Lerner, J. (2020)

¹³² Ibid., Lerner, J. (2020)

expeditiously and remove or disable access to the infringing material, it is necessary that the provider is able to identify, with a certain precision, what material is in question. A generic awareness would not be enough to make this obligation workable in practical terms.¹³³

For this reason, the distinction between actual knowledge and red flag knowledge is usually explained not as a distinction between specific and generic knowledge, but rather as a distinction between a subjective and an objective dimension of awareness. Actual knowledge concerns the case in which the provider really knows, in a direct and concrete way, of a specific infringement. Red flag knowledge, instead, concerns situations in which the provider is aware of facts or circumstances that would make the infringement objectively obvious for a reasonable person. So, also in this second case, the point is not a generic suspicion that unlawful content may exist on the platform, but the presence of concrete indicators that make a specific infringement evident.¹³⁴

This interpretation allows both standards to keep an autonomous role. Actual knowledge covers the more direct form of awareness, while red flag knowledge applies where the provider may not have direct certainty, but is confronted with facts so evident that ignoring their meaning would not be reasonable. At the same time, both standards remain limited by the requirement of specificity, and this avoids transforming the safe harbor into an empty protection. If general awareness of widespread infringement were enough, in fact, the notice-and-takedown mechanism would lose much of its function, and service providers could be excluded from the safe harbor almost every time large quantities of user-generated content are involved.¹³⁵

Another important aspect is that the DMCA does not impose on service providers a general obligation to monitor their platforms or to affirmatively search for infringing activities. This means that the law does not expect providers to inspect in a constant and proactive way all the material uploaded by users. Coherently with this logic, even a deficient notification, if it does not satisfy the formal requirements required by the statute, cannot automatically create actual knowledge or red flag knowledge. Also from this point

¹³³ Ibid., Lerner, J. (2020)

¹³⁴ Ibid.

¹³⁵ Ibid.

of view, the system confirms that the knowledge standard must be connected to sufficiently clear and identifiable elements, and not to vague or incomplete signals.¹³⁶

In broader terms, the theory behind the knowledge requirement reflects a precise legislative choice. On one side, copyright holders must have an effective instrument to obtain the removal of infringing material. On the other side, intermediaries should not lose the safe harbor only because they operate platforms on which infringement may happen as a general phenomenon. The statute therefore tries to avoid two opposite risks: giving too much protection to providers even when they are faced with clear evidence of infringement, and at the same time imposing on them a form of liability based only on the abstract possibility that unlawful content may be present on the service.¹³⁷

For these reasons, the knowledge standard under Section 512 can be understood as a requirement of sufficiently concrete awareness. The provider must be linked, through actual knowledge or through objectively evident warning signs, to specific infringing material. What is not enough, instead, is a broad awareness that the platform, like many online services, may contain unlawful content in a general sense. This is the point on which much of the balance of the DMCA safe harbor regime is based.¹³⁸

Another point that created many discussions in the interpretation of the DMCA safe harbor is the role of *willful blindness*. The statute does not mention this concept in an express way, and because of this its place inside Section 512 has not always been completely clear. Even so, the issue became important because it concerns those situations in which a service provider does not have direct knowledge of infringement, but maybe avoids, in a conscious way, to confirm what it strongly suspects.¹³⁹

In general terms, willful blindness refers to a form of deliberate avoidance. It is not simple negligence, and it is not just a generic lack of attention. The idea is that a subject is aware of a high probability that a certain fact exists, but decides on purpose not to verify it, exactly in order to avoid obtaining direct knowledge. In this sense, the law can treat this

¹³⁶ Ibid., p. 36

¹³⁷ Ibid., p. 37

¹³⁸ Ibid., p. 37

¹³⁹ Ibid., p. 37

conscious avoidance as something very close to actual knowledge, because the absence of knowledge is not innocent, but is the result of a voluntary choice.¹⁴⁰

Applied to the context of online intermediaries, the problem is delicate. On one side, if willful blindness were interpreted too broadly, it could become a way to impose liability even in situations where the statute does not require a general duty to monitor. On the other side, if this doctrine were excluded completely, a provider could try to remain formally ignorant on purpose, even in the presence of strong indications of infringement, and still continue to benefit from the safe harbor. For this reason, the theory of willful blindness stands in a middle position between knowledge and lack of knowledge.¹⁴¹

The interpretation that is more coherent with Section 512 is that willful blindness can have a role, but only in a limited and careful way. In particular, it cannot be used to transform a generic awareness that some infringement exists on the platform into a sufficient basis for liability. Also here, the point must remain the same as in the knowledge standard: there must be a connection with specific infringing activity. So, what matters is not that the provider avoids knowing in a general sense that infringement happens on the service, but that it deliberately avoids confirming facts that would reveal particular and identifiable infringements.¹⁴²

This limitation is important also because the DMCA clearly says that service providers are not subject to a general obligation to monitor their platforms or to actively search for unlawful material. For this reason, willful blindness cannot mean that the provider should have investigated everything, or that it is liable just because it did not do more to discover infringement. The doctrine does not create a general proactive duty. Rather, it applies only where there is a conscious decision to avoid confirming what is already strongly indicated by concrete circumstances.¹⁴³

Seen in this way, willful blindness works as a corrective element inside the safe harbor system. It prevents providers from using the lack of formal knowledge as a shield when

¹⁴⁰ Ibid., p. 37

¹⁴¹ Ibid., p. 37

¹⁴² Ibid., p. 37

¹⁴³ Ibid., p. 37

this lack of knowledge is actually the consequence of intentional avoidance. At the same time, however, it must remain compatible with the structure of Section 512, which protects intermediaries from a duty of constant surveillance. Because of this, the doctrine cannot be based on broad assumptions, diffuse suspicions, or the simple fact that infringement is widespread on many online platforms.¹⁴⁴

In practical terms, the idea is that willful blindness may exist when the provider carries out affirmative behavior aimed at not learning about specific infringing content. It is not enough that the provider could have known more, or that it was in a position to suspect infringement in a general sense. What is required is a stronger element of conscious avoidance, directed toward information that would make a specific infringement evident. Only in this way the doctrine remains coherent with the general logic of the DMCA.

For these reasons, willful blindness should be understood as a narrow concept, which does not replace the knowledge requirement but operates close to it. It can support the finding of knowledge or awareness only where the provider intentionally avoids confirming specific infringements. On the contrary, the deliberate avoidance of a merely general awareness that unlawful material may be present on the platform should not be enough, by itself, to exclude the safe harbor. In this balance, the doctrine tries to prevent strategic ignorance, without destroying the protections that Section 512 gives to online intermediaries.¹⁴⁵

2.2 Intermediary Liability in the European Union

The question of the liability of intermediary service providers in the context of European copyright law has been, for a long time, one of the most discussed and complex topics in the panorama of digital law. To understand well this topic, it is necessary to start from a fundamental distinction: the specific rules of liability apply only to providers that act as intermediaries, that is, as middlemen that act between one internet user and another party. This means that the specific rules do not apply when the provider of digital services is

¹⁴⁴ Ibid., p. 37

¹⁴⁵ Ibid., p. 36

directly responsible for the infringing content, for example, when it publishes its own content or when it has made its own the content originally uploaded by third parties.¹⁴⁶

The main legislative reference at European level is the E-Commerce Directive (Directive 2000/31/EC), which in Chapter II Section 4 regulates in specific way three categories of intermediary services: the mere conduit (Article 12), the caching (Article 13) and the hosting (Article 14). To these provisions it is added also the Article 15, which prohibits to impose upon providers general obligations of monitoring.¹⁴⁷ As the recital 40 of the same Directive clarifies, this entire section is addressed exclusively to "service providers acting as intermediaries", and for this reason the member states, in the phase of national implementation, have introduced explicitly the requirement that the providers deal with "informations of third party".¹⁴⁸

A further and important definition comes from Article 8(3) of the Copyright Directive (Directive 2001/29/EC), which defines the intermediaries as those providers whose services are used by a third party to infringe a copyright or a related right. This definition is particularly relevant because it confirms that the liability of intermediaries in the European framework is always constructed around the infringement of a third party, not around a direct conduct of the provider itself.¹⁴⁹

The case law of the Court of Justice of the European Union (CJEU) has contributed in decisive way to define the boundaries of the application of these rules. In particular, the CJEU has clarified that an intermediary which plays a "active role" in relation to the infringing content, for example by indexing, promoting or optimising the presentation of offers of third parties, as happened in the well-known case *L'Oréal v. eBay* (C-324/09), cannot benefit from the privilege of liability provided by Article 14 of the E-Commerce Directive. On the contrary, the mere fact that the provider receives a remuneration for its

¹⁴⁶ Nordemann, J.B. (2020) 'The functioning of the internal market for digital services: responsibilities and duties of care of providers of digital services', *Study for the European Parliament*, Policy Department for Economic, Scientific and Quality of Life Policies.

¹⁴⁷ European Parliament and Council of the European Union (2000) *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, Official Journal of the European Union, L 178, 17 July 2000.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid. Nordemann

services or provides general informations to its customers is not sufficient, by itself, to exclude the application of the privilege. In the same way, the CJEU has excluded from the protection of the Directive those providers that played a "integral part of a overall service", as established in the cases Airbnb Ireland (C-390/18) and Uber Spain (C-434/15).¹⁵⁰

The justification for imposing responsibilities and duties of care on intermediaries, even when they are not the direct authors of the infringement, is rooted in general principles of tort law. The mere causation in the sense of *conditio sine qua non* is not sufficient by itself to establish a duty of care: in the tort law, in general, only the person who directly caused the harm is liable. However, there are situations where also third parties, as the intermediaries, can be held responsible if there is a "good reason". The academic European Group for Tort Law has identified in the Principles of European Tort Law (PETL) four scenarios in which a duty of positive action to protect others from damage can arise: when the law provides so, when the actor creates or controls a dangerous situation, when there is a special relationship between the parties, and when the seriousness of the harm and the ease of avoiding the damage point together towards such a duty.¹⁵¹

In the specific context of the intermediaries, at least three of these four scenarios appear particularly relevant. First, the providing of services on internet creates by itself a situation of risk, given that the internet allows to commit violations in anonymous way and the identification of the individual responsible is often a process very costly and sometimes even impossible. Second, the legal action against the intermediaries, whose services are used for the infringements, can have a much greater preventive and corrective effect than the individual prosecution of each single user. Third, the intermediaries can become, in an internet world that becomes always more anonymous, real hubs of trust: since the personal relationships that in the offline world guarantee the trustworthiness of the communications are not reproducible on internet, the intermediaries can play a fundamental role in the reconstruction of this trust.¹⁵²

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid. European Parliament and Council of the European Union (2000) *Directive 2000/31/EC*

Against this background, it appears justified that the European legislator, lately, has chosen to construct specific harmonised rules for the responsibilities and duties of care of intermediary service providers, and that this process of harmonisation continues to evolve in response to the new challenges posed by the digital environment.

2.2.1 The EU's Evolving Approach to Intermediary Liability in Copyright

The existing European legal framework constitutes the natural starting point of every attempt of harmonisation in the field of intermediary liability in copyright. Its central pillar is to be found in the E-Commerce Directive (ECD), through which the European legislator has introduced a special immunity regime for internet intermediaries, the so-called "safe harbours" for mere conduit, caching and hosting services. Such immunities have a horizontal nature, applying also to copyright. Article 15 ECD completes the regime with a prohibition of general monitoring obligations. In the specific field of copyright, these provisions find an integration in Article 8(3) of the InfoSoc Directive (ISD), which requires that right holders must be put in condition to ask for an injunction against intermediaries whose services are used by third parties to infringe.¹⁵³¹⁵⁴

An important separation exists between the intermediaries that can benefit from the safe harbours and those that can be subject to injunctions. The CJEU has interpreted the safe harbours as requiring that the intermediaries must be "neutral", that is their service must have a merely technical, automatic and passive nature. By contrast, Article 8(3) ISD applies to any intermediary that finds itself in the best position to bring the infringement to an end. The distinction is based on the culpability of the intermediary: injunctions can be directed against any intermediary, while substantive liability requires an absence of neutrality, that is an active involvement which produces knowledge or control¹⁵⁵¹⁵⁶.

¹⁵³ Angelopoulos, C. (2019) Harmonising Intermediary Copyright Liability in the EU: A Summary.

¹⁵⁴ European Parliament and Council of the European Union (2001) *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, *Official Journal of the European Union*, L 167, 22 June 2001.

¹⁵⁵ Ibid., Angelopoulos

¹⁵⁶ Ibid., European Parliament and Council of the European Union (2001)

Although undoubtedly useful, the ECD and the ISD do not offer a complete harmonised framework. The safe harbours are formulated only in a negative way, indicating to Member States when they cannot impose liability, but not when they should do it; Article 8(3) ISD concerns only injunctions. Through its case law, the CJEU has tried to reduce this gap by referring itself to the Charter of Fundamental Rights, and in particular to the need of ensuring a "fair balance" between copyright (Article 17(2)) and other rights of equal value, such as the intermediary's freedom to conduct a business and the users' freedom of expression and data protection. In this way, fundamental rights have become one of the main engines of European harmonisation of intermediary liability.¹⁵⁷¹⁵⁸

The impact of the "fair balance" doctrine has been firstly developed with reference to injunctions: the CJEU has affirmed that courts cannot impose wide filtering obligations to hosting providers, while blocking injunctions against internet access providers are admissible, provided that users are not deprived in an unnecessary way of lawful access to information. EU law has not, however, developed a reliable method to determine when a fair balance is effectively reached by a specific injunction.¹⁵⁹

More recently, the Court has examined also the implications of fundamental rights on substantive liability. In *GS Media*, facing the absence of harmonised rules on accessory copyright liability, the Court has worked through the notion of communication to the public. Observing that hyperlinks are essential for the functioning of the internet and, consequently, also for users' freedom of expression, it has connected liability to an actual or constructive knowledge: liability can be imposed only where the provider knew or should have known that the hyperlink conducted to content made available without the authorisation of the right holder. The same standard has been successively applied also to other actors who promote third-party copyright infringements.¹⁶⁰

GS Media is collocated in an intermediate position between primary and accessory liability. Through a rather creative interpretation, the CJEU has imposed what is formally a primary liability, but has made it depend from a condition of knowledge. Such solution

¹⁵⁷ Ibid. Angelopoulos

¹⁵⁸ Ibid., European Parliament and Council of the European Union (2001)

¹⁵⁹ Ibid.

¹⁶⁰ Ibid., p. 43

fits well with the precedent case law on neutrality and brings intermediary liability closer to a model of fault liability and, therefore, to the general logic of tort law.¹⁶¹

Even with these developments, a complete harmonised framework still does not exist. Rather than leaving such system to slowly emerge through case law, a better solution would consist in defining it through legislation. For this purpose, it may result useful to bring intermediary copyright liability back down from the level of fundamental rights and to reinsert it within tort law, which more naturally governs the legal relations between private parties, the same method often adopted at national level, where copyright rules alone do not result sufficient.¹⁶²

Since EU law does not provide a complete framework, Member States have had to rely on their own national solutions. The approaches of three national legal systems are briefly considered - the United Kingdom, France and Germany - because they correspond to the three major traditions of tort law in Europe.

All three legal systems have, in one way or another, experimented solutions internal to copyright law. In the United Kingdom, the first tool used by courts has often been the doctrine of authorisation (Section 16(2) CDPA 1988), interpreted as the granting, or apparent granting, to a third person of the right to perform a restricted act.¹⁶³ The House of Lords has made clear that simple facilitation is not sufficient. Given that modern intermediaries rarely purport to grant the legal right to infringe, the notion has had to be stretched beyond its natural meaning in order to apply to them. Moreover, even before *GS Media*, lower UK courts had already found intermediaries directly liable under communication to the public.¹⁶⁴

French courts, on the other side, have mainly followed a primary liability approach, applying the general dispositions of the French Intellectual Property Code also to intermediaries and affirming that primary liability can include the "taking over" of third-party infringements or even the "provision of the means" through which they are realised.

¹⁶¹ Ibid. Angelopoulos

¹⁶² Ibid. Angelopoulos

¹⁶³ United Kingdom (1988) *Copyright, Designs and Patents Act 1988*, c. 48. London: HMSO.

¹⁶⁴ Ibid. Angelopoulos

¹⁶⁵In this way, the French system allows to find liability also in situations that English law would classify as mere facilitation, an approach criticised by French scholars, who underline how the strict liability model of primary infringement does not result adequate for simple contributors. Because of this wide understanding of direct infringement, French case law has heavily depended on the safe harbour conditions: courts had initially developed a *notice-and-stay-down* regime, later overturned by the Cour de cassation as incompatible with the prohibition of general monitoring.¹⁶⁶

Germany has taken a different path: establishing a direct liability against an online host is much more difficult. In a 2015 decision, the Hamburg Court of Appeal has held that YouTube could not be considered directly liable, since the act of making content available was performed not by the platform, but by its users.¹⁶⁷

In order to integrate these copyright-based approaches, courts in all three countries have also made use of general tort law. Two main tort models can be distinguished: the "residual liability" or "single fault" model, and the "concurrent liability" or "multiple faults" model.¹⁶⁸

The United Kingdom represents the main example of the single fault model, through the doctrine of joint tortfeasance. To establish such liability, each joint tortfeasor must be involved in the commission of the tort in such way that the infringing act can be considered also as his own. In copyright matter, two main participation links are recognised: inducement or procurement, and combination, which requires a common design aimed at the infringement. Also in this context, mere facilitation does not result sufficient.¹⁶⁹

France, by contrast, follows more easily a multiple faults model: the accessory actor is not considered liable for the same tort as the primary infringer, but for a distinct, even if connected, wrongful act. In the practice, the general tort provisions of Articles 1382 and 1383 of the French Civil Code are used for this purpose, establishing that all legal subjects

¹⁶⁵ France (1992) *Code de la propriété intellectuelle*, Loi n° 92-597 du 1er juillet 1992.

¹⁶⁶ Ibid., p. 43

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

must avoid causing harm to others.¹⁷⁰ French law does not sharply distinguish between active conduct and omissions, and the standard applied to intermediaries is that of the *prestataire diligent et avisé*, the diligent and prudent intermediary, who must take all reasonable measures to avoid that its services are used to infringe third parties' rights. The parallel with the CJEU's notion of diligent economic operator appears evident.¹⁷¹

Germany presents a mixed model. Article 823(1) BGB imposes liability on anyone who, intentionally or negligently, unlawfully injures the legal right of another.¹⁷² However, the requirement of unlawfulness makes the system different: in cases of omission, which are typical in intermediary liability, liability requires either intention or the violation of a *Verkehrspflicht*, a duty of care imposed by society. A residual model is also available through Article 830(1) BGB, which treats instigators and accessories as joint tortfeasors but requires at least a contingent intent.¹⁷³ This condition is normally not considered fulfilled in the case of online intermediaries, although lower courts have, at times, treated a serious and persistent breach of the duty to examine notifications as indication of intent.¹⁷⁴

From this comparison, it emerges that the main difference between the two models lies in the fault standard: residual liability requires intention, while concurrent liability may already be founded on negligence.

A final solution is represented by injunctive relief. Since Article 8(3) ISD is formulated in positive terms, the remedy is used in all three jurisdictions. The United Kingdom has implemented it through section 97A CDPA 1988, with litigation heavily focused on injunctions against internet access providers to block infringing websites.¹⁷⁵ In France, Article 6-I-8 LCEN allows injunctions against both access and hosting providers, while Article L.336-2 CPI goes even further, extending them to any person capable of

¹⁷⁰ France (1804) *Code civil*, dernière modification consolidée.

¹⁷¹ *Ibid.*, p.43

¹⁷² Germany (1896) *Bürgerliches Gesetzbuch (BGB)*, as last amended.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, p. 43

¹⁷⁵ *Ibid.*, United Kingdom (1988) *Copyright, Designs and Patents Act 1988*

contributing to the prevention or cessation of the infringement, a wording wider than what Article 8(3) ISD strictly requires.¹⁷⁶¹⁷⁷

Germany results particularly distinctive because of the doctrine of *Störerhaftung*, which permits the issuance of injunctions (not damages) against persons who causally contribute to an infringement in violation of a reasonable duty to review. German courts have interpreted it in a very strict way for hosting providers: under the so-called *Kerntheorie*, once an infringement has been notified, the duty of review extends to all other infringements similar in their essential core, including future ones. In this way, German courts have effectively developed a *notice-and-stay-down* regime, the same that French courts have refused, justifying it on the ground that the monitoring is targeted only at specific infringements relative to works already identified, and therefore does not constitute a "general" monitoring.¹⁷⁸

The analysis of the national approaches reveals both similarities and differences. In order to organise the main messages, it results useful to reconnect the national solutions to the basic components of tort liability, namely fault and causation.

The attraction of English and German law toward joint tortfeasance can be explained with the traditional concern that both systems have of preventing an excessive expansion of fault liability, which has induced them to place strict limits on liability for omissions, through the duty of care in England and through unlawfulness and *Verkehrspflichten* in Germany. These approaches are reinforced by conservative theories of causation, with the effect of substantially restricting accessory liability based on negligence. Both systems therefore show a preference for residual liability, depending on findings of intention to bridge the causation gap. France is different: it adopts a wider and more unitary approach both toward fault and toward causation, relying on the simple *conditio sine qua non* test. For this reason, French law does not need complex theories of joint

¹⁷⁶ France (2004) *Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (LCEN)*, Journal Officiel de la République Française, 22 juin 2004.

¹⁷⁷ Ibid., p.43

¹⁷⁸ Ibid.

tortfeasance, being able to sustain accessory liability through the basic rules of negligence.¹⁷⁹

These differences may at first sight seem to render a harmonised European regime impossible. Nevertheless, in the practice the results reached are often not very different: even if France does not incorporate strong limiting mechanisms into tort law itself, the safe harbours of the ECD have been used to produce effects broadly similar to those seen in the UK and in Germany. What differs more is the structure rather than the substance, and it is exactly such structure that should constitute the main focus of EU harmonisation proposals.¹⁸⁰

In this perspective, projects concerning the harmonisation of European tort law result particularly useful. The Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR) can provide the harmonising "glue" necessary in this area, allowing European accessory intermediary copyright liability to find a grounding in stronger theoretical foundations.¹⁸¹¹⁸² Following their guidance, the basic components of a truly European model require both fault on the part of the intermediary and a causal link with the infringement. Fault can consist either in intent or in negligence: intent is the more straightforward case, and where it is present the need of a strong causal link becomes less important. Negligence depends on a judgement of reasonableness, which emerges at the point where risk and care meet, together with the defendant's knowledge of the risk and the ability to avoid it. This shows that intermediary liability in European tort law depends on an operation of balancing, creating also a connection with the fair balance jurisprudence of the CJEU.¹⁸³

A particular attention is required in cases of omission, which are central in accessory liability. All national systems agree that, in order for an omission to be objectionable, it must amount to the violation of an affirmative duty to act. The PETL and the DCFR follow different strategies here, and also different models of causation: the DCFR is more

¹⁷⁹ Ibid., p. 43

¹⁸⁰ Ibid.

¹⁸¹ European Group on Tort Law (2005) *Principles of European Tort Law (PETL)*. Vienna: Springer.

¹⁸² Von Bar, C., Clive, E. and Schulte-Nölke, H. (eds.) (2009) *Draft Common Frame of Reference (DCFR): Outline Edition*. Munich: Sellier European Law Publishers.

¹⁸³ Ibid., p. 43

cautious, incorporating into causation a series of limiting factors and relying on residual rules based on intention to sustain accessory liability; the PETL adopts the *conditio sine qua non* approach, permitting a model closer to the French multiple faults solution.¹⁸⁴

2.2.2 The DSM Directive (EU) 2019/790

A particularly relevant development in the European framework on intermediary liability has been represented by the adoption, in the year 2019, of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, known as DSM Directive. Such instrument tries to give an answer to what the European legislator himself has defined as value gap, that is the situation for which the big online platforms obtain economic profits from the massive diffusion of copyright-protected works uploaded by their users, while right holders receive only a limited remuneration, when they receive one (Recital 61 DSM Directive). The reason of this imbalance was to be individuated exactly in the safe harbour regime of the E-Commerce Directive, that permitted to such platforms to invoke the hosting immunity whenever they were able to demonstrate a sufficient grade of passivity. The DSM Directive intervenes on this point with a solution that, even if formally compatible with the preceding framework, produces in the substance a change of paradigm.¹⁸⁵

The heart of the new discipline is contained in Article 17, that applies to a specific typology of intermediary introduced by Article 2(6): the online content-sharing service provider (OCSSP). According to the definition there given, is OCSSP the provider of an information society service whose main scope, or one of the main scopes, consists in storing and giving to the public access to a great quantity of copyright-protected works uploaded by its users, which the same provider organises and promotes with the scope of obtaining a profit (Art. 2(6) DSM Directive). It is a definition evidently constructed on the profile of the big user-generated content platforms, while other subjects are excluded from the same, such as, for example, non-profit online encyclopaedias, educational and

¹⁸⁴ Ibid., p.43

¹⁸⁵ European Parliament and Council of the European Union (2019) 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, OJ L 130, 17.5.2019, pp. 92–125.

scientific repositories, platforms for the development of open source software, cloud services for private use, and online marketplaces.¹⁸⁶

Article 17, paragraph 1, establishes that, when an OCSSP gives public access to works uploaded by its own users, it realises itself an act of communication to the public, for which it is therefore necessary to obtain an authorisation from the right holders (Art. 17(1) DSM Directive). In this way, the Directive attracts directly inside primary liability a conduct that until now, in the major part of cases, was considered only indirect. To confirm such new qualification, Article 17, paragraph 3, excludes the application of the hosting safe harbour of Article 14 ECD to the acts of communication to the public realised by OCSSPs (Art. 17(3) DSM Directive). The line between neutrality and active involvement, that the CJEU had progressively elaborated through its jurisprudence, results therefore substituted, limitedly to this category of providers, by a direct rule of non-application of the immunity.¹⁸⁷

In absence of authorisation, Article 17, paragraph 4, introduces a particular mechanism of liability exemption, founded on a standard of best efforts. The OCSSP is not held liable if it demonstrates to have made, in cumulative way: (a) its best efforts to obtain the authorisation; (b) its best efforts to ensure the unavailability of the specific works regarding which the right holders have provided the relevant and necessary informations; and (c) in any case, after having received a sufficiently motivated notice, to have acted in expeditious way to disable the access to the notified content, as well as to have made its best efforts to prevent future uploads of the same (Art. 17(4), letters (a)–(c), DSM Directive). The third condition, in particular, codifies at European level a true and proper notice-and-stay-down obligation, that, as already seen before, had been refused by the French Cour de cassation while being substantially adopted by the German courts through the *Kerntheorie*.¹⁸⁸

Article 17, paragraph 5, tempers such obligations through a criterion of proportionality. The evaluation about whether the provider has respected its best efforts obligations must take in consideration, among the other elements, the typology, the audience and the

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

dimensions of the service, the type of works uploaded by the users, as well as the availability of adequate and effective means and the cost of the same for the provider (Art. 17(5) DSM Directive). A differentiated regime is then provided, in Article 17, paragraph 6, for the newer and smaller providers, whose services result available to the public from less than three years and that have an annual turnover inferior to 10 millions of euros: to such providers only the less burdensome obligations foreseen in letter (a) and in the first part of letter (c) of paragraph 4 apply, with a further condition relative to the average number of unique monthly visitors, that extends the regime when such number is superior to 5 millions (Art. 17(6) DSM Directive).¹⁸⁹

Particularly delicate is the position of the users, to which Article 17, paragraph 7, dedicates a specific protection. The cooperation between OCSSPs and right holders cannot have the effect of impeding the availability of works uploaded by users that do not infringe copyright, in the cases in which the same are covered by an exception or limitation included (Art. 17(7), DSM Directive). The same disposition imposes to Member States to ensure that users are in condition to always rely on the existing exceptions for quotation, criticism and review, as well as for caricature, parody and pastiche, exceptions that, on this specific point, acquire a mandatory character (Art. 17(7), DSM Directive). Article 17, paragraph 8, reaffirms then that the application of the article cannot translate in any case in a general monitoring obligation, in line with the principle already affirmed by Article 15 ECD (Art. 17(8) DSM Directive). Article 17, paragraph 9, finally, imposes the introduction of effective and rapid complaint and redress mechanisms, which permit to users to contest the decisions of disabling of access or removal of their content, through a human review of the decision itself (Art. 17(9) DSM Directive).¹⁹⁰

The compatibility of such system with the Charter of Fundamental Rights has been confirmed by the CJEU with the decision *Poland v Parliament and Council* (Case C-401/19).¹⁹¹ The Court has recognised that Article 17 implicates a limitation of the freedom

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Court of Justice of the European Union (2022) *Republic of Poland v European Parliament and Council of the European Union*, Case C-401/19, Judgment of the Grand Chamber of 26 April 2022, EU:C:2022:297.

of expression of the users, to the extent that it presupposes the utilisation of automatic content recognition tools. Notwithstanding this, it has retained such limitation justified, since the Directive itself contains a series of guarantees, in particular those of paragraph 7, 8 and 9, that, if correctly implemented, are in grade to ensure the fair balance between the conflicting fundamental rights. In this way, the jurisprudence on the fair balance, developed until now mainly on the piano of injunctions and of substantive liability, finds a first explicit transposition inside a legislative text.¹⁹²

The DSM Directive represents therefore a notable attempt of the European legislator to pass from a purely negative harmonisation, as that of the safe harbours, to a positive harmonisation of the conditions of liability of a specific category of intermediaries. Its operative impact will depend, nevertheless, from the concrete modalities of implementation chosen by the Member States and from the interpretation that the CJEU will give, in the next years, of concepts still so much open as those of best efforts and of proportionality.¹⁹³

2.2.3 The Digital Services Act and the Restatement of Hosting Liability

A further and important step in the evolution of the European framework on the intermediary liability has been represented by the adoption, in the year 2022, of the Regulation (EU) 2022/2065 on a Single Market for Digital Services, known as Digital Services Act, or simply DSA, entered into force in November 2022 and become fully applicable on 17 February 2024. Such instrument does not move in isolation from the pre-existing framework: on the contrary, it places itself explicitly in continuity with it, going to substitute the liability provisions of the E-Commerce Directive, in particular the Articles from 12 to 15, and incorporating them inside a single regulation of general scope, directly applicable in all the Member States without the necessity of a national transposition.¹⁹⁴ The intention of the legislator, on this point, was not that of overturning the system of liability exemptions already existing, but rather that of consolidating it and clarifying it, taking account also of the jurisprudence that the CJEU had in the meantime elaborated. It can be said, in other words, that the DSA does not invent nothing new on

¹⁹² Ibid., p. 53

¹⁹³ Ibid.

¹⁹⁴ Ibid., European Parliament and Council of the European Union (2000) *Directive 2000/31/EC*

this specific aspect, but goes to put in order what was already there, giving to it a more solid and uniform legal basis at the level of the entire Union.¹⁹⁵

The central provision for what concerns the intermediary liability is Article 6 of the DSA, dedicated to the hosting services. The structure of such article reproduces, in its substance, the same logic that was already at the base of Article 14 of the E-Commerce Directive. A provider of hosting services is not liable for the informations stored at the request of a recipient of the service, on the condition that the provider does not have actual knowledge of illegal activity or illegal content and, as regards the claims for damages, is not aware of facts or circumstances from which the illegal activity or the illegal content results apparent or, in the alternative, that upon obtaining such knowledge or awareness, it acts in expeditious way to remove or to disable the access to the illegal content. The logic, therefore, is the same as before: the immunity is conditioned, and it comes lost in the moment in which the knowledge arrives and the provider does not react in adequate way. (Art. 6(1))¹⁹⁶¹⁹⁷

There are, however, some elements of clarification that the DSA introduces with respect to what before existed. In the first place, the Regulation makes explicit that a general awareness of the fact that a service could also be used for storing illegal content is not sufficient, by itself, to give rise to the knowledge of the provider in the sense of Article 6. This clarification results important because it comes to confirm, at the level of primary legislation, an interpretation that had already emerged through the jurisprudence of the CJEU and that, as has been seen in the preceding sections of this chapter, had been object of considerable debate, above all in relation to the question of whether a diffuse and generic suspicion of infringement could be enough to make a platform lose the protection of the safe harbour. The DSA, on this point, gives a clear answer: it is not enough, and the knowledge must always be referred to specific and identifiable contents, not to a

¹⁹⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), *Official Journal of the European Union*, L 277, 27 October 2022

¹⁹⁶ Ibid., p.55

¹⁹⁷ Ibid., European Parliament and Council of the European Union (2000) *Directive 2000/31/EC*

generic and undifferentiated awareness of the phenomenon of the infringement in its generality. (Recital 18)¹⁹⁸

In the second place, the DSA introduces a codification of the so-called Good Samaritan principle, today contained in Article 7. The providers of services that carry out, in good faith and in diligent manner, voluntary investigations of own initiative directed to the detection of illegal content, or that take other measures aimed to remove or to disable the access to it, shall not be considered ineligible for the liability exemptions for the only reason of having done so. Such provision comes to resolve a problem that presented itself under the E-Commerce Directive, where the voluntary monitoring could, in certain circumstances, produce the acquisition of constructive knowledge and therefore the loss of the immunity, a result that, in practice, tended to discourage the platforms from a proactive behaviour, given that being more attentive could paradoxically translate itself in a greater exposition to liability. With Article 7, this perverse incentive is eliminated, and the platforms are put in condition of acting in responsible way without for this reason risking to lose the protection. (Art. 7)¹⁹⁹

Article 8 of the DSA, moreover, comes to reaffirm in explicit terms the prohibition to impose on the providers of intermediary services general obligations of monitoring, a principle that was already present in Article 15 of the E-Commerce Directive and that, as has been seen, has played a central role in the entire debate on the limits of the intermediary liability, both in Europe and in the United States. The fact that such prohibition has been reproduced inside a regulation of direct application, and not only inside a directive subject to national transposition, gives to it a character more strong and uniform across the territory of all the Member States. (Art. 8)²⁰⁰

Also the relationship between Article 6 DSA and the notice-and-action mechanism introduced by Article 16 of the same regulation merits a specific attention. Under Article 16, the providers of hosting services are obliged to put in place mechanisms that allow to

¹⁹⁸ Ibid., European Parliament and Council of the European Union (2022) *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

any individual or entity to notify to them the presence of specific items of illegal content on their service. A notice that satisfies the requirements set out in Article 16 is considered, under the paragraph 3 of the same article, to give rise to actual knowledge or awareness for the purposes of Article 6, on the condition that such notice results sufficiently precise to allow a diligent provider to identify the illegality of the content without the necessity of a detailed legal examination. This connection between the notification mechanism and the knowledge standard comes to confirm, at the level of regulation, a logic that was already implicit in the DMCA system and that, in the European context, had been elaborated through the case law examined in the preceding sections. Also the European legislator, in this sense, seems to recognise that the notification, more than being a simple procedural formality, represents the moment in which the responsibility of the provider starts to take a concrete form. (Art. 16(3))²⁰¹

Seen in this broader perspective, the DSA does not represent a rupture with the system established by the E-Commerce Directive, but rather its consolidation and its partial evolution. The basic architecture of the hosting immunity, conditioned on the absence of knowledge and on the expeditious action in the moment in which such knowledge arrives, remains substantially unchanged. What the DSA adds is a greater degree of legal certainty, a more clear articulation of the relationship between the voluntary action and the liability, and a more structured set of procedural obligations that accompany the substantive exemptions. In this sense, Article 6 DSA can be understood as the current reference point of the European regime of hosting liability, and its interpretation will inevitably be shaped, in the coming years, by the same tensions between the protection of the copyright holders, the freedom of the intermediaries and the fundamental rights of the users that have characterised the entire evolution described in this chapter.

²⁰¹ Ibid., European Parliament and Council of the European Union (2022) *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*

2.2.4 From Passive to Active Role of Platforms

One of the most significant lines of evolution of the European framework on intermediary liability concerns the progressive passage from a model founded on the neutrality of the platform to a model of increasing responsibility, in which the same platform is considered an active subject in the management of the risk of copyright infringement. Such passage has not happened suddenly, but through a gradual transition, in which the jurisprudence of the CJEU and the intervention of the legislator have acted in parallel.

The starting point is constituted, as already seen, by the regime of the E-Commerce Directive. The hosting safe harbour of Article 14 protects the provider only when the same does not have knowledge of the illicit character of the information stored or, as soon as obtained such knowledge, acts expeditiously to remove or disable access to the content (Art. 14(1), letters (a) and (b), Directive 2000/31/EC). This logic is explained by Recital 42 of the same Directive, according to which the immunities there foreseen presuppose that the activity of the provider has a "merely technical, automatic and passive nature", so that it does not know nor controls the information that is transmitted or stored (Recital 42, Directive 2000/31/EC). To complete the framework, Article 15 prohibits to Member States to impose on such intermediaries general obligations of monitoring on the informations transmitted or stored (Art. 15(1), Directive 2000/31/EC). The entire discipline results therefore constructed around a figure of neutral provider, that limits itself to furnish a technical infrastructure without entering into the merit of the contents.²⁰²

Already with the growth of the platforms, of the indexing systems, of the mechanisms of promotion of the contents and of the monetisation of the traffic, such image has started to result always less convincing. The CJEU has been the first one to take note of this evolution. In *Google France*, decided in matter of referencing service, the Court has affirmed that the safe harbour of Article 14 ECD can cover the activity of the referencing service provider only if the role of the same "is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the

²⁰² European Parliament and Council of the European Union (2000) *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')*, OJ L 178, 17.7.2000.

data which it stores" (*Google France*). In this way, the neutrality ceases to be a simple descriptive presupposition and becomes a true and proper condition of applicability of the immunity.²⁰³

The step forward has been realised by the Court with *L'Oréal v eBay* (Case C-324/09). In such decision, the CJEU has clarified that an online marketplace is excluded from the benefit of Article 14 ECD when it plays an active role of such nature to give it knowledge of, or control over, the data relating to the offers for sale stored on its servers (*L'Oréal v eBay*). The Court has then individuated some typical indexes of such active role: in particular, when the provider furnishes assistance that consists, between other things, in optimising the presentation of the offers for sale or in promoting them, the same cannot be considered neutral anymore (*L'Oréal v eBay*). In this way, the jurisprudence recognises explicitly that the modern platforms do much more than host in a passive way the contents of their users: they organise, valorise and render economically productive the same contents, and this intervention has direct consequences on the liability regime.²⁰⁴

This first erosion of the model of neutrality has found a consolidation, on the legislative plane, with the adoption of the DSM Directive. Article 17, applicable to the category of online content-sharing service providers defined by Article 2(6), attributes to such providers a direct role in the act of communication to the public of the works uploaded by their users, for which an authorisation of the right holders becomes necessary (Art. 17(1), Directive (EU) 2019/790). The paradigmatic passage is confirmed by Article 17, paragraph 3, that excludes expressly the application of the hosting safe harbour of Article 14 ECD to such acts (Art. 17(3), Directive (EU) 2019/790). In absence of authorisation, the liability of the OCSSP can be avoided only if the same demonstrates to have realised its best efforts to obtain a licence, to ensure the unavailability of the specific works signalled by the right holders and, after a sufficiently motivated notice, to disable access to the infringing content and prevent its future upload (Art. 17(4), letters (a)–(c), Directive (EU) 2019/790). The legislator, in other words, does not limit himself anymore to ask the platform to remain neutral: he attributes to the same a direct responsibility of management

²⁰³ Court of Justice of the European Union (2010) *Google France SARL and Google Inc. v Louis Vuitton Malletier SA and Others*, Joined Cases C-236/08 to C-238/08, ECLI:EU:C:2010:159.

²⁰⁴ Court of Justice of the European Union (2011) *L'Oréal SA and Others v eBay International AG and Others*, Case C-324/09.

of the risk of infringement, through obligations of licensing, a reinforced notice-and-takedown and a standard of diligence modelled on best efforts.²⁰⁵

That this constitutes a true and proper new liability regime has been confirmed by the CJEU in the decision *Poland v Parliament and Council* (Case C-401/19). The Court has recognised that Article 17 DSM Directive introduces, for the concerned providers, a specific regime of liability that departs from the one previously foreseen by Article 14 ECD (*Poland v Parliament and Council*). At the same time, it has specified that such regime, in the measure in which it presupposes the utilisation of automatic tools of content recognition, implicates a limitation of the freedom of expression and information of the users, and results therefore compatible with Article 11 of the Charter only if accompanied by the safeguards foreseen in paragraph 7, 8 and 9 of the same Article 17, in particular, the protection of permitted uses, the prohibition of general monitoring obligations and the introduction of effective complaint and redress mechanisms (*Poland v Parliament and Council*).²⁰⁶

From this reconstruction emerges, therefore, a clear line of continuity. In the original system of the E-Commerce Directive, the protection of the intermediary was dependent on its neutrality: only the passive, automatic and merely technical subject could invoke the hosting immunity. The jurisprudence of the CJEU has started to erode such image where it became evident that the platform organises, indexes, promotes and monetises the contents uploaded by the users. The DSM Directive, finally, has consolidated this transition on the legislative plane, attributing to certain platforms a direct role in the communication to the public and, with it, a series of active obligations finalised to the prevention of the infringement. The European platform passes therefore, gradually, from the position of passive host, protected by a conditioned immunity, to that of active subject of the digital ecosystem, responsible in first person of the governance of the contents that the same makes available.

²⁰⁵ European Parliament and Council of the European Union (2019) *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*.

²⁰⁶ Court of Justice of the European Union (2022) *Republic of Poland v European Parliament and Council of the European Union*, Case C-401/19.

2.2.5 The Italian Approach: Administrative Speed Over Judicial Review

Among the national responses to the problem of online piracy, the Italian one deserves a separate mention. Not so much because it concerns directly the question of intermediary liability, but because it represents one of the most aggressive and technologically advanced attempts, in the European context, to translate the general principles of copyright enforcement into a concrete and operational instrument.

The legal basis of the Italian system is found in Law No. 93 of 14 July 2023, entered into force on 8 August of the same year. Through this law, new powers were attributed to the Italian Communications Authority, AGCOM, with the aim of strengthening its functions for a more effective and timely contrast of online piracy activities related to live events. On the basis of this legislative mandate, AGCOM adopted Resolution No. 189/23/CONS of 26 July 2023, which modified the existing regulation on the protection of copyright online and introduced specific provisions for the contrast of piracy related to live sports events. In particular, the blocking of domain names and IP addresses predominantly used for the illicit distribution of protected contents must take place within thirty minutes from the notification of the rightsholder, through a single technological platform with automated functioning.²⁰⁷²⁰⁸

This platform is the so-called Piracy Shield. It became operative on 1 February 2024, and allows an automated management of the notifications following the precautionary order issued by AGCOM. The mechanism works in a machine-to-machine way: the rightsholder reports the infringing content through the platform, AGCOM issues the blocking order, and the internet service providers, as well as, following the amendments introduced by the Omnibus Decree of August 2024, also VPN providers and publicly available DNS services, are required to implement the block within the thirty-minute

²⁰⁷ Italy, *Legge 14 luglio 2023, n. 93, recante disposizioni per la prevenzione e la repressione della diffusione illecita di contenuti tutelati dal diritto d'autore mediante le reti di comunicazione elettronica*, Gazzetta Ufficiale del 24 luglio 2023.

²⁰⁸ AGCOM (2023) *Delibera n. 189/23/CONS del 26 luglio 2023, recante modifiche al Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica*, Autorità per le Garanzie nelle Comunicazioni, Rome.

deadline. The blocking covers fully qualified domain names and IP addresses predominantly used for the illicit distribution of protected contents.²⁰⁹

The system has then been progressively extended. With Resolution No. 209/25/CONS of 30 July 2025, the dynamic injunctions and the use of the Piracy Shield platform were extended to all audiovisual contents transmitted live, going well beyond the original focus on sports events.²¹⁰

From a comparative perspective, the Italian approach results distinctive for at least two reasons. The first one is that it is based on an administrative rather than a judicial procedure: it is AGCOM, not a court, that issues the blocking orders, and the speed of the intervention is privileged over the traditional guarantees of judicial review. The second one is that the automatization of the process places on the rightsholder the full responsibility for the accuracy of the notification, without any ex ante verification neither by the service providers nor by the authority itself.

This model has attracted significant attention at the European level. The Commission Staff Working Document SWD(2025) 384 final of 20 November 2025, which assessed the effects of the Commission Recommendation on combating online piracy of sports and other live events, makes an explicit reference to the Piracy Shield tool in Italy, placing it among those national systems that have raised discussions on the adequacy of the safeguards in place. The same document, moreover, recalls that the Digital Services Act, which became fully applicable on 17 February 2024, has introduced a series of provisions that result particularly relevant in the context of the fight against online piracy: among these, the procedural rules on orders to act against illegal content, applicable to all providers of intermediary services, the notice and action mechanisms, the trusted flagger mechanism, and the transparency reporting obligations. It is exactly in this point that the tension between the speed-oriented logic of Piracy Shield and the guarantees required by the DSA becomes more evident, in particular, the requirement of proportionality and the

²⁰⁹ AGCOM (2023) *Delibera n. 321/23/CONS del 5 dicembre 2023, recante i requisiti tecnici e operativi della piattaforma Piracy Shield*, Autorità per le Garanzie nelle Comunicazioni, Rome.

²¹⁰ AGCOM (2025) *Delibera n. 209/25/CONS del 30 luglio 2025, recante estensione delle ingiunzioni dinamiche e della piattaforma Piracy Shield a tutti i contenuti audiovisivi trasmessi in diretta*, Autorità per le Garanzie nelle Comunicazioni, Rome.

right of the interested parties to be heard before a blocking order is implemented, and this tension represents, at the moment, one of the most open and debated questions in the European context.²¹¹

In this sense, also the position taken by the European Commission itself has been quite clear. In a letter of 13 June 2025, the Director General of the Directorate-General for Communications Networks, Content and Technology addressed Italy's Minister of Foreign Affairs, expressing in a formal way the concerns of the Commission about the compatibility of the Piracy Shield framework with EU law, and in particular with the Digital Services Act. The concerns raised were essentially three: the lack of transparency in the blocking decisions, the absence of any prior judicial review, and the concrete risk of overblocking legitimate content. And this last risk, it must be said, had already materialized in a very concrete way, as demonstrated by the incident of October 2024, in which Google Drive was temporarily blocked for all Italian users as a consequence of an erroneous notification submitted through the platform.²¹²

The concrete dimensions of this risk have been documented, for the first time in an empirical and systematic way, by the academic study of Sommesse, Sperotto, Prado, van der Ham and Affinito, conducted at the University of Twente and accepted at the international conference CNSM 2025. By reconstructing and analyzing the blocking activity of the platform through a validated dataset, the authors found that, from 1 February 2024 to 4 June 2025, the platform issued a total of 3,782 blocking orders, covering more than 10,900 IP addresses and 42,600 domain names. Among the resources affected, more than 500 confirmed websites resulted to be completely unrelated to any illegal streaming activity, representing therefore a direct and documented form of collateral damage. The study also found that approximately 24% of the blocked IP addresses belonged to leased address space, which suggests that illegal streaming operators tend to continuously rotate their infrastructure in order to evade the blocks, raising serious doubts about the long-term effectiveness of the system, in addition to the

²¹¹ European Commission (2025) *Commission Staff Working Document SWD(2025) 384 final: Assessment of the effects of Commission Recommendation (EU) 2023/1018 of 4 May 2023 on combating online piracy of sports and other live events*, Brussels, 20 November 2025.

²¹² European Commission (2025) *Letter of the Director General of DG CONNECT to Italy's Minister of Foreign Affairs Antonio Tajani on the compatibility of the Piracy Shield framework with EU law*, 13 June 2025.

risks of collateral damage for those who subsequently inherit those same IP addresses. On the basis of these findings, the authors urged policymakers to reconsider the core principles of the blocking approach, observing that its broad impact on legitimate services and the potential risks for national infrastructure may outweigh the intended benefits.²¹³

Seen in this broader perspective, the Italian Piracy Shield represents a significant experiment in the field of automated copyright enforcement, and one that raises fundamental questions about the balance between effectiveness and fundamental rights that, as has been seen throughout this chapter, lies at the heart of the entire debate on intermediary liability.

2.3 Comparative Analysis: U.S. vs EU Approaches

Considering the two systems in a joint perspective, it results possible to observe that the United States and the European Union follow different legal paths, but try to give an answer to problems that result, in the substance, very similar. In the American system, the framework is structured in a clearer way around a combination of common law doctrines, as contributory and vicarious liability, and the statutory safe harbors of the DMCA, which operate mainly through a reactive logic founded on the *notice-and-takedown* mechanism. This means that intermediaries are not generally required to carry out an active monitoring of contents, but they must intervene as soon as they receive knowledge of specific infringements: the intervention, therefore, collocates itself for the major part on an ex post plane.²¹⁴²¹⁵

In the European Union, on the contrary, the system starts from the E-Commerce Directive, which also provides safe harbours, but places a stronger emphasis on the idea of neutrality of the intermediary, and has been progressively reshaped by the jurisprudence of the CJEU and, more recently, by the DSM Directive, in particular by

²¹³ Sommese, R., Sperotto, A., Prado, A., van der Ham, J. and Affinito, A. (2025) '90th Minute: A First Look to Collateral Damages and Efficacy of the Italian Piracy Shield', in *Proceedings of the 21st International Conference on Network and Service Management (CNSM 2025)*, IFIP / University of Twente.

²¹⁴ Ibid., p. 26

²¹⁵ Ibid., p. 30

Article 17, that introduces a more proactive role for certain platforms and requires, in some cases, preventive efforts directed to limit the availability of infringing content.²¹⁶²¹⁷

The evolution finds a particularly interesting illustration at the national level, in the Italian experience of the Piracy Shield system. Such instrument, introduced by Law No. 93 of 2023 and operational since February 2024, represents one of the most radical attempts, in the European context, to translate the general principles of copyright enforcement into a concrete operational tool, one that privileges the speed of the administrative intervention over the traditional guarantees of judicial review, and that places on the rightsholder the full responsibility for the accuracy of the notification. The tensions that this approach has generated, both at the level of fundamental rights and in terms of compatibility with the DSA, as evidenced by the formal concerns expressed by the European Commission in June 2025, show well how the search for effectiveness in the fight against piracy can enter in conflict with other values that the legal system is called to protect at the same time.²¹⁸

Notwithstanding these differences, both systems present a similar underlying tension. On one side, they try to protect innovation and the functioning of digital services through a limitation of intermediary liability; on the other side, they seek to ensure an effective enforcement of copyright in an environment where direct infringers result often difficult to individuate and to control. The result is that neither of the two models offers a complete or perfectly balanced solution.

The American approach, more flexible and case-driven, exposes itself to the risk of under-enforcement and of strategic behaviours on the part of the platforms; the European approach, that is becoming always more interventionist, as demonstrated precisely by the DSM Directive, the DSA and the national experiments such as the Italian one, exposes itself instead to the opposite risk of over-enforcement and of a greater pressure on the platforms to control the activity of the users, with the consequent dangers for the freedom of expression and for the openness of the internet that the academic literature has started to document in a systematic way.

²¹⁶ Ibid., p. 43

²¹⁷ Ibid., p. 50

²¹⁸ Ibid., p. 64

In this sense, even if the legal tools adopted are different, both systems converge toward the same structural challenge: the individuation of a sustainable balance between the protection of intellectual property, the role of the intermediaries and the preservation of fundamental freedoms in the digital environment.

CHAPTER III

Enforcement and Intermediary Liability in the Digital Music Market: The Sony v. Cox Case

3.1 From Rights Allocation to Enforcement in the Digital Environment

In the first chapter, it is described the importance gained by rights allocation and enforcement in this field. It is a process that has been going on for centuries, but just in the last decades had some concrete improvement. A lot of aspects are still left on behalf of national courts decisions, with broad guidelines, especially for a creative field like copyright; for this reason the enforcement has still some problems to being implemented homogenously.

This difficulty is not accidental. Copyright law is built on a constitutional tension that has never been fully resolved: the rights must be broad enough to give to the authors a sufficient incentive to create, but at the same time limited enough to allow the others to use and to build upon those works.²¹⁹ In the United States, this balance is not just a policy preference but a proper constitutional requirement, the Patent and Copyright Clause gives to the Congress the power to enact copyright law specifically to promote the progress of science and useful arts, which means that a protection that goes beyond what is necessary to incentivize the creation is not only undesirable, but arguably unconstitutional.²²⁰ This structural ambiguity at the foundation of copyright law is one of the reasons for which the enforcement has never been simple, and why the expansion of digital technologies made the problem dramatically more visible.

In the digital environment this is even harder to control. In particular with digital streaming, which is the dominant way in which music consumption happens. For example, the 83% of music revenue in the United Stetes in 2020 came from digital streaming.²²¹

The rapid development of technologies that permit low-cost reproduction of data and information has dramatically changed the issues arising in copyright law. The commercial

²¹⁹ Bohannon, C. (2008) 'Copyright harm, foreseeability, and fair use', *Washington University Law Review*

²²⁰ Ibid.

²²¹ Priest, E. (2022) The Future of Music Copyright Collectives in the Digital Streaming Age.

creative industries are characterised by high costs of production of original material, a high failure rate for new commercial product, and near-zero costs of content reproduction. This also means a massive proliferation of infringement in both commercial uses of copyrighted materials (e.g., pirated versions of CDs, DVDs, etc.), and non-commercial uses of copyright material by consumers in their everyday (digital) lives.²²²

To understand why enforcement became so structurally difficult, it is necessary to look at what the internet actually changed in practical terms. Before the digital era, copying was expensive and physically constrained, the paradigm of copying technology was the printing press, a machine that might be owned by a small business but certainly not by a household. The law was relatively effective at controlling a limited number of large, identifiable machines. But the combination of the personal computer and the internet transformed this completely: a typical household came to possess the equivalent of a printing press, a record-stamping plant, and a film production facility, all connected to a near-zero-cost worldwide distribution network.^{223 224} This shift did not just change the scale of potential infringement, it changed its nature. Before the internet, using a copyrighted work did not necessarily involve copying it; after the internet, even the simple act of reading, accessing, or listening to content produces multiple digital copies automatically. Copyright law, which had always been triggered by the act of copying, suddenly became relevant to virtually every interaction with digital content.²²⁵

What makes this particularly difficult to manage is that the expansion of copyright protection over time, which today covers not only the direct copying but also the preparation of derivative works that modify, transform, or adapt the original work in any way, has made it increasingly hard to understand when a use actually causes a harm to the copyright owner and when instead it simply deprives them of a potential benefit that they were never in the position to exploit in the first place.²²⁶ This distinction matters enormously for the enforcement: a system that treats every technical violation as an actionable infringement regardless of the actual harm will inevitably produce over-

²²² Ibid.

²²³ Solum, L.B. (2005) 'The Future of Copyright', *Texas Law Review*, 83(4), pp. 1137–1172.

²²⁴ Lessig, L. (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press.

²²⁵ Ibid., Solum (2005)

²²⁶ Bohannon, C. (2008) 'Copyright harm, foreseeability, and fair use', *Washington University Law Review*

enforcement, while a system that is not able to identify the harm with clarity will struggle to protect the legitimate interests.

In the digital age, where most dealings with copyright material are potentially infringing reproductions, the question of what rights users have to make uses of copyright material has become increasingly important to resolve.²²⁷ It became important to analyze and consider the limits that exist to the liability of intermediaries who facilitate these uses through cloud and other services, as individuals increasingly make use of ‘cloud’ services to retain, store, and share content. In the absence of copyright reform, there is a possibility that intermediaries cannot be certain of their potential exposure for the services they provide, even where most uses are likely non-infringing.²²⁸

Over the last two decades, copyright owners have often responded to the challenges of copying in the digital environment through strategies of enforcement and deterrence. Copyright owners have sought to shift user behaviour and the social norms that support infringement through education campaigns, high profile lawsuits against both intermediaries and individual users, and, most recently, decentralised warning and enforcement through internet service providers. None of these approaches have so far been able to substantially reduce copyright infringement.²²⁹ The absence of lawful and convenient digital services, offering timely and affordable access to copyright material, appears to be a key driver of infringement. Since ‘born digital’ information is very easy to copy and distribute, the prospect of eliminating all forms of illegal copying is near zero.²³⁰

For these reasons, it is necessary to clarify the role of intermediaries and to better define the scope of their liability.

The allocation of liability for online intermediaries is an increasingly important policy issue as more activities move online and are structured by a small number of powerful

²²⁷ Flew, T., Suzor, N. and Liu, B.R. (2013) Copyrights and copyfights: copyright law and the digital economy. *International Journal of Technology Policy and Law*, 1(3), pp. 297–315.

²²⁸ *Ibid.*, p. 25

²²⁹ *Ibid.*

²³⁰ *Ibid.*

platforms. While the liability of online intermediaries first appeared as a technical issue with the rise of Internet Service Providers (ISPs) in the 1990s, the focus has now shifted to large global platforms that organise communication and provide access to content.²³¹ That the enforcement of copyright in the digital environment is structurally complex, and not only from a legal theory perspective, is confirmed also by the empirical data. A comprehensive study of almost one thousand copyright infringement cases filed in US federal courts between 2005 and 2008 showed that, when copyright litigation becomes contentious, it becomes significantly more contentious than other types of civil litigation, producing almost double the number of substantive court decisions compared to comparable civil cases, and a higher rate of trials.²³² This suggests that the uncertainty embedded in copyright doctrine translates directly into practical difficulties in enforcement, making the resolution of disputes harder and longer than in other areas of law. Furthermore, and relevant for the context of digital music enforcement, the same study documented how the file sharing litigation campaign, which was almost entirely driven by Fortune 1000 recording industry companies acting through standardised, serial complaints, ended abruptly in 2008 precisely because it proved unsustainable as an enforcement strategy.²³³ The sheer volume of cases, combined with the low defendant response rate and the predominantly voluntary terminations, revealed that mass litigation was not an effective tool to actually reduce infringement, but rather a form of deterrence with limited and temporary impact.

It is precisely in this context that the legislative responses on both sides of the Atlantic must be understood. In the United States, the US Digital Millennium Copyright Act (DMCA) was approved by the Congress in 1998. It amended some American copyright law to innovate them, taking into account the digital evolution. There were three main updates: establishing protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down; encouraging copyright owners to give greater access to their works in digital formats by providing them with legal protections against

²³¹ Erickson, K. and Kretschmer, M. (2019): Empirical approaches to intermediary liability

²³² Cotropia, C.A. and Gibson, J. (2014) 'Copyright's Topography: An Empirical Study of Copyright Litigation', *Texas Law Review*

²³³ Ibid.

unauthorized access to their works (for example circumventing encryption); and making it unlawful to provide false copyright management information (for example, names of authors and copyright owners, titles of works) or to remove or alter that type of information in certain circumstances.²³⁴

Although the DMCA is limited to copyright and a single jurisdiction, it has become the dominant model for intermediary liability globally, both through its influence on legislation and through the global practices of major platforms. In fact, the volume of takedown notices has increased dramatically over time. One study analysed over 501,000 notices covering almost 57 million individual takedown requests. Music accounted for approximately 60% of all notices in the dataset. Much of this enforcement activity is conducted by third-party agents acting on behalf of rights holders, including trade associations and specialised enforcement firms.²³⁵

In the European Union, the innovation guided by the digital era is mainly represented by, the E-Commerce Directive which provides conditional liability exemptions for intermediary service providers, that apply when providers do not have actual knowledge of illegal activity or information and act expeditiously to remove or disable access once such knowledge is obtained.²³⁶

Unlike the DMCA, the E-Commerce Directive does not prescribe a detailed notice-and-takedown procedure, and is often described more broadly as a ‘notice-and-action’ regime.²³⁷

Also, under Directive (EU) 2019/790 on copyright in the Digital Single Market, the role of online content-sharing service providers has been significantly redefined. In particular, Article 17 establishes that such providers perform an act of communication to the public or making available to the public when they give access to copyright-protected works

²³⁴ United States Copyright Office (1998). The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary. Washington D.C.: U.S. Copyright Office.

²³⁵ Erickson, K. and Kretschmer, M. (2019): Empirical approaches to intermediary liability

²³⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on electronic commerce [2000]

²³⁷ Ibid.

uploaded by their users, thus they are directly responsible.²³⁸ As a consequence, these platforms are required to obtain authorisation from the relevant rights holders, for example through licensing agreements. In the absence of such authorisation, service providers may be held liable for unauthorised acts of communication to the public, unless they demonstrate that they have made best efforts to obtain authorisation, ensured the unavailability of specific works for which rights holders have provided relevant information, and acted expeditiously to disable access to or remove infringing content upon receiving a sufficiently substantiated notice.²³⁹

The Directive therefore introduces a system in which the responsibility of platforms is active and has specific obligations aimed at preventing the availability of infringing content within the digital environment.

Over-enforcement could happen, in both, the European and American systems. It occurs when lawful content is removed due to incorrect or overbroad notices. Providers may have incentives to remove content quickly to avoid liability, even when the legality of the content is uncertain. But this is not what happened in the *The Sony v. Cox Case*: the over-enforcement did not happen, Cox Communication was not found liable but lost access to the DMCA safe harbor for failure to act.

3.2 Factual Background of the Case

This case is related to music piracy, a phenomenon that became more and more relevant and frequent with the evolution of internet and digital services, and that in the years covered by this case was at the center of a broader legal battle between the music industry and the new digital world. To better understand this case it is important to address some topics, that are all strictly connected to each other.

To start from the beginning, it is necessary to understand how the technology that is at the basis of this case actually works. The peer-to-peer file sharing, and in particular the BitTorrent protocol, is not like a simple download from a website. In this system, in fact, every user that downloads a file becomes at the same time also an uploader of that same

²³⁸ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright in the Digital Single Market [2019]

²³⁹ Ibid.

file, which means that the distribution of the content is decentralized and happens simultaneously among thousands of users.²⁴⁰ This makes the control of the phenomenon extremely difficult, because there is no single server to shut down, and the content spreads almost by itself. This technical element is important because it helps to understand both the scale of the infringement problem and the difficulty of attributing a direct responsibility to a subject like Cox, that after all is only providing the internet connection.

The main actor of this case is Cox Communications, an internet service provider, that is commonly abbreviated as ISP, that provides services like internet, telephone, and cable television to millions of users across the United States. Like all the ISPs, Cox finds itself in a peculiar position: on one side it has a contractual obligation to provide the service to its subscribers, and on the other side it is technically in the middle between the rights holders and the people who infringe those rights. The anonymity that the internet protocol, the IP, guarantees to the users within peer-to-peer networks made it particularly difficult to identify and stop the infringers, and this is one of the reasons why the music industry decided to go after the ISPs rather than, or in addition to, the individual users.²⁴¹

This approach, however, was not new at all. As Cotropia and Gibson show in their empirical study of copyright litigation, the recording industry had already experimented with a massive litigation campaign against individual file sharers between 2003 and 2008, filing what the authors themselves call "cookie-cutter" lawsuits, that is, essentially identical complaints filed on a large scale against thousands of defendants. That campaign was eventually abandoned, and the industry shifted its strategy toward putting pressure on the ISPs directly, which is exactly the context in which the Cox case was born.²⁴²

The period covered by the infringement notices in this case is approximately 2012-2014, and this timing is not at all casual. Those were in fact years of deep transformation for the music industry. Spotify had arrived in the United States only in 2011, and the streaming market was still in its very early phase. According to the IFPI Digital Music Report 2015, overall recorded music revenues in 2014 fell slightly by 0.4% to \$14.97 billion, and for

²⁴⁰ Johnsen, J.A. (2005) *Peer-to-peer networking with BitTorrent*. UCLA Samueli School of Engineering.

²⁴¹ Cox Communications, Inc. v. Sony Music Entertainment (2026) Supreme Court of the United States

²⁴² Cotropia, C.A. and Gibson, J. (2014) 'Copyright's Topography: An Empirical Study of Copyright Litigation', *Texas Law Review*, 92(1981)

the first time in history digital revenues equalled physical format sales, each representing 46% of total revenues. Subscription streaming was still a minor component, representing only 23% of digital revenues, with an estimated 41 million people worldwide paying for a music subscription service, up from 28 million in 2013.²⁴³ The major record labels, Sony included, were still trying to understand how to navigate this transition, and in this context the enforcement of copyrights became even more aggressive, because every single infringement represented not only a legal violation but also a direct economic threat in a moment in which the industry was struggling to find a stable revenue model.

To monitor the infringements, Sony and the other plaintiffs relied on MarkMonitor, a company specialized in the protection of intellectual property online. The system used by MarkMonitor works in an automated way: it scans the peer-to-peer networks looking for IP addresses that are sharing files identified as protected by copyright, and when it finds one, it generates automatically a notice of infringement that is then sent to the ISP responsible for that IP address. During the period covered by the case, MarkMonitor sent to Cox exactly 163,148 notices identifying IP addresses of Cox subscribers.²⁴⁴

Most of the ISPs, in response to this kind of pressure coming from the music industry, joined a voluntary system called the Copyright Alert System, which established a common protocol for responding to the infringement notices. Cox, however, decided not to join this system, and instead developed its own internal policy. In 2014, Cox created a graduated response system based on the notices that it received from MarkMonitor: after the second notice for the same subscriber, Cox would send a warning; after additional notices, Cox would temporarily terminate the internet access of that subscriber until a response was received; and after thirteen notices, the subscriber was subject to the permanent termination of the service.²⁴⁵

In theory, this system seems reasonable enough. In practice, however, it had a fundamental problem that Sony pointed out with particular insistence at trial: the so-called "revolving door" problem. The subscribers who were terminated could in fact simply

²⁴³ IFPI (2015) *Digital Music Report 2015*. Published by RIAA.

²⁴⁴ Cox Communications, Inc. v. Sony Music Entertainment (2026) Supreme Court of the United States

²⁴⁵ Ibid.

reapply for the service and obtain a new account, which means that the termination was not really a deterrent. At trial, Sony argued, and the evidence seemed to confirm, that Cox was perfectly aware of this problem but did nothing to solve it. The numbers in this sense speak for themselves: during the entire claim period, Cox terminated only 32 subscribers for copyright infringement, while it terminated hundreds of thousands of subscribers for non-payment during the same period.²⁴⁶

This brings us to another element that is very important for understanding the legal theories of the case, and in particular the theory of vicarious liability. Cox was a commercial company that made money selling internet subscriptions, and fast internet connections, exactly the kind that is needed to download large files through BitTorrent, were one of its main selling points. At trial, Sony argued that Cox had a direct financial interest in not terminating the infringer subscribers, because at the end of the day they were paying customers. This argument, that Cox was in some way benefiting economically from the infringement that it had the power to stop, is at the core of the vicarious liability theory, which on appeal the Fourth Circuit dismissed, finding that this theory could not be sustained on the facts of the case.²⁴⁷

To complete the picture, it is also worth mentioning that Cox had a contractual relationship with its subscribers that explicitly prohibited the use of the connection to post, copy, transmit or disseminate content that infringes copyrights. This means that Cox was not indifferent to the problem in formal terms: it had the contractual tools to act against the infringers, a fact that the Supreme Court itself later acknowledged when it noted that Cox had affirmatively discouraged infringing activity through these contractual terms.²⁴⁸ The problem, as the trial made very clear, was that having those tools on paper and actually using them are two very different things.

²⁴⁶ *Sony Music Entertainment v. Cox Communications*, No. 1:18-cv-00950 (E.D. Va. 2019).

²⁴⁷ *Sony Music Entertainment v. Cox Communications*, 93 F.4th 222 (4th Cir. 2024).

²⁴⁸ *Cox Communications, Inc. v. Sony Music Entertainment* (2026) Supreme Court of the United States

3.3 The Legal Issue: Contributory Liability and ISP Responsibility

Historically, the ISP responsibilities went through major changes; at the beginning it was considered liable just when there was an active role in the infringement, but lately in the last decades, even passive roles are analyzed. This is the reason why some instrument like the Digital Millenium Copyright Act (DMCA) were introduced, to put a limit on the ISP responsibility and have a general balance, avoiding the over-enforcement. In this case it is been crucial the deifinition of the ISP role, which firstly was found liable, but then at the end was acquitted.

This Court has recognized two categories of secondary liability, which means liability for the copyright infringement of another. Those two categories are “contributory” liability and “vicarious” liability. This case concerns mostly contributory liability, which requires that a provider intended its service to be used for infringement; while vicarius would mean deriving financial benefit ftom the infringement.²⁴⁹

In this case, the infringement happened between 2013 and 2014, when some of Cox’s internet subscribers used peer-to-peer file-sharing networks, such as BitTorrent, to download and distribute copyrighted songs owned by numerous record companies and music publishers, including Sony Music Entertainment and other major companies, (the “Plaintiffs”).²⁵⁰ These record companies, through the Recording Industry Association of America (RIAA), hired a company called MarkMonitor to monitor illegal file sharing and notify internet service providers when infringement was detected. MarkMonitor sent Cox over 163,148 notices of infringement during the relevant period;²⁵¹ in response Cox operated a “thirteen-strike” policy, under which it warned or temporarily suspended subscribers after repeated notices, but in practice it rarely terminated service for copyright infringement, while regularly terminating service for nonpayment.²⁵²

Sony sued Cox in the United States District Court for the Eastern District of Virginia. On Sony’s telling, Cox profited directly from the infringement and had a right and ability to

²⁴⁹ Ibid.

²⁵⁰ Cox Communications, Inc. v. Sony Music Entertainment (2026).

²⁵¹ Ibid.

²⁵² Ibid.

supervise the direct infringers. According to Sony's allegations, Cox was liable for willfully infringing 10,017 copyrighted works, subjecting it to up to \$1.5 billion in statutory damages.²⁵³

To understand why this case became so significant, it is important to consider what kind of harm the law should actually recognize in situations like this one. As Bohannon argues, copyright law needs a theory of harm that is connected to its constitutional purpose, which is to promote creative progress, and not every technical violation of an exclusive right should automatically be considered an actionable harm.²⁵⁴ In her view, the harm that copyright law should care about is only the one that would affect a reasonable copyright owner's decision to create or distribute a work in the first place, what she calls a harm to the "foreseeable markets" of the copyright holder.²⁵⁵

This framework becomes very relevant in the Cox case, because the central question was not just whether infringement happened, it clearly did, through BitTorrent, but whether Cox, as an intermediary, had contributed to that harm in a legally meaningful way. The Court had to decide, in other words, whether Cox's passive role in allowing infringement to continue was the kind of conduct that copyright liability was designed to address, or whether it was something more remote and less foreseeable.²⁵⁶

What makes this even more complicated is the distinction between harm that comes from market substitution, users downloading songs instead of buying them, and harm that is more speculative, for example the idea that Cox, by not terminating subscribers, had somehow endorsed or enabled a broader culture of infringement. Bohannon is very clear that only the first type of harm should count: courts should not presume harm just because a technical violation occurred, but should require actual proof that the copyright owner lost sales or licensing revenues that she would have otherwise obtained.²⁵⁷

²⁵³ Ibid.

²⁵⁴ Bohannon, C. (2008) 'Copyright harm, foreseeability, and fair use', *Washington University Law Review*, 85(5), pp. 969–1031.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

The Sony majority itself, she reminds us, required "a meaningful likelihood of future harm" and not just an abstract entitlement to compensation.²⁵⁸

In the Cox case, this question of harm becomes even more pressing, because the damages requested, up to \$1.5 billion, were based on statutory damages, which do not require proof of actual loss. This is precisely the kind of situation where, without a clear theory of what harm copyright is meant to prevent, the risk of over-enforcement becomes very real.²⁵⁹

3.4 The Court's Reasoning

At first, after the suing by Sony, in the United States District Court for the Eastern District of Virginia, It was found that Cox's infringement was willful. In the District Court, not only Sony prevailed as to both contributory and vicarious liability, but also it was denied to Cox the statutory safe harbor under the Digital Millennium Copyright Act (DMCA) and allowed the case to proceed to trial on theories of vicarious and contributory copyright infringement.²⁶⁰ The jury found in favor of Sony on both theories, found Cox's infringement willful, and awarded \$1 billion in statutory damages.²⁶¹

Although later on appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the jury's finding of willful contributory infringement, reasoning that supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.²⁶² This decision is crucial for what concerns ISP liabilities, because it introduces a broader approach that goes beyond the earlier decisions of the Supreme Court. But for what concerns the vicarious liability verdict, the decision changed: Cox had not receive sufficient financial benefit from the infringements to prove the liability; also they vacated the damages award, remanding the case for a new trial on damages.²⁶³

²⁵⁸ Ibid. Bohannon, C. (2008)

²⁵⁹ Ibid.

²⁶⁰ Sony Corp. of America v. Universal City Studios, Inc. (1984) 464 U.S. 417.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

This case did not end with the Fourth Circuit decision, in fact the Supreme Court reviewed the case. The crucial point was the broader approach used for the assessment of contributory infringement: in their opinion it needed to be narrower.

The Supreme Court began the analysis from a fundamental principle: the Copyright Act does not expressly impose liability for infringement committed by another. Secondary liability is therefore not clearly codified in the statute but derives from judicial precedent. For this reason, the Court decided that it is reluctant to expand such liability beyond what has already been recognized in prior cases.²⁶⁴

The principle to be declared liable says that, there is the need to be the *intent* that its service be used for infringement. According to the Court's precedents, this intent can be established only in two situations: either the provider *induces* infringement, or it provides a service tailored to infringement.²⁶⁵ This introduces a strict requirement of intent, excluding broader theories based merely on awareness or negligence.

The Court then clarified the meaning of inducement, relying on *Grokster*. Inducement requires active encouragement through specific acts, such as promoting or marketing a service as a tool for copyright infringement.²⁶⁶ In *Grokster*, liability was found because the companies built their business model around infringing uses and explicitly encouraged such behavior. In contrast, in this case, the Court did not find evidence that Cox promoted or encouraged infringement. In fact, Cox sent warnings, suspended services, and terminated some accounts, which indicates the absence of active encouragement.²⁶⁷

The second crucial point concerns whether the service is tailored to infringement. A service falls into this category only if it is not capable of substantial or commercially significant non-infringing uses. The Court said that a product with legitimate uses cannot give rise to contributory liability, even if it can also be used for infringement.²⁶⁸

²⁶⁴ Ibid.

²⁶⁵ Ibid., Sony Corp. of America v. Universal City Studios, Inc. (1984) 464 U.S. 417.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

Applying this reasoning, the Court declared that Internet access clearly has extensive lawful uses and is therefore a neutral service, not designed or adapted for infringement.

Another key part of the decision is the rejection of liability based on mere knowledge. The Court repeatedly states, relying on *Kalem* and *Grokster* cases, that knowing that a service may be used for infringement is not enough to establish the required intent.²⁶⁹ At the same time, a failure to take sufficient steps to prevent infringement does not, by itself, create contributory liability. This sharply limits the scope of intermediary responsibility.

This is where the Supreme Court directly criticized the Fourth Circuit and the broader standard used. The Supreme Court rejected this approach, explaining that it goes beyond the two recognized categories, inducement and tailored services, and conflicts with established precedent.²⁷⁰ In doing so, the Court refused to recognize a new form of contributory liability based solely on knowledge and inaction.

Applying these principles, the Court decided that Cox is not contributorily liable, since Cox did not induce infringement, and its service was not designed for infringing uses. Holding Cox liable simply for failing to terminate users would improperly expand secondary liability beyond the limits established by precedent.²⁷¹

Also, the Court addressed the argument concerning the DMCA safe harbor. Sony contended that denying liability would render the safe harbor meaningless. The Court rejected this argument, explaining that the DMCA does not create liability but rather provides a defense.²⁷² This means that failure to meet the safe harbor requirements does not preclude a provider from arguing that its conduct is not infringing; so the loss of safe harbor protection does not automatically result in liability. The Court establishes a narrow and strict standard: contributory liability requires proof of intent, and neither knowledge of infringement nor failure to act is sufficient on its own.²⁷³

²⁶⁹ Ibid.

²⁷⁰ *Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 U.S. 417.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

3.4.1 Structural Challenges and the Gap Between Law and Reality

The *Sony v. Cox* decision, however, it does not exist in a vacuum, and in fact it reflects a tension much deeper that has been building since the early days of digital copyright law. This tension is the one between the formal legal standards that courts apply and the social and technological reality in which those standards must operate.

One of the most important structural problems that this case brings to light is the question of what happens when the illegal behavior becomes, in practice, the norm for millions of people. As Lessig already observed, and as Solum later discussed in his analysis of *Free Culture*, when millions of people engage in behavior that is technically unlawful, the enforcement of the law becomes not only technically difficult, but also socially very difficult to justify.²⁷⁴

In the context of peer-to-peer file sharing, this dynamic it created what Solum calls a mismatch between copyrights and copynorms: the law said one thing, but the social norms of an entire generation said something completely different. The consequence is that any enforcement strategy that tries to hold intermediaries responsible for the behavior of their users, it risks to produce results that appear disproportionate or even arbitrary to large parts of the public.

This problem is not only theoretical. In *Sony v. Cox*, the jury awarded \$1 billion in statutory damages, a figure that, regardless of its legal correctness, it communicates something important about the difficulty of calibrating enforcement in a world where infringement happens at massive scale and through infrastructure that also serves entirely legitimate purposes. The Court itself seemed to be aware of this, which is one of the reasons why it chose to narrow the standard for contributory liability rather than expand it.

A second structural problem is the risk of over-enforcement, that is to say, the risk that intermediaries, in order to avoid liability, will take down or block content that is in fact

²⁷⁴ Solum, L.B. (2005) 'The Future of Copyright', *Texas Law Review*, 83(4), pp. 1137–1172. [Review of: Lessig, L. (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press.]

lawful. This risk is particularly relevant when the enforcement is delegated, formally or informally, to private actors that use automated systems. As Frosio has shown in the European context, content recognition technologies such as YouTube's Content ID are not capable to distinguish between infringing uses and lawful ones, including uses that fall within exceptions like fair use or parody.²⁷⁵ The result is what Frosio calls a "chilling effect" on freedom of expression: users and creators self-censor or lose access to legitimate content not because a court has decided against them, but because an algorithm has flagged their content and no human being has reviewed the decision.

The *Sony v. Cox* decision, by refusing to extend contributory liability to mere knowledge and inaction, it can be read as an implicit recognition of this risk. If an ISP could be held liable simply for knowing that some of its users were infringing, the rational response would be to over-terminate, to cut off service to anyone who is accused, regardless of whether the accusation is justified or not. This would effectively privatize the enforcement, transferring the power to decide who can access the internet from courts and legislatures to private companies that operate under the threat of liability. Frosio describes exactly this dynamic in his analysis of the European Digital Single Market Strategy, where he argues that the push towards proactive monitoring and filtering obligations is turning online intermediaries into a sort of internet police, enforcing content standards not through transparent legal obligations but through algorithmic tools developed and controlled by a handful of major platforms.²⁷⁶

The tension between over-enforcement and under-enforcement is, in this sense, a structural feature of intermediary liability rather than a problem that any single decision can solve. The *Sony v. Cox* ruling chooses a particular point on this spectrum, one that is closer to the under-enforcement side, by requiring proof of intent and refusing to impose liability for passive facilitation. Whether this is the right point, it is a question that goes beyond the legal analysis: it requires a judgment about the relative costs of allowing some infringement to persist versus the costs of chilling legitimate uses and of delegating enforcement to private actors.

²⁷⁵ Frosio, G.F. (2017) 'Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy', *Northwestern University Law Review*, 112, pp. 19–46.

²⁷⁶ Ibid.

A third and final structural challenge is the divergence between the American and European approaches to these questions. While the Supreme Court in *Sony v. Cox* was narrowing the standard for secondary liability and reaffirming the importance of intent, the European Commission was moving in almost the opposite direction, proposing in its Digital Single Market Strategy a framework that would require platforms to implement proactive filtering and monitoring obligations in order to close the so-called "value gap" between rightholders and online platforms.²⁷⁷ This divergence is not simply a matter of different legal traditions: it reflects fundamentally different assumptions about who should bear the costs of copyright enforcement and what the role of intermediaries should be in a digital society. In Europe, the tendency has been to see platforms as beneficiaries of infringing activity who should therefore be required to contribute to its suppression. In the United States instead, at least after *Sony v. Cox*, the tendency has been to see platforms as neutral infrastructure providers who should only be held responsible when they actively encourage or enable infringement.

This transatlantic divergence it creates real problems for global platforms that must comply with both regimes simultaneously, and it raises deeper questions about whether a coherent international framework for intermediary liability is possible or even desirable.

3.5 Economic and Structural Implications for the Music Industry

As discussed in the first chapter, copyright law is based on a fundamental balance, between granting exclusive rights to authors, or other figures like producers, and granting the public access to the work, with the broader aim of protecting innovation, from an economical and social perspective. This is the reason why enforcement plays a crucial role: it must effectively protect right holders but also grant that over-enforcement does not happen, to avoid restrictions that harm the public access.

The case study, and in particular the Supreme Court decision, highlight how even in front of infringements, the enforcement is not granted.

²⁷⁷ Ibid.

As explained above, after examining the DMCA framework and the claims of vicarious and contributory liability that Sony claimed, Cox was not declared liable. This outcome highlights how technological innovation, particularly the development of the Internet, is creating significant challenges for copyright holders. In this situation they have been victims of material that was downloaded and distributed illegally, without, however, the law recognizing Cox's liability, and therefore without any form of compensation.

From an economic perspective, this situation implies a loss of remuneration for right holders, in addition to the legal costs. However, even the quantification of this economic harm is not straightforward. As Lessig has argued, not all unauthorized file sharing produces the same kind of damage: there is a fundamental difference between users who would have purchased the content anyway, and users who would have never bought it regardless, for whom the unauthorized copy does not actually represent a lost sale.²⁷⁸

This distinction finds an important empirical confirmation in the economic literature on music downloading. Rob and Waldfogel (2004), in a study conducted on a sample of American college students, have tried to measure in a precise way the relationship between illegal downloading and music purchases. Their results show that each downloaded album reduces purchases only by approximately 0.2 units, a significantly lower figure than a one-to-one displacement, which is what the recording industry has always claimed. A particularly relevant finding, for the purposes of this analysis, concerns the valuations that users attribute to the music they download: downloaded albums result to be valued between a third and a half less than purchased ones, which suggests that a significant part of the downloaded music would not have been purchased anyway, even in the absence of file sharing.²⁷⁹ This data supports, on an empirical level, exactly the distinction that Lessig proposes on a theoretical level.

But the contribution of Rob and Waldfogel goes beyond the simple question of sales displacement. Their analysis also considers the effects of downloading on social welfare, and here the results are even more complex and, in a certain sense, counterintuitive. Even

²⁷⁸Solum, L.B. (2005) 'Legal theory lexicon: fair use', *Legal Theory Blog*.

²⁷⁹ Rob, R. and Waldfogel, J. (2004) 'Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students', *NBER Working Paper*, No. 10874. National Bureau of Economic Research, Cambridge, MA.

if downloading reduces per capita expenditure on music, in their sample from \$126 to approximately \$101, it at the same time produces an increase in consumer welfare of around \$70 per capita. This happens because, before the advent of digital distribution, record labels operated substantially as single-price monopolists in a market with very low marginal costs, a structure that by its nature generates significant deadweight loss: there are consumers who would be willing to pay something for a certain album, but not enough to cover the price fixed by the monopolist, and therefore they simply renounce to it. Downloading has in part filled this gap, allowing users with low valuations to access music that they would have never purchased, transforming what would have been deadweight loss into consumer surplus.²⁸⁰

This distinction is particularly relevant in cases like *Sony v. Cox*, where the alleged infringement involved a massive and heterogeneous number of users, making it practically impossible to calculate the real economic damage suffered by the right holders. The difficulty of quantifying harm with precision is therefore not only a theoretical problem, but also a concrete obstacle in the litigation process, that further complicates the possibility for copyright holders to obtain adequate compensation.

But from the structural point of view, the concern is even deeper: this raises crucial uncertainties about the efficiency of the enforcement, which is applied on a case-by-case basis and subject to strict legal standards. In this regard, it is also worth considering what empirical research on copyright litigation reveals: more than 80% of copyright cases terminate voluntarily, through settlement or dismissal, without any court reaching a decision on the merits.²⁸¹

This means that judicial enforcement, even when it is activated, rarely produces a clear and definitive outcome. While limiting over-enforcement is necessary to preserve the balance underlying copyright law, finding an Internet Service Provider not liable despite the occurrence of infringement may weaken trust in the system. To fully understand why this is problematic, it is necessary to consider what kind of harm copyright law is actually designed to protect against. As Bohannon has argued, copyright harm is legally relevant

²⁸⁰ Ibid.

²⁸¹ Cotropia, C.A. and Gibson, J. (2014) 'The upside of intellectual property's downside', *UCLA Law Review*, 61(4), pp. 884-942.

only to the extent that it is likely to affect a reasonable copyright owner's decision to create or distribute the work in the first place, what she defines as an ex ante incentive.²⁸²

From this perspective, the problem is not only that Sony did not receive compensation, but that outcomes like the one in *Sony v. Cox* risk becoming structurally predictable: when right holders cannot foresee if and how the law will protect them against large-scale infringement facilitated by intermediaries, the very incentive to invest in the creation and distribution of works is potentially undermined. The empirical picture described by Rob and Waldfogel adds a further layer of complexity to this reasoning: if a significant part of downloading does not actually translate into lost sales, the economic harm suffered by right holders is structurally difficult to demonstrate and quantify, and this makes even more difficult to construct a solid legal case.

Such outcomes therefore risk undermining the incentives of authors, producers, performers and other right holders to create and disseminate their works, thereby potentially affecting the overall functioning of the creative industries and challenging the very balance upon which copyright law is built.

²⁸² Bohannon, C. (2008) 'Copyright harm, foreseeability, and fair use', *Washington University Law Review*, 85(5), pp. 969–1031.

CONCLUSIONS

The journey that this work has tried to make is not a simple one, and perhaps it is exactly this complexity that makes it worth doing. Starting from the very foundations of copyright, why it exists, who it protects, and what it is supposed to achieve, and arriving to the concrete reality of a case like *Sony v. Cox*, what emerges is not a clear and reassuring picture, but something much more ambiguous and, in a certain sense, honest.

The case of *Sony v. Cox* is, in the end, a story about a system that tried to adapt itself to a world that had changed faster than it could follow. The law was built in a moment in which copying was expensive, physical, and limited. The internet made it free, invisible, and unlimited. And the question of who should be responsible for this transformation - the platforms, the ISPs, the users, the legislators - is one that nobody, so far, has been able to answer in a way that is truly satisfying.

The Supreme Court's decision to narrow the standard for contributory liability, refusing to extend it to mere knowledge and inaction, is legally coherent with the precedents. That is true, and it would be wrong to ignore it. But it is also true that the outcome of the case which saw Cox not liable, Sony without compensation, and 163,148 infringement notices that produced, in the end says something uncomfortable about the state of enforcement. Not because Cox was necessarily acting in bad faith, but because the system allowed a situation in which repeated, documented, massive infringement could happen without producing any real legal consequence for the intermediary that had both the knowledge and the technical ability to do something about it.

This is the mirror that the case holds up to the environment in which copyright operates today. It is an environment that is still, in many important ways, not fully at pace with the digital world. The DMCA was written in 1998, when streaming was not even imaginable as the dominant form of music consumption, and when the idea that a single ISP would receive 163,000 infringement notices in two years would have seemed absurd. The safe harbor regime was designed with good intentions, and probably with good results for its time. But it was designed for a different internet, and the gap between what the law says and what the digital reality looks like has only grown larger since then.

The European approach, with the DSM Directive and the obligations introduced by Article 17, represents an attempt to close this gap from a different direction, by asking platforms to do more, to be more active, to take on a proactive role in the prevention of infringement. Whether this is the right answer is genuinely uncertain. The risk of over-enforcement, of algorithmic filtering that removes legitimate content along with the infringing one, is not a theoretical risk: it is already happening, as the Italian Piracy Shield experience demonstrated in a very concrete way when Google Drive was temporarily blocked for millions of users because of an erroneous automated notification. The system that was supposed to be fast and efficient produced collateral damage of a dimension that would have been unacceptable in any judicial proceeding.

What both approaches - the American and the European - have in common is that they struggle, in different ways, with the same fundamental problem: the enforcement of copyright in the digital age requires decisions that are too fast, too numerous, and too technically complex to be made well by either courts or algorithms alone. Courts are slow, and by the time a decision is reached, the infringing content has already circulated for years. Algorithms are fast, but they are not capable of understanding context, fair use, parody, or the difference between a legitimate clip and an infringing one.

The result is a system that is neither fully effective nor fully fair. Right holders, as the empirical data discussed in Chapter III shows, do not always receive compensation proportionate to the harm they suffer. Users, on the other side, risk losing access to legitimate content because a machine flagged it incorrectly. And intermediaries find themselves in the middle, trying to comply with legal standards that were not designed for the scale at which they operate.

Perhaps the most honest conclusion that this analysis allows to draw is that the law in this area is still, genuinely, unfinished. Not in the sense that nothing exists, the DMCA, the E-Commerce Directive, the DSM Directive, the Digital Services Act, and the national experiments like Piracy Shield are all real legislative responses to real problems. But they are responses that were written at different moments, for different purposes, by different legislators, and they do not form a coherent whole.

The international dimension of copyright enforcement, which this thesis has touched upon but not explored fully, makes the problem even harder: infringement does not stop at national borders, but the law does, and the gap between global digital reality and territorially fragmented legal systems is one that no directive and no Supreme Court decision can bridge on its own.

What *Sony v. Cox* leaves, then, is not a solved question, but a better-defined unsolved one. It clarifies where the limits of secondary liability are under U.S. law, and in doing so it implicitly signals where the legislative response will have to come from, if it comes at all. It shows that the balance between protecting right holders and preserving the openness of the internet is not achievable through judicial interpretation alone. And it demonstrates, more clearly than any theoretical argument could, that the music industry and the digital infrastructure that distributes its content are still operating in different legal worlds; worlds that will need, sooner or later, to find a way to coexist more honestly than they do today.

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