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To what extent should copyright law be constrained by the right to freedom of expression in the digital world?

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Introduction

The Internet has radically changed the way we live our lives, and how we express, receive and exchange information and ideas. Today, this open and neutral landscape is the primary source of knowledge and the most popular medium of communication for millions of people. Given these new digital realities, a battle between powerful copyright-holders and ordinary Internet users has emerged. While the interaction of copyright law and the principles of freedom of expression may not seem conflicting at first glance, the Internet has been at the heart of an alarming expansion of copyright claims at the expense of free speech and the right to access information.

New digital technologies enable people to access copyright works in new ways. Authors and content-creators are fighting hard, to the detriment of users, to prevent illegitimate uses of their works. The recent expansion and enforcement of copyright law in various states, as well as the development of the Internet, raise the question of the extent to which copyright law should be constrained by freedom of expression. How can both rights be properly balanced in a digital environment? How should this balance be addressed by the courts? In order to resist against the ever-growing threat that copyright claims pose to freedom of information and expression in the digital environment, it is essential that copyright law needs to be reconceived.

In a first part, this dissertation highlights the clash between copyright and freedom of expression. It starts with a review of the nature of the relationship between both fundamental rights, followed by an analysis of relevant jurisprudence. This dissertation also emphasises the important role of online intermediaries, which have the power to control the flow of information on the Internet. Accordingly, issues such as notice-and-takedown and website blocking will inevitably be addressed, as they are a by-product of the tension between both rights. In a second part, this dissertation suggests ways in which freedom of expression can be accommodated within copyright law. The ultimate goal is to balance both rights at every stage of interference. The creation of new speech-friendly mechanisms in copyright law is highly needed. But, apart from technology and legislation, the balance of copyright

and freedom of expression can also be achieved by the courts, which play a vital role in safeguarding fundamental rights.

1. The relationship between copyright and freedom of expression

In order to understand the intersection between both rights, it is essential to analyse copyright and freedom of expression under the umbrella of fundamental rights. Both rights are enshrined in international and national human rights instruments.

A) The conflicting rights to be balanced

1) Freedom of expression

The right to freedom of expression generally includes the right to freely express information and hold opinions, as well as the right to seek, receive and impart information and ideas. The right to freedom of expression is not only recognised by international instruments, like the Universal Declaration of Human Rights (UDHR)[1] and the International Covenant on Civil and Political Rights (ICCPR)[2], but also by regional legal documents, like the European Convention on Human Rights (ECHR)[3] and the Charter of Fundamental Rights of the European Union (EUCFR)[4]. The right is also enshrined in various national constitutions, the most famous being the First Amendment to the United States' Constitution.

Freedom of expression and the right to access information are crucial for various reasons. First, referring to Justice Oliver Wendell Holmes, Jr.'s dissent in *Abrams v. United States*[5], the concept of the marketplace of ideas, which emerged in First Amendment case law, suggests that freedom of speech is essential in order to find the truth. Inspired by John Stuart Mill's writings, the theory of the marketplace of ideas holds that only an absolutely open discussion leads to the discovery of the

[1] Article 19 UDHR
[2] Article 19 ICCPR
[3] Article 10 ECHR
[4] Article 11 EUCFR
[5] Abrams v. United States, 250 U.S. 616 (1919)

truth. Therefore, the freedom for individuals to express both their popular or unpopular views is crucial for a well-functioning society, where the truth arises out of the competition of ideas. A second free speech theory also stems from American case law and holds that freedom of expression is necessary for the functioning of democracy. In *Whitney v. California*[6], Justice Louis Brandeis stated that 'those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They believed that freedom to think as you will and to speak as you think is indispensable to the discovery and spread of political truth'. The right to freely express an opinion is crucial in a democracy because it protects every individual's right to speak in a political debate. Finally, freedom of expression and information is indispensable for an individual's self-fulfilment and the enjoyment of other fundamental rights, such as the freedom of religion, the right to education or the freedom of association. A person's personality can only develop if he or she can autonomously and freely engage in self-expression without boundaries. The maximisation of the flow of information, self-expression and the incident right to gain knowledge are essential to promote education, creativity and wisdom.

These contentions necessarily justify the fundamental right to freedom of speech. However, they seem quite overoptimistic and idealistic. It is thus universally recognised that the right to freedom of expression is not an absolute right and may be subject to restrictions. Those limitations need to be strictly prescribed and must pass a three-part test. In order to restrict an individual's freedom to speak or receive information, courts need to assess whether any such restriction is prescribed for by law, necessary and proportionate with the purported aim, and pursue one of the purposes set out in international or European law[7].

2) Copyright

The status of copyright as a fundamental right, however, is not as obvious and explicit than that of freedom of expression. One argument is that copyright is essential to provide authors with a right to benefit from the protection of material and

[6] Whitney v. California, 274 U.S. 357 (1927)
[7] Article 19(3) ICCPR, Article 10(2) ECHR, Article 52(1) EUCFR

moral interests resulting from their scientific, artistic or literary works. In this context, the purpose of copyright is to promote creativity and spread cultural expression within society. It can then be argued that copyright is a form of property, the right to protection of which is also guaranteed by various human rights instruments[8]. Creative efforts of authors and artists are a form of property which should be protected.

Copyright is both an economic right to copy and disseminate an idea, and a moral right to decide how a creative work can be used by others[9]. It intends to prevent unfair use of a person's creative efforts for a certain period of time. Copyright infringement occurs when a creative work is used, distributed or recreated without the consent of the copyright owner. Therefore, copyright aims to provide an incentive for authors and artists to publish their works since they are guaranteed that the right to their work will be protected and that their name will be mentioned when their work is used in any way. By protecting their works, creators do not only express their ideas, but also contribute to the exchange of cultural, artistic and scientific information. The power to control some information flows justifies the concept of copyright. While copyright-holders are enjoying a monopoly regarding the exploitation of their works, the public has a right to access their ideas and expressions. Consequently, copyright intends to establish 'available access to copyrighted work on the basis of the respect for authors' rights'[10].

B) The nature of the complex relationship between copyright and freedom of expression

Two different approaches exist regarding the nature of the inter-relationship between copyright and freedom of expression. The first approach sees the relationship as one of co-existence, while the second approach sees it as one of conflict, where both rights clash.

[8] Article 17(2) EUCFR, Article 1 First Protocol of the ECHR

[9] David Henningsson (2012), 'Copyright and Freedom of Expression in Sweden and the European Union: The Conflict Between Two Fundamental Rights in the Information Society', Lund University, Master's, p. 17

[10] Irina V. Shugurova and Mark V. Shugurov (2016) 'Copyright or Right-To-Copy? Towards the Proper Balance between Freedom of Expression and Copyright in Cyberspace', *Journal of Advocacy, Research and Education*, Vol. 7 No. 3, p. 153

1) A relationship of co-existence

The idea that the relationship between copyright and freedom of expression is one of co-existence or co-operation suggests that both rights are thought to be complementary. This co-existence can be explained by the purpose of copyright, which is the promotion of creative or scientific innovation and the enrichment of cultural heritage and public discourse, as well as the dissemination of knowledge and information goods[11]. According to Graham Smith, 'the predominant standpoint has been that copyright is a fundamentally beneficial engine for free expression, rather than a restriction'[12]. People have a legitimate expectation that their right to express themselves freely as well as their right to access and impart information will be promoted and fostered rather than restrained by copyright.

In this context, the American experience proves to be an interesting source for comparison. In the United States, it is assumed that copyright and freedom of expression do not collide. The United States' Supreme Court has stated that since the Copyright Clause and the First Amendment were adopted in close time, this proximity indicates that copyright's limited monopolies are compatible with free speech principles and that copyright's purpose is to promote the creation and publication of free expression[13]. The Supreme Court held that the framers of the Constitution intended copyright itself to be the engine of free speech[14]. This approach that copyright and freedom of expression co-exist in a relationship of co-operation suggests that both rights essentially share one goal, which is the broad dissemination of information and ideas.

Another argument underlying the absence of a conflict between copyright and freedom of expression is that copyright law already incorporates built-in safeguards that sufficiently protect freedom of expression. Some authors argue that copyright's internal principles, in particular, the idea/expression dichotomy and the defence of

[11] Article 19 Organisation (2013), 'The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age', *International Standards Series*, p. 9
[12] Graham Smith (2010), 'Copyright and freedom of expression in the online world', *Journal of Intellectual Property Law & Practice*, Vol. 5 No. 2, p. 1
[13] Eldred v. Ashcroft, 537 U.S. 186 (2003)
[14] Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1983)

fair dealing, are sufficient to resolve any potential conflict between both rights, and there would be no reason to look outside copyright law[15]. Consequently, there is enough room for individuals to freely express themselves by taking ideas or non-original expressions by exercising an internal copyright exception[16].

However, recent case law departs from the idea that both rights are complementary and suggests that the conflict between copyright and freedom of expression becomes more and more apparent.

2) A relationship of conflict

The British newspaper *The Guardian* once notably stated that 'copyright law strikes its own balance between an author's right to property and the public's right to information, but copyright is by its nature an interference with the right to freedom of expression'[17]. This statement is accurate insofar as it confirms the possibility of a clash between both rights. Even American lawyer and Professor Melville Nimmer abandoned the American approach that both rights co-exist peacefully and acknowledges that they 'held "side by side," may, in fact, be contradictory'. He introduces the absolutist idea that the American Copyright Act in itself is a law made by Congress that abridges the freedom of speech, and therefore, contradicts the First Amendment[18]. This simple reflection constitutes a useful starting point for accepting that, in fact, copyright and freedom of speech are, at least to a certain degree, incompatible. Consequently, it can be argued that copyright restricts an individual's ability to freely speak or write about the copyright owner's protected expression, as he must first obtain permission from the owner. Therefore, the mere existence of the exclusive right of a copyright owner to control and prevent the dissemination of their ideas and works constitutes a barrier to other persons' freedom of expression.

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[15] Estelle Derclaye (2008) 'Intellectual property rights and human rights: coinciding and cooperating. In: Intellectual property rights and human rights: enhanced edition of Copyright and human rights', *Information law series (18) Wolters Kluwer Law & Business, Alphen aan den Rijn*, p. 142

[16] Ibid.

[17] Charles Swan, 'When Does Freedom of Speech Trump Copyright? (February 2013), available at <https://www.theguardian.com/media-network/media-network-blog/2013/feb/13/freedom-speech-trump-copyright>

[18] Melville B. Nimmer (1970) 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?', *UCLA Law Review*, Vol. 17, p. 1181

The incompatibility between both rights can be explained by the opposing interests of the public, on the one hand, and creative authors, on the other hand. While the general public wants to access and use copyright-protected works in the broadest manner possible, authors want to enjoy the highest level of protection and enforcement of their exclusive rights in their works. The exclusive right to certain expressions owned by the copyright-holder potentially prevents others from expressing themselves in the same manner. This approach was confirmed by Lord Phillips in *Ashdown v. Telegraph*[19], where he stated that 'copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright'[20].

For example, copyright-holders can prevent individuals from freely accessing scientific works published in academic journals on the Internet, which, in turn, has a negative impact on people's ability to form and express a personal opinion about a particular scientific topic. To put it differently, creating subsequent 'down-stream' works often relies on the possibility of accessing and studying previous 'up-stream' creations[21]. The conflicting nature of the relationship between both rights becomes clear whenever a court enforces a copyright because it is restraining what may be said or heard[22]. The fact that copyright both fosters and hinders people's freedom of expression has accurately been explained by Neil Netanel as the 'copyright paradox'[23].

C) Reasons leading to the increasing tension between copyright and freedom of expression

In the past, copyright law and freedom of expression laws have always been regarded as autonomous legal regimes. The acknowledgement of the tension

[19] Ashdown v. Telegraph Group Ltd. (2001)
[20] *Ashdown v. Telegraph*, § 33
[21] Enrico Bonadio (2011), 'File Sharing, Copyright and Freedom of Speech', *European Intellectual Property Review*, Vol. 33 No. 10, p. 2
[22] Edmund T. Wang (2011), 'The Line between Copyright and the First Amendment and why its vagueness may further free speech interests', *Penn Law Journal of Constitutional Law*, Vol. 13 No. 5, p. 1474
[23] Neil W. Netanel (2008), 'Introduction, Copyright's Paradox', *Oxford University Press*, UCLA School of Law Research Paper No. 08-06

between both rights is only a recent phenomenon. The dramatic development of the digital environment and the expansion of the copyright framework in different jurisdictions are the two main factors leading to the growing engagement in the issue.

1) The development of the Internet

The question of the nature of the relationship between copyright and freedom of expression as well as the tension between both rights is especially acute in the digital world, where copying is cheaper, quicker, easier, and results in creating an exact copy of the original, but where detection is simple, and where technology offers an unprecedented control of creative works[24]. Any operation that potentially limits an Internet user's activity, including actions such as blocking, restricting or removing online content, engages the right to freedom of expression. Such actions will potentially undermine an Internet user's legitimate right to freely communicate, as well as to receive and express information and ideas.

The Internet is crucial for people and organisations to gain knowledge, develop personal opinions and spread creativity. It can be argued that a genuine right to knowledge and access to information online is deduced from the fundamental right to freedom of expression. The Internet phenomenon Wikipedia is the best example of how people nowadays gain their knowledge. Scientific research and online academic publications should be freely available in a democratic society. The importance of knowledge resources is crucial for supporting creativity, innovation and social progress. For this reason, the Internet has become the main tool for dissemination of intellect and is indispensable for maintaining a free flow of information.

Furthermore, having access to a broadband connection has increasingly been perceived as being on the same level as having access to public goods, such as healthcare or education. Several jurisdictions have introduced a legal, human right to Internet access. Among European countries, Finland and Estonia were the first to pass a law stating that Internet access is essential for the exercise of a fundamental

[24] Michael D. Birnhack (2008), 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act', *Tel Aviv University Law Faculty Papers*, Paper 55, p. 15

human right. In the EU, Article 3-bis of Directive 140/2009[25] highlights the importance of the right for EU citizens to have an Internet connection and expressly refers to the ECHR. The conflicting nature of both rights becomes more and more apparent within cyberspace, as Internet users tend to shift from passive consumers of copyright-protected material to active co-creators of copyrighted works. The new communicative environment provided for by the progressively growing development of the Internet necessarily justifies stronger copyright enforcement.

2) The expansion of the copyright framework

Cross-border uses of online copyright-protected content have dramatically increased in the information age, especially since the Copyright Directive was adopted in 2001. The Directive requires the member states to provide copyright-holders with exclusive reproduction and distribution rights, as well as the right to communication to the public[26]. A typical illustration of this communication right is making a copyright protected work available to the public by publishing it on a website. This shows how the Internet has created new methods by which people can express themselves in ways that potentially infringe copyright laws[27]. Consequently, the new different means by which people access, receive, use or distribute creative and scientific works lead to an increased need for new laws that protect copyright holders in light of the new digital realities.

The increase of digital tools available for accessing, sharing or modifying artistic, literary or scientific, copyright-protected works, explains the outrage of the creators of those works, whose exclusive rights are violated on a daily basis. Many Internet users are not even aware that they engage in infringing activities while surfing the Internet. On the one hand, copyright-holders legitimately request stronger legal protection in order to effectively promote their creative works in the digitally networked environment. Authors rely, for instance, on very controversial technical protection measures, such as encryption or digital locks, which allow them to control unauthorised copying or transmission of their products. On the other hand, they are

[25] Directive 140/2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services
[26] Articles 2 and 3 Copyright Directive 2001
[27] David Henningsson (n. 9), p. 23

regularly claiming an infringement of their exclusive rights without thoroughly checking if there has been a real violation. Therefore, a balanced set of rules is crucial to protect copyright-holders from infringement, without thereby giving them the possibility to misuse their exclusive rights.

This demand of an expansive copyright framework is essentially illustrated by a proposal for a Directive on copyright in the Digital Single Market, issued by the European Commission in September 2016[28]. With this proposal, the Commission aims to increase cross-border access to online content, broaden the possibilities to use copyright-protected materials in education, research and cultural heritage and improve the copyright marketplace in general. Various artists supported the reform, arguing that Internet platforms need to take more responsibility to detect copyright infringement. Opponents, on the other hand, feared that the new framework would undermine Internet freedom and creativity. Ultimately, the proposal was rejected for containing some highly controversial provisions. One Article imposed a 'link tax' on online platforms to pay news organisations in order to link to their news articles, while another provision required that every content that is uploaded online would need to be filtered for copyright infringement. The rejection of the Directive is thus a great relief for online intermediaries as they would have to bear high costs to adapt to the new provisions.

In the United States, the trend has also been to strengthen the protection of copyright-holders by expanding copyright's scope and duration. As Lawrence Lessig correctly notes, 'now copyright affixes automatically, it extends for the life of the author plus seventy years without any effort by the copyright owner, and the copyright owner need make no effort at all to continue to enjoy this government-granted monopoly'[29]. These new attempts of copyright measures have not been counterbalanced with a similar development of the rights and freedoms of individual Internet users, including their right to free expression and to receive information and

[28] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280

[29] Lawrence Lessig (2001), 'The Future of Ideas: The Fate of the Commons in a Connected World', *Random House*, New York, p. 264

ideas[30]. This constant proliferation and strengthening of copyright law underline the conflict-oriented nature of the relationship between both rights[31].

D) The attitude of Europe's courts regarding the conflict between copyright and freedom of expression

Europe's two highest courts, the ECtHR and the CJEU, have recognised the conflict between copyright and freedom of expression on the Internet. By adopting a fundamental rights approach, both courts have tried to seek a fair balance between the competing interests. Additionally, one remarkable case outside of Europe exemplifies the conflict between freedom of expression and intellectual property and demonstrates the fundamentally different approaches of the American and Canadian courts.

1) The European Court of Human Rights

The rights guaranteed by the EU Charter correspond to the rights enshrined in the ECHR[32]. Therefore, the case law of the Strasbourg Court is highly relevant when interpreting the scope of rights contained in the Charter[33]. One decision that accurately reflects the ECtHR's approach is the judgement of 10 January 2013 in *Ashby Donald v. France*[34]. It is the first Internet-related case in which the ECtHR analyses the clash between copyright and freedom of expression[35]. The Court unambiguously acknowledged that copyright law can have an adverse effect on freedom of expression. In this case, three photographers published pictures taken at a fashion show in Paris on a website without permission of the fashion houses, thereby infringing French copyright law. The applicants argued in particular that their conviction violated their right to freedom of expression and information.

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[30] Yin Harn Lee (2015), 'Copyright and Freedom of Expression: A Literature Review', *CREATe Working Paper*, 2015/04, available at: <http://www.create.ac.uk/publications/copyright-and-freedom-of-expression-a-literature-review/>, p. 32.
[31] Yin Harn Lee (n. 30), p. 32
[32] Article 53 EUCFR
[33] David Henningsson (n. 9), p. 14
[34] ECtHR, Ashby Donald and others v. France, 10 January 2013
[35] Dirk Voorhoof and Inger Høedt-Rasmussen, 'ECHR: Copyright vs. freedom of expression', January 2013, available at http://copyrightblog.kluweriplaw.com/2013/01/25/echr-copyright-vs-freedom-of-expression/

The ECtHR confirms the existence of a conflict between the right to freedom of expression and information and the right of property, which are both fundamental rights protected by the Convention and its Protocols. The Court states that a conviction based on a breach of copyright law for illegally publishing copyright-protected works constitutes an interference with the applicants' rights to freedom of expression and information. In this case, the interference was justified as it was in accordance with paragraph 2 of Article 10 of the ECHR. This judgement marks the beginning of a growing tendency of the Court towards accepting external limitations co copyright protection, in order to strike a balance between copyright and free speech values.

Although the ECtHR did not find a violation of Article 10 in this case, the decision enunciates the very important principle of the possibility for copyright law to restrict and undermine freedom of expression, as well as the fact that copyright's internal safeguards and exceptions may not be sufficient to guarantee Article 10 rights. Regulating this interference requires a balancing exercise between both rights involved. However, the Strasbourg Court did not undertake such a balancing test, as it considered that, due to the commercial nature of the speech, the domestic courts enjoyed a particularly wide margin of appreciation which was not overstepped by the domestic judge's decision to rule in favour of the fashion designers' right to property[36].

While the ECtHR acknowledges that the balancing exercise must differ according to whether the content was created in the general interest of the public or not, it failed to explain the weight of the criteria of commerciality and demonstrates some unwillingness to account for some essential free expression considerations, such as the form of the expression[37]. There is a pressing need for the Court to develop a clear set of criteria in order to balance Article 10 of the Convention and Article 1 of the First Protocol to the Convention[38]. The judgement underlines the importance for copyright law to be strictly scrutinised and be compliant with freedom of expression rights. The decision suggests that, in addition to the defences and exceptions

[36] *Ashby Donald v. France*, §§ 41-42
[37] Yin Harn Lee (n. 30), p. 45
[38] Dirk Voorhoof and Inger Høedt-Rasmussen (n. 35)

already incorporated into copyright law, external safeguards should be applied to guarantee free expression and information rights.

2) The Court of Justice of the European Union

The Luxembourg Court has also dealt with cases of copyright mechanisms which potentially undermine freedom of expression values, especially in relation to intermediary liability. In *Scarlet v. SABAM*[39], the CJEU had to decide whether an Internet service provider (ISP) could be held liable for copyright infringement for allowing Internet users to communicate copyright-protected works to the public. In fact, SABAM, a Belgian collecting society brought proceedings against Scarlet, an ISP, for payment of royalties for copyright-protected music that is downloaded or streamed by Internet users from Scarlet's catalogue without authorisation. On the one hand, SABAM sought a declaration stating that Internet users infringed copyright through the use of Scarlet's services, and on the other hand, SABAM sought an injunction, ordering Scarlet to take all measures necessary in order to block the unlawful use of file-sharing by its customers. The CJEU concluded that the injunction sought by SABAM was incompatible with the EU principle of prohibiting general monitoring. Accordingly, an ISP cannot be obliged to adopt disproportional or excessively costly measures to end copyright infringing activities. In fact, the Court acknowledged that the fundamental right to intellectual property 'must be balanced against the protection of other fundamental rights'[40]. This is the only relevant statement by the Court, which limited itself to merely listing the effect of the conflict of both rights.

Another judgement regarding balancing intermediary liability is *UPC Telekabel*[41]. The CJEU was, again, confronted to the imposition of an injunction ordering an ISP to remove copyright infringing material. In contrast to *Scarlet v. SABAM*, the Court provided some tangible guidelines in this case. It held that, on the one hand, a blocking measure cannot unnecessarily deprive Internet users of the possibility of lawfully accessing the information available, and, on the other hand, that the

[39] CJEU, Scarlet Extended SA v. SABAM, C-70/10, 24 November 2011
[40] Ibid. § 44
[41] CJEU, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, C-314/12, 27 March 2014

measure cannot have the effect of preventing unauthorised access to the protected subject-matter[42]. However, the judgment has a mixed outcome. While it protects copyright-holders against copyright infringement by allowing blocking measures, it restricts Internet user's freedom to access certain information online.

This balancing jurisprudence of the CJEU on the clash between copyright and freedom of information can be criticised for its ambiguous and vague wording. The Court repeatedly invokes the need for striking a fair balance, but then fails to explain how this balance should be achieved. Online intermediaries gain little from the CJEU's case law, as they still don't have clear guidance on their role as gatekeepers, as well as on how to identify whether a content is copyright infringing or not.

3) The conflicting approaches of American and Canadian courts

A Canadian judgement, granting an extraterritorial order, has recently triggered a controversial debate about the role of online intermediaries in relation to intellectual property infringement. This case, *Google v. Equustek*[43], arose from a patent dispute between a manufacturer of networking devices and its distributor, which allegedly began producing and selling the devices as its own, using confidential information. Following the right-holder's request, a lower court ordered Google to de-list the infringer's web pages from Google's search engine globally. This global de-indexing order was upheld by both the Court of Appeal and the Supreme Court of Canada, despite Google's argument that the order would interfere with Internet users' right to freedom of expression. Justice Abella, who delivered the opinion of the majority of the Supreme Court, stated that 'this is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods'[44]. I my opinion, this decision is very troubling, as such a global injunction hugely interferes with the fundamental right to freedom of expression and information. The Court completely

[42] Ibid. § 64
[43] Google Inc., v. Equustek Solutions Inc., 2017 1 SCC 34 (Can.)
[44] *Google v. Equustek*, § 48

ignored and undervalued the free speech issues at stake. In fact, the Canadian judgement is unsatisfactory for setting a dangerous precedent, as it conflicts with the laws of other states. While injunctions are needed to enforce intellectual property rights on the Internet, the Canadian Court absolutely overstepped its power by suggesting that any court in the world can edit online speech, whether or not the content is lawful in another country.

The case entered a second phase, when Google sought a temporary injunction in the United States, blocking the enforceability of the Canadian order. The District Court of Northern California granted the injunction and held that the order was not enforceable in the United States and directly interferes with the First Amendment. It accorded Google the protection of Section 230 of the Communication Decency Act (CDA). This reasoning is very troubling, as the Court misconstrues the whole scope of Section 230. The CDA should not be used to prevent the enforcement of court orders. Besides, the District Court undermined the principle of international comity that govern the enforcement of international court orders. While this cryptic assessment can also be criticised for failing to analyse the nature of the speech that Google was ordered to de-list, it is nevertheless convincing in light of the protection of freedom of expression on the Internet. Of course, every ISP should not be given the immunity of Section 230, because de-indexing is an important enforcement tool online. But, the decision of the District Court is crucial in so far as it stops the global trend of courts ordering that content is deleted from the Internet on a world-wide basis. No court in the world should have the power to regulate the entirety of the Internet. In my view, the American judgement should be seen as a favourable example for courts in countries with weaker speech protections.

The *Google v. Equustek* case shows how fundamentally different the approaches of two jurisdictions can be in relation to the conflict between freedom of speech and intellectual property. It also highlights the importance of online intermediaries, which play a vital role in the intersection of both rights.

E) Intermediary liability

In the digital environment, besides the copyright owner and the Internet user, a third actor is involved in the relationship between copyright and freedom of expression. This third actor, an Internet intermediary, can be an online service provider, a social network or a search engine, who hosts copyright-protected content. In this context, it is clear that it is difficult to avoid the contentious issue of whether online Intermediaries should be liable for copyright infringement concerning content provided by third parties. Various copyright-related issues on the Internet have important implications for freedom of expression and need to be analysed more profoundly.

1) Notice and takedown

Notice and takedown, an intermediary liability provision, is a process conducted by Internet hosting services in response to allegations that content infringes copyright or, in general, is unlawful. The statutory basis for this content removal procedure can be found in Article 14(1) of the E-Commerce Directive. Notice and takedown procedures are constantly used as a weapon by copyright-holders, particularly by large movie and music companies, who are fearing violation of their exclusive rights in their creative works. Such procedures can potentially result in an unjustified interference with the right to freedom of expression of ordinary Internet users, as well as online intermediaries, as the material sought to be removed may in some cases be non-infringing. This adverse effect on freedom of expression and information is often overlooked when powerful copyright-holders voice their concerns.

It is obvious that these procedures incentivise Internet hosts to unquestioningly take down material without an adequate notice or evidence of actual infringement, as they have little interest in defending the rights of Internet users and have much to lose if they ignore filed notices. Consequently, potential legitimate content is deleted, which has a chilling effect on freedom of expression. This chilling effect is, for several reasons, especially acute in light of copyright. First, as filing a notice does not require high costs or a lot of effort, notice-and-takedown may be used to have content removed that is simply not copyright-protected. Second, there is a considerable risk that takedown notifications are issued by entities that are not copyright owners or their authorised representatives. Furthermore, it is also possible that notices are

issued against uses of copyright-protected material, that is, in fact, permitted under the fair defence exception. Last, where a takedown notification demands the removal of allegedly copyright infringing content, the whole website that also includes a wide variety of non-infringing material, risks being entirely removed.

While the ECtHR has not yet reached a decision in a case of notice-and-takedown grounded on copyright infringement, it has ruled on notice-and-takedown issues based on other grounds, such as defamation. In those cases, the Court stated that, 'if accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved'[45]. The ECtHR is thereby suggesting that notice-and-takedown systems, if adequately tailored, could potentially be a solution in themselves to the issues they create. There is indeed potential that such procedures are, at least partially, suitable for finding a proper balance in cases of intermediary liability, and especially where notices are based on copyright infringement. It is obvious that intermediaries are best placed to fight copyright-infringing activities, but it is unfair to let them bear all the burden. They need to rely on concrete guidance by a court. Therefore, a judgement by the ECtHR establishing a clear set of criteria regarding content removal procedures for copyright infringement would be highly needed and appreciated.

However, the current notice-and-takedown regime as provided for in Article 14(1) of the E-Commerce Directive lacks clear and detailed guidance as to how Internet intermediaries should react to notices based on copyright infringement without undermining Internet users' freedom of expression and information. In contrast to the American regime, EU legislation limits the action expected of the intermediary to only one possibility, taking down the infringing material. Article 14(1) also applies horizontally to all areas of law in which intermediary liability arises as a potential issue[46]. In the United States, the Digital Millennium Copyright Act (DMCA) establishes a specific regime for a content removal process based on copyright

[45] ECtHR, Delfi AS v. Estonia, 16 June 2015, §159, and ECtHR, MTE v. Hungary, 2 February 2016, §91

[46] Christina Angelopoulos and Stijn Smet (2016), 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability', an Authors' Original Version of an article published by Taylor & Francis in Journal of Media Law, p. 2

infringement. A more calibrated system of a permissible intermediary liability framework that distinguishes between liability for intellectual property infringements and other areas of law would also be greatly welcomed and needed in Europe.

The content removal process provided for in the E-Commerce Directive has come under severe criticism for not resulting in an adequate balance between the fundamental rights involved. The regime needs to be analysed against the Manila Principles[47], a recommended framework governing intermediary liability developed by many organisations, including the Electronic Frontier Foundation. These principles are established to create fair notice-and-takedown procedures while promoting the right to freedom of expression and the right to access information online, by balancing the rights of both online intermediaries and people requesting removal of information. According to the Manila Principles, a law should not require an online intermediary to remove or restrict content until a judicial authority orders them to do so. This is exactly the main issue with the procedure in Article 14(1), as it provides one-sided incentives to remove content to entities that do not have the legal expertise of a court[48].

Another concern is that the notice-and-takedown regime has considerably diversified over the past years. Several systems have developed, such as notice-and-stay-down, notice-and-suspension, or notice-wait-and-takedown, each addressing unlawful online material in a different manner[49]. Such procedures are very costly and require the implementation of complicated systems, as they oblige intermediaries not only to remove unlawful content but to take additional measures to ensure that it is not reposted afterwards. Online hosts are thus likely to filter the totality of their content in order to screen out unlawful material, which would necessarily result in the type of general monitoring prohibited by Article 15 of the E-Commerce Directive. Consequently, a risk of chilling effects on speech would occur, as Internet users would hesitate to express themselves online knowing that their material is being monitored.

[47] Manila Principles on Intermediary Liability, Version 1.0, 24 March 2015, available at < https://www.manilaprinciples.org>
[48] Christina Angelopoulos and Stijn Smet (n. 46), p. 15
[49] Ibid. p. 16

A possible solution that sufficiently guarantees Internet users', as well as online intermediaries' freedom of expression, are so-called notice-and-notice procedures. Under this regime, an intermediary who receives a notice of an alleged copyright infringement is merely required to forward the notice to the indicated subscriber who is associated with the infringing activity, instead of taking down the content in question. In parallel, the copyright owner is informed that the alleged end-user has been contacted. The majority of infringers would probably stop engaging in their infringing activities if they received a warning note from an ISP. This self-regulating mechanism is, so far, the fairest in place, as it does not delegate to the intermediary the whole process of determining whether a content is unlawful. Instead, Internet content providers remain middlemen, and it is up to the alleged primary infringer to choose whether to take down the content or contest the forwarded notice. Additionally, notice-and-judicial-takedown can function as a complementary all-purpose solution, if the parties do not reach a satisfactory outcome among themselves[50]. Consequently, the removal of lawful content is avoided and the freedom of expression and information is guaranteed. This notice-and-notice system has already been successfully implemented by Canada[51], which sets an exemplary attitude towards the balancing of copyright and freedom of expression.

2) Website blocking injunctions

Internet intermediaries are progressively asked to act as a copyright police and prohibit access to websites on grounds of copyright infringement. Copyright-holders adopt the increasingly popular strategy of seeking injunctions against online intermediaries in order to compel them to stop their subscribers from accessing websites that contain infringing copies of protected works. Website blocking has several negative implications from the perspective of freedom of expression. First, ordering site-blocking injunctions is questionable and may, in some cases, constitute a severe interference with Internet users' right to receive and impart information. Second, such measures may also interfere with the right to freedom of expression of the website operators and the ISPs. While it is understandable that copyright-holders want to have websites deleted that infringe their exclusive rights, blocking measures,

[50] Christina Angelopoulos and Stijn Smet (n. 46), p. 22
[51] Canadian Copyright Act, sections 41.25 - 41.26

in general, imply a constraint on fundamental rights and carry a considerable risk of over-blocking. Consequently, lawful content can potentially be removed.

The most problematic form of website blocking is, most certainly, Internet Protocol (IP) address blocking[52]. An IP address numerically identifies devices which are connected to the Internet. Since many websites often share the same IP address, blocking one of those would consequently lead to blocking all of the websites that do not infringe copyright. As noted by Justice Arnold in *Dramatico v. Sky*, 'IP address blocking is generally only appropriate where the relevant website's IP address is not shared with anyone else. If shared, the result is likely to be over-blocking'[53].

The CJEU has provided some instructions on the balancing in cases of website blocking injunctions based on copyright infringement. In *Scarlet v. SABAM*, the CJEU considered whether the granting of an injunction, aimed to compel an ISP to block a website containing files of copyright-protected musical works, would constitute a general obligation for the ISP to monitor the data of its subscribers. The Court held that such a measure would impose on the ISP an obligation of general monitoring, which is prohibited by Article 15(1) of the E-Commerce Directive. Furthermore, it stated that the blocking measure could potentially undermine the subscribers' right to freedom of expression and information, as the filtering system may not properly distinguish between legitimate and unlawful content. In *SABAM v. Netlog*[54], the CJEU arrived at the same conclusion concerning a social networking platform.

In its most recent judgement, *UPC Telekabel*, the CJEU held that a blocking injunction, framed in general terms, and prohibiting an ISP to hinder its customers to access a certain website, without specifying the precise measures to be taken, did not violate Internet users' right to freedom of information. The Court argued that the means adopted by the ISP must comply with this fundamental right, emphasising that the blocking must be 'strictly targeted' and that subscribers are accorded the

[52] Christophe Geiger and Elena Izyumenko (2016), 'The role of human rights in copyright enforcement online: elaborating a legal framework for website blocking', *Center for International Intellectual Property*, Studies Research Paper No. 2016-05, p. 20
[53] Dramatico Entertainment v. British Sky Broadcasting (2012) EWHC 1152 (Ch) (2 May 2012), § 13
[54] CJEU, SABAM v. Netlog NV, Case C-360/10, 16 February 2012

opportunity to assert their right before the national court once the implementing measures taken by the ISP were known[55]. The Court also held that the injunction should make copyright infringement difficult to achieve and needs to seriously discourage users from committing it[56]. However, it is very questionable how such a result-tailored injunction sufficiently guarantees Internet users' freedom of information.

This line of judgements by the CJEU is highly problematic, as the Court repeatedly lacked to engage in fundamental rights reasoning and provided very little guidance as to how an adequate balance between copyright and freedom of expression should be struck. As Advocate General Cruz Villalón noted in *UPC Telekabel*, 'no such balance can be said to exist in the case of an outcome prohibition not specifying the measures to be taken, which is issued against an ISP'[57]. In fact, ordering such open-textured injunctions puts ISPs in a burdensome position, as they have no indication on whether the technical measures implemented by them reach an adequate level of effectiveness. While there is still enormous room of improvement in the Court's reasoning, national courts now, at least, have a temporary set of balancing conditions to rely on whenever they are confronted to a case of a website blocking injunction grounded on copyright infringement.

It is also very regrettable that the CJEU, in its cryptic decisions, makes no reference to the case law of the ECtHR. For some reason, the freedom of an ISP to conduct a business seems to be prioritized over Internet users' freedom of information, as the former issue is regularly addressed in more detailed and definite terms than the latter[58]. Some commentators even go that far to argue that the Court's constant emphasis on the freedom to conduct a business indicates the economic and business-driven logic of its jurisprudence[59]. Finally, the Luxembourg Court seems to be a little disoriented as it forgot one of the main principles of human rights law,

[55] Ibid. §§ 56-57
[56] *SABAM v. Netlog* § 62
[57] *UPC Telekabel*, Opinion of AG Cruz Villalón, § 85
[58] Yin Harn Lee (n. 30), p. 173
[59] Evangelia Psychogiopoulou (2012), 'Copyright enforcement, human rights protection and the responsibilities of internet service providers after Scarlet', *European Intellectual Property Review*, Vol. 34 No. 8, p. 554

under which fundamental rights duties are imposed on States, and not on private entities like Internet intermediaries.

3) File sharing

File-sharing is a technology that allows a global and cheap exchange of digitised information, such as movies, music, eBooks or computer games, either via a central online server or directly between individual end-users' computers (peer-to-peer). File-sharing on the Internet is probably the most obvious form of copyright infringement and concerns most flagrantly the music and movie industries. Thousands of lawsuits have been filed by copyright-holders to stop Internet users from downloading music and movies in file-sharing networks. Downloading such content from a website is generally equivalent to copying the material. To comply with copyright law, the downloader, as well as the uploader of the content, would need to receive permission from the copyright-holder in order to legitimately exchange copyright-protected files.

Fearing violations of their 'making available' and 'communication to the public' rights, and the subsequent loss of profits, copyright-holders tend to maliciously invoke copyright provisions to end file-sharing activities. In *OPG v. Diebold*[60], the US District Court for the Northern District of California held that copyright provisions in relation to file-sharing were used 'as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property'. In addition, to directly sue individual users, they often take action against ISPs which provide the technological means for file-sharing. In the copyright-holders' view, ISPs should be held liable for acting as gatekeepers and permitting copyright infringement. This way, legitimate non-protected creative works risk being deleted, which consequently has a negative impact on Internet users' freedom to receive ideas and gain knowledge. Even when copyright-holders prefer not to enforce their exclusive rights, there is a risk of a chilling effect on freedom of expression, as many file-sharers engage in self-censorship, out of fear of being sued by copyright-holders.

[60] OPG v. Diebold, 337 F. Supp. 2d 1195, N.D. Cal. 2004

File-swapping nonetheless is extremely important to foster freedom of expression values in a digital environment. By sharing music, movies, texts, eBooks, or other material, people contribute to the cultural exchange and the marketplace of ideas. Platforms which allow people to exchange videos and leave comments, such as YouTube, are equivalent to big rooms where people face-to-face exchange opinions, ideas and information[61]. Even by passively sharing information over such platforms, users are enhancing their self-fulfilment, identity, critical thinking and sense of community. An additional speech-friendly justification of file-sharing is the fact that artistic works can only be successfully created if authors are able to access previous works of subsequent artists[62]. Inspiration is not theft, and generally strengthens creativity and originality in our society. Finally, file-sharing over online platforms also extremely favours minor, less popular, artists, who are given an opportunity to reach a larger public than when relying on traditional means of communication. This form of exchange and communication constitutes an important counterweight to powerful, copyright-supported multi-media companies. Although, file-sharing is not only relevant in the music and movie industry. Several associations, schools and universities use file-sharing technologies to facilitate communication among their members by interchanging relevant documents or research material. In our society, where education is unthinkable without having access to the Internet, these networks inevitably enhance research and educational qualities, and foster individuals' right to know.

In response to the outrage of powerful copyright-holders, several jurisdictions have elaborated a legal framework providing for the possibility to block relentless file-sharers' Internet access[63]. Disconnection from the Internet is a very sensitive sanction because it constitutes a considerable barrier to the right to freedom of expression and the ancillary right to receive and impart ideas. Such a sanction may often affect the entire family of the single alleged infringer, as a household generally relies on one and the same broadband subscription[64]. Legislation in relation to

[61] Enrico Bonadio (n. 21), p. 8
[62] Ibid.
[63] United States: Section 512(i)(1)(A) DMCA; France: Hadopi II law, which was however abolished by decree n°2013-596 of 8 July 2013
[64] Enrico Bonadio (n. 21), p. 9

Internet disconnection should be adopted in the strictest terms and conditions possible, and only be applied to the most persistent copyright infringers.

A recent phenomenon in the file-sharing context is the increase of private, contractual agreements between right-holders and ISPs[65]. Instead of directly suing alleged infringers, copyright-holders, using notice-and-takedown regimes, tend to oblige ISPs to take measures of terminating access to the copyrighted works of infringing file sharers. This suspension of Internet access is very critical as ISPs unilaterally act without any court order or other proof of actual infringement, and thus become real enforcement agents. Therefore, it is abundantly clear that these private contracts are not a viable solution for balancing copyright-holders' exclusive rights and file-sharers right to free expression, as those provisions excessively empower ISPs to the detriment of Internet users' freedom to speak and to receive information.

The ECtHR, in *The Pirate Bay v. Sweden*, has decided a case on the conflict between copyright in musical works and freedom of expression in relation to file-sharing. Indeed, the Court acknowledged that the conviction for copyright infringement of the owners of a file-sharing network violated their freedom of expression. It held that sharing, as well as allowing others to exchange, digital files online, even copyright-protected material and for profit-making purposes, was covered by the right to 'receive and impart information' under Article 10 of the ECHR[66]. This judgement is important, as it was established that Article 10 not only applies to the content of any information but necessarily also to the medium of communication and reception of the information. However, it was decided that the applicants' conviction passed the test of necessity in a democratic society, and that, therefore, the interference with their right to free expression was legitimate. It is very regrettable that the Court did not elaborate a clear set of factors to be integrated into a balancing exercise, and left a particularly wide margin of appreciation to the member states.

[65] Enrico Bonadio (n. 21), p. 15
[66] Dirk Voorhoof and Inger Høedt-Rasmussen, 'ECHR: Copyright vs. freedom of expression II (The Pirate Bay)', March 2013, available at <http://copyrightblog.kluweriplaw.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/?print=print>

Nonetheless, the ECtHR's decision is useful in so far as it proves that, in order to strike a proper balance between copyright and freedom of expression, the debate turns around the requirement of necessity in a democratic society. In order to determine if restrictions on file-sharing activities are necessary, it needs to be verified whether such limitations necessarily safeguard copyright's aims, which are the promotion of culture and creativity, as well as the right for the copyright-holders to receive a fair remuneration. In the context of transferring musical files, influential record labels have argued that file-sharing networks encourage piracy and hurt legitimate music sales. However, studies on music sales reveal that the assumption that people illegally download music instead of purchasing it is not automatically correct[67]. To the contrary, survey-based studies have demonstrated that peer-to-peer file-sharing has had no effect on music sales, and even serves as a free promotional tool for artists to reach new potential consumers[68]. Due to new digital recording technologies, the cost of producing as well as distributing musical works over the Internet has been reduced, which thus potentially causes an increase in music sales. Copyright-holders can therefore actually benefit from file-sharing networks, as they allow them to improve their overall marketing strategies. In other words, restricting file-sharing activities is not, in every case, unquestionably necessary in a democratic society.

Alternatively, reconceptualising copyright as a 'compensation right' will better serve Internet consumers' freedom to exchange information. Since it is extremely challenging in an online environment to enforce copyright-holders' exclusive rights without undermining Internet users' right to free expression, a regime based on the secure and fair rewarding of right-holders may be the best solution to serve freedom of expression values[69]. In fact, a private copy levy system, according to which a tax is imposed on the sale of electronic devices that are used by file-sharers for private copying purposes, should be established. The levy, which is paid by the providers of products, such as blank MP3 players, rewritable burning CD's or computers, is then distributed to copyright-holders depending on the success of their works. As a result,

[67] Robert Danay (2005), 'Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom', *International Journal of Communications Law & Policy*, Special Issue Global Flow of Information, p. 26
[68] Robert Danay (n. 67), p. 31
[69] Enrico Bonadio (n. 21), p. 20

users would still be able to freely share files for a private use and thus enhance their cultural knowledge. On the other hand, right-holders would get rewarded for their effort, and the purposes of copyright will be maintained. This levy system is obviously a more speech-friendly solution than terminating Internet access.

4) User-generated content

With the development of the Internet emerged the phenomenon of a massive increase in the amount of user-created content. Gradually, with digital tools available for producing such content, Internet users interact and collaborate with each other via social networking sites or video sharing platforms to create and remake their own content, and subsequently, consume the works generated by other ordinary Internet users. The modern and sophisticated technology in light of the participative web has triggered a social shift of the control of content creation into the hands of ordinary Internet users, who have become actual content providers.

Through this new medium of expression, people are able to express their ideas, criticise other people's works and stimulate their creative spirit, free from the constraints of traditional mass media. The OECD has defined user-generated content as content that 'reflects a certain amount of creative effort, and which is created outside of professional routines and practices'[70]. Compared to simple file-sharers, users who generate their own content often have stronger needs to express themselves. User-generated content has a significant expressive value, as it is often used to parody or satirise popular mass media or public figures, or to comment on and criticise various aspects of political, social and cultural life[71]. Creators of such works do not only exchange information, but actively transform or illustrate content to express a particular view. In order for a work to qualify as user-generated content, it cannot simply be copied or re-posted, but must contain some degree of originality or transformability[72].

[70] Organisation for Economic Cooperation and Development (OECD), Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking (28 September 2007)
[71] Yin Harn Lee (n. 30), p. 120
[72] Samuel Trosow (2014), 'Copyright as Barrier to Creativity: The Case of User-Generated Content', I*ntellectual Property for the 21st Century: Interdisciplinary Approaches*, Chapter 25, p. 5

The problem with user-created content published online is that it often includes portions of copyright-protected works, such as video, audio, texts, images or educational documents, generally without knowledge or permission from the right-holder. It is, therefore, crucial to define a clear scope of permissible use or borrowing of copyright-protected content in relation to creating new cultural material. The creation of user-generated content allows ordinary individuals to contribute to the marketplace of ideas. While restrictions on file-sharing primarily limit Internet users' right to receive and impart information, restrictions on user-generated content generally have a negative impact on individuals' right to freely express themselves and comment on various topics that are often in the general interest of the public. In practice, right-holders generally rely on licenses or technological protection measures, such as digital locks, to control the use of their creative works. Therefore, a balanced copyright framework needs to be construed in a way that not merely tolerates, but actively encourages the development and circulation of user-generated content. Since hundreds of millions of Internet users either create or consume user-generated content, policy-makers still face the challenge of establishing an environment where individuals are inspired and supported to use existing works in order to freely express their views and opinions on important and relevant subjects.

Safeguarding Internet users' freedom of expression requires a flexible protection for the creation of user-generated content. If a person engages in the creation of transformative or derivate content for his or her private use, or, in general, for non-commercial purposes, he or she should not be regarded as a copyright infringer. As a solution, a specific exception for user-generated content should be considered by European legislators. Section 29.21 of the Canadian Copyright Act, also referred to as the 'YouTube exception', proves to be an interesting source for inspiration, as it allows ordinary Internet users to engage in the creation of user-generated content under five conditions[73]. First, the work which is re-used must have been 'published or otherwise made available to the public'. Second, the use of the resulting user-generated content must be solely for non-commercial purposes. Third, if it is reasonable to do so, the source, such as the name of the author or performer, must be mentioned. Fourth, the user must reasonably believe that the existing work was

[73] Canadian Copyright Act, s. 29.21 (1)

not copyright-infringing. Fifth, the use of the newly created content must not have 'a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one'.

While the Canadian provision is not absolutely unambiguous, especially regarding the fifth condition, it nonetheless provides for a useful threshold for the creation of user-generated content. A similar legal provision should also be incorporated in European or national law since the Internet knows no geographical borders and issues arising out of user-generated content exist on a global scale. The integration in copyright law of a specific defence for non-commercial user-generated content would properly safeguard millions of Internet users' right to freedom of expression and thus promote knowledge and culture in our society. Of course, implementing and enforcing such a concrete defence would require a great deal of research, and policy-makers would need to establish a clear set of criteria, and particularly draw a precise, bright-line, distinction between commercial and non-commercial purposes.

2. The integration of freedom of expression values within copyright law

Apart from rethinking the scope of existing copyright mechanisms, the creation of new legal tools needs to be considered in order to sufficiently accommodate freedom of expression values within copyright law. Additionally, courts need to provide stronger guidance on the balancing of both fundamental rights.

A) Rethinking the scope of existing copyright mechanisms

In the US, as well as in the UK, courts traditionally adopt the approach that copyright's built-in safeguards are sufficiently adequate to balance the protection of copyright and allowing freedom of speech. However, various examples show that internal defences such as the idea/expression dichotomy or the fair dealing defence are too uncertain to effectively prevent copyright from undermining freedom of

speech[74]. Various other existing copyright exceptions have also proven to be inefficient concerning individuals right to know. In order to comply with the requirements of individuals' right to free expression and their subsequent right to knowledge, the application of those copyright mechanisms needs to be questioned.

1) The idea/expression dichotomy

The idea/expression dichotomy, the central doctrine of copyright law[75], states very simply that copyright protects only an author's expression in his work, but not his ideas themselves. The dichotomy is sometimes referred to as 'the line on which copyright and free speech is balanced'[76]. According to American law Professor Melville Nimmer, ideas fall on the free speech side, while the expression of an idea in a specific form falls on the copyright side of the line[77]. He concludes that this line constitutes an acceptable definitional balance, as it encroaches to a reasonable extent upon both freedom of speech and copyright[78]. In the UK, courts have also supported the theory that the idea/expression dichotomy sufficiently safeguards freedom of expression. This view is confirmed in *Ashdown v. Telegraph*, where the Court of Appeal held that 'it is important to emphasise in the present context that it is only the form of the literary work that is protected by copyright. Copyright does not normally prevent the publication of the information conveyed by the literary work. Thus, it is only the freedom to express information using the verbal formula devised by another that is prevented by copyright. This will not normally constitute a significant encroachment on the freedom of expression'[79]. As stated by Abraham Drassinower, 'the contrast between ideas and expression is a contrast between the generality of ideas and the specificity of expression'[80]. So, it can be argued that what justifies the protection of the exact words of an author is the particularisation of the expression.

[74] Edmund T. Wang (n. 22) p. 1473
[75] Abraham Drassinower (2003), 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright law', *Canadian Journal of Law and Jurisprudence*, Vol. 16 No. 1, p. 4
[76] Edmund T. Wang (n. 22) p. 1477
[77] Melville B. Nimmer (n. 18), p. 1190
[78] Ibid. p. 1992
[79] *Ashdown v. Telegraph*, § 31
[80] Abraham Drassinower (n. 75), p. 16

In fact, this dividing line between unprotected ideas and protected expression illustrates a form of balancing between copyright and the right to freedom of expression. But, bearing in mind the approach that copyright protects a form of property, this statement may, at first glance, seem paradox, because an idea rather seems like a form of property than the expression of the idea. John Perry Barlow, Internet Pioneer and EFF-founder once stated that 'I do not regard my expression as a form of property. Property is something that can be taken from me. If I don't have it, somebody else does. Expression is not like that. The notion that expression *is* like that is entirely a consequence of taking a system of expression and transporting it around, which was necessary before there was the Internet, which has the capacity to do this infinitely at almost no cost'[81]. This statement truly demonstrates that relying on a simple line between ideas and expression to properly balance copyright and free expression values, is inflexible and not adapted to the realities of the online environment.

The idea/expression dichotomy can be criticised for not sufficiently acknowledging the fundamental rights aspect of both interests. Considering that Article 10(1) of the ECHR is drafted in the broadest sense possible and does not distinguish between the forms of expression, theoretically, every expression is presumptively protected by the ECHR. Therefore, in the context of copyright law, preventing others than the copyright-holder from using the exact form of his or her works necessarily constitutes a *prima facie* violation of Article 10(1)[82]. Furthermore, the vagueness of the theory does not always enable individuals to properly determine whether their speech constitutes a protected expression or just a simple idea. It is not clear if one should adopt a broad or a narrow view of ideas and expression[83]. As a result, the precise scope of what constitutes copyright-protected material remains uncertain. Finally, digital technologies allow individuals to use photographs, videos, sound-recordings or artistic works in new ways, such as mash-ups or remixes. In this context, it is often difficult to distinguish between an idea and its expression, as both seem to merge. An idea and the expression of the idea can be so inextricably linked that the simple

[81] John Perry Barlow, E-G8 Forum, Paris, 2011, interview available at <https://www.youtube.com/watch?v=JX4ciDBHfNU>
[82] Robert Danay (n. 67), p. 10
[83] Yin Harn Lee (n. 30), p. 77

theory of the dividing line is incapable of guaranteeing that the speech is not illegitimately suppressed.

Rather than placing the idea/expression dichotomy on the side of the copyright-holder or on the side of the speaker, it should be reconceived and being placed between both parties as the guide through which a proper balance can be achieved. But, given the digital reality in which people express their views and gain their knowledge through a new communicative medium, the theory of a dividing idea-expression-line seems unreasonable.

2) The concept of fair usage

The idea of fair usage exists within various jurisdictions and is referred to as fair use in the United States or fair dealing in the United Kingdom. Fair dealing is an exception to copyright-holders' exclusive rights over their creative works. While there is no particular statutory definition of the concept of fair usage, it is commonly agreed that fair dealing allows the legitimate use or reproduction of a copyright-protected work without the permission from the right-holder. Obviously, the copyrighted material must be dealt with in a fair way. The Copyright, Designs and Patents Act (CDPA) enumerates some purposes of fair dealing, such as research, private study, criticism, review and news reporting (sections 29-30), various educational uses (sections 32-36A), use in connection with library or archives (sections 37-44), or public administration (sections 45-50). As a result, the defence of fair dealing does not apply to any use that does not fit within one of these enumerated categories, no matter how fair the dealing seems.

While it is clear that the concept of fair usage necessarily implies a non-commercial use of a protected work, there is no statutory definition of the term ‘fair’. By determining what constitutes a fair dealing of a protected work, courts are weighing copyright-holders’ and Internet users’ interests against each other in order to strike a fair balance. However, in the online environment, where millions of users engage in expressive communication by using copyright-protected works, it is very hard to efficiently determine who is an infringer and who is a fair user. In the UK, courts have found that the fair dealing defence sufficiently safeguards the fundamental right to

freedom of expression. The Vice-Chancellor in *Ashdown v. Telegraph* stated that 'I can see no reason why the court should travel outside the provisions of the 1988 Human Rights Act and recognise on the facts of particular cases further or other exceptions to the restrictions on the exercise of the right to freedom of expression constituted by the 1988 Act'[84]. This statement needs to be challenged, as the various issues related to the removal of digital content from the Internet illustrate that the existing defences in copyright law are not adapted to new digital realities, and, moreover, do not sufficiently safeguard free expression values.

The current fair dealing defence is profoundly restrictive, as the evaluation of the fairness of a dealing is undertaken only if the particular use of a work falls within one of the few categories enumerated by the CDPA. In contrast to the American equivalent of fair use[85], the fair dealing defence is not open-ended, and the purposes listed in the provision are exhaustive. The shortcomings of this closed-purpose mechanism can be exemplified by the case of parody. Until 2014, using a copyright-protected work for the purpose of parody or pastiche would infringe copyright in the work, no matter how 'fair' the use was. In contrast to the American fair use equivalent, which typically includes parodies, the vast majority of parodies in the UK would not fall within the fair dealing defence for criticism or review[86]. Finally, given the importance of parodies for social critique, an explicit exception was created in 2014, under which fair dealing 'for the purposes of caricature, parody or pastiche does not infringe copyright in the work'. Establishing a new legal exception is a long process and could have been avoided if the fair dealing defence would be a more flexible, and open-ended, tool.

While the exception for parody was welcomed for better accommodating in copyright law individuals' fundamental right to free expression, the fair dealing model is still not capable of balancing copyright and free speech values. Adding new categories to the fair dealing provision through statutory revision cannot be a definite solution, because, even if the broadest interpretation of the exceptions will be adopted, courts cannot permit dealings that do not fall within one of the enumerated purposes, no

[84] *Ashdown v. Telegraph*, § 38
[85] 17 U.S.C. § 107
[86] Ian Hargreaves (2011), 'Digital Opportunity: A Review of Intellectual Property and Growth', HM Treasury, London

matter how fair or legitimate it is. Therefore, the best way to ensure that socially beneficial uses of protected works are not excluded, is to create a more open-ended provision with a non-exhaustive list of purposes[87]. In fact, only a more flexible fair dealing defence allows courts to focus on challenges posed by new digital technologies and unforeseen developments in the online environment[88]. Fair dealing should be reconceived as an integral, central part of copyright law, rather than an exception.

3) Existing limitations and exceptions in relation to the digital environment

At EU level, the attempt to achieve a fair balance between the interests of right-holders in digital content and Internet users is illustrated by the adoption of the Information Society Directive. Article 5 of the Directive provides an exhaustive list of specific and limited exceptions to the reproduction right, the right of communication to the public, and the right of making available to the public. This harmonisation effort has been perceived as a failure and, especially Article 5 attracted a lot of criticism for merely providing an optional and limited catalogue of exceptions with the possibility for national legislators to adopt a narrower reading[89]. The phenomenon that member states have regularly adopted more restrictive exceptions than those provided by the Directive has been acknowledged by the Commission[90]. In a Green Paper issued in 2008, the Commission aimed to 'foster a debate on how knowledge for research, science and education can be best disseminated in the online environment'[91]. While the aim of the Commission was to accommodate stronger free expression values into copyright law, it, unfortunately, failed to address important limitations, such as the private copy exception and the possibility of an exception for derivative works. In fact, a restrictive interpretation of the exceptions established in the Directive should be prohibited.

[87] Carys Craig (2010), 'Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32' in 'From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda', edited by Michael Geist, Toronto, *Irwin Law*, p. 189
[88] Carys Craig (n. 87) p. 190
[89] Teodor Chirvase (2013), 'Copyright and the Right to Freedom of Expression in the Knowledge Society', *Contemporary Legal Institutions*, Romanian-American University, Vol. 5 No. 1, p. 184
[90] Green Paper of the Commission of the European Communities on 'Copyright in the knowledge economy', Brussels, COM (2008) 466/3, p. 4
[91] Ibid. p. 3

Another unfortunate aspect of the Information Society Directive is included in Articles 6 and 7. Those provisions establish the right for copyright-holders to control and protect, through technology, their exclusive rights. National legislation, as well as the WIPO Copyright Treaty[92], prohibit the circumvention of such technical measures, even in a case where an exception would apply. Under these circumstances, the possibility of making a private copy, a parody, or educational and scientific research, is irrelevant, as soon as a technological measure hinders such a use of a copyrighted work[93]. This loophole in current copyright legislation inevitably needs to be rectified. A provision could be introduced, explicitly stating that circumvention is allowed when undertaken for lawful purposes. A clear framework and a broad reading of exceptions in copyright law are crucial to ensure the dissemination of information and knowledge because it is the very existence of such exceptions that strike a balance between the exclusive rights of right-holders and the right to access information of Internet users. While the use of technological measures to enforce exclusive rights is legitimate and understandable, copyright exceptions should be immune from anti-circumvention provisions. As long as it is unlawful to circumvent a technological measure for a use included in one of the exceptions, the very existence of the exceptions is irrelevant and pointless.

Given the inflexibilities of existing copyright mechanisms and their inability to properly accommodate freedom of expression values in every copyright scenario, the creation of new statutory mechanisms necessarily needs to be considered.

B) The creation of new legal mechanisms

Possible options for new external defences include the adoption of a particular compensation mechanism and the creation of a new 'creative' exception for derivative works.

1) A particular compensation right for copyright-holders

[92] Articles 11 and 12 WIPO Copyright Treaty
[93] Teodor Chirvase (n. 89), p. 185

In practice, a tool such as a compensation right for copyright-holders is necessary to balance their interests with those of Internet users. As mentioned above in relation to file-sharing services, the implementation of a general levy system would safeguard copyright-holders' right to a fair and secure remuneration without undermining Internet users' fundamental right to access and exchange information. More generally, a compensation-based mechanism would serve Internet users' interests in the least restrictive way, by still letting them access copyrighted works for their private use. Such a levy system could be inspired by Neil Netanel's proposal of a so-called non-commercial use levy[94]. This regime would be broader in scope than private copy levy systems, as the levy would be imposed on a wider range of products and services. In return, individuals would be able to copy and disseminate, for non-commercial purposes, all forms of digital and non-digital communicative expression over online networks. This privilege could also extend to individual's non-commercial streaming of music, videos and literary works (as opposed to making such files available for download), and to individuals' non-commercial derivative works[95]. The levy would be paid by the suppliers of audio and video recording equipment, as well as copy equipment. As a result, Internet users would be immune against copyright infringement claims, and can legitimately copy, distribute or modify content for a non-commercial use.

Alternatively, a system of government compensation to right-holders could be considered. Copyright-holders would be paid from an administrative body funded by general tax revenues rather than by levies imposed on certain goods and services[96]. Other advocates of compensation mechanisms have proposed the implementation of a compulsory licensing system, similar to that used in cable retransmission, where the relevant fees would not be fixed by copyright-holders from the industry, but by independent policy-makers[97]. The latter system would probably be the fairest, as it would stop the industry from abusing its power to issue injunctions against technologies for disseminating content and limit its use of digital encryption methods. Like the non-commercial use levy, these mechanisms would allow Internet users

[94] Neil W. Netanel (2003), 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing', *Harvard Journal of Law & Technology,* Vol. 17 No. 1, p. 35
[95] Ibid. p. 37
[96] Yin Harn Lee (n. 30) p. 211
[97] Lawrence Lessig, (n. 29), p. 255

greater freedom to explore, copy, share or transform copyrighted expressive content, while still safeguarding copyright's aim of granting authors a fair remuneration for their creative efforts.

Moreover, these compensation systems are less restrictive than notice-and-takedown regimes or website blocking injunctions and do not undermine Internet users' freedom to speak as well as to receive information. Since exclusive rights granted by copyright are almost unenforceable in the Internet environment without significantly restricting available content, a broader levy-based solution granting a fair compensation to right-holders should undeniably be adopted. As noted by Neil Netanel, a 'free flowing, but paying peer-to-peer regime' would be established[98].

2) The establishment of a new 'creative' exception for derivative works

Since the Internet has become the most popular medium of communication, millions of users feed their knowledge and form their opinions based on material they find online. As a consequence, Internet users have legitimately become active content creators online and should be allowed to remix, adapt or modify copyrighted works in order to develop their own expressive creation, which is an important aspect of their self-fulfilment. Neil Netanel correctly notes that derivative creations embrace 'speech that is among the most creative and vital of peer-to-peer communication'[99]. Therefore, every individual should have the right to transform existing content without boundaries and without needing the permission from copyright-holders. As long as people use protected works for non-commercial purposes, no restriction should apply to them, and they should be immune against copyright claims.

Given these implications, a new 'creative' exception for non-commercial derivative or transformative works should be created by policy-makers. This defence would apply, inter alia, to user-generated content, and exist in parallel to the traditional fair dealing defence. Inspired by Canada's 'YouTube defence', this exception likely would render lawful most non-commercial mashups, sampling, machinima, digital collage, fan

[98] Neil Netanel (n. 94), p. 37
[99] Ibid. p. 39

fiction, and remix, among other types of non-commercial transformative works[100]. In cases where the fair dealing defence is not efficient, the 'creative' defence could alternatively be invoked, provided that all of its conditions can be met. This new exception would offer a viable solution if it respects a clear set of criteria. Among those factors, the first necessarily relates to the non-commercial nature of the newly created material. The transformative work should, in no way, have an adverse economic impact on the original work[101]. Furthermore, in respect of the original author, the derivative creator should identify the underlying work and indicate that it has been modified without the original author's consent[102]. In this context, the source, such as the name of the original author should be mentioned, and confusion regarding which is the original work would be avoided. Finally, in order to respect the original author's right to receive a secure and fair remuneration, he or she should receive a commission for every use of the subsequent work.

Moreover, it is obvious that the new author must have a legitimate reason for transforming or using someone else's copyright-protected material, and must incorporate sufficient creativity into the derivative or transformative work, in order to avoid mere copying. Apart from guaranteeing individuals' freedom of expression, allowing Internet users to generate new works from existing material can also have a beneficial effect for the original authors, as their works are promoted in new, unconventional ways. The respect of all the above criteria would ensure, on the one hand, that copyright-holders receive a fair remuneration for their creative efforts, and, on the other hand, that creativity and inspiration are spread through communicative online networks. In practice, courts would necessarily need to adopt a broad reading of the 'creative' exception. This requires judges to take a lot of time and engage in thorough research in order to provide for a proper interpretation of the exception. In the UK, the Gowers Review of Intellectual Property recommended the creation of a similar new defence that would enable Internet users to generate creative, derivative

[100] Graham Reynolds (2010), 'Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression' in 'From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda', edited by Michael Geist, Toronto, *Irwin Law*, p. 414
[101] Yin Harn Lee (n. 30), p. 131
[102] Neil Netanel (n. 94), p. 39

or transformative works. Unfortunately, the proposal for this new exception was never implemented[103].

Mechanisms such as a general levy-based regime or a new 'creative' exception are potentially workable solutions for striking a fair balance between copyright-holders' and Internet users' interests, as copyright values are not erased and the freedom to access, and subsequently use, copyright-protected works are preserved. They have the goal to make the Internet a virtual forum where public debate, artistic creativity and cultural diversity co-exist with commercial transactions[104]. In fact, the adoption of such proposals would mark a shift from the conflicting nature of the relationship between copyright and freedom of expression to a balanced and cooperative relationship between both rights, in which copyright would beneficially function as 'an engine of free expression'. However, as demonstrated above, current legislation undervalues certain aspects of the intersection between copyright and freedom of expression, especially under the conditions of the complexity of the Internet. Therefore, judicial balancing is still crucial to reach a fair compromise between the two competing interests.

C) The crucial role of the judiciary

Europe's highest courts are recommended to provide member states with tangible guidance on balancing fundamental rights. In order to find an adequate compromise between the exclusive rights of copyright-holders and the right to freedom of expression and access information on the Internet, the ECtHR, as well as CJEU, need to develop a detailed balancing test as soon as possible. Both rights are not absolute, which means that they can legitimately be restricted to protect countervailing interests. The three actors involved in the relationship between copyright and freedom of expression in the digital world need to accept that their respective fundamental rights cannot be absolutely assured. Since there is no abstract hierarchy between the relative fundamental rights, balancing is inevitably the preferred solution. However, creating a fair balance is a challenge that should not be underestimated by the courts.

[103] Andrew Gowers (2006), 'Gowers Review of Intellectual Property', HM Treasury, London
[104] Enrico Bonadio (n. 21), p. 21

One possibility to find a proper balance between copyright and freedom of expression would be the ad hoc balancing exercise[105]. In this sense, courts have to weigh copyright and freedom of expression interests against each other, on a case-by-case basis, in order to decide which of both rights requires the greater protection under the particular circumstances. According to Melville Nimmer, this type of balancing is very unsatisfactory as there is no set of clear rules to guide the courts. Nobody can predict the outcome of a particular conflict between copyright and freedom of expression that has not yet been tested before a court. Consequently, this ad hoc balancing would have an adverse chilling effect on freedom of expression, as its unpredictability would deter many speakers from expressing themselves.

Another tool adopted by the courts is the definitional balancing exercise, praised by Melville Nimmer for its ability to generate a rule 'which can be employed in future cases without the occasion for further weighing of interests'[106]. Rather than determining in each case which conflicting right should prevail, definitional balancing means to establish categories of speech that require protection. This American approach intends to define the scope of speech that is included within the meaning of the First Amendment and speech that is excluded, so that it may be restricted based on its content[107]. In contrast to ad hoc balancing, definitional balancing allows a court to apply a certain balancing outcome of a judgement in a case, without subsequently engaging in additional balancing. However, even if it provides more legal certainty than ad hoc balancing, which requires a new balance in every case, it has been found that the definitional balancing process does not always allow courts to strike a proper balance between the conflicting speech and non-speech interests[108].

In an online environment, where the exchange of information happens on an unprecedented scale, both the ad hoc and definitional balancing processes will not

[105] Melville Nimmer (n. 18), p. 1183
[106] Alexander Aleinikoff (1987), 'Constitutional Law in the Age of Balancing', *The Yale Law Journal*, Vol. 96 No. 5, p. 979 citing Melville Nimmer in 'Nimmer on Freedom of speech'
[107] Melville Nimmer (n. 18), p. 1184
[108] Ibid. p. 1185

result in a viable compromise between copyright and freedom of expression. In order to analyse the balancing exercises adopted by the courts, one can imagine the metaphorical image of a set of scales[109]. Typically, when courts engage in ad hoc balancing, they place both competing interests on the scale and rule in favour of the tipping scales in each particular case. However, rather than outweighing two interests, balancing can also be understood as striking a fair compromise among conflicting interests. In this sense, the aim of the balancing exercise is to achieve an equilibrium where the scales are on the same level, rather than having them tip to one side[110]. This equilibrium balancing needs to be promoted by the courts, as, compared to ad hoc balancing, it offers clearer guidelines for future cases. This approach should be adopted by both the ECtHR and the CJEU in order to increase legal certainty, which is highly needed in the digital age. In fact, the right to freedom of expression and the competing copyright interests need constant balancing at every stage where they interfere.

In addition, to provide a clear balancing test, both European Courts need to provide unambiguous guidance to online intermediaries, who, after all, are in the best position to strike a proper balance between both rights in practice. It is uncertain why they should bear the total burden of safeguarding Internet users' and copyright-holders' fundamental rights. Provided that they do not act as a complicit in an infringing activity, they should not be liable for content created by other parties. Moreover, ISPs, search engines, social networks or sharing platforms do not all have the technical and financial means, as well as the legal assistance, to determine which content is lawful and which is not.

As regards intermediary liability, it is clear that a framework inspired by the Manila Principles is the best solution. Mechanisms that divide the duty of removing copyright infringing content between intermediaries, the alleged infringer and the judicial authorities are the most appropriate. Splitting the burden of ending a copyright infringing activity and ensuring freedom of information online is the fairest way to balance both interests. To achieve this goal, courts need to actively engage in a balancing process that provides clear criteria in terms of free speech interests on the

[109] Alexander Alleinikoff (n. 106), p. 943
[110] Ibid.

Internet. Without clear instructions, a search engine, a social media network or an ISP has no way of determining what copyright-protected content should, or should not, be removed from the web, in order to guarantee the freedom of expression of the intermediaries as well as the freedom to access information of regular Internet users. Factors which should be taken into account are related to the impact of the copyright infringement, the harm suffered by the copyright-holder, the value of the speech involved, and the effect of a potential restriction. As long as online intermediaries do not exactly know how to identify copyright infringing material, there is a risk of a chilling effect on the right to freedom of expression and information. Out of fear of being sued by copyright-holders from various industries, intermediaries are incentivised to remove content, which is potentially legitimate. Given these points, both the CJEU and the ECtHR should encourage the elaboration of a clear legal framework regulating the liability of all stakeholders regarding new communication technologies.

Conclusion

All things considered, in the online environment, where individuals are interacting and sharing knowledge, creativity and culture on an unprecedented scale, copyright-holders are legitimately concerned about violations of their exclusive property rights. The development of the Internet and the creation of new technologies enabling the free flow of digitised information justifies the enforcement and modernisation of copyright law. However, Internet users should be allowed to freely access all kind of information, in order to develop their personal opinions, feed their knowledge and stimulate their critical mind. For this reason, the establishment of a legal framework that fairly balances the relevant fundamental rights is crucial.

Various copyright enforcing measures online, such as notice-and-takedown systems or website blocking orders, encroach on Internet users' right to freedom of expression, as lawful content risks to be removed from the open and neutral platform of the Internet. Therefore, it is abundantly clear that new legislation, as well as new jurisprudence, is needed to safeguard Internet users fundamental right to access

information and share knowledge. Freedom of expression interests can be protected by technology as well as by law. The creation of new speech-friendly mechanisms in copyright law would enable non-commercial uses of relevant copyright-protected works and legitimise various ways of transforming such works. While online intermediaries are best placed to implement a new, and fair, legal framework, they should not bear the full responsibility of ending copyright-infringing activities.

Overall, it is essential that the law catches up with the new technologies and the prevailing culture in a society, where Internet access is indispensable for individual's self-fulfilment. But, apart from policy-makers, courts play an important role in safeguarding the right to freedom of speech and the principles of copyright law. Europe’s two highest Courts, the ECtHR and the CJEU, both need to provide guidance to member states, in order for them to constrain national copyright law by the right to freedom of expression.

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