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Martin Senftleben\*

## Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions

*Cloud-based services keep forming, changing and evaporating like clouds in the sky. They range from personal storage space for films and music to social media and user-generated content platforms. The copyright issues raised by these platforms seem as numerous as the liquid droplets and frozen crystals constituting clouds in the atmosphere of our planet. As providers of cloud-based services may seek to avoid dependence on creative industries and collecting societies, one of these questions concerns the breathing space that copyright law offers outside the realm of exclusive rights. Which limitations of protection can serve as a basis for the development of new business models? Which safe harbours may be invoked to avoid secondary liability for copyright infringement? Which obligations may result from injunctions sought by copyright owners? After outlining relevant cloud services (section 1) and identifying the competing interests involved (section 2), the inquiry will address these influence factors – limitations, safe harbours and injunctions (section 3). The analysis will yield the insight that the most effective protection of copyright in the cloud is likely to result from acceptance of a compromise solution that, instead of insisting on the power to prohibit unauthorized use, leaves room for the interests of users and the business models of platform providers (concluding section 4).*

### 1. Cloud-Based Services

Before embarking on a discussion of breathing space for cloud-based business models, it is necessary to clarify the type of websites that will be addressed in the following analysis. As it is difficult to trace the conceptual contours of the “cloud”,<sup>1</sup> a wide variety of online platforms

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\* Ph.D.; Professor of Intellectual Property, VU University Amsterdam; Senior Consultant, Bird & Bird, The Hague.

<sup>1</sup> As to the difficulty of defining cloud services, see W.R. Denny, “Survey of Recent Developments in the Law of Cloud Computing and Software as a Service Agreement”, *The Business Lawyer* 66 (2010), p. 237 (237): “[T]here is no uniform definition of cloud computing available.”; M.H. Willow/D.J. Buller, “Cloud Computing: Emerging Legal Issues for Access to Data, Anywhere, Anytime”, *Journal of Internet Law* 14 (2010), p. 1 (5): “[E]xperts differ on a precise definition of ‘cloud computing’.” However, see also the attempts made by M.A. Melzer, “Copyright Enforcement in the Cloud”, *Fordham Intellectual Property, Media and Entertainment Law Journal* 21 (2011), p. 403 (404): “Cloud computing refers to a set of approaches to diffuse computing power across more than one physical computer.”; and D.J. Gervais/D.J. Hyndman, “Cloud Control: Copyright, Global Memes and Privacy”, *Journal on Telecommunications and High Technology Law* 10 (2012), p. 53 (56): “Cloud computing is a term used to describe a global technological infrastructure in which the user of a computer accesses and uses software and data located outside of the user’s personal computer or other digital device. The user connects to these external devices by way of an Internet connection, but typically has no knowledge of the nature or even location of the server on which the data and software are located. This anonymous, external, and often unidentifiable interaction is known as ‘cloud computing’ or simply ‘the Cloud’.” See also the description given by W.H. Page, “Microsoft and the Limits of Antitrust”, *Journal of Competition Law and Economics* 6 (2010), p. 33 (49-50): “Cloud computing offers virtually unlimited, on-demand computing resources. Your applications now live in a new platform – a computing cloud. In the cloud, your applications take advantage of the seemingly limitless processor cycles, memory storage, and network bandwidth along with extensive software capabilities.”

inevitably enters the picture. If the “cloud” is equated with the Internet, the discussion may even degenerate into a general debate on the scope of copyright protection in the digital environment.

To avoid this generalization, the present inquiry will focus on services that offer individual users the opportunity of storing copyrighted material on an online platform.<sup>2</sup> This clarification still leaves room for the inclusion of various types of platforms and services. A distinction can be drawn, however, with regard to the size of the target audience:

- an online platform for posting photographs, such as Flickr, or an online platform for posting videos, such as YouTube, allows individual users to make content generally available on the Internet. In this case, the *general public* with access to the Internet is the target audience;
- a social networking site, such as Facebook, allows individual users to post various types of works, such as texts, photographs and videos. In this case, the target audience is not the general public. It is a *specific group* of Internet users having access to the personal webpages of the individual user providing content;
- a digital locker service allowing individual users to upload personal copies of protected works to personal cloud storage space for later downloading or streaming on multiple devices, or a private video recorder allowing users to obtain recordings of TV programmes for the purpose of watching them at a more convenient time. In this case, the target audience is confined to the *individual user*.

## 2. Interests Involved

On the basis of this outline of relevant storage services, the different stakeholders involved can be identified: copyright owners, platform providers and individual users. If cloud-based services are used to disseminate protected works without prior authorization, copyright owners may want to invoke their exclusive rights to prohibit the use or claim an appropriate reward.<sup>3</sup> They will point out that without the enforcement of their rights, sufficient incentives for new creativity, on-going investment in cultural productions and an adequate income from creative work cannot be ensured.<sup>4</sup>

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<sup>2</sup> It is this feature of cloud-based services that challenges the exclusive rights of copyright owners. Cloud-based services allow users to access and share own or third party content anywhere around the globe. Cf. Melzer, *supra* note 1, p. 407. The result is generalized access to entire repertoires of cultural productions via a wide variety of devices with Internet functionality, ranging from personal computers to mobile phones. Cf. Gervais/Hyndman, *supra* note 1, p. 65.

<sup>3</sup> This will be different in the case of copyright owners opting for a creative commons licence or another open access model. As to the debate on creative commons, cf. N. Elkin-Koren, “Exploring Creative Commons: A Skeptical View of a Worthy Pursuit”, L.M.C.R. Guibault/P.B. Hugenholtz (eds.), *The Future of the Public Domain – Identifying the Commons in Information Law*, The Hague/London/New York: Kluwer Law International 2006, p. 325. With regard to the specific problem of share-alike obligations, see T. Gue, “Triggering Infection: Distribution and Derivative Works Under the GNU General Public Licence”, *Journal of Law, Technology and Policy* 2012/1, p. 95.

<sup>4</sup> As to these rationales of copyright protection, see A. Strowel, *Droit d’auteur and Copyright: Between History and Nature*, in: B. Sherman/A. Strowel, *Of Authors and Origins*, Oxford: Clarendon Press 1994, p. 235 (241-251); P.E. Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in: B. Sherman/A. Strowel, *ibid.*, p. 159 (170); S.P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the*

Platform providers, however, will argue that a general obligation to monitor the data streams generated by users is too heavy a burden, and that instead, the risk of platforms being held liable for copyright infringement must be minimized. Otherwise, exposure to that risk would force them to close down their websites. The vibrant Internet as we know it today would cease to exist.<sup>5</sup>

Finally, individual users benefitting from cloud-based services are not unlikely to emphasize that their interests go far beyond mere convenience and entertainment. Online platforms for publishing photographs and videos afford them the opportunity to get actively involved in the creation of online content. Enhanced user participation strengthens the role of the Internet as a democratic medium that offers room for a wide variety of opinions and contributions.<sup>6</sup> Social media offer new forms of self-expression and social interaction. Private video recorders can be seen as a service facilitating access to TV streams and, therefore, as a means of supporting the receipt of information.<sup>7</sup>

The protection of copyright is thus to be reconciled with several competing interests. Against this background, policy makers are not unlikely to weigh the rationales of copyright protection against other values, such as freedom of expression and information, the interest in maintaining an open Internet, the freedom to conduct a business and a participatory Internet culture. Moreover, it must not be overlooked that at the policy level, economic considerations may play a crucial role. As a medium that keeps generating new business models, the Internet still offers a remarkable potential for economic growth.<sup>8</sup> Breathing space for the development of cloud-based services, therefore, can be part of a country's innovation policies.<sup>9</sup>

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Alternative of a Government-Run Reward System, *Fordham Intellectual Property Media and Entertainment Law Journal* 9 (1998), p. 301 (310).

<sup>5</sup> Cf. M.A. Lemley, "Rationalizing Internet Safe Harbors", *Journal on Telecommunications and High Technology Law* 6 (2007), p. 101 (112). For an overview of jurisprudence on secondary liability of platform providers and the central role of safe harbours in the creation of the legal certainty necessary for innovation in the area of online platforms and services, see Melzer, *supra* note 1, p. 423-439.

<sup>6</sup> As to "consumer-participants", see N. Elkin-Koren, "Making Room for Consumers Under the DMCA", *Berkeley Technology Law Journal* 22 (2007), p. 1119 (1138); C. Soliman, "Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing", *Albany Law Journal of Science and Technology* 22 (2012), p. 279 (280-293); G. Mazziotti, *EU Digital Copyright Law and the End-User*, Berlin/Heidelberg: Springer 2008; L. Leung, "User-generated content on the internet: an examination of gratifications, civic engagement and psychological empowerment", *New Media and Society* 11 No. 8 (2009), p. 1327; T. Daugherty/M.S. Eastin/L. Bright, "Exploring Consumer Motivations for Creating User-Generated Content", *Journal of Interactive Advertising* 8 No. 2 (2008), p. 16.

<sup>7</sup> As to this aspect of the freedom to receive and impart information guaranteed in Article 10 of the European Convention on Human Rights, see European Court of Human Rights, 22 May 1990, application no. 12726/87, *Autronic/Switzerland*, para. 47: "Furthermore, Article 10 applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information." Cf. C. Geiger, *Droit d'auteur et droit du public à l'information*, Paris: Litec 2004, p. 134-136; N.W. Netanel, "Copyright and a Democratic Civil Society", *Yale Law Journal* 106 (1996), p. 283.

<sup>8</sup> This has been highlighted, for instance, in OECD, "Participative Web: User-Created Content", document DSTI/ICCP/IE(2006)7/Final, dated April 12, 2007, online available at <http://www.oecd.org/internet/ieconomy/38393115.pdf>. For an approach based on legal theory, see C. Geiger, "Die Schranken des Urheberrechts als Instrumente der Innovationsförderung – Freie Gedanken zur Ausschließlichkeit im Urheberrecht", *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2008, p. 459.

<sup>9</sup> For instance, see the consultation in the UK, HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework*, final government response dated 20 December 2012, available at <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>, p. 8-10.

### 3. Survey of Flexibility Tools

Given the diversity of interests involved, it is not surprising that different strategies have emerged to regulate the impact of copyright protection on cloud-based services. A survey of available regulatory instruments leads to a matrix of copyright limitations, safe harbours for hosting, and injunctions against online platforms. Copyright limitations can be adopted to exempt certain forms of generating online content from the control of the copyright owner (subsection 3.1). Safe harbours for hosting services can be introduced to shield platform providers against the risk of secondary liability for infringing content made available by users (subsection 3.2). Injunctions against platforms providers (subsection 3.3) can be granted to allow copyright owners to take action against infringers.

#### 3.1 Copyright Limitations

As clarified above, the present inquiry focuses on services that offer individual users the opportunity of storing copyrighted material on an online platform. Depending on the involvement of the user in the creation of the content, and the target audience that is reached, different limitations of copyright can become relevant in this context. Breathing space may result from inherent limits of exclusive rights, such as limits set to the right of adaptation in national law. It may also result from the adoption of exceptions that exempt certain forms of use from the control of the copyright owner. To provide an overview, amateur remixes of protected works (3.1.1) can be distinguished from the use of links (3.1.2) and private copying (3.1.3). The discussion, finally, leads to the question whether a more flexible approach to limitations is required to keep pace with the fast development of cloud-based services (3.1.4).

##### 3.1.1 Quotations, Adaptations and Remixes

In many cases, users of cloud-based services will upload their own literary or artistic creations to online platforms and social networking sites. If the protected work of another author is quoted, adapted or remixed, however, the question arises whether a copyright limitation can be invoked to justify the unauthorized use. In most countries, the debate on user-generated content has not led to agreement on specific exceptions yet.<sup>10</sup> The inclusion or adaptation of protected material thus depends on the scope of traditional copyright limitations. The taking

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<sup>10</sup> Canada is an exception to this rule. Under the new article 29.21 of the Copyright Act of Canada, as introduced by Bill C-11, “Copyright Modernization Act”, adopted on June 18, 2012, non-commercial user-generated content that is based on copyrighted material does not amount to infringement. As to the general debate on user-generated content, see S.D. Jamar, “Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context”, *Widener Law Journal* 19 (2010), p. 843; M. Knopp, “Fanfiction – nutzergenerierte Inhalte und das Urheberrecht”, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 28; N. Helberger/L. Guibault/E.H. Janssen/N.A.N.M. Van Eijk/C. Angelopoulos/J.V.J. Van Hoboken, *Legal Aspects of User Created Content*, Amsterdam: Institute for Information Law 2009, available at <http://ssrn.com/abstract=1499333>; E. Lee, “Warming Up to User-Generated Content”, *University of Illinois Law Review* 2008, p. 1459; B. Buckley, “SueTube: Web 2.0 and Copyright Infringement”, *Columbia Journal of Law and the Arts* 31 (2008), p. 235; T.W. Bell, “The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy”, *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), p. 841; S. Hechter, “User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership”, *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), p. 863; G. Lastowka, “User-Generated Content and Virtual Worlds”, *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), p. 893.

of portions of a protected work can constitute a permissible quotation.<sup>11</sup> An adaptation seeking to ridicule the original work may fall under the exemption of parody.<sup>12</sup>

In copyright systems providing for an open-ended fair use limitation, specific criteria may be available to draw a line between infringing copying and permissible remix and reuse. Under the U.S. fair use doctrine, for instance, the notion of transformative use traditionally constitutes an important factor capable of tipping the scales to a finding of fair use.<sup>13</sup> In the famous parody case *Campbell v. Acuff-Rose*, the U.S. Supreme Court explained with regard to the fair use analysis:

*The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation [...] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative”.*<sup>14</sup>

In comments on the fair use doctrine, the notion of transformative use is understood in the sense of productive use. The fair use must aim to employ the copyrighted matter in a different manner or for a purpose different from the original. Mere repackaging or republication is insufficient. By contrast, a use adding value to the original, transforming the original in new information, new aesthetics, new insights and understandings, constitutes “the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>15</sup> The identification of use that supports freedom of speech and cultural follow-on innovation, therefore, lies at the core of the analysis.

This rationale can serve as a guiding principle when a distinction must be drawn between infringing and permissible user-generated content. In *Warner Bros. and J.K. Rowling v. RDR Books*, for instance, the U.S. District Court for the Southern District of New York assessed the contents of an online Harry Potter fan site in the light of the notion of transformative use.<sup>16</sup>

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<sup>11</sup> The international right of quotation set forth in Article 10(1) BC has been implemented in the EU in Article 5(3)(d) EU Information Society Directive 2001/29. For an example of the evolution of a flexible quotation right under this standard, see M.R.F. Senftleben, “Quotations, Parody and Fair Use”, in: P.B. Hugenholtz/A.A. Quaedvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, p. 359, online available at <http://ssrn.com/abstract=2125021>. With regard to the current debate on the consistency of this broadening of the quotation right, see M. de Zwaan, ‘Ruimte in het citaatrecht in Europa? Zoekmachine vindt niets bij ‘search naar flexibilites’, *Tijdschrift voor auteurs-, media- en informatierecht* 2012, p. 141.

<sup>12</sup> See Article 5(3)(k) EU Information Society Directive 2001/29. As to the question whether parody can be qualified as a specific kind of quotation that may be covered by Article 10(1) BC, see A.A. Quaedvlieg, ‘De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat’, *RM Themis* 1987, p. 279.

<sup>13</sup> Cf. P.N. Leval, “Toward a Fair Use Standard”, *Harvard Law Review* 103 (1990), p. 1105 (1111); N.W. Netanel, “Copyright and a Democratic Civil Society”, *Yale Law Journal* 106 (1996), p. 283 (381). As to the application of the fair use doctrine in practice, see M. Sag, “Predicting Fair Use”, *Ohio State Law Journal* 73 (2012), p. 47, online available at <http://ssrn.com/abstract=1769130>; P. Samuelson, “Unbundling Fair Uses”, *77 Fordham Law Review* 2537 (2009); B. Beebe, “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005”, *University of Pennsylvania Law Review* 156 (2008), p. 549.

<sup>14</sup> Supreme Court of the United States of America, 7 March 1994, 510 U.S. 569 (*Campbell v. Acuff-Rose*), section A. The case concerned a rap version of Roy Orbison’s and William Dees’ song “Oh, Pretty Woman” which the rap group 2 Live Crew had composed to satirize the intact world built up in the original.

<sup>15</sup> Leval, *supra* note 28, p. 1111.

<sup>16</sup> Cf. A. Schwabach, “The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright”, *University of Pittsburgh Law Review* 70 (2009), available at <http://ssrn.com/abstract=1274293>;

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The platform Harry Potter – The Lexicon provides an encyclopedia of the individual characters, magic spells, beasts, potions etc. described in the Harry Potter books.<sup>17</sup> Inevitably, this requires the reuse of parts of the original Harry Potter books. The Court, however, took as a starting point that The Lexicon was transformative:

*Because it serves these reference purposes, rather than the entertainment or aesthetic purposes of the original works, the Lexicon's use is transformative and does not supplant the objects of the Harry Potter works...*<sup>18</sup>

The recognition of this added value to the general public, however, did not hinder the judge from holding that verbatim copying on the fan site amounted to copyright infringement where it was in excess of the legitimate purpose of providing a reference tool. The wholesale taking of substantial portions of background material provided by J.K. Rowling herself, for instance, did not constitute fair use. The Court thus drew a line between permissible content supporting the transformative character of the website and infringing content that was unnecessary for the reference purposes served by The Lexicon.

Breathing space for user-generated adaptations of copyrighted works may also result from inherent limits set to the right of adaptation in national legislation. The adaptation right granted in the Dutch Copyright Act, for instance, does not cover adaptations constituting “a new, original work”.<sup>19</sup> Hence, certain forms of adaptations remain free from the outset.<sup>20</sup> A similar mechanism for providing breathing space can be found in the German Copyright Act which contains a free use principle exempting adaptations that constitute “independent works”,<sup>21</sup> and the Austrian Copyright Act which exempts “independent, new works” resulting from an adaptation.<sup>22</sup> Transformations of protected works falling under these free adaptation rules are immune against copyright claims brought by the copyright owner whose work served as a basis for the adaptation. Traditionally, the courts in Austria, Germany and the Netherlands created room for parody in this way.<sup>23</sup>

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M.W.S. Wong, “Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?”, *Vanderbilt Journal of Entertainment and Technology Law* 11 (2009), p. 1075 (1124-1130).

<sup>17</sup> See <http://www.hp-lexicon.org/>.

<sup>18</sup> United States District Court Southern District of New York, September 8, 2008, Warner Bros. and J.K. Rowling vs. RDR Books, 07 Civ. 9667 (RPP). Cf. the case comment by A.J. Sanders, *European Intellectual Property Review* 2009, p. 45.

<sup>19</sup> Article 13 Dutch Copyright Act.

<sup>20</sup> In fact, the central test applied in this context is not whether the adaptation constitutes a creation satisfying the originality test. As pointed out by J.H. Spoor, “Verveelvoudigen: Reproduction and Adaptation under the 1912 Copyright Act”, in: P.B. Hugenholtz/A.A. Quaadvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, p. 197 (206-212), courts in the Netherlands are not unlikely to ask whether the allegedly infringing work presents the original features of the earlier work to such an extent that the overall impressions given by both works differ insufficiently to consider the former an independent work.

<sup>21</sup> § 24 German Copyright Act. For an overview of German case law, see G. Schulze, in: T. Dreier/G. Schulze, *Urheberrechtsgesetz – Kommentar*, 4th ed., Munich: C.H. Beck 2013.

<sup>22</sup> § 5(2) Austrian Copyright Act.

<sup>23</sup> For instance, see Austrian Supreme Court, 13 July 2010, case 4 Ob 66/10z, “Lieblingshauptfrau”; German Federal Court of Justice, 20 March 2003, case I ZR 117/00, “Gies-Adler”; Dutch Supreme Court, 13 April 1984, case LJN: AG4791, “Suske en Wiske”, *Nederlandse Jurisprudentie* 1984, no. 524. For a discussion of this free adaptation principle against the background of international obligations, see Senftleben, *supra* note 11, p. 374-381; P.E. Geller, “A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?”, *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901.

When a free adaptation rule of this kind is invoked, the question becomes crucial which criteria are applied to identify those adaptations that can be deemed free in the sense that they do not affect the copyright owner's right of adaptation. Under the German free adaptation rule, this question is answered by requiring a transformation of the original work to have new features of its own that make the individual features of the original work fade away.<sup>24</sup> Applying this standard, the German Federal Court of Justice recognized in parody cases that the required distance from the original work, making its individual features fade away, could not only be achieved through substantial alterations of the original work. By contrast, an inner distance, such as the distance created by a parodist's mockery, could also be sufficient.<sup>25</sup>

When applied broadly, this line of reasoning could become relevant in cases of user-generated content. Arguably, the individual, non-commercial nature of amateur remixes may also justify to assume an inner distance from the underlying original work. If the remix clearly constitutes an amateur creation that is presented on the Internet without profit motive, the contrast with the original work will be obvious to the Internet public. User-generated content falling in this category could then be exempted on the grounds that it constitutes an "independent work" that makes the features of the original work fade away.<sup>26</sup> The fact that the rules on free adaptations have often been applied in parody cases does not exclude an extension to other areas, such as user-generated content. In the *Perlentaucher* case, for instance, the German Federal Court of Justice confirmed the general applicability of the principles governing the determination of free adaptations. In this case, the question of a free adaptation arose with regard to abstracts derived from book reviews in the German newspaper *Frankfurter Allgemeine Zeitung*.<sup>27</sup> The sound sampling case *Metall auf Metall* can serve as a further example of the universal applicability of the rules governing free adaptations.<sup>28</sup>

Breathing space for adaptations of protected works may thus follow from specific exceptions, such as the right of quotation and the exemption of parody. It may also result from open-ended copyright limitations supporting transformative use and free adaptation rules leaving room for derivative works that keep a sufficient (inner) distance from the original work. When a remix or adaptation does not amount to copyright infringement, the resulting derivative work can be disseminated on the Internet without encroaching upon the exclusive rights of the

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<sup>24</sup> See the overview provided by P.E. Geller, 'A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?', *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901; F.W. Grosheide, 'De grondslagen van de parodie-exceptie', in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 1 (19-25); H.E. Ruijsenaars, 'Een onoverwinnelijke Galliër? Enkele opmerkingen t.a.v. de parodie op stripfiguren', *Informatierecht/AMI* 1993, p. 143 (149).

<sup>25</sup> See G. Schulze, in: Th. Dreier, G. Schulze, *Urheberrechtsgesetz – Kommentar*, 4th ed., Munich: C.H. Beck 2013, commentary on § 24.

<sup>26</sup> For a similar approach seeking to create "a space for noncommercial flow", see D. Halbert, "Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights", *Vanderbilt Journal of Entertainment and Technology Law* 11 (2009), p. 921 (955-959). Cf. also R. Tushnet, "Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It", *Yale Law Journal* 114 (2004), p. 535 (552), pointing out that creative use of protected works typically involves "both copying and reworking".

<sup>27</sup> German Federal Court of Justice, 1 December 2010, case I ZR 12/08 (*Perlentaucher*), *Gewerblicher Rechtsschutz und Urheberrecht* 2011, p. 134 (137-138), online available at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de).

<sup>28</sup> Cf. German Federal Court of Justice, 20 November 2008, case I ZR 112/06 (*Metall auf Metall*), *Gewerblicher Rechtsschutz und Urheberrecht* 2009, p. 403, online available at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de); F.J. Dougherty, 'RIP, MIX and BURN: Bemerkungen zu aktuellen Entwicklungen im Bereich des digitalen Sampling nach US-amerikanischem und internationalem Recht', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2007, p. 481. With regard to the sound sampling debate in the U.S., see D.M. Morrison, 'Bridgeport Redux: Digital Sampling and Audience Recording', *Fordham Intellectual Property, Media and Entertainment Law Journal* 19 (2008), p. 75.

author whose work served as a basis for the remix. Breathing space for remixing and adapting protected works, thus, also creates breathing space for online platforms and social media that allow users to present their remixes and adaptations to the public.

### 3.1.2 *Embedded Content*

For sharing information about a literary or artistic creation, a user of cloud-based services need not necessarily upload the copyrighted work as such. Instead, a link can be sufficient to draw the attention of other users to protected content that has already been made available elsewhere on the Internet. The user of a social networking platform, for instance, may use a link to “embed” protected content from an external source in her personal pages. The external content may then be displayed within a frame that is integrated in the user’s webpages – a technique often referred to as “framing” or “in-line linking”. In contrast to the traditional hyperlink with underlined blue text, visitors of the personal pages need not leave the networking site when following the link. By contrast, the embedded content – for example a music video – is shown within the framework of the personal pages. This advanced form of embedded linking raises delicate copyright issues.<sup>29</sup>

On the one hand, it may be argued that the embedded link makes the work available for a new public – the group of Internet users having access to the user’s personal webpages. Viewed from this perspective, it may be qualified as a relevant act of communication to the public comparable with the further distribution of radio and TV signals in hotels, or a relevant act of public performance comparable with the playing of radio music in restaurants.<sup>30</sup> This parallel is doubtful, however, because at least a classical hyperlink does not extend the audience. It merely indicates the location of content that has already been made available to the Internet audience on another webpage.<sup>31</sup> With regard to “frames” and “in-line links”, it would have to be explained against this background why the use of a more advanced linking technique justifies the assumption that there is a new audience to be distinguished from the audience formed by Internet users in general.<sup>32</sup>

Given these doubts, an emphasis may be laid, on the other hand, on the fact that the embedded link only provides a reference to protected content that is already available for Internet users on another website. As long as it is clear that the content stems from another online source,<sup>33</sup>

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<sup>29</sup> For an overview of these issues, see D.J.G. Visser, “Het ‘embedden’ van een YouTube filmpje op en Hyves-pagina”, *Mediaforum* 2010, p. 12; S. Ott, “Haftung für Embedded Videos von YouTube und anderen Videoplattformen im Internet”, *Zeitschrift für Urheber- und Medienrecht* 2008, p. 556.

<sup>30</sup> In this sense, District Court of The Hague, 19 December 2012, case 407402/HA ZA 11-2675, *Buma vs. Nederland.FM*, available at [www.ie-forum.nl](http://www.ie-forum.nl), para. 4.5. As to a potential parallel with the use of broadcasts in hotels and restaurants, see Article 11bis(1)(ii) and (iii) BC. With regard to the situation in the EU, see CJEU, 7 December 2006, case C-306/05, *SGAE vs. Rafael Hoteles*, finding that the further distribution of broadcasting signals in hotels aims at a new public; and CJEU, 15 March 2012, case C-135/10, *SCF vs. Marco Del Corso*, para. 86 and 96, establishing a *de minimis* threshold for the assumption of a new public that is not met in the case of a dentist’s waiting room.

<sup>31</sup> Cf. A. Strowel/N. Ide, “Liability with Regard to Hyperlinks”, *Columbia Journal of Law and the Arts* 24 (2001), p. 403 (425).

<sup>32</sup> As to the difficulty of distinguishing between different audiences and the risk of the notion of a (new) “public” becoming too vague and unreliable, see J.H. Spoor, “Hooggeschat Publiek”, *Tijdschrift voor auteurs-, media- en informatierecht* 2007, p. 141.

<sup>33</sup> Even if a certain risk of confusion cannot be ruled out, this need not exclude a ruling in favour of the user who embeds content. See US Court of Appeals for the Ninth Circuit, 16 May 2007, *Perfect 10, Inc. vs. Google Inc.*, Fd 3d. 701 (USCA, 9<sup>th</sup> Cir. 2007), para. 7: “While in-line linking and framing may cause some computer users to believe they are viewing a single Google webpage, the Copyright Act, unlike the Trademark Act, does not

the embedded link does not differ substantially from a traditional hyperlink that, according to established case law, does not constitute an infringing act of communication to the public. In the EU, the German Federal Court of Justice recognized in its famous *Paperboy* decision that without search services availing themselves of hyperlinks to indicate the location of online content, the abundant information available on the Internet could not be found and used in an efficient way.<sup>34</sup> In line with previous statements in literature,<sup>35</sup> hyperlinks were seen as mere footnotes: a means of safeguarding freedom of information in the digital environment and ensuring the proper functioning of the Internet. Taking this insight as a starting point, the Court arrived at the conclusion that a hyperlink – the case concerned deep links to press articles – did not amount to copyright infringement:

*A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided.*<sup>36</sup>

The Court fortified this approach by pointing out that the person setting the hyperlink refrained from keeping the work on demand or transmitting it herself. Moreover, that person had no control over the availability of the work. If the web page containing the work was deleted, the hyperlink would miss its target and become pointless.<sup>37</sup> The courts in other EU Member States lent weight to similar arguments in the context of more advanced forms of linking. In the case *Vorschaubilder*, The Austrian Supreme Court, for instance, developed the following line of reasoning with regard to picture thumbnails of portrait photographs that had been displayed as search results together with the URL of the source webpage:

*Only the person who has the original or a copy of a work can make that work available to other persons in a way that allows him to control access to the work. A person [...] who only provides a link that can be used to view the work at its original location, however, only facilitates access to a file included in the source website without making that work available himself in the sense of § 18a of the Copyright Act. Under these circumstances, he does not control access, as the file can be deleted without his intervention...*<sup>38</sup>

These examples show that breathing space for references to online content can be derived from an interpretation of the exclusive rights of copyright owners that leaves room for the application of different kinds of links. The considerations supporting the refusal of copyright infringement in the German *Paperboy* case and the Austrian *Vorschaubilder* case can be employed to exempt the use of “frames” and “in-line links” to provide references to external

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protect a copyright holder against acts that cause consumer confusion.” Measures to prevent confusion about the origin of the embedded content, however, may support a finding that the “framing” does not amount to copyright infringement. See Austrian Supreme Court, 17 December 2002, case 4Ob248/02b, METEO-data, p. 4.

<sup>34</sup> German Federal Court of Justice, 17 July 2003, case I ZR 259/00, “Paperboy”, available at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de), p. 25. The decision is published in *Gewerblicher Rechtsschutz und Urheberrecht* 2003, p. 958. As to the impact of the decision on the regulation of online information flows, cf. T. Hoeren, “Keine wettbewerbsrechtliche Bedenken mehr gegen Hyperlinks? Anmerkung zum BGH-Urteil “Paperboy””, *Gewerblicher Rechtsschutz und Urheberrecht* 2004, p. 1; G. Nolte, “Paperboy oder die Kunst den Informationsfluss zu regulieren”, *Zeitschrift für Urheber- und Medienrecht* 2003, p. 540.

<sup>35</sup> For instance, see J. Litman, *Digital Copyright: Revising Copyright Law for the Information Age*, New York: Prometheus Books 2001, p. 183, who draws a line between hyperlinks and traditional footnotes.

<sup>36</sup> German Federal Court of Justice, *ibid.*, p. 20 (para. 42).

<sup>37</sup> German Federal Court of Justice, *ibid.*, p. 20 (para. 42).

<sup>38</sup> Austrian Supreme Court, 20 September 2011, case 4Ob105/11m, “Vorschaubilder”, p. 22-23.

content on social networking pages.<sup>39</sup> As long as the use does not amount to an infringement of other intellectual property rights or an act of unfair competition, this exemption would have the result of platform providers being free to offer “framing” and “in-line linking” as features of their platforms and users being free to refer to content available elsewhere on the Internet.

### 3.1.3 Digital Lockers

While breathing space for the use of cloud-based services may thus result from limits that are set to exclusive rights, copyright exceptions can also constitute an important basis for new cloud-based services. The exemption of private copying, for instance, can serve as a basis for digital lockers or personal TV recorders. If a protected work is uploaded to a platform offering personal storage space for films and music, the creation of a cloud copy may qualify as a permissible act of private copying. This is true, at least, when the cloud copy is made by the private user and access to that copy is confined to the individual user making personal use of the digital locker for the purpose of private study and enjoyment.

In this vein, the U.S. Court of Appeals for the Second Circuit held in the *Cablevision* case with regard to an online video recorder that, firstly, it was the user, rather than Cablevision as a provider, who did the copying produced by the recording system<sup>40</sup> and, secondly, that the transmission of works required for the playback function of the service did not amount to a relevant act of public performance

*[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber.*<sup>41</sup>

Similarly, the German Federal Court of Justice held in the *Shift.TV* case that, rather than the provider of the service, the private user of the automated system for recording TV broadcasts was responsible for the making of copies of protected works, and that the public required for an act of communication to the public was missing because each individual copy was made available only to the subscriber who had made that copy.<sup>42</sup> However, this decision in favour of the applicability of private use privileges did not hinder the German Federal Court of Justice from also finding that the transmission of over-the-air TV signals to the online recorders of private subscribers could be qualified as an infringing act of retransmission.<sup>43</sup> The Court, therefore, neutralized its initial finding in favour of private use by also holding that

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<sup>39</sup> In this sense also L. Bently et al., “The Reference to the CJEU in Case C-466/12 Svensson”, *University of Cambridge Legal Studies Research Paper* No. 6/2013, available at <http://ssrn.com/abstract=2220326>, p. 13-14. However, see S. Ott, “Die urheberrechtliche Zulässigkeit des Framing nach der BGH-Entscheidung im Fall “Paperboy””, *Zeitschrift für Urheber- und Medienrecht* 2004, p. 357 (362-365); “Haftung für verlinkte urheberrechtswidrige Inhalte in Deutschland, Österreich und den USA”, *Gewerblicher Rechtsschutz und Urheberrecht – International Teil* 2007, p. 14, who agrees that the universal Paperboy criteria developed with regard to deep links seem equally valid with regard to framing and in-line linking. Pointing to differences in the presentation of “framed” links, however, he proposes assuming a relevant act of communication to the public.

<sup>40</sup> U.S. Court of Appeals for the Second Circuit, 4 August 2008, 536 F.3d 121 (2d Cir. N.Y. 2008), *Cartoon Network LLP/CSC Holding, Inc.*, p. 26, at 11-16.

<sup>41</sup> U.S. Court of Appeals for the Second Circuit, *ibid.*, p. 43, at 11-16.

<sup>42</sup> German Federal Court of Justice, 22 April 2009, case I ZR 216/06, “Internet-Videorecorder”, published in *Gewerblicher Rechtsschutz und Urheberrecht* 2009, p. 845, para. 23 and 26.

<sup>43</sup> German Federal Court of Justice, *ibid.*, para. 33 and 35.

the automated Shift.TV system might encroach upon the retransmission right of broadcasting organizations.<sup>44</sup>

From the outset, the invocation of private use as a defence has been excluded by the Supreme Court of Japan in the *Rokuraku II* decision. In this case, an emphasis was laid on the preparatory acts of receiving and feeding TV broadcasts carried out by the service provider. As these preparatory acts finally enabled the private user to obtain a copy of the works, the Court held that it was not the private user, but the provider of the TV recorder system who made the copies of TV programmes.<sup>45</sup>

These divergent court decisions do not come as a surprise. Traditionally, the exception for private copying is one of the most controversial exceptions in copyright law.<sup>46</sup> National private copying systems differ substantially in terms of scope and reach. Restrictive systems may not offer more than the opportunity to make a recording of a TV programme for the purpose of watching it at a more convenient time (“time-shifting”).<sup>47</sup> As demonstrated by the *Cablevision* case in the U.S., even a private copying regime with this limited scope may offer breathing space for an online service that facilitates time-shifting by allowing subscribers to make a recording of TV programmes in the cloud.

More generous private copying regimes are not confined to time-shifting. Several continental-European copyright regimes may generally allow the uploading of copies to personal storage space in the cloud for private use as long as the initiative for the reproduction is taken by the private user.<sup>48</sup> However, differences between these more generous systems follow from the individual configuration of the use privilege at the national level. Must the private copy be made by the private user herself? Or could it also be made by a third party on her behalf? In the latter case, does it matter whether this third person derives economic benefit from the private copying? Does private copying require the use of a legal source? Or may even an illegal source serve as a basis for a legitimate private copy?<sup>49</sup> Does it become relevant in this context whether the illegality was evident to the private user?<sup>50</sup>

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<sup>44</sup> In fact, the Court of Appeals of Dresden, 12 June 2011, “Shift.TV”, published in *Zeitschrift für Urheber- und Medienrecht* 2011, p. 913, to which the case had been remanded, finally found an infringement of the retransmission right.

<sup>45</sup> Supreme Court of Japan, 20 January 2011, 65-1 Minshû 399, “Rokuraku II”. Cf. the discussion of the case by T. Ueno, “The making available right in the “cloud” environment”, elsewhere in this book.

<sup>46</sup> For a detailed discussion of private copying, see G. Hohagen, *Die Freiheit der Vervielfältigung zum privaten Gebrauch*, München: C.H. Beck 2004. As to the debate on private copying in the digital environment, see C. Geiger, “The Answer to the Machine Should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment”, *European Intellectual Property Review* 2008, p. 121.

<sup>47</sup> For instance, see the decision of the U.S. Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 US 417 (1984), IV B. Cf. W.J. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors”, *Columbia Law Review* 82 (1982), p. 1600.

<sup>48</sup> For a description of the flexible Dutch private copying regime as an example of a broad continental-European private copying system, see D.J.G. Visser, “Private Copying”, in: P.B. Hugenholtz/A.A. Quaedvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, p. 413. For a comparison between continental-European and Anglo-American private copying systems, see J.N. Ullrich, “Clash of Copyrights – Optionale Schranke und zwingender finanzieller Ausgleich im Fall der Privatkopie nach Art. 5 Abs. 2 lit. B) Richtlinie 2001/29/EG und Dreistufentest”, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2009, p. 283 (286-290).

<sup>49</sup> An affirmative answer to this question has been given by the Dutch legislator in the framework of the implementation of the EU Information Society Directive 2001/29 into Dutch law. For a discussion of this position in the light of the three-step test, see M.R.F. Senftleben, “Tegengif of overdosis? Over rechtszekerheid bij privé-kopiëren uit illegale bron”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2011, p. 153. In the

While these nuances must be taken into account when determining the permissible ambit of operation of digital locker services, a further layer of legal complexity results from the fact that at least broad private copying exemptions not focusing on specific purposes will give rise to an obligation to provide for the payment of equitable remuneration. Otherwise, the private copying regime is not unlikely to cause an unreasonable prejudice to the legitimate interests of the copyright owner in the sense of the third step of the international three-step test.<sup>51</sup> The possibility of reducing an unreasonable prejudice to a reasonable level through the payment of equitable remuneration is reflected in the drafting history of the first international three-step test laid down in Article 9(2) BC. At the 1967 Stockholm Conference, Main Committee I – working on the substantive provisions of the Berne Convention – gave the following example to illustrate this feature of the international three-step test:

*A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.*<sup>52</sup>

The determination of an adequate level of equitable remuneration for a broad private copying privilege is a challenging task. In the European Union, the Court of Justice of the European Union (CJEU) sought to provide an answer in the *Padawan* decision. The CJEU stated that

*fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.*<sup>53</sup>

The Court also made it clear that a distinction had to be drawn between private users who could be expected to copy protected works,<sup>54</sup> and professional users who were unlikely to make private copies. While the payment of fair compensation had to cover the use made by private users, professionals would use the available storage space for professional purposes not involving the unauthorized reproduction of the protected works of third parties. Professional users thus had to be exempted from the payment obligation.<sup>55</sup>

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meantime, this standpoint has led to prejudicial questions to the CJEU. See Dutch Supreme Court, 21 September 2012, case LJN BW5879, ACI/ThuisKopie, available at [www.rechtspraak.nl](http://www.rechtspraak.nl).

<sup>50</sup> This question is relevant, for instance, under the German regulation of private copying. The private copying privilege does not apply in case an “evidently unlawful source” is used. Cf. K. Fangerow/D. Schulz, “Die Nutzung von Angeboten auf [www.kino.to](http://www.kino.to) – Eine urheberrechtliche Analyse des Film-Streamings im Internet”, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 677 (679-680); T. Reinbacher, “Strafbarkeit der Privatkopie von offensichtlich rechtswidrig hergestellten oder öffentlich zugänglich gemachten Vorlagen”, *Gewerblicher Rechtsschutz und Urheberrecht* 2008, p. 394.

<sup>51</sup> For a more detailed discussion of this point, see M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 235-241.

<sup>52</sup> See Report on the Work of Main Committee I, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 1145-1146.

<sup>53</sup> CJEU, 21 October 2010, case C-467/08, *Padawan/SGAE*, para. 42.

<sup>54</sup> CJEU, *ibid.*, para. 56.

<sup>55</sup> CJEU, *ibid.*, para. 53.

In the case of a digital locker in the cloud, this approach taken in the EU would mean that the calculation of equitable remuneration requires an assessment of the harm flowing from the cloud service and a distinction between private and professional use. The impressive list of prejudicial questions on adequate remuneration that is currently pending before the CJEU<sup>56</sup> indicates that the application of this standard poses substantial difficulties already with regard to traditional storage media and copying equipment.<sup>57</sup> Private copying in the cloud is not unlikely to generate further prejudicial questions in the near future.<sup>58</sup>

### 3.1.4 Update of Exceptions

Besides the difficulty of ascertaining the amount of equitable remuneration, the uploading of private copies to digital lockers in the cloud also raises important questions with regard to the further development of the exception for private copying and copyright exceptions in general. In practice, the provider of private storage space in the cloud is not unlikely to avoid the multiplication of identical private copies on the server. If several subscribers upload the same film to their individual digital lockers, the provider may decide to give these users access to one central master copy instead of allowing them to make several identical copies.

In light of the rules established in copyright law, however, use of a master copy that can be accessed by a potentially large group of subscribers gives rise to the question whether the use can still be qualified as an act of private copying. On the one hand, the use possibilities of the individual users are not enhanced. From a functional perspective, the master copy is only used to achieve a result identical to the situation arising from the storage of a unique private copy for each individual subscriber. On the other hand, the use of a single master copy for the execution of several requests may be seen as an infringing act of making this master copy available to a broader public.<sup>59</sup> From a technical perspective, the fact remains that the subscriber does not have access to a unique cloud copy made on the basis of the file she has on her personal computer. Instead, she obtains access to a master copy that is made available by the provider of the digital locker.

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<sup>56</sup> See the questions asked in case C-457/11, VG Wort/Kyocera Mita (German Federal Court of Justice; Opinion AG Sharpston, 24 January 2013); case C-521/11, Amazon.com (Austrian Supreme Court; Opinion AG Mengozzi, 7 March 2013); case C-435/12, ACI/ThuisKopie (Dutch Supreme Court); case C-463/12, Copydan/Nokia (Danish Supreme Court), available at [www.curia.eu](http://www.curia.eu).

<sup>57</sup> See the description of difficulties that have arisen in different EU Member States by T. Dreier, “Living with Copyright from Luxembourg”, *Tijdschrift voor auteurs-, media- en informatierecht* 2012, p. 243 (Germany); S. Dussollier, “De invloed van de Padawan-uitspraak op het ongelijke veld van thuiskopieheffingen in België”, *ibid.*, p. 247 (Belgium); V. Still, “Is the Copyright Levy System Becoming Obsolete?”, *ibid.*, p. 250 (Finland); R. Xalabarder, “The Abolishment of Copyright Levies in Spain”, *ibid.*, p. 259 (Spain).

<sup>58</sup> For a discussion of several problem areas, see M. Bisges, “Beeinträchtigung des Systems der Urhebervergütung für Privatkopien durch Cloud-Dienste”, *Gewerblicher Rechtsschutz und Urheberrecht* 2013, p. 146.

<sup>59</sup> This follows at least from decisions taken with regard to the analogue environment. In CJEU, 15 March 2012, case C-162/10, Phonographic Performance (Ireland)/Ireland, para. 69, the CJEU held for instance, “that a hotel operator which provides in guest bedrooms [...] other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus, is a “user” making a “communication to the public” of a phonogram within the meaning of Article 8(2) of Directive 2006/115/EC.” This ruling may indicate that the Court is prepared to also hold that use of master copies by the provider of digital lockers amounts to an infringing act of communication to the public. For a discussion of the situation in the U.S., see M. Rasenberger/C. Pepe, “Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?”, *Journal of the Copyright Society of the U.S.A.* 59 (2012), p. 501 (512-517).

Hence, the question arises whether the private copying exception can be interpreted flexibly on the basis of a functional analysis or must be read narrowly in line with a technical analysis. A functional analysis would focus on the use possibilities of the private user. As long as these possibilities are not enhanced in comparison with a situation where a unique copy is made for each individual subscriber, use of a master copy would still fall within the scope of the private copying exception. The breathing space for digital locker services would thus increase. A technical analysis, by contrast, would allow the scrutiny of each individual act of use carried out by the provider of cloud storage space. Accordingly, it makes a difference whether each subscriber makes and obtains access to her own unique copy (communication to the public may be denied), or whether instead, the provider offers access to a master copy (communication to the public may be assumed).

In the EU, room for a flexible, functional approach to cloud-based private copying services cannot readily be derived from CJEU jurisprudence. Formally, the CJEU adhered to the dogma of strict interpretation of copyright exceptions in the case *Infopaq/DDF*. Scrutinizing the mandatory exemption of transient copies in EU copyright law,<sup>60</sup> the Court pointed out that for the interpretation of each of the cumulative conditions of the exception, it should be borne in mind that,

*according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly [...]. This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.*<sup>61</sup>

According to the Court,

*[t]his is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*<sup>62</sup>

This further consideration seems to indicate that the Court infers, from the three-step test enshrined in the Information Society Directive, the necessity of a strict interpretation of exceptions. In *Football Association Premier League*, however, the decision in *Infopaq/DDF* did not hinder the Court from emphasizing with regard to the same exemption the need to guarantee its proper functioning and ensure an interpretation that takes due account of the exemption's objective and purpose. The Court explained that in spite of the required strict interpretation of the conditions set forth in Article 5(1) of the Information Society Directive

*the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive (OJ 2000 C 344, p. 1).*<sup>63</sup>

<sup>60</sup> Article 5(1) Information Society Directive 2001/29/EC.

<sup>61</sup> CJEU, 16 July 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, para. 56-57.

<sup>62</sup> CJEU, *ibid.*, para. 58.

<sup>63</sup> CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para. 162-163.

The Court went on to explain more generally that

*[i]n accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.*<sup>64</sup>

In light of these considerations, the Court concluded that the transient copying at issue in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test in EU copyright law.<sup>65</sup> This ruling seems to indicate that the CJEU, as many national courts in EU Member States, formally adheres to the dogma of a strict interpretation of exceptions. The adoption of this general principle, however, need not prevent the Court from arriving at a more balanced solution in individual cases.<sup>66</sup> By contrast, the dogma of strict interpretation itself may be applied rather flexibly by the Court.

Against this background, it is of particular interest that in *Painer/Der Standard*, the CJEU again underlined the need for a fair balance between “the rights and interests of authors, and [...] the rights of users of protected subject-matter”.<sup>67</sup> More specifically, the Court clarified that the right of quotation in EU copyright law<sup>68</sup> was

*intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.*<sup>69</sup>

Along these lines drawn in the decisions *Football Association Premier League* and *Painer/Der Standard*, the CJEU may arrive at a flexible, functional approach to the exception for private copying with regard to digital lockers in the cloud. This flexible approach to the private copying exception would lead to additional revenue streams flowing from levies that are due for private copying in the cloud.<sup>70</sup> It is noteworthy that the Court already opted for such a functional approach in the case *UsedSoft/Oracle*. Answering the question whether the downloading of software from the Internet exhausts the distribution right of the copyright

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<sup>64</sup> CJEU, *ibid.*, para. 164.

<sup>65</sup> Article 5(5) Information Society Directive 2001/29/EC. See CJEU, *ibid.*, para. 181.

<sup>66</sup> National court decisions in EU member states show that, in practice, the dogma of strict interpretation may be applied flexibly. In a 2002 decision concerning the scanning and storing of press articles for internal e-mail communication in a private company, the German Federal Court of Justice, for instance, held that digital press reviews had to be deemed permissible just like their analogue counterparts, if the digital version – in terms of its functioning and potential for use – essentially corresponded to traditional analogue products. The Court noted in this context that the evolution of new technologies required a flexible interpretation of exceptions. See German Federal Court of Justice, 11 July 2002, case I ZR 255/00, *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 963. See case comment T. Dreier, *Juristenzeitung* 2003, p. 473; T. Hoeren, ‘Pressespiegel und das Urheberrecht’, *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 1022.

<sup>67</sup> CJEU, 1 December 2011, case C-145/10 (*Eva Maria Painer v. Standard VerlagsGmbH*), para. 132-133.

<sup>68</sup> Article 5(3)(d) Information Society Directive 2001/29/EC.

<sup>69</sup> CJEU, *ibid.*, para. 134.

<sup>70</sup> This scenario raises the further question whether it makes sense to insist on the grant of exclusive rights allowing the exclusion of users from the enjoyment of cultural productions. From a practical perspective, enhanced (collective) licensing and remuneration schemes may offer comparable revenues while not restricting access to protected works. Cf. Gervais/Hyndman, *supra* note 1, p. 76: “Cultural industries that will do well in the Cloud will be Sherpas, not park rangers. Intellectual property rules make this possible, but the solution is licensing and more access, and enforcement limited to professional pirates.”

owner, the Court drew a functional parallel with the sale of software on CD-ROM or DVD. According to the CJEU, it makes no difference

*whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD.*<sup>71</sup>

In this vein, it may be argued that it makes no difference whether the private user has access to a cloud copy of her own copy of a film, or to a master copy of the same film that is used by the provider of digital lockers in the cloud to satisfy individual requests by private users who have the film in their personal collection.

### 3.2 Safe Harbours

Whereas copyright exceptions exempt certain forms of generating online content from the control of the copyright owner and, accordingly, lead to the exclusion of direct liability for unauthorized use, safe harbours concern the question of secondary liability. A safe harbour can be introduced to shield platform providers against the risk of secondary liability for infringing content made available by users of online platforms. Safe harbours for hosting are of particular importance in this context (section 3.2.1). The invocation of this type of safe harbour, however, depends on appropriate reactions to notifications about infringing content (section 3.2.2). The breathing space for cloud-based services resulting from safe harbour regimes thus depends on the requirements that follow from accompanying obligations, such as the establishment of efficient notice-and-takedown systems.

#### 3.2.1 Safe Harbour for Hosting

The so-called safe harbour for hosting relates to the storage of third party content without any active involvement in the selection of the hosted material. In the EU, the E-Commerce Directive refers to an information society service that consists of “the storage of information provided by a recipient of the service”. This kind of safe harbour rests on the assumption that a general monitoring obligation would be too heavy a burden for platform providers. Without the safe harbour, the liability risk would thwart the creation of platforms depending on third party content and frustrate the development of e-commerce.<sup>72</sup>

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<sup>71</sup> CJEU, 3 July 2012, case C-128/11 (UsedSoft v. Oracle), para. 47. Cf. the case comments by M. Stieper, *Zeitschrift für Urheber- und Medienrecht* 2012, p. 668; M.R.F. Senftleben, “Die Fortschreibung des urheberrechtlichen Erschöpfungsgrundsatzes im digitalen Umfeld”, *Neue Juristische Wochenschrift* 2012, p. 2924; F.W. Grosheide, “Een revolutie in het EU-auteursrecht? Enkele kanttekeningen bij het UsedSoft vs Oracle-arrest”, *Tijdschrift voor auteurs-, media- en informatierecht* 2013/2 (forthcoming).

<sup>72</sup> Cf. Melzer, *supra* note 1; Lemley, *supra* note 5. As to the remaining liability risk under different national systems, see T. Hoeren/S. Yankova, “The Liability of Internet Intermediaries – The German Perspective”, *International Review of Intellectual Property and Competition Law* 43 (2012), p. 501; C. Alberdingk Thijm, “Wat is de zorgplicht van Hyves, XS4All en Marktplaats?”, *Ars Aequi* 2008, p. 573. For a broad discussion of potential obligations of platform providers and a sophisticated differentiation of warning, monitoring, control and prevention obligations on the basis of active or neutral involvement, see M. Leistner, “Von “Grundig-Reporter(n) zu Paperboy(s)” Entwicklungsperspektiven der Verantwortlichkeit im Urheberrecht”, *Gewerblicher Rechtsschutz und Urheberrecht* 2006, p. 801.

With regard to safe harbours in the EU – covering all types of intellectual property<sup>73</sup> –, the conceptual contours of the safe harbour for hosting have been clarified by the CJEU in cases that concerned the unauthorized use of trademarks in keyword advertising and in offers made on online marketplaces.<sup>74</sup> Because of the horizontal applicability of EU safe harbours across all types of intellectual property, the rules evolving from these trademark cases are also relevant to cases involving copyrighted works. In *Google France/Louis Vuitton*, the CJEU qualified the advertising messages displayed by the Google keyword advertising service as third party content provided by the advertiser and hosted by Google. These advertising messages appear once the search terms selected by the advertiser are entered by the Internet user. The advertising is thus triggered by specific “keywords”. In the keyword advertising cases decided by the CJEU, these keywords consisted of protected trademarks. Accordingly, the question arose whether the search engine would be liable for trademark infringement. As to the applicability of the safe harbour for hosting in these circumstances, the Court pointed out that it was necessary to examine

*whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.*<sup>75</sup>

The financial interest which Google has in its advertising service is not decisive in the framework of this examination. An active involvement in the process of selecting keywords,

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<sup>73</sup> For a comparative analysis of this horizontal safe harbour approach with the specific copyright safe harbour regime in the U.S., see M. Peguera, “The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems”, *Columbia Journal of Law and the Arts* 32 (2009), p. 481; H. Travis, “Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law”, *Notre Dame Law Review* 84 (2008), p. 331; and against the background of French case law J.C. Ginsburg, “Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs”, *Arizona Law Review* 50 (2008), p. 577 (590-608).

<sup>74</sup> With regard to the development of jurisprudence concerning keyword advertising in the EU, cf. M.R.F. Senftleben, ‘Adapting EU Trademark Law to New Technologies – Back to Basics?’, in: C. Geiger (red.), *Constructing European Intellectual Property*, Cheltenham: Edward Elgar 2013, p. 176, verkrijgbaar op <http://ssrn.com/abstract=1875629>; A. Ohly, “Keyword Advertising auf dem Weg zurück von Luxemburg nach Paris, Wien, Karlsruhe und Den Haag”, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 776; J. Cornthwaite, “AdWords or Bad Words? A UK Perspective on Keywords and Trade Mark Infringement”, *European Intellectual Property Review* 2009, p. 347; R. Knaak, “Keyword Advertising – Das aktuelle Key-Thema des Europäischen Markenrechts”, *Gewerblicher Rechtsschutz und Urheberrecht International* 2009, p. 551; C. Well-Szőnyi, “Adwords: Die Kontroverse um die Zulässigkeit der Verwendung fremder Marken als Schlüsselwort in der französischen Rechtsprechung”, *Gewerblicher Rechtsschutz und Urheberrecht International* 2009, p. 557; G. Engels, “Keyword Advertising – Zwischen beschreibender, unsichtbarer und missbräuchlicher Verwendung”, *Markenrecht* 2009, p. 289; M. Schubert/S. Ott, “AdWords – Schutz für die Werbefunktion einer Marke?”, *Markenrecht* 2009, 338; O. Sosniza, “Adwords = Metatags? Zur marken- und wettbewerbsrechtlichen Zulässigkeit des Keyword Advertising über Suchmaschinen”, *Markenrecht* 2009, p. 35; Ch. Gielen, “Van adwords en metatags”, in: N.A.N.M. van Eijk et al. (eds.), *Dommering-bundel*, Amsterdam: Cramwinckel 2008, p. 101; O. van Daalen/A. Groen, “Beïnvloeding van zoekresultaten en gesponsorde koppelingen. De juridische kwalificatie van onzichtbaar merkgebruik”, *BMM Bulletin* 2006, p. 106.

<sup>75</sup> CJEU, 23 March 2010, cases C-236/08-238/08, *Google France and Google/Louis Vuitton et al.*, para. 114. The Court also held that the search engine offering a keyword advertising service did not use affected trademarks in the sense of trademark law. Direct liability arising from keyword advertising services thus seems to be excluded in the EU. See CJEU, *ibid.*, para. 57. As to the debate on potential direct liability and primary infringement, see, however, G.B. Dinwoodie/M.D. Janis, “Lessons From the Trademark Use Debate”, *Iowa Law Review* 92 (2007), p. 1703 (1717), pointing out in the light of developments in the U.S. that “the sale of keyword-triggered advertising and the manner of presentation of search results potentially create independent trademark-related harm, thus making it an appropriate subject of direct liability.”

by contrast, would be relevant to the assessment of eligibility for the safe harbour.<sup>76</sup> In the further case L'Oréal/eBay, the CJEU arrived at a more refined test by establishing the standard of “diligent economic operator”. The Court explained that it was sufficient,

*in order for the provider of an information society service to be denied entitlement to the exemption [for hosting], for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question.*<sup>77</sup>

While stressing that this new diligence test should not be misunderstood to impose a general monitoring obligation on platform providers, the Court indicated that, under this standard, own investigations of the platform provider would have to be taken into account. Moreover, a diligent economic operator could be expected to consider even imprecise or inadequately substantiated notifications received in the framework of its notice-and-takedown system. According to the Court,

*the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining [...] whether the [service provider] was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.*<sup>78</sup>

In sum, the current development of the requirements to be met for successfully invoking the safe harbour for hosting in the EU reflects a shift from a general exemption from investigations to an obligation to consider even imprecise notifications. Platform providers must set up a knowledge management system that reaches a certain level of sophistication.<sup>79</sup>

On the one hand, this development may be deemed desirable and consistent when focusing on service providers that are highly profitable enterprises. Market leaders in the area of online information services are capable of investing in enhanced content monitoring and improved knowledge management. On the other hand, it must not be overlooked that the prerequisites for invoking the safe harbour for hosting also determine the entrance level for newcomers on the market. The prerequisite of neutrality and passivity constitutes a relatively low entrance requirement that can be met by newcomers even if their financial resources are limited. A challenging knowledge management obligation that requires extra staff, by contrast, leads to a substantial hurdle that newcomers without much capital may find insurmountable.

A high threshold for invoking the safe harbour for hosting, therefore, enhances the risk of market concentration. While well-established, profitable businesses may have little difficulty

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<sup>76</sup> CJEU, *ibid.*, para. 116-118. As to the discussion on “financial benefit directly attributable to the infringement” in the U.S., see B. Brown, “Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World”, *Berkeley Technology Law Journal* 23 (2008), p. 437 (445-453).

<sup>77</sup> CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay, para. 120.

<sup>78</sup> CJEU, *ibid.*, para. 122. The notion of “diligent economic operator” recalls the test whether “a reasonable person operating under the same or similar circumstances” would find that infringing activity was apparent. This latter test was proposed in the legislative history of the safe harbour provisions in the U.S. to determine whether an intermediary was aware of facts or circumstances from which infringing activity is apparent. Cf. Brown, *supra* note 76, p. 455-458; Rasenberger/Pepe, *supra* note 59, p. 555-560.

<sup>79</sup> National approaches to this knowledge management requirement differ from country to country and between the courts. See the overview provided by R. Matulionyte/S. Nerisson, “The French Route to an ISP Safe Harbour, Compared to German and US Ways”, *International Review of Intellectual Property and Competition Law* 42 (2011), p. 55. For a far-reaching obligation to manage infringing links, including searches for comparable links and additional measures with regard to the affected work, see Court of Appeals Hamburg, 14 March 2012, case 5 U 87/09, “Rapidshare II”.

in fulfilling knowledge management obligations, the risk of being held liable because of insufficient knowledge management is not unlikely to inhibit newcomers from entering the market. Shying away from the risk of liability for third party content, they may sell their ideas for new platforms to market leaders with less budget constraints. As a result, the vibrant Internet we know today – an effervescent source of new business models and services often invented and implemented by small providers – may become a medium governed by only a few major players.<sup>80</sup>

### 3.2.2 Notice-and-Takedown Procedures

As to the diversity and openness of online content, the requirements with regard to notice-and-takedown procedures are to be considered as well. In many countries, a platform provider availing itself of the immunity following from the safe harbour for hosting is under an obligation to promptly take action once sufficiently substantiated information about infringing content is received.<sup>81</sup> While the obligation to take measures upon notification seems to constitute a widely-shared standard, a survey of national regulations in this area sheds light on substantial differences. The detailed norms in the U.S. Digital Millennium Copyright Act include not only a notice-and-takedown mechanism but also rules on counter-notices that may lead to the reinstatement of content.<sup>82</sup>

An unjustified takedown can thus be corrected if the user who had posted the content sends a counter-notice and rebuts the arguments supporting the initial takedown. Ultimately, unjustified “censorship” may thus be remedied if the effort to bring a successful counter-notice keeps within reasonable limits. Nonetheless, concerns about unjustified takedowns have been articulated even under this system of notices and counter-notices.<sup>83</sup> Against this

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<sup>80</sup> This risk is emphasized by Lemley, *supra* note 5, p. 112. For an example of how unclear liability rules may strengthen the market position of big enterprises *via-à-vis* small competitors, see B. Leary, “Safe Harbor Startups: Liability Rulemaking Under the DMCA”, *New York University Law Review* 87 (2012), p. 1134 (1167-1169), who discusses Apple’s iCloud service that is based on the scanning of a user’s computer to identify song files and the subsequent granting of streaming and downloading access to Apple’s own copies of those songs.

<sup>81</sup> However, it is to be noted that at least with regard to personal storage space in digital lockers in the cloud, this *quid pro quo* underlying present safe harbour regimes is unlikely to work. As contents in personal digital lockers is not publicly available, there is no possibility for copyright owners to monitor this content and use the notice-and-takedown system to put an end to infringement. This problem is pointed out by Leary, *supra* note 79, p. 1160, who proposes to “modify the DMCA to extend liability immunity only to user-content service providers who comply with safe harbor rulemaking and would delegate power to the Librarian of Congress, with the advice of the Copyright Office, to issue periodic rules approving and requiring the implementation of specific anti-infringement measures – substitutes for notice and takedown.” While this proposal relies on the regulation of anti-infringement measures, a more generous private copying regime generating revenue streams through levy systems may be a further solution – at least in countries that already provide for flexible private copying regimes, such as many EU Member States.

<sup>82</sup> Section 512(g)(1) of the U.S. Copyright Act provides that, if the user who had posted content that has later been taken down serves a counter-notice accompanied by a statement under penalty and perjury that the content was removed or disabled through mistake or misidentification, the intermediary must put back the material within 10-14 days unless the copyright owner seeks a court order against the user. As to the practical importance of this counter-notice system, for instance with regard to fair use privileges, see I. Chuang, “Be Wary of Adding Your Own Soundtrack: *Lenz v. Universal* and How the Fair Use Policy Should be Applied to User Generated Content”, *Loyola of Los Angeles Entertainment Law Review* 29 (2009), p. 164 (165-166); M.S. Sawyer, “Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA”, *Berkeley Technology Law Journal* 24 (2009), p. 363 (391).

<sup>83</sup> See W. Seltzer, “Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment”, *Harvard Journal of Law and Technology* 24 (2010), p. 171 (177-179); J.M. Urban/L. Quilter, “Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital

background, it is of particular interest that recent legislation in Canada departs from the notice-and-takedown model and provides for a notice-and-notice system instead.<sup>84</sup> When receiving information about infringing content, the platform provider is not obliged to remove the content. It is sufficient for the provider to inform the user who had posted the content about the notice. The Canadian law maker, therefore, does not see a need for a prompt removal of allegedly infringing content.<sup>85</sup>

EU legislation reflects an opposite focus on removal. Rules on counter-notices are sought in vain. The EU system generally provides for notice-and-takedown rather than preferring notice-and-notice procedures with regard to certain kinds of websites, such as social media. Upon receipt of a sufficiently substantiated notification about infringing content, the platform provider is obliged to act expeditiously to remove or disable access to the content at issue.<sup>86</sup> It is an open question whether this rudimentary harmonization stopping at the takedown step offers sufficient safeguards against unjustified removals. The current notice-and-action initiative in the EU may address this issue. Besides a quicker takedown for rights owners and increased legal certainty for platform providers, additional safeguards for fundamental rights, such as freedom of expression, are on the agenda.<sup>87</sup>

### 3.3 Injunctions Against Platforms

The survey of legal standards defining the breathing space for cloud-based services would be incomplete without the consideration of injunctions which copyright owners may obtain against platforms hosting infringing content. Under EU legislation, copyright owners are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.<sup>88</sup> Irrespective of the immunity against secondary liability that may follow from safe harbours for hosting, online platforms may thus be obliged to take measures against infringing use of their services. The liability question is to be distinguished from obligations resulting from an injunction. In particular, the exemption from

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Millennium Copyright Act”, *Santa Clara Computer and High Technology Law Journal* 22 (2006), p. 621, showing, among other things, that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors. Even though the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare. However, cf. also the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by F.W. Mostert/M.B. Schwimmer, “Notice and Takedown for Trademarks”, *Trademark Reporter* 101 (2011), p. 249 (259-260).

<sup>84</sup> See new articles 41.25 and 41.26 of the Copyright Act of Canada, as introduced by Bill C-11, “Copyright Modernization Act”, adopted on June 18, 2012. Under the new Article 41.26(1)(a), an online intermediary receiving a notification about infringing content must “as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it.”

<sup>85</sup> A reform of safe harbour provisions is also discussed in the US. For the results of a working group of twenty copyright scholars and practitioners seeking to develop a model for modifying the DMCA safe harbours, see P. Samuelson, “The Copyright Principles Project: Directions for Reform”, *Berkeley Technology Law Journal* 25 (2010), p. 1175 (1217), proposing the creation of a fifth safe harbour for service providers applying “reasonable, effective, and commercially available” technology for deterring infringement.

<sup>86</sup> Article 14(1)(b) of the E-Commerce Directive 2000/31/EC. The rudimentary harmonization in the Directive, however, seems to leave room for more sophisticated systems at the national level. In France, for instance, a statutory notification procedure has been introduced that, among other things, requires correspondence with the author or editor of allegedly infringing content. Cf. Peguera, *supra* note 66, p. 490-491.

<sup>87</sup> Further information on this initiative, the public consultation and relevant background documents are available at [http://ec.europa.eu/internal\\_market/e-commerce/notice-and-action/index\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm).

<sup>88</sup> Article 8(3) Information Society Directive 2001/29/EC; Article 11 Enforcement Directive 2004/48/EC.

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liability for hosting does not shield an online platform against obligations to terminate or prevent an infringement.<sup>89</sup>

### 3.3.1 Impact on Cloud-Based Services

The potential impact of these injunctions on cloud-based services must not be underestimated. At EU level, the conceptual contours of injunctions seeking to terminate and prevent infringing use have been traced in cases concerning trademark rights. In the context of measures against trademark infringement on online marketplaces, the CJEU clarified in the case *L'Oréal/eBay* that it was possible

*to order an online service provider, such as a provider making an online marketplace available to internet users, to take measures that contribute not only to bringing to an end infringements committed through that marketplace, but also to preventing further infringements...*<sup>90</sup>

While the Court pointed out that this did not imply a general and permanent prohibition on the use of goods bearing a specific trademark,<sup>91</sup> it did make clear that measures had to be taken against repeat infringers. The Court explained that

*if the operator of the online marketplace does not decide, on its own initiative, to suspend the [infringer] to prevent further infringements of that kind by the same seller in respect of the same trade marks, it may be ordered, by means of an injunction, to do so.*<sup>92</sup>

Hence, a proper balance is to be found between the interest of the right owner in effectively stopping current and preventing future infringements, and the interest of online platforms in not becoming subject to a general monitoring obligation that may be too heavy a burden to continue the cloud-based service. Hence, the question of threshold requirements to be met by newcomers seeking to set up a new cloud-based service platform again becomes relevant in this context. As knowledge management obligations arising from safe harbour regimes, obligations resulting from injunctions may constitute an entrance barrier for newcomers. A heavy obligation with regard to the termination and prevention of copyright infringement is not unlikely to form a market entry requirement that newcomers without much financial resources will find difficult to meet. Too heavy a termination and prevention obligation, therefore, enhances the risk of market concentration.

### 3.3.2 Filtering Online Content

The complexity of the balancing exercise resulting from these considerations clearly comes to the fore in the debate on the filtering of online content – a debate that, in the EU, culminated in the *Scarlet/SABAM* ruling rendered by the CJEU. The background to this ruling was an initiative taken by the Belgian collecting society SABAM to impose an obligation on the Internet access provider Scarlet to put an end to the infringement of copyright through P2P networks. SABAM sought an order that would have obliged Scarlet to generally prevent its customers from sending or receiving files containing a musical work of the authors,

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<sup>89</sup> Article 14(3) E-Commerce Directive 2000/31/EC.

<sup>90</sup> CJEU, 12 July 2011, case C-324/09, *L'Oréal/eBay*, para. 131.

<sup>91</sup> CJEU, *ibid.*, para. 140.

<sup>92</sup> CJEU, *ibid.*, para. 141.

composers and editors represented by SABAM if these right owners have not given their prior permission.

In its decision, the CJEU addressed the different interests at stake by balancing copyright protection against freedom of expression and information, the right to privacy of Internet users, and the freedom of conducting a business enjoyed by online intermediaries. On its merits, the balancing carried out by the Court can be understood as an attempt to establish a harmonious relationship between different legal positions supported by fundamental rights and freedoms.<sup>93</sup>

In the context of this complex balancing of rights and freedoms, the Court found that the broad injunction sought by SABAM – amounting to the establishment of a system for the general filtering of online content – encroached upon the fundamental rights and freedoms of Internet users and online intermediaries. For this reason, the Court rejected the injunction sought by SABAM:

*Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.*<sup>94</sup>

The ruling can be understood to illustrate the outer limits of injunctions against online intermediaries: a general filtering obligation goes too far. Online intermediaries are neither obliged to embark on a systematic analysis of online data streams nor bound to collect data about users sending copyrighted content via the network. Moreover, a general filtering system is hardly capable of distinguishing adequately between unlawful and lawful content. Its introduction would inevitably affect lawful communications, such as the sending of files with permissible parodies or quotations of protected musical works, or with musical works that have already fallen into the public domain.

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<sup>93</sup> CJEU, 24 November 2011, case C-70/10, para. 49-50. With regard to the foundations of these legal positions, see Article 17, and particularly 17(2) EU Charter of Fundamental Rights, on the one hand, and Articles 8, 11 and 16 of the Charter on the other. As to the explicit recognition of intellectual property in Article 17(2) of the Charter, see C. Geiger, “Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope”, *European Intellectual Property Review* 2009, p. 113. As to the influence of freedom of speech guarantees on copyright, cf. C. Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, *International Review of Intellectual Property and Competition Law* 37 (2006), p. 371; A. Strowel/F. Tulkens/D. Voorhoof (eds.), *Droit d’auteur et liberté d’expression*, Brussels: Editions Larcier 2006; P.B. Hugenholtz, ‘Copyright and Freedom of Expression in Europe’, in: N. Elkin-Koren/N.W. Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, p. 239; Th. Dreier, ‘Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?’, in: R. Dreyfuss/D. Leenheer-Zimmerman/H. First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, p. 295; S. Macciachini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Y. Benkler, ‘Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain’, *New York University Law Review* 74 (1999), p. 355; N.W. Netanel, ‘Copyright and a Democratic Civil Society’, *Yale Law Journal* 106 (1996), p. 283. The impact of the guarantee of freedom to conduct a business has not yet been explored in literature to a comparable degree.

<sup>94</sup> CJEU, *ibid.*, para. 53.

The rejection of a general filtering obligation in *Scarlet/SABAM*, however, leaves the question unanswered whether specific filters remain permissible, such as a filtering obligation relating to a specific music file and a specific user.<sup>95</sup> As discussed above, the CJEU already held in *L'Oréal/eBay* that measures against repeat infringers are legitimate. Against this background, it can be hypothesized that, between the two poles explored in CJEU jurisprudence – the general filtering rejected in *Scarlet/SABAM* and the specific filtering in the case of repeat infringers –, there is room for configuring intermediate filtering systems that may give rise to new litigation and further attempts to balance the right to intellectual property against freedom of expression and information, the right to privacy, and freedom to conduct a business.<sup>96</sup>

### 3.3.2 Blocking of Website Access

A variation of the filtering theme – the blocking of access to websites hosting or facilitating the dissemination of infringing content – already led to injunctions against Internet access providers in several EU Member States.<sup>97</sup> These cases shed light on an important difference between access and hosting services. While the ban on general filtering systems in *Scarlet/SABAM* exempts Internet access providers from the obligation to filter all communications running through their networks, the ban did not hinder national courts from impeding access to individual hosting platforms by ordering Internet access providers to block access these websites. While the courts are prepared to keep the burden of filtering within certain limits, there seems to be increasing willingness to order the blocking of platforms that host infringing content or systematically facilitate copyright infringement.

A general court practice of granting injunctions that oblige Internet access providers to block access to online platforms, however, may finally lead to industry standards impacting on the diversity of online content. After the courts have clarified the prerequisites for the blocking of websites in several decisions, the creative industries and telecom operators may find it too burdensome to continue arguing about access control before the courts. Instead, they may return to the negotiation table to reach agreement on platforms that should be blocked.

This scenario gives rise to concerns about *de facto* censorship of online content without control through democratic institutions. The creative industries will strive for the blocking of websites that are suspected of facilitating copyright infringement. Telecom companies will

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<sup>95</sup> Cf. J. Reus, “De bescherming van IE-rechten op platforms voor user-generated content”, *Intellectuele eigendom en reclamerecht* 2012, p. 413; E.J. Dommering, “De zaak Scarlet/Sabam – Naar een horizontale integratie van het auteursrecht”, *Tijdschrift voor auteurs-, media en informatierecht* 2012, p. 49. As to general shortcomings of filtering technology in terms of adequate evidence, regard for copyright exceptions and limitations, and sufficient safeguards for a due process, see S.K. Katyal/J.M. Schultz, “The Unending Search for the Optimal Infringement Filter”, *Columbia Law Review Sidebar* 112 (2012), p. 83 (89, 96 and 102).

<sup>96</sup> For instance, see Court of Appeals of Leeuwarden, 22 May 2012, case LJN: BW6296, *Stokke/Marktplaats*, available at [www.rechtspraak.nl](http://www.rechtspraak.nl), where the Court sees room for filtering on the basis of specific criteria, such as a particular text (para. 8.2), but arrives at the conclusion that this would be disproportionate in light of the impediment of the free movement of goods (para. 8.9-8.10). Text filters have also been rejected by Court of Appeals Hamburg, 14 March 2012, case 5 U 87/09, *Rapidshare II*.

<sup>97</sup> For instance, see District Court of The Hague, 11 January 2012, *BREIN/Ziggo and XS4All*, published in *Tijdschrift voor auteurs-, media- en informatierecht* 2012, p. 119. The practice of blocking websites has also led to prejudicial questions pending before the CJEU. See Austrian Supreme Court, 11 May 2012, case 4 Ob 6/12d, *kino.to/UPC*, published in *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2012, p. 934.

seek to minimize costs and risks by reaching a widely-shared standard on blocked content.<sup>98</sup> However, parties seeking to safeguard the openness of the Internet and diversity of online content may be absent from the negotiation table.<sup>99</sup> In consequence, the list of blocked websites resulting from the negotiations may become longer than any list to which courts would have agreed after a careful balancing of all fundamental rights and freedoms involved. The voice of users appreciating information diversity and pluralism on the Internet may easily be overheard in negotiations focusing on the reconciliation of industry interests.<sup>100</sup>

## 4. Conclusion

A survey of flexibility tools in the area of copyright law shows that breathing space for cloud-based services can be derived from

- a cautious interpretation of exclusive rights, in particular the right of adaptation and the right of communication to the public;
- copyright exceptions for quotations, parodies and private copying; and
- safe harbours that can be invoked by online platforms hosting user-generated content.

The availability of sufficient room for new services finally depends on the obligations coming along with these flexibility tools. A flexible private copying regime will require the payment of equitable remuneration. Broad safe harbours for hosting will be accompanied by knowledge management obligations to be fulfilled in the context of notice-and-takedown

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<sup>98</sup> Cf. S.K. Katyal, “Filtering, Piracy Surveillance and Disobedience”, *Columbia Journal of Law and the Arts* 32 (2009), p. 401 (408); J. Gibson, “Risk Aversion and Rights Accretion in Intellectual Property Law”, *Yale Law Journal* 116 (2007), p. 882.

<sup>99</sup> This point has also been raised with regard to the UGC Principles agreed upon in 2007 by Disney, CBS, NBC Universal, Fox, Viacom, Microsoft, MySpace, Veoh and Dailymotion. The Principles are included in A.N. Braverman/T. Southwick, “The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned”, *Columbia Journal of Law and the Arts* 32 (2009), p. 471 (476-480). As to the critique based on consumer groups not being represented in the negotiations, see Chuang, *supra* note 82, p. 189; Sawyer, *supra* note 82, p. 403.

<sup>100</sup> For instance, the UGC Principles, *supra* note 99, p. 477, provide for a filtering process to be carried out prior to the uploading of content by users of UGC platforms. While this process is described in some detail in the principles, the safeguard for use privileges evolving from the U.S. fair use doctrine is confined to the principle that “Copyright Owners and UGC Services should cooperate to ensure that the Identification Technology is implemented in a manner that effectively balances legitimate interests in (1) blocking infringing user-uploaded content, (2) allowing wholly original and authorized uploads, and (3) accommodating fair use.” Formally, fair use is thus taken into account. However, it is doubtful whether this vague principle (“...should cooperate to ensure...”) lends sufficient weight to the fundamental guarantee of freedom of speech underlying the fair use doctrine. In any case, it does not address the question of how to determine privileged fair use. While copyright owners may adopt a restrictive approach, the interpretation developed by a court might be more flexible. Cf. Katyal, *supra* note 98, p. 411-416 and 422, and the analysis of fair use case law in the literature *supra* note 13. See also, on the one hand, the reaction by the Electronic Frontier Foundation and other activist groups insisting on clearer guidelines, “Fair Use Principles for User Generated Video Content”, available at <https://www.eff.org/pages/fair-use-principles-user-generated-video-content>; and on the other hand, the more optimistic assessment by Ginsburg, *supra* note 65, p. 588-589, pointing out that filters may become more sophisticated over time. As to the impact of intermediary liability on the marketplace of speech, cf. more generally S.F. Kreimer, “Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link”, *University of Pennsylvania Law Review* 155 (2006), p. 11; R. Tushnet, “Power Without Responsibility: Intermediaries and the First Amendment”, *George Washington Law Review* 76 (2008), p. 986 (1004).

procedures. Eligibility for immunity under a safe harbour regime, moreover, does not exclude obligations arising from court orders to terminate or prevent copyright infringement.

An examination of these influence factors leads to delicate questions about the scope of copyright protection and the limits of liability for infringement. Should the right of adaptation be understood to cover amateur remixes of protected works that are presented on an online platform, such as YouTube? Should the right of communication to the public be extended to links that are embedded in a Facebook page? Should private copying exceptions cover the use of master copies by the providers of digital lockers? Should eligibility for the safe harbour for hosting depend on a sophisticated knowledge management system capable of memorizing all information that may help to identify infringing use? Should notice-and-takedown procedures be replaced with notice-and-notice procedures? Should the filtering of online content be permissible? Should websites that facilitate copyright infringement be blocked?

While it is beyond the scope of the present inquiry to answer all these questions, the overview of issues surrounding cloud-based services shows that copyright is embedded in a complex matrix of competing interests. User interests may be supported by the fundamental guarantee of freedom of expression and information, and the right to privacy. The providers of cloud-based services may invoke freedom of expression and information for enabling users to receive and impart information. In the EU, the fundamental freedom to conduct a business is to be factored into the equation as well.

The Preamble of the Berne Convention recalls that the countries of the Berne Union are

*equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works...*

While this desire is not reduced in any way when it comes to the question of breathing space for cloud-based services, it follows from the analysis that in the cloud, protection “in as effective and uniform a manner as possible” can only be achieved through a fair balancing of all rights and interests involved. In this balancing exercise, copyright represents an important value among others to be taken into account.

Therefore, the most effective protection of copyright in the cloud follows from a weighing process in which the goals of copyright protection – incentives for the creative industry, an appropriate reward for the creative work of individual authors – are balanced against the need to offer sufficient room for the fundamental rights and freedoms of users and providers of cloud-based services.

As a result of this balancing exercise, copyright will no longer be perceived as an outdated relic of the analogue past. Users and providers of cloud services will understand that copyright is an integral part of the *quid pro quo* governing the use of cultural productions in the cloud. In consequence, copyright protection will no longer hang by the thread of exclusive rights granted in copyright statutes – exclusive rights that seem less and less enforceable. By contrast, copyright protection will obtain the social legitimacy and societal support necessary to uphold the copyright system in the cloud environment.<sup>101</sup>

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<sup>101</sup> For similar recommendations for stabilizing copyright’s societal acceptance, see Geiger, *supra* note 8, p. 468.