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Poland's Challenge to EU Directive 2019/790: Standing up to the Destruction of European Freedom of Expression

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Comments

Poland's Challenge to EU Directive 2019/790: Standing up to the Destruction of European Freedom of Expression

Michaela Cloutier*

ABSTRACT

In 2019, the European Parliament and Council passed Directive 2019/790. The Directive's passage marked the end of a four-year-long legislative attempt to impose more liability for copyright violations on Online Service Providers, an effort which was controversial from the start. Online Service Providers fear that the 2019 Directive, especially its Article 17, will completely change the structure of liability on the Internet, forcing providers to adopt expensive content filtering systems. Free speech advocates fear that ineffective filtering technology will infringe upon Internet users' rights to express themselves, and legal scholars have pointed out the Directive's inconsistency with prior Euro-

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pean legislation and case law. The final version of the Directive does not contain an explicit proactive monitoring requirement for Online Service Providers, but criticism of the Directive persists. In May of 2019, Poland brought an official action in the Court of Justice of the European Union (CJEU) against the EU Parliament and Council, alleging that the Directive conflicts with rights protected under the Charter of Fundamental Rights of the European Union, specifically freedom of expression.

This Comment first discusses the text of the Charter of Fundamental Rights and the balance that courts had previously struck between conflicting fundamental rights implicated by three earlier EU Directives. Next, this Comment examines CJEU case law on intermediary liability for copyright violations, especially as those decisions relate to the intersection of intellectual property rights and freedom of expression. Finally, this Comment analyzes Poland's challenge in light of the prior statutory framework and the CJEU's fundamental rights jurisprudence to identify some of the salient issues in the pending case on the Directive's legality.

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I. INTRODUCTION

On April 17, 2019, the European Union (EU) Parliament and Council passed Council Directive 2019/790 on Copyright and Related Rights in the Digital Single Market.¹ Throughout the four years of drafting, hearings, and negotiations that culminated in the Directive's passage,² two clauses created points of contention: Article 11 (15 as passed) and Article 13 (17 as passed).³ Article 11 is sometimes referred to as the Link Tax because it requires that any websites containing more than a "snippet" of copyrighted information from elsewhere obtain a license from the initial author.⁴ Article 13 places copyright liability onto Online Service Providers (OSPs)⁵ and online platforms for all infringing material uploaded

1. Council Directive 2019/790, 2019 O.J. (L 130) 92, 92; *see also* Cory Doctorow, *The European Copyright Directive: What Is It, and Why Has It Drawn More Controversy than Any Other Directive in EU History?*, ELECTRONIC FRONTIER FOUND. (Mar. 19, 2019), <https://bit.ly/2Pz5oKY> [<https://perma.cc/VTE5-9JW7>] [hereinafter Doctorow, *The European Copyright Directive*] (explaining that directives are rules made by the European Parliament which become binding law upon European citizens only after they are "transposed" via national legislation in each EU member state).

2. Dave Davis, *What You Need to Know About the European Copyright Directive*, COPYRIGHT CLEARANCE CTR., (May 15, 2019), <https://bit.ly/2TbythW> [<https://perma.cc/WX3Q-2DPD>].

3. Doctorow, *The European Copyright Directive*, *supra* note 1 (identifying Article 11, the "link tax," and Article 13 "censorship machines" as the most controversial aspects of the Directive).

4. *Id.* (explaining that Article 11 is especially controversial because it provides no definition of "snippet," meaning that EU member states can pass legislation defining the term in varying ways to apply to any amount of content the member states see fit).

5. *See Best Practices for Online Service Providers: Are You an OSP?*, ELECTRONIC FRONTIER FOUND. (June 20, 2008), <https://bit.ly/2TbOuVe> [<https://perma.cc/USC6-JP66>] (explaining that an Online Service Provider is any entity offering the transmission or routing of online communications, or connections to aid those communications, as well as any provider of online services or network access including email services and website hosting). Essentially every website could be considered an OSP. *Id.* For the purposes of this Comment, "OSP" is meant to encapsulate both Internet Service Providers and online content providers as used in US and EU legislation. *See* Jay Darrington, *What is an Internet Content Provider?*, CHRON, <https://bit.ly/38JFTiN> [<https://perma.cc/5AES-YLDZ>] (last visited Aug. 9, 2020) (explaining that Internet Service Provider "refers to the company who gives you Internet access, such as AT&T or Comcast" while an online content provider or Internet content provider is "a website or organization that handles

via or onto their services.⁶ Earlier versions of Article 13 explicitly required OSPs to impose content filters in order to comply with this imposition of liability.⁷ The European Union Parliament and Council discussed both controversial articles extensively and then, based on expert advice, decided against including the proposed versions of the articles.⁸ German MEP⁹ Axel Voss later reintroduced the controversial articles—versions that had already been discarded—and they inexplicably made their way into the final version of the Directive.¹⁰ While the final versions of the articles do not contain explicit filtering obligations, the articles’ opponents remain concerned that the effect is the same.¹¹

Proponents of the 2019 Copyright Directive had difficulty getting the Directive passed with these two clauses present, even in forms that did not contain explicit monitoring obligations.¹² Prior to voting on the actual Directive, there was a last-minute vote on

the distribution of online content such as blogs, videos, music[,] or files.”). Some examples include ABC News, Disney, and MSNBC. *Id.*

6. Doctorow, *The European Copyright Directive*, *supra* note 1 (“Article 13 removes the protection for online services Instead, it says that online platforms have a duty to ensure that none of their users infringe copyright, period.”); *see* Council Directive 2019/790, arts. 17(1), 17(3), 2019 O.J. (L 130) 92, 119 (imposing liability for “giv[ing] the public access to copyright-protected works or other protected subject matter uploaded by its users” and revoking limitations on liability provided by prior Directives).

7. *See, e.g., Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 29–30, COM (2016) 593 final (Sept. 14, 2016) (“Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall . . . take measures to ensure the functioning of agreements concluded with rightholders for the use of their works . . . such as the use of effective content recognition technologies . . .”).

8. Doctorow, *The European Copyright Directive*, *supra* note 1.

9. *See Members of the European Parliament*, EUROPA, <https://bit.ly/2zQeyy2> [<https://perma.cc/K2MZ-Y5HB>] (last visited Aug. 9, 2020) (explaining that MEP stands for “member of European Parliament”). The European Union is made up of 705 Members elected by the 27 member states of the European Union. *Id.*

10. Doctorow, *The European Copyright Directive*, *supra* note 1 (explaining that the clauses “were reintroduced in forms that had already been discarded as unworkable” and that the reintroduction led to criticism “from the world’s top technical, copyright, journalistic, and human rights experts and organizations”).

11. *Id.* “Article 13 advocates say that filters aren’t required, but when challenged, not one has been able to explain how to comply with Article 13 without using filters.” *Id.* (emphasis omitted).

12. *See generally id.* (identifying the reintroduction of Articles 11 and 13 as a turning point before which the Directive appeared close to passing).

whether to reconsider amending Articles 11 and 13.¹³ The vote to reconsider failed by just five votes.¹⁴

Following that vote, as many as ten MEPs admitted to voting mistakenly,¹⁵ believing that they were voting against the controversial articles, rather than against amending them.¹⁶ However, despite the confusion, Parliament proceeded to a vote on the Directive itself.¹⁷ The final vote was 348 to 274 with 36 abstentions.¹⁸ While Article 11 and Article 13 were both subjects of criticism, only Article 13 is the subject of this Comment.

Public outcry against Article 13 was immense.¹⁹ There were protests across Europe.²⁰ In Germany alone there were 40 separate protests, with 40,000 protestors in Munich and 30,000 in Berlin.²¹ Some politicians claimed that the public outcry against Article 13 was being manufactured by big tech companies and that petition signatures were fake.²² Hundreds of thousands of protestors responded by showing up with signs reading “we are not bots” to demonstrate that real people were concerned about Article 13’s imminent impact.²³ Some European websites went dark²⁴ or dis-

13. See Copyright in the Digital Single Market: European Parliament Vote, EUR. PARL. DOC. (2019).

14. *Id.*; Emanuel Karlsten, *Sweden Democrats & Swedish Social Democrats Defeat Motion to Amend Articles 11 & 13*, MEDIUM, (Mar. 26, 2019), <https://bit.ly/39eRequ> [<https://perma.cc/MV8J-ZKJZ>].

15. Mike Masnick, *Enough MEPs Say They Mistakenly Voted for Articles 11 & 13 that the Vote Should Have Flipped; EU Parliament Says Too Bad*, TECHDIRT (Mar. 26, 2019), <https://bit.ly/2PBtpRY> [<https://perma.cc/86MH-XUND>]; James Vincent, *Ten European Lawmakers Say They Voted Against Pivotal Copyright Amendment by Accident*, THE VERGE, (Mar. 27, 2019, 11:37 AM), <https://bit.ly/2Tan161>.

16. Karlsten, *supra* note 14 (“If [the MEPs] had approved the vote, there’d have been a chance to delete [the] controversial Articles 11 and 13 from the Directive.”).

17. *Id.*

18. European Parliament Press Release, European Parliament Approves New Rules for the Internet (Mar. 26, 2019).

19. See *EU Copyright Bill: Protests Across Europe Highlight Rifts over Reform Plans*, DEUTSCHE WELLE (Mar. 23, 2019), <https://bit.ly/3ahNgNE> [<https://perma.cc/BR4L-4T6J>].

20. *Id.*

21. *Id.*

22. Mike Masnick, *Huge Protests Across Europe Protest Article 13; Politician Lies and Claims They Were Paid to Be There*, TECHDIRT (Mar. 25, 2019, 12:28 AM), <https://bit.ly/2PzCKJZ> [<https://perma.cc/T5QH-XXPE>].

23. *Id.*

24. See, e.g., *Why German Wikipedia Is Down for 24 Hours*, THE LOCAL (Mar. 21, 2019, 09:28 CET+01:00), <https://bit.ly/2YEz9z2> [<https://perma.cc/2MLT-MXBK>] (“In place of the usual Wikipedia site, for Thursday visitors will see a black screen with white writing describing the reasons for the protest.”).

played banners in protest,²⁵ and over 130 European businesses asked Parliament to reject the Directive.²⁶ People were concerned about over-filtering of fair-use content like memes and mashups due to the lack of sophisticated filtering technology.²⁷ Others were concerned about the untenable costs to small businesses of expensive filtering software like Content ID²⁸ and the effect the Directive would have on freedom of expression and the exchange of ideas via the Internet.²⁹

The Directive became one of the most controversial issues in EU history.³⁰ The petition opposing the Directive attracted more

25. Tamara Evdokimova, *Online Protests Sweep European Internet Ahead of Copyright Law Vote*, SLATE (Mar. 21, 2019, 4:20 PM), <https://bit.ly/32FyWfC> [<https://perma.cc/CH7J-T6L3>].

26. Cory Doctorow, *More than 130 European Businesses Tell the European Parliament: Reject the #CopyrightDirective*, ELECTRONIC FRONTIER FOUND. (Mar. 20, 2019), <https://bit.ly/3adz4W7> [<https://perma.cc/SAM8-57N9>].

27. See Ryan Browne, *What Europe's Copyright Overhaul Means for YouTube, Facebook and the Way You Use the Internet*, CNBC (Mar. 29, 2019, 2:01 AM), <https://cnb.cx/2uGAMA6> [<https://perma.cc/7L4H-CU3H>] (“Detractors have said this would lead to controversial pre-filter systems, where everything from memes to GIFs are blocked from online platforms.”). See also Doctorow, *The European Copyright Directive*, *supra* note 1 (“[F]ilters are notoriously inaccurate, prone to overblocking legitimate material—and lacking in checks and balances, making it easy for censors to remove material they disagree with.”).

28. See Doctorow, *The European Copyright Directive*, *supra* note 1 (“All but the crudest filters cost so much that only the biggest tech companies can afford to build them. . . .”). The most famous copyright filter is YouTube’s “ContentID, which blocks videos that match items identified by a small, trusted group of rightsholders.” *Id.* See also *How Content ID Works*, YOUTUBE, <https://bit.ly/2As4N9c> [<https://perma.cc/FXK3-MBA6>] (last visited Aug. 9, 2020) (“Copyright owners can use a system called Content ID to easily identify and manage their content on YouTube. Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright owners get to decide what happens when content in a video on YouTube matches a work they own.”). YouTube users have complained that the Content ID system is already open to abuse and that more stringent regulations would only exacerbate the issues. Browne, *supra* note 27.

29. See Doctorow, *The European Copyright Directive*, *supra* note 1 (explaining that Article 13’s opponents are concerned about filters not being able to recognize “fair dealing” exceptions and incidental uses). Fair dealing refers to a myriad of European exceptions/defenses to copyright violation—similar to American fair use—and includes parody, criticism, and commentary. See *id.* Incidental use occurs when copyrighted content is playing or pictured in the background of a post or new work but is done so accidentally or not for the purpose of showcasing the copyrighted content. See *id.* For example, “[i]f your kid takes her first steps in your living room while music is playing in the background, the “incidental” sound could trigger a filter,” and the video might be taken down, even though the use would likely be permissible under fair dealing. *Id.*

30. Doctorow, *The European Copyright Directive*, *supra* note 1.

signatures than any other petition in Change.org's history.³¹ In April 2019, the Directive passed, with a version of the controversial Article 17 (previously 13) remaining, but without an explicit obligation to monitor, and with a disclaimer that the Article should not be read to require active monitoring.³²

Following the Directive's passage, the Netherlands, Luxembourg, Poland, Italy, and Finland issued a joint statement about their concerns, claiming that the Directive fails to meet its purported aims of stimulating innovation, creativity, investment, and the production of new content.³³ The countries articulated their belief that the Directive represents a step backward in innovation for the EU and expressed concerns about the legal clarity of the Directive.³⁴

On May 24, 2019, Poland filed a challenge to the Directive in the Court of Justice of the European Union (CJEU), claiming that the Directive sets up a scheme of liability that essentially requires OSPs to proactively monitor all content posted to their sites, even though it purports not to impose a monitoring requirement.³⁵ Poland further claims that this obligation to monitor violates the Charter of Fundamental Rights of the EU.³⁶

Part II of this Comment will discuss the EU Charter of Fundamental Rights and its effect on the 2019 Directive.³⁷ It will also explore the framework of copyright law in the EU prior to the passage of the 2019 Directive, including relevant EU Directives and CJEU case law.³⁸ Part III of this Comment will discuss Poland's challenge to the Directive's legitimacy in the CJEU, including the

31. *Id.*; see *Stop the Censorship-Machinery! Save the Internet!*, CHANGE.ORG, <https://bit.ly/39beRQJ> [<https://perma.cc/PLA9-B6JL>] (last visited Aug. 9, 2020).

32. See Council Directive 2019/790, art. 17(8), 2019 O.J. (L 130) 92, 120.

33. General Secretariat of the Council, Joint Statement by the Netherlands, Luxembourg, Poland, Italy and Finland, Draft Directive of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (First Reading), 2016/0280 (COD), (Apr. 15, 2019), 2.

34. *Id.* at 2 ("Furthermore, we feel that the Directive lacks legal clarity, will lead to legal uncertainty for many stakeholders concerned and may encroach upon EU citizens' rights.")

35. Action Brought on May 24, 2019, Case C-401/19, *Pol. v. Parliament*, 2019 O.J. (C 270) 21–22. Poland argues that the Directive's "obligation to make best efforts to ensure the unavailability of specific works" and "to prevent the future uploads of protected works . . . [requires] the service providers—in order to avoid liability—to carry out prior automatic verification (filtering) of content uploaded online by users, and . . . introduce preventive control mechanisms." *Id.*

36. *Id.*

37. See *infra* Part II.

38. See *infra* Part II.

three tests that the CJEU will consider when making its decision.³⁹ This Comment recommends that the CJEU overturn the 2019 Directive on the basis of Poland's arguments but concludes that the decision of the CJEU is unpredictable and will depend on whether the CJEU finds that the Directive actually imposes a general monitoring obligation.⁴⁰ Regardless of the CJEU's decision, the 2019 Copyright Directive and the resulting controversy and litigation have brought to light the inconsistency of copyright regulation in the EU. Ideally the CJEU's ruling will succeed where the Directive failed and clarify the official EU policy on intermediary liability without mandating an overhaul of the existing copyright and freedom of expression framework.

II. BACKGROUND

A. *Overview of the EU Charter on Fundamental Rights*

Major concern with the 2019 Copyright Directive has centered around its apparent conflict with the European Union Charter on Fundamental Rights⁴¹ ("the Charter") on the basis that the Directive insufficiently protects the Charter-enumerated right to freedom of expression.⁴² The Charter contains protections for both intellectual property rights and freedom of expression.⁴³ These protections require European member countries and the EU itself to ensure balance between any Charter-protected rights that might be implicated in all legislation they enact.⁴⁴

Specifically, Article 17 of the Charter provides for protection of property rights, which includes intellectual property.⁴⁵ Article 17 allows for the regulation of the use of property only "in so far as is necessary for the general interest" and otherwise gives everyone the right to "own, use, dispose of and bequeath" his or her own possessions.⁴⁶

Article 11 governs the protection of freedom of expression and information.⁴⁷ This protection includes the right to "receive and impart information and ideas without interference by public author-

39. *See infra* Part III.

40. *See infra* Part IV.

41. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter].

42. Sophie Stalla-Bourdillon et al., *An Academic Perspective on the Copyright Reform*, 33 *COMPUT. L. & SEC. REV.* 13, 14 (2017).

43. Charter, *supra* note 41, arts. 17(2), 11.

44. *See id.* art. 52.

45. *Id.* art. 17.

46. *Id.* art. 17(1).

47. *Id.* art. 11.

ity.”⁴⁸ Article 11 also protects the “freedom and pluralism of the media.”⁴⁹ The CJEU uses “freedom to receive and impart information” and “freedom of expression” somewhat interchangeably throughout its case law but both terms refer to the Article 11 protection that the 2019 Copyright Directive allegedly infringes.⁵⁰

Article 52 of the Charter sets forth the scope of the guaranteed rights.⁵¹ Article 52 requires that any limitations on the Charter’s rights and freedoms “respect the essence of those rights and freedoms.”⁵² Article 52 further requires that specific laws must provide for any such limitations; limitations on Charter-protected rights cannot be inferred or assumed.⁵³ Article 52 specifies that limitations are “[s]ubject to the principle of proportionality.”⁵⁴ Such limitations must be “necessary and genuinely meet objectives of general interest [recognized] by the Union or the need to protect the rights . . . of others.”⁵⁵ The member states of the European Union introduced the Charter in December 2000,⁵⁶ and the Treaty of Lisbon⁵⁷ made the Charter legally binding as of 2009.⁵⁸ This means that all European member state and European Council legislation is subject to the Charter’s provisions and must take care not to infringe upon these rights beyond the extent permissible under

48. *Id.* art. 11(1).

49. *Id.* art. 11(2).

50. *See id.* art. 11; *see e.g.* Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, 12027 para. 50 (referring to the Article 11 protection as “freedom to receive or impart information”).

51. Charter, *supra* note 41, art. 52.

52. *Id.* art. 52(1).

53. *See id.*

54. *Id.* *See generally* *Proportionality Principle*, EUR-LEX, <https://bit.ly/2wZ3Aok> [<https://perma.cc/D526-RPU9>] (last visited Aug. 9, 2020) for more information about the principle of proportionality.

55. Charter, *supra* note 41, art. 52(1).

56. *Id.* *See* European Parliament Press Release, Proclamation of the Charter of Fundamental Rights by the Three European Institutions (Dec. 12, 2007) for an explanation of the Charter’s proclamation, a formal event which “provides a legal basis for the article which refers to the Charter in the EU Reform Treaty,” the Treaty of Lisbon. The proclamation was conducted by the heads of the three European institutions, the Parliament, Commission, and Council, and it took place the day before the official signing of the Treaty of Lisbon. *Id.*

57. Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

58. *Id.* at 134 (explaining, at Article 6(2) under Final Provisions of the Treaty, that the “[t]reaty shall enter into force on 1 January 2009,” subject to the ratification process).

the principle of proportionality and the essence of the rights and necessity requirements.⁵⁹

B. Explanations Relating to the Charter of Fundamental Rights

The drafters of the Charter also issued Explanations Relating to the Charter of Fundamental Rights (“the *Explanations*”).⁶⁰ The Explanation on Article 17 provides that the guarantees of Article 17, Paragraph 1 of the Charter “shall apply as appropriate to intellectual property,” which includes literary and artistic property as well as patents, trademarks, and associated rights.⁶¹ This means that the Charter affords less sweeping protections to intellectual property rights than to other forms of property under Article 17 and other rights under their respective Articles in the Charter.⁶²

In contrast, the Explanation on Article 11, Freedom of Expression and Information, contains no such appropriateness limitations.⁶³ With one exception—licensing requirements for “broadcasting, television, or cinema enterprises”⁶⁴—the *Explanations* do not indicate any limitations on the extent to which the protections of the Charter apply to freedom of expression rights.⁶⁵

The *Explanations* also provide commentary on Article 52 of the Charter.⁶⁶ The language in the Charter limiting its scope originated in CJEU case law on fundamental rights, allowing for

59. See Charter, *supra* note 41, art. 52.

60. *Explanations Relating to the Charter of Fundamental Rights*, 2007 O.J. (C 303) 17 [hereinafter *Explanations*]. The Explanations were issued under the authority of the Convention that drafted the Charter of Fundamental Rights. *Id.* They do not have the force of law but are intended as a tool of interpretation and clarification. *Id.*

61. *Id.* at 24.

62. See *id.* at 24.

63. *Id.* at 21.

64. See European Convention on Human Rights art. 10(1), Nov. 4, 1950, E.T.S. No. 5. The *Explanations* clarify that Article 11 of the Charter corresponds to Article 10 of the European Convention on Human Rights, which also deals with the right to freedom of expression and information. *Explanations, supra* note 60, at 21 (referencing European Convention on Human Rights, Nov. 4, 1950, E.T.S. No. 5). The *Explanations* further clarify that this correspondence leaves intact “any restrictions which Union law may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.” *Explanations, supra* note 60, at 33. The referenced sentence from the European Court of Human Rights (ECHR) allows member states to require the licensing of broadcasting, television, or cinema enterprises. European Convention on Human Rights art. 10(1), Nov. 4, 1950, E.T.S. No. 5. Thus, the *Explanations* indicate that the requirement of such licensing does not constitute a limitation of freedom of expression in violation of Article 11 of the Charter of Fundamental Rights. See *Explanations, supra* note 60, at 33.

65. *Explanations, supra* note 60, at 21.

66. *Id.* at 32.

restrictions on fundamental rights only when such restrictions “correspond to objectives of general interest pursued by the Community” and do not rise to the level of “disproportionate and unreasonable interference undermining the very substance of those [rights].”⁶⁷ The *Explanations* clarify that the meaning and scope of Charter-guaranteed rights are also subject to determination in the case law of the European Court of Human Rights (ECHR) and the CJEU.⁶⁸ Thus, the protections for both Intellectual Property and Freedom of Expression and the application of those protections to European Union legislation should be read in light of the case law of those courts, and any limitations on fundamental rights must be proportionate.⁶⁹

C. *EU Directives on Intellectual Property and the Internet*

Since 2000, the EU has passed several directives that relate to liability for copyright-infringing content posted online.⁷⁰ Prior to 2019, these directives created a liability scheme that was less strict than the scheme the 2019 Directive imposes, especially for OSPs.⁷¹

1. *The 2000 eCommerce Directive*

The 2000 eCommerce Directive,⁷² particularly Articles 12 through 15,⁷³ describes the pre-2019 intellectual property liability scheme for OSPs.⁷⁴ Articles 10 through 21 of the eCommerce Directive set forth the liability limitations for OSPs.⁷⁵ Article 12 exempts an OSP from liability when the OSP limits its involvement to the transmission of infringing data, so long as the providers do not initiate the transmission, select the receiver, or select/modify the information in the transmission.⁷⁶ When OSPs limit involvement in

67. *Id.* at 32–33, quoting Case C-292/97, *Karlsson*, 2000 E.C.R. I-2760, 2777, para. 45.

68. *Explanations*, *supra* note 60, at 33.

69. *Id.* at 33.

70. See Santiago Nadal, *Intellectual Property and Freedom of Speech: A Long-standing European Discussion*, 61 No. 8 DRI For Def. 25, 31. (2019).

71. *Id.* at 28.

72. Council Directive 2000/31, 2000 O.J. (L 178) 1.

73. *Id.* arts. 12, 15.

74. Péter Mezei & István Harkai, *Enforcement of Copyrights over the Internet: A Review of the Recent ECJ Case Law*, 21 J. INTERNET L. 12, 16 (2017).

75. Council Directive 2000/31, arts. 10–21, 2000 O.J. (L 178) 1, 12–15; see Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 393 (2005).

76. Council Directive 2000/31, art. 12, 2000 O.J. (L 178) 1, 12; Giuseppe Colangelo & Mariataresa Maggolino, *ISPs' Copyright Liability in the EU Digital Single Market Strategy*, 26 INT'L J.L. & INFO. TECH. 142, 143 (2018).

this manner, they are “mere conduits” and are not responsible under Article 12.⁷⁷

Article 13 of the eCommerce Directive renders an OSP exempt from liability when it provides only “caching.”⁷⁸ Caching occurs when an OSP supplies only “automatic, intermediate, and temporary storage,” and the OSP cannot modify the information.⁷⁹ To preserve the exemption, OSPs also must comply with the requirements governing access to their stored information and expeditiously remove or disable access to the information upon learning that a court or administrative agency has ordered removal.⁸⁰

Article 14 similarly provides a general exemption from liability for mere hosting,⁸¹ subject to two conditions.⁸² A hosting OSP is exempt if the OSP has no actual knowledge of illegal activity and is unaware of any facts indicating illegal activity is occurring.⁸³ Additionally, an OSP is exempt if it acts expeditiously, upon obtaining knowledge of such illegal activity, to remove or disable access to the infringing content.⁸⁴ However, Article 14(3) does not prevent a court from requiring that the OSP prevent or terminate infringement.⁸⁵ Article 14 also does not prevent member states from establishing procedures to govern removal or disablement of access to information.⁸⁶

Finally, Article 15 of the eCommerce Directive established that OSPs have neither a general obligation to monitor the information OSPs transmit or store, nor to actively seek out unlawful activity for prevention.⁸⁷ Commentators frequently refer to Article 15’s protection from a general monitoring requirement as the “safe harbor”

77. Colangelo, *supra* note 76, at 142.

78. *Id.* at 142 (citing Council Directive 2000/31, art. 13, 2000 O.J. (L 178) 1, 13).

79. Council Directive 2000/31, art. 13, 2000 O.J. (L 178) 1, 13.

80. *Id.*

81. *Id.* art. 14. Hosting occurs when a provider offers a service “that consists of the storing of information provided by a recipient of the service.” *Id.* art. 14(1).

82. *Id.* art. 14.

83. *Id.*

84. *Id.* Article 14 of the eCommerce Directive is an essential prong of the pre-2019 regime for copyright protection in the EU. See Colangelo, *supra* note 76, at 142. Coupled with the absence of a duty to *obtain* knowledge—for example, through proactive monitoring—Article 14 protects hosting OSPs from liability for copyright infringement in a wide range of situations. See *id.* Under this scheme, OSPs are only liable if a rightholder or third party informs the OSP of infringement *and* the OSP does nothing to disable access to the infringing material. *Id.* See also *infra* note 246 (elaborating on this system, sometimes referred to as notice-and-takedown).

85. Council Directive 2000/31, art. 14(3), 2000 O.J. (L 178).

86. *Id.* art. 14.

87. *Id.* art. 15.

provision because it gives relief from liability to OSPs that meet the specified conditions.⁸⁸

Article 15 does provide, however, that member states may establish obligations for OSPs to inform competent public authorities of alleged unlawful activities or information occurring via their services.⁸⁹ Under Article 15, member states may also require OSPs to communicate information to the relevant authorities to permit them to identify the infringing users.⁹⁰ Article 14(3) indicates that member states may establish some procedures for removal or disablement, but Article 15 insists that such measures may not rise to the level of a general monitoring obligation.⁹¹

2. *The 2001 InfoSoc Directive*

A year after passing the eCommerce Directive, the European Union enacted a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (“InfoSoc Directive”).⁹² Recital 59 of the InfoSoc Directive⁹³ asserts that intermediaries are often in the best position to end infringing activities.⁹⁴ The Directive thus provides that rightholders⁹⁵ should be able to apply for injunctions directly against intermediaries who “carry”⁹⁶ a third party’s infringement of a protected work.⁹⁷ Article 8(3) of the Directive reiterates this

88. See Colangelo, *supra* note 76, at 143.

89. Council Directive 2000/31, art. 15(2), 2000 O.J. (L 178) 1, 13.

90. *Id.*

91. Colangelo, *supra* note 76, at 143; Council Directive 2000/31, arts. 14(3), 15, 2000 O.J. (L 178) 1, 13.

92. Council Directive 2001/29, 2001 O.J. (L 167) 10.

93. *Id.* para. 59. Recitals are “whereas” clauses at the beginning of legislation that the drafters include to aid in interpretation. Tadas Klimas & Jurate Vaiciukaite, *The Law of Recitals in European Community Legislation*, 15 ILSA J. Int'l & Comp. L. 1, 7 (2008). Scholars and politicians frequently disagree about the legal effect that should be afforded Recitals. *Id.* at 7, 11. Courts also place varying levels of value on Recitals as interpretive tools, ranging from entirely irrelevant to mandatory law valued above other legislative provisions. *Id.* at 12–13. However, at minimum, Recitals set forth the reasons underlying the legislation that they accompany and help to explain the drafters’ choices about which medium of legislation was best suited for their aims. *Id.* at 7, 9.

94. Council Directive 2001/29, para. 59.

95. See Council Directive 2001/29, paras. 25, 31, 35, 2001 O.J. (L 167) 10, 12–13 (defining a rightholder as the owner of rights in a piece of intellectual property who possesses an exclusive right to make their copyrighted works available to the public.) The Directive also describes different categories of rightholders and protected subject-matter, much of which rightholders can license for use. *Id.*

96. See *id.* (indicating broadly that an intermediary carries a third party’s infringement of a protected work when the infringing third party uses the intermediary’s services to engage in infringing activities).

97. *Id.* para. 59.

protection.⁹⁸ However, Article 8 also requires that sanctions under its authority shall be effective, proportionate, and dissuasive.⁹⁹

3. *The 2004 Enforcement Directive*

The EU passed the 2004 Enforcement Directive (“Enforcement Directive”)¹⁰⁰ with the goal of effectively applying substantive intellectual property law in the EU.¹⁰¹ Discussions about the Enforcement Directive arose out of concern that member states were enforcing intellectual property rights in disparate ways, despite being subject to the same EU-wide intellectual property conventions.¹⁰²

The Enforcement Directive sets forth an affirmative right for rightholders to apply for injunctions against intermediaries whose services and/or websites permit or facilitate infringing uses.¹⁰³ The Directive emphasizes the importance of provisional measures allowing for immediate termination of infringement, even before a court decides on the merits of an infringement action.¹⁰⁴ The Enforcement Directive even references “prohibitory measures” when “justified by the circumstances” to prevent future intellectual property right infringements.¹⁰⁵

The Enforcement Directive appears to give significant power to rightholders to prevent infringement of their works, but the scope of the Directive is limited.¹⁰⁶ Article 2(3) of the Enforcement Directive provides that the Directive shall not affect existing EU provisions governing the substantive law on intellectual property in general or the eCommerce Directive Articles 12 to 15 in particular.¹⁰⁷ The Enforcement Directive also purports not to affect the InfoSoc Directive¹⁰⁸ and defers to the InfoSoc Directive to govern injunctions against intermediaries.¹⁰⁹ Thus, the Article 15 safe harbor provision—and the InfoSoc Directive’s effective, proportion-

98. *Id.* art. 8(3).

99. *Id.* art. 8.

100. Council Directive 2004/48, 2004 O.J. (L 167) 16.

101. *Id.* para. 3.

102. *Id.* para. 7.

103. *Id.* para. 23.

104. *Id.* para. 22.

105. *Id.* para. 24.

106. *Id.* art. 2(3).

107. *Id.* art. 2(3). Enforcement Directive article 2(3) also explains that the Directive does not affect other EU directives regarding data protection and electronic signatures. *See id.*

108. *Id.* art. 2(2).

109. Council Directive 2004/48, 9(3)(a), 2004 O.J. (L 167) 16, 22.

ate, and dissuasive requirement on sanctions—both remain intact.¹¹⁰

While the Enforcement Directive does explicitly permit imposing pre-judicial provisional measures on defendants who have allegedly infringed on copyrights,¹¹¹ the Enforcement Directive also mandates a review, upon request of the defendant, to decide whether the imposed preemptive measures were appropriate.¹¹² The Enforcement Directive further requires the member states to revoke the provisional measures, if the defendant so requests, when the rightholder does not institute actual infringement proceedings to protect his or her rights.¹¹³

Judicial authorities may also require an applicant to provide compensation for injury caused by a member state judicial authority instituting unfounded provisional measures.¹¹⁴ Article 3(1) of the Directive provides that measures, remedies, and procedures to ensure enforcement of intellectual property rights shall be fair and equitable, shall not be unnecessarily complicated or costly, and shall not entail unreasonable time limits or unwarranted delays.¹¹⁵ The Enforcement Directive reiterates that measures must also be effective, proportionate, and dissuasive,¹¹⁶ as required by the InfoSoc Directive.¹¹⁷ So, while the Enforcement Directive appears to give rightholders substantial power to protect against the infringement of their works, it also provides several checks to ensure rightholders do not abuse that power and to protect the safe harbor provision for intermediaries.

D. History of CJEU Case Law

Because the 2019 Copyright Directive involves fundamental rights, the Charter provides that courts and member states must in-

110. *See id.* art. 8.

111. *Id.* art. 9(1)(a). Such pre-judicial measures occur before a defendant has a chance to appear in court to defend himself or otherwise comment upon the matter. *Id.* art. 9(4). These measures may include, for example, injunctions against the allegedly infringing action, penalty payments, or guarantees by the alleged infringer that he or she will compensate the rightholder for the infringement. *Id.* art. 9(1)(a). The Directive permits member states to impose injunctions of this type more liberally when there is a risk of irreparable harm to the rightholder if the infringing action does not cease. *Id.* art. 9(4).

112. *Id.* art. 9(4).

113. *Id.* art. 9(5).

114. *Id.* art. 9(7).

115. *Id.* art. 3(1).

116. Council Directive 2004/48, 3(2), 2004 O.J. (L 167) 16, 20.

117. Council Directive 2001/29, art. 8, 2001 O.J. (L 167) 10, 18.

terpret the Directive in the light of CJEU case law.¹¹⁸ The CJEU has extensive case law regarding the rights of copyright holders and OSPs on the Internet, principally in two areas: 1) primary and secondary liability for intermediaries¹¹⁹ and 2) the allowance of proactive monitoring obligations, which lead to *de facto* strict liability.¹²⁰

1. Defining a “Communication to the Public” and Primary Versus Secondary Liability

The Council passed Recital 64 alongside the 2019 Copyright Directive.¹²¹ Recital 64 explains that “online content-sharing service providers perform an act of communication to the public” and therefore are responsible for their content.¹²² However, this pronouncement conflicts with the approach the CJEU has taken to interpret the meaning of “communication to the public” in prior case law.¹²³ The CJEU has not historically found that a communication to the public occurs each time a provider does more than provide physical facilities.¹²⁴ Rather, the CJEU previously held that a “communication to the public” requires a user giving access to the protected content to an additional group of people: a “new” public who would not have been able to enjoy the work absent that indis-

118. *Explanations*, *supra* note 60, at 33. See also Aida Torres Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights*, 1080 INT’L J. CONT. L. 15 (2017) (explaining that the Charter acts as a floor when EU legislation calls for member state implementation: member state authorities and courts may implement EU law as they choose, but implementation measures must protect the fundamental rights enumerated in the Charter with the level of protection called for by the Charter and the interpretive CJEU case law).

119. Giancarlo Frosio, *To Filter or Not to Filter? That is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L.J. 331, 340 (2018) [hereinafter Frosio, *To Filter*].

120. *Id.* at 352.

121. Council Directive 2019/790, para. 64, 2019 O.J. (L 130) 92, 106. In earlier versions of the Directive, this provision was numbered Recital 38. See *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 20, COM (2016) 593 final (Sept. 14, 2016). The Proposal read:

Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders.

Id. The earlier version, however, explicitly excluded OSPs who were hosting providers pursuant to the definition in Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1, 13. See *id.* Some of the Directive’s opponents aimed their complaints at this provision, under the name Recital 38. See, e.g., Mezei & Harkai, *supra* note 74, at 25; Stalla-Bourdillon, *supra* note 42, at 13.

122. Council Directive 2019/790, para. 64, 2019 O.J. (L 130) 92, 106.

123. Frosio, *To Filter*, *supra* note 119, at 342.

124. *Id.*

pensable intervention.¹²⁵ Because end-users¹²⁶ upload work, the CJEU determined that their “indispensable intervention,” not any of the hosting provider’s actions, amounted to infringement.¹²⁷ The pre-2019 system thus distinguished end-users from online hosting providers, regardless of their level of involvement, so long the providers did not deliberately choose to pass along infringing material.¹²⁸ Additionally, the question of whether a communication to the public had occurred would be for the courts to decide on a case-by-case basis.¹²⁹ The judgments of the CJEU indicate that a service provider’s 1) key intervention and 2) knowledge are the important considerations in determining whether a deliberate passing-along of information—and therefore a communication to the public—has occurred.¹³⁰ Under the pre-2019 regime, a judicial body would undertake this analysis for every act of alleged infringement attributed to a service provider, rather than automatically assuming that a communication to the public has occurred merely because the infringing content appears on an OSP’s site.¹³¹ Recital 64 instead allows a judicial body to assume a communication to the public has occurred in any infringement case involving content posted to an online content sharing provider’s website.¹³²

The “communication to the public” determination is vital because OSPs that communicate to the public are directly—rather

125. Joined Cases C-403 & 429/08, *Football Ass’n Premier League v. QC Leisure*, 2011 E.C.R. I-9159, 9238-89, paras. 194-97; *id.* at 343.

126. See Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 *Nw. U.L. REV. ONLINE* 19, 36 (2017) [hereinafter Frosio, *Reforming Intermediary Liability*] (explaining that end-users are users of online platforms who physically upload and download content).

127. Joined Cases C-403 & 429/08, *Football Ass’n Premier League v. QC Leisure*, 2011 E.C.R. I-9159, 9238, para. 195.

128. Frosio, *To Filter*, *supra* note 119, at 344; Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1, 13.

129. See e.g. Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456, para. 18 (Curia), <https://bit.ly/33MFsDF> (addressing whether “communication to the public” includes creation of peer-to-peer sharing platform); Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, para. 20 (Curia), <https://bit.ly/3fJLE1s> (addressing whether the posting of a hyperlink to a work constituted a “communication to the public”). See also Frosio, *Reforming Intermediary Liability*, *supra* note 126, at 36 (“characterizing hosting providers as ‘communicating to the public’ has never been an obvious conclusion under EU law.”).

130. Stalla-Bourdillon, *supra* note 42, at 16 (2017), *citing* Case C-160/15 *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, para. 349 (Curia), <https://bit.ly/3fJLE1s>.

131. Stalla-Bourdillon, *supra* note 42, at 16.

132. See Council Directive 2019/790, para. 64, 2019 O.J. (L 130) 92, 106.

than secondarily—liable for infringement.¹³³ The assumption that OSPs are communicating with the public and are therefore directly liable is a significant departure from the liability standard for OSPs under the old framework.¹³⁴

The CJEU has reiterated its position assigning mere secondary liability to OSPs, absent a finding of a communication to the public.¹³⁵ Under the CJEU decision in *GS Media v. Sanoma Media*,¹³⁶ a hosting provider is not primarily liable unless it communicates to the public by providing access to infringing material to a “new public.”¹³⁷ In *GS Media*, the hosting site posted hyperlinks to copyright-protected content at other locations on the Internet where the content was already freely accessible.¹³⁸ The CJEU found that the alleged infringement had not reached a “new public” when the content was already available elsewhere on the Internet because users *could* have accessed the content without the OSP’s intervention.¹³⁹ However, the court still considered the knowledge element to determine whether a communication to the public had occurred.¹⁴⁰ Ultimately, GS Media communicated to the public because the company had knowledge of the illegal nature of the links.¹⁴¹ The CJEU said that if the secondary poster either 1) should have known that the original posting of the content was infringement, or 2) posted the links in pursuit of financial gain, then a court could presume the poster had knowledge.¹⁴² Thus, in these two scenarios, a court could determine that a communication to the public occurred, despite no evidence of a “new public.”¹⁴³ However, the court noted that when posting on the second website merely enables a user to more easily locate content that is legitimately posted elsewhere, the website does not engage in a communication to the public.¹⁴⁴ Thus, the court maintained that a communication to the public was necessary in order to find an OSP directly—rather than secondarily—liable, and that such a communication to the public only occurred

133. Stalla-Bourdillon, *supra* note 42, at 17; see Frosio, *To Filter*, *supra* note 119, at 343.

134. Stalla-Bourdillon, *supra* note 42, at 16, 18.

135. See e.g., Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644 (Curia), <https://bit.ly/3fJLE1s>.

136. *Id.*

137. *Id.* para. 21.

138. *Id.* para. 25.

139. *Id.* para. 42, 52.

140. *Id.* para. 55.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* para. 26, 55.

when there was a) knowledge or b) a new public reached because of the OSP's intervention.¹⁴⁵

A year later, the CJEU loosened the definition of “communication to the public” in *Stichting Brein v. Ziggo BV*,¹⁴⁶ finding that a communication to the public occurs when a person or OSP makes available or manages a sharing platform which, via the “indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.”¹⁴⁷ Prior to *Ziggo*, the CJEU required an “indispensable” standard to find that a “communication to the public” had occurred,¹⁴⁸ meaning that, unless the infringement could never have occurred without the conduct in question, the actor was not liable for a copyright violation.¹⁴⁹

In *Ziggo*, the CJEU instead employed an “essential” standard,¹⁵⁰ meaning that an intervener could be liable when end-users might have been able to find or share the infringing material *without* the online hosting provider's intervention, but finding the infringing material would have been more complex.¹⁵¹ The court found that an intervention rising to the level of a communication had occurred, even though the intervening party was not “indispensable” in the process of the end-user obtaining access but rather “essential” to that access.¹⁵² The CJEU determined that, “as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with [less complex] access to protected works is liable to constitute an ‘act of communication’” under Article 3(1) of the InfoSoc Directive.¹⁵³

The court found that the defendant, The Pirate Bay, had violated the InfoSoc Directive because The Pirate Bay intervened, with full knowledge, and because, without the defendant's intervention, end-users would either not have been able to access the works, or the sharing of the works would be more complex.¹⁵⁴ The court

145. Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, para. 55 (Curia), <https://bit.ly/3fJLE1s>.

146. Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456 (Curia), <https://bit.ly/33MFsDF>.

147. *Id.* paras. 37, 43, 48.

148. Frosio, *To Filter*, *supra* note 119, at 344.

149. *Id.*

150. Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456, para. 37, 43 (Curia), <https://bit.ly/33MFsDF>.

151. *Id.* para. 36.

152. *Id.* para. 37.

153. *Id.* para. 35.

154. *Id.* para. 36

also found it important that The Pirate Bay actively filtered some content and deleted obsolete files.¹⁵⁵ Even under this loosened standard, the court was unwilling to find that a communication to the public had occurred without a) knowledge or b) the infringing content reaching a new public.¹⁵⁶ The only change in the liability scheme was that the court was willing to find the OSP liable on the basis that the content had reached a new public when the OSP was essential to that process rather than indispensable.¹⁵⁷

Under the decisions in *GS Media* and *Ziggo*, the court considers several factors in determining whether a website commits a communication to the public, including intent, financial gain, and the extent to which the website reaches a “new public” with its communication.¹⁵⁸ Unless the rightholder can establish some or all of these factors, a new public is not reached and the OSP is not directly liable for copyright infringement.¹⁵⁹ Additionally, under both cases, the question of whether an OSP communicated to the public—and thereby incurred primary liability—remains a case-by-case decision for the courts based on those factors.¹⁶⁰

2. *Proactive Monitoring Obligations and De Facto Strict Liability*

A second concern with the 2019 Copyright Directive in the context of CJEU case law is its placement of monitoring obligations on intermediaries.¹⁶¹ Article 15 of the eCommerce Directive explicitly prohibits general monitoring obligations but allows national law to provide for such monitoring obligations in specific cases.¹⁶²

155. *Id.* para. 38.

156. *Id.* para. 35.

157. Frosio, *To Filter*, *supra* note 119, at 344.

158. Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456, para. 28 (Curia), <https://bit.ly/33MFsDF>; Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, paras. 53, 22 (Curia), <https://bit.ly/3fJLE1s>.

159. *See* Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456, para. 28 (Curia), <https://bit.ly/33MFsDF>; Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, paras. 42, 52 (Curia), <https://bit.ly/3fJLE1s>.

160. *See generally* Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456 (Curia), <https://bit.ly/33MFsDF> (court undertook an analysis to determine if OSP communicated to the public); Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644 (Curia), <https://bit.ly/3fJLE1s> (same).

161. Frosio, *To Filter*, *supra* note 119, at 352. Intermediaries can be Internet access providers such as Comcast and Verizon or hosting providers such as Facebook, Twitter, YouTube, and Microsoft. *See* Frosio, *Reforming Intermediary Liability*, *supra* note 126, at 20, 25. “Online platforms” are considered a subset of online intermediaries. *Id.* at 22.

162. Council Directive 2000/31, art. 15, 2000 O.J. (178) 1, 13.

In the past, the CJEU has chosen to balance the competing interests of intellectual property rights and freedom to impart and receive information by interpreting the eCommerce Directive to establish a liability framework based on actual or constructive knowledge.¹⁶³ Under this system, hosting providers are not liable unless they have actual knowledge of the infringing content and refuse to remove the infringing content once they have that knowledge.¹⁶⁴ Additionally, proactive monitoring requirements are not only disallowed under this system but are also unnecessary because an OSP is not liable until the OSP knows of the infringement.¹⁶⁵

a. Anti-Monitoring Case Law

In *Scarlet v. SABAM*,¹⁶⁶ the CJEU considered a case in which the Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) brought suit against Scarlet Extended SA in response to Scarlet's refusal to install a system for filtering electronic communications that use file-sharing software.¹⁶⁷ SABAM is a management company representing authors, composers, and editors in authorizing the use of their musical works.¹⁶⁸ Scarlet is an OSP that delivers its customers access to the Internet.¹⁶⁹ SABAM brought suit because customers on Scarlet's service were using peer-to-peer, file-sharing applications to download music belonging to SABAM without paying royalties.¹⁷⁰ SABAM sought, among other remedies, an order requiring Scarlet to end the infringement by blocking its customers from sending and receiving files containing musical works via peer-to-peer software without the permission of rightholders.¹⁷¹ SABAM also sought a periodic penalty for Scarlet's noncompliance.¹⁷² Scarlet challenged the requested injunction on several

163. Frosio, *To Filter*, *supra* note 119, at 352. See also Pérez, *supra* note 118 (explaining that the CJEU has been increasingly protective of Charter-enumerated rights ever since it entered into force in 2009).

164. Frosio, *To Filter*, *supra* note 119, at 352.

165. *Id.*

166. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006.

167. *Id.* para. 2. This case originated in the Tribunal de première instance in Brussels. *Id.* para. 18. SABAM prevailed in that court and Scarlet appealed to the cour d'appel de Bruxelles. *Id.* para. 24, 28. That court referred the case to the CJEU to determine, in a preliminary ruling, the relation between several EU Directives governing copyright in the digital context, and the effects of those Directives on national courts. *Id.* para. 28.

168. *Id.* para. 15.

169. *Id.* para. 16.

170. *Id.* para. 17.

171. *Id.* para. 20.

172. *Id.*

grounds, including that the injunction would violate Article 15 of the eCommerce Directive because the injunction would impose a general obligation for Scarlet to monitor communications on its network.¹⁷³

In deciding *Scarlet*, the CJEU thus considered whether the eCommerce Directive and the InfoSoc Directive, read together and in conjunction with the protection of fundamental rights under the Charter, prevent an injunction on an OSP to introduce a system for filtering.¹⁷⁴ The CJEU considered whether such a system for filtering, which identified and blocked infringing music files, was impermissibly broad when it 1) accessed all electronic communications passing via the intermediary's services, in particular those using peer-to-peer software, 2) applied indiscriminately to all its customers, 3) was a preventative measure, 4) was provided at the exclusive expense of the intermediary,¹⁷⁵ and 5) lasted for an unlimited period.¹⁷⁶ Under these circumstances, the court agreed with Scarlet, finding that SABAM's requested preventive filtering requirement was too broad.¹⁷⁷ The court found that Article 15 of the eCommerce Directive therefore prohibited SABAM's injunction because the requested filtering requirement essentially necessitated active monitoring of all data for all customers, amounting to a general monitoring obligation.¹⁷⁸

While Article 17(2) of the Charter contains the obligation to protect intellectual property rights, the CJEU found nothing in the wording of the provision or case law to indicate that the right to protection of intellectual property is inviolable, requiring absolute protection.¹⁷⁹ Rather, the court determined that national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of the affected websites' users.¹⁸⁰ Ultimately, the CJEU struck down SABAM's monitoring requirement injunction because the injunction infringed on several Charter-protected rights including the OSP's freedom to conduct its business and the OSP's customers' rights to protection of data and freedom to receive or impart infor-

173. *Id.* para. 25.

174. *Id.* para. 29.

175. *Id.* In this case the intermediary was Scarlet. See *id.* paras. 5, 25.

176. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, para. 29.

177. *Id.* paras. 36, 39–40.

178. *Id.*

179. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, 12025, para. 43.

180. *Id.* para. 45.

mation.¹⁸¹ The court therefore clarified that a fair balance between those conflicting rights required permitting some infringement of copyright and disallowing the infringement of the right to freedom of expression.¹⁸² In short, an active monitoring requirement like the one requested in *Scarlet* is impermissible because it does not provide enough protection for (among other rights) the Article 11 right to freedom of information and expression.¹⁸³ Thus, in *Scarlet*, the CJEU reinforced the prohibition on general, proactive monitoring requirements for access providers.¹⁸⁴

The CJEU further acknowledged that the prohibition on active monitoring requirements comes from the language in Article 11 of the Charter, protecting the freedom to impart and receive information.¹⁸⁵ The prohibition also finds support in Article 3(1) of the Enforcement Directive, which requires measures that protect intellectual property rights to not be unnecessarily complicated or costly.¹⁸⁶ Because the expenses for implementing a filtering system were borne only by the OSPs, the court found that the injunction requiring filtering was unnecessarily costly and a violation of the OSP's freedom to conduct business.¹⁸⁷

The court affirmed the *Scarlet* holding in *SABAM v. Netlog*¹⁸⁸ when it disallowed an injunction ordering a social network to adopt a content filtering system to prevent access to copyright-infringing material.¹⁸⁹ In this case, SABAM brought suit against Netlog, a site on which users would build virtual communities and publish video clips.¹⁹⁰ SABAM complained that such videos often contained copyrighted content for which rightholders, through SABAM, were not receiving royalties.¹⁹¹ SABAM further alleged that Netlog was

181. *Id.* para. 48, 50.

182. *See id.* While the CJEU in *Scarlet* called the right “the freedom to receive or impart information,” the court also cited to Article 11 as a whole, encompassing the freedom of expression as well. *See id.* para. 50. *See also supra* note 50 and accompanying text (explaining that the court sometimes uses “freedom to receive or impart information” and “freedom of expression” interchangeably because both are enumerated in Article 11 of the Charter).

183. *See* Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, 12027, para. 50.

184. Frosio, *To Filter*, *supra* note 119, at 349.

185. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, 12027, para. 50.

186. *Id.* para. 48.

187. *Id.* para. 49.

188. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog*, ECLI:EU:C:2012:85 (Curia), <https://bit.ly/2rnyB2S>.

189. *Id.* para. 52.

190. *Id.* para. 17.

191. *Id.* para. 18.

allowing such copyrighted content to be illegally shared with the public.¹⁹²

As in *Scarlet*, the court made its determination on the basis of Article 15 of the eCommerce Directive, reiterating that Article 15 prevented member states from imposing a general monitoring obligation on OSPs.¹⁹³ The court found that the requested injunction, which would require Netlog to introduce a system of filtration in an attempt to identify electronic files containing SABAM's music, was impermissible.¹⁹⁴ The court emphasized that the requested injunction constituted a general monitoring obligation because the proposed system would be used as a preventative measure for all of Netlog's customers, at Netlog's own cost, for an unlimited period, and would access most of the information on Netlog's servers.¹⁹⁵

The court reiterated that general monitoring obligations are incompatible with Article 3 of the Enforcement Directive, which requires that measures to protect intellectual property rights be fair and proportionate and not excessively costly.¹⁹⁶

Finally, the court explained that filtering measures and proactive monitoring obligations must strike a fair balance between copyright and other fundamental rights, including users' freedom to impart and receive information.¹⁹⁷ The court expressed concerns that such measures "could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications."¹⁹⁸ The court reasoned that a general monitoring obligation, such as the obligation in SABAM's proposal, does not strike the right balance.¹⁹⁹ Thus, the court clarified that copyright law is not a right to be valued above others but rather one of many important rights that EU law must guarantee in accordance with the Charter.²⁰⁰

The court repeatedly referenced its decision in *Scarlet* throughout the *Netlog* decision.²⁰¹ The court defined "hosting" in accor-

192. *Id.*

193. *Id.* para. 3.

194. *Id.* paras. 22, 26, 52.

195. *Id.*

196. *Id.* para. 34.

197. *Id.* para. 51.

198. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog NV*, ECLI:EU:C:2012:85, para. 50 (Curia), <https://bit.ly/2rnyB2S>.

199. *Id.* para. 51.

200. Mezei & Harkai, *supra* note 74.

201. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, paras. 29–34, 38, 41, 49–51.

dance with Article 14 of the eCommerce Directive²⁰² and then determined that Netlog, a social media site, is a hosting provider.²⁰³ The court thus extended its decision in *Scarlet*, finding it impermissible under the safe harbor provision in Article 15 of the eCommerce Directive to subject hosting providers (in addition to OSPs) to a general monitoring obligation.²⁰⁴

In both the *Scarlet* and *Netlog* decisions, the court invalidated general monitoring obligations on three separate grounds: 1) the requirement that protections of fundamental rights strike a fair balance when such protections infringe on other fundamental rights and a determination that broad general monitoring requirements fail this test, 2) the eCommerce Article 15 prohibition on proactive monitoring requirements, and 3) the requirement in Article 3 of the Enforcement Directive that monitoring requirements must be fair, proportionate, and not excessively costly.²⁰⁵

b. Pro-Monitoring Case Law

Despite the clear prohibition on general monitoring requirements that the CJEU articulated in *Scarlet* and *Netlog*, the court has decided several cases in recent years that indicate the court's willingness to permit general monitoring.²⁰⁶ In *Telekabel v. Constantine Film*,²⁰⁷ the court emphasized that such an injunction requiring a monitoring obligation would protect copyright, which is also a fundamental right deserving maximum protection.²⁰⁸ The court reiterated the fair balance analysis but found that the established filtering system, if sufficiently narrowly tailored, might not violate freedom of information.²⁰⁹ However, in order to be allowed, such measures would have to be sufficiently effective to ensure genuine protection of copyright and to prevent unauthorized access to the protected subject matter.²¹⁰ Absent sufficient effectiveness, the measures would fail to strike the right balance.²¹¹ The CJEU thus allowed an injunction requiring an OSP to develop preventative

202. *Id.* para. 4.

203. *Id.* para. 27.

204. *Id.*

205. *See id.* paras. 35–36, 45; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers v. Netlog*, ECLI:EU:C:2012:85, paras. 33–34, 51 (Curia), <https://bit.ly/2rnyB2S>.

206. Nadal, *supra* note 70, at 29–30.

207. Case C-314/12, *UPC Telekabel v. Constantin Film*, ECLI:EU:C:2014:192, (Curia), <https://bit.ly/30EUOIV>.

208. *Id.* para. 31.

209. *Id.* para. 56.

210. *Id.* para. 62.

211. *Id.*

measures when the injunction did not prescribe the exact measures the OSP must take, so long as the OSP could and did adopt measures which struck a balance between applicable fundamental rights.²¹²

In *Bonnier Audio v. Perfect Commc'n*,²¹³ the court upheld a similar standard.²¹⁴ The court found that legislation succeeded at striking a fair balance between various rights when it required 1) clear evidence of actual infringement of intellectual property rights before other rights could be compromised, 2) that the information requested was necessary to facilitate the investigation into the infringement, and 3) that the reasons for the measure outweighed the nuisance or other harm entailed for the person or conflicting interests affected,²¹⁵ namely an Internet subscriber/user or another legally protected right or interest.²¹⁶ The legislation at issue in *Bonnier* required that OSPs not just monitor for intellectual property infringements but also transmit personal data about the infringers to authorities investigating the infringements.²¹⁷ Despite the multiple fundamental rights at issue, the CJEU found that the legislation struck a fair balance.²¹⁸

While the CJEU has not officially changed course on the permissibility of general proactive monitoring requirements for OSPs, the decisions in *Telekabel* and *Bonnier* show the court's willingness to find that a proactive monitoring requirement strikes a fair balance between the competing fundamental rights of intellectual property and freedom of information in certain circumstances.²¹⁹

III. ANALYSIS

The original version of the 2019 Copyright Directive explicitly called for proactive monitoring obligations by intermediaries.²²⁰ In addition to the poor public reception to the proposed Directive, many critics believed that the Directive's proactive monitoring requirement violated Article 15 of the eCommerce Directive and its

212. *Id.* para. 63–64.

213. Case C-461/10, *Bonnier Audio v. Perfect Commc'n* Swed. AB, ECLI:EU:C:2012:219 (Curia), <https://bit.ly/3krVatV>.

214. *Id.* para. 56–58.

215. *Id.*

216. *Id.* para. 51. *See also id.* paras. 59–60 (identifying the protection of personal data as the conflicting interest at issue in *Bonnier*).

217. *Id.* para. 52.

218. *Id.* para. 56.

219. *See* Stalla-Bourdillon, *supra* note 42, at 14; Nadal, *supra* note 70, at 31.

220. *See* Thomas Riis & Sebastian Felix Schwemer, *Leaving the European Safe Harbor, Sailing Toward Algorithmic Content Regulation*, 22 No. 7 J. INTERNET L. 1, 2 (2019).

CJEU case law interpretation, which prohibited monitoring obligations.²²¹ The final version of the 2019 Directive, as passed, removes this strict obligation to proactively monitor.²²²

However, the 2019 Copyright Directive still massively changes the liability scheme for OSPs in two major ways.²²³ First, the Directive gives OSPs primary liability instead of secondary liability by proclaiming that OSPs “communicate to the public” in a wide range of situations in which OSPs were previously found to be passive parties to the infringement.²²⁴ Because OSPs can now be held primarily liable, the 2019 Copyright Directive may also impose strict liability on OSPs.²²⁵ Under the Directive, OSPs are responsible from the moment anyone uploads content, regardless of whether the OSP had knowledge of the infringing content’s existence.²²⁶ The new version of the Copyright Directive thus retains the presumption of knowledge from the first draft.²²⁷

A. *Poland’s Challenge to the 2019 Copyright Directive in the CJEU*

Poland asserts that the new presumption of knowledge creates a scheme of liability in which proactive monitoring is necessary for OSPs to avoid liability for infringement.²²⁸ Because OSPs are directly and strictly liable for infringing content from the moment the content is uploaded, OSPs have little choice but to proactively monitor, despite legislation and case law precedent protecting OSPs and consumers from the imposition of proactive monitoring requirements.²²⁹ The Directive thus imposes a novel, immense burden on OSPs to ensure that no infringing content reaches the public via their platforms—and leaves it up to those OSPs to determine what constitutes infringement.²³⁰ OSPs will be encouraged to over-block material to avoid expensive litigation, inevitably leading to the sup-

221. Frosio, *To Filter*, *supra* note 119, at 349.

222. See Council Directive 2019/790, art. 17(8), 2019 O.J. (L 130) 92, 120.

223. Nadal, *supra* note 70, at 25.

224. *Id.*; Council Directive 2019/790, art. 17(1) 2019 O.J. (L 130) 92, 119.

225. Frosio, *To Filter*, *supra* note 119, at 352.

226. *Id.*

227. See *id.*

228. Action Brought on May 24, 2019, Case C-401/19, *Pol. v. Parliament*, 2019 O.J. (C 270) 21, 22.

229. *Id.* (asserting that the Directive necessitates “prior automatic verification (filtering)” of user content and the introduction of “preventive control mechanisms” for an OSP to avoid liability).

230. See *id.* See also Doctorow, *The European Copyright Directive*, *supra* note 1.

pression of free expression.²³¹ As a result, Poland asserts that the Directive is invalid because it infringes on the right to freedom of expression, along with other fundamental rights, rendering it incompatible with the Charter.²³²

In considering the challenge Poland raised, the CJEU must determine whether the Directive strikes the right balance between competing fundamental rights under the Charter.²³³ Additionally, the CJEU has traditionally evaluated whether Directives comport with the eCommerce Directive's Article 15 prohibition of proactive monitoring requirements. The court typically also considers the requirement in Article 3 of the Enforcement Directive that monitoring requirements be fair, proportionate, and not excessively costly when evaluating whether proactive monitoring requirements should be upheld.²³⁴ The CJEU will likely consider these tests when evaluating whether the new Directive complies with the Charter.²³⁵

B. *Test 1 – Proportionality*

The right to protection of intellectual property is not inviolable.²³⁶ The Charter does not require absolute protection of intellectual property at the expense of other fundamental rights.²³⁷ Instead, the Charter requires that courts and authorities strike a fair balance between the protection of copyright and the fundamental rights of the affected websites' users.²³⁸ The 2019 Copyright Directive constitutes a limitation on the fundamental right of freedom to impart and receive information, in favor of the right to protection

231. See Doctorow, *The European Copyright Directive*, *supra* note 1 (explaining that the Directive provides damages for infringement of copyright, but not for the improper censoring of legitimate posts). Because this imbalance financially penalizes OSPs if they fail to catch infringing content, they have an incentive to over-filter. See *id.*

232. Action Brought on May 24, 2019, Case C-401/19, *Pol. v. Parliament*, 2019 O.J. (C 270) 21, 22; see Riis, *supra* note 220 (explaining that all provisions on proactive filtering obligations are subject to the analysis in *Scarlet* and *Netlog*, including the proposed Article 13—now Article 17—obligation).

233. See Nadal, *supra* note 70, at 28. See also Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, paras. 36, 45.

234. See Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, paras. 35–36, 45; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog NV*, ECLI:EU:C:2012:85, paras. 33–34, 51(Curia), <https://bit.ly/2rnyB2S>.

235. See Nadal, *supra* note 70, at 29.

236. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, para. 43.

237. *Id.*

238. *Id.* para. 45.

of intellectual property.²³⁹ Imposing immediate liability on OSPs for any infringing information passing through their servers essentially requires OSPs that wish to avoid liability to proactively monitor all data that contacts their services.²⁴⁰

This monitoring of user data constitutes a restriction on users' rights to receive and impart information because filtering systems cannot always distinguish between copyright-infringing content and lawful content.²⁴¹ Thus, lawfully communicated information is always at risk of being blocked by the filters.²⁴² The imposition of liability for all infringing content also encourages OSPs to over-filter, rather than under-filter, increasing the risk of infringement upon the fundamental right to information.²⁴³

The Explanations accompanying the Charter only permit limitations on fundamental rights when the restrictions "correspond to objectives of general interest pursued by the Community."²⁴⁴ The 2019 Directive likely meets this standard because it responds to concerns about a "value gap" between the number of people accessing copyright-protected content and the royalties that rightholders are receiving from that access.²⁴⁵ The European Commission also doubted the effectiveness of the pre-2019 notice and takedown regime,²⁴⁶ which provides an additional objective of general interest to justify the limitation.²⁴⁷

The principle of proportionality also requires limitations on fundamental rights to be necessary.²⁴⁸ The 2019 Directive must be necessary because it imposes a limitation on the fundamental right to freedom of expression and information.²⁴⁹ The Directive's ar-

239. Nadal, *supra* note 70, at 26; *see* Action Brought on May 24, 2019, Case C-401/19, Pol. v. Parliament, 2019 O.J. (C 270) 21, 22.

240. Nadal, *supra* note 70, at 30.

241. *Id.* at 29.

242. *Id.*

243. Riis, *supra* note 220, at 11.

244. *Explanations*, *supra* note 60, at 32.

245. *See* Colangelo, *supra* note 76, at 142 (explaining that the ease of access to copyright-protected content via online content providers makes it difficult for rightholders to determine when their works are being used and affects rightholders' ability to get payment for that use).

246. *See* Riis, *supra* note 220 at 17 (explaining that the regime set up by the eCommerce Directive creates a notice-and-takedown system by which rightholders or other users alert the OSP to the existence of infringing content, giving the OSP "actual knowledge" sufficient to hold them liable, which ensures the OSP's "expeditious removal" of the allegedly infringing content).

247. *See id.* at 148.

248. Charter, *supra* note 41, art. 52.

249. *See id.*; Action Brought on May 24, 2019, Case C-401/19, Pol. v. Parliament, 2019 O.J. (C 270) 21–22.

ticated bases of necessity are questionable.²⁵⁰ Legal scholars have criticized the necessity of the 2019 Directive because its “value gap” claims—most frequently propagated by the music industry²⁵¹—are not sufficiently supported by empirical evidence.²⁵² However, studies actually indicate that artist profits have increased as a result of online music streaming platforms.²⁵³ Furthermore, the assessment of the purported impact of the Directive admitted that its creators had not conducted an elaborate quantitative comparison of the effectiveness of the Directive and other potential policy options.²⁵⁴ Even if the “value gap” exists, the Directive is not “necessary” if it will not solve the problem.²⁵⁵ Because industry claims about the value gap are unsupported, and because the Directive might not even fix such a gap if it did exist, the purported value gap does not satisfy the “necessity” requirement to allow for limitations on the right of freedom of expression.²⁵⁶

In addition to necessity, the principle of proportionality also requires limitations on fundamental rights to not constitute “disproportionate and unreasonable interference” that undermines the very substance of the fundamental right being restricted.²⁵⁷ This means that the limitations on a fundamental right cannot be so restricting that the right is effectively no longer protected at all.²⁵⁸ In terms of the current Directive, the principle of proportionality requires that the essence of the right to receive and impart information still be upheld.²⁵⁹

In determining whether a regulation or piece of legislation strikes a proportional balance between conflicting fundamental rights, the CJEU generally holds that proactive monitoring obligations do not strike the right balance when the obligations consist of a system that filters by identifying and blocking infringing files.²⁶⁰ Such a system is too broad and thereby constitutes a general monitoring obligation when it 1) accesses all electronic communications passing through the intermediary’s services, 2) applies indiscriminately to all of the service’s customers, 3) is a preventative measure,

250. See Colangelo, *supra* note 76, at 154.

251. *Id.*

252. *Id.*

253. *Id.*

254. See *id.*

255. See *id.*

256. See *id.*

257. *Explanations, supra* note 60, at 32.

258. See *id.*

259. See *id.*

260. See Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, para. 29.

4) is provided exclusively at the expense of the intermediary, and 5) lasts for an unlimited period.²⁶¹ The court in *Netlog* affirmed the prohibition in a similar scenario, finding that a filtration system failed to strike the right balance based on the same criteria.²⁶² However, in *Netlog*, the court only mentioned that the system accessed “most” of the information on the OSP’s servers, not all.²⁶³ While this change is slight, it represents the CJEU’s position that the right of Europeans to freely receive and impart information must be protected even against less clearly intrusive filtration.²⁶⁴

By imposing liability for any infringing content posted on an OSP’s site or transmitted through an OSP’s servers, the 2019 Directive requires the monitoring system to access all the data passing through the OSP’s servers and apply to all the OSP’s customers.²⁶⁵ Additionally, by imposing immediate liability from the moment of upload, before actual harm is done, the Directive requires the monitoring system to be proactive and preventative.²⁶⁶ The Directive also offers no indication of resources dedicated to the implementation of these systems, indicating that OSPs will bear the costs of whatever monitoring system the OSPs choose to implement.²⁶⁷ Finally, the Directive does not indicate an end date for strict liability for OSPs.²⁶⁸ That means that OSPs must adopt any imposed monitoring systems used to avoid liability for an unlimited period of time.²⁶⁹ The Directive therefore necessitates that OSPs adopt a monitoring system meeting all five of the criteria deemed impermissible in *Scarlet*.²⁷⁰ Such an obligation constitutes a general, proactive monitoring requirement and therefore fails to strike a balance between competing fundamental rights under CJEU case law.²⁷¹

Finally, the Directive may also fail the proportionality analysis even if the CJEU were to disagree with Poland’s assertion that the

261. *Id.* paras. 29, 36, 39–40.

262. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog NV*, ECLI:EU:C:2012:85, para. 52 (Curia), <https://bit.ly/2rnyB2S>.

263. *Id.* paras. 23, 25.

264. *See id.* para. 48 (emphasizing that the court is unwilling to permit the monitoring system because it infringes on the right to protection of personal data and the right to receive and impart information).

265. *See* Council Directive 2019/790, art 17(1) 2019 O.J. (L 130) 92, 119. (OSP’s have to obtain licenses before any copyrighted works may legally appear on their sites).

266. *See id.*

267. *See id.* art. 17.

268. *See id.*

269. *See id.*

270. *See supra* notes 260–262 and accompanying text.

271. *See Riis, supra* note 220, at 9.

Directive necessitates a general monitoring requirement.²⁷² The Directive triggers a proportionality analysis because of its potential harms to the Charter-protected rights of two parties.²⁷³ First, the European Commission encourages OSPs to self-regulate for infringing content.²⁷⁴ The Directive both explicitly articulates this as a policy standpoint and impliedly requires it as a necessary consequence of liability-increasing legislation.²⁷⁵ OSPs are subject to challenges under this scheme when they fail to successfully self-regulate.²⁷⁶ Second, this increase in liability on OSPs and the likely resultant increase in self-regulation will also impact users' freedom of information because OSPs will be encouraged to over-monitor their sites.²⁷⁷ Because of the risk of infringement on the rights of both OSPs and users, the Directive will require a proportionality analysis, even if it does not directly trigger an Article 15 analysis on the basis of creating a general monitoring obligation.²⁷⁸ Since some parties' rights are gravely harmed, the CJEU might still find that the Directive fails to strike a fair balance between competing fundamental rights, even if the court does not find that the Directive rises to the level of a general monitoring obligation.²⁷⁹

C. *Impact of Recent Pro-Monitoring Case Law on Proportionality Analysis*

In *Telekabel*, the CJEU found that an injunction requiring monitoring systems struck a fair balance between conflicting fundamental rights when the injunction gave the OSP latitude to develop and adopt its own preventative measures, so long as the measures actually adopted by the OSP struck a fair balance.²⁸⁰ Proponents of the 2019 Copyright Directive may argue that the decision in *Telekabel* permits the imposition of a requirement that OSPs develop and implement monitoring procedures, so long as it allows the OSPs latitude in doing so.²⁸¹ Directive proponents may also

272. See *id.* at 12; see also Giancarlo F. Frosio, *Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility*, 26 INT'L. J.L. & INFO. TECH. 1, 1 (2018) [hereinafter Frosio, *Why Keep a Dog*].

273. See Charter, *supra* note 41 art. 52.

274. See Riis, *supra* note 220, at 10–11.

275. *Id.*

276. See *id.*

277. See *id.* at 11; see also Frosio, *Why Keep a Dog*, *supra* note 272, at 1.

278. See Riis, *supra* note 220, at 11; see also Frosio, *Why Keep a Dog*, *supra* note 272, at 1.

279. See *supra* notes 265–271 and accompanying text.

280. Case C-314/12, *UPC Telekabel Wien v. Constantin Film Varleih*, ECLI:EU:C:2014:192, para. 63–64 (Curia), <https://bit.ly/30EU0Iv>.

281. See Nadal, *supra* note 70, at 30.

claim that the requirement imposed by the 2019 Directive provides such latitude because the Directive imposes no direct instructions for the OSPs as to how OSPs must accomplish such monitoring.²⁸² In fact, the final version of the Directive does not include an explicit monitoring requirement at all.²⁸³ However, as previously described, the monitoring obligation that the 2019 Copyright Directive necessitates would require OSPs to adopt filtration systems that meet all five of the criteria deemed to impermissibly impose on the right to receive and impart information in *Scarlet* and *Netlog*.²⁸⁴ Thus, while the Directive does not explicitly require that OSPs adopt a monitoring system that fails to strike a balance, the Directive leaves OSPs no choice but to implement a monitoring system that does not strike a balance.²⁸⁵ The legislation therefore does not leave OSPs latitude to choose a permissible, balance-striking system and is not consistent with the Charter's proportionality requirements, even under the decision in *Telekabel*.

Proponents of the Directive may also argue that the decision in *Bonnier Audio* provides a route for the Directive's new OSP liability rules to be legitimized. In *Bonnier*, the CJEU found that legislation succeeded at striking a fair balance between various rights when 1) the legislation required clear evidence of actual infringement of intellectual property rights before other rights could be compromised, 2) the information requested was necessary to facilitate the investigation into the infringement,²⁸⁶ and 3) the legislation required that the reasons for the measure outweighed the nuisance or other harm the measure entailed for the person or conflicting interest affected.²⁸⁷ Proponents of the 2019 Copyright Directive may argue that the Directive amounts to a permissible monitoring obligation on the basis that it strikes a fair balance between conflicting fundamental rights under the standard articulated in *Bonnier*.²⁸⁸

However, if applied to the online copyright liability conflict, the *Bonnier* standard would require the presentation of actual evi-

282. *See id.*

283. *See id.* at 26.

284. *See supra* notes 260–70 and accompanying text.

285. Nadal, *supra* note 70, at 26.

286. Case C-461/10, *Bonnier Audio v. Perfect Commc'n Swed. AB*, ECLI:EU:C:2012:219, paras. 56–58 (Curia), <https://bit.ly/3krVatV>. *Bonnier* dealt with data furnished to law enforcement in order to facilitate investigations into intellectual property infringement. *Id.* para. 57. However, the court in *Bonnier* analyzed the balance of implicated fundamental rights in the same manner the court analyzes all conflicts of rights under the Charter. *Id.* para. 58.

287. *Id.* paras 56–58.

288. *See* Nadal, *supra* note 70, at 30.

dence of infringement of intellectual property rights before the right to receive and impart information could be infringed upon.²⁸⁹ *Bonnier* would allow for the implementation of a monitoring requirement that infringed upon the freedom to impart and receive information only after an OSP had knowledge of infringement of intellectual property rights.²⁹⁰ The Directive does not meet this standard because it imposes liability from the moment content is uploaded.²⁹¹ Additionally, the legislation would strike a fair balance under *Bonnier* only if the reasons for the monitoring measure outweighed the nuisance or other harms.²⁹² The *Bonnier* standard would therefore require a determination that the nuisance to users and OSPs of monitoring all data passing through an OSP's servers did not outweigh the need to protect the intellectual property rights of rightholders.²⁹³ In *Bonnier*, the court found the legislation permissible when the legislation required that a determination of this type was made prior to the imposition on the conflicting fundamental right.²⁹⁴ The 2019 Directive requires no such determination before imposing liability and, by extension, a monitoring requirement.²⁹⁵ The 2019 Directive's monitoring requirement therefore likely fails to strike a fair balance even under the standard imposed in *Bonnier*.

D. Test 2 – Article 15 Prohibition

In addition to questions of proportionality, underlying the decisions in *Scarlet* and *Netlog* is the Enforcement Directive's Article 15 prohibition on general monitoring obligations.²⁹⁶ In both *Scarlet* and *Netlog*, the court found that the proposed filtering systems constituted a general monitoring obligation and not only failed to strike a fair balance but were also inconsistent with the prohibition on general monitoring obligations.²⁹⁷ As previously analyzed, the mon-

289. See Case C-461/10, *Bonnier Audio v. Perfect Commc'n Swed.* AB, ECLI:EU:C:2012:219, para. 56 (Curia), <https://bit.ly/3krVatV>.

290. See *id.* para. 56.

291. See Frosio, *To Filter*, *supra* note 119, at 352.

292. See Case C-461/10, *Bonnier Audio v. Perfect Commc'n Swed.* AB, ECLI:EU:C:2012:219, para. 58 (Curia) <https://bit.ly/3krVatV>.

293. See *id.* para. 58.

294. *Id.* para. 56.

295. See Council Directive 2019/790, art. 17(1), 2019 O.J. (L 130) 92, 119.

296. Riis, *supra* note 220, at 9; Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, 12025, para. 43; see also Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog NV*, ECLI:EU:C:2012:85, para. 3 (Curia), <https://bit.ly/2rnyB2S>.

297. Nadal, *supra* note 70, at 27. See Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006,

itoring requirement effectively imposed by the 2019 Copyright Directive is similar to the impermissible *Scarlet* and *Netlog* filtering requirements according to the five *Scarlet* criteria.²⁹⁸ Because of this similarity, a system adopted to comply with the new provisions would likely also necessarily constitute a general monitoring requirement and be deemed impermissible under the Enforcement Directive's Article 15 prohibition on general monitoring requirements.

E. Test 3 – Article 3 Requirement

Article 3(1) of the Enforcement Directive requires that any measures to ensure enforcement of intellectual property rights shall be fair and equitable, not be unnecessarily complicated or costly, and not entail unreasonable time limits or unwarranted delays.²⁹⁹ The CJEU in *Scarlet* found that a general monitoring obligation that met the five *Scarlet* criteria would fail the test in Article 3(1) of the Enforcement Directive, which requires measures protecting intellectual property rights to not be unnecessarily complicated or costly.³⁰⁰ In thus concluding, the CJEU emphasized the fact that the injunction would have required the OSP to bear the costs of the system on its own.³⁰¹

As analyzed above, the general monitoring requirement that the 2019 Directive impliedly imposes would necessarily meet the same five criteria as the impermissible monitoring system in *Scarlet*, including the criterion that the OSP would bear the costs of the system.³⁰² Thus, the monitoring requirement that the 2019 Directive imagines is also impermissible under the Enforcement Directive Article 3(1) requirement that measures for enforcing intellectual property rights not be unnecessarily costly.³⁰³

The monitoring requirement that the 2019 Directive imagines fails the three tests that the CJEU historically employs in determining whether monitoring obligations are permissible.³⁰⁴ If the CJEU

12025, para. 43; *see also* Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v. Netlog NV*, ECLI:EU:C:2012:85, paras. 22, 26, 52 (Curia), <https://bit.ly/2rnyB2S>.

298. *See supra* notes 260–70 and accompanying text.

299. Council Directive 2004/48, art. 3(1), 2004 O.J. (L 195) 16, 20.

300. Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 2011 E.C.R. I-12006, para. 49.

301. *Id.*

302. *See supra* notes 260–270 and accompanying text.

303. *See supra* notes 259–262 and accompanying text; Council Directive 2004/48, art. 3(1), 2004 O.J. (L 167) 16, 20.

304. *See supra* Part III. A–D.

chooses to analyze the Directive's permissibility under these standards, as challenged in Poland's complaint, CJEU case law directs that the court will find the Directive impermissible.³⁰⁵

Recent decisions including *Telekabel* and *Bonnier Audio* indicate that the court has been willing to relax the prohibition on general monitoring obligations in certain scenarios.³⁰⁶ The CJEU may be unwilling to find that 2019 Directive, as amended, truly mandates an impermissible general monitoring obligation.³⁰⁷ However, even if the court concludes the Directive does *not* require a general monitoring obligation, the court may also conclude that the Directive does not fail to strike a fair balance between conflicting fundamental rights or constitute an unnecessarily costly imposition on OSPs and similarly refuse to invalidate it on those grounds.

The CJEU should find the 2019 Copyright Directive is inconsistent with CJEU case law and invalidate the Directive. If the Directive remains in effect, member states will have to implement the Directive into national law by the end of 2021,³⁰⁸ which could greatly suppress freedom of expression on the Internet worldwide.³⁰⁹

IV. CONCLUSION

The 2019 Copyright Directive and its controversial Article 17 threaten to stifle freedom of expression in Europe and around the world in the name of closing a copyright "value gap" that arguably does not exist.³¹⁰ Poland has challenged the problematic provisions of Article 17 in the Court of Justice of the European Union on several different bases.³¹¹

This Comment first set forth the complicated legislative framework within which the newest Directive must rest by recounting the recent history of European attempts to regulate copyright law on the Internet in a manner that comports with the Charter of Fundamental Rights, which included three European Council Directives.³¹² This Comment next analyzed the CJEU's case law interpretation of those Directives, including cases addressing the Directives' interactions with one another and with the Charter, to

305. See *supra* Part III. A–D.

306. Nadal, *supra* note 70, at 29–30.

307. See *id.*

308. Davis, *supra* note 2.

309. See Doctorow, *The European Copyright Directive*, *supra* note 1.

310. *Supra* Part III.B

311. See Action Brought on May 24, 2019, Case C-401/19, Pol. v. Parliament, 2019 O.J. (C 270) 21–22; see also *supra* Part III.A.

312. *Supra* Part II.C.

demonstrate the tough protections that the CJEU places around fundamental rights, which the Directive's supporters must overcome to see it implemented.³¹³ Finally, this Comment analyzed the probability that the CJEU will uphold the Directive's Article 17 given the case-law-established tests that the CJEU will likely apply, coupled with the court's recent move toward heightened copyright protection.³¹⁴ Because of the strong protections provided by the Charter of Fundamental Rights, coupled with the dangers the Directive poses to freedom of expression, this Comment concluded that the court should invalidate the Article under the framework established by prior case law, and advocated for the court to do so to protect the future of European freedom of expression.³¹⁵

313. *Supra* Part II.D.

314. *Supra* Part III.

315. *Supra* Part III.
