

GLOBAL TRENDS IN ONLINE COPYRIGHT ENFORCEMENT: A NON-NEUTRAL ROLE FOR NETWORK INTERMEDIARIES?

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ABSTRACT: This article examines a worldwide shift in laws, policies, and practices pertaining to intermediaries' role in online copyright enforcement. We use a comparative methodology to expose an emerging trend in jurisdictions, including Australia, Belgium, Canada, China, the European Union, France, Germany, Japan, New Zealand, Singapore, South Korea, the United Kingdom, and the United States.

Previously, the worldwide standard approach to issues of Internet service provider liability was to require carriers and hosts to behave passively until becoming aware of copyright-infringing activities on their networks, at which time a reaction typically involving the takedown of allegedly infringing content was required. Very recent events in several jurisdictions demonstrate a new trend away from a passive-reactive approach toward an active-preventative approach instead. Government policies, voluntary practices, legislative enactments, and judicial rulings are all contributing to this shift in the rules applicable to online intermediaries.

One reason for the shift is increased pressure from rights holders on legislators and policymakers to make intermediaries play a greater role in online copyright enforcement. Another less obvious reason is that intermediaries' and rights-holders' interests are aligning. While rights holders are concerned about copyright enforcement and intermediaries are concerned about network management, the result is a mutual interest in content filtering or traffic shaping.

The danger highlighted by this article is that policymakers might inadvertently craft inappropriate legal and regulatory responses by failing to appreciate the divergent motivations behind, and implications following, this trend. To help avoid those pitfalls,

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this article exposes a new global trend in the area of online copyright enforcement, and it suggests increased coordination among policymakers and affected stakeholders as an appropriate response.

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For most of the recent history of the Internet, intermediaries, such as content hosts and connectivity providers, have marketed their services as facilitating fast and efficient transmission of entertainment content, especially music. Intermediaries have downplayed or ignored the fact that much of that content was hosted or transmitted without the consent of its copyright owners. By remaining passive hosts or service providers, intermediaries could take advantage of the safe harbor provisions in many jurisdictions' copyright laws. Those provisions require intermediaries only to react *ex post* to notices of infringement. Doing so entitles them to immunity from copyright liability for their customers' infringing activities.

But since about the middle of 2007, a different global trend seems to be emerging. Entertainment industries, government legislators, and regulatory agencies increasingly are pressuring online intermediaries to play a more active role in preventing copyright infringement *ex ante*. In some contexts, intermediaries are voluntarily shifting their role from passive providers to active enforcers because they share with some copyright holders a common objective: to become better at proactively managing information transmitted through networks, especially peer-to-peer (p2p) traffic. While intermediaries worry about transmission efficiencies, content owners care more about copyright enforcement. The end result is that both have reasons to support content-filtering or traffic-shaping practices. Consequently, many intermediaries worldwide began to more actively police their networks, filter content, shape traffic, and otherwise cooperate in copyright enforcement efforts.

This article examines global shifts in laws and policies governing Internet intermediaries, their causes, and their implications for communications policy, in particular the principle of network neutrality. Using a comparative methodology, the first part of the article analyzes established safe harbor provisions in the copyright laws of twelve diverse jurisdictions: Australia, Canada, China, the European Union (E.U.), France, Germany, Japan, New Zealand, Singapore, South Korea, the United Kingdom, and the United States. When studied thematically, the provisions seem to be relatively homogenous. Almost without exception, legislation insulates providers (as carriers or hosts) from liability for third-party copyright infringement if they play a *passive-reactive* role. The general expectation is that intermediaries will allow users to store and transmit what they wish without interference, modification, or influence. Almost all legislative provisions, however, require that the providers react (in various ways) when they are made aware of the existence of allegedly copyright-infringing material within their system. Although no jurisdiction contains

a general obligation to monitor content, intermediaries must react to allegations of infringement.

The second section of this article examines very recent developments in Belgium, France, New Zealand, South Korea, the United Kingdom, the United States, and elsewhere, as well as a proposed multilateral trade agreement, all of which could mandate or encourage a more active monitoring and enforcement role for intermediaries. If these developments foreshadow more widespread trends, they may indicate that a pronounced shift is occurring in the rules applicable to online communications intermediaries. Instead of passively providing hosting and carriage services, reacting only to knowledge of alleged copyright infringements, there may be an emerging onus on intermediaries to actively prevent copyright infringement.

Laws and policies requiring, or even permitting, intermediaries to play a more *active-preventative* role may be effective if one's only concern is copyright enforcement. But such laws and policies could be problematic when viewed through the lens of telecommunications policy and public policy more broadly. Expanding globally on Tim Wu's insights into the relationship between copyright and communications policies, the third section of this article will examine some of the problems that we expect to arise unless industry and regulators recognize the implications of shifting away from passive-reactive immunity schemes toward more active-preventative systems. This analysis will outline some of the communications and copyright issues that policymakers responsible for both topics should consider.

I. CURRENT GLOBAL THEMES: PASSIVE-REACTIVE REGIMES

Despite the apparent diversity of contexts in which global safe harbor provisions were enacted, the core principles contained in most statutes are rather similar. There is a consistent global theme underlying these provisions, which requires intermediaries that provide carriage or hosting services to act passively and neutrally.¹ Of those evaluated, no provision places on intermediaries a general obligation to monitor the content that they either host or transmit, nor did we find statutory requirements mandating that intermediaries make substantial efforts to prevent copyright-infringing material from residing on or passing through their networks. The global norm is to establish passive-reactive schemes that require or permit intervention in third-party communications upon receiving allegations of copyright infringement. This

1. Carriage and hosting are distinct activities and, as such, are treated differently by most of the legislative exemption clauses that we examined.

approach exists in the laws of Australia,² Canada,³ China,⁴ the European Union,⁵ France,⁶ Germany,⁷ Japan,⁸ New Zealand,⁹ Singapore,¹⁰ South Korea,¹¹ the United Kingdom,¹² and the United States.¹³ Although some provisions are concise and general,¹⁴ others spell out in intricate detail the exact nature of the expectations upon intermediaries.¹⁵ Regardless of the particular approach, each jurisdiction's laws conform to this global theme.

A. Transitory Internet Communications

Most copyright safe harbor systems deal either explicitly or implicitly with carriers' liability for transitory communications where their role is as mere conduits. Several jurisdictions deal explicitly with this matter. The safe harbors of the European Union, the United States, the United Kingdom, and Singapore, for example, each set out several requirements for limited liability for transitory communications. A person other than the intermediary must have initiated the transmission.¹⁶ The communication must be carried out by an automated process without the selection of content by the intermediary.¹⁷

2. Copyright Act, 1968, § 116AH(1) (Austl.).

3. *See* Copyright Act, R.S.C., ch. C-42, § 2.4(1)(b) (1985) (Can.). The Canadian copyright system stems from the combination of this statute, case law, and de facto practices that have emerged in the industry. As a result of this combination, "permits" in this context means intermediaries that intervene will probably not be held liable for their users' copyright infringement.

4. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), arts. 6, 14–17, 19 & 21–25, LAWINFOCHINA (last visited Aug. 17, 2009), *translated in* Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

5. Commission Directive 2000/31, art. 13(e), 2000 O.J. (L 178) 1 (EC).

6. Law No. 2004-575 of June 21, 2004, art. 6, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

7. Gesetz über die Nutzung von Telediensten [Act on the Utilization of Teleservices], July 22, 1997, BGBl. I at 1870, § 5 (F.R.G.).

8. Tokutei denkitsuushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, arts. 3–4, *translated in* http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

9. Copyright Act 1994, 1994 S.N.Z. No. 143, § 92A–E (N.Z.).

10. Copyright Act 1987 (No. 2 of 1987), § 193 (Sing.).

11. Jeojakgweonbeop [Copyright Act], ch. 6 (1986), *translated in* http://eng.copyright.or.kr/law_01_01.html (last visited Sept. 6, 2009) (S. Korea).

12. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, §§ 17–19 (U.K.).

13. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512 (2006).

14. *See, e.g.*, Copyright Act, R.S.C., ch. C-42, § 2.4(1)(b) (1985) (Can.).

15. *See, e.g.*, DMCA, § 512.

16. *See, e.g., id.* § 512(a)(1); Commission Directive 2000/31, art. 12(1)(a), 2000 O.J. (L 178) 1 (EC).

17. *See, e.g.*, DMCA, § 512(a)(2); S.I. 2002/2013, § 17(2) (U.K.).

The intermediary must not determine the recipient of the transmission.¹⁸ Any intermediate copies cannot be accessible to the general public and may only be stored for as long as is reasonably necessary.¹⁹ The intermediary must not modify the material in any way.²⁰ If these conditions are met, the intermediary is immune from copyright liability for the transitory communication. Moreover, if nothing is copied onto the carrier's servers (that is, there is no caching), there can be no obligations whatsoever. Some jurisdictions, such as Australia²¹ and China,²² adopt some, but not all, of these requirements for immunity.

Other jurisdictions do not specify the precise requirements for carriers to obtain immunity for copyright infringements. In Canada, for example, the *Copyright Act* merely states that “a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.”²³ This presupposes several of the aforementioned conditions for immunity for transitory communications in other jurisdictions. Canada's provision precludes the possibility of the intermediary modifying the content under the “only act” stipulation, and the phrase “for another person to so communicate the work” means that the intermediary cannot be the initiator of the transmission.²⁴ In its analysis in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, the Supreme Court of Canada held that the *Copyright Act* specifies that only neutral intermediaries enjoy immunity from liability.²⁵ This immunity is enjoyed “[s]o long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing ‘a conduit’ for information communicated by others”²⁶ Justice Binnie reiterated this principle, reinforcing that “[t]o the extent [that Internet service providers (ISPs)] act as innocent disseminators, they are protected by [§]2.4(1)(b) of the Act.”²⁷ He drew an analogy to a case that held the owners of telephone wires who were “utterly ignorant of the nature of the message” were not responsi-

18. See, e.g., S.I. 2002/2013, § 17(1)(b) (U.K.); Directive 2000/31, art. 12(1)(b) (EC).

19. See, e.g., DMCA, § 512(a)(4); Copyright Act 1987 (No. 2 of 1987), § 193B(2)(d) (Sing.).

20. See, e.g., DMCA, § 512(a)(5); S.I. 2002/2013, § 17(1)(c) (U.K.).

21. Copyright Act, 1968, § 116AH(1)(3) (Austl.).

22. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 20, LAWINFOCHINA (last visited Aug. 17, 2009), translated in Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

23. Copyright Act, R.S.C., ch. C-42, § 2.4(1)(b) (1985) (Can.).

24. *Id.*

25. Soc'y of Composers, Authors and Music Publishers of Can. v. Canadian Ass'n of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, ¶¶ 92–101 (Can.).

26. *Id.* ¶ 92.

27. *Id.* ¶ 95.

ble for the content of the transmissions.²⁸ As a result, although Canada does not have an explicit list of requirements for immunity from liability for transitory communications, the effect of the general provision is similar to other jurisdictions' more detailed schemes.

B. Caching

Most provisions in the jurisdictions studied also address caching, which is the "immediate and temporary storage of data" that is transmitted by intermediaries.²⁹ While intermediaries process data to transmit it from point A to point B on the Internet, temporary copies are sometimes cached on carriers' server equipment. If one carrier's other customers want to access the same information a short time later, the data may either be transferred from the original source or from the cached copy. Caching lowers costs for all parties and speeds up the transmission by reducing the aggregate amount of bandwidth that carriers use.³⁰ Data recipients usually do not know whether transmissions are sent from an original source or from a cached source. Intermediaries usually complete the process automatically.³¹

Explicit provisions often stipulate that carriers are not liable for copyright-infringing material that is temporarily stored in their systems' caches. That is true of legislation from Australia,³² the European Union,³³ France,³⁴ Germany,³⁵ New Zealand,³⁶ Singapore,³⁷ the United Kingdom,³⁸ and the United States.³⁹ In all of these jurisdictions, intermediaries are immune from copyright liability if their caching activities are content neutral.

Though some jurisdictions seem to offer unconditional immunity for caching activities,⁴⁰ most attach conditions. Carriers must not modify the cached data⁴¹ and must refresh it regularly in accordance with established industry practice.⁴² They must not interfere with technology that collects and

28. *Id.* ¶ 96 (quoting *Elec. Dispatch Co. of Toronto v. Bell Tel. Co. of Can.*, [1891] 20 S.C.R. 83, 91 (Can.)).

29. Rob Frieden, *Internet 3.0: Identifying Problems and Solutions to the Network Neutrality Debate*, 1 INT'L J. COMM. 461, 463 n.8 (2007).

30. *Soc'y of Composers, Authors and Music Publishers of Can.*, 2 S.C.R. 427, ¶¶ 23, 114.

31. *Id.* ¶ 23.

32. Copyright Act, 1968, § 116AH(1)(3) (Austl.).

33. Commission Directive 2000/31, art. 13, 2000 O.J. (L 178) 1 (EC).

34. Law No. 2004-575 of June 21, 2004, art. 2.3, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

35. Gesetz über die Nutzung von Telediensten [Act on the Utilization of Teleservices], July 22, 1997, BGBl. I at 1870, § 5(3) (F.R.G.).

36. Copyright Act 1994, 1994 S.N.Z. No. 143, § 92E (N.Z.).

37. Copyright Act 1987 (No. 2 of 1987), § 193E (Sing.).

38. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 18 (U.K.).

39. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(b) (2006).

40. *See, e.g.*, BGBl. I at 1870, § 5(3) (F.R.G.).

41. *See, e.g.*, DMCA, § 512(b)(2)(A); § 193(C)(2)(c)(iii) (Sing.).

42. *See, e.g.*, Copyright Act, 1968, § 116AH(1)(3) (Austl.); Copyright Act 1994, 1994 S.N.Z. No. 143, § 92E(1)(d) (N.Z.)

returns information about data usage.⁴³ Carriers must also limit recipients' access to cached data in accordance with conditions established by content providers⁴⁴—maintaining password protection, for example.⁴⁵ Finally, in most jurisdictions, carriers must promptly remove from their caches copyright-infringing material of which they become aware.⁴⁶

In other jurisdictions, such as China,⁴⁷ Japan,⁴⁸ and South Korea,⁴⁹ the aforementioned conditions do not explicitly apply. Rather, the practice of caching, like most other intermediary activities, is protected unless the intermediary knows (or, in Japan, ought to have known) that the information to be cached is itself a violation of copyright.⁵⁰ In these cases, the intermediary has a legal obligation to react by removing the content and eliminating the cache.⁵¹

Even in jurisdictions without detailed legislative provisions on caching, carriers might nevertheless be immune from copyright liability. In Canada, for example, the Supreme Court has ruled that intermediaries are not liable for infringing cached content if they neither create a “cache for reasons other than improving system performance [n]or modif[y] the content of cached material.”⁵² The Court explained the policy underlying the exemption this way: “[t]he creation of a ‘cache’ copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and . . . ought not to have any *legal* bearing on the communication between the content provider and the end user.”⁵³ Although the relevant Canadian statutory provision contains no express mention of caching, the Supreme Court referred to interpretations of the American *Digital Millennium Copyright Act (DMCA)* in defining the scope of Canada’s far more general provision.⁵⁴ So, despite significant differences in the level of detail in these schemes, their practical effects are strikingly similar.

43. *See, e.g.*, DMCA, § 512(b)(2)(C); S.I. 2002/2013, § 18(b)(iv) (U.K.).

44. *See, e.g.*, DMCA, § 512(b)(2)(D); § 92E(1)(b) (N.Z.).

45. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 11 (1998), available at www.copyright.gov/legislation/dmca.pdf.

46. *See, e.g.*, DMCA, § 512(b)(2)(E); S.I. 2002/2013, § 18(b)(v) (U.K.).

47. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 21, LAWINFOCHINA (last visited Aug. 17, 2009), translated in Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

48. *See generally* Tokutei denkitsushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, translated in http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

49. Jeojakgweonbeop [Copyright Act], ch. 6 (1986), translated in http://eng.copyright.or.kr/law_01_01.html (last visited Sept. 6, 2009) (S. Korea).

50. Law No. 137 of 2001, art. 3(1)(ii) (Japan).

51. *See, e.g.*, *id.* art. 3(2)(ii).

52. Soc’y of Composers, Authors and Music Publishers of Can. v. Canadian Ass’n of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, ¶ 32 (Can.).

53. *Id.* ¶ 115.

54. *Id.* ¶ 117.

Indeed, this is the theme worldwide. Carriers are immune from liability for copyright-infringing content in their caches if they act passively, unless they have notice of infringements, in which case they must respond actively to remove the content. In other words, but for knowledge of specific infringing content, the carriers are expected to act in a passive, neutral manner.

C. Hosting

All of the jurisdictions covered in this study have mechanisms for addressing not only transitory communications and temporary caches but also hosted content. In some jurisdictions, the rules governing hosts are quite separate from the rules governing carriers. In others, these issues are addressed together in a complementary package of statutory provisions.

Hosting content involves storing third-party information on the intermediaries' systems. When many jurisdictions enacted safe harbors immunizing hosts from liability for copyright-infringing content on their systems, hosting services typically offered were by the same telecommunications companies that provided carriage services or by smaller companies that specialized in Web hosting. Recently, however, new companies have offered different types of hosting services. Many services—YouTube, MySpace, Facebook, or many others—facilitate social networking or host “user-created content.”⁵⁵ The safe harbor systems in most jurisdictions that were studied apply to all types of content hosts, despite significant technical and commercial differences among these various intermediaries.

Safe harbor provisions that deal explicitly with hosting services usually state that, subject to certain conditions, hosts are not liable for copyright-infringing content residing on their servers. The legislation of Australia,⁵⁶ China,⁵⁷ the European Union,⁵⁸ France,⁵⁹ New Zealand,⁶⁰ Singapore,⁶¹ the United Kingdom,⁶² and the United States⁶³ all have specific provisions relating

55. “User-created content” is defined by the Organization for Economic Co-operation and Development (OECD) as material that is “*i*) content made publicly available over the Internet, *ii*) which reflects a certain amount of creative effort, and *iii*) which is created outside of professional routines and practices.” OECD, PARTICIPATIVE WEB AND USER-CREATED CONTENT 9 (2007), available at http://oecd.org/documentprint/0,3455,en_21571361_38620013_39428648_1_1_1_1,00.html. See also Jeremy de Beer, *Legal Strategies to Profit from Peer Production*, 46 CAN. BUS. L.J. 269, 269–70 (2008).

56. Copyright Act, 1968, §§ 116AE, 116AH(1) (Austl.).

57. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 22, LAWINFOCHINA (last visited Aug. 17, 2009), translated in *Intell. Prop. Prot. in China*, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

58. Commission Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC).

59. Law No. 2004-575 of June 21, 2004, art. 6, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

60. Copyright Act 1994, 1994 S.N.Z. No. 143, § 92C (N.Z.).

61. Copyright Act 1987 (No. 2 of 1987), § 193D (Sing.).

62. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 19 (U.K.).

63. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(c) (2006).

to hosting activities. As was the case with caching, the global theme is to create a knowledge-based liability regime, whereby intermediaries are liable for customers' activities only if they fail to take action after becoming aware of allegations that they are hosting copyright-infringing material.

Statutory frameworks establishing safe harbors for hosts normally address the consequences of some or all of the following three broad issues: (1) knowledge of infringing activities, (2) notification of alleged infringements, and (3) financial benefits from infringement.

1. Knowledge of Infringing Activities

Perhaps the most fundamental condition of hosts' immunity from liability for their customers' copyright infringements is that they lack actual or constructive knowledge of such infringements. This requirement exists in the laws of every jurisdiction studied. In most jurisdictions, there are at least two conditions for exempting hosts from liability for hosting infringing material. First, hosts must not have any actual knowledge of the presence of specific copyright-infringing content on their systems.⁶⁴ Second, if hosts learn of allegations of infringing content on their systems, they must act promptly to remove it or disable access to it.⁶⁵ Whether or not a country's laws specifically address hosting activities, there is a trend to disqualify from protection providers who have knowledge of infringing content residing on their systems.

In the United States, the *DMCA* is explicit that either actual⁶⁶ or constructive⁶⁷ knowledge of copyright infringements is sufficient to impose liability upon hosts who do not respond to such knowledge in the prescribed manner. The ambit of the American scheme is relatively wide, catching not only actual knowledge of infringing material by the provider but also awareness of "facts or circumstances from which infringing activity is apparent."⁶⁸ The net effect of this provision, paired with a section that protects providers from removing legitimate content with a good faith belief that it is infringing⁶⁹ (to be discussed), is a regime that heavily favors the removal of content that is actually or suspected to be infringing. Although, as will be seen, the laws in other jurisdictions have a similar effect, the *DMCA* represents the most comprehensive scheme.

In Canada, there is not yet a detailed statutory regime spelling out the consequences of intermediaries' knowledge of infringing activities. In the absence of a legislated safe harbor scheme in Canada, the issue of intermedi-

64. *See, e.g.*, *DMCA*, § 512(c); Commission Directive 2000/31, art. 14(1)(a), 2000 O.J. (L 178) 1 (EC).

65. *See, e.g.*, S.I. 2002/2013, § 19(a)(ii) (U.K.); Law No. 2004-575 of June 21, 2004, art. 6, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

66. *DMCA*, § 512(c)(1)(A)(i).

67. *Id.* § 512(c)(1)(A)(ii).

68. *Id.*

69. *Id.* § 512(g)(1).

ary liability depends on the authorization doctrine. As in many other jurisdictions currently or formerly part of the British Commonwealth, the right to authorize reproductions, public performances, and so on is an exclusive right of the copyright owner.⁷⁰ The effect of this right corresponds roughly to aspects of the notion of secondary infringement in the United States.

Though the Canadian statute specifies that intermediaries acting as mere conduits do not themselves *communicate* content,⁷¹ no similar limitation applies in respect of copyright owners' *authorization* rights. The common law recognized by the Supreme Court of Canada, however, has filled this void. The Court held that with respect to authorization, "[t]ypically the host server provider will not monitor" the activity of their customers, and that "[g]iven the vast amount of information posted, it is impractical in the present state of the technology to require the host server provider to do so."⁷² Justice Binnie, however, did state that "copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action."⁷³ The Court hinted that upon notice of infringing content, the host might be required to "take it down."⁷⁴

The theme seems to be to protect hosts from liability if they were unaware of copyright-infringing material residing on their servers. China,⁷⁵ Japan,⁷⁶ and South Korea,⁷⁷ for example, all have general provisions that protect hosts so long as they do not know about infringing material. Moreover, legislation in Australia,⁷⁸ the European Union,⁷⁹ France,⁸⁰ Germany,⁸¹ New Zealand,⁸² Sin-

70. Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.).

71. *Id.* § 2.4(1)(b).

72. Soc'y of Composers, Authors and Music Publishers of Can. v. Canadian Ass'n of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, ¶ 109 (Can.).

73. *Id.* ¶ 124.

74. *Id.* ¶¶ 110, 127.

75. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 22(3), LAWINFOCHINA (last visited Aug. 17, 2009), *translated in* Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

76. Tokutei denkitsuushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, art. 3(1)(i), *translated in* http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

77. Jeojakgweonbeop [Copyright Act], ch. 6 (1986), *translated in* http://eng.copyright.or.kr/law_01_01.html (last visited Sept. 6, 2009) (S. Korea).

78. Copyright Act, 1968, §§ 116AE, 116AH(1) (Austl.).

79. Commission Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC).

80. Law No. 2004-575 of June 21, 2004, art. 6, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

81. Gesetz Früher die Nutzung von Telediensten [Act on the Utilization of Teleservices], July 22, 1997, BGBl. I at 1870, § 5(3) (F.R.G.).

82. Copyright Act 1994, 1994 S.N.Z. No. 143, § 92C (N.Z.).

gapore,⁸³ the United Kingdom,⁸⁴ and the United States⁸⁵ also includes specific provisions relating to hosting activities. Whether through general exemption provisions, specific legislative schemes, or common law doctrine, the theme is to immunize hosts who are unaware of the existence of copyright-infringing material on their systems.

2. *Notification of Alleged Infringements*

Upon acquiring knowledge of allegedly infringing activities, hosts usually must respond in a particular way in order to obtain the benefit of a copyright safe harbor. Necessary responses range in scope depending on the specific jurisdiction within which the host operates. Most jurisdictions' laws mandate that allegedly infringing content be blocked or removed—the so-called notice and takedown system. In the United States, upon obtaining knowledge, explicit⁸⁶ or implicit,⁸⁷ of infringement, the provider loses immunity unless it, “upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”⁸⁸ There is a similar requirement for intermediaries storing cached information.⁸⁹ In Japan, providers are not liable for damages for infringing third-party content if they “can technically apply measures by which transmission of such information resulting in the infringement of rights is prevented.”⁹⁰ The United Kingdom has adopted language precisely from the European Union, stipulating that an intermediary is not to be held liable for hosting copyright-infringing material if it “upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”⁹¹ Again, there are similar provisions for cached

83. Copyright Act 1987 (No. 2 of 1987), § 193D (Sing.).

84. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 19 (U.K.).

85. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(c) (2006).

86. *Id.* § 512(c)(1)(A)(i).

87. *Id.* § 512(c)(1)(A)(ii).

88. *Id.* § 512(c)(1)(C).

89. *Id.* § 512(b)(2)(D).

90. Tokutei denkitsushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, art. 3(1), *translated in* http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

91. Commission Directive 2000/31, art. 14(1)(b), 2000 O.J. (L 178) 1 (EC); Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 19(a)(ii) (U.K.).

material.⁹² The theme is repeated in legislation from Australia,⁹³ China,⁹⁴ France,⁹⁵ New Zealand,⁹⁶ and Singapore.⁹⁷

In almost every jurisdiction where legislation details hosts' obligations, there exists a notice-and-takedown system. This includes Australia,⁹⁸ China,⁹⁹ the European Union,¹⁰⁰ France,¹⁰¹ Germany,¹⁰² New Zealand,¹⁰³ Singapore,¹⁰⁴ South Korea,¹⁰⁵ the United Kingdom,¹⁰⁶ and the United States.¹⁰⁷ Under such a system, copyright owners are able, in a prescribed manner, to contact the provider with allegations of infringement. Once this notice has been received, the provider has an obligation to remove the content that is the subject of the notice. Failure to do so will result in a forfeiture of the safe harbor protections.

Proposals in certain other jurisdictions would merely require hosts to pass allegations of infringement along to their customers. This is the case in Canada, where successive governments have proposed legislation that would codify a so-called notice-and-notice approach. In 2005, Bill C-60 proposed such a system, whereby the owner of a copyright could send a notice of a claimed infringement to carrier, host, or information-location-tool provider.¹⁰⁸ The recipient of this notice would then have an obligation "without delay to forward the notice electronically" and retain all relevant records for a period of six months.¹⁰⁹ In 2008, proposed Bill C-61 contained a notice-and-notice scheme that was very similar.¹¹⁰ Although both of these proposals failed to

92. Directive 2000/31, art. 13(1)(e), (EC); S.I. 2002/2013, § 18(b)(v) (U.K.).

93. Copyright Act, 1968, § 116AH(1)(4)(2A) (Austl.).

94. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 15, LAWINFOCHINA (last visited Aug. 17, 2009), *translated in* Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

95. Law No. 2004-575 of June 21, 2004, art. 6, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

96. Copyright Act 1994, 1994 S.N.Z. No. 143, § 92C(2)(a)(ii) (N.Z.).

97. Copyright Act 1987 (No. 2 of 1987), § 193(D)(2)(b)(ii) (Sing.).

98. § 116AH(1)(4)(2A) (Austl.).

99. Arts. 14–17 (P.R.C.).

100. Commission Directive 2000/31, art. 14(1)(b), 2000 O.J. (L 178) 1 (EC).

101. Law No. 2004-575 of June 21, 2004, art. 6, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.).

102. Gesetz über die Nutzung von Telediensten [Act on the Utilization of Teleservices], July 22, 1997, BGBl. I at 1870, § 5(2) (F.R.G.).

103. Copyright Act 1994, 1994 S.N.Z. No. 143, §92C(2)(a) (N.Z.).

104. Copyright Act, ch. 63, § 193C(2)(b) (1987) (Sing.).

105. Jeojakgweonbeop [Copyright Act], ch. 6 (1986), *translated in* http://eng.copyright.or.kr/law_01_01.html (last visited Sept. 6, 2009) (S. Korea).

106. Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 19(a)(ii) (U.K.).

107. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(j)(1)(B) (2006).

108. Bill C-60, An Act to Amend the Copyright Act, 1st Sess., 38th Parl., § 40.1(1) (first read June 20, 2005; not read second time due to federal election) (Can.).

109. *Id.* § 40.2(1)(a)–(b).

110. Bill C-61, An Act to Amend the Copyright Act, 2nd Sess., 39th Parl., § 41.25–27 (first read June 12, 2008; not read second time due to federal election) (Can.).

become law as a result of Canadian federal elections, they demonstrate that some governments are considering alternatives to the notice-and-takedown scheme.

Interestingly, Japan does not have a strict notice-and-takedown regime. Instead, the Japanese legislation sets out a somewhat more subscriber friendly system of “notice-wait-and-takedown.”¹¹¹ Although similar to a notice-and-takedown regime, there is an important difference; before the content is taken down, the alleged infringer is notified and offered the opportunity to contest the claim of infringement. If the alleged infringer agrees to have the material removed, or no counternotice is received within seven days, the content is removed from the host system.¹¹² Most other notice-and-takedown regimes force alleged infringers to react to claims of infringement only after access to the content has been disabled. Although the American legislation¹¹³ is by far the most detailed in that regard, there are similar provisions in China,¹¹⁴ Japan,¹¹⁵ Singapore,¹¹⁶ and South Korea.¹¹⁷

To further ensure that copyright owners are not tempted to bombard providers with infringement allegations, some jurisdictions have mechanisms to penalize copyright owners who file false notices. For example, Singapore’s legislation provides that any person who files an infringement claim that is actually or believed to be false is liable to pay a fine and compensate the alleged infringer for losses resulting from the false claim.¹¹⁸ There are similar compensatory provisions in the legislation of China,¹¹⁹ South Korea,¹²⁰ and the United States.¹²¹ In Australia, the *Copyright Act* states only that “[t]he regulations may provide civil remedies for conduct by relevant parties in relation to conditions.”¹²²

Hosts are often immunized from liability for wrongful takedowns. Some jurisdictions have provided hosts who conform to the content removal provi-

111. Tokutei denkitsuushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, art. 3(2)(ii), *translated in* http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

112. *Id.*

113. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(g)(3)(A)–(D) (2006).

114. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 16, LAWINFOCHINA (last visited Aug. 17, 2009), *translated in* Intell. Prop. Prot. in China, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

115. Law No. 137 of 2001, art. 3(2)(ii) (Japan).

116. Copyright Act 1987 (No. 2 of 1987), § 193DA(2) (Sing.).

117. Jeojakgweonbeop [Copyright Act], ch. 6 (1986), *translated in* http://eng.copyright.or.kr/law_01_01.html (last visited Sept. 6, 2009) (S. Korea).

118. § 193DD(1) (Sing.).

119. Art. 24 (P.R.C.).

120. Ch. 6 (S. Korea).

121. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(f)(1) (2006).

122. Copyright Act, 1968, § 116AJ(2) (Austl.).

sions with protection against actions taken by aggrieved customers. These sections, found in the legislation of Australia,¹²³ China,¹²⁴ Japan,¹²⁵ Singapore,¹²⁶ and the United States,¹²⁷ shield hosts from liability to customers for damages resulting from decisions to remove material believed in good faith to infringe copyright.

So-called graduated response procedures for repeated infringement allegations, ultimately culminating in potential termination of customers' accounts, do exist in some countries but in the past have not been the norm. The United States has a provision allowing a court to issue an injunction restraining an intermediary from providing service to an infringer,¹²⁸ and under Singapore's *Copyright Act*, termination of a repeat infringer is also an option available to the courts.¹²⁹ Australia has recently imported this principle into its *Copyright Act*.¹³⁰ Though graduated response provisions are not yet the norm, these example provisions demonstrate that recent controversies over proposed graduated-response schemes¹³¹ are not entirely novel.

3. *Financial Benefits from Infringement*

In some, but not all jurisdictions, there are express requirements that to obtain immunity, hosts must not benefit from infringing activities. For example, in the American *DMCA*, providers engaged in hosting activities are only exempted from liability if, among other things, they do "not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity."¹³² The Australian *Copyright Act* contains an almost identical requirement of hosts in its safe harbor provision.¹³³ The Chinese legislation mandates that a provider is exempted from liability only if it has "not obtained any economic benefit from the provision of the works, performance and audio-visual products to its service objects."¹³⁴

123. *Id.* § 116AJ(1).

124. Art. 24 (P.R.C.).

125. Tokutei denkitsuushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information], Law No. 137 of 2001, art. 3(2), translated in http://www.isc.meiji.ac.jp/~sumwel_h/doc/codeJ/provider-e.htm (last visited Sept. 4, 2009) (Japan).

126. Copyright Act 1987 (No. 2 of 1987), § 193DA (Sing.).

127. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512(g)(1) (2006).

128. *Id.* § 512(j)(1)(ii).

129. § 193DB(1)(b) (Sing.).

130. Copyright Act, 1968, § 116AH(1)(1) (Austl.).

131. *Infra* Part II.A.

132. DMCA, § 512(c)(1)(B).

133. § 116AH(1)(4) (Austl.).

134. Ordinance on the Protection of the Right to Network Dissemination of Information (promulgated by the State Council, May 18, 2006, effective July 1, 2006), art. 9, LAWINFOCHINA (last visited Aug. 17, 2009), translated in *Intell. Prop. Prot. in China*, <http://english.ipr.gov.cn/laws/laws/others/235897.shtml> (last visited Sept. 5, 2009) (P.R.C.).

American courts have not considered what constitutes a direct as opposed to indirect benefit, but generating revenues from advertisements placed alongside infringing content could put a service provider in a precarious position. A direct financial benefit might also exist in circumstances where infringing content attracts traffic to a Web site. So far, this and other aspects of the DMCA's safe harbors remain relatively untested in the context of firms hosting peer-produced content, though current litigation may eventually shed some light on the legal issues.¹³⁵

II. FROM PASSIVITY TO POLICING

Recent developments around the world demonstrate that intermediaries' roles are shifting from passively providing hosting or connectivity services to actively monitoring and managing content on their networks. Intermediaries in most jurisdictions are still able to take advantage of provisions granting immunity from liability for copyright infringements committed by their customers, but the contours of these safe harbors are changing. Passivity is no longer the prerequisite for immunity. Instead, through judicial rulings, administrative regulations, policy-making initiatives, legislative enactments, voluntary programs, and multilateral negotiations, intermediaries are beginning to play a more proactive role in online copyright enforcement. This section of the article discusses some of the ways in which this trend is developing.

A. Policy-Making Initiatives

A clear trend toward more active involvement of intermediaries in online copyright enforcement has begun to emerge only in the past several years. In late 2007, the French government revealed an unprecedented agreement among France's major online intermediaries and its film and music industries. French President Nicolas Sarkozy had earlier established "The Olivennes Commission," led by the head of the French music store FNAC, to fulfill Sarkozy's campaign promises concerning copyright enforcement.¹³⁶ Through consultation and negotiation with copyright holders and major intermediaries, although not, it seems, Internet user groups, the Commission facilitated creation of "'The Élysée Agreement' for the development and protection of creative works and cultural programmes on the new networks."¹³⁷

The agreement consists of a plan to create a centralized administrative authority to deal with online infringement by requiring intermediaries to first notify their customers of any allegations of copyright infringement, and if

135. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 461 (S.D.N.Y. 2007).

136. Stephen W. Workman, *Developments in ISP Liability in Europe*, INTERNET BUS. L. SERV., Aug. 24, 2008, http://www.ibls.com/internet_law_news_portal_view.aspx?id=2126&s=latestnews.

137. The Olivennes Comm'n, *The "Élysée Agreement" for the Development and Protection of Creative Works and Cultural Programmes on the New Networks*, Nov. 23, 2007, http://www.amt.fr/IMG/pdf/Accords_Fiche_explicative_anglais_.pdf.

repeated allegations are made, applying sanctions appropriate to the customers' alleged behavior. Sanctions are expressly contemplated to include suspending Internet service for up to one year or possibly termination of subscribers' accounts. Internet intermediaries also agreed to test screening systems, which the Commission reported is the most promising solution to online infringement. In exchange for this cooperation from intermediaries, rights holders agreed to reduce the delay in releasing films for DVD rental or on-demand viewing and to facilitate interoperability by eliminating technological protection measures from French music sold online.¹³⁸

The International Federation of the Phonographic Industry (IFPI) hailed this agreement as "the single most important initiative to help win the war on online piracy that we have seen so far."¹³⁹ The deal, however, has been heavily criticized by civil society and user groups. Even Olivennes himself stated publicly that the proposed penalties would be disproportionate, especially if the administrative authority were to create a national blacklist of suspended or terminated users.¹⁴⁰

In the face of public criticism, the European Parliament voted overwhelmingly in April 2008 (586 votes to 36) against policies that would terminate Internet service to repeat infringers and urged European nations to reject France's example.¹⁴¹ The resolution requires member states "to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access."¹⁴²

France is not the only E.U. Member State engaged in and affected by this debate. Developments in the United Kingdom (U.K.) indicate that the British government may be moving in a similar direction. In December 2006, the former Financial Times editor, Andrew Gowers, was commissioned by the U.K. Chancellor of the Exchequer to examine the U.K.'s intellectual property framework. The Gowers report recommended, among other things, that intermediaries should do more to facilitate enforcement of copyrights online.¹⁴³ A voluntary arrangement was preferred, but if that were insufficient, the report suggested that a legislative response would be warranted.¹⁴⁴ A European Par-

138. *Id.*

139. Press Release, Int'l Fed'n of the Phonographic Indus., Int'l Recording Indus. Welcomes Groundbreaking Agreement in Fr. to Help in the Fight Against Internet Piracy (Nov. 23, 2007), http://www.ifpi.org/content/section_news/20071123.html (quoting John Kennedy, Chairman & CEO of the Int'l Fed'n of the Phonographic Indus.).

140. Workman, *supra* note 136.

141. Resolution on Cultural Industries in Europe (2007/2153(INI)), EUR. PARL. DOC. A6-0063/2008 (2008), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0063+0+DOC+PDF+V0//EN>.

142. *Id.*

143. ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 108 (2006), available at http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf.

144. *Id.* at 101-03, Recommendation 39.

liamentarian from the U.K. made a similar recommendation for greater cooperation continent-wide, suggesting a one-year timeline for a voluntary rather than mandatory response.¹⁴⁵

In January 2008, the U.K. government acted on the recommendations contained in the Gowers report and asked intermediaries and rights holders to discuss collaborative solutions to end the problem of online copyright infringement.¹⁴⁶ The Department for Culture, Media, and Sport threatened that legislation would be introduced by April 2009 if a voluntary solution was not reached.¹⁴⁷ A public consultation process regarding this issue, established by the Department for Business Enterprise & Regulatory Reform, was open until the end of October 2008.¹⁴⁸ Thus far, it is unclear how far the U.K. government is prepared to go in following through with these threats. Lord Peter Mandelson, Secretary of State for Business, Innovation and Skills, wrote in a column published in *The Times* that mandating service providers to suspend subscriber accounts would be a “sanction of last resort.”¹⁴⁹ Even the possibility of such draconian measures, however, is causing deep divisions among rights holders and has led to a softening of such demands.¹⁵⁰

B. Voluntary Collaboration

Whether or not a causal relationship between government threats and industry behavior exists, negotiations among private industry players have led to significant results in the U.K. Beginning in June 2008, Virgin Media began a ten-week trial campaign of sending “educational” letters to thousands of Internet subscribers alleged to be file sharing illegally.¹⁵¹ The campaign, a joint venture between Virgin Media and the British recording industry association, warned the recipients that file sharing would ultimately result in ter-

145. Amendments 1–124: Motion for a Resolution on Cultural Industries in the Context of the Lisbon Strategy (2007/2153(INI), PE398.378v.01-00, at 25–26 (Nov. 27, 2007), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/am/696/696239/696239en.pdf.

146. Workman, *supra* note 136.

147. DEP’T FOR CULTURE, MEDIA, & SPORT, CREATIVE BRITAIN: NEW TALENTS FOR THE NEW ECONOMY 10 (2008), available at <http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf>.

148. DEP’T FOR BUS. ENTER. & REGULATORY REFORM, CONSULTATION ON LEGISLATIVE OPTIONS TO ADDRESS ILLICIT PEER-TO-PEER (P2P) FILE-SHARING 6 (2008), available at <http://www.berr.gov.uk/files/file47139.pdf>.

149. Peter Mandelson, *Taking Something for Nothing Is Wrong . . . That’s Why We Must Stop Illegal File Sharing and Give the Creative Industries a Breathing Space*, THE TIMES (London), Aug. 29, 2009, at 25, available at http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6814187.ece.

150. Patrick Foster & Dan Sabbagh, *Battle of the Bands Over Demands to Ban Internet Access for Music Pirates*, THE TIMES (London), Sept. 16, 2009, at 25, available at http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article6836104.ece?&EMC-Bltm=9AQGEB (with an online title of *Music Industry Ready for Climbdown on Internet Piracy Demands*).

151. Amol Rajan, *Virgin Warns Illegal Downloaders: Stop or Face Prosecution*, THE INDEP., June 7, 2008, <http://www.independent.co.uk/arts-entertainment/music/news/virgin-warns-illegal-downloaders-stop-or-face-prosecution-842086.html>.

mination of their accounts.¹⁵² Although details are scarce, the record industry reportedly wants Virgin Media to escalate this campaign to implement a French-style policy of graduated responses.¹⁵³

Shortly afterward, it was announced that five more of Britain's largest Internet intermediaries had followed Virgin Media's lead and would begin their own "educational" letter campaigns.¹⁵⁴ In addition to threatening subscribers that illegal file sharing could lead to suspension or termination of Internet service, subscribers were warned that their online activities could be monitored and their Internet connection speeds could be degraded to make file sharing impractical.¹⁵⁵

That apparently was the first overt reference to an emerging but disturbing trend in response to allegations of online infringement—a *notice-and-slowdown* system. In other words, the announcement of the collaboration by the major U.K. carriers represents the first significant step towards sanctioned non-neutral provider practices in the U.K. Although many of the finer details are not yet available, what is known is sufficient to demonstrate that the U.K. is part of what seems to be a growing global trend of altering the passive-reactive role for intermediaries.

Developments in many other jurisdictions also have proven that intermediaries are increasing levels of cooperation with copyrights holders to reduce online infringement. For example, in June 2007, the *Los Angeles Times* reported that AT&T was working with Hollywood to develop technologies that would prevent users from transmitting infringing content on the provider's network.¹⁵⁶ Even American postsecondary institutions are playing a more active role in combating peer-to-peer file sharing by forwarding rights-holders' allegations of infringement to their students.¹⁵⁷ Universities merely providing connectivity rather than hosting services are not legally required to take this step,¹⁵⁸ but it is reflective of the growing collaboration between copyright holders and connectivity providers worldwide.

152. Lars Brandle, *ISPs On The Agenda At BPI AGM*, BILLBOARD.BIZ, July 9, 2008, http://www.billboard.biz/bbbiz/content_display/industry/e3i3a02b4b8960ca28a1cbaf4bafed07503.

153. Rajan, *supra* note 151.

154. Press Release, U.K., Dept. for Bus., Enter. & Reg. Reform, *New Measures to Address Online File-Sharing* (July 24, 2008), <http://www.wired-gov.net/wg/wg-news-1.nsf/0/788A1BAE10F752DB80257490002B4756?OpenDocument>.

155. *Net Firms in Music Pirates Deal*, BBC NEWS, July 24, 2008, <http://news.bbc.co.uk/2/hi/technology/7522334.stm>.

156. James S. Granelli, *AT&T to Target Pirated Content*, L.A. TIMES, June 13, 2007, <http://articles.latimes.com/2007/jun/13/business/fi-piracy13>.

157. U.S. GEN. ACCT. OFF. (GAO), *REPORT TO CONG. REQUESTERS, FILE SHARING: SELECTED UNIVERSITIES REPORT TAKING ACTION TO REDUCE COPYRIGHT INFRINGEMENT 8-9* (2004), available at <http://www.gao.gov/new.items/d04503.pdf>.

158. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F.3d 1229, 1234 (D.C. Cir. 2003).

Similar practices are occurring in Canada. A 2006 study¹⁵⁹ confirmed that eighty percent of Canadian Internet service providers voluntarily forward notices of alleged copyright infringement to their customers. The same study revealed that less than two percent of notices could be attributed to Canadian copyright holders, with the vast majority sent by or on behalf of American film, television, or music producers or software companies. The system costs Canadian intermediaries nearly a half million dollars per month, which raises interesting questions about their motivation for cooperating with copyright holders in this way.

Three things distinguish the notice-and-notice procedures now being implemented in jurisdictions around the world from procedures that were in place just a few years ago. First, only intermediaries hosting allegedly infringing content, not intermediaries providing connectivity services to customers allegedly accessing infringing content, routinely followed notification procedures in the past. Both carriers and hosts are now cooperating with copyright holders to forward infringement notices to uploaders and downloaders. Second, the nature of the notifications are becoming increasingly threatening. References to terms of use policies that threaten suspension or termination of service to those who use intermediaries' facilities illegally, including for copyright infringement, are more common now than they previously were. Third, notice-and-notice procedures are increasingly only part of an overall strategy of cooperation between copyright holders and intermediaries, which may also include active monitoring and management of traffic. As is discussed in more detail in Part III of this article, links are beginning to emerge between intermediaries' copyright enforcement and traffic management strategies.

C. Legislative Enactments

Some governments have gone further than discussing policy and coercing or facilitating voluntary industry agreements. France's proposed three-strike policy would not likely be effective without legislative reform to reinforce intermediaries' obligations regarding copyright enforcement. Despite the European Parliament's resolution against such an approach, France has proceeded with its plans for graduated responses to allegations of online infringement. In May 2009, French Senators and Parliamentarians had sealed the adoption of what has become known as the HADOPI law. The government entity—a high-level authority for the diffusion of works and the protection of rights on the Internet, hence the acronym HADOPI—will now be established.¹⁶⁰ Though a Member of European Parliament, Guy Bono, asked the

159. PAUL CHWELOS, INDUSTRY CANADA, INTERNET SERVICE PROVIDERS REPORT: EXECUTIVE SUMMARY & CONCLUSIONS, Jan. 20, 2006, <http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip01430.html>.

160. Catherine Saez, *French Parliament Passes Final Internet Anti-Piracy Law; Reaction Expected*, INTELLECTUAL PROP. WATCH, May 13, 2009, <http://www.ip-watch.org/weblog/2009/05/13/french-parliament-seals-restrictive-internet-anti-piracy-law-reaction-expected/>.

European Commission to launch legal action to stop France from going ahead with these plans, the E.U.'s information commissioner, Viviane Reding, ruled out this possibility.¹⁶¹

In a mandatory constitutional review, however, France's *Conseil constitutionnel* censored the new law and held, based on the 1769 Declaration of the Rights of Man and of the Citizen, that denying Internet access to alleged infringers requires due process of law.¹⁶² Respecting this constraint, French lawmakers in the Senate and the National Assembly approved a modified version of the bill.¹⁶³ Most details remain the same, with the only key difference being that the power to order termination of subscriber accounts now resides with the judiciary rather than an administrative body.¹⁶⁴ The degree of deference to administrators in this process remains to be seen.

New Zealand has also passed legislation that represents a major development in the nature of safe harbors for Internet intermediaries. The new *Copyright (New Technologies) Amendment Act 2008* creates a notice-and-takedown regime in New Zealand and significantly limits the potential of intermediary liability.¹⁶⁵ In this respect, the law is not novel; it conforms closely to the global themes discussed above. To qualify for the safe harbor, however, New Zealand's new law would have required that providers "must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer."¹⁶⁶ This provision (which, interestingly, had been removed from earlier drafts of the legislation) would have established a graduated response to copyright infringement in New Zealand.¹⁶⁷

The amending *Act* became law on October 31, 2008, with the section mandating the termination of repeat offenders scheduled to come into effect later, on February 28, 2009.¹⁶⁸ According to Associate Commerce Minister

161. Leigh Phillips, *Commission Gives Paris a Pass Over Piracy Bill*, EUOBSERVER.COM, May 14, 2009, <http://euobserver.com/19/28127>.

162. CC decision no. 2009-580DC, June 10, 2009, ¶¶ 16–17, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France] (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf.

163. Law No. 2009-669 of June 12, 2009, amended Sept. 15, 2009, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France] (Fr.), available at <http://www.assemblee-nationale.fr/13/pdf/ta/ta0332.pdf> (original in French).

164. *Id.* art. 1.

165. Copyright (New Technologies) Amendment Act 2008, 2008 S.N.Z. No. 27, § 53 (referencing the amendment of § 92C(4) of the Copyright Act 1994) (N.Z.).

166. *Id.* (referencing the amendment of § 92A(1) of the Copyright Act 1994).

167. See Copyright (New Technologies and Performers' Rights) Amendment Bill—Second Reading, Sept. 4, 2007, H.R. Bill, http://www.parliament.nz/en-NZ/PB/Debates/Debates/b/4/3/48HansD_20070904_00001162-Copyright-New-Technologies-and-Performers.htm (N.Z.); Copyright (New Technologies and Performers' Rights) Amendment Bill—Third Reading, April 8, 2008, H.R. Bill, http://www.parliament.nz/en-NZ/PB/Debates/Debates/5/2/4/48HansD_20080408_00000860-Copyright-New-Technologies-Amendment-Bill.htm (N.Z.).

168. Copyright (New Technologies) Amendment Act 2008, 2008 S.N.Z. No. 27, § 2 (N.Z.); Judith Tizard, *Copyright (New Technologies) Amendment Comes into Force*, BEEHIVE.GOV.TZ, Oct. 3, 2008, <http://www.beehive.govt.nz/release/copyright+new+technologies+amendment+comes+force>.

Judith Tizard, the delay in the repeat offender provision was to “enable rights holders and Internet service providers (ISPs) time to reach agreement on how it can be effectively implemented.”¹⁶⁹ In a surprising development, just days before this section of the New Zealand law was to take effect, concerned citizens convinced Parliamentarians to delay implementation of this system pending further study and consultation.¹⁷⁰ A public consultation process took place during the summer of 2009.¹⁷¹

In contrast to the New Zealand government’s cautiousness, the government of the Republic of Korea has fundamentally altered its copyright legislation to impose active-preventative obligations on communications intermediaries. On July 16, 2008, the Ministry of Culture, Sports and Tourism announced a bill to amend the *Copyright Act* that includes a graduated response scheme. The bill passed into law on April 22, 2009.¹⁷²

As originally proposed, the South Korean Bill would have enabled the government to direct intermediaries to terminate the account of repeat alleged infringers. The proposed legislation would have established a graduated response to be exercised at the discretion of the Minister of Culture, Sports and Tourism under Presidential Decree. For users who transmit copyrighted information or programs that enable digital rights management technology to be disabled, the government could have ordered that intermediaries either warn the offending transmitter or stop the transmission altogether.¹⁷³ In cases where the transmitter is deemed to have reoffended, the Minister could have ordered the intermediary to suspend or terminate the transmitter’s account.¹⁷⁴ The Minister also could have ordered that the intermediary close a bulletin board that has received three complaints that it contains copyrighted material.¹⁷⁵ Repeated failures by the intermediary to conform to the Minister’s orders, which result in damage (to the value of the copyrighted work), could result in significant consequences. In that event, the Minister could have ordered other

169. Tizard, *supra* note 168.

170. Juha Saarinen Auckland, *John Key Delays Copyright Law*, COMPUTERWORLD, Feb.23, 2009, <http://computerworld.co.nz/news.nsf/news/86D681292534A2CCCC25756600143FD1>; *see also* Creative Freedom Foundation, <http://creativecommons.org.nz/> (last visited Sept. 6, 2009).

171. N.Z. Ministry of Econ. Dev., Intellectual Property Policy: Copyright, http://www.med.govt.nz/templates/StandardSummary_____172.aspx (last visited Sept. 25, 2009).

172. E-mail from Ji-Sung Kim, Executive Committee Member, IPLeft, to Jeremy de Beer, Associate Professor, University of Ottawa, (May 19, 2009, 10:22:46 GMT) (on file with author). For the text of the Bill in Korean, *see* Jeojakgweonbeop Ilbugaejeongbeopyulan [Copyright Law Partial Amendment Bill] (2009), (S. Korea), *available at* http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_00B8R1V1H2U7K1D4O5H0J5Z5I4U7P0.

173. *Unofficial Translation of the “Three Strike Out (Graduated Response)” Provision in the Copyright Law Amendment Bill Proposed by the Ministry of Culture, Sports and Tourism in July, 2008*, art. 133-2(1), IPLLEFT, Oct. 10, 2008, http://www.ipleft.or.kr/bbs/view.php?board=ipleft_5&id=488&page=1&category1=3 (an unofficial translation of art. 133-2 of the Copyright Law Amendment Bill announced in July 2008 (S. Korea)).

174. *Id.* at art. 133-2(2).

175. *Id.* at art. 133-2(3).

intermediaries to block access to (and from) the offending intermediary's network.¹⁷⁶

The law as passed closely resembles the proposal, except that measures providing for termination and access blocking were removed, and the suspension period was limited to a particular period of time.¹⁷⁷ Despite these changes, the law reflects the general worldwide trend toward increasingly active roles for online intermediaries.

D. Judicial Decisions

Other significant developments have happened in courtrooms around the world. Judicial decisions in various jurisdictions have imposed requirements on intermediaries to take more active steps to prevent copyright infringement on their systems.

French courts have been among the most active. In June 2007, French humorist *Lafesse* (which translates to "the Buttock") launched a suit against MySpace, claiming infringement of his author's rights and personality rights after several videos of his skits appeared on the company's Web site.¹⁷⁸ France's *Loi pour la Confiance dans l'Economie Numérique* (LCEN) provides that hosts "may not be held civilly liable for the activities or information stored at the request of a recipient of these services if they did not have actual knowledge of their unlawful nature or of facts and circumstances making this nature apparent, or if, as soon as they obtained such knowledge, they acted expeditiously to remove or to disable access to these data."¹⁷⁹ It also stipulates that providers are under no general obligation to monitor the information that they transmit or store.¹⁸⁰ MySpace, having complied with the legislation, should have been protected from such a suit.

But the Paris Tribunal de Grande Instance (TGI) held MySpace to be the *publisher* rather than the *host* of the content.¹⁸¹ The Paris TGI justified its

176. *Id.* at art. 133-2(4).

177. Ji-Sung Kim E-mail, *supra* note 172.

178. Workman, *supra* note 136 (discussing *Lafesse v. MySpace*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 22, 2007 (Fr.), available at <http://www.foruminternet.org/telechargement/documents/tgi-par20070622.pdf> (original decision in French)).

179. Nicolas Jondet, *The Silver Lining in Dailymotion's Copyright Cloud*, JURISCOM.NET, Apr. 19, 2008, at 3, available at <http://www.juriscom.net/documents/da20080419.pdf> (author's personal translation of article 6-I-2 in *Loi pour la Confiance dans l'Economie Numérique* (LCEN) [Law on the Confidence in the Digital Economy], Law No. 2004-575 of June 21, 2004, art. 6-I-2, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.)).

180. *Id.* at 5 (author's personal translation of article 6-I-7 in *Loi pour la Confiance dans l'Economie Numérique* (LCEN) [Law on the Confidence in the Digital Economy], Law No. 2004-575 of June 21, 2004, art. 6-I-7, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004 (Fr.)).

181. Workman, *supra* note 136 (discussing *Lafesse v. MySpace*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 22, 2007 (Fr.), available at

decision by citing the fact that MySpace allows users to upload content through a specific frame structure. Moreover, every time the video was viewed, an advertisement was displayed that resulted in advertising revenue for MySpace.¹⁸² Because the court was convinced that MySpace was the publisher, it was not permitted to rely on the French hosting exemption adopted in accordance with Article 14 of the E.U. *E-Commerce Directive*.¹⁸³ MySpace was ordered to remove the infringing content or face a daily €1,000 fine and to pay €61,000 for commercial prejudice, infringement of moral and personal rights, and the plaintiff's legal fees.¹⁸⁴

Less than one month later, the same court issued a ruling that was similar but went "a few steps further."¹⁸⁵ In July 2007, Nord-Ouest Production sued the hosting site Dailymotion after a copy of its film *Joyeux Noel* appeared on the Internet without authorization.¹⁸⁶ Dailymotion argued that per 6-I-7 of LCEN, they had "no general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity."¹⁸⁷ The plaintiff argued that Dailymotion was a publisher and thus, as was the case with MySpace in *Lafesse*, must prevent all acts of infringement from occurring.

The court held that Dailymotion had deliberately enabled mass-scale piracy, writing that "it could not seriously be argued that the aim of the architecture and the technical means put in place by Dailymotion were merely

<http://www.foruminternet.org/telechargement/documents/tgi-par20070622.pdf> (original decision in French)).

182. Cade Metz, *MySpace Succumbs to The Buttock*, THE REG., July 11 2007, http://www.theregister.co.uk/2007/07/11/french_court_calls_myspace_a_publisher/ (discussing *Lafesse v. MySpace*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 22, 2007 (Fr.), available at <http://www.foruminternet.org/telechargement/documents/tgi-par20070622.pdf> (original decision in French)).

183. Workman, *supra* note 136 (discussing *Lafesse v. MySpace*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 22, 2007 (Fr.), available at <http://www.foruminternet.org/telechargement/documents/tgi-par20070622.pdf> (original decision in French)).

184. Metz, *supra* note 182. (discussing *Lafesse v. MySpace*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 22, 2007 (Fr.), available at <http://www.foruminternet.org/telechargement/documents/tgi-par20070622.pdf> (original decision in French)).

185. Cade Metz, *French Court Slaps Poor Man's YouTube*, THE REG., July 26, 2007, http://www.theregister.co.uk/2007/07/26/dailymotion_guilty_of_copyright_infringement/ (discussing *Nord-Ouest Prod. v. S.A. Dailymotion*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

186. Workman, *supra* note 136 (discussing *Nord-Ouest Prod. v. S.A. Dailymotion*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

187. Jondet, *supra* note 179, at 5 (author's personal translation of article 6-I-7 in *Loi pour la Confiance dans l'Economie Numérique (LCEN)* [Law on the Confidence in the Digital Economy], Law No. 2004-575 of June 21, 2004, art. 6-I-7, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 22, 2004 (Fr.)).

meant to enable [any Internet user] to share their home-made videos with their friends or the wider Internet community.”¹⁸⁸ In a manner that contradicts the *Lafesse* decision, the court held that because Dailymotion did not control the content of the postings, they were *not* a publisher, despite the presence of remunerated advertising and promotion of the general site.¹⁸⁹ But, Dailymotion was nonetheless liable, as the exemption from a general duty to monitor their network “did not apply when the unlawful activities were generated or induced by the service provider itself.”¹⁹⁰ Dailymotion was a hosting service provider, and because it must have been aware that its platform was being used for copyright infringement (in fact, it “enabled, induced and thrived on” the induced infringements¹⁹¹), it had an obligation to implement technical solutions to prevent all unlawful activities. The court held “that Dailymotion had failed to comply with an obligation to implement prior control systems to monitor and prevent unlawful activities”¹⁹² and to take down the infringing video, despite having received two infringement notices.¹⁹³ Ultimately, Dailymotion was fined €23,000 in damages and a further €1,500 for each day the infringing video stayed online.¹⁹⁴

The *Dailymotion* ruling expanded the circumstances under which hosting service providers in France could be held liable for infringement. Following the decision, hosting service providers could see their safe harbor protection disappear if a court decides they “must have been aware” of the infringing content, they “induced” the infringement in an effort to increase traffic to their

188. *Id.* at 5 (author’s personal translation of Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

189. Brad Spitz, *DailyMotion: A “Hosting Provider” Liable for Copyright Infringement*, BRADSPITZ.COM, July 18, 2007, <http://copyrightfrance.blogspot.com/2007/07/dailymotion-hosting-provider-liable-for.html> (discussing Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

190. Jondet, *supra* note 179, at 5 (author’s personal translation of Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

191. *Id.* at 7 (author’s personal translation of Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

192. *Id.* at 5 (author’s personal translation of Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

193. Spitz, *supra* note 189 (discussing Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

194. Metz, *supra* note 185 (discussing Nord-Ouest Prod. v. S.A. Dailymotion, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, July 13, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20070713.pdf> (original decision in French)).

site, or they profited from the infringement by posting advertisements alongside videos on their Web site.

As a result of the *Dailymotion* ruling, IRIS, a French Internet advocacy group, recommended that to avoid being found liable for copyright infringement, sites hosting user-created content should abandon the advertisement-based revenue model and instead generate revenues by charging for storage space on their hosting servers.¹⁹⁵ That change in business models would fundamentally alter the incentive structures these hosts use to attract content, and might ultimately undermine the viability of these types of hosts' business altogether.

In the days after the decision, Dailymotion announced that it would use software from a company called Audible Magic to fingerprint audio files. And in October 2007, it announced that it had struck a deal with *Institut National des Archives* (INA), the French national television archive, to employ "Signature," the INA's video fingerprinting technology.¹⁹⁶ This fingerprinting software allows hosts to compare, at the point of submission, audio or video files with those of rights holders and to reject any files that match.¹⁹⁷

Also in October 2007, Dailymotion announced that it had agreed to the "Principles for User-Generated Content," negotiated between some major rights holders (including CBS, Disney, Fox Entertainment, NBC Universal, Sony Pictures, and Viacom) and intermediaries (including Microsoft, Crackle, MySpace, Veoh, and Dailymotion).¹⁹⁸ These principles form nonlegally binding guidelines to "foster[] creativity while respecting the rights of copyright owners."¹⁹⁹ The guidelines require the operators of sites hosting user-created content to implement filtering and fingerprinting technology to block ostensibly infringing files, to promote public education relating to copyright, and to remove copyrighted material that had been uploaded before the agreement.²⁰⁰ In exchange for operators' efforts to protect copyright, the rights holders have agreed not to sue operators that adhere to the policy.²⁰¹

The third major French ruling pertaining to passivity requirements occurred in October 2007. A French film company, Zadig Productions, sued Google Video when the video *Tranquility Bay* repeatedly appeared on Google's site.²⁰² Each time the video appeared, Zadig filed formal take-down

195. Jondet, *supra* note 179, at 12 (author's personal translation of the IRIS commentary).

196. *Id.* at 14.

197. *Id.*

198. Press Release, DailyMotion et al., Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights, 1 (Oct. 18, 2007), http://www.dailymotion.com/press/CP_principlesofUGC.pdf.

199. *Id.* at 2.

200. *Id.* at 5-9.

201. *Id.* at 9. For more information on the Principles for User-Generated Content, see *Principles for User Generated Content Services*, UGCPRINCIPLES.COM, <http://www.ugeprinciples.com/>.

202. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, October 19, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20071019.pdf>.

notices, with which Google complied each time. The recurrence of the movie's posting, however, caused Zadig to become concerned that Google had not done enough to prevent its reposting. The result was a lawsuit in which Zadig argued that Google had a duty not only to remove the content on request, but a duty to prevent any subsequent infringement.²⁰³ Google, much like MySpace and Dailymotion in the above examples, relied on the hosting service provider exemption under French law.²⁰⁴ The Paris T.G.I. concluded that although Google Video offered the "architecture and the technical means" to upload and access content, Google was considered just a host because "the content was provided by the users themselves."²⁰⁵ Nevertheless, despite being considered a host and complying promptly with the take-down notices, the Paris T.G.I. decided that Google had not done enough.

The court ruled that Google was not liable for the first instance of infringement, but it was liable for all subsequent infringement because, once it had been informed by the rights holders of the infringement, Google "had to implement all the technical means necessary to avoid further dissemination."²⁰⁶ The Paris T.G.I. rejected Google's argument that the French law required a new takedown notice every time a new copy was uploaded. Instead, the court held that even "if the [multiple postings] are attributable to different users, their content . . . is identical."²⁰⁷ Although the French (and European) law prohibits the imposition on a host of a general obligation to monitor its system, the Paris T.G.I. chose its words carefully to require hosts to employ "targeted and temporary surveillance" to "avoid damage or abate damage caused by [specific content]."²⁰⁸ Because Google had failed to do this, it did not qualify for France's safe harbor. As such, Google was ordered to pay a €30,000 fine to Zadig.²⁰⁹

203. Workman, *supra* note 136 (discussing S.A.R.L. Zadig Prod. v. Google, Inc., Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 19, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20071019.pdf> (original decision in French)).

204. Nicolas Jondet, *Google Video Held Liable for the Copyright Infringement of "Tranquility Bay"* (TGI Paris 19 Octobre 2007), FRENCH-LAW.NET, Mar. 25, 2008, <http://french-law.net/google-video-held-liable-for-the-copyright-infringement-of-tranquility-bay-tgi-paris-19-octobre-2007.html> (providing French law in English and discussing S.A.R.L. Zadig Prod. v. Google, Inc., Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 19, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20071019.pdf> (original decision in French)).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Cade Metz, *French High Court Thumps Google Video*, THE REG., Dec. 5, 2007, http://www.theregister.co.uk/2007/12/05/french_high_court_thumps_google_video/ (discussing S.A.R.L. Zadig Prod. v. Google, Inc., Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 19, 2007 (Fr.), available at <http://www.juriscom.net/documents/tgiparis20071019.pdf> (original decision in French)).

This ruling against Google Video represents another read-in limitation on the French safe harbor for providers of hosting services. The Paris T.G.I. has introduced a duty on hosting service providers to employ whatever measures are necessary to prevent infringing content from being reposted after having been notified of the initial infringement. Practically speaking, the French court has compelled hosting intermediaries to implement technological controls that actively prevent, rather than passively react to, alleged infringements.

Rulings imposing strict obligations on providers have not, however, been limited to France. Following closely on the heels of France's *Lafesse* decision, the Brussels Court of First Instances ruled that intermediaries must play a more significant role in the fight against online copyright infringement in Belgium.²¹⁰ Unlike the French decisions, however, the Belgian developments pertain to the role of *carriers*, not *hosts* of allegedly infringing content.

In early 2007, the collective society representing composers and music publishers in Belgium, SABAM, filed a lawsuit against an intermediary, Scarlet (formerly Tiscali), to compel the intermediary to adopt technological measures to stop its subscribers from downloading illegal music.²¹¹ The court ruled that intermediaries have both a legal responsibility and the technical ability to stop copyright infringement, and ordered Scarlet to use one of 11 methods suggested in an expert report to either block or filter p2p infringements on its network.²¹² If Scarlet failed to do this within six months, it was to face a daily penalty of €2,500.²¹³

This decision is controversial for at least two reasons. First, it represents the first time in Europe that such an obligation has been imposed on carriers. As with the French developments, the *Scarlet* decision represents a significant departure from the principle that connectivity providers are mere conduits. Although the ruling does not appear to make Scarlet liable for any infringing material that escapes technological filters, it raises serious concerns about the future role of online intermediaries.

Second, the judgment appears to contradict a prohibition on monitoring obligations contained in the E.U.'s *E-Commerce Directive*. Article 15 of the *Directive* states that "Member States shall not impose a general obligation on

210. *Belgium ISP Ordered by the Court to Filter Illicit Content*, EUROPEAN DIGITAL RIGHTS, July 18, 2007, <http://www.edri.org/edriagram/number5.14/belgium-isp/> (discussing SABAM v. S.A. Scarlet (formerly Tiscali), Tribunal de premiere instance de Bruxelles [T.P.I.] [Court of First Instance] Brussels, May 18, 2007 (Belg.), available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf> (original decision in French)) [hereinafter *Belgium ISP*].

211. *Id.*

212. Workman, *supra* note 136 (discussing SABAM v. S.A. Scarlet (formerly Tiscali), Tribunal de premiere instance de Bruxelles [T.P.I.] [Court of First Instance] Brussels, May 18, 2007 (Belg.), available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf> (original decision in French)).

213. *Belgium ISP*, *supra* note 210 (discussing the SABAM v. S.A. Scarlet (formerly Tiscali) case, Tribunal de premiere instance de Bruxelles [T.P.I.] [Court of First Instance] Brussels, May 18, 2007 (Belg.), available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf> (original decision in French)).

providers, when providing the services covered by Articles 12 [transmission], 13 [caching] and 14 [hosting], to monitor the information which they transmit or store”²¹⁴ According to the court, because the eleven technical measures suggested in an expert report were limited to blocking or filtering certain content passing through Scarlet’s network, there would be no general obligation on providers to monitor their networks.²¹⁵ The court’s questionable reasoning in reaching this conclusion seems to be that blocking and filtering with technological measures does not constitute monitoring, but rather avoids the need for provider monitoring altogether.

While intermediaries and entertainment industry players negotiate privately over terms of cooperation, serious questions about intermediaries’ legal responsibilities have come before U.S. courts. In March 2007, Viacom International (parent company of, among others, Country Music Television, Paramount Pictures Corporation, Black Entertainment Television, and Comedy Partners) launched a lawsuit against YouTube (a subsidiary of Google) claiming that “YouTube has harnessed technology to willfully infringe copyrights on a [massive] scale.”²¹⁶ This case will test the legal distinctions between firms that merely host possibly infringing content and those that facilitate or induce copyright infringement.²¹⁷ Although the lawsuit is still in its relatively early stages, if courts eventually rule against YouTube, this could signal that the United States is moving in a direction similar to France.

In a series of recent cases, however, courts have vindicated the video-sharing site Veoh from copyright liability, due to the applicability of the *DMCA*’s safe harbor provisions.²¹⁸ The most recent decision in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, rendered in September 2009, found no grounds to impute to Veoh implied knowledge of infringement, agreed with Veoh it lacked the right and ability to control infringements despite its technological control over the site, would not mandate filtering or blocking re-

214. Commission Directive 2000/31, art. 15(1), 2000 O.J. (L 178) 1 (EC).

215. Workman, *supra* note 136 (discussing *SABAM v. S.A. Scarlet* (formerly Tiscali), Tribunal de premiere instance de Bruxelles [T.P.I.] [Court of First Instance] Brussels, May 18, 2007 (Belg.), available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf> (original decision in French)).

216. Complaint at 2, ¶ 2, *Viacom Int’l, Inc. v. YouTube, Inc.*, 540 F.2d 461 (S.D.N.Y. 2007) (No. 07 Civ. 2103).

217. See de Beer, *supra* note 55, at 275–76; Jason C. Breen, Comment, *YouTube or YouLose? Can YouTube Survive a Copyright Infringement Lawsuit*, BERKELEY ELECTRONIC PRESS (BEPRESS), 2007, at 16, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=9209&context=expresso>. See also Phillip Kunz, *Whose Tube?—A Contributory Copyright Infringement Analysis of the Pending Lawsuit*, Robert Tur v. Youtube, Inc., 17 DEPAUL-LCA J. ART & ENT. L. & POL’Y 167, 168 (2006); Alexis Allen, *Battling in the Name of Balance: Evaluating Solutions to Copyright Conflict in Viacom International v. YouTube*, 2007 BYU L. REV. 1023, 1047 (2007).

218. *IO Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1092 (C.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. CV 07-5744 AHM(AJWx), slip op. at 28–29 (C.D. Cal. Sep. 11, 2009).

quirements, and refused to require Veoh to terminate the accounts of repeated alleged infringers.²¹⁹ Interestingly, American courts seem to be less demanding in these regards than their European counterparts.

Elsewhere though, there is further evidence of courts' willingness to require intermediaries to play a more active-preventative role in online copyright enforcement. Consider the example of a recent Chinese case known as the *Tudou* case.²²⁰ Tudou operates a network and Web site to which users can upload, view, and share video clips. It is, essentially, the Chinese equivalent of YouTube. Tudou was sued by the licensed distributor of *Fengkuang De Shitou* [*Crazy Stone*], one of the most popular Chinese films of 2006, for unauthorized dissemination of the film over its network. The appellate court, the Shanghai Higher People's Court, upheld the trial judgment that rejected Tudou's defenses that it was not responsible for its users' behavior, that the plaintiffs failed to avail themselves of its fingerprinting and filtering technology, and that it took down the content as soon as legal action was commenced. The court held that Tudou should have been aware of the infringement from the circumstances and done more to prevent the infringement from happening.²²¹

E. Multilateral Negotiations

In 2007, efforts to engage Internet intermediaries more in online copyright enforcement initiatives shifted to a new, multinational forum. On October 23, 2007, various national governments confirmed what had long been suspected: that a multilateral anticounterfeiting agreement—the Anti-Counterfeiting Trade Agreement (ACTA)—was being negotiated.²²² The agreement, being negotiated privately between Canada, the European Union, Japan, Mexico, New Zealand, South Korea, Switzerland, and the United States, apparently would aim to reduce piracy and counterfeiting, though its effects are likely to be much broader. The nonpublic negotiations have resulted in an uproar among many interested observers.²²³

Opposition to the secret negotiations has been significantly fueled by the recent release of a leaked ACTA draft on the Internet. The document, posted on May 22, 2008 by *Wikileaks*, elaborates on some of the agreement's general

219. *UMG Recordings, Inc.*, No. CV 07-5744 AHM(AJWx), slip op. at 18–20, 25–26.

220. *Xinzhuan Zai Xian (Beijing) Info. Tech. Co., Ltd. v. Quan Tudou Internet Tech. Co., Ltd.*, Aug. 29 2008, (Shanghai Higher People's Ct., July 30, 2008), available at: http://ipr.china.court.org/public/detail_sfws.php?id=22357 (in Chinese).

221. *Id.* ¶ 17.

222. Press Release, Foreign Affairs & Int'l Trade Can., *Canada Joins Discussions Toward International Anti-Counterfeiting Trade Agreement* (Oct. 23, 2007), http://w01.international.gc.ca/Minpub/Publication.aspx?isRedirect=True&publication_id=385528&Language=E&docnumber=146.

223. See, e.g., Michael Geist, *Transparency Needed on ACTA*, THESTAR.COM, June 9, 2008, <http://www.thestar.com/sciencetech/article/439551>; CanWest News Service, *Copyright Deal Could Toughen Rules Governing Info on iPods, Computers*, CANADA.COM, May 26, 2008, <http://www.canada.com/topics/technology/science/story.html?id=ae997868-220b-4dae-bf4f-47f6c96ce5e>.

provisions.²²⁴ The “Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement” appears to call for increased criminal and administrative measures to deal with violations of intellectual property rights. Of particular relevance to this article, the agreement apparently targets communications intermediaries, calling for the following: (1) a “legal regime, including safeguards for Internet service providers (intermediaries) from liability, to encourage intermediaries to cooperate with rights holders in the removal of infringing material;” (2) “remedies against circumvention of technological protection measures used by copyright owners and the trafficking of circumvention devices;” and (3) “procedures enabling rights holders who have given effective notification of a claimed infringement to expeditiously obtain information indentifying the alleged infringer.”²²⁵ If ratified, this Agreement could pave the way for a much more interventionist role for providers.

III: POLICY CONSIDERATIONS

A. An Explanation

In order to evaluate implications of the global trend from passive-reactive to active-preventative safe harbor schemes for communications intermediaries, it is necessary to understand why the policy shift may be happening. The trend seems to be attributable to several factors.

First and foremost is pressure from the entertainment industries on government lawmakers and policymakers. Well-organized copyright industry associations have effectively lobbied governments worldwide, convincing public authorities that greater enforcement efforts are needed to combat online copyright infringement.²²⁶ Governments have responded to this pressure, presumably because they are convinced of the importance of creative industries to their nations’ cultural and economic well-being. In principle, therefore, governments are committed to developing strategies that can assist in reducing infringement on the Internet.

Because of the almost ubiquitous and highly decentralized nature of the problem of online piracy, however, solutions are not easy to create or implement. Enforcement efforts targeted at individual infringers, such as the global recording industry’s lawsuits against alleged file sharers, have proven to be

224. Proposed US ACTA Multi-Lateral Intellectual Property Trade Agreement (2007), Wikileaks (May 21, 2008), https://secure.wikileaks.org/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement (discussing a leaked draft document of *Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement*, at 1, <http://ipjustice.org/wp/wp-content/uploads/ACTA-discussion-paper-1.pdf>). (Wikileaks was used as a source for this information, as the authors are not aware of any print publications or other official sources that make this document available.)

225. *Id.* (discussing a leaked draft document of *Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement*, at 3–4, <http://ipjustice.org/wp/wp-content/uploads/ACTA-discussion-paper-1.pdf>).

226. See generally WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009).

ineffective.²²⁷ Copyright holders and governments realize that Internet intermediaries are technologically and commercially well positioned to assist with copyright enforcement. As a result, laws and policies are being formulated that either encourage or conscript intermediaries into the enforcement battle.

There is also a paradox with previous safe harbor policies that has led to pressure for change. Under the existing laws of most jurisdictions surveyed in this article, intermediaries must remain passive-reactive in order to obtain immunity from liability for copyright infringements occurring on their networks. The more active intermediaries are in the hosting or transmission process, the less likely they are to be protected by safe harbors. This paradoxically gives the parties best able to actively limit online infringements strong disincentives to leverage their unique position to facilitate enforcement. The fact that intermediaries' active interference with Internet traffic may be intended to prevent or reduce copyright infringement is not accounted for in the language of most jurisdictions' safe harbor provisions; safe harbors are premised on passivity and reactivity. Whether this was an intentional or accidental consequence of policies formulated in the last decades of the 20th century is now immaterial. This paradoxical arrangement has proven to be unsustainable in the 21st century's online environment.

Intermediaries have in the past objected to the imposition upon them of responsibility for their customers' copyright infringements on several grounds. One is the lack of control over customers' activities, specifically the supposed impracticability of tracking or policing those activities. Intermediaries also have argued that it would be inappropriate as a matter of public policy to require any active interference with content they host or transmit. In some cases, intermediaries have aligned with Internet users and public interest advocates to oppose the imposition of obligations to cooperate with copyright holders. In *RIAA v. Verizon*²²⁸ in the United States and *BMG v. Doe*²²⁹ in Canada, for example, intermediaries argued that compelling disclosure of personally identifying information in response to allegations of infringement would adversely impact the privacy rights of their customers. Whether their customers' privacy concerns or their own compliance costs were the intermediaries' real worry will never be known, but the fact is that intermediaries and their customers have previously taken common positions regarding the role of the intermediary in copyright enforcement efforts.

More recently, intermediaries' positions have begun to ally more closely with those of copyright holders, and this is not only the result of government and industry pressure. Intermediaries' self-interest has played an equally important role in this shift. Two additional factors might explain intermediaries'

227. Electronic Frontier Foundation, *RIAA v. The People: Five Years Later*, EFF.ORG, 2008, at 1, available at <http://www.eff.org/files/eff-riaa-whitepaper.pdf> (The Electronic Frontier Foundation is an organization promoting digital civil liberties.).

228. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003).

229. *BMG Canada, Inc. v. John Doe*, [2004] F.C. 488 (Can.).

evolving perspective on their role in online copyright enforcement: first, the burden that file sharing activities impose upon intermediaries' network resources, and second, increasing integration between the businesses of content production and distribution.

Connectivity providers worldwide have taken a variety of steps to manage traffic on their networks, irrespective of allegations of copyright infringement. These steps include most notably limiting the amount of bandwidth available for certain applications, such as p2p file sharing. Intermediaries have not expressly cited a relationship between p2p copyright infringement and traffic shaping. Rather, intermediaries typically claim that traffic shaping is necessary to reduce network congestion, which would otherwise inhibit the Internet's functionality. Certain traffic is the target of shaping not because it is more likely to be copyright-infringing than other traffic, but because it is alleged to be less time sensitive than, for instance browsing, e-mailing, or Internet telephony. So slowing or limiting p2p file transfers is a goal shared by both network intermediaries and copyright holders. Intermediaries care about network efficiency; copyright holders care about online infringements. File sharing is perceived as a threat to both.

Commercial incentives are the second reason intermediaries may voluntarily shape some types of Internet traffic. Many content creators would be willing to pay more for preferential distribution by intermediaries such as prioritization of their own content over competitors'. Indeed, several distribution deals have been reached between content creators and Internet intermediaries that would offer the intermediaries' customers exclusive or preferential access to those creators' content.²³⁰ As vertical integration between the companies that produce and the companies that distribute digital content increases, more of these sorts of deals will materialize, and prioritization of partners' content has the potential to become a more common occurrence.

B. Implications

Nothing in the foregoing analysis of why a global policy shift is happening indicates whether the shift *per se* is good or bad. A number of scholars have begun to debate the substantive implications of the rapidly changing nature of online communications and intermediaries' roles in that context, suggesting various legal reforms or policy responses.²³¹ Such debates are important, but the following analysis in this article reveals that there is an antecedent problem to address—policymakers in various spheres may not appreciate the broader effect of their decisions. There is a fundamental problem with the

230. De Beer, *supra* note 55, at 283–87.

231. See, e.g., Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 83 NOTRE DAME L. REV. 331 (2008); Carlisle George & Jackie Scerri, *Web 2.0 and User-Generated Content: Legal Challenges in the New Frontier*, J. INFO. L. TECH. (2007), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2007_2/george_scerri/george_scerri.pdf.

processes by which the policies discussed in this article are being embedded into social, technological, and legal norms.

More specifically, policymakers may not appreciate that they are making *de facto* communications policy under the guise of copyright enforcement strategies.²³² And in the communications policy-making process, key stakeholders have been absent from the negotiating table, mainly because of misunderstandings about the nature of the policies that are being inadvertently made. In other words, the debate over the conditions of immunity from copyright liability for Internet intermediaries has profound implications for the parallel communications policy debate over the principle of network neutrality. Internet users are being largely excluded from this copyright policy debate because it is too often implicitly (and wrongly) assumed that the users most affected by it are “pirates,” whose perspective is discounted accordingly.

In 2004, law professor Tim Wu published an influential article in the *Michigan Law Review*. In it, he suggested that attempts to regulate copyright online are creating a “*de facto* communications regime.”²³³ This regime, Wu pointed out, regulates disseminators (intermediaries, for example) under traditional copyright rules. The result is that communications policies are being implemented inadvertently.²³⁴

The piecemeal manner in which online copyright issues are regulated is largely responsible for this phenomenon. For example, in the United States, multiple governmental actors are involved: courts ruling on a copyright issue may have one interpretation, while Congress, focusing on a communication issue, may have another. On top of this, the Federal Communications Commission and Department of Justice Antitrust Enforcement Agency may also affect regulation by throwing their proverbial hats in the ring.²³⁵ Expectedly, this leads to a regulatory patchwork where the final policies are somewhat accidental. Wu’s conclusion was that “[a]s copyright law becomes more important, it is essential that judges, lawmakers, and academics understand the effects of the law on parties other than authors.”²³⁶

The same problems with regulatory patchwork that have led to copyright’s *de facto* communications policy in the United States are magnified on the global scale. The forums in which copyright-communication debates occur are proliferating,²³⁷ thereby increasing the likelihood of inadvertencies and inconsistencies internationally. Significant variations are inevitable when policies are implemented differently in different jurisdictions. Because Internet traffic flows globally, not just nationally, copyright and communications policies in one jurisdiction are almost certain to affect practices in others.

232. Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 279 (2004).

233. *Id.* at 278–79.

234. *Id.* at 286.

235. *Id.* at 296.

236. *Id.* at 366.

237. See, e.g., Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1 (2007).

Realizing that the contours of copyright safe harbors for intermediaries have implications for global communications policy, it is worth investigating the nature of the policies being made inadvertently. Imposing active-preventative rather than passive-reactive obligations on intermediaries may conflict with principles of network neutrality, which some argue ought to be enshrined in legislation or regulation. There is no complete consensus on the definition of network neutrality, a term first coined by Wu.²³⁸ But it is generally used to connote the idea that intermediaries cannot discriminate on price or service against particular applications or content providers.

Debates over network neutrality are hotly contested.²³⁹ Some people argue that neutrality is crucial if society is to realize the democratizing potential of the Internet.²⁴⁰ But not everyone agrees.²⁴¹ Other commentators suggest that traffic management is essential in order to avoid online congestion and that the ability to price-discriminate among uses or users of networks can provide incentives to invest in maintaining and improving communications networks.²⁴² Concerns about the privacy and other implications of management practices, including so-called deep packet inspections by intermediaries, further complicate debates over network neutrality.²⁴³ The key point being made in this article is that the policy shift requiring activity rather than passivity

238. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

239. See, e.g., Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007); see also Rob Frieden, *Keeping the Internet Neutral?: A Response to the Wu-Yoo Debate*, 59 FED. COMM. L.J. 621 (2007); Barbara A. Cherry, *Still Preoccupied with Competitors and Forgetting End Users: A Response to the Network Neutrality Debate of Tim Wu and Christopher Yoo*, 59 FED. COMM. L.J. 625 (2007); Susan P. Crawford, *Moving Slowly in the Fast Lane: A Comment in Response to Profs. Wu and Yoo*, 59 FED. COMM. L.J. 629 (2007); H. Kenneth Cheng et al., *The Debate on Net Neutrality: A Policy Perspective* (Jan. 30, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959944#PaperDownload.

240. Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. TELECOMM. & HIGH TECH. L. 69, 74-75 (2004).

241. See, e.g., Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 20-25 (2005); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006); Daniel F. Spulber & Christopher S. Yoo, *Networks in Telecommunications Economics and Law*, available at <http://www.law.northwestern.edu/searlecenter/papers/networks/Networks000Introduction.pdf>; Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Broadband Competition?: A Comment on the End-to-End Debate*, 3 J. TELECOMM. & HIGH TECH. L. 23 (2004); Robert W. Hahn & Robert E. Litan, *The Myth of Net Neutrality and What We Should Do About It*, 1 INT'L J. COMM. 595 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947847; Steven Gliberman, *A Policy Analysis of Net Neutrality*, FRASER INST. DIGITAL PUBLICATION (2008), http://www.handsoff.org/blog/wp-content/uploads/2008/06/Policy_Analysis_of_Net_Neutrality.pdf.

242. I.G.B. Grant et al., *It's Just a Tool: Reason, Not Romance: A Better Internet in the Balance*, SEABOARD GROUP (Oct. 2008), <http://www.seaboardgroup.com/main/index.php?option=content&task=view&id=774&Itemid=190>.

243. See, e.g., Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633 (2008).

from Internet intermediaries when it comes to online enforcement of copyright has significant implications for, and is significantly implicated by, parallel debates over network neutrality. Policy-making in one field is highly likely to affect the other.

In that context, it is helpful also to examine the impact of copyright safe harbor laws and practices on issues that go beyond communications policy and implicate social policy more generally. Intermediaries' liability for copyright infringement should be analyzed within the context of their role vis-à-vis other socially significant issues such as hate speech, child pornography, defamatory content, viruses, other forms of malicious computer code, and more.²⁴⁴ Attention must be paid to the theoretical basis on which liability might or might not be imposed.²⁴⁵ Moreover, these questions need to be considered from a variety of critical perspectives to evaluate, for example, implications on "gender-based differences in communicative style and substance."²⁴⁶

Some commentators argue that it would be economically inefficient to require intermediaries to monitor content flowing through or residing on their networks and that more active policing should be encouraged by subsidies, rather than liability risks.²⁴⁷ Of course, an efficiency analysis is always relative to alternative arrangements, so it is difficult to say categorically whether broad safe harbors are desirable or undesirable from an economic perspective.²⁴⁸ Others offer arguments in favor of allocating responsibility for wrongful online conduct to intermediaries, one way or another.²⁴⁹

Whether or not intermediaries should ultimately play a more active-preventative role in online copyright enforcement remains an open question. That question can be answered in an intelligent manner only if lawmakers and policymakers are informed about its broader context and implications. This article has demonstrated that a major policy shift in the global governance of online intermediaries is taking place with little or no deliberate consideration of the substantive matter, the reasons why such a shift may be happening, or even full realization that the shift is occurring at all.

244. Compare Douglas Lichtman & Eric A. Posner, *Holding Internet Service Providers Accountable*, Univ. Chi. L. & Econ., Olin Working Paper No. 217 (July 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573502&rec=1&srcabs=236478, with Jim Harper, *Against ISP Liability*, 28 REG. 30 (2005).

245. See, e.g., K. A. Taipale, *Secondary Liability on the Internet: Towards a Performative Standard for Constitutive Responsibility*, Ctr. for Advanced Studies in Sci. & Tech. Policy, Working Paper No. 04-2003, (2003), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=712101.

246. Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 449 (2005).

247. Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 263 (2002).

248. Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. L. & TECH. 395, 409 (2003).

249. Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 250 (2005).