

IMPACTS OF INDIRECT LIABILITY REGULATION OF INTERMEDIARIES IN COPYRIGHT-INFRINGEMENT CONTENT ON THE INTERNET

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ABSTRACT

The Internet Services Intermediaries play an essential role in discussing the freedom of speech, innovation¹ and economic growth in the digital environment². In the arena of the intellectual property policy, the emerging regulation on the indirect liability held by them³ has faced the challenge of adequate its system not only for preserving the interest of the copyright owners but also for promoting the accessibility to the digital recourses.

In this analysis, two aspects deserve special attention: The increasing legal risk faced by the intermediaries due to the legal fragmentation and the legal measures that may limit freedom in the digital environment.

Keywords: Internet Services Intermediaries; Copyright Infringement; Digital Information; Safe Harbour Liability; Digital Trade; Digital Barriers; Indirect Liability.

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1 World Bank. *World Development Report 2016: Digital Dividends*. The World Bank, 2016, p. 10.

2 Savola, Pekka. “Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers”. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, vol. 5, n.º 2, 2014, pp. 116-138, p. 116.

3 Shalika, Chamani. “Online Copyright Infringement and the Liability of Internet Service Providers”. *SSRN Electronic Journal*, October 4, 2019.

LOS IMPACTOS DE LA REGULACIÓN EN MATERIA
DE LA RESPONSABILIDAD INDIRECTA EN CABEZA
DE LOS INTERMEDIARIOS DE SERVICIOS DE INTERNET POR EL USO
DE CONTENIDOS QUE VIOLAN LOS DERECHOS DE AUTOR

RESUMEN

Los Intermediarios de Servicios de Internet juegan un papel esencial en la discusión entre la libertad de expresión, la innovación⁴ y el crecimiento económico en el entorno digital⁵. En el ámbito de la política de Propiedad Intelectual, la regulación sobre la responsabilidad indirecta que asumen los intermediarios se enfrenta al desafío lograr preservar el interés de los titulares de los derechos de autor, pero también promover la accesibilidad a los recursos digitales.

En este análisis, dos aspectos merecen especial atención. El riesgo al que se enfrentan los intermediarios como consecuencia de la fragmentación legal y las medidas legales que pueden limitar libertades en el entorno digital.

Palabras clave: intermediarios de servicios de internet; infracciones de derechos de autor; información digital; responsabilidad de puerto seguro; comercio digital; barreras digitales; responsabilidad indirecta.

INTRODUCTION

The access to the internet and the development of the digital economies have brought immense public and private benefits in terms of inclusion, efficiency and innovation on a global scale⁶. Indeed, this global access to the internet has helped increase a whole digital revolution that provides positive impacts by easing communication and free flow of information, which generates faster growth of the economy worldwide and brings enormous social benefits.

However, the rapid spread of digital technologies has reflected fundamental challenges in many aspects of the current legal system⁷. In fact, in the arena of copyright protection, various issues arise because technology eases copyright infringement activities as any user can easily upload and/or download copyright

4 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, p. 10.

5 Savola, "Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers", *op. cit.*, p. 116.

6 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, p. 10.

7 Lillà Montagnani, Maria and Yordanova Trapova, Alina. "Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market". *International Journal of Law and Information Technology*, vol. 26, n.º 4, 2018, pp. 294-310, p. 296.

material⁸. More importantly, in this scenario, sanctioning every infringement action is costly, time-consuming, and in the majority of cases, it is impossible⁹.

In this discussion, Internet Intermediaries are important actors because they develop essential internet access activities and are a crucial medium in the flow of digital information, which may facilitate the dissemination of copyright content in the digital space¹⁰. Therefore, to safeguard the rights and interests of the copyright holders, legislature schemes have increased the penalties and extended the scope of responsibility rules on all the internet services providers¹¹. However, these measures undermine the free access to the information, which damages the copyright regime's public purpose by pushing over-censorship and discouraging innovation¹².

The U.S. has implemented a balanced model of regulation regarding the liability of Internet Intermediaries in which the liability exemptions known as "the safe harbour" are crucial. Indeed, as it will be shown later on, the U.S. proposals are focused on promoting digital trade and supporting a 'market-driven, open, interoperable internet under a multi-stakeholder system'¹³. Consequently, these policies have influenced many jurisdictions (such as the European Union's case) and have been developed through free trade agreements (FTA) such as the USMCA.

The present article analyses this matter in three parts: Part I identifies specific concepts related to the intermediaries and studies the importance of having balanced legislature schemes in order to avoid the creation of digital barriers. Part II describes and assesses the impact of the most notably approaches at a national level in this matter that is the U.S. Digital Millennium Copyright Act (1998) (DMCA) and the European Union Copyright Directive (EUCD). Additionally, Part II analyses the state of the law on an international scale, focused on the FTA of the U.S. and the essential contributions of these FTA worldwide. Finally, Part III concludes with an overall evaluation of the legal measures introduced by the European Union and the United States in order to present further recommendations. However, as illustrated below, as the international treaties do not directly address ISP liability, and many jurisdictions adapt their strategies, the ISP have been forced to face significant uncertainty regarding their liability. Consequently, the final recommendation is to discuss a proposal of a global forum focused on setting minimum standards to reduce this aspect.

8 May, Christopher. "Commodifying the Information Age: Intellectual Property Rights, the State and the Internet" *SCRIPTed. A Journal of Law, Technology and Society*, vol. 1, n.º 3, 2004, pp. 408-419, p. 4.

9 *Ibid.*

10 Savola, "Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers", *op. cit.*, p. 116.

11 *Ibid.*, p. 294.

12 *Ibid.*, p. 116.

13 United States, JointStatement on Electronic Commerce, WTO INF/ECOM/5, March 25, 2019 quoted in Congressional Research Service, *Internet Regimes and WTO E-Commerce Negotiations* (No R46198, 2020), p. 19.

I. THE IMPACT OF THE INTERMEDIARIES IN THE DIGITAL ENVIRONMENT

The easy promotion and free access to information in the digital market facilitate innovation and push economic growth¹⁴. These digital dividends —*the broader development benefits from using digital technologies*—¹⁵ brought by the free access to the internet also benefit IP owners. The free flow of information through digital networks eliminates or minimises marginal market costs and increases revenues for creators. For instance, young artists eliminate copy distribution, transportation, and storage charges just by uploading their work on the web¹⁶.

These benefits promote the production of new creative efforts, especially in developing countries, because for them, having access to new technologies is critical to overcoming the economic barriers they experience¹⁷. Indeed, internet access generates a profound sense of connectedness and facilitates the participation of a wide range of actors by easing the communication on a global scale and encouraging new forms of entertainment¹⁸. These factors are essential as they impact today's societies and economic and cultural growth.

The cross-border digital transfer of information facilitates public communication and increases business opportunities¹⁹. Indeed, access to digital technologies has impacted the way in which society exercises its freedom of speech and its capabilities to deploy business worldwide. Basically, the ability to transfer data across borders has become vital for the smooth operation of national, regional and international business²⁰ as well as the enforcement of fundamental freedoms²¹. Moreover, because of the flourishing society of information, free flow of ideas, development of new skills, and new knowledge, all have become highly valuable sources like the oil was for more than a century ago²².

However, as the economy and other rights related to freedom have become highly dependent on universal and affordable access to digital technologies, legal

14 Fitzgerald, Anne & Elidaes, Dimitrios G. *Nutshell: Intellectual Property*, 4th ed. Lawbook Co, 2015, p. 3.

15 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, p. 2.

16 Liu, Jiarui. "Why Is Betamax an Anachronism in the Digital Age – Erosion of the Sony Doctrine and Indirect Copyright Liability of Internet Technologies Internet". *Vanderbilt Journal of Entertainment Law & Practice*, vol. 7, n.º 2, 2004, pp. 343-366, p. 353.

17 Commission on Telecommunications and Information Technologies. "Policy Statement Trade-Related Aspects of Electronic Commerce and Telecommunications". International Chamber of Commerce, June 6, 2001, p. 1.

18 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, pp. 2-3.

19 Chander, Anupam and Le, Uyen P. "Breaking the Web: Data Localization vs. The Global Internet". *SSRN Electronic Journal*, 2014.

20 Rentzhog, Magnus and Jonströmer, Henrik. *No Transfer, No Trade*. Kommerskollegium, 2014, p. 2.

21 Chander and Le, "Breaking the Web: Data Localization vs. The Global Internet", *op. cit.*

22 Thurow, Lester C. "Needed: A New System of Intellectual Property Rights". *Harvard Business Review Magazine*, September/October, 1997, pp. 95-96; Fitzgerald & Dimitrios, *Nutshell: Intellectual Property*, *op. cit.*, p. 2.

measures pursued by protecting copyrights have faced significant challenges²³. One of the most controversial challenges has been to adapt the system not only to preserve the interest of the copyright owners in controlling and exploiting their intellectual property rights but also to promote access to recourses available in the digital space²⁴.

Internet Intermediaries play a crucial role in this scenario. The concept of these actors is broad and comprises essential activities of internet access²⁵, such as providing access to digital networks, facilitating the transmission of information, hosting services and more²⁶. Therefore, as it will be shown in the following section, in the copyright infringement scenario in the digital environment, intermediary services providers acquire a particular interest to the policymakers because of the impact of their activities, especially when they host digital content.

A. TYPES OF INTERNET INTERMEDIARIES AND THEIR IMPORTANCE

In the technological environment, Internet intermediaries are essential agents. They are involved in multinational and even global activities that enable interconnectivity and facilitate the provision of services and facilities through the network²⁷. Depending on the various activities that these intermediaries perform, they can be identified differently, for instance, as (1) internet service providers (ISP) including sub-classes of “access providers” and “content providers”; or online service providers (OSP); (2) bulletin operators (BBO); and (3) web site operators²⁸. However, for the purpose of this paper, these intermediaries will be referred to in general terms such as ISP or OSP, without disregarding the differences made in this framework by the distinct postures and legislative approaches of the United States and the European Union.

These activities are crucial since they allow society to take full advantage of internet services and significantly impact a country's economy. These agents are companies whose activity is to provide access for users to the digital media and enable connections to facilitate the flow of information through the network²⁹. The actions of these intermediaries comprise the provision of facilities and services, including (cloud-based services, social networking sites, auction sites, blogging

23 Shalika, “Online Copyright Infringement and the Liability of Internet Service Providers”, *op. cit.*, p. 4.

24 Liu, “Why Is Betamax an Anachronism in the Digital Age...”, *op. cit.*, pp. 352-353.

25 Savola, “Proportionality of Website Blocking...”, *op. cit.*, p. 116.

26 *Ibid.*

27 De Miguel Asensio, Pedro A. “Internet Intermediaries and the Law Applicable to Intellectual Property Infringements”. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, vol. 3, n.º 3, 2012, pp. 350-360, p. 350.

28 Weiskopf, David N. “The Risks of Copyright Infringement on the Internet: A Practitioner's Guide”. *University of San Francisco Law Review*, vol. 33, n.º 1, 1998, pp. 1-58.

29 Shalika, “Online Copyright Infringement and the Liability of Internet Service Providers”, *op. cit.*, p. 4.

sites and other platforms that enable users to post content), hyperlinks and search engines, and more³⁰.

In this scenario, these intermediaries have the power to affect various aspects of the digital environment. These companies determine the development of the technology itself (the code and architecture of online expression and information) and significantly influence the protection of online freedoms³¹.

Consequently, the activities these agents perform have called the special attention of the lawmakers, as they are an essential medium in the flow of digital information but also in the protection of the copyright content in the digital space³². On the one hand, the global interconnectivity access provided by the internet makes it difficult, costly and time-consuming to identify direct copyright infringers, who usually act from anonymity in the virtual world³³. But, on the other hand, the ISP may be held accountable for indirect liability³⁴ due to their position as internet services providers, which can help facilitate the direct copyright infringement of their subscribers³⁵.

The direct liability of Internet intermediaries arises every time they directly transmit a digital copy of a copyrighted work³⁶. In turn, the indirect responsibility or intermediary liability denotes the practices of holding ISP responsible for the content hosted in their services and disseminated or created by their users³⁷. For the purposes of this paper, the focus will be on the responsibility held on the ISP as an indirect one, not the direct one, since the latter is already defined under the limits and exceptions of the national and international copyright regimes.

However, an overload indirect liability regime might carry on some issues. The activity of these agents allows them to be not only critical mediums to facilitate copyright infringements on the internet but also to foster freedom online or limit it by censoring and/or monitoring information circulating on the web³⁸. Therefore,

30 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 350.

31 Land, Molly. "Toward an International Law of the Internet". *Harvard International Law Journal*, vol. 54, n.º 2, 2013, pp. 393-458, pp. 395-396.

32 May, "Commodifying the Information Age...", *op. cit.*, p. 4.

33 *Ibid.*

34 Martinet, Beatrice and Oertli, Reinhard J. "Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour". *Landslide*, vol. 7, n.º 5, 2014, p. 41.

35 Hua, Jerry Jie. "Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation". *National Taiwan University Law Review*, vol. 9, n.º 1, 2014, pp. 1-47, p. 10.

36 Chander, Anupam. "How Law Made Silicon Valley". *Emory Law Journal*, vol. 63, n.º 3, 2014, pp. 639-694, pp. 657-658.

37 Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011), quoted in Land, "Toward an International Law of the Internet", *op. cit.*, p. 443.

38 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance. Mapping the Digital Frontiers of Trade and Intellectual Property. Research Volume Three*. Centre for International Governance Innovation (CIGI) and the Royal Institute of International Affairs, 2017, p. 6.

requiring these agents to censor or monitor the content on internet harms the free expression and undermines the economic and social benefits of the digital environment³⁹. In this scenario, the effectiveness of protecting the copyright holders challenges the limitation of the freedom to carry out business processes on behalf of the ISP and the rest of the users⁴⁰.

Undoubtedly, the undue expansion of an indirect responsibility regime adversely affects economic growth and negatively impacts the free flow of information and freedom of expression. These measures, for instance, could have a chilling effect on the ISP who, to avoid lawsuits issues, would end up censoring too much information⁴¹. Moreover, it might inflate the price of recurring online services as the ISP will force them to incur high operating costs to adapt their business models to limit their exposure to liability for the third-parties content⁴². Then, an indirect responsibility or intermediary liability regime is likely to become a digital trade barrier⁴³.

In order not to impose excessive responsibility onto the ISP, States have pushed for the inclusion of legal reforms on the digital market⁴⁴.

The U.S. was the earliest country in enacting tools to achieve this objective. Recently, the European Union has followed these initiatives as a wish to overcome uncertainties in this field and do not create digital barriers by imposing unfair or excessive liabilities on the ISP⁴⁵. Nevertheless, this analysis must emphasise that to favour the development of global markets from digital environments, a harmonised and predictable international legal framework in this field is required.

B. FREE FLOW OF INFORMATION, ECONOMIC GROWTH AND IMPACTS OF THE COPYRIGHT'S REGIMENS ON THE INTERNET

The Copyright legal system is a fundamental tool to encourage innovation and, consequently, push the economic growth of the new information society⁴⁶. From a utilitarian and economic perspective⁴⁷, the copyright system's principal aim is to protect creators in order to encourage the development of new ideas and

39 *Ibid.*

40 Savola, "Proportionality of Website Blocking...", *op. cit.*, pp. 116-117.

41 Liu, "Why Is Betamax an Anachronism in the Digital Age", *op. cit.*, pp. 352-353.

42 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 353.

43 Liu, "Why Is Betamax an Anachronism in the Digital Age", *op. cit.*, pp. 352-353.

44 Lucchi, Nicola. "Internet Content Governance and Human Rights". *Vanderbilt Journal of Entertainment and Technology Law*, vol. 16, n.º 4, 2013, pp. 809-856, p. 825.

45 Thompson, Marcelo. "Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries". *Vanderbilt Journal of Entertainment & Technology Law*, vol. 18, n.º 4, 2015, pp. 783-848, p. 794.

46 See Perel, Maayan and Elkin-Koren, Niva. "Accountability in Algorithmic Copyright Enforcement". *Stanford Technology Law Review*, vol. 19, n.º 3, 2016, pp. 473-533, pp. 492-493.

47 See, e. g., Chatterjee, Mala and Fromer, Jeanne C. "Minds, Machines, and the Law: The Case of Volition in Copyright Law". *Columbia Law Review*, vol. 119, 2019, pp. 1887-1916, p. 1893.

knowledge⁴⁸. Consequently, by providing creators with economic temporal monopolies, the copyright system promotes new inventions of literary, artistic and creative works and guarantees access to new knowledge which benefits the whole community. In this sense, adequate copyright legal system goals must focus not only on protecting the copyright owners' interest but also on fostering free access to information to encourage innovation which benefits the whole community.

Undoubtedly, innovation is an essential competitive advantage for every country in the world in the era of digital economies⁴⁹. Access to information is crucial to the economic development of society as it has an important impact on many economic sectors. For instance, access to new information is essential to industries such as pharmaceuticals, and educational or biotechnological companies, which also have a critical impact on other vital sectors like agriculture and mining⁵⁰. Therefore, in the digital space, adequate regulation of the copyright system is an essential tool to allow users to get access to the market and push economic markets' growth and competitiveness⁵¹.

Indeed, the U.S. Constitution incorporates an intellectual property clause that focuses on encouraging creativity and innovations⁵², granting protection to "Authors and Inventors"⁵³ to "promote the Progress of Science and the useful Arts"⁵⁴. The Supreme Court underlined the critical importance of this clause in the Sony case⁵⁵. In this case, the Court states that the main objective of the U.S. copyright regimen is conferring the monopoly to authors in order to economically exploit their creation or authorise its use by maximising the benefits for the public from the contributions made by the authors⁵⁶.

However, the free flows of information in the digital space facilitate the rapid and uncontrollable dissemination of digital copyright infringements⁵⁷. Moreover, in the digital area, the data can be easily downloaded, modified or falsified⁵⁸ and,

48 Fitzgerald & Elidaes, *Nutshell: Intellectual Property*, *op. cit.*, p. 10.

49 Australia. Department of Industry, Science and Resources. *Shaping Australia's future: innovation - framework paper / [Dept. of] Industry, Science and Resources*. Canberra: Dept. of Industry, Science and Resources, 1999, p. 9 (see http://industry.gov.au/library/content_library/shaping.pdf), quoted in *ibid.* 2.

50 *Ibid* at 3.

51 Chander, "How Law Made Silicon Valley", *op. cit.*, p. 643.

52 See, generally, De Cock Buning, Madeleine. "Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property Special Issue on the Man and the Machine". *European Journal of Risk Regulation (EJRR)*, vol. 7, n.º 2, 2016, pp. 310-322, p. 320.

53 See, generally, Hedrick, Samantha Fink. "I Think, Therefore I Create: Claiming Copyright in the Outputs of Algorithms". *New York University Journal of Intellectual Property & Entertainment Law (JIPeL)*, vol. 8, n.º 2, 2019, pp. 324-ss., p. 334.

54 U.S. CONST. art. I, § 8, cl. 8.

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

56 See, generally, Hedrick, "I Think, Therefore I Create...", *op. cit.*, p. 334.

57 Shalika, "Online Copyright Infringement and the Liability of Internet Service Providers", *op. cit.*, p. 4.

58 Hanson, RT; Reeson, A. & Staples, M. Distributed Ledgers. Scenarios for the Australian economy over the coming decades. Canberra: Commonwealth Scientific and Industrial Research Organisation, 2017, p. iv.

consequently, anywhere at any time, copyright infringements occur around the world. Therefore, allowing information to be freely sent or to be downloaded anywhere at any time has raised new questions about current copyright legal measures⁵⁹ on a national and international scale.

In this light, the role performed by the Internet Services Intermediaries is crucial⁶⁰. The activity of these agents allows them to be not only critical mediums to facilitate copyright infringements on the internet but also to foster freedom online or limit it by censoring and/or monitoring information circulating on the web⁶¹. Therefore, these agents play an essential role in discussing the freedom of speech, innovation and economic growth.

Consequently, States must recognise the impacts that overstretched liability regimes on the ISP may take on the decentralised flow of the data in cyberspace. A critical example of the close relationship between providers' online services' liability regimes and the social benefits of the digital environment is the difficulty to access free Wi-Fi in Germany. The imposition of an unlimited responsibility imposed on the IPS for all their users' actions has led challenging to find public Wi-Fi in Germany⁶². The difficulty of accessing Wi-Fi limits the possibility of offering free access to the internet⁶³. This case is definitely a digital trade barrier that constrains the general society to the wide range of digital dividends, promoting access to free internet. Moreover, as shown above, this policy conflicts with the public purpose of the copyright regime as it thwarts free access to information and therefore undermines access to new knowledge, which is essential to promote new inventions that benefit the whole community.

These kinds of measures are barriers to the digital market because it limits the free speech of users on the internet and the competitiveness of e-commerce, as well as the users' participation in the benefits of internet activities. These barriers have a substantial negative impact on cultural and economic growth⁶⁴. *The Civil Society Declaration on Shaping Information Societies for Human Needs 2003*^[65]

59 Shalika, "Online Copyright Infringement and the Liability of Internet Service Providers", *op. cit.*, p. 1.

60 *Ibid.* at 4.

61 May, "Commodifying the Information Age...", *op. cit.*, p. 4.

62 The German law that provides unlimited liability on the IPSs is the "Störerhaftung" law (most commonly translated as "interferer's liability"). Under the "Störerhaftung" law, third parties can be held liable if they play a causal contribution to the infringing action. Then, public Wi-Fi providers may be held responsible for copyright infringements committed by users using their networks. However, legal reforms has been consider; for more information about it please refer to *Lexology*. "Free WiFi for Free People" - Germany restricts the liability of providers of public WiFi networks", Octobre 31, 2017 [on line]. In: <https://www.lexology.com/library/detail.aspx?g=f3ee9ec6-a670-4b4e-b995-6342fcbc8e18>

63 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 11.

64 Birnhack, Michael D. "Global Copyright, Local Speech". *Cardozo Arts & Entertainment Law Journal*, vol. 24, n.º 2, 2006, pp. 491-547, p. 543.

65 This Declaration was adopted in December, 2003, by the World Summit on the Information Society (WSIS), which convened under the auspices of the International

clearly recognised the effect of the limitation of access to information and the freedom of expression in the digital environment. In the context of copyright, the Declaration required existing international copyright regulation instruments, including the TRIPS Agreement⁶⁶ and the WIPO internet treaties⁶⁷, which have to be reviewed to ensure the cultural promotion, linguistic and media diversity and the contribution to the development of human knowledge⁶⁸. The Declaration also recognised the importance of article 19 of the *Universal Declaration on Human Rights* and enumerated the rights to media, access, and speech that derive from there, especially in the context of the internet⁶⁹.

II. ANALYSIS OF THE CURRENT STATE OF LAW

The economic and cultural impacts of digital economies lead to broad regulatory implications⁷⁰. Indeed, digital technologies are a window of opportunity to promote inclusion, efficiency and innovation⁷¹, bringing critical legal challenges. Concerning the copyright system, fundamental challenges have been recently identified as the principal aim to provide an appropriate balance between copyright holders' protection and the right of others to engage in digital dividends freely⁷². In the digital space, the massive increase of copyright infringements gets bigger the importance of implementing efficient and balanced protection between copyright holders' legitimate demand for adequate protection of the statutory monopoly and the right of others to engage in the digital dividends freely⁷³.

One of the most challenging issues has been the liability faced by the ISP in the digital environment⁷⁴. The position of these agents in the digital space is critical since the more significant part of content traffic on the internet pass through IPS's services and the more significant part of this information consist of copyrighted-content work, such as TV programs, music or videos⁷⁵. In fact, Netflix, YouTube and Amazon account for nearly 57 per cent of downstream internet traffic in the U.S. during peak hours⁷⁶.

Telecommunication Union (ITU), and focused on the digital environment. These commitments were reaffirmed in the second WSIS summit in Tunis, in November, 2005, *ibid.*

66 *The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights 1995.*

67 *The WIPO Copyright Treaty 1996 (WCT) and the WIPO Performances and Phonogram Treaty 1996 (WPPT).*

68 Birnhack, Michael D. "Copyright Law and Free Speech after *Eldred v. Ashcroft*". *Southern California Law Review*, vol. 76, n.º 6, 2002, pp. 1275-1330.

69 Birnhack, "Global Copyright, Local Speech", *op. cit.*, p. 534.

70 Meltzer, Joshua P. "Digital Australia: An Economic and Trade Agenda". *Brookings*, May 22, 2018.

71 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, p. 2-3.

72 Liu, "Why Is Betamax an Anachronism in the Digital Age...", *op. cit.*

73 *Ibid.*

74 Lucchi, "Internet Content Governance and Human Rights", *op. cit.*, p. 825.

75 Hua, "Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation", *op. cit.*, p. 4.

76 O'Rourke, Claire. "Stepping in for the FCC: Extending the Video Privacy Protection Act to Internet Service Providers Comments". *George Mason University Civil Rights Law Journal*, vol. 29, n.º 2, 2018, pp. 221-244, pp. 230-231.

Towards achieving balanced and efficient protection for these agents, different regimens have proposed implementing legal schemes on the limitation of liability. These measures are introduced as policies of safe harbours, which limit the liability of these intermediaries in the arena of copyright infringements⁷⁷.

The U.S. has taken these measures to avoid creating barriers to legitimise trade and ensure protection against copyright infringement abuse⁷⁸. This is particularly important in cases where normativity requires the automatic removal of illegal online content⁷⁹. Hence, unlike the U.S. approach, which generally limits liability, many European and Asian nations leave intermediaries open to liability⁸⁰ for the actions of their users⁸¹. Accordingly, the U.S. regulatory strategies are focused on including appropriate protections on intermediary liability in the intellectual property context⁸². This protection measure has also been included as a part of several FTA⁸³.

However, as the internet has a global impact⁸⁴, an international consensus focused on balancing the various interests involved seems to be the best measure to protect the agents involved in the digital market. For this document, an international consensus facilitates digital intermediaries to engage in the global digital marketplace regardless of frontiers⁸⁵.

A. INTERNET INTERMEDIARIES AND THE LAW APPLICABLE TO INTELLECTUAL PROPERTY INFRINGEMENTS

The vast and global expansion of the internet and its significant impact on the national economies has caught the interest of the States interested in enforcing the I.P. protection and balancing the goals of consumer privacy, security, and open

77 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 114.

78 Savola, "Proportionality of Website Blocking...", *op. cit.*, p. 119.

79 Lillà Montagnani and Yordanova Trapova, "Safe Harbours in Deep Waters...", *op. cit.*, p. 298.

80 As it will be explained, in contrast to the US regime, which offers a different standard of copyright liability, the EUCD and Asian regimen *incorporate* a general standard for intermediary liability in regard to copyright, trademarks and other offences. For more information about it refer to Tokutei denkitsuushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji ni kansu ru houritsu [Law Concerning the Limits of Liability for Damages of Specied Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders], Law No. 137 of 2001, art. 3, translated at www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/Compensation-Law.pdf (Japan).

81 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, pp. 10-11.

82 WTO. Understanding the WTO. "Intellectual Property: Protection and Enforcement". In: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

83 *Ibid.*

84 Chander and Le, "Breaking the Web...", *op. cit.*, p. 30.

85 Reed, Kristina M. "From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce Comment". *Transnational Lawyer*, vol. 13, n.º 2, 2000, pp. 451-476, p. 469.

commerce⁸⁶. Moreover, with the rapid spread of the internet and the accelerated rise of digital copyright infringements, many jurisdictions have focused their attention on the adoption of adequate policies towards balancing their intellectual property laws and enforcing the benefits brought by the digital economies.

In this sense, given the importance of the activities performed by the ISP agents in the digital market, some policymakers have tried to address the issue of the liability they may face by the content flow through their networks. As it will be shown, the U.S. legislative initiatives have incorporated critical approaches on a national and international scale⁸⁷. Moreover, these legislative responses became a valuable guideline to other jurisdictions interested in having a clear policy in this matter⁸⁸. The European Union's approach to this matter becomes visible through the E.U. Directive 2001/29/E.C., which despite using the U.S. approach as a reference, it counts with differences that reflect some disadvantages for the ISP in the field. This will be explained in this section.

Consequently, the purpose of the present section will be to demonstrate the weaknesses and strengths identified in these legislative responses demonstrating why, although revealing some drawbacks, the U.S. policy responses make an essential contribution to this matter. The measures incorporated at both national and international levels by entering into FTA with countries such as Canada provide a comprehensive framework which generates confidence in the ISP and the rest of the users in the internet facilities⁸⁹.

However, it should be emphasised that one of the principal problems in regard to the liability faced by the ISP is the fragmentation and the lack of uniformity of the applicable legal framework. Therefore, the development of substantive international standards seems to be the best option in order to strike a balance between I.P. protection that encourages innovation and maintains competition and the diffusion of ideas over the internet⁹⁰.

1. Analysis of The Legal National Reforms' Responses on The Digital Market

The U.S. has led the inclusion of legal reforms in the digital market. These legislative instruments have focused on ensuring the free and healthy movement or transfer of information through the network, controlling the obligations imposed on the internet⁹¹. Following this trend, the European Union has shown its interest

86 Fefer, Rachel F. "Data Flows, Online Privacy, and Trade Policy". *Congressional Research Service Report*, March 26, 2020.

87 Akhtar, Shayerah Ilias; Wong, Liana & Fergusson, Ian F. "Intellectual Property Rights and International Trade". *Congressional Research Service Report*, May 12, 2020, p. 15.

88 Fefer, "Data Flows, Online Privacy, and Trade Policy", *op. cit.*

89 Akhtar, Wong & Fergusson and Wong, "Intellectual Property Rights and International Trade", *op. cit.*, p. 15.

90 Meltzer, Joshua P. "Governing Digital Trade". *World Trade Review*, vol. 18, n.º S1, 2019, pp. S23-S48, 258.

91 Lucchi, "Internet Content Governance and Human Rights", *op. cit.*, p. 825.

in generating a digital social climate capable of providing security and confidence in the flow of information through the network⁹².

Both the U.S. and the European Union models establish specific conditions to relieve the online intermediaries' liability⁹³. The models of regulation regarding the liability of Internet Intermediaries have been identified as, among others, in the U.S. as the safe harbour provisions in the DMCA and as limitations in the European Union Directive 2001/29/E.C. or EUCD⁹⁴, also known as the *E-Commerce Directive* or the *InfoSoc Directive*⁹⁵.

Regarding the U.S. and the European Union models, this paper has identified some disadvantages. On the one hand, these regulatory schemes have been widely criticised for imposing greater liability and more burdens for intermediaries through the notice and takedown safe-harbour rules⁹⁶. On the other hand, not all jurisdictions have recognised this kind of secondary liability for ISP, and the ones that have proceeded in this way have different liability standards in each country. Both issues generate significant uncertainty for the ISP and become digital barriers⁹⁷.

For this paper, even if the U.S. regime may have some issues, so far, the benefits gained by the DMCA's measures easily overcome the disadvantages identified. On the contrary, the European Union model represents significant limitations to the social benefits of communications in cyberspace and impacts the costs of free public access.

a. The United States Model – The Digital Millennium Copyright Act (DMCA)

Under the United States legal system, the indirect responsibility or secondary liability becomes visible in two forms, contributory infringement and vicarious liability⁹⁸. In general, contributory infringement emerges when the defendant has an actual or constructive understanding of the infringing activity and “induces, causes or materially contributes to the infringing conduct of another”⁹⁹. While vicarious liability appears when the defendant not only owes de duty and has the

92 *Ibid.*

93 Cheung and, Anne & Weber, Rolf H. “Internet Governance and the Responsibility of Internet Service Providers”. *Wisconsin International Law Journal*, vol. 26, n.º 2, 2008, pp. 403-477, p. 351.

94 *Ibid.*, pp. 357-358.

95 European Parliamentary Research Service. Comparative Law Library Unit. *Copyright Law in the EU*, June, 2018, p. 3.

96 Reidenberg, Joel. “The Rule of Intellectual Property Law in the Internet Economy Copyright in Context: Institute for Intellectual Property & Informational Law Symposium - Fourth Annual Baker Botts Lecture”. *Houston Law Review*, vol. 44, n.º 4-Symposium, 2007, pp. 1073-1095, pp. 1094-1095.

97 De Miguel Asensio, “Internet Intermediaries and the Law Applicable to Intellectual Property Infringements”, *op. cit.*, p. 351.

98 Cheung & Weber, “Internet Governance and the Responsibility of Internet Service Providers”, *op. cit.*, pp. 357-358.

99 Liu, “Why Is Betamax An Anachronism in the Digital Age...”, *op. cit.*, pp. 345-346.

ability to monitor the infringing conduct but also when he possesses an economic interest in the unauthorised exploitation of the copyrighted content¹⁰⁰.

Title II of the DMCA¹⁰¹, namely the “Online Copyright Infringement Liability Limitation Act” (OCILLA), provides the liability regime faced by service providers who transmit potentially infringing material over their networks. In said title, the Act provides ISP’ safe harbours from secondary liability for copyright infringement by users¹⁰², based on some influential cases, such as *Universal City Studios vs. Sony Corporation of America* (1984)¹⁰³, also known as the “Betamax case”. Besides, it incorporates the Notice and Takedown regime (N&TD)¹⁰⁴. These rules seek to prevent unauthorised access to copyright-protected material and encourage online service providers (OSP) to cooperate with the copyright owner to reduce the digital infringements in this scenario¹⁰⁵.

In the framework of the DMCA, the intermediaries must fulfil a set of particular conditions to be entitled to immunity from secondary liability¹⁰⁶. First of all, the DMCA’s section 512 identifies the service provider’s activity¹⁰⁷. It then states the conditions that the ISP must comply with in order to be eligible for the limitation on liability. For instance, in the case of activities related to information location tools, the ISP must: (1) demonstrate not to be aware of the infringement, (2) if the ISP has the right and ability to control such activity, the ISP must prove that it has not received revenues directly related to the infringement conduct and (3) finally, upon the notification from the copyright owners, the ISP must demonstrate that he has done its best to avoid this violation, by adopting rapid measures to take down the material or block access to it¹⁰⁸.

100 *Ibid.*

101 See, especially, Sag, Matthew. “Internet Safe Harbors and the Transformation of Copyright Law”. *Notre Dame Law Review*, vol. 93, n.º 2, 2017, pp. 499-564, pp. 506-511.

102 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 8.

103 *Universal City Studios vs. Sony Corporation of America Inc.*, 464 U.S.

104 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 8.

105 See Perel and Elkin-Koren, “Accountability in Algorithmic Copyright Enforcement”, *op. cit.*, pp. 484-485.

106 Reidenberg, “The Rule of Intellectual Property Law in the Internet Economy Copyright in Context...”, *op. cit.*, pp. 1094-1095.

107 DMCA Agreement s 512. Four categories of ISP conducts under which ISPs can be protected from copyright infringement liability subject to certain conditions: (1) “transitory digital network communications” which limit the liability of ISPs in circumstances where the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else’s request; (2) “system caching” which limits the liability of ISPs that temporarily store the transmitted material made available online by a person other than the ISPs and deliver the material to the expected subscriber; (3) “storage of information on systems or networks at direction of users” which limits the liability of ISPs for infringing material on websites hosted on their systems; and (4) “information location tools” which limit the liability of ISPs that link users to a site that contains infringing material, such as search engines and online directories.

108 See Toth, Andrea Katalin. “Algorithmic Copyright Enforcement and AI: Issues and Potential Solutions, through the Lens of Text and Data Mining”. *Masaryk University Journal of Law and Technology*, vol. 13, n.º 2, 2019, pp. 361-387, p. 375.

However, in order to impose not excessive loads onto the ISP, the Act has two particular elements. On the one hand, the Act establishes specific procedures on how ISP may receive notifications from the copyright owners¹⁰⁹. On the other, the Act emphasises that ISP are neither obliged to track the third-party content they host nor –on its initiative or before the copyright owners’ notification– to block access to suspected infringing material in order to qualify the safe harbour protection¹¹⁰.

The benefits of the DMCA’s measures are vast. In the United States, liability limitations regimes have proved their ability to generate confidence in the digital market; they have also improved productivity and pushed on economic growth¹¹¹. Indeed, some authors have argued that Silicon Valley firms’ success relies on the low legal risks they face since they just need to respond promptly to the authors’ requests¹¹². These authors argue that the firms of Silicon Valley do not need to worry about monitoring their services; instead, they focus their efforts on attracting customers and be careful to respond appropriately to the copyright holder’s request¹¹³.

For this paper, it can be argued that the Act has adequate measures to relieve the online intermediaries’ liability and provide a clear guide of the role of these agents. The NT&D regimen provides clear and detailed procedures easily followed by the authors and the ISP. Nevertheless, as it will be proved ahead, measures of immediate takedown may allow unfair blocks or removals of legitimate works, which become a vital disadvantage to online users in terms of financial losses and free speech rights risks¹¹⁴.

Additionally, some Act’s provisions may represent significant risks to the free speech of digital users, as they easily allow ISP to silence communication and remove material on websites hosted on their systems¹¹⁵. Indeed, the DMCA provides that, under an explicit request based on the “good faith belief” of the existence of online copyright infringement¹¹⁶, ISP must remove the potential infringement material under the risk of losing its safe harbours¹¹⁷. Furthermore, the Act requires the ISP to remove material from the network during the process without giving the interested parties a previous hearing¹¹⁸. Consequently, as the subjective requirement

109 Hua, “Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation”, *op. cit.*, pp. 22-23.

110 *Ibid.*

111 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*

112 *Ibid.* at 11.

113 *Ibid.* at 10-11.

114 Hua, “Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation”, *op. cit.*, pp. 23-24.

115 Saini, Saloni. “Liability of Internet Service Provider for Third Party Infringement of Trademark and Copyright” *Latest Laws*, Jan 29, 2020 [on line]. In: <https://www.latestlaws.com/articles/liability-of-internet-service-provider-for-third-party-infringement-of-trademark-and-copyright-by-saloni-saini/>

116 *Ibid.*

117 *Ibid.*

118 Mercurio, Bryan. “Internet Service Provider Liability for Copyright Infringements

of the “good faith belief” cannot be considered as bringing concrete evidence of actual infringement, in practice, upon any takedown claim, any ISP will be forced to block the content, even if the evidence is unclear. Otherwise, the ISP will lose safe harbours measures’ benefits¹¹⁹.

These provisions create high financial burdens¹²⁰. The subjective requirement of the “good faith belief” imposes additional financial duties onto online users; therefore, these additional burdens end up limiting the access and benefits provided by online accessibility. Among others, these financial burdens include the litigation costs that users are forced to pay in order to protect their right to public expression, as well as the financial losses while their content is kept off the online servers¹²¹. Moreover, general fairness and justice issues may arise, considering that copyright holders may submit conflicting claims and Act under improper motives by handled false information to affect a competitor’s business¹²².

Although this paper has identified that these issues require specific reforms, the benefits brought to technology providers, and copyright holders are enormous. The limitation on liability of the safeguards provision and the well-detailed takedown notification procedures generate confidence in these agents to participate in the digital market. This effect is reflected in cases such as *UMG Recordings Inc vs. Veoh Networks Inc (2009)*¹²³, in which the intermediary was successfully covered under the safe harbour measure by simply applying the DMCA. In this case, it was enough to demonstrate that Veoh had cooperated with U.M.G., expeditiously removing the infringement material after receiving the respective notification from the copyright owner.

b. The European Union Model – The European Union Copyright Directive (EUCD)

Although the European Union approach seeks to incorporate a regimen to relieve the load on the ISP and broadly adopt the DMCA’s approach, the European Union regime imposed greater liability loads for intermediaries¹²⁴. Contrary to the U.S. regime, which offers a different standard of copyright liability, the European Union’s Directive 2001/29/E.C. or EUCD incorporates a general standard for

of Subscribers: American and Australian Developments”. *MurUEJL* 51, vol. 9, n.º 4, 2002. In: <http://www.austlii.edu.au/au/journals/MurUEJL/2002/51.html>.

119 Saini, “Liability of Internet Service Provider for Third Party Infringement of Trademark and Copyright”, *op. cit.*

120 Mercurio, “Internet Service Provider Liability for Copyright Infringements of Subscribers: American and Australian Developments”, *op. cit.*

121 *Ibid.*

122 Liu, “Why Is Betamax an Anachronism in the Digital Age...”, *op. cit.*, p. 349.

123 *UMG Recordings vs. Veoh Networks* 93 U.S.P.Q. 2d 1010 (C.D. Cal. September 11, 2009).

124 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 9.

intermediary liability concerning copyright, trademarks and other offences¹²⁵. Therefore, the EUCD's approach does not consider the specific conditions of the copyright regime, which are entirely different from other IP regimes.

Besides, the EUCD provides member States flexibility to establish additional proactive responsibilities on the online intermediaries. So that the EUCD provides member States flexibility to establish additional responsibilities on the online intermediaries. However, this flexibility has generated a great level of fragmentation as the implementation of the Directive varies in each state as well as the jurisprudence related¹²⁶. Indeed, article 12(3) of the EUCD allows each country to bring in measures against unlawful ISP' activities¹²⁷ and determine whether ISP owe a "duty of care" to unlawful activities on the internet¹²⁸.

In this regard, it is crucial to point out that allowing countries to impose a "duty of care" on the ISP generates confusion with article 15(1), which expressly prohibits imposing on these agents a load of compliance with monitoring obligations¹²⁹. Contrary to the U.S. Act, which discharges ISP from the duty to monitor the content they host or to block access to suspicious infringing material as an eligibility condition for the benefit of the liability limitation¹³⁰.

Additionally, as it happens in the *Electronic Commerce Regulations 2002* of the United Kingdom, the EUCD does not incorporate a specific notice-and-takedown procedure. However, it does prompt ISP to remove or disable access to the concerning materials expeditiously¹³¹. The European Directive's lack of this regime is a significant matter to the ISP as it creates greater uncertainties to determine whether they are able to benefit from the limitation of responsibility measures. As it occurs in the DMCA, it is necessary to have this kind of procedure to measure whether these agents have acquired sufficient knowledge about the infringement conduct in order to determine whether they are eligible for the liability limitation¹³².

This analysis show-up the disadvantages of the European Directive, which in practice brings significant problems to the ISP. Indeed, under this regime, the ISP might endure bigger loads to benefit from the responsibility limitation measures. They are compelled with proactive responsibilities to detect and prevent unlawful activities on the internet without counting on a clear notice-and-takedown regime.

125 *Ibid.*

126 Madiega, Tambiama. *Reform of the EU liability regime for online intermediaries. Background on the forthcoming digital services act*. Brussels: EPRS, European Parliamentary Research Service, In-Depth Analysis, 2020, p. 2.

127 Savola, "Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers", *op. cit.*, p. 117.

128 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 9.

129 Savola, "Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers", *op. cit.*, p. 117.

130 Hua, "Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation", *op. cit.*, pp. 22-23.

131 *Ibid.* at 23.

132 Peguera, 2009, p. 490, quoted in CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 9.

In contrast, the DMCA shifts the burden to the copyright holder, who must comply with a detailed notification procedure. Instead of focusing on monitoring their networks for possible copyright infringement, ISP companies just need to wait for the copyright holder's notification. In the light of this contrast, in May 2020 European Commission expressed its intentions to table a proposal to revise the liability regime as part of the forthcoming digital services act¹³³.

2. Regional and International Agreement Responses

This section will analyse the international responses to the copyright challenges brought by digital developments. In this sense, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the WIPO internet treaties¹³⁴ will be the heart of this analysis. In fact, both are focused on pushing for the development of an Intellectual Property Rights (IPRs) legal framework based on balanced rights and obligations between protecting private rights holders and the obligation “to secure social and cultural development that benefits all”. Moreover, both incorporate provisions for member countries to provide incentives to their enterprises and institutions in order to promote the technology.

However, as it will show, none directly addresses the intermediary liability. Consequently, recent Free Trade Agreements (FTA) such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA) have assumed this challenge by implementing international commitments and their national rules into these agreements towards guaranteeing a balanced benefit to the ISP and the copyright owners¹³⁵. Both the CPTPP and USMCA are key treaties in this analysis since both include WTO commitments and ensure the protection of the internet intermediaries from unfair liability for digital copyright infringement of third-party content¹³⁶.

a. International Treaties Responses

In response to the global dissemination of IPRs, international treaties have arisen in the international law field since the late nineteenth century¹³⁷. The most notable treaties in this field are the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention for the Protection of Artistic and Literary Works* (1886). Later on, in 1995, the interest in the inclusion of intellectual property in

133 Madiega, *Reform of the EU liability regime for online intermediaries...*, *op. cit.*, p. 2.

134 WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known together as the “Internet Treaties”). For more information refer to https://www.wipo.int/copyright/en/activities/internet_treaties.html

135 Akhtar, Wong & Fergusson, “Intellectual Property Rights and International Trade”, *op. cit.*, p. 40.

136 Meltzer, “Governing Digital Trade”, *op. cit.*, p. 44.

137 Birnhack, “Global Copyright, Local Speech”, *op. cit.*, pp. 505-506.

the international trade arena ended with the enactment of the TRIPS Agreement, which included provisions of both previous treaties¹³⁸.

The TRIPS agreement is crucial as it provides minimum standards for protecting and enforcement of IPRs to the WTO members¹³⁹. The objectives of the TRIPS Agreement are focused on promoting inclusion of the intellectual property protection to contribute to technical innovation and the transfer of technology against the creation of barriers to legitimate trade¹⁴⁰.

The TRIPS agreement takes a unique role in extending IPRs globally¹⁴¹. The TRIPS provisions focus on incorporating minimum standards to provide a harmonised legal framework to the State Members¹⁴² towards pushing on information or knowledge expansion and increasing the confidence in the digital economies¹⁴³. These goals are reflected in article 7 of the agreement, which is centred on a balanced promotion of the rights and obligations of the copyright holders “to secure social and cultural development that benefits all”¹⁴⁴.

Thus, through the process of global “ratcheting up” of the I.P. policies, the TRIPS requires all member states to establish legal frameworks to enforce the protection of copyright owner rights¹⁴⁵. In the light of the digital environment, this provision implies the requirement to the member countries to incorporate digital I.P. policies capable of offering a clear and unified legal framework for all the players involved in the digital economies.

For this paper, the introduction of the “Most Favoured Nation” (MFN) treatment in the context of I.P. is a crucial feature. This principle emerges in trade conventions and, until the enactment of the TRIPS agreement, was not part of the international I.P. regime. The MFN principle requires that all nationals of all WTO members should enjoy the same legal treatment¹⁴⁶. In addition, the MFN principle guarantees a unified and fair application of rules in the digital trade areas. Consequently, the MFN principle has a significant role in analysing the ISP’ liability, bearing in mind the importance of providing a unified and fair application of rules of the legal liability that they may face by conducting their business in the digital environment.

However, the goals set in this agreement towards reducing barriers in the international market contrast with the lack of provisions about the ISP’ liability

138 WTO. Intellectual Property. “Overview of TRIPS Agreement”. In: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

139 Commission on Telecommunications and Information Technologies, “Policy Statement Trade-Related Aspects of Electronic Commerce and Telecommunications”, p. 2.

140 WTO. Intellectual Property. “Overview of TRIPS Agreement”, *op. cit.*

141 Birnhack, “Global Copyright, Local Speech”, *op. cit.*, p. 506.

142 WTO. Intellectual Property. “Overview of TRIPS Agreement”, *op. cit.*

143 May, “Commodifying the Information Age...”, *op. cit.*, p. 411.

144 Lamy, Pascal. “Trade-Related Aspects of Intellectual Property Rights - Ten Years Later”. *Journal of World Trade*, October, 2004, p. 925, quoted in Akhtar, Wong & Fergusson, “Intellectual Property Rights and International Trade”, *op. cit.*, p. 14.

145 Birnhack, “Global Copyright, Local Speech”, *op. cit.*, p. 510.

146 *Ibid.* at 528.

in the digital context¹⁴⁷. Indeed, at the time the WTO rules were negotiated, the internet was in its early stages of evolution and, therefore, with significant gaps in the definition of some digital trade issues¹⁴⁸. Hence, the TRIPS agreement falls short of addressing the challenges presented in the ISP' activities in the digital environment related to the increasing copyright digital infringement.

Later on, the WIPO Internet Treaties¹⁴⁹ were enacted with the purpose to deal with the digital trade challenges and the global protection required for IPRs¹⁵⁰. Thus, these treaties go beyond the TRIPS and Berne Convention's foundations¹⁵¹ and provide measures capable of dealing with the copyright challenges brought on by digital network technology¹⁵², especially the diffusion of copyright content through digital networks such as the internet¹⁵³.

Although these treaties do not have a legal framework concerning the ISP' liability, the WCT indirectly provides safe harbours for technological intermediaries¹⁵⁴. First, the WCT grants the right to communicate and¹⁵⁵ extend the copyright holders' right to distribute their work by wire or wireless means so that they control when and how "members of the public may access the works from a place and at a time individually chosen by them"¹⁵⁶. Second, in order to not overstretch the copyright grants of the owners, article 8 of the WCT agreement prescribes the imposition of the obligation of "provision of physical facilities for enabling or making a communication" as an exercise of the right of communication to the public¹⁵⁷.

Nevertheless, the WCT has not been expanded among the states as TRIPS has. While the TRIPS counts with 164 state members¹⁵⁸, the WCT counts only with 51^[159]. The less popularity of the WCT is a problem as their provisions regarding the ISPs' liability end up confined to certain jurisdictions¹⁶⁰. Consequently, this fact limits not only the benefits brought by the requirements of the WCT but also end up generating the fragmentation of the legal framework, which makes it difficult for ISP and the user to rely on conducting their business in the digital

147 Meltzer, "Governing Digital Trade", *op. cit.*, p. 37.

148 *Ibid.* at 42.

149 The *WIPO Copyright Treaty 1996 (WCT)* and the *WIPO Performances and Phonogram Treaty 1996 (WPPT)*.

150 Birnhack, "Global Copyright, Local Speech", *op. cit.*, p. 513.

151 *Ibid.* at 517.

152 Shalika, "Online Copyright Infringement and the Liability of Internet Service Providers", *op. cit.*, p. 6.

153 Flanagan, Anne & Maniatis, Spyros. *Intellectual property on the Internet*. University of London, 2008, p. 71.

154 Hua, "Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation", *op. cit.*, p. 7.

155 *Ibid.*

156 WIPO Copyright Treaty, art. 8, Dec. 20, 1996, 2186 U.N.T.S. 121 quoted in *ibid.*

157 *Ibid.*

158 WTO. Understanding the WTO. "Members and Observers". In: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

159 WIPO. "WCT Notification No. 2. WIPO Copyright Treaty. Signatories". In: https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_2.html.

160 Birnhack, "Global Copyright, Local Speech", *op. cit.*, p. 513.

environment. For that reason, a substantial global legal approach based on an international consensus appears to be an urgent measure to take for overcoming the legal fragmentation that ISPs face, which reflects themselves in excessive legal uncertainties regarding their liability¹⁶¹.

As the TRIPS and the WIPO internet treaties encourage states to reduce barriers in the digital market but do not address third-party intermediary liability, recent FTA such as CPTPP and USMCA have assumed this challenge¹⁶². The challenge of these FTA is effectively responding to the technological innovations not contained in the international agreements¹⁶³.

Consequently, the FTA play an essential role in analyzing the challenges brought by the digital environment to the copyright regime¹⁶⁴. These agreements expand the copyright recognised by the previously explained treaties and adjust the system to the new challenges and necessities brought by technological advances¹⁶⁵. That explains why these multilateral agreements finally became in the “TRIPS-Plus” regime¹⁶⁶.

b. Regional Agreements Responses – Free Trade Agreements (FTA)

For this section, the heart of the analysis will be the U.S. regulatory choices that have led to essential agreements. In addition, the U.S.’s implemented policies have significant importance. The measures implemented by these agreements have proved successful in that they make a substantial advance towards adjusting the current Intellectual Property (I.P.) legal frameworks to address the challenge of technological innovations¹⁶⁷.

The U.S. was the first country to focus its attention on the importance of counting on a specific framework of digital trade, differentiated from the traditional legal scheme. In regards to the Intellectual Property (I.P.) normativity, since the mid-80’s, the United States has strongly advocated enforcing the establishment of an I.P. global consensus capable of supporting and safeguarding as well as promoting digital trade¹⁶⁸. Thus, it has implemented these goals through diverse FTA, such

161 De Miguel Asensio, “Internet Intermediaries and the Law Applicable to Intellectual Property Infringements”, *op. cit.*, p. 353.

162 Akhtar, Wong & Fergusson, “Intellectual Property Rights and International Trade”, *op. cit.*, p. 40.

163 Birnhack, “Global Copyright, Local Speech”, *op. cit.*, p. 514.

164 Meltzer, “Governing Digital Trade”, *op. cit.*, p. 45.

165 Gao, Henry S. “Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation”. *Legal Issues of Economic Integration*, vol. 45, n. 1, 2018, pp. 47-70.

166 Birnhack, “Global Copyright, Local Speech”, *op. cit.*, p. 514.

167 Gao, “Regulation of Digital Trade in US Free Trade Agreements...”, *op. cit.*

168 Congressional Research Service, *Internet Regimes and WTO E-Commerce Negotiations*, *op. cit.*, p. 19.

as the USMCA and CPTTP, which notably reveal the interest in incorporating specific technological protection measures¹⁶⁹.

Through the subscription of FTA, this nation has managed to incorporate IPRs' policies in the digital market on an international scale. It has also engaged its efforts to enhance and reinforce the protection of intellectual property rights in the digital environment¹⁷⁰ under the basis of the minimum standards established in the TRIPS agreement.

Given the importance of reducing the digital trade barriers, the U.S. has made a series of interesting regulatory choices that have led to important agreements, in particular regarding digital copyright infringements and the role of the ISP in this scenario. For instance, the subscription of NAFTA¹⁷¹ was focused on improving global standards for enforcement of IPRs¹⁷². However, in this agreement, specific gaps were identified, which may constitute barriers to digital trade. Indeed, the agreement does not include a legal framework of the IPS' liability.

Consequently, in 2008 the U.S. started negotiations to reduce the gaps identified in NAFTA and expand its trade abilities¹⁷³. In 2017, the negotiations culminated with the subscription of the Trans-Pacific Partnership Agreement (TPP Agreement), subject to ratification of a total of 12 countries that joined the negotiations¹⁷⁴.

Nevertheless, before the subscription stage started, the U.S. withdrew its participation from the TPP¹⁷⁵. The U.S. decision led to the negotiation of both the USMCA and the CPTTP agreements, which include vital commitments on the digital trade, especially concerning the intermediary internet liability issues¹⁷⁶.

i. The United States-Mexico-Canada Agreement (USMCA)

As a consequence of the withdrawal from the TPP, in 2018 the U.S. began negotiations with Mexico and later on with Canada in order to reach an agreement capable of updating the provisions of the North American Free Trade Agreement (NAFTA agreement)¹⁷⁷. These negotiations concluded with the USMCA agreement, which includes greater protections than NAFTA for the IPRs¹⁷⁸ and creates

169 Akhtar, Wong & Fergusson, "Intellectual Property Rights and International Trade", *op. cit.*, p. 39.

170 *Ibid.*

171 The North American Free Trade Agreement 1994.

172 Meade, Elizabeth. "The new NAFTA and what it means for tech companies' liability for users' conduct online". *The University of Cincinnati Intellectual Property and Computer Law Journal*, vol. 4, n.º1, 2019, pp. 1-18.

173 *Ibid.* at 1-2.

174 *Ibid.* at 1-2.

175 *Ibid.*

176 Meltzer, "Governing Digital Trade", *op. cit.*, p. 44.

177 The North American Free Trade Agreement (NAFTA) 1994.

178 Meade, "The new NAFTA and what it means for tech companies' liability for users' conduct online", *op. cit.*, pp. 1-2.

a uniform trade standard across the U.S., Mexico and Canada. Ironically enough, the USMCA agreement nearly copied the TPP agreement's provisions¹⁷⁹. However, the USMCA provides more explicit rules than TPP regarding the "safe harbours" for the ISP from copyright liability infringements¹⁸⁰.

In order to ensure the enforcement of copyright protection and limit the emergence of any market disruption, the USMCA agreement implements a legal framework for ISP' liability limitation, providing "safe harbour measures" and a notice & takedown regime¹⁸¹. Thus, like the DMCA, the USMCA imposes specific conditions that the ISP must comply with, depending on the activity they perform on the network¹⁸² and finally implements a standard to notice & takedown regime¹⁸³.

The Act identifies four types of activities or functions of services¹⁸⁴ the ISP develops in the digital environment to provide the limitation of liability under this agreement. The Act describes these four types of activities or functions of services as follows:

– The first function is "transmitting, routing or providing connections for material without modification of its content or the intermediate and transient storage of that material done automatically in the course of such a technical process"¹⁸⁵.

– The second function is "caching carried out through an automated process". Caching is "the process of saving data temporarily' to the website, browser, or app"¹⁸⁶.

– The third function is "storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the ISP", and

– The fourth function is "referring or linking users to an online location by using information location tools, including hyperlinks and directories".

Once the functions of the ISP have been identified, the statute imposes certain requirements to qualify for the statutory safe harbour protection. These requirements include: (1) the active participation of the ISP towards avoiding future infringements, (2) the ISP cannot interfere with the standard technical measures implemented by each country to protect the IPRs, and (3) in the case of the third and fourth activity, ISP cannot receive financial benefits directly related from the infringement activity if the ISP can supervise or control such activity. However,

179 *Ibid.*

180 *Ibid.*

181 *Ibid.* at 14.

182 *Ibid.*

183 *Ibid.*

184 "There are four functions of service provided which the limitations that preclude monetary relief may be applied to. These limitations are modeled after those in the DMCA". *Ibid.*

185 "Limitations to this function only apply when the ISP does not initiate the spreading of the materials, and where it does not select the material that is posted or the material's recipients". *Ibid.*

186 "This is done so that the website, browser, or app does not have to download the information every time a user visits". *Ibid.*

the USMCA does not impose on the ISP the duty to monitor the content of their services nor by its initiative track infringement acts¹⁸⁷.

The agreement leaves room for each member to incorporate the four identified types of activities or functions of services the ISP develops to qualify for the limitation of liability under this agreement. Nevertheless, in order to avoid any disruption of the agreement application, the Act imposes minimal duties that the members must adhere to ensure the uniformity of the regime. In fact, the agreement requires each country to provide clear legal conditions to qualify for the liability limitations measures; additionally, it also recognises the importance of having a straightforward process for the notice and takedown¹⁸⁸. Moreover, regarding the ISP' second and third categories of services functions, the members are required to establish a guide about when ISP has actual knowledge of the infringement to quickly and efficiently remove or disable access to the infringing material on their network or system¹⁸⁹.

It can be seen how the USMCA implements adequate measures to relieve the online intermediaries' liability and discourage digital copyright infringements. Indeed, by implementing a unified and clear liability of ISP scheme¹⁹⁰, these policies not only have a substantial impact on the promotion of technological innovation and the transfer of technology but also on the abolition of barriers in the digital trade. These features are critical to this analysis as they generate the certainty and clarity needed by the intermediaries on the internet¹⁹¹.

However, as the commitment solely applies amongst the signatory states, the safe harbour measures are reduced to a person covered under the agreement¹⁹². Therefore, the advantages brought by the USMCA agreement are reduced for the U.S., Mexico, and Canada solely¹⁹³. Consequently, the benefits brought by the USMCA generate a contrast with the fragmentation and uncertainty that the ISP still has to face with the rest of the non-member states¹⁹⁴. In a nutshell, the natural consequence of the lack of an international provision in this area brings legal fragmentation and more risks these players have to face.

ii. The Comprehensive and Progressive Agreement on TPP (CPTPP)

After the U.S. withdrew from the TPP Agreement, the remaining parties restarted negotiations to restore it, culminating with the CPTPP¹⁹⁵. This commitment is

187 *Ibid.* at 15.

188 *Ibid.* at 14.

189 *Ibid.*

190 *Ibid.* at 13.

191 *Ibid.*

192 Meltzer, "Governing Digital Trade", *op. cit.*, p. 255.

193 Meade, "The new NAFTA and what it means for tech companies' liability for users' conduct online", *op. cit.*, pp. 17-18.

194 *Ibid.*

195 Meltzer, "Governing Digital Trade", *op. cit.*, p. 44.

one of the largest FTA¹⁹⁶ of the world as it represents around 13,5 % of global GDP¹⁹⁷, linking 11 Asia-Pacific economies¹⁹⁸.

The CPTPP incorporates crucial provisions for the IPRs as it focuses on encouraging its protection and enforcement on a global economic scale. Thus, under the base of the minimal standards incorporated under the TRIPS, the CPTPP is focused on facilitating the free flow of information across borders, knowledge and the transfer of digital products, all to push the growth of the economy¹⁹⁹.

In order to avoid the creation of unjustifiable barriers in the digital market, the CPTPP incorporates TPP's E-commerce Chapter²⁰⁰. The implementation of this chapter has a positive impact on the digital trade for the parties, as the commitment includes relevant agreements aimed to protect internet intermediaries from an eventual responsibility²⁰¹. For instance, article 18.3.2 requires states to implement appropriate measures to prevent the abusive exercise of IPRs by the holders, which may represent a restraint on the digital trade or affections on the international transfer of technology.

The E-Commerce Chapter includes provisions focused on removing obstacles to digital trade²⁰². In this sense, the chapter promotes commitments to allow the cross-border transfer of information by electronic means when such activity is for business conduct. The chapter also proscribes data localisation measures, the imposition of customs duties on electronic transmissions and requirements regarding access to the source code of software owned by a person of another part as a condition for the import, sale or use of the software.

However, in the interest of keeping the attention of the U.S. in the agreement, Japan asked for the suspension of certain TPP's provisions. Therefore, among others, the provisions of the IPRs were suspended, specifically those pertaining to the arena of legal liability and safe harbour provisions for ISP²⁰³. Unfortunately, this suspension means that the parties will be no longer subject to have an ISP' legal framework, particularly in regards to the limitation of the responsibility they face

196 Goodman, Matthew P. "From TPP to CPTPP". In: CSIS. Center for Strategic & International Studies, March 8, 2018. In: <https://www.csis.org/analysis/tpp-cptpp>.

197 Canda, Global Affairs. "About the CPTPP". In: *GAC*, November 19, 2015. In: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/background-document_information.aspx?lang=eng.

198 Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

199 Goodman, "From TPP to CPTPP", *op. cit.*

200 Australian Government, Department of Foreign Affairs and Trade. "CPTPP Suspensions Explained", Jan, 2019. In: <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-suspensions-explained>.

201 Meltzer, "Governing Digital Trade", *op. cit.*, p. 44.

202 Meltzer, Joshua P. "The United States-Mexico-Canada Agreement: Developing Trade Policy for Digital Trade". *SSRN Electronic Journal*, 2020, p. 254.

203 Congressional Research Service, *Internet Regimes and WTO E-Commerce Negotiations*, *op. cit.*

for the copyright infringements occurring in their networks²⁰⁴. These suspensions will remain until CPTPP countries decide otherwise by consensus²⁰⁵.

It is essential to emphasise that this suspension brings two principal disadvantages. First, the suspension of the TPP's provisions of ISP' liability limitation not only discourages the ISP from cooperating with the copyright owner in reducing the digital infringements in this scenario but also generates a fragmentation in the legal liability scheme the ISP face in conducting its business in the network²⁰⁶.

III. EVALUATION OF THE APPROACHES TO THE TOPIC

A. EVALUATION OF STRENGTHS AND WEAKNESSES

In light of the analysis made above, it can see how the governance of the ISP' brings significant consequences to both users and the ISP themselves²⁰⁷. In this context, two particular aspects deserve particular attention. On the one hand, the increasing legal risk faced by the ISP results from the legal fragmentation existing worldwide in this scenario. But, on the other hand, certain risks appear with implementing measures of immediate takedown.

First of all, as it was shown above, despite the issues identified in the DMCA, the Act has adequate measures to relieve the online intermediaries' liability²⁰⁸. The DMCA provides an adequate scenario of responsibility's limitation in the light of the copyright infringements on the digital environment as it is clear and balanced. The DMCA's provisions are crucial since it makes it easy for these players to conduct their business and reduce their liability exposure to a potential source of unfair and unpredictable results²⁰⁹.

For this document, the incorporation by the U.S. approaches of specific conditions to relieve the online intermediaries' liability seems like a necessary load that these agents must assume²¹⁰. However, some critics arise in this regard; these conditions are not considered an excessive load to the ISP; instead, they are a minimum requirement to avoid unfair decisions and facilitate the assessment of their liability. Moreover, these conditions are acceptable as providing a clear framework to follow.

204 Australian Government, Department of Foreign Affairs and Trade. "CPTPP Suspensions Explained", *op. cit.*

205 *Ibid.*

206 Meade, "The new NAFTA and what it means for tech companies' liability for users' conduct online", *op. cit.*, pp. 17-18.

207 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 353.

208 Hua, "Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation", *op. cit.*, pp. 23-24.

209 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 353.

210 Meade, "The new NAFTA and what it means for tech companies' liability for users' conduct online", *op. cit.*, p. 14.

More importantly, these measures neither impose the duty of monitoring nor tracking the content ISP host nor require them to block access to suspected infringing material in order to allow them to qualify for the safe harbour protection²¹¹. This approach is exactly the opposite of the E.U. point of view, where the ISP must comply with the “duty of care” to detect and prevent unlawful activities on the internet²¹².

As it was previously addressed, requiring the ISP to police the content hosted on their servers actively undermines free expression and has negative economic consequences²¹³. The duty of the care imposed on the ISP by the E.U. Directive 2001/29/E.C is an excessive load on these agents, as they are not only forced to increase their costs but also encouraged to censor any content potentially risked. Thus, “duty of care” provisions limit the users’ freedom on the internet and burden the financial business model of the ISP²¹⁴.

It must also be emphasised that the measures of immediate takedown implemented by the U.S. should be reinforced in a manner that avoids unfair blocks or unfair removals of legitimate works. Undoubtedly, the immediate takedown measures encourage censoring any content that is potentially risky instead of promoting the protection of the free flow of information and trade of digital products.

In a nutshell, given the importance of the new technology protection development and the free flow of information and trade of digital products, the request for the immediate takedown of the ISP as a condition to limit its responsibility may create unfair digital barriers. These ones may have negative impacts on online users in economic terms as well as risk the free exercise of their freedom of expression²¹⁵.

In this regard, the Manila Principles on Intermediary Liability are a valuable guideline to the legal approaches as they focus on promoting the protection of free online expression and innovation²¹⁶. In 2015, a group of civil society organisations (including the Electronic Frontier Foundation and the KictAnet of Kenya) drafted the *Manila Principles on Intermediary Liability* focused on setting the best practices in the scenario of the legal limit for the ISP²¹⁷. These Manila Principles highlight the importance of guaranteeing the due process, transparency and accountability as a base to address this matter successfully.

211 Hua, “Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation”, *op. cit.*, pp. 22-23.

212 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 9.

213 *Ibid.* at 6.

214 *Ibid.*

215 Hua, “Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation”, *op. cit.*, pp. 23-24.

216 CIGI & Royal Institute of International Affairs. *Global Commission on Internet Governance...*, *op. cit.*, p. 12.

217 *Ibid.* at 11-12.

For this paper, it could be argued that the U.S. has successfully applied the Manila Principles to the ISP' limitation of responsibility²¹⁸. However, the U.S. approach should reinforce its measures to ensure the due process and implement judicial order as a requirement before requesting the takedown of digital content.

Secondly, in light of the above criticisms made, it should be emphasised that the intermediaries are still forced to deal with multiple laws²¹⁹. As the ISP' activities have a global impact, the ISP are forced to address each legal framework in which their service is provided and adapt its business model to reduce the liability exposure.

Since the TRIPS and the WIPO treaties do not address third-party intermediary liability issues, currently, there is no global forum providing minimal standards in this matter. Additionally, the benefits brought by the measures implemented in the U.S. FTA, that is, the USMCA, are limited since they are reduced to the signatories.

Moreover, the U.E. directive, despite following the U.S. approach, has some differences and significant weaknesses. In the same light, other countries such as China²²⁰ or Australia²²¹ have adjusted their legal system to the scenario of the ISP' liability; however, they have still essential differences. This legal fragmentation generates uncertainty and represents a digital barrier to the ISP.

This effect is more visible in the CPTTP' suspension of the IPRs' provisions due to the U.S. withdrawal. Bearing in mind the CPTTP has an important global effect, the agreement was an excellent opportunity to offer a harmonised and clear framework to the ISP²²². However, the fragmentation of the regimens forces the ISP to deal with different laws in each country as it eliminates the requirement for states to have a harmonised legal framework in this area.

As the rapid spread of digital technologies has a global impact²²³, the fragmentation of multiple and diverse legislation responses is inconvenient. The legal fragmentation may affect the growth of economic benefits brought by the use of internet facilities²²⁴ and reduce the social benefits brought by the free flow of information and knowledge in the digital environment²²⁵.

218 “• Intermediaries should be shielded by law from liability for third-party content. • Content must not be required to be restricted without an order by a judicial authority. • Requests for restrictions of content must be clear, be unambiguous, and follow due process. • Laws and content-restriction orders and practices must comply with the tests of necessity and proportionality. • Laws and content restriction policies and practices must respect due process. • Transparency and accountability must be built into laws and content restriction policies and practices”. *Ibid.*

219 De Miguel Asensio, “Internet Intermediaries and the Law Applicable to Intellectual Property Infringements”, *op. cit.*, p. 353.

220 Hua, “Establishing Certainty of Internet Service Provider Liability and Safe Harbor Regulation”, *op. cit.*, p. 24.

221 Shalika, “Online Copyright Infringement and the Liability of Internet Service Providers”, *op. cit.*, p. 5.

222 Meade, “The new NAFTA and what it means for tech companies' liability for users' conduct online”, *op. cit.*, pp. 17-18.

223 World Bank, *World Development Report 2016: Digital Dividends*, *op. cit.*, p. 10.

224 May, “Commodifying the Information Age...”, *op. cit.*, p. 4.

225 Meltzer, Joshua P. *Maximizing the Opportunities of the Internet for International Trade*. E15 Expert Group on the Digital Economy – Policy Options Paper. E15 Initiative.

B. FINAL RECOMMENDATIONS

The U.S. measures incorporated at both national and international levels by entering into FTA give a comprehensive framework that provides confidence to the ISP and the rest of the users in the internet facilities.

However, it should be emphasised that one of the principal problems regarding the liability faced by the ISP is the fragmentation and the lack of uniformity of the applicable legal framework. Therefore, for this paper, the recommendation would be to focus on promoting the efforts to raise a global forum²²⁶ focused on setting minimal standards to reduce the uncertainties regarding the ISP' liability²²⁷.

A global forum regarding liability safe harbours may facilitate the operation of ISP in the digital market and encourage the stakeholders to follow an easy process to protect their products²²⁸. Hence, the development of this global forum of substantive international standards seems to be the best option in order to strike a balance between I.P. protection that encourages innovation and maintaining competition and the diffusion of ideas over the internet²²⁹.

The importance of this approach is explained by the fact that Internet usage is global, and so are the ISP' activities. Therefore, as many jurisdictions are adopting their own individual strategies, the process of addressing the ISP' liability is fragmented and confusing. The fragmentation and lack of uniformity generate uncertainty about the law, and that has a significant negative effect since it causes providers to be more risk-averse than needed, preferring occasionally suspending access to some online services when no copyrights infringements have not occurred.

In this approach, the U.S. could take the lead in the global conversations, as its model has influenced many jurisdictions and has proved to address this matter successfully²³⁰. In the negotiations, it is essential to cover the elements of indirect Internet intermediary liability and the exceptions to such liability under the conditions considered by the safe harbours measures above explained. The importance of considering these conditions is reflected in the fact that they narrow the unfair sanctions, and without overload, the ISP, lead them to cooperate with the copyright holder in deterring online copyright infringement²³¹.

Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016.

226 Liu, "Why Is Betamax an Anachronism in the Digital Age", *op. cit.*, p. 354.

227 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 352.

228 *Ibid.*

229 Meltzer, "Governing Digital Trade", *op. cit.*, p. 258.

230 Fefer, "Data Flows, Online Privacy, and Trade Policy", *op. cit.*

231 Australian Government, Department of Foreign Affairs and Trade. "CPTPP Suspensions Explained", *op. cit.*

IV. CONCLUSIONS

With the rapid spread of digital technologies, governance on the internet has become a significant challenge. The regulation of the internet has significant impacts not only in the light of the free exercise of expression²³² but also on economic growth²³³. In this sense, the emerging regulation on the liability held by the ISP in the digital environment has faced the challenge of adequate its system for preserving the interest of the copyright owners in the control and exploitation of their IPRs, but also promoting access to the recourses available on the digital space²³⁴.

In this discussion, the U.S. policies have implemented an intermediary liability regime adequately complemented with safeguards, limiting these intermediaries' liability²³⁵. These measures are crucial as they provide a comprehensive framework that generates confidence in the ISP and the rest of the users of the internet facilities²³⁶.

However, as the international treaties do not address ISP liability directly, and many jurisdictions are adapting their strategies, the ISP has been forced to face more significant uncertainty concerning their liability. The uncertainty in the law has a significant negative effect since it causes providers to be more risk-averse than needed, preferring occasionally suspending access to some online services when no copyrights infringements have not occurred.

Therefore, developing a global forum seems to be the best option to strike a balance between I.P. protection that encourages innovation and the diffusion of ideas over the internet. In this sense, the United States legislative responses are a valuable guideline for a successful approach in this matter²³⁷. The importance of this approach is to explain that Internet usage is global, and so are the ISP' activities; therefore, a measure that effectively removes discriminatory trade barriers would be establishing an international agreement providing a clear legal framework of ISP' liability²³⁸.

232 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 353.

233 Reed, "From the Great Firewall of China to the Berlin Firewall...", *op. cit.*, p. 473.

234 Liu, "Why Is Betamax an Anachronism in the Digital Age", *op. cit.*, pp. 352-353.

235 Akhtar, Wong & Fergusson, "Intellectual Property Rights and International Trade", *op. cit.*, p. 15.

236 *Ibid.*

237 Fefer, "Data Flows, Online Privacy, and Trade Policy", *op. cit.*

238 De Miguel Asensio, "Internet Intermediaries and the Law Applicable to Intellectual Property Infringements", *op. cit.*, p. 352.

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