

**“A UNIQUE APPROACH TO THE LIABILITY OF P2P INTERMEDIARIES”:
A COMPARATIVE STUDY OF COPYRIGHT LIABILITY OF PROVIDERS OF
PEER-TO-PEER FILE SHARING SERVICES IN
CANADA AND SWEDEN**

by

ANNIKA SVANBERG

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ABSTRACT

Most comparative studies concerning copyright liability of Internet Service Providers (ISPs) look at the United States and a larger European country, such as France or the United Kingdom, the European Union generally, and/or an Asian country. Only a few comparative studies take into account the Canadian approach to ISP liability, and there is no comparative study dealing with Swedish ISP liability laws. Moreover, only a few studies in the field deal with copyright liability in the context of illegal file sharing. In an attempt to fill that gap in the literature, this thesis compares, by using a functional comparative methodology, the Swedish and Canadian ISP liability laws' application to providers of peer-to-peer file sharing services (P2P intermediaries). The problem that this thesis seeks to address is this: To what extent may a P2P intermediary be held liable, under Swedish and Canadian law, for copyright infringement committed by those using its service, and what liability approach – the Swedish or Canadian – is the better one?

The liability of P2P intermediaries under Swedish law depends on the Swedish doctrine on contributory liability in copyright law, as it was recently interpreted by the Swedish Court of Appeal in the law suit against The Pirate Bay – one of the world's largest P2P intermediaries. By contrast, P2P intermediary liability in Canada is determined by the recently adopted *Copyright Modernization Act*, establishing unique concepts, such as liability for enabling copyright infringement, and a so called 'notice and notice' system under which ISPs must forward copyright owners' notices of claimed infringement to its subscribers/users.

Through a comparative analysis of: the Swedish doctrine on contributory copyright liability and the Canadian enabling provision; and the Canadian notice and notice system and the corresponding Swedish system addressing claims of copyright infringements from copyright owners, this thesis concludes that Canada offers a more effective, well-balanced and predictable liability standard and tool for curbing copyright infringement committed by means of illegal file sharing, than Sweden. It is therefore recommended that Sweden and other countries shift focus from the United States and European Union ISP liability laws to the unique Canadian approach.

PREFACE

All parts of this thesis were designed and researched by the student.

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LIST OF ABBREVIATIONS

CaCA	Canadian Copyright Act
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act
ISP	Internet Service Provider
K&TD	Knowledge and takedown
N&N	Notice and notice
N&TD	Notice and takedown
OECD	The Organisation for Economic Co-operation and Development
P2P	Peer-to-peer
SwCA	Swedish Copyright Act
SwECA	Swedish E-Commerce Act
SwPC	Swedish Penal Code
TFEU	Treaty on the Functioning on the European Union
WTO	World Trade Organization

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Only one thing is impossible for God: to find any sense in any copyright law on the planet.

- Mark Twain, Mark Twain's Notebook (1902-1903).

Hello and thank you for contacting us. We have shut down the website in question. Oh wait, just kidding. We haven't, since the site in question is fully legal. Unlike certain other countries, such as the one you're in, we have sane copyright laws here. But we also have polar bears roaming the streets and attacking people :-).

- Fredrik Neij, founder of The Pirate Bay, Response to Cease and Desist Letter from Electronic Arts Inc. (14 September 2004).

1 INTRODUCTION

1.1 Background

We are in the middle of a digital revolution where the Internet has quickly grown from a small exclusive system to a global network, over which anyone can access an unlimited amount of information and services, from anywhere in the world, every day. Today, Internet provides not only access to music, movies, games, software, news, and all other imaginable forms of information, it also enables new forms of interactions and sharing of information through internet forums, instant

messaging, social networking, etc.¹ Brian Fitzgerald describes this new digital landscape as follows: “[w]e live in an era where any person of any age can email, blog, podcast, make entries in Wikipedia or upload a home-crafted or user-generated video on YouTube in the blink of an eye to a world-wide audience of hundreds of millions of people...Creativity and sharing have taken on incredible dimensions.”² Add to this landscape the sophisticated technologies for sharing files, most notably the so called peer-to-peer (**P2P**) technology; sharing on the Internet has indeed taken on incredible dimensions. By using P2P file sharing software, such as BitTorrent, DC ++ or LimeWire, individuals from anywhere in the world can connect with each other to create P2P networks over which music, movies, e-books, computer games, computer software, etc. can be obtained and shared. Through P2P file sharing endless copies are being made of the latest music and Hollywood movies, without loss in quality and at no cost for the file sharer.³ On the other side of this incredible file sharing phenomenon, however, stand the authors, musicians, producers, game developers and other copyright owners who under the law are granted the exclusive right to authorize, control reproduction, communication and other uses in respect of their copyrighted works. A report from December 2010 reveals that approximately 30 million users are sharing files at any given time by

¹ Brian Fitzgerald, “Copyright 2010: The Future of Copyright” (2008) 2 Eur IP Rev 43 at 43-44.

² *Ibid.*

³ See Sheryl N Hamilton, “Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 285 at 289.

using the BitTorrent file sharing software.⁴ With user anonymity being the norm on P2P file sharing networks, it has become very difficult for copyright owners to enforce their rights by raising claims against the individual file sharer.⁵

Sweden has been pointed out as a jurisdiction where illegal file sharing of copyrighted music, film, video etc., can go on without the legislator or the legal authorities taking much notice or action.⁶ In March 2007, Steven Daly wrote: “[i]f the online file-sharing universe is the Wild West, Sweden is Deadwood – a place where the rule of law leaves barely a footprint.”⁷ According to Daly, that would be “[t]hanks to a combination of national copyright laws, laissez-faire social attitudes, and inexpensive and superior bandwidth”.⁸ Because of this, Daly continues, “gentle little Sweden...has become a file-sharing fortress in which more than 10 percent of its nine million citizens trade digital material”.⁹ As a citizen of Sweden I feel compelled to look into the accuracy of Daly’s arguments. I am curious to know why Swedish copyright laws, if Daly is to be believed, have failed in combating the illegal file sharing of copyrighted works. I am particularly curious to know how Sweden handles the issue of illegal P2P file sharing compared to a jurisdiction, which after years of

⁴ “A Snapshot of the Public BitTorrent Landscape” (14 December 2010), online: Torrent Freak <<http://torrentfreak.com>>; see also Christopher Siebens, “Divergent Approaches to File-Sharing Enforcement in the United States and Japan” (2011) 52:1 VA J Int’l L 155 at 157.

⁵ See Siebens, *supra* note 4 at 157.

⁶ Jan Rosén, “Copyright Control in Sweden and Internet Uses - File Sharers’ Heaven or not?” (2008) 2 NIR 95 at 95.

⁷ Steven Daly, “Pirates of the Multiplex”, *Vanity Fair* (1 March 2007) 1, online: Vanity Fair.com <<http://www.vanityfair.com>>.

⁸ *Ibid.*

⁹ *Ibid.*

considerations and negotiations, finally updated its copyright act with a copyright regime which is “modern, flexible and in line with current international standards”¹⁰ and “gives copyright owners the tools they need to combat piracy”¹¹. These were only few of many promises made when the Canadian Government introduced the *Copyright Modernization Act*,¹² which came into force (with a few exceptions) on 7 November 2012.¹³ With the *Copyright Modernization Act*, Canada provides one in many aspects different regime for tackling illegal file sharing, than that provided for in Sweden. What could “gentle little Sweden” learn from the Canadian *Copyright Modernization Act*? And what could Canada learn from Sweden’s failure to protect copyrighted works from illegal file sharing? This is hoped to be shown in this thesis.

Long before Steven Daly commented on the Swedish situation, however, Sweden had already begun to take actions against the challenges that Internet communication imposes on copyright protection and enforcement. Already in 2000, Sweden established a so called ‘safe harbor regime’ that clarifies the liability for

¹⁰ Government of Canada, Press Release, “Ministers Paradis and Moore Welcome Passage by the House of Commons of the Copyright Modernization Act” (19 June 2012) online: Balanced Copyright: The Copyright Modernization Act <<http://balancedcopyright.gc.ca>> [Government of Canada, “Welcome Copyright Modernization Act”].

¹¹ Government of Canada, Media Release, “What the Copyright Modernization Act Says About Penalties and Remedies for Infringement” (10 March 2011) online: Balanced Copyright: The Copyright Modernization Act <<http://balancedcopyright.gc.ca>>.

¹² Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41st Parl, 2012 (assented to 39 June 2012) [*Copyright Modernization Act*].

¹³ Most amendments under the Copyright Modernization Act came into force on 7 November 2012. However, the so called notice and notice system, analyzed in detail in this thesis, and laid down in Sections 41.25, 41.26, and 41.27(3) of the Copyright Modernization Act, will come into force at a later date. According to Barry Sookman, the notice and notice system will likely follow the adoption of regulations related to the notice and notice provisions. Barry Sookman, “Copyright Modernization Act soon to be law in Canada” (30 October 2012), online: Barry Sookman Blog <<http://www.barrysookman.com>> [Sookman, “Soon to be law in Canada”].

those involved in the transmission, location and hosting of content on the Internet. On the Internet, content is rarely, if ever, transferred directly from the originator (often referred to as ‘content provider’ or ‘content creator’) to the end-user.¹⁴ A range of actors “act[ing] as go-betweens between content creator and consumer”¹⁵ are involved in the information delivery process on the Internet. These intermediary actors, known as ‘Internet Service Providers’ (**ISPs**), and traditionally referring to telecommunication companies like Bell, Telus, AOL, Tele2 and others who provide access to the Internet under contract with their customers,¹⁶ have become targets of copyright owners’ enforcement claims in Sweden, Canada and elsewhere. To prevent the ISPs from assuming too extensive a liability, safe harbor regimes that under certain circumstances grant immunity to ISPs for their involvement with copyrighted content, have been established worldwide. Today, however, there is a much wider range of actors than telecommunication companies, who assist in the information delivery process on the Internet and hence acting as ISPs, than when the leading safe harbor regimes were drafted in the United States and European Union (**EU**) in the late 1990s.¹⁷ Lillian Edwards & Charlotte Waelde explain:

In the field of copyright liability, in particular, new classes of “online intermediaries” have emerged...in the wake of the extensive promulgation and use of peer-to-peer (P2P) file sharing software programs, such as Napster, Grokster, EMule, SoulSeek and BitTorrent (to name but a few). The various immunity provisions or “safe harbor” instruments such as

¹⁴ P Bernt Hugenholtz, ed, *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (London, UK: Kluwer Law International, 2000) at 7.

¹⁵ *Ibid* at 7.

¹⁶ Hamilton, *supra* note 3 at 287.

¹⁷ Lillian Edwards & Charlotte Waelde, “Online Intermediaries Liability for Copyright Infringement”, *WIPO Report* (13 May 2009) online: WIPO <<http://www.wipo.int>> at 7.

[those in the United States and EU]...were largely designed not to deal with copyright infringement in the context of P2P [file sharing]...but to address more straightforward situations of transmission, caching, and hosting of content. A typical situation envisaged was where a traditional ISP made file-space available to subscribers on its servers and, unknown to the ISP, that subscriber used that space to download, store and possibly upload illegal copies of copyright works. Here the ISP is fairly clearly a “host” without awareness of providing access to infringing works and, unless put on notice...was exculpated from civil and criminal liability under both...[the American and EU ISP liability] regimes.

But in the brave new world of...P2P file sharing, a number of “new” intermediaries less obvious than “hosts” can be identified...These...are the intermediaries who enable or assist in the downloading and uploading of files, both legal and illegal, by means of particular P2P software.¹⁸

This thesis looks into how Sweden and Canada address the liability of this new class of online intermediaries, hereinafter referred to as ‘P2P intermediaries’, and explores how the Swedish and Canadian safe harbor regimes apply these actors.

Sweden has, together with the 26 other EU Member States¹⁹ implemented the United States *Digital Millennium Copyright Act*²⁰ (**DMCA**) inspired safe harbor regime, laid down in the *Directive 2000/32/EC on electronic commerce*²¹ (E-Commerce Directive). The EU Member States are partially governed by the *Treaty*

¹⁸ *Ibid* at 7.

¹⁹ The following countries are currently members of the EU: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Croatia is currently an acceding country, and candidate countries include Iceland, Montenegro, Serbia, the former Yugoslav Republic of Macedonia and Turkey. Potential candidates include Albania, Bosnia and Herzegovina, and Kosovo.

²⁰ *Digital Millennium Copyright Act of 1998*, Pub L No 105-304, 112 Stat 2860 [DMCA].

²¹ EC, *Commission Directive 2000/31/EC of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, [2000] OJ, L 178/1 [E-Commerce Directive].

on the Functioning of the European Union²² (TFEU) and the Treaty on the European Union²³, which authorize EU's institutions to adopt regulations, directives and decisions.²⁴ These laws are binding on the Member States and take precedence over national law.²⁵ Directives, however, are pursuant to Article 288 of the TFEU only "binding, as to the result to be achieved...but shall leave to the national authorities the choice of form and methods" for implementation.²⁶ Accordingly, Sweden has implemented the provisions of the E-Commerce Directive into the *Swedish E-Commerce Act*²⁷ (**SwECA**). Specifically, the E-Commerce Directive requires the Member States to introduce a DMCA inspired safe harbor regime with a notice and takedown (**N&TD**) system under which ISPs that host content are protected from liability on the condition that the ISP, upon formal notifications from copyright owners, take down illegal content that they host.²⁸ However, in accordance

²² Treaty on the Functioning of the European Union, 30 March 2010, OJ C 84/49 [TFEU].

²³ Treaty on the European Union, 30 March 2010, OJ 83/13.

²⁴ J.E. (Win) Bassett, IV, "Unanswered Arrrrguments After the Pirate Bay Trial: Dropping Sail in the Safe Harbors of the EU Electronic Commerce Directive" (2010) 12:1 NCJ L & Tech 67 at 79.

²⁵ *Ibid* at 80; see also Nigel Foster, *Foster on EU Law*, 3d ed (New York: Oxford University Press, 2011) at ch 6 at 115.

²⁶ Directives harmonize, i.e. bring the member states' national laws into the line with each other, only in certain legal areas or with respect to certain legal matters; the purpose of directives is to promote the smooth functioning of the internal EU market. Foster, *supra* note 25 at 294.

²⁷ *Lag om elektronisk handel och andra informationssomhålllets tjänster*, SFS 2002:562 [Swedish E-Commerce Act].

²⁸ A proper notification must be written, provided to the designated agent of the service provider, and include: a) physical or electronic signature of person authorized to act on behalf of the copyright owner; b) identification of the copyrighted work claimed to have been infringed or, if multiple copyrighted works are on a single online site, a representative list of such works; c) identification of the infringing material that is to be removed or disabled and information reasonably sufficient to permit the service provider to locate the material; d) information sufficient for the service provider to contact the complaining party; e) a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner, its agent, or the law; and f) a statement that the notification is accurate and under penalty of perjury the complaining party is authorized to act

with Article 288 of the TFEU, the E-Commerce Directive leaves up to the Member States to determine the forms for the N&TD system. Sweden has rejected the formal notification part of the N&TD system in favor of a knowledge and takedown system (**K&TD**). For liability under the SwECA it is enough that the ISPs has obtained *actual knowledge or awareness* that infringing content is stored on its servers, and fails to expeditiously take down that content. How the ISP has obtained this knowledge, if it is through notification or through some other means, does not matter.²⁹

As explained in more detail in chapter 4, the liability limitations under the E-Commerce Directive safe harbors, as implemented into the SwECA, apply both to civil and criminal liability. Moreover, the safe harbors exempt from civil and criminal liability only ISPs acting as ‘mere conduits’ (i.e. mere transmitters of content created by and intended for other parties), ‘cachers’ (i.e. hosts of local copies of remote webpages, created by the ISP when requested by the user), and ‘hosts’ (i.e. ISPs that store content originated by third parties).³⁰

on behalf of the copyright owner. *DMCA*, *supra* note 20 s 512(c)(3); see also Robert P Lantham, Carl C Butzer, & Jeremy T Brown, “Legal Implications of User-Generated Content: YouTube, MySpace, Facebook” (2008) IP & T L Rev 1 at 3.

²⁹ The Swedish legislator states in the preparatory works that the American formalistic system for taking down of content is inconsistent with Swedish law: “The fact that the formal requirements for a notification are not met, or that no notification has been sent [to the intermediary], cannot result in the intermediary always escaping liability. Swedish law contains no such formalistic element. Instead...all relevant circumstances shall be taken into account in determining whether an intermediary had such intent that warrants liability to be imposed on the intermediary. In determining this [intent], it cannot matter how the intermediary obtained the insight [of infringing content on its servers].” Prop. 2001/02:150 *Lag om elektronisk handel och andra informationssamhällets tjänster, m.m* (14 March 2002) at 99 [Prop. 2001/02:150] [translated by author].

³⁰ Lillian Edwards, “Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights”, *WIPO Report* (22 June 2011) at 9-10.

Although the E-Commerce Directive safe harbor regime was implemented into the SwECA already in 2000, it was not until last year that the Swedish Court ruled on its application in the context of illegal file sharing. With the Swedish Supreme Court's decision on 1 February 2012 not to grant leave to appeal in the *Pirate Bay* case,³¹ there is finally a precedent in place which clarifies the liability standards with respect to P2P intermediaries, and arguably also other types of online meeting and search services.³² The Pirate Bay, located in Sweden, was one of the largest P2P intermediaries in the world, making available to the public huge amounts of copyright works. The Pirate Bay had at the time the Swedish prosecutor brought criminal indictment against the operators of the site, approximately 12 million users.³³ The indictment was supported by a large number of American and European copyright owners (record and film production companies)³⁴ raising considerable damages claims against the operators of The Pirate Bay. Civil claims may under Swedish procedural law be brought jointly with criminal indictments.³⁵ On Appeal to the Svea Court of Appeal, the Court ruled that The Pirate Bay was *not* protected by any of the

³¹ *Sweden v Neij*, [2010] Svea Court of Appeal B 4041-09 [*Pirate Bay*].

³² Andreasson & Schollin argue that the implications of the Pirate Bay case reach far beyond P2P intermediaries, holding a variety of online services that provide meeting and search services, liable for contributory copyright infringement. Jens Andreasson & Kristoffer Schollin, "Goda och onda medhjälpare – är du social adekvat, lille vän? Om Pirate Bay-målets betydelse" (2011) 5-6 SvJT 534.

³³ Bassett, *supra* note 24 at 70.

³⁴ Sony BMG Music Entertainment (Sweden) AB, Universal Music Aktiebolag, Playground Music Scandinavia AB, Bonnier Amigo Music Group AB, EMI Music Sweden Aktiebolag, Warner Music Sweden Aktiebolag, Mars Media Beteiligungs GmbH & Co Filmproduktion, Yellow Bird Films AB, Nordisk Film Valby A/S, Warner Bros Entertainment Inc., Metro-Goldwyn-Mayer Pictures Inc., Columbia Pictures Industries Inc., Twentieth Century Fox Film Corporation., Activision Publishing Inc. and Blizzard Entertainment Inc.

³⁵ Peter Danowsky, "The Enforcement of Copyright in a Borderless Online Environment: A Practitioner's View" in Johan Axhamn, ed, *Copyright in a Borderless Online Environment* (Stockholm: Norstedts Juridik 2012) 127 at 129.

safe harbors in the SwECA, and thus held the four operators of the file sharing service liable for contributory copyright infringement by applying the Swedish doctrine on contributory liability in copyright law, laid down in the *Swedish Penal Code*³⁶ (**SwPC**) and *Swedish Copyright Act*³⁷ (**SwCA**). Each operator was sentenced to 10 months in prison. Moreover, the SwCA, together with the *Swedish Tort Liability Act*³⁸, allowed the Court to require the operators to pay approximately SEK 46 million (~ CAD \$7.1 million) in damages (joint liability) to the copyright owners.³⁹ The Pirate Bay, however, is still up and running, claiming to have more than 25 million users, but who runs the site, and its location is unknown.⁴⁰

The liability of ISPs under Canadian law depended, until the *Copyright Modernization Act* came into force in 2012, on the so called ‘authorization doctrine’.⁴¹ It is an infringement of copyright under the *Canadian Copyright Act*⁴² (**CaCA**) to authorize somebody to do anything with a copyrighted work which is included in the copyright owner’s exclusive right, such as making the work available

³⁶ *Brottsbalk*, SFS 1962:700, c 23, s 4 [*Swedish Penal Code*].

³⁷ *Lag om upphovsrätt till konstnärliga och literära verk*, SFS 1960:729, s 53 [*Swedish Copyright Act*].

³⁸ *Skadeståndslag*, SFS 1972:260, [*Swedish Tort Liability Act*].

³⁹ *Swedish Copyright Act*, *supra* note 37 ss 46, 53-54, 57; *Swedish Tort Liability Act*, *supra* note 38 c 2, s 2, c 6, s 4.

⁴⁰ David Sarno, “The Internet sure loves its outlaws”, *Los Angeles Times* (29 April 2007) online: Los Angeles Times <<http://www.latimes.com>>.

⁴¹ Jeremy de Beer & Christopher D Clemmer, “Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?” (2009) 49 *Jurimetrics* 375 at 379.

⁴² *Copyright Act*, RS C 1985 [*Canadian Copyright Act*].

to the public by uploading it on the Internet.⁴³ Moreover, the issue of liability exemption for ISPs was, before the *Copyright Modernization Act* came into force, governed solely by the so called ‘common carrier provision’ under which those who provide the means for communication of works on the Internet, may not be held liable for the communication.⁴⁴ The Canadian Supreme Court was in *SOCAN*⁴⁵ given an opportunity to interpret the common carrier provision in relation to ISPs.⁴⁶ The Court held in brief that intermediaries who merely supply software and hardware to facilitate the use of the Internet are relieved from liability under the common carrier provision.⁴⁷ With the *Copyright Modernization Act*, the liability of ISPs is clarified further. However, it should be noted that the possibilities to exempt ISPs from liability under the common carrier provision, and hold ISPs liable for authorizing infringement remain.⁴⁸ The *Copyright Modernization Act* clarifies the liability of ISPs by establishing safe harbor provisions that, similar to the Swedish safe harbors, grant immunity to ISPs acting strictly as intermediaries in communication, caching and hosting activities.⁴⁹ It should be noted that the new Canadian safe harbors, unlike the Swedish, do not grant *exemption* from liability. Instead, the *Copyright*

⁴³ *Ibid* s 27(1); Gregory R Hagen, “Modernizing ISP Copyright Liability” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 359 at 370-371

⁴⁴ *Canadian Copyright Act*, *supra* note 42 s 2.4(1)(b).

⁴⁵ *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, [2004] 2 SCR 427, 2007 SCC 445 [*SOCAN*].

⁴⁶ Hagen, *supra* note 43 at 371.

⁴⁷ *SOCAN*, *supra* note 45 at para 101.

⁴⁸ Hagen, *supra* note 43 at 360.

⁴⁹ *Supra* note 12 ss 31.1.(1)-(4); *ibid* at 360.

Modernization Act states that certain types of ISP activities do not *amount* to a copyright infringement. Thus, the Canadian safe harbors do not operate to exempt liability for something that would otherwise be illegal, and hence are no safe harbors.⁵⁰ However, for clarity of exposition this thesis refers to these provisions as safe harbors, even though they are not safe harbors in the right sense of the word.

An ISP who commits an act of copyright infringement, and is not protected under the Canadian safe harbors, may pursuant to the CaCA face both criminal and civil remedies.⁵¹ In addition to criminal sanctions already existing under the CaCA⁵², the *Copyright Modernization Act* introduces also a new civil remedy for copyright owners with the unique so called enabling provision.⁵³ The enabling provision establishes a type of secondary liability by making it an infringement of copyright itself to enable acts of copyright infringement for others.⁵⁴ Moreover, while the rest of the Western world has introduced the N&TD system (or similar), Canada has rejected this system in favor of the made in Canada so called ‘notice and notice’ (**N&N**) system, under which ISPs, or with the word of the CaCA, providers of ‘network services’⁵⁵, must forward notices of alleged infringement to its

⁵⁰ Hagen, *supra* note 43 at 375.

⁵¹ *Supra* note 42 s 34(1).

⁵² *Ibid* ss 42-43.

⁵³ “Questions and Answers The Copyright Modernization Act”, Media Release, (29 September 2011), online: Balanced Copyright <<http://balancedcopyright.gc.ca>>.

⁵⁴ *Canadian Copyright Act*, *supra* note 42 s 27(2.3); Hagen, *supra* note 43 at 360.

⁵⁵ *Supra* note 12 s 31.1.(1).

customers/users.⁵⁶ As a result, the obligation to take down content under Canadian law does not lie with the ISPs, but with their users. It should be noted that the N&N system has not yet come into force, but will likely do so, following the adoption of regulations related to these provisions.⁵⁷ For clarity of exposition, the N&N system is referred to in this thesis as it was already in force.

Despite Canada's original approach to the liability of ISPs, launched for the first time in June 2005 by Bill C-60⁵⁸ – Canada's first attempt to amend the CaCA – it has been given almost no attention in the literature, neither domestically nor internationally. The aim of this thesis is to go some way to fill that gap in the literature.

1.2 Purpose of this thesis

The liability of 'traditional ISPs' (i.e. those who provide Internet access under contract with their subscribers) has already been considered by many scholars. Therefore, this thesis focuses on the liability standard that applies to P2P intermediaries, a topic which has been given comparatively little attention in the literature. This thesis, however, does not attempt to give an answer to the question, or even contribute to the debate, of whether liability should be imposed on P2P intermediaries or not. Without taking sides in that question, this thesis looks into the

⁵⁶ Hamilton, *supra* note 3 at 286.

⁵⁷ Sookman, "Soon to be law in Canada", *supra* note 13.

⁵⁸ Bill C-60, *An Act to amend the Copyright Act*, 1st Sess, 38th Parl, 2005, cl 40.1 and 40.2 (first reading 20 June 2005) [*Bill C-60*].

liability standards developed under Swedish and Canadian law for these new types of ISPs, and compare these standards to each other.

The liability for online copyright infringement committed by means of P2P file sharing is an intensely debated issue among policy and law makers, practitioners and individuals; almost everyone seem to have an opinion about whether liability for illegal P2P file sharing should exist or not, and the form for such liability if any. Despite this general interest in the issue, there is surprisingly little research on the topic in Canada. The well-known Canadian legal scholar and copyright activist Michael Geist frequently comments on the Canadian copyright reform on his blog.⁵⁹ However, the topic dearest to Geist's heart seems to be the so called 'digital locks provisions' which are also law in Canada with the adoption of the *Copyright Modernization Act*.⁶⁰ Canada's digital locks provisions are not dealt with in this thesis. Barry Sookman, another Canadian legal scholar also running his own intellectual property law blog, comments broadly on the issue of copyright liability of ISPs, but does not look specifically into the issue of liability of P2P intermediaries.⁶¹ Similarly, Swedish scholarship in the field tends to focus on the liability of ISPs broadly. However, a few articles addressing the liability of P2P intermediaries were

⁵⁹ Michael Geist Blog: <<http://www.michaelgeist.ca/>>.

⁶⁰ Digital locks, or 'technological protection measures' as they are also called, are designed as a restraint on the use on intellectual property. These cryptographic entanglements preclude people from using digital works in way copyright owners do not approve of. Digital locks can be attached music, movies, electronic book and other digital works. Breaking a digital lock is a crime under the Copyright Modernization Act. Ian Kerr, "Digital Locks and the Automation of Virtue" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 247 at 250.

⁶¹ Barry Sookman Blog <<http://www.barrysookman.com/>>.

written in connection to the court proceedings against the operators of The Pirate Bay, which have been very useful in writing this thesis (see literature review).

As the literature review below demonstrates, the comparative legal scholarship in the field almost exclusively focuses on the United States DMCA ISP liability regime, and on a larger European country such as Germany, France, the United Kingdom, and/or the EU generally, and/or an Asian country. A few comparative scholars have considered Canadian ISP liability laws, but almost all of them focus on the liability of traditional ISPs and do not take into account the legislative changes established by the *Copyright Modernization Act*. Moreover, no comparative study considers the application of the CaCA to P2P intermediaries. Similarly, no comparative research in the field considers Swedish law, other than very briefly, and there is no comparative study focusing specifically on how Sweden addresses the liability of P2P intermediaries. The purpose of this thesis is to address this gap in the literature and through a comparative research of the Swedish and Canadian approaches to the liability of P2P intermediaries, answer the question of what approach – the Canadian or the Swedish – is the better one in combatting copyright infringement committed by means of P2P file sharing.

1.3 Literature review

Considering the literature in the field of ISP liability as a whole, one key point stands out: most of the literature in this field is produced in the United States, and comparatively little research has been done in relation to ISP liability in Canada and Sweden. This section provides a review of the relevant literature in the field,

including: a) literature that analyze the benefits and shortcomings of the Swedish and Canadian ISP liability laws; and b) literature analyzing ISP liability by using a comparative methodology. This section summarizes the key findings in that literature and provides a brief discussion of how this thesis contributes to fill some of the gaps in that literature.

(a) *Literature analyzing the benefits and shortcomings of the Swedish and Canadian ISP liability regimes*

Most Canadian literature to date dealing with the *Copyright Modernization Act* concerns the much debated digital locks provisions, which is indeed an interesting topic, but outside the scope of this thesis.⁶² The key Canadian studies to date providing a more comprehensive analysis of the benefits and shortcomings of the Canadian ISP liability regime are written by Andrew Bernstein & Rima Ramchandani, Scott Nesbit, Gregory R. Hagen, Sheryl H. Hamilton, Barry Sookman and Michael Geist. Below follows a review of these key works in chronological order.

⁶² See e.g. Kerr, *supra* note 60; Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 177; Michael Geist, "The Case for Flexibility in Implementing the WIPO Treaties: An Examination of the Anti-Circumvention Requirements" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 204; Mark Perry, "The Protection of Rights Management Information: Modernization or Cup Half Full?" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 304; and Michael Geist, "Why Bill C-11's Digital Locks Rules May Hurt Copyright Enforcement" *Michael Geist Blog* (12 June 2012), online: Michael Geist Blog <<http://www.michaelgeist.ca>>.

Andrew Bernstein & Rima Ramchandani's article from 2002 is one of the most cited Canadian articles in the field.⁶³ Although it was written more than 10 years ago, and so does not address the *Copyright Modernization Act* or any of the three previous attempts to amend the Canadian Copyright Act,⁶⁴ it contains an interesting analysis of copyright, defamation and anonymity issues in the online environment; issues that a Canadian ISP liability regime, according to Bernstein & Ramchandani, must address. Through a critical analysis of the American and British examples on how liability attaches to providers of Internet access in the United States and the United Kingdom, Bernstein & Ramchandani make recommendations as to how a Canadian ISP liability regime should be drafted. Moreover, Bernstein & Ramchandani suggest precautions that Canadian Internet access providers could take to avoid liability under both current and future Canadian ISP liability law. Many of these suggestions are still valid, such as to ensure to state in the Internet access subscription contract that the user is not to make illegal or civilly unlawful use of its access.⁶⁵

Scott Nesbit is one of the earliest commentators to the Canadian copyright reform and the Canadian ISP liability regime.⁶⁶ Already in 2003, Nesbit notes that while both EU and United States have adopted ISP liability laws, Canada has taken

⁶³ Andrew Bernstein & Rima Ramchandani, "Don't Shoot the Messenger! A Discussion of ISP Liability" (2002) 1:2 CJLT 77.

⁶⁴ Bill C-60, *supra* note 58; Bill C-61, *An Act to amend the Copyright Act*, 2nd Sess, 39th Parl, 2008 (first reading 12 June 2008) [*Bill C-61*]; and Bill C-32 *An Act to amend the Copyright Act*, 3rd Sess, 40th Parl, 2010 (first reading 2 June 2010) [*Bill C-32*].

⁶⁵ *Supra* note 63 at 85.

⁶⁶ Scott Nesbit, "Rescuing the Balance?: An Assessment to Canada's Proposal to Limit ISP Liability for Online Copyright Infringement" (2003) 2:2 CJLT 115.

a “slow and cautious approach to reform”⁶⁷. Nesbit examines the early ISP liability provisions introduced by ‘A Framework for Copyright Reform’⁶⁸ issued by the Canadian Government in 2001. Nesbit analyzes these early ISP liability provisions in light of the fundamental purpose of intellectual property regimes, namely to reflect a balance between the interests at stake. The answer that Nesbit offers to the question of whether this early proposed Canadian ISP liability regime reflects a balance is this: “it is not clear that the proposed amendments as they currently stand achieve an entirely acceptable balance. In particular, revisions to the notice and take-down scheme might be required.”⁶⁹ Although many different legislative proposals of a Canadian ISP liability regime were seen after Nesbit’s article was published (e.g. the N&TD system was eventually rejected in favor of the N&N system), his article contains a thorough and still valid review of American and Canadian jurisprudence, and the natural rights and utilitarian theories, in seeking a justification for imposing copyright liability on providers of Internet access under a statutory ISP liability regime. Moreover, his analysis and arguments of how a Canadian ISP liability regime is best drafted to reflect a balance between the interests at stake, applies equally well to the *Copyright Modernization Act* ISP liability regime.

⁶⁷ *Ibid.*

⁶⁸ Strategic Policy Sector, Marketplace Policy Branch, *A Framework for Copyright Reform* No. C2-584/2001 (Ottawa: 2001).

⁶⁹ *Supra* note 66 at 126.

Sheryl H. Hamilton (2010) provides a comprehensive analysis of what approach to the liability of ISPs, and the taking down of illegal content, is the best one in a Canadian context.⁷⁰ Hamilton examines three possible ISP liability regimes: total liability, total immunity and limited liability. Through an analysis of the benefits and shortcomings of the EU and American limited liability regimes, and the N&TD system and the N&N system as proposed under Bill C-60⁷¹, Hamilton concludes that the made in Canada approach to the liability of providers of Internet access is more beneficial than both the American and EU approach. She arrives at this conclusion by arguing that “[t]he limited liability/notice and notice system proposed in Bill C-60 is an important and effective recognition of”⁷² the balance between the interests at stake.

The most substantial up-to-date analysis of the *Copyright Modernization Act* is provided by Gregory R. Hagen (2010) who carefully analysis the features of Bill C-32⁷³, which contains largely the same provisions as the *Copyright Modernization Act* with respect to the immunity provisions for ISPs, the N&N system, and enabling provision.⁷⁴ Hagen carefully analysis the benefits and shortcomings of each of the features of Bill C-32 and concludes with respect to the proposed ISP liability regime, including the N&N system and enabling provision, that although this law indeed

⁷⁰ *Supra* note 3.

⁷¹ *Supra* note 58.

⁷² *Supra* note 3 at 308.

⁷³ *Supra* note 64.

⁷⁴ *Supra* note 43.

contains some strengths, it gives copyright owners a rather weak tool for the enforcement of their rights, especially when copyright is infringed by means of P2P file sharing. Hagen explains that the Canadian Government's choice of a rather weak ISP liability regime may be explained by the fact that the Bill also seeks to target online infringement by controlling the subject matter itself through the proposed digital locks provisions.⁷⁵

Barry Sookman (2012) also analyzes how the Canadian ISP liability regime is best drafted, arguing in numerous articles and blog posts that the Canadian N&N system under the *Copyright Modernization Act* is not effective enough against large scale copyright infringement, and that the N&TD system is more effective in that regard.⁷⁶

Michael Geist takes yet another view on the *Copyright Modernization Act* ISP liability regime, arguing in numerous of articles and blog posts, that Canada needs, neither an N&N system, nor an N&TD system.⁷⁷ According to Geist, the already

⁷⁵ *Ibid* at 369-370.

⁷⁶ See e.g. Barry Sookman, "Some thoughts on Bill C-32: an Act to Modernize Canada's copyright laws" *Barry Sookman Blog* (3 June 2010); "Are Canada's copyright laws friendly or unfriendly towards wealth destroyers according to Prof. Geist?" *Barry Sookman Blog* (9 March 2011); "Rethinking notice and notice after C-32" *Barry Sookman Blog* (4 April 2011); "Some observations on Bill C-11" (3 October 2011) online: Barry Sookman Blog: <<http://www.barrysookman.com>>; see also Barry Sookman, "Case Comment: Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Service Providers" (2004) 3:3 CJLT 149.

⁷⁷ Michael Geist, "What Copyright Laws? Recording Industry Files Massive Lawsuit Against isoHunt" *Michael Geist Blog* (14 February 2011); "Liberal MP Dan McTeague Emerges As Unofficial CRIA Spokesperson" *Michael Geist Blog* (24 February 2011); and "The Canadian isoHunt Litigation: The CRIA Cease and Desist Letter That Started it All" *Michael Geist Blog* (4 March 2011), online: Michael Geist Blog <<http://www.michaelgeist.ca>>; see also Michael Geist, "The Case Against isoHunt", *The Globe and Mail* (1 March 2011) online: The Globe and Mail <<http://theglobeandmail.com>>. For generally on the Canadian copyright reform and N&N system, see e.g. Michael Gest, "The Effectiveness of Notice and Notice" *Michael Geist Blog* (15 February 2007); "Canada's Notice-and-Notice vs. U.S.'s Notice-and-Takedown" *Michael Geist Blog* (29 June 2012); "Government To Delay

established authorization doctrine is an effective tool in the enforcement of copyright online, and applies well to those who share, and enable the sharing, of copyright works over P2P networks.

Since the issue of ISP liability for Sweden came to be determined on the EU level, much of the Swedish scholarship has come to focus on the E-Commerce Directive, rather than domestic Swedish law.⁷⁸ Moreover, it took almost 10 years before the first Swedish case on the issue of copyright liability in the context of ISP liability, appeared before the Swedish Court, which could be an explanation for the silence from Swedish commentators in the field for many years after implementation of the E-Commerce Directive. However, since the *Pirate Bay* case, a number of articles have been published that analyze the benefits and shortcomings of the Swedish ISP liability regime, particularly in the context of illegal P2P file sharing.

The American author J.E (Win) Bassett, IV (2010) analyzes the questions left unanswered by the Swedish District Court in the *Pirate Bay District Court*⁷⁹ case.⁸⁰

Implementation of Bill C-11's Internet Provider Rules" *Michael Geist Blog* (31 October 2012), online: Michael Geist Blog <<http://www.michaelgeist.ca>>; see also Michael Geist, "Piercing the peer-to-peer myths: An examination of the Canadian Experience", online: (2005) 4:1 First Monday <http://firstmonday.org/issues/issue10_4/geist/>; Michael Geist, "Reality of Bytes: Regulating Economic Activity in the Age of the Internet" (1998) 73 Was L Rev 521; and Michael Geist, *Internet Law in Canada*, 2d ed (North York, ON: Captus Press, 2000).

⁷⁸ John N Adams & P Bernt Hugenholtz, "Exploitation and Liability" (2002) 1 NIR 123; Jakob Pelsner Mathiasen, "E-handelslovens regulering af formidleransvaret" (2004) 2 NIR 137; Jakob Pelsner Mathiasen, "Fildelning" (2007) NIR 47; Daniel Westman, "Förslag på nya civilrättsliga sanktioner i kampen mot olaglig fildelning – en kritisk granskning" (2007) 3 IRI PM 1; Henrik Bengtsson, "Förhandsgranskning av och övervakningsansvar för interaktiva elektroniska tjänster" (2009) 1:09 Ny Juridik 6; Clement Salung Petersen, "Netværksoperatørernes rolle i bekæmpelsen af opphavsretskrænkelser på internettet" (2009) 1 NIR 21; Johan Axhamn, "Mellanhandsansvar på internet: En rapport kring internetleverantörers roll och ansvar", *Netopia Forum för Digitala Samhällsfrågor* (November 2010).

⁷⁹ *Swede v Neij* [2009] Stockholm District Court B13301-06 [*Pirate Bay District Court*].

Bassett reviews the case carefully, pointing out where guidance from the District Court is missing and/or unclear. He concludes that the *Pirate Bay* case raises many difficult questions with respect to the Swedish ISP liability regimes interpretation in the context of P2P file sharing, suggesting that the Swedish Court in case of appeal, should refer these difficult principal questions to the Court of Justice of the European Union (**CJEU**). It is particularly important, Bassett argues, that CJEU rules on the issue of whether P2P intermediaries may benefit from the E-Commerce Directive safe harbors. (The Court of Appeal, however, did not refer any questions to the CJEU for preliminary rulings).

Jens Andreasson & Kristoffer Schollin (2011) carries out a critical analysis of the Court of Appeal's interpretation of the Swedish ISP liability laws in the *Pirate Bay* case, arguing that the Court did not take into account all interests at stake when ruling that the liability exemption afforded ISPs did not apply to P2P intermediaries, and thus held The Pirate Bay liable for contributory copyright infringement.⁸¹ Andreasson & Schollin argues that with the *Pirate Bay* case, Sweden has adopted a rather extensive and unbalanced ISP liability standard where any online search and meeting service, used by individuals to infringe copyright, may face contributory copyright liability, regardless of whether the service is provided primarily for legal or illegal purposes.

⁸⁰ *Supra* note 24.

⁸¹ *Supra* note 32.

Peter Danowsky (2012), the counsel to the record industry in the Pirate Bay trials, gives his view on the new ISP liability standard established by the Court of Appeal in the *Pirate Bay* case.⁸² He reviews the case carefully and analyzes the implications that the Court's interpretation on the Swedish ISP liability laws may have for future cases. He concludes that litigation cannot be the only way of effectuating greater policing of the unlawful exploitation of copyright protected works on the Internet, and suggests indirectly a graduated response approach as a better alternative to the current Swedish K&TD system.⁸³

Marianne Levin (2012) carries out an interesting analysis of whether the Swedish ISP liability regime reflects a balance between the interests at stake, looking particularly at whose balance should be taken into account when drafting ISP liability laws.⁸⁴ Levin concludes that when copyright is enforced online, there are a number of additional interests to consider than when copyright is infringed in the offline environment. Levin argues that when drafting ISP liability laws, the interests of the following stakeholders and protected interests should be taken into account: internet services (providers and other new Internet entrepreneurs); social media (users/consumers); freedom of information and expression (society as a whole and

⁸² *Supra* note 35.

⁸³ A graduated response system is a system under which ISPs send escalating notifications or alerts to users found to infringe copyright. The final, ultimate alert, in case of repeat infringement, is termination of the repeat infringer's Internet access. *Ibid* at 131.

⁸⁴ Marianne Levin, "A Balanced Approach on Online Enforcement of Copyright" in Johan Axhamn, ed, *Copyright in a Borderless Online Environment* (Stockholm: Norstedts Juridik 2012) 135.

individuals); and commercial communications infrastructure (companies and society etc.).⁸⁵

Johan Axhamn (2012) analyzes the outcome of the *Pirate Bay* case, by looking into the issue of to what extent the Swedish ISP liability laws, as interpreted by the Court of Appeal, allow for liability to be imposed on other actors than direct and contributory copyright infringers.⁸⁶ Particularly, Axhamn attempts to answer the question of whether copyright liability, in light of the *Pirate Bay* case, may attach to: a) advertisement agencies who sell advertisement space on websites found to contribute to its users' copyright infringements; b) those who advertise on a website that contributes to its users' copyright infringement; c) providers of internet access to websites that contributes to its users' copyright infringement; and d) actors that store BitTorrent trackers used by others to infringe copyright. Axhamn concludes that with the *Pirate Bay* case, a very extensive contributory liability doctrine has been established in Swedish law. He concludes that it is likely that contributory copyright liability attach to all the actors above.

(b) Comparative scholarship

Rosa Julià-Barceló & Kamiel J. Koelman (2000) compares the EU approach to the liability of ISPs to that under the United States DMCA, focusing particularly on

⁸⁵ *Ibid* at 147.

⁸⁶ Johan Axhamn, "Något om ansvar för medhjälp till upphovsrättsintrång – särskilt i onlinemiljö" (2012) 1 NIR 26.

the pros and cons of the EU and American N&TD system.⁸⁷ Through comparative analysis, Julià-Barceló & Koelman conclude that the EU ISP liability regime respects both the interests of ISPs and copyright owners, but disregards the right of freedom of speech and fair competition on the Internet.⁸⁸ This is because, unlike under the United States ISP liability regime, there is no regulated procedure for putting back content which ISPs have taken down by mistake.

Xavier Amadei (2002) analyzes the historical development of the liability standards that apply to ISPs for their involvement with copyright content, defamatory and other illicit content in France and the United States.⁸⁹ He notes that liability of providers of Internet access in both France and the United States, before the modern safe harbor regimes, largely depended on whether Internet access providers could be analogized to publishers or distributors. Amadei then outlines the factors that led France and the United States courts to focus on the Internet access providers in setting the standard for liability of illegal content on the Internet. Amadei concludes that similar policy arguments warranted Internet access providers liability in France and United States. He also concludes that although French and American ISP liability laws share some common features, when applied to the same case, different outcome are obtained. Amadei therefore concludes that a harmonized ISP liability regime should be adopted.

⁸⁷ Rosa Julià-Barceló & Kamiel J Koelman, "Intermediary Liability in the E-Commerce Directive: So far so Good, but It's Not Enough" (2000) Computer L & Sec R 231.

⁸⁸ *Ibid* at 238.

⁸⁹ Xavier Amadei, "Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content" (2002) 35 Cornell Int'l L J 189.

Guy Pessach (2007) is one of few comparative scholars who looks at the issue of liability when copyright has been infringed by means of P2P file sharing.⁹⁰ Through a comparative study of the Australian, American and Canadian ISP liability regimes, Pessach analyzes the policy considerations that should guide courts and legislatures when dealing with third party liability for copyright infringement that occurs through P2P file sharing services. Although Pessach focuses on the issue of liability of individuals using the P2P file sharing services, and ISPs providing Internet access hereto, rather than on the issue of P2P intermediary liability, his analysis and conclusions apply also to P2P intermediaries. He concludes that liability should be imposed: a) only in circumstances when the primary use of copyrighted material is classified as an infringing use rather than a use that is protected under one of copyright law's exemptions and limitations;⁹¹ b) should take into account both interests of the copyright owners and the interests of the public and society;⁹² and c) should take into account P2P file sharing as a beneficial platform for enabling communicative, expressive, and creative activities⁹³. Pessach focuses primarily on

⁹⁰ Guy Pessach, "An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing Past, Present, and Next Generation's Questions" (2007) 40 Vand J Transnat'l L 1.

⁹¹ A prerequisite for imposing liability under the doctrine on contributory liability in copyright law is a direct infringement by a primary infringer. Pessach argues that American and Australian case law shows that overall the use of file sharing services by individuals for the purpose of downloading copyrighted material is regarded as primary infringement of copyright. Pessach further argues that it is a shortcoming that existing case law does not distinguish between legitimate and illegitimate downloads of copyrighted content through P2P file sharing services, since not all uses of copyrighted material, such as uses personal use, are illegal. *Ibid* at 95-96 and 105.

⁹² *Ibid* at 116.

⁹³ *Ibid* at 116 and 122.

Australian and American law. References to Canadian law are made occasionally, but his study does not take into account the *Copyright Modernization Act*.

Hanibal Travis (2008) compares the safe harbor regimes in the EU and the United States.⁹⁴ A key issue raised in Travis' article is the human rights implications (freedom of expression and freedom of speech) of ISPs liability laws imposing obligations on ISPs, such as YouTube, to monitor for and filter out quotations or clips on its website, unless a copyright owner 'opts in' to being included on the site.⁹⁵ Travis concludes that the current design of the American and EU safe harbor regimes interferes everyone's right to take part in the cultural life of the community, to enjoy the arts and to benefit from scientific progress.

Jeremy de Beer & Christopher D. Clemmer (2009), examine the shift in laws, policies and practices pertaining to the role of providers of Internet access in online copyright enforcement in Australia, Belgium, Canada, China, EU, France, Germany, Japan, New Zealand, Singapore, South Korea, United Kingdom, and United States.⁹⁶ The question that they seek an answer to is whether the policy shift, requiring activity rather than passivity from Internet access providers in enforcing copyright online, has any implications for the so called principle of 'network neutrality'. Network neutrality is a concept once coined by the American law professor Tim Wu from Columba Law School (United States), implying that ISPs and

⁹⁴ Hannibal Travis, "Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors and International Law" (2008) 84:1 Notre Dame L Rev 331.

⁹⁵ *Ibid* at 6.

⁹⁶ *Supra* note 41.

governments should treat all Internet content equally, not discriminating or charging differentially by user, content, site, platform, etc.⁹⁷ On just over 16 pages, de Beer & Clemmer outline the role that Internet access providers are expected to play in enforcing copyright online in the 13 countries subject to comparison. Needless to say, the comparative research is rather brief. With respect to the Canadian approach, the authors conclude that there is not yet a clear liability standard with respect to ISPs. However, they acknowledge that the Canadian legal framework may change, but does not analyze the, at the time proposed, Canadian ISP liability regime. The overall conclusion that de Beer & Clemmer make with respect to the question of whether Internet access providers should play a more active-preventative role in online copyright enforcement, and thus divert from the network neutrality principle, “remains an open question”⁹⁸ that has to be answered in the context of the interests of right holders, Internet access providers and Internet users’ alike.⁹⁹

Harshita Bhatnagar & Vinay V. Mishra (2009) compares the benefits and shortcomings of the ISP liability regimes in Australia, EU, Singapore and the United, with the goal to give an answer to the question of how an international ISP liability regime is best drafted.¹⁰⁰ Bhatnagar & Mishra argues that the liability of ISPs should

⁹⁷ Tim Wu, “Network Neutrality, Broadband, Discrimination” (2003) 2 J Telecomm & High Tech L 141.

⁹⁸ *Supra* note 41 at 390.

⁹⁹ *Ibid.*

¹⁰⁰ Harshita Bhatnagar & Vinay V Mishra, “ISP Liability for Third Party Copyright Infringement: A Comparative Analysis for Setting International Standard Norms” (2009) 50:1 Acta Juridica Hungaria 59.

be limited and concludes that international standards for copyright protection must occur in the spirit of free dissemination of information, and must encourage the broadest communication possible: “[t]he internet is the future and ISPs are the gateway. Let the world come together and protect it from being dragged into gratuitous litigations.”¹⁰¹

Broder Kleinschmidt (2010) compares the different approaches to ISP liability by outlining the regulatory framework in the EU, and exemplifies how this is applied and interpreted in the United Kingdom and Germany.¹⁰² He then carries out a comparative analysis of the ISP liability regimes in Australia, Canada, Germany, New Zealand, United Kingdom, and United States. He focuses particularly on the different approaches taken by these countries with respect to the justifications for, and effectiveness of, obligations imposed on providers of Internet access to take down illegal content, and prevent illegal content on the Internet by installing blocking and filtering technologies. He concludes that obligations imposed on Internet access providers’ to take down illegal content in these jurisdictions “can only be 100 % effective if...applied globally.”¹⁰³ With respect to blocking and filtering measures, Kleinschmidt concludes that these are disproportionate in all six jurisdictions.¹⁰⁴ His analysis of the Canadian approach spans over almost two pages, and is thus rather

¹⁰¹ *Ibid* at 83.

¹⁰² Broder Kleinschmidt, “An International Comparison of ISP’s Liabilities for Unlawful Third Party Content” (2010) 18:4 Int’l JL & IT 332.

¹⁰³ *Ibid* at 355.

¹⁰⁴ *Ibid* at 354.

brief. Moreover, his analysis of Canadian law does not take into account the *Copyright Modernization Act*.

Seagull Haiyan Song (2010) compares ISP copyright liability in China, Europe and the United States, and reviews how liability of providers of Internet access providers is determined in these jurisdictions.¹⁰⁵ Similarly to Amadei, Song notes that even though there has been no universally accepted ISP liability regime, an overall review of copyright infringement cases in China, Europe and the United States show that courts will generally consider the same factors when determining liability of Internet access providers. By comparing the ISP liability regimes of EU and the United States to China's, Song addresses a number of problems and uncertainties under the existing Chinese ISP regulations, particularly with respect to the Chinese N&TD system. Song concludes his article by proposing a number of recommendations for the Chinese government to consider in future legislative reform.

Emerald Smith (2011) analyzes the liability of ISPs under international copyright law and French, German, Italian, Spanish, and United States law.¹⁰⁶ The main focus of this article is the liability of online service providers, such as Facebook and YouTube providing user-generated content, and how a liability regime for these types of ISPs is best drafted. By comparing the ISP liability regimes of the five

¹⁰⁵ Seagull Haiyan Song. "A Comparative Copyright Analysis of ISP Liability in China Versus the United States and Europe" (2010) 27:7 The Computer & Internet Lawyer 1.

¹⁰⁶ Emerald Smith, "Lord of the Files: International Secondary Liability for Internet Service Providers" (2011) 68:3 Wash & Lee L Rev 1555.

countries, Smith notes that the international legal landscape has created a great variety of answers to the question of whether liability should attach to companies, such as YouTube, when users' infringe copyright by posting infringing content on the service provider's website. He concludes that the current ISP liability regimes are ineffective because they provide such diverse answers, and that an international standard for secondary liability would be beneficial.¹⁰⁷

Daniel Seng (2011) compares in his World Intellectual Property Organization (**WIPO**) Report the national laws of indirect liability and safe harbor defenses in the context of copyright liability of ISPs.¹⁰⁸ The ISP liability regimes of 15 countries, including Australia, Canada, China, Egypt, India, Jamaica, Japan, Malaysia, New Zealand, Nigeria, Republic of Korea, Singapore, South Africa, United Kingdom and United States, are compared in this preliminary survey which is concluded by Fernández-Díez' (reviewed below). Seng's comparative study is quite brief, providing an overview of the different safe harbor provisions in these 15 jurisdictions on 58 pages. With respect to Canadian law, Seng's analysis is limited to the authorization doctrine which he discusses on just over two pages.

Ignacio Garrote Fernández-Díez (2011) is another WIPO Report author who compares the ISP liability regimes of a large number of countries, including Argentina, Belgium, Brazil, Chile, Colombia, Finland, France, Germany, Italy,

¹⁰⁷ *Ibid* at 10.

¹⁰⁸ Daniel Seng, "Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries", *WIPO Report* (10 November 2010) online: WIPO <<http://www.wipo.int>>.

Mexico, Morocco, Russia, Rwanda, Senegal, and Spain.¹⁰⁹ Unlike Seng, Fernández-Díez analyzes the ISP liability regimes from a broader perspective looking at not only the traditional ISPs, but also those who design, maintain and commercially exploit electronic platforms or social networks (e.g. Facebook and YouTube), search engines, and P2P intermediaries.¹¹⁰ Fernández-Díez concludes with respect to P2P intermediary liability that “there is an absence of legal regulation in this regard in most of the countries studied.”¹¹¹ However, German case law shows a trend in holding P2P intermediaries liable as contributors.¹¹²

Hong Lou (2013) compares the ISP liability regimes in China and the United States.¹¹³ By comparing the American and Chinese approaches to direct and secondary infringement, contributory, and vicarious liability Lou concludes that the liability standards for imposing liability on ISPs as direct or secondary infringers are not as predictable as in the United states and suffer from some unclear definitions. Lou further concludes that the Chinese liability standards under the contributory and vicarious liability doctrines are stricter than in the United States and should treat search engines and ISPs equally.

¹⁰⁹ Ignacio Garrote Fernández-Díez, “Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights”, *WIPO Report* (2011) online: WIPO <<http://www.wipo.int>>.

¹¹⁰ *Ibid* at 3.

¹¹¹ *Ibid* at 72.

¹¹² *Ibid* at 32-41.

¹¹³ Hong Lou, *Comparative Studies on ISPs’ Secondary Copyright Liability in China and the US* (JSD Thesis, City University of Hong Kong School of Law, 2013) [unpublished].

(c) *The contribution of this thesis to the literature*

Having outlined the contents and key findings in the existing Swedish, Canadian and comparative key literature in the field, the following can be concluded: First, there is no previous study that comprehensively analyzes the *Copyright Modernization Act* ISP liability regime; Nesbit, Hamilton, and Hagen all consider previous attempts to update the CaCA. Likewise, none of the comparative studies take into account the *Copyright Modernization Act* ISP liability regime. Second, the majority of the studies in the field consider the liability of *Internet access providers*; there is no comparative study in the field focusing on the liability of *P2P intermediaries* other than very briefly (see Fernández-Díez), and only a few non-comparative studies, such as Andreasson & Schollin and Axhamn, look at the liability of these new types of ISPs. Third, the overwhelming majority of the literature in the field considers the United States ISP liability regime. Almost all of the key comparative studies compare the American ISP liability regime to the ISP liability regime in a larger EU country, such as the United Kingdom, Germany or France, or EU generally, and/or an Asian country. There is no comparative study looking at the Swedish ISP liability regime, and there is no comparative study in the field considering Canadian law, other than very briefly. Fourth, studies evaluating the benefits and shortcomings of the Canadian and Swedish ISP liability regimes arrives at different conclusions with respect to what type of regime is preferred, but with the general view that an ISP liability regime is needed to effectively protect and enforce copyright on the Internet. With respect to the comparative studies in the field, it seems to be a trend in concluding that a harmonized ISP liability regime is the best

option for copyright enforcement in a borderless online environment. Fifth, given the limited number of studies in general, comparative studies in particular, that deal with the Canadian and Swedish approaches to the liability of ISP and P2P intermediaries, a comparative study of this would be a valuable contribution to the existing literature in the field.

This thesis attempts to make that contribution through a functional comparative analysis of the Canadian and Swedish approaches to P2P intermediary liability. By comparing the *Copyright Modernization Act* ISP liability regime, and the Swedish ISP liability regime as interpreted by the Court of Appeal in the *Pirate Bay* case, this thesis attempts to answer the question of what approach to P2P intermediary liability is the better one. As the literature review above shows, such an analysis has not previously been done.

1.4 Methodology and limitation of this thesis

This thesis will consider two quite different approaches to the liability of P2P intermediaries – the Swedish and Canadian –and determine which approach is the better one. In order to give a solid answer to this question, this thesis will evaluate and assess what country's ISP liability regime:

- provides the most *effective* tool in combating copyright infringement committed by means of P2P file sharing;
- provides the most *well-balanced* tool in combatting copyright infringement committed over P2P networks; and

- provides the most *predictable* liability standard for P2P intermediaries.

The term 'ISP liability regime' is used throughout this thesis to indicate all features for the determination of liability of P2P intermediaries, including the safe harbors, the enabling provision and authorization doctrine, the doctrine on contributory liability in copyright law, and the N&N and K&TD systems.

This thesis attempts to answer the three research questions outlined above through:

- I) case law analysis and doctrinal review of legislation and secondary doctrinal sources, to determine whether and to what extent, P2P intermediaries may benefit from the Swedish and Canadian safe harbors;
- II) analysis of the development and current operation of the Swedish and Canadian ISP liability regimes and how these apply to P2P intermediaries; and
- III) comparative analysis of the liability standard that apply to P2P intermediaries under Canadian and Swedish law, including:
 - i) the Swedish doctrine on contributory copyright liability and the Canadian enabling provision; and
 - ii) the Canadian and Swedish safe harbors, by a comparative analysis of the Canadian N&N and the Swedish K&TD systems.

Based on this analysis, this thesis makes the following main points:

- I) P2P intermediaries fall both under the definition of the type of actors, and the type of ISP services, covered by the Swedish and Canadian safe harbors, and should therefore qualify for protection under these.
- II) The Canadian authorization doctrine is not effective against P2P intermediaries; liability of P2P intermediaries under Canadian law will therefore depend solely on the enabling provision. The liability of P2P intermediaries under Swedish law depends solely on whether the P2P intermediary's service could be said to be beneficial for the society.
- III) When comparing the application of the Canadian and Swedish ISP liability regimes to P2P intermediaries, the following is revealed:
 - i) The liability standard established under the enabling provision is more *predictable* and provides a more well-balanced tool for combatting copyright infringement committed by means of P2P file sharing. It also provides a more *effective* tool in combatting intentional, systematic, and large scale copyright infringement committed by means of P2P file sharing. By contrast, even though the Swedish doctrine on contributory liability in copyright law gives those who apply it an incomparable opportunity to take into account all interests at stake, and hereby make a well-balanced liability assessment, the liability under this tool is more difficult to predict than under the enabling provision, and could be

ineffective even against P2P intermediaries who contribute to copyright infringement on an intentional, systematic and large scale.

- ii) Although the N&N system is a more time-consuming method for the taking down of infringing content than the K&TD system, it is more *effective* against copyright works shared over P2P networks because the N&N system, unlike the K&TD system, targets the source of the infringing content. Moreover, unlike the K&TD system, the N&N system does not leave the sometimes difficult decision of whether copyright has been infringed in the hands of the ISPs, and so reflects a better *balance*.

The *predictability* of the N&N and K&TD systems does not differ and has therefore not been taken into account in the comparative analysis.

This thesis uses a comparative methodology based on the so called functional approach. The functional comparative methodology is based on the idea that every country faces similar functional issues and responds to the same issues with different legal provisions and solutions.¹¹⁴ With this assumption, different legal systems and solutions to the same issue can profitably be compared.¹¹⁵ Accordingly, the comparative analysis carried out in this thesis assumes that the Swedish and

¹¹⁴ Christopher A Whytock, "Legal Origins, Functionalism, and the Future of Comparative Law" (2009) 6 BYUL Rev 1879.

¹¹⁵ *Ibid* at 1879.

Canadian ISP liability laws provide a solution to the same social problem. That is, the problem of online copyright infringement committed by means of P2P file sharing. It is important, however, to be aware of the limitations of such assumption.

First, it is not certain that the Canadian and Swedish ISP liability laws intend to solve entirely the same social problems. For example, the Canadian safe harbors are established *vertically*, meaning that they regulate the liability standards that apply to ISPs with respect to copyright liability only. By contrast, the E-Commerce Directive, which has shaped the design of the Swedish safe harbors, was not established to tackle the illegal dissemination of copyrighted content only, but to tackle *all* types of illegal content on the Internet. Thus, the Swedish safe harbor regime, with its K&TD system, applies *horizontally*. It exempts ISPs from civil and criminal liability with respect to all types of illegal content that ISPs may become involved with when carry out their intermediary services, regardless of area of law, whether it is copyright, defamation, misleading advertising, trademark infringement, child pornography, etc.¹¹⁶ Consequently, the horizontal Swedish safe harbors and K&TD system reflect a wider spectrum of social issues than the vertical Canadian provisions that apply only to copyright infringement. This is an important aspect to keep in mind when comparing and evaluating the two liability regimes, and ultimately make recommendations that one country should adopt the other's approach.

¹¹⁶ There is a vast amount of different types of illegal content on the Internet. Although literature and media tend to focus on the illegal dissemination of copyright content, an Internet intermediary may of course disseminate all imaginable forms of illegal information, such as child pornography, prostitution, terrorism, hate speech, defamation, misleading advertising, unfair commercial practices, unfair competition, trademark infringements etc. Pablo Bistacchi, "Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce" (2003) 19:1 Santa Clara Computer & High Tech LJ 111 at 117; see also Julià-Barceló & Koelman, *supra* note 87 at 231.

A second limitation of a functional comparative methodology, relates to the fact that not all legal rules or concepts make good comparators. This is the case with the Swedish doctrine on contributory liability in copyright law and the authorization doctrine. Contributory copyright liability under Swedish law is a criminal offense that is determined by the application of the SwPC, general Swedish criminal principles, and the SwCA. Moreover, liability under this doctrine is imposed on an ISP as a *contributor* to somebody else's copyright infringement. Thus, the contributory liability doctrine imposes a type of *secondary liability* on ISPs. By contrast, the Canadian authorization doctrine is a common law copyright doctrine under which ISPs may be imposed *direct* copyright liability for authorizing infringement. Swedish copyright law does not recognize the concept of authorizing infringement as a ground for direct copyright infringement, and Canadian law does not recognize the concept of contributory liability in copyright law. Consequently, these two features of the Swedish and Canadian ISP liability regimes are only roughly comparable, and recommendations that Sweden should implement the authorization doctrine, or Canada the doctrine on contributory liability in copyright law, should be made with care; a common law solution that effectively mitigates a problem in Canada might not be appropriate for the Swedish civil law tradition, and the other way around.¹¹⁷ However, the Canadian enabling provision, similar to the Swedish contributory liability doctrine, imposes a type of secondary copyright liability on those who enable others' copyright infringement. Thus, the enabling provision

¹¹⁷ See Whytock, *supra* note 114 at 1886.

and the Swedish doctrine on contributory copyright liability are relatively homogenous and can profitably be compared.

A third limitation to be aware of when engaging in comparative legal research is that the outcome of the comparative analysis depends on the parameters the comparator chose to look at. The goal of this thesis is to determine which of two countries' approaches to the liability of P2P intermediaries is the better one. However, the comparative analysis in this thesis is limited to the three key points outlined above, namely, to determine which ISP liability regime is the most effective, well-balanced and predictable in combatting copyright infringement committed by means of P2P file sharing. Based on an assessment and evaluation of these three criteria this thesis will conclude that the Canadian approach is the better one. However, if other and/or additional criteria would have been subjected to the comparative analysis, the outcome of the analysis may have been another. For example, if this thesis would have taken into account privacy concerns, which under Swedish law is given a remarkably strong protection, the outcome of the comparative analysis could have been another. Thus, it is important to keep in mind the limited scope of the comparative analysis of this thesis.

Although it is important to be aware of the limitations that the functional comparative methodology imposes on this study, these should not be overstated. It is fair to assume that despite the differences in the Canadian and Swedish ISP liability laws, ultimately, when applied to P2P intermediaries, they perform the same overall function and address the same real problem. That is, to fight the illegal dissemination of copyrighted works over P2P networks. In order to do so it is

important to provide an effective, well-balanced and predictable tool.¹¹⁸

Consequently, the concerns about functionalism's inability to determine which of two solutions to a legal problem is the best, is a valid critique when the problem being solved in the former jurisdiction is different from the problem that needs to be solved in the latter.¹¹⁹ However, with respect to the issue of P2P intermediary liability, the Canadian and Swedish laws are relatively homogenous; they share the same overall goal and address the same real problem. The Canadian and Swedish ISP liability systems can thus be profitably compared.

1.5 Organization of this thesis

In order to understand the design of the Swedish and Canadian ISP liability regimes and how they operate to impose and exempt from liability for copyright infringement committed by means of P2P file sharing, it is important to have an understanding of the basics of Swedish and Canadian copyright laws.

Consequently, chapter 2 provides a comparative overview of the copyright laws that apply in Canada and Sweden, and outlines the challenges that illegal P2P file sharing impose on these laws.

Moreover, without a clear understanding of the nature and role of P2P intermediaries, it is impossible to assess how well the Swedish and Canadian liability laws apply to these types of ISPs. Consequently, chapter 3 provides an account for what P2P file sharing is and the role played by P2P intermediaries in

¹¹⁸ Government of Canada, "Welcome Copyright Modernization Act", *supra* note 10; *Prop. 2001/02:150*, *supra* note 29 ch 7.

¹¹⁹ Whytock, *supra* note 114 at 1886.

P2P file sharing. This chapter concludes that P2P intermediaries fall under the definition of the type of actors that may benefit from liability exemption under the Swedish and Canadian safe harbors, that is the so called ‘service providers’ (Sweden) and ‘network service providers’ (Canada).

Chapter 4 examines the Swedish and Canadian safe harbors, and argues that the type of services provided by a P2P intermediary fall under the definition of hosting. This chapter analysis the issue if it is possible for a P2P intermediary to fall both under the definitions of a ‘service provider’ (Sweden) and ‘network service provider’ (Canada), and considered a host provider, *without* being eligible for protection under the safe harbors. It is being argued that P2P intermediaries, in light of how the law is drafted, should qualify for protection under the Swedish and Canadian safe harbors.

Chapter 5 deals with the liability standard established under the doctrine of contributory liability in copyright law (Sweden), and enabling provision and authorization doctrine (Canada), and how these apply to P2P intermediaries. This chapter argues that the authorization doctrine is difficult to apply to P2P intermediaries, and concludes that the liability of P2P intermediaries under Canadian law depends solely on the application of the enabling provision. It is further argued that when the Swedish Court of Appeal applied the doctrine on contributory copyright liability in the *Pirate Bay* case, the Court did not take into account all factors that the doctrine requires. By drawing on Andreasson & Schollin, this chapter shows that a much wider range of factors could have been taken into account in assessing the liability of The Pirate Bay.

Chapter 6 carries out the substantive analysis by comparing the Canadian enabling provision against the Swedish doctrine on contributory liability in copyright law, and the Canadian N&N system against the Swedish K&TD system.

Chapter 7 finishes this thesis by summarizing the key findings and conclusion of this study, and suggests areas where further research on the topic could be done based on these key findings and conclusion.

1.6 Conclusion of this thesis

This thesis concludes that the Canadian and Swedish ISP liability regimes compared, Canada offers a better approach to the liability of P2P intermediaries. With the unique concepts of enabling of copyright infringement, and the N&N system, this thesis argues that Canada provides a liability regime that is more effective in curbing copyright infringement committed by means of P2P file sharing; provides a more well-balanced tool for curbing copyright infringement committed over P2P networks; and provides a more predictable liability standard for P2P intermediaries, than the corresponding Swedish regime. It is in light of this that this thesis concludes that Sweden and other countries should shift the focus from the United States and the EU, and learn from Canada's unique approach.

2 THE PROBLEM OF ILLEGAL P2P FILE SHARING AND ENFORCEMENT OF COPYRIGHT ON THE INTERNET

2.1 Introduction

The purpose of this thesis is to determine which of two approaches to P2P intermediary liability – the Canadian or the Swedish – is the better one in combatting copyright infringement committed by means of P2P file sharing. In order to determine this, it is crucial to have an understanding of what type of actions constitute copyright infringement in the context of illegal P2P file sharing and how copyright could be enforced in the online environment. The goal of this chapter is to provide that understanding. Section 2.2 sets the problem of illegal P2P file sharing in a context by outlining the scope of the problem and its effects on copyright protection. Section 2.3 outlines the scope of the Swedish and Canadian Copyright Acts and explains how copyright is infringed over P2P file sharing networks. Section 2.4 explains the challenges in enforcing copyright on P2P networks and why it is crucial to turn to the ISPs in doing so.

2.2 The problem of illegal file sharing

The problem of online copyright infringement, committed by means of P2P file sharing, is by now a very well-known one.¹²⁰ The nature and scale of the problem

¹²⁰ *Twentieth Century Fox Film Corp v British Telecommunications Plc*, [2011] EWHC 1981 (Ch) at para 19 [*Twentieth Century Fox*].

are addressed by numerous reports and surveys worldwide.¹²¹ Statistics Sweden reports that 25% of persons in the age of 16-74 used P2P file sharing for exchanging movies and music on the Internet in 2011.¹²² This represents approximately 1.7 million individuals¹²³ or 18% of the Swedish population.¹²⁴ By contrast, Canada had in 2004, according to a report from the Organisation for Economic Co-operation and Development (**OECD**), the greatest number of file sharers by percentage of population in the world: “[I]t has been shown elsewhere that the United States makes up more than 50% of all simultaneous file-sharing users, with Germany at around 10%, Canada and France at 8%. Weighted by population, however, Canada has the greatest file-sharing population”.¹²⁵ The International Chamber of Commerce still singles out Canada as a “major source of the world’s piracy problem” in a more recent statement from 2010.¹²⁶ Further, on a

¹²¹ In the United States, for example, the Institute for Policy Innovation calculated, in August 2007, the economic consequences of online piracy as costing the United States’ economy nearly \$12.5 billion and the loss of more than 71,000 jobs every year. Institute For Policy Innovation, News Release, 188, “The True Cost of Sound Recording Piracy to the U.S. Economy” (August 2007) online: IPI <<http://www.ipi.org>>; see also Danowsky, *supra* note 35 at 129. Moreover, in *Twentieth Century Fox* The Hon Mr. Justice Arnold refers to: i) a study by Ipsos MediaCAT dated April 2010 analyzing the scale of film and television piracy in the UK revealing an estimate overall loss from film piracy at £477 million, and an overall loss from television piracy at £58 million; and ii) a study by Tera Consultants dated March 2010 which concludes that in 2008 the audio and audiovisual industries in the UK lost almost 670 million euros in revenue to physical and digital piracy, with the larger proportion of that loss revenue attributable to digital piracy. *Ibid* at para 20.

¹²² Statistics Sweden, Statistics Report, “Use of Computers and the Internet by Private Persons in 2011” (January 2012) at 206.

¹²³ *Ibid* at 206; see also Musiksverige, Statistics Report, Q2 2011, “Musiksverige - Fildelning & nedladdning”, (2011) online: <<http://www.musiksverige.org>>.

¹²⁴ In the end of December 2011 Sweden had a population of 9 482 855; Statistics Sweden, Statistics Report, “Sveriges befolkningsmängd efter kön och ålder 31 december 2011”, (22 March 2012).

¹²⁵ OECD, Report, “Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy” (13 Dec 2005) at 10 and 75.

¹²⁶ International Chamber of Commerce, News Release, “International Chamber of Commerce Urges G8/G20 Action on Counterfeiting and Piracy” (22 June 2010) online: <<http://www.iccwbo.org>>; see also United States Trade Representative, Report, “2010 Special 301 Report” (30 April 2010) which

worldwide scale it is worth noting that the International Federation of the Phonographic Industry in 2008 estimated that 40 billion files were shared on the Internet unlawfully and as a result, 95% of all music downloads in that year were unlicensed.¹²⁷

Although online copyright infringement clearly is a serious and widely spread problem, it should be noted that statistics supplied, especially by the industry, is far from uncontested.¹²⁸ Ian Hargreaves (commissioned by the Prime Minister of the United Kingdom) is one of many who have addressed the issue of quantifying the scale of copyright infringement on the Internet. Hargreaves states in his report from 2011 that “in the Review’s four months of evidence gathering, we have failed to find a single UK survey that is demonstrably statistically robust. For many surveys, methodology is not available for peer review.”¹²⁹ In an attempt to summarize the findings of studies on online copyright infringement from the United Kingdom and elsewhere, Hargreaves arrives at the following conclusion:

refers to “the continuing challenges of Internet piracy in countries such as Canada”. For comments on these reports, see Hagen, *supra* note 43 at 362.

¹²⁷ IFPI, Report, “Digital Music Report 2009: New Business Models for a Changing Environment” (January 2009) online: IFPI <<http://www.ifpi.org>>; see also Edwards, *supra* note 30 at 16.

¹²⁸ Lillian Edwards summarizes the counter arguments made against the IFPI report as follows. (i) [E]very unlawful download cannot be regarded as a lost legal sale, given the idea of “try before you buy” and the fact that downloading may merely be replacing radio in this function; (ii)...downloading may in fact act as advertising or marketing for the legal content sectors, with some surveys showing high consumers of infringing downloads are also high consumers of legal music; (iii) some downloads may be of material not available legally and thus not replacing sales, e.g. deleted back catalogue; (iv) there is some doubt as to the methodologies and accuracies of the key surveys in the field; and (v) even apart from dubieties over the figures on file sharing itself, decline in music industry revenues may be at least partially due to factors other than file sharing, including the growth of alternative consumer goods on which to spend income, a loss of innovation in the music and film markets, and the decline of “blip” profits caused by the windfall effect of the format transfer from vinyl to CD in the 90s. Edwards, *supra* note 30 at 16; see also *Twentieth Century Fox*, *supra* note 120.

¹²⁹ Ian Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth”, *Independent Report* (May 2011) at para 8.3 at 67; see also *Twentieth Fox*, *supra* note 120 at para 21.

What conclusions can we draw from these widely differing perspectives? Certainly that many creative businesses are experiencing turbulence, which translates into fears about the further, future impact of copyright infringement on sales, profitability and sources of investment. However, at the level of the whole economy or even at the level of whole creative business sectors, the measured impacts to date are not as stark as is sometimes suggested by the language used to describe them. That said, copyright infringement is a stubborn fact of the digital landscape which might well get worse and which justifies serious government effort in identifying the right mix of measures to address it.¹³⁰

Online copyright infringement is a serious problem for copyright owners, but in general it seems difficult to confidently quantify its effects.¹³¹ However, even though there seem to be no secure figures indicating whether 95% of all music downloads in 2008 were actually unlicensed or whether 18% of the Swedish population engage in illegal file sharing, or whether Canada is a “major source of the world’s piracy problem” it is likely that a fair amount of the file sharing Swedes and Canadians do use P2P file sharing tools for illegal purposes.¹³²

P2P file sharing and copyright infringement is often used synonymously, however it should be noted that in neither Sweden nor Canada is P2P file sharing illegal *per se*, but P2P file sharing as an act of communication to the public will always fall within the frames of copyright, and the copyright owner’s consent for this

¹³⁰ Hargreaves, *supra* note 129 at para 8.23; see also *Twentieth Century Fox*, *supra* note 120 at para 21.

¹³¹ *Twentieth Century Fox*, *supra* note 120 at para 22.

¹³² See Rosén, *supra* note 6 at 95.

communication is needed as a matter of principle.¹³³ The basic principles for copyright protection in Sweden and Canada is outlined in the next section.

2.3 Copyright protection in Sweden and Canada

Anyone who has created a literary or artistic work shall have copyright in that work under the SwCA. The Act lists a number of examples of what constitutes a literary or artistic work, including:

- a. fictional or descriptive representations in writing or speech,
- b. computer programs,
- c. musical or dramatic works,
- d. cinematographic works,
- e. photographic works or another works of fine arts,
- f. works of architecture of applied art,
- g. works expressed in some other manner.¹³⁴

Similarly, in Canada copyright law is a creature of statute and the rights and remedies provided by the CaCA are exhaustive.¹³⁵ Section 5(1) of the CaCA grants copyright protection to the creators of “every original literary, dramatic, musical and artistic work”, including:

[E]very original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as complications, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations,

¹³³ *Ibid* at 96.

¹³⁴ *Supra* note 37 art 1 [translated by Henry Olsson (Ministry of Justice Sweden: 2009)].

¹³⁵ Nesbit, *supra* note 66 at 116.

sketches and plastic works relative to geography, topography, architecture or science¹³⁶.

It should be noted that neither the SwCA nor the CaCA protect ideas. What is protected under the Acts is expression of ideas in the works enumerated above. Thorson P. eloquently explains this fundamental principle of copyright law in the Canadian case *Moreau v St. Vincent*¹³⁷.

It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.¹³⁸

Further, both the SwCA and the CaCA also protect performers' and producers' rights (in the SwCA referred to as neighboring or related rights).¹³⁹ Performers of works and producers of recordings of sounds and moving images, are granted copyright in their performances and recordings. For example, a record company that has recorded an artist's music, or a film producer who has filmed a movie, is granted copyright in the recording and production. In this thesis, the term 'copyright owner' refers both to the actual copyright owner/author, the holder of a neighboring right, or any other person to which the copyright right has been assigned or transferred.

¹³⁶ *Supra* note 42 s 2.

¹³⁷ *Moreau v St Vincent*, [1950] Ex CR 198, at 203.

¹³⁸ *Ibid* at 203; see also Henry Olsson, *Copyright: Svensk och internationell upphovsrätt* 8th ed (Stockholm: Norstedts Juridik, 2009) ch 1.

¹³⁹ *Swedish Copyright Act*, *supra* note 37 c 5; *Canadian Copyright Act*, *supra* note 42 Part II.

The types of works that typically appear on file sharing sites include music, videos, movies, e-books, computer games and software. As shown above, these types of works may qualify for copyright protection under Swedish and Canadian law, as musical, cinematographic or dramatic works, and literary works respectively. It should be noted, however, that computer games are not a category of work under Canadian law. Instead, computer games are protected under the CaCA as literary works. In Sweden computer games are protected as computer programs in accordance with Article 1 b of the SwCA quoted above. What does it mean to have copyright in a work then? What rights does it give the copyright owner?

Having been granted copyright under the SwCA means that that the copyright owner has “the exclusive right to exploit the work by making copies of it and to make it available to the public, be it in the original or an altered manner, in translation or adaption, in another literary or artistic form, or in another technical manner.”¹⁴⁰ As making of copies the Act considers “any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part”.¹⁴¹ With regards to the criteria ‘making available to the public’, Article 2 of the Act lists four cases in which the work is deemed to have been made available to the public, namely:

1. When the work is being communicated to the public;

¹⁴⁰ *Swedish Copyright Act*, *supra* note 37 art 2, para 1 [translated by Henry Olsson (Ministry of Justice Sweden: 2009)].

¹⁴¹ *Ibid* art 2, para 2 [translated by Henry Olsson (Ministry of Justice Sweden: 2009)].

2. when the work is publicly performed;
3. when copies of the work are publicly exhibited; and
4. when copies of the work are placed on sale, leased, lent, or otherwise distributed to the public.¹⁴²

Anyone who, in relation to a literary or artistic work, commits an act which infringes any of the copyright owners' exclusive rights enumerated above, "shall, where the act is committed willfully or with gross negligence, be punished by fines or imprisonment for not more than two years."¹⁴³ In addition, the SwCA allows for damages, punitive damages and injunctions prohibiting, on penalty of a fine, a party from committing or contributing to an infringing act (a more detailed discussion of available remedies for copyright infringement under Swedish law is provided in chapter 4).¹⁴⁴

Section 3(1)(a)-(i) of the CaCA provides copyright owners with an exclusive 'bundle of rights'¹⁴⁵, including, *inter alia*, the exclusive right for copyright owners to produce or reproduce the work or any substantial part thereof in any material form;¹⁴⁶ perform the work in public;¹⁴⁷ translate the work;¹⁴⁸ convert the work from

¹⁴² *Ibid*, art 2.

¹⁴³ *Ibid* art 53 [translated by Henry Olsson (Ministry of Justice Sweden: 2009)].

¹⁴⁴ *Ibid* art 53 b.

¹⁴⁵ Nesbit, *supra* note 66; see also David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 18.

¹⁴⁶ *Supra* note 42 s 3(1).

¹⁴⁷ *Ibid* s 3(1).

¹⁴⁸ *Ibid* s 3(1)(a).

one medium to another;¹⁴⁹ and communicate the work to the public by telecommunication¹⁵⁰. In addition the CaCA provides, unlike the SwCA, copyright owners with an exclusive right to authorize anyone else to do any of the activities protected under the other enumerated rights.¹⁵¹

Any violation of a copyright owner's exclusive right under the CaCA is an infringement of copyright. Section 27(1) of the CaCA states that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do." More specific examples of how copyright is infringed are set out in Section 27(2) of the Act. Further, Part IV of the CaCA specifies the remedies that may be awarded in cases where copyright has been infringed. Copyright owners are in accordance with Section 34(1) entitled to a number of different remedies, such as damages and injunctions. Section 34(1) reads as follows:

Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

In addition, criminal remedies are available pursuant to Section 42 of the Act. (A more detailed discussion on available remedies in relation to copyright infringement under Canadian law is provided in chapter 4).

¹⁴⁹ *Ibid* s 3(1)(b)-(c).

¹⁵⁰ *Ibid* s 3(1)(f).

¹⁵¹ *Ibid* s 27(1); see also Nesbit, *supra* note 66 at 116.

In the context of P2P file sharing both Swedish and Canadian case law support the finding that downloading and uploading of copyrighted files by means of P2P technology constitute copyright infringement. In the *Pirate Bay* case, the Swedish Court held that the downloading, uploading and sharing of files over P2P networks, is covered by the term ‘communication to the public’ under Article 2, Point 1 of the SwCA.¹⁵² Thus, a copyright protected work shared over a P2P network, without the copyright owner’s consent, represents a violation of the copyright owner’s exclusive right to communicate that work to the public, and hence is a copyright infringement under Swedish law. Similarly to the SwCA, uploading to and downloading of works from P2P networks constitute an infringement of the copyright owner’s exclusive right to communicate the work to the public by telecommunication pursuant to Section 3 of the CaCA.¹⁵³ While it is easier to see how uploading of a work on a P2P network constitutes a communication to the public, the fact that downloading is also covered by this term needs further explanation. Downloading of a work represents a communication to the public because, as will be explained in more detail in chapter

¹⁵² The Swedish Court held that a ‘communication to the public’ “is deemed to include any making available of the work to the public by wire or by wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public includes also acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them.” With respect to this provision the Court held that “acts of communication that occur in such a way that members of the public may access the work...at a time individually chosen by them” is not to be interpreted as there must be a complete freedom of choice with respect to timing, or that the work must be continuously available for downloading, in order for the work to be considered ‘communication to the public’ under the provision. In *the Pirate Bay* case, it was simply enough, in order for the works in question to be considered ‘communicated to the public’, that these at some point had been possible to access through the file sharing site. Thus, all types of communications of a work at a distance, including also interactive communications and other on-demand services, is included in the right holder’s exclusive right to exploit the work. *Supra* note 31 at 17; see also Prop. 2004/05:110 *Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG m.m.* (10 March 2005) at 69 f and 379.

¹⁵³ *Supra* note 42 s 3(1)(f).

3, when users download works by means of P2P file sharing, the works are at the same time shared to other users that have joined the file sharing network (or so called 'swarm'). Sharing at the same time as you download is in most cases a precondition to join a swarm. It is further worth noting that the right under the SwCA for anyone to make, for private purposes, one or a few copies of works that have been made available to the public, does not apply when the master copy has been made available to the public in violation of the copyright owner's exclusive right to, e.g. communicate the work to the public. Article 12, Paragraph 4 of the SwCA states:

This Article [i.e. the private use exception] does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of Article 2 [stating the copyright owner's exclusive rights].

Thus, downloading copyrighted works by means of P2P technology, also for private purposes, constitutes a copyright infringement under Swedish law. Consequently, users who download files through P2P file sharing networks can never escape liability for copyright infringement by making the 'private use argument'. The CaCA as amended by the *Copyright Modernization Act* similarly addresses this issue by providing that:

It is not an infringement of copyright for an individual to reproduce a work...or any substantial part of the work if

(a) the copy of the work...from which the reproduction is made is *not* [emphasis added] an infringing copy.¹⁵⁴

¹⁵⁴ *Supra* note 42 s 29.22(1).

The act of reproducing a work for private purposes by downloading it by means of P2P file sharing, is not a reproduction that Canadian law considers a lawful private reproduction since the source of the copy is illegal. (The source of the copy has, by being uploaded on a P2P file sharing server, been communicated to the public in violation of the copyright owner's exclusive right). Moreover, in *BMG Canada*¹⁵⁵, the Canadian Court of Appeal indicated that copyrighted works uploaded and downloaded by means of P2P file sharing constitute infringement of the copyright owner's exclusive right to authorize the reproduction of the work.¹⁵⁶

Although it appears clear that the unauthorized sharing of copyrighted works over P2P networks constitutes copyright infringement, it has not always been clear against whom the copyright owners may raise injunction and compensation claims. This is one of the core issues in enforcing copyright online. Hagen notes that "the ability of copyright owners to maintain control of the distribution of their copyrighted subject matter [on the Internet] depends upon their control of Internet communications."¹⁵⁷ But this ability is limited because "unlike conventional telecommunications systems there is no central point of control."¹⁵⁸ However, a number of solutions to how copyright owners are to protect their rights on the Internet have been proposed by jurisdictions worldwide, including both technical and

¹⁵⁵ *BMG Canada Inc v Doe*, [2005] FC 81, 83.

¹⁵⁶ *Ibid*; see also Pessach, *supra* note 90 at 16-19.

¹⁵⁷ *Supra* note 43 at 363.

¹⁵⁸ *Ibid* at 365.

legislative solutions.¹⁵⁹ The approach adopted by Sweden, is to extend liability to ISPs and other third parties who contribute to a copyright infringement, in accordance with the doctrine on contributory liability in copyright law. In Canada, the issue of liability for ISPs and other third parties for online copyright infringement depended until the *Copyright Modernization Act* came into force on the authorization doctrine. However, with the *Copyright Modernization Act* being law in Canada, the issue of third party liability has been clarified further: Liability may now be imposed also on anyone who enables others' copyright infringement.¹⁶⁰

2.4 Why holding ISPs liable?

Extending liability for illegal content that appears on the Internet, from those who have uploaded it (i.e. the content providers), to the ISPs is not a new phenomenon. In fact, "[t]he problem of liability of online intermediaries on the Internet was one of the earliest problems in the cyberspace environment to grab headlines, worry the fledging Internet industry and demand the serious attention of lawyers."¹⁶¹ Already from the early 1990s cases (mainly from the US and UK) extended the liability for content that was in some way criminally or civilly actionable, such as libelous, defamatory or pornographic, to providers of Internet access.¹⁶² These early cases successfully claimed that without the aid of an Internet access provider, transmission and hosting services, no content author or provider could, in

¹⁵⁹ See de Beer and Clemmer, *supra* note 41.

¹⁶⁰ *Supra* note 12 s 27(2.3).

¹⁶¹ Edwards & Waelde, *supra* note 17 at 4.

¹⁶² *Ibid* at 15.

general, publish or distribute material on the Internet.¹⁶³ Consequently, suing ISPs as publishers instead of the original content authors or providers fast became the norm in early Internet libel cases.¹⁶⁴ By virtue of their role as ‘gatekeepers’ to the Internet, the ISPs have since the advent of the commercial Internet “felt themselves to be sitting on a liability time-bomb”¹⁶⁵. And this time bomb exploded with the invention of P2P file sharing technology.

In the past, film production and record companies (residing mainly in the United States) sought to enforce their copyrights by suing individual file sharers.¹⁶⁶ Bassett explains that this was because “direct infringement by one user was easier to prove than secondary infringement by a large company.”¹⁶⁷ Suing individuals, however, Bassett further notes, raised legal costs, was time consuming, resulted in bad publicity for the suing companies, and perhaps most important, “failed to substantially curb illegal file- sharing.”¹⁶⁸ Consequently, film production and record companies are again looking to companies to enforce their rights.¹⁶⁹ Accordingly, recent case law from Sweden and other European countries show a trend in holding the ISPs liable for their users’ copyright infringements. In the *Black Internet*¹⁷⁰ and

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid*; see also Bernstein & Ramchandani, *supra* note 63 at 77.

¹⁶⁶ Bassett, *supra* note 24 at 76.

¹⁶⁷ *Ibid*; see also *Sweden v Dalerstedt*, [2009] Vänersborg District Court B 2569-09; and *Sweden v Brodin*, [2012] Svea Court of Appeal B 7972-11.

¹⁶⁸ *Supra* note 24 at 76-77.

¹⁶⁹ *Ibid* at 77.

¹⁷⁰ *Black Internet AB v EMI Music Sweden AB*, [2010] Svea Court of Appeal Ö 7131-09/Ö 8773-09 [*Black Internet*].

*Portlane*¹⁷¹ cases from 2010 a number of American and European film production and record companies sought injunction orders against the ISPs 'Black Internet' and 'Portlane', ordering them to cease providing Internet access to The Pirate Bay's website and so called file sharing tracker, claiming that by providing these services, Black Internet and Portlane contributed to The Pirate Bay's contributory copyright infringement. The Swedish Court granted the injunction orders in accordance with the companies' request. However, the primary focus of film production and record companies and other movie and music industry organizations is neither the traditional ISPs nor the individual file sharers. Instead copyright owners have begun largely focusing on suing the P2P intermediaries.¹⁷²

On 17 March 2006, the Swedish Government received the following letter from John Malcolm, Executive Vice President and Director of Worldwide Anti-Piracy for the Motion Picture Association of America (**MPAA**):

Clearly the complaints that we filed on behalf of our neighbors in 2004 and 2005 with the police in Stockholm and Gothenburg against the operators of The Pirate Bay have resulted in no action. As I am sure you are aware, the American Embassy has sent entreaties to the Swedish government urging it to take actions against The Pirate Bay and other organization operating within Sweden that facilitate copyright theft. As we discussed during our meeting, it is certainly not in Sweden's best interests to earn a reputation among other nations and trading partners as a place where utter lawlessness with respect to intellectual property is tolerated. I would urge you once again to exercise your influence to urge law

¹⁷¹ *Columbia Pictures Industries Inc v Portlane AB*, [2010] Svea Court of Appeal Ö 10146-09 [*Portlane*].

¹⁷² Bassett, *supra* note 24 at 77.

enforcement authorities in Sweden to take much-needed action against The Pirate Bay.¹⁷³

With MPAA and the Government of the United States threatening to blacklist Sweden within the World Trade Organization (**WTO**)¹⁷⁴, the Swedish Government two years later brought criminal charges of copyright infringement against the operators of The Pirate Bay, and the Swedish Court had for the first time the opportunity to interpret Sweden's already existing safe harbors, in the context of illegal file sharing, copyright infringement, and P2P intermediaries.¹⁷⁵ Surprisingly, the Swedish Court ruled that the safe harbors were not applicable to P2P intermediaries; as will be shown in the next two chapters, there is strong support for the argument that not only traditional ISPs, but also P2P intermediaries, should qualify for liability protection as *hosts* under both the Swedish and Canadian safe harbors.

¹⁷³ Letter from John G. Malcolm, Executive Vice-President and Director of Worldwide Piracy, MPAA, to Dan Eliasson, Secretary of Ministry of Justice, Sweden (17 March 2006) [*Letter from MPAA*].

¹⁷⁴ Bassett, *supra* note 24 at 79.

¹⁷⁵ *Pirate Bay District Court*, *supra* note 79; *Pirate Bay*, *supra* note 31; see also Högsta Domstolens Beslut [2012] B 5880-10 [*Pirate Bay Supreme Court Decision*].

3 DEFINING INTERNET SERVICE PROVIDERS AND P2P INTERMEDIARIES

3.1 Introduction

The term ISP has been briefly defined above as “the range of providers, acting as go-betweens between content creator and consumer, involved in the information delivery process on the Internet.”¹⁷⁶ With this broad definition, a wide range of actors, including P2P intermediaries, fall under the definition of an ISP. This chapter attempts to define the term further and explain what type of ISPs are eligible for protection under the Swedish and Canadian safe harbors. Specifically, this chapter looks into where P2P intermediaries fall pursuant to this definition. Through doctrinal review of legislation and secondary doctrinal sources, section 3.2 explains what types of ISPs are eligible for protection under the Swedish and Canadian safe harbors. Section 3.3 provides a definition of P2P intermediaries. It is being argued that P2P intermediaries fall both under the definition of ‘service providers’ in the SwECA, and providers of ‘network services’ in the CaCA, which is the first prerequisite to become eligible for protection under both the Swedish and Canadian safe harbors.

3.2 ISPs: content-, access, and host providers

The term ISP is a confusing term for an Internet intermediary because it does not necessarily distinguish between the underlying roles of access providers, hosts

¹⁷⁶ See Hugenholtz, *supra* note 14 at 7.

and others.¹⁷⁷ This distinction is, as will be shown in this chapter, important in defining an ISP's legal liability under Swedish and Canadian law. As mentioned in chapter 1, traditionally, ISPs are companies like Bell, Rogers, Telus, Tele2, AOL and others that provide Internet access under contract with their customers.¹⁷⁸ It is often considered to be two levels of ISPs: those that provide backbone access services (i.e. ISPs that provide the actual wires for communication on the Internet) and those that provide secondary access and other services (i.e. ISPs that provide users with Internet access etc.).¹⁷⁹ In the early history of the Internet, the difference between ISPs providing backbone access, secondary Internet access, and other services led to a distinction being made between Internet access providers and ISPs.¹⁸⁰ Internet access providers were those who merely provided fundamental communications services such as Internet access and hosting, and ISPs those who provided additional services that facilitated the transaction between end users, such as search functions, e-mail etc.¹⁸¹ However, this distinction has become difficult to maintain, Lillian Edwards and Charlotte Waelde explain:

¹⁷⁷ OECD, *supra* note 125 at 11.

¹⁷⁸ Hamilton, *supra* note 3 at 287.

¹⁷⁹ *Ibid* at 287. Backbone providers are ISPs that do not retail Internet services to individual subscribers but provide the facilities and long distance connections including fiber optics and telephone wires that support the Internet. SOCAN, *supra* note 45 at para 15. ISPs that provide secondary access are the ISPs who provide the users with (secondary) Internet access and other services. The backbone providers, in turn, provides these 'secondary ISPs' with access to the wires that connect all the 'secondary ISPs' to each other allowing them to offer their customers Internet access at high speed. Webopedia, "What is backbone providers" *Webopedia* (1 March 2013), online: Webopedia <<http://www.webopedia.com>>; see also OECD, *supra* note 125 at 11.

¹⁸⁰ Hamilton, *supra* note 3 at 287; see also Chris Reed, *Internet Law: Text and Materials*, 2d ed (London, UK: Oxford University Press 2004) at 78; see also Edwards & Waelde, *supra* note 17 at 6.

¹⁸¹ Reed, *supra* note 180 at 287; see also Edwards & Waelde, *supra* note 17 at 6.

the early sharp distinction drawn basically between Internet Access Providers ('IAPs')...and Internet Service Providers ('ISPs')...became less and less meaningful as the ISP sector expanded during the boom years of the Internet to provide portal services giving access to large amounts of both in-house and third party produced content, while providers of what might be seen as "pure" telecommunications services, like mobile phone companies, also became deeply involved in both the "content business" and in providing "value added" services such as location data handling.¹⁸²

The new types of Internet intermediaries that emerged during these 'boom years of the Internet' include for example, online retailers and distributors of goods and services (e.g. Amazon), dating websites (e.g. eDarling), online auction sites (e.g. eBay), software and game providers (e.g. Nintendo), traditional newspapers and news channels launching digital news services (e.g. CNN.com), search engines (e.g. Google), social networking sites (e.g. Facebook), blogs, universities, libraries and archives offering access to digitized content, chatrooms, individuals and institutions setting up websites which involved content provided by a third part or hyperlinks to such content.¹⁸³ These actors are all more or less involved in providing Internet content, and at the same time involved in the transmission, storage and location of that content, and are thus ISPs.¹⁸⁴ However, when referring to ISPs in a legal context, it is important to distinguish between the underlying roles of access providers, host providers and content providers.¹⁸⁵ This is because it is only access and host providers that are relevant to the matter of liability for third party content under Swedish and Canadian law. Unlike content providers, access and host

¹⁸² *Supra* note 17 at 6.

¹⁸³ *Ibid* at 5-6.

¹⁸⁴ *Ibid* at 6; see also OECD, *supra* note 125 at 11-12.

¹⁸⁵ Kleinschmidt, *supra* note 102 at 333; see also OECD, *supra* note 125 at 11.

providers do not create, offer or use any Internet content themselves; access and host providers are “neither publisher or offeror, nor consumer or users of content.”¹⁸⁶ Instead, these types of ISPs merely provide others with intermediary services that technically enable the publication and accessibility of content provided by others.¹⁸⁷ While *content providers* create digital content and offer it online, *host providers* provide storage capacities and *access providers* transmit Internet content.¹⁸⁸ However, even though it for legal reasons is important to distinguish between the underlying roles of access providers, hosts, content providers and others, it should be noted that in reality these categories are not always clear cut. An ISP may play more than one role, and this role may also change over time.¹⁸⁹ Nevertheless, it is only host- and access providers that act strictly as intermediaries that may benefit from the Swedish and Canadian safe harbors.

Having provided a definition of ISPs in the context of legal liability for third party content, the rest of this chapter examines where the P2P intermediaries fall pursuant to this definition. In order to answer this question, it is crucial to have an understanding of what P2P file sharing is and the role the P2P intermediaries play in the exchange of music, movies, etc., over P2P file sharing networks. This is accounted for in the next section.

¹⁸⁶ Kleinschmidt, *supra* note 102 at 333.

¹⁸⁷ *Ibid* at 333.

¹⁸⁸ *Ibid* at 333.

¹⁸⁹ See OECD, *supra* note 125 at 5, 10.

3.3 Definition of P2P intermediaries

(a) *What is P2P file sharing?*

File sharing is when files, stored on a computer, are made available to other users (computers) on the Internet.¹⁹⁰ There are a number of different technologies for sharing files, but the two main ones are the so called client-server structure, and the P2P structure.¹⁹¹ The client-server structure is an older method for sharing files, which requires a central computer (host computer) from which all the uploading and downloading takes place.¹⁹² Today, the P2P structure is the dominating file sharing technology.¹⁹³

Files that are shared by means of P2P technology are downloaded from other users, who already have the files stored on their computers. Unlike the client-server structure, there is no central host computer in P2P technology (against which infringement claims could be raised), and because the file is downloaded from ordinary computers and not from a server, they are referred to as 'peers'.¹⁹⁴ In order for two users or peers to exchange files between each other through the P2P file sharing technology, they must have a particular file sharing software program installed on their computers. The most popular file sharing program is the BitTorrent

¹⁹⁰ Carmen Carmack, "How BitTorrent Works" (26 March 2005), online: How Stuff Works <<http://computer.howstuffworks.com>>.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Edwards, *supra* note 30 at 17.

¹⁹⁴ Carmack, *supra* note 190.

software or protocol as it is also called.¹⁹⁵ The BitTorrent software may be downloaded for free and is available on numerous websites on the Internet.

The BitTorrent file sharing software divides files, such a movie or a song, often referred to as the *target file*, into very small pieces, and gives each piece a mathematical number, a so called *hash number*.¹⁹⁶ The BitTorrent software also creates so called torrent files. A *torrent file* is data about the target file that specifies how many pieces the target file has been divided into and the location of each piece.¹⁹⁷ It should be noted that torrent files contain *no* information about the *content* of the target file.¹⁹⁸ The sole function of torrent files is to *link* users to the right piece of the target file, so that all pieces of the movie, song etc. can be collected by the user.¹⁹⁹ In order for the target file to be shared over a P2P network, the torrent file must also contain the address to one or more trackers.²⁰⁰ The *tracker* notifies users about who else in the network is sharing the target file the user is interested in.²⁰¹

¹⁹⁵ There are many different types of P2P file sharing programs available such as BitTorrent, uTorrent, Frostwire, LimeRunner, DC++ etc. BitTorrent is now the dominant player in most Western markets except Latin America. Edwards, *supra* note 30 at 17.

¹⁹⁶ *Pirate Bay District Court*, *supra* note 79 at 51.

¹⁹⁷ Camrack, *supra* note 190.

¹⁹⁸ Andreasson & Schollin, *supra* note 32 at 536.

¹⁹⁹ *Ibid.*

²⁰⁰ *Pirate Bay District Court*, *supra* note 79 at 51.

²⁰¹ Bradley Mitchell. "What is a BitTorrent tracker?" *About* (1 March 2013), online: About <<http://www.about.com>>.

Specifically the tracker identifies the network location of users that are uploading and downloading the target file and passes this information onto the user.²⁰²

In order for a user to *share* a work that he or she has stored on his or her computer over a P2P network, the user must for each work create a torrent file by using the BitTorrent software. When the torrent file has been created, the creator, often referred to as the 'seeder', receives information about how many pieces the target file has been divided into, including the target file's hash number.²⁰³ The seeder must also include the web address to one or more trackers in the torrent file.²⁰⁴ The seeder may then upload the torrent file on any P2P file sharing website that supports the BitTorrent software. When the torrent file is uploaded and stored on the website, it becomes searchable and available for other users.²⁰⁵ Thus, no copy of the work is stored on the P2P file sharing website, the work (target file) will always remain at the seeder's computer from where other users may download it, piece by piece, over the P2P network which has been created between the users.²⁰⁶

To *download* a target file via a P2P network, the user begins by searching on the file sharing website for the specific torrent file that the user is interested in. Normally, the seeder gives the torrent file the same name as the target file (i.e. the

²⁰² *Ibid.*

²⁰³ *Pirate Bay District Court, supra* note 79 at 52.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Andreasson & Schollin, *supra* note 32 at 536. The incentive for a user to take on the role of a 'seeder' and share the works he or she already has, is explained by the file sharing process: The seeder earns points that make his or her future downloading of other works faster. The more you share, the faster you download other works. Carmack, *supra* note 190.

name of the movie, song etc.).²⁰⁷ When the user has found the torrent file that he or she is looking for, he or she needs the (BitTorrent) file sharing software to open the torrent file. When the user opens the torrent file, the tracker is contacted and informs the user about who else is in the process of sharing the target file which the torrent file links to.²⁰⁸ Subsequent to a so called 'hand shaking', the user may join the 'swarm' of users who are in the process of sharing the same target file.²⁰⁹ As soon as one user in the swarm has successfully downloaded a piece of the target file, that piece becomes available for other users in the swarm.²¹⁰ By gathering the small pieces of the target file, and download them simultaneously from people who already have downloaded them, the transfer speed increases significantly.²¹¹ As a result, popular and large files, such as movies and TV programs may be downloaded very fast.²¹²

(b) *The P2P intermediary's role in P2P file sharing*

The *P2P intermediary's role* in the uploading, downloading and sharing processes described above is typically to provide the *website* with a *database* in which the seeder may upload and store the torrent files that he or she has created. The P2P intermediary typically also provides a *search function* so that users can search for the torrent file they are looking for. It is typically also the P2P intermediary

²⁰⁷ *Pirate Bay District Court, supra* note 79 at 52

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*; see also Carmack, *supra* note 190.

²¹¹ Carmack, *supra* note 190.

²¹² *Ibid.*

who provides the *tracker function*. This being said, is the provision of these type of intermediate services of such character as to qualify P2P intermediaries for protection under the Swedish and Canadian safe harbors?

(c) *The position of P2P intermediaries under the Swedish E-Commerce Act*

The Swedish safe harbors, laid down in the SwECA, apply only to so called 'service providers' (*tjänsteleverantörer*).²¹³ Rather than granting immunity to specific categories of service providers, the SwECA exempts from liability specific service provider activities. Accordingly, service providers that provide mere conduit, caching (a type of access services) and hosting services, may not be held liable for the content they provide access to or host, (provided that they comply with the conditions for liability exemption established by the safe harbors, see chapter 4 of this thesis). Thus, the first issue to assess in determining if a P2P intermediary could benefit from the Swedish safe harbors is if they fall under the definition of a service provider under the SwECA.

A *service provider* is defined in the SwECA as a "natural or legal person providing an information society service."²¹⁴ An *information society service* is defined as "services normally provided for remuneration and provided at a distance by electronic means and at the individual request of a recipient of a service."²¹⁵ Further,

²¹³ The E-Commerce Directive, however, uses the term 'Information Society Service Providers' or 'intermediary service providers'. The definition provided for in the SwECA, however, corresponds with that provided for in the E-Commerce Directive. *Supra* note 21 art 2(b).

²¹⁴ *Swedish E-Commerce Act*, *supra* note 27 art 2 [translated by author].

²¹⁵ *Ibid* [translated by author].

a *recipient of a service* is defined as a “natural or legal person who uses an information society service”.²¹⁶ Thus, a service provided on the Internet is considered an information society service when the following four conditions are met:

- the service is normally be provided for remuneration;
- the service is provided at a distance;
- the service is provided by electronic means; and
- the service is provided at the individual request of a recipient of a service.

These conditions were established by the E-Commerce Directive and have been implemented into the SwECA. It is a well-established EU principle that domestic legislation, and in particular legislation enacted or amended to implement EU Directives, must be construed as far as possible in conformity with, and to achieve the result intended by the Directives.²¹⁷ Thus, *Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and*

²¹⁶ *Ibid* [translated by author]; by contrast, the E-Commerce Directive defines an ‘information society service’ as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.” ‘Recipient of a service’ is defined as “any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purpose of seeking information or making it accessible”. *Ibid* arts 2 (d), 1(2).

²¹⁷ See *Twentieth Century Fox*, *supra* note 120 at para 93 for a review of EU case law establishing this principle of interpretation of domestic legislation in the context of European directives; see also discussion on the function of Directives in chapter 1 of this thesis.

regulations, as amended by *Directive 98/48/EC*²¹⁸ (Directive 98/34/EC), serves as ground for interpretation of the four conditions above.

Beginning with the second bullet point, the Directive 98/34/EC clarifies that a service is provided *at a distance* when it is “provided without the parties being simultaneously present”.²¹⁹ *By electronic means* (third bullet point) has been defined by the Directive as meaning that “the service is sent initially and received at its destination by means of electronic equipment for the processing...and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.” *At the individual request of a recipient of a service* (fourth bullet point) shall be understood as “the service is provided through the transmission of data on individual request.”²²⁰ As mentioned above, the services typically provided by a P2P intermediary include a website with a database on which users may upload and store torrent files, and from which other users may download the torrent files; a search function for the torrent files; and a tracker which coordinates the file transfer among the users. Clearly, the service provided from a P2P intermediary’s website is provided at a distance: the P2P intermediary’s service is available to the users at a time chosen by them and the P2P intermediary does not have to be present at the time the users choose to use it. It is also clear that a P2P intermediary’s service is provided by electronic means and at the individual

²¹⁸ EC, *Commission Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations*, [1998] OJ, L 217/18 at 18 [*Directive 98/48/EC*].

²¹⁹ *Ibid* art 1(2).

²²⁰ *Ibid* art 1(2).

request by the users: the service is provided over the Internet and may be utilized at a time and place chosen by the user.²²¹ However, the first criteria, namely that the service must *normally be provided for remuneration*, is more complicated in the context of P2P intermediaries, as these are typically provided to the user free of charge.

The preparatory works to the SwECA holds that since the law requires that the service is only *normally* and not *actually* provided for remuneration.²²² It is therefore sufficient that the service in question “normally is of economic importance”.²²³ Lillian Edwards explains with respect to the same condition, that an online service, in order to be considered an information society service, does not have to give rise to online contracting, it is enough that “the service broadly forms part of an ‘economic activity’”.²²⁴ Accordingly, a P2P intermediary is a service provider pursuant to the SwECA, if there is some kind of direct or indirect financial compensation at hand.²²⁵ The Swedish preparatory works further clarify that such direct or indirect financial compensation include, *inter alia* advertisement and online marketing.²²⁶ Thus, even though users of P2P file sharing services typically do not pay to use a P2P intermediary’s services, the requirement of remuneration is still

²²¹ The Swedish District Court found these conditions being met in relation the P2P intermediary, see *supra* note 79 at 74.

²²² *Prop. 2001/02:150, supra* note 29 at 56 [translated by author].

²²³ *Ibid* [translated by author].

²²⁴ *Supra* note 30 at 8.

²²⁵ *Prop. 2001/02:150, supra* note 29 at 56.

²²⁶ *Ibid.*

met if the service is financed by advertising revenues.²²⁷ In *Google v Louis Vuitton*²²⁸, the CJEU found that Google 'Adwords' referencing service (see chapter 4 below) was a 'services provider' even though the users of the search engine 'Google' and its operator (Google France) did not claim any remuneration for displaying the search results.²²⁹ The CJEU arrived at this conclusion by holding that the search engine was financed by advertisement revenues and revenues from the Adwords business, and hence provided for remuneration.²³⁰ Similarly, in the *Pirate Bay* case, the Swedish Court found that even though The Pirate Bay's users did not pay for the file sharing service, the requirement of remuneration was met because The Pirate Bay was at least partially financed by advertising revenues.²³¹ Consequently, P2P intermediaries that are at least partially financed by advertising revenues, fall under the SwECA's definition of a service provider. However, it should be noted that neither the *Prate Bay* case nor *Google v Louis Vuitton*, conclusively settle the matter of whether The Pirate Bay or Google, in their roles as cost-free providers of a website, torrent file directory, tracker and search links would qualify as service providers under the SwECA and E-Commerce Directive.²³²

²²⁷ *Ibid.*

²²⁸ *Google France SARL v Google Inc*, 2010 CJEU C-236/08 – C-238/08 [Google].

²²⁹ Edwards, *supra* note 30 at 8-9.

²³⁰ *Google*, *supra* note 238 at para 115.

²³¹ See the District Court's judgment to which the Court of Appeal refers. *Pirate Bay District Court*, *supra* note 79 at 74; *Pirate Bay*, *supra* note 31 at 24.

²³² See Edwards, *supra* note 30 at 9.

(d) *The position of P2P intermediaries under the Copyright Modernization Act*

Instead of the term ‘service provider’ employed by the SwECA, the *Copyright Modernization Act* safe harbors exempt from liability persons providing ‘network services’. A *provider of a network service* is defined as a person who provides services related to the operation of the Internet or another digital network. Section 31.1(1) of the CaCA reads:

A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or reproduction of a work or other subject-matter through the Internet or that other network, does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

Pursuant to this definition, all persons that utilize any digital network are providers of network services.²³³ According to Hagen, “another digital network” includes also P2P file sharing networks: “[p]resumably [another digital network]...includes private networks that are not part of the Internet as well as overlay networks on the Internet, including virtual private networks and peer-to-peer file sharing networks.”²³⁴

Consequently, a person who, in providing a service related to the operation of a P2P network, i.e. a P2P intermediary, is a network service provider under the definition of Section 31.1(1) of the CaCA.

Having concluded that P2P intermediaries are ‘service providers’ under the SwECA and ‘network service providers’ under the CaCA, the next question is if an

²³³ Hagen, *supra* note 43 at 375.

²³⁴ *Ibid.*

Internet intermediary could be a service provider and network service provider *without* being eligible for protection under the Swedish and Canadian safe harbors.

This question is dealt with in the next chapter.

4 LIABILITY EXEMPTION UNDER THE CANADIAN AND SWEDISH SAFE HARBORS: FOR P2P INTERMEDIARIES?

4.1 Introduction

The previous chapter showed that P2P intermediaries fall under the definition of a ‘service provider’ (Sweden) and a ‘network service provider’ (Canada), which is a precondition to benefiting from the Swedish and Canadian safe harbors. The goal of this chapter is to take that analysis further and explore if P2P intermediaries also meet the prerequisites for liability exemption established by the Swedish and Canadian safe harbors. In order to meet this goal, sections 4.3 and 4.4 provide an account for the contents of the Swedish and Canadian safe harbors and explain what would be required by a P2P intermediary in order to qualify for protection. Section 4.4 provides an analysis of whether P2P intermediaries could benefit from the Swedish and Canadian safe harbors. This chapter argues that P2P intermediaries should qualify for liability protection under the Swedish and Canadian safe harbor afforded *hosts*. While this is arguably the case in Canada, the Swedish Court of Appeal in the *Pirate Bay* case denied The Pirate Bay access to the Swedish safe harbors. This chapter argues that the Swedish Court’s conclusion is unfortunate in light of, *inter alia*, the CJEU’s ruling in *Google v Louis Vuitton*. Before turning attention to the scope of the Swedish and Canadian safe harbors, section 4.2 explains what type of liability the safe harbors apply to.

4.2 Overview of the Canadian and Swedish safe harbors: Exemption from liability for what?

The Swedish safe harbors address the *civil* and *criminal* liabilities of ISPs acting as mere conduits, cachers, and hosts. Each safe harbor establishes a number of criteria that must be met in order for the ISP to enjoy liability protection. As explained in more detail below, ISPs that act as *mere conduits* will not be liable for damages or for any other pecuniary remedy or for any criminal sanction under Swedish law, provided that they do not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission.²³⁵ Thus, Swedish law regards mere conduits “as basically absolved from all liability as regards...content...originated by and destined for other parties”²³⁶. ISPs engaged in *caching* activities will not be liable for damages or other remedy or criminal sanction where the caching is “automatic, intermediate and temporary storage of information carried out for the sole purpose of performing the transmission.”²³⁷ Finally, ISPs acting as *hosts* are immune from *criminal liability* provided that they have no actual knowledge of infringing content being stored on their servers; and are exempt from *civil liability* provided that they: a) Have no actual knowledge of infringing content; and b) are “not aware of facts and circumstances from which the illegal activity or

²³⁵ Swedish E-Commerce Act, *supra* note 27 art 16; compare E-Commerce Directive, *supra* note 21 s 12; see also Edwards, *supra* note 30 at 9; Pinsnet Masons, “The UK’s E-Commerce Regulations” (September 2010), online: Out-Law <<http://www.out-law.com>>.

²³⁶ Edwards, *supra* note 30 at 9.

²³⁷ Swedish E-Commerce Act, *supra* note 27 art 16(2) [translated by author]; compare E-Commerce Directive, *supra* note 21 s 13.

information is apparent”²³⁸. In addition, Article 19 of the SwECA states with respect to criminal liability of these actors that only where a crime has been committed *willfully* may criminal liability attach: “A service provider that transmits or stores information on behalf of another person, may be held liable for a criminal offence relating to the content of that information only if the offence was committed *willfully*.”²³⁹ This is an important provision in the context of copyright liability, because copyright infringement is a criminal offence under Swedish law. Thus, a service provider who unintentionally transmits, caches or hosts infringing content may not be imposed criminal remedies. Damages liability could probably theoretically still apply, however in light of the conditions for liability exemption under the safe harbors, it is unlikely that a service provider who does not know that it transmits, caches and hosts content would *not* be protected from damages liability claims under the safe harbors. As will be shown in the next section, the application of the safe harbors are, if not explicitly, at least indirectly, dependent on the ISP’s knowledge.

Regardless of the question of liability under the Swedish safe harbors, a copyright owner may always seek different types of injunctions to be imposed upon mere conduits, cachers, hosts and other ISPs, on penalty of a fine.²⁴⁰ In accordance with Preamble 45 of the E-Commerce Directive “such injunctions can in particular

²³⁸ *Swedish E-Commerce Act*, *supra* note 27 art 18(1) [translated by author]; compare *E-Commerce Directive*, *supra* note 21 art 18; see also Edwards, *supra* note 30 at 10.

²³⁹ *Swedish E-Commerce Act*, *supra* note 27 art 19 [translated by author].

²⁴⁰ *Swedish Copyright Act*, *supra* note 37 art 53b.

consist of orders by courts or administrative authorities requiring the termination or prevention of any infringements, including the removal of illegal information or the disabling of access to it.”²⁴¹ Accordingly, the Swedish Court has in two cases imposed injunctions on providers of Internet access, who were otherwise protected from civil and criminal claims under the SwECA, ordering the ISPs to terminate Internet access to a website that contained copyright content.²⁴²

In cases where copyright has been infringed, and the Swedish safe harbors do not apply, the copyright infringer may be punished by fines or imprisonment in accordance with the SwCA: “Anyone who...commits an act which infringes...copyright...shall where the act is committed willfully or with gross negligence, be punished by fines or imprisonment for not more than two years.”²⁴³ With the *Pirate Bay* case, it is now also clear that anyone who contributes to a copyright infringement may be punished by fines or imprisonment in accordance with the Swedish doctrine on contributory liability. However, these are remedies available to the prosecutor. Copyright owners may raise damages claims against copyright infringers pursuant to the SwCA. Anyone who exploits a work in violation of the SwCA shall pay to the copyright owner “a reasonable compensation for the exploitation.”²⁴⁴ Unlike Canadian law, there is no concept of statutory damages in

²⁴¹ The SwCA similarly provides: “Upon a petition by the author or his or her successor in title or by a party that, on the basis of a license, has the right to exploit the work, the Court may issue an injunction prohibiting, on penalty of a fine, a party that commits, or contributes to, an act constituting an infringement or a violation referred to in Article 53 to continue that act.” *Ibid* art 53b.

²⁴² *Black Internet*, *supra* note 170; *Portlane*, *supra* note 171.

²⁴³ *Supra* note 37 art 53 [translated by Henry Olsson (Ministry of Justice Swede: 2009)].

²⁴⁴ *Ibid* art 54 [translated by Henry Olsson (Ministry of Justice Swede: 2009)].

Swedish law (see below). Damages for copyright infringement is instead calculated with consideration taken to e.g. lost profit, profit that has been made by the party that committed the infringement, damage caused to the reputation of the work, and moral damage.²⁴⁵ In addition, a copyright owner whose right has been violated may, upon petition, require the infringing works to be recalled from the channels of commerce, be altered or destroyed, “or that some other measure shall be taken in respect” of the infringing work.²⁴⁶ The copyright owner may also seek pecuniary compensation for appropriate measures to disseminate information about the judgment in the case.²⁴⁷

The Canadian safe harbors are drafted somewhat differently. As mentioned in chapter 1, the Canadian safe harbors do not operate to exempt ISPs from liability for an act that would otherwise be considered illegal. Instead, the Canadian safe harbors state that copyright is not infringed in case of mere communication, caching and hosting of infringing content, provided that certain conditions are met. These conditions are, as will be shown below, largely the same as under the Swedish safe harbors. In cases where the safe harbors do not apply and the ISP is found liable for copyright infringement, the CaCA provides the available remedies: A copyright owner is under the CaCA, where copyright has been infringed, entitled to all civil remedies “by way of injunction, damages, accounts, delivery up and otherwise that

²⁴⁵ *Ibid* art 54 s 2.

²⁴⁶ *Ibid* art 55 [translated by Henry Olsson (Ministry of Justice Sweden: 2009)].

²⁴⁷ *Ibid* art 53h.

are or may be conferred by law for the infringement of a right.”²⁴⁸ With respect to damages, copyright owners may choose a statutory damages ranging between \$500 and \$20,000, for all infringements involved in the proceedings, calculated on the basis of the number and flagrancy of the infringements.²⁴⁹ It is further worth noting that the *Copyright Modernization Act* establishes a cap with respect to non-commercial infringement, of a sum of not less than \$100 and not more than \$5,000.²⁵⁰ In addition to civil remedies, the CaCA provides *criminal remedies*, such as fines and imprisonment, applying to those who *knowingly* infringe copyright.²⁵¹

4.3 The Swedish safe harbors

(a) *Access providers*

Access providers are under certain conditions, established in Article 16 and 17 of the SwECA, exempted from liability for the content they provide access to. Article 16 regulates the liability of service providers that merely transmit information or provide Internet access (i.e. mere conduits). Article 16 reads:

(1) A service provider that transmits information provided by a recipient of the service in a communication network, or provides access to such network, shall not because of the content of the information be liable to any damage or economic sanction.

²⁴⁸ *Supra* note 42 s 34(1).

²⁴⁹ *Ibid* s 38.1(1) and (5); Austl, Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats* (November 2000) at 66.

²⁵⁰ Copyright Modernization Act, *supra* note 12 s 38(1)(b); Michael Geist, “Why Liability is Limited: A primer on New Copyright Damages as File Sharing Lawsuits Head To Canada” *Michael Geist Blog* (28 November 2010), online: Michael Geist Blog <<http://www.michaelgeist.ca>>.

²⁵¹ Canadian Copyright Act, *supra* note 42 s 42.

(2) The transmission and provision in accordance with the first paragraph also covers such automatic, intermediate and temporary storage of information carried out for the sole purpose of performing the transmission.²⁵²

Thus, Article 16(1) exempts service providers from liability in the following two cases: a) when they merely transmit information provided by a content provider; and b) when they merely provide access to the Internet. “Automatic, intermediate and temporary storage of information carried out for the purpose of performing the transmission” under Article 16(2) refers to the type of services typically carried out by the so called ‘backbone providers’.²⁵³ Consequently, Article 16 targets service providers, whose only role in the information transmission process is to provide the actual wires for the transmission (e.g. copper cable, fiber optics cable, or satellite transmission etc.), and to provide the backbone of the Internet (e.g. servers and routers).²⁵⁴

Article 17 provides liability exemption for service providers involved in the information transmission process by providing a safe harbor for caching which is a specific type of transmission. Unlike the type of intermediate storage carried out by backbone providers and other access providers covered by Article 16, caching (or ‘proxy caching’ as is also called) under Article 17 is a different kind of intermediate information storage for the purpose of making the transmission more efficient.²⁵⁵

²⁵² Translated by author.

²⁵³ *Prop. 2001/02:150*, *supra* note 29 at 20; see also note 179.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid* at 21.

Proxy caching is when an ISP stores, for example a webpage on a local intermediate server (a proxy server) closer to the user. This will make the Internet transmission more efficient.²⁵⁶ Service providers providing caching services are exempted from liability for the content they catch. Article 17 states:

A service provider that transmits information provided by a recipient of the service in a communication network shall not be liable to any damage or economic sanction, for such automatic, intermediate and temporary storage performed for the sole purpose of making more efficient the information's onward transmission to other recipient of the service.²⁵⁷

Thus, the liability exemptions provided in Article 16 and 17 intend to cover only cases where the activity of the service provider is "limited to the technical process of operating and giving access to...[the Internet] over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient"²⁵⁸. However, those providing mere conduit and caching services are not given an unconditional immunity. Recital 44 of the E-Commerce Directive explains:

A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

²⁵⁶ Essentially, there are three different types of caching services: server caching, client caching and memory caching. The latter two are performed in the users' computers and are of less relevance in this context. Proxy caching is, simply put, websites with many visitors are stored on a server closer to the customer. Those who visit the website will then not need to be directed to the original website's server. Instead, they can be directed to the cache copy closest to the user. With this technology, Internet is perceived as faster. *Ibid* at 21.

²⁵⁷ Translated by author.

²⁵⁸ *E-Commerce Directive*, *supra* note 21 Preamble 42.

Accordingly, Article 16 of the SwECA states that a service provider may benefit from the liability exemption for mere conduit services on the condition that the service provider does not

1. initiate the transmission;
2. select the receiver of the transmission; or
3. select or modify the information.²⁵⁹

The liability exemption granted backbone providers under Article 16(2) cited above, apply only if the information is not stored longer than is necessary for the transmission.²⁶⁰ A service provider in its role as a caching provider may benefit from the liability exemption under Article 17 only if it

1. does not modify the information²⁶¹
2. complies with present conditions on access to the information²⁶²
3. complies with rules regarding the updating of the information, specified in a manner widely recognized and used by the industry²⁶³

²⁵⁹ [Translated by author]. Modifying the information means that the content may not be changed. Changes of technical nature, such as converts to another format, however, does not deprive the access provider protection from liability. *Prop. 2001/02:150*, *supra* note 29 at 120 explains that the fact that a picture from a website must be reduced in scale in order to be read by, for example, smart phone software or WAP technology, is not to be considered a modification of the information.

²⁶⁰ *Supra* note 27 art 16 s 2.

²⁶¹ Modification in this context has the same meaning as under Article 16, i.e. it refers to changes of the actual content and not its technical presentation, see *prop. 2001/02:150* at 120.

²⁶² Such condition could for example be that the recipients of the service must enter a specific password or pay to access the updated information. For such condition to be useful, the same condition must of course apply to the cache copy. Thus, if the information on a website is intended only for a specific group, the proxy cacher must ensure that the information is not spread outside of this group by the cache copy. *Prop. 2001/02:150*, *supra* note 29 at 120.

²⁶³ The preparatory works to the provision explain that customers who visit a particular webpage do not know if it is the original webpage, or if it is a cache copy. For this reason, it is important that the information updated on the original page is also updated at the same pace on all the cache servers. The rules for updating of information enacted by the industry must thus be followed. *Ibid* at 120-121.

4. does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information,²⁶⁴ and
5. acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or administrative authority has ordered such removal or disablement.²⁶⁵

Considering the conditions above, the liability exemption granted access providers (mere conduits and proxy cachers) applies only when the access provider is in no way involved with the actual information that is transmitted or cached; any modification of the information or any own initiative by the access provider with respect to whether the information should be transmitted, to whom it should be sent, or decision on whether it is still available on the Internet, precludes production under Article 16 and 17.²⁶⁶ Consequently, only service providers whose services are truly limited to the technical process of operating and giving access to the Internet and/or for the sole purpose of making transmissions more efficient may benefit from the

²⁶⁴ The term 'data on the use' means, for example, information about how many visitors a website has (so called 'hitch counting'). Such information is often used as the basis for calculating advertising revenues etc. Since the use of caching itself can cause difficulties particularly with respect to the calculation of numbers of visitors of a particular website, it is important that those who cache do not actively interfere or prevent the use of technology developed to deal with the hitch counting. *Ibid* at 121.

²⁶⁵ This means that the cacher must remove its cached content, as soon as it becomes aware that the information it caches for some reason has been removed from or disabled access at its original location. All cache copies must be removed regardless of whether the information has been removed at its original source, or because it contained something illegal and a court or other authority has ordered the removal or disablement of the original source, or because it is out of date, or for any other reason, *Ibid* at 121 [translated by author]; see also *E-Commerce Directive*, *supra* note 31 Preamble 46.

²⁶⁶ See *E-Commerce Directive*, *supra* note 31 Preamble 43.

safe harbors provided in Article 16 and 17 of the SwECA.²⁶⁷ These services are of a mere technical, automatic and passive nature, which implies that the service provider has neither knowledge nor control over the information which is transmitted.²⁶⁸ As a result, when the service provider acts in such a way that its activity is no longer of a purely technical, automatic and passive nature, it has gone beyond the activities of mere conduit or caching and will not benefit from the liability exemptions.²⁶⁹

(b) Host providers and the K&TD system

The third and last ISP activity granted liability exemption under the SwECA relates to the storage of information. Article 18 of the SwECA states:

A service provider that stores information provided by a recipient of the service shall not because of the content in the information be liable to any damage or economic sanction.²⁷⁰

The preparatory works to the provision clarifies that the liability exemption under Article 18 typically applies to those who provide so called 'web hosting'.²⁷¹ That is, service providers that provide space on their servers to customers who wish to set up a website and make it accessible to other Internet users, but do not have their own server with permanent Internet connection.²⁷² However, as discussed in chapter

²⁶⁷ *Ibid* Preamble 42-43.

²⁶⁸ *Ibid* Preamble 42.

²⁶⁹ *Ibid* Preamble 44.

²⁷⁰ Translated by author.

²⁷¹ *Prop 2001/05:150, supra* note 29 at 21.

²⁷² *Ibid*.

3 of this thesis, with the invention of new types of online services, host providers span a much wider range of actors than the traditional web hosting companies. Today, more advanced communication services such as those publishing user-generated content, e.g. YouTube, MySpace and Facebook, typically seek protection under the Article 18 safe harbor.²⁷³ As argued below, P2P intermediaries should also qualify for protection under the safe harbor afforded hosts. In order to qualify for liability exemption under Article 18, however, the service provider must meet certain conditions: A host benefits from the liability exemption under Article 18 only when it does:

(1) [N]ot have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or

(2) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.²⁷⁴

Thus, Article 18 establishes the K&TD system in Swedish law: A host that obtains knowledge or awareness that its services are used to infringe copyright, must act expeditiously to take down the infringing content. It is worth emphasizing that the K&TD system applies only to hosts.

Moving forward, *the Copyright Modernization Act* safe harbors cover the same type of actors and internet intermediary activities as the SwECA. In addition,

²⁷³ Lantham, Butzer, & Brown, *supra* note 28 at 3.

²⁷⁴ Translated by author.

the CaCA provides, as mentioned above, a fourth ‘safe harbor’ which grants immunity to those acting as common carriers.

4.4 The Canadian “safe harbors”

(a) *The ‘common carrier’ exemption under the Canadian Copyright Act*

The *Copyright Modernization Act* adds to, but does not replace, the already existing immunity provision for ‘common carriers’ in the CaCA.²⁷⁵ The common carrier exemption, laid down in Section 2.4(1)(b) of the CaCA reads:

For the purposes of communication to the public by telecommunication,

...

(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to communicate the work or other subject-matter does not communicate that work or other subject matter to the public.

Although Section 2.4(1)(b) is not a safe harbor in the sense of granting *immunity* for an act that is otherwise illegal, and was originally intended to protect those who acted as intermediaries between broadcasters and re-transmitters of broadcast signals,²⁷⁶ the Canadian Supreme Court in *SOCAN* clarified that the common carrier exemption also applies to ISPs:

Section 2.4(1)(b) shields from liability the activities associated with providing the means for another to communicate by telecommunication. The ‘means’...are not limited to routers and hardware. They include all software connection equipment, connectivity services, hosting and other facilities and services without which such communication would not

²⁷⁵ Hagen, *supra* note 43 at 368.

²⁷⁶ *Ibid* at 369.

occur...So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing “a conduit” for information communicated by others, then it will fall within s. 2.4(1)(b).²⁷⁷

The Court further held that the common carrier exemption applies to ISPs that cache and host content, provided that they are content neutral.²⁷⁸ Finally, the Court clarified that the common carrier exemption only protects the communication function of an ISP as an intermediary and not ISPs per se.²⁷⁹ The *Copyright Modernization Act* adds additional immunity for network service providers that provide access and host services.

(b) Access providers under the Copyright Modernization Act

The *Copyright Modernization Act* clarifies that network service providers, that provide the means for a work to be communicated on the Internet do not infringe copyright, solely by providing these means. Section 31.1(1) of the CaCA reads:

A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

By making Section 31.(1) applicable to network service providers, providing *any means* for Internet communication, the Canadian safe harbors apply not only to traditional ISPs, but also to newer types of Internet intermediaries that provide

²⁷⁷ *Supra* note 45 at para 92.

²⁷⁸ *Ibid* at para 104-119; see also Hagen, *supra* note 43 at 370.

²⁷⁹ *Supra* note 45 at 49 para 102.

access such as bloggers, video sites, social networking sites and others who communicate third party content on the Internet.²⁸⁰ In accordance with the discussion in chapter 3, P2P intermediaries also fall under the definition of network service providers. Hagen notes that by making the provision applicable to ‘any means’ for telecommunication, rather than to someone who supplies ‘the means’ necessary for telecommunication like under the common carrier exemption, the provision is best interpreted as providing an explicitly broader common carrier exemption.²⁸¹

Like the SwECA, the *Copyright Modernization Act* introduced also provisions on the liability of access providers that cache content (proxy caching). Section 31.1(2) of the CaCA states:

Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Similar to the SwECA, liability exemption under Section 31.1(2) requires that the proxy cacher, in respect of the work or other subject matter

(a) does not modify it, other than for technical reasons;

(b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and

²⁸⁰ Hagen, *supra* note 43 at 375.

²⁸¹ *Ibid.*

(c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject-matter.

Thus, the CaCA targets the same type of access services as the SwECA, by exempting those providing the means for communication over the Internet (or other network) and those who cache content to make the transmission more efficient. Moreover, both Acts establish similar conditions for liability exemptions, such as, compliance with industry standards. The third type of intermediate activity deemed not to amount to a copyright infringement under the CaCA, after the *Copyright Modernization Act* entered into force, is hosting.

(c) *Host providers under the Copyright Modernization Act*

Those who provide digital memory in which another person stores a work may not be held liable for copyright infringement under Section 31.1(4) of the CaCA:

[A] person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

The immunity, however, does not come without limitations. The host provider will not escape liability if it knows of a court decision or decision from other competent jurisdiction ruling that the host provider's storage of a work or other subject-matter amounts to an infringement of copyright. Section 31.1(5) states:

Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by

making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

The *Copyright Modernization Act* does not, unlike the SwECA establish an extrajudicial N&TD or K&TD regime under which network service providers who host content are required to take it down when provided with a notice or other information that they host infringing content.²⁸² An obligation to take down infringing material arises only from a remedy imposed by a court to take down the material.²⁸³ Thus, a takedown notice in Canada “generally takes...the form of a lawyer’s demand to take down alleged infringing material, the failure of which could result in the commencement of a copyright infringement suit.”²⁸⁴ Instead, the *Copyright Modernization Act* establishes the unique N&N system.

(d) *The N&N system*

As mentioned in chapter 1, the N&N system and related provisions (Sections 41.25, 41.26, and 41.27(3)) will come into force at a later not yet specified date.²⁸⁵ The N&N system requires all types of network service providers (not only hosts as is the case with the K&TD system) to forward notices of copyright infringement from copyright owners to the network service providers’ users/subscribers. However, major Canadian ISPs have voluntarily forwarded notices of alleged infringement to

²⁸² See *ibid* at 360; see also Hamilton, *supra* note 3 at 302.

²⁸³ Hagen, *supra* note 43 at 381; see also Legal and Legislative Affairs Division, *Bill C-11: An Act to amend the Copyright Act*, Publ. No. 41-1-C-11-E (Ottawa: 14 October 2011-20 April 2012) [Legislative Summary].

²⁸⁴ Hagen, *supra* note 43 at 382.

²⁸⁵ Sookman, “Soon to be law in Canada”, *supra* note 13.

their subscribers for many years.²⁸⁶ In 2000, the Canadian Association of Internet Service Providers, the Canadian Cable Television Association, and the Canadian Recording Industry Association agreed to a voluntary N&N system.²⁸⁷ Seven years later, in 2007, the Canadian ISP Telus sent out an average of 4000 notices every month.²⁸⁸ Most of Canada's large ISPs have already voluntarily, and at own expense, participated in the N&N system for many years, with millions of notices of alleged copyright infringements being forwarded to their subscribers.²⁸⁹ Hagen notes that since the voluntarily N&N system came into practice, "copyright owners have rarely, if ever, gone to the next step and enforced their statutory rights in Canadian courts against file sharers."²⁹⁰ It is in light of this the Canadian Government, through the *Copyright Modernization Act*, imposes a statutory obligation on all Canadian network service providers to participate in the N&N system. A copyright owner may, under Section 41.25(1) of the CaCA send a notice of claimed infringement to a person who provides:

(a) [T]he means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

²⁸⁶ Hagen, *supra* note 43 at 360; Paul Chewlos, Report, "Internet Service Providers Report Prepare for Industry Canada" (1 January 2006); see also Hagen at 385.

²⁸⁷ Hagen, *supra* note 43 at 385.

²⁸⁸ Amanda Carpenter, "Bill C-32: Clarifying the Roles and Responsibilities of Internet Service Providers and Search Engines" *IP Osgode* (June 15, 2010) online: IP Osgode <<http://www.iposgoode.ca>>.

²⁸⁹ Intellectual Property Policy Directorate Industry Canada, Media Release "Submission of Bell, Rogers, Shaw and Telus" online: Industry Canada <<http://www.ic.gc.ca>>.

²⁹⁰ *Supra* note 43 at 385.

(b) for the purpose set out in subsection 31.1(4) [i.e. hosting], the digital memory that is used for the electronic location to which the claim of infringement relates.

It is important to note that unlike the K&TD system, and accordance with the wording of Section 41.25(1), the CaCA allows copyright owners to send notices of alleged infringement to *both* access providers and host providers.

A notice must pursuant to Section 41.25(2) of the CaCA be in writing and contain information about the identity of the claimant. The notice must further in accordance with Section 41.25(2) of the CaCA:

- [I]dentify the work that is alleged to be infringed;
- state the claimant's interest or right to the copyright in the work;
- specify the electronic location of the work;
- specify the infringement that is claimed, including date and time; and
- provide other information that may be prescribed by regulation.

Once a network service provider has received a notice, it must pass it on to the alleged infringer. Section 41.26(1) holds:

A person described in paragraph 41.25(1)(a) [access provider] or (b) [host provider] who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it.

Another important difference between the Swedish K&TD system and the Canadian N&N system is that if the network service provider fails to carry out its N&N obligation, it could be liable to statutory damages ranging from CAD 5,000 to 10,000.²⁹¹ Thus, unlike the K&TD system, failure for a Canadian network service provider to participate in the N&N system does not result in the network service provider losing its protection under the safe harbors. By contrast, failure to participate in the Swedish K&TD system could result in liability being imposed on the host service provider.

Having outlined the contents of the Swedish and Canadian safe harbors and briefly pointed out their differences and similarities, the next section continues the analysis from the previous chapter, and attempts to answer the question if P2P intermediaries may qualify for protection under the Swedish and Canadian safe harbors. As shown above, this requires that their services are characterized as either mere conduit/communication, caching or hosting.

4.5 The safe harbors: for P2P intermediaries?

The previous chapter argued that P2P intermediaries fall under the definition of a service provider and network service provider under the SwECA and CaCA, which is a precondition to enjoy protection under safe harbors provided herein. This chapter has shown that in order to benefit from the Swedish and Canadian safe harbors, the service provider and network service provider must provide either a

²⁹¹ “A claimant’s only remedy against a person who fails to perform his or her obligations under subsection 1 [forward notices of infringement] is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.” *Supra* note 12 s 41.26(3).

mere conduit/communications, caching or hosting service. This raises the question if the type of service provided by a P2P intermediary may be characterized as any of these types of services.

Chapter 3 showed that the main function of a P2P intermediary is to provide a website, a database in which users may upload and store torrent files, a search function, and a tracker. Thus, the primary role of a P2P intermediary is to store information provided by the users. This is, as have been shown in this chapter, characterized as hosting under the SwECA and the CaCA. A service provider who “stores information provided by a recipient of a service”²⁹² (Sweden) and a network service provider who “provides digital memory in which another person stores the work or other subject-matter”²⁹³ (Canada) are granted immunity as hosts.²⁹⁴ The next question then is, could a P2P intermediary fall both under a) the definition of a service provider (Sweden) and network service provider (Canada); and b) provide services characterized as hosting services, *without* availing itself of the exemptions from liability established under the Swedish and Canadian safe harbors? This

²⁹² *Swedish E-Commerce Act*, *supra* note 27 art 18 [translated by author].

²⁹³ *Copyright Modernization Act*, *supra* note 12 s 31.1(5).

²⁹⁴ It is interesting to note that some authors have argued that P2P intermediaries could benefit also from the safe harbors granted communicators/mere conduits. Bassett, for example, states the following with respect to the P2P intermediary the Pirate Bay: “[t]he files being stored are not copyright-protected information or works. Instead, they are user-created torrent files that simply direct Internet-traffic...[T]he files on The Pirate Bay do not point directly to copyrighted movies, for example. Rather, they point to torrent trackers, which connect users to swarms of other users who may have bits and pieces of copyrighted movies. Thus, technically, the only information transmitted through The Pirate Bay is the location of other users who have bits and pieces of a particular file that users want to download. There is no previous authority whether this filetype distinction matters, but should an appellate court find the difference to be important, the mere conduit safe harbor may relieve The Pirate Bay of liability.” Bassett, *supra* note 24 at 88-89; see also Andreasson & Schollin, *supra* note 32 at 555.

question of principle was raised (with respect to Swedish law) in the *Pirate Bay* case, and the Court of Appeal answered the question in the affirmative:

The [P2P file sharing] service [The Pirate Bay] included, *inter alia*, a possibility to upload and store torrent files, a database and a tracker function. Thus, it is neither a mere conduit service, nor a caching service. However, [The Pirate Bay] corresponds in some respects to host services under Article 18 of the [SwECA]. This safe harbor concerns liability for content that is stored. The damage claim [in this case], however, is not based on liability of the *content* [emphasis added] of the information that is *stored* [emphasis added] on [The Pirate Bay's] website, but rather [on the claim] that the *functions* [emphasis added] provided [by The Pirate Bay] have furthered the users' copyright infringements. Thus, the service is not covered by any of the provisions in Article 16-18 of the [SwECA].²⁹⁵

This conclusion is surprising, not only because of the finding above that a P2P intermediary is both a service provider and a host, but also because, as Andreasson & Schollin note, the conclusion seems inconsistent with the CJEU case *Google v Louis Vuitton* to which the Court refers to in its judgment.²⁹⁶ *Google v Louis Vuitton* raised the questions of whether Google, by providing its AdWords service, infringed Louis Vuitton's trademark, and whether a search service on the Internet may benefit from the liability exemption afforded hosts under Article 14 of the EU E-Commerce Directive (which corresponds to Article 18 of the SwECA). Although *Google v Louis Vuitton* concerns trademark infringement by a search engine, there are, as will be shown below several similarities between Google's and The Pirate Bay's services.²⁹⁷

²⁹⁵ *Pirate Bay*, *supra* note 31 at 49.

²⁹⁶ Andreasson & Schollin, *supra* note 32 at 552.

²⁹⁷ *Ibid.*

In *Google v Louis Vuitton*, Google had sold advertisement links, under its so called AdWords service, to sellers of fake Louis Vuitton products. When a user searches on the Internet by using Google's search engine, Google displays the search results that best match the words the user types in the search field, in decreasing relevance.²⁹⁸ These search results are called 'natural'.²⁹⁹ However, Google also offers the AdWords service; a paid referencing service which enables persons, by means of reservation of one or more search keyword, to obtain the placing of an advertising link to its site.³⁰⁰ "That advertising link appears under the heading 'sponsored links', which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results."³⁰¹ In 2003, it came to Louis Vuitton's attention that when users 'googled' Louis Vuitton products by keying search words constituting Louis Vuitton's trademarks, Google displayed sponsored links which linked to sites offering fake Louis Vuitton products.³⁰² Louis Vuitton brought proceedings against Google in domestic court (France), but lost both in the court of first instance and court of appeal. Upon appeal to Cour de cassation, the French Court referred the following questions to CJEU for interpretation under the preliminary rulings procedure:³⁰³ a)

²⁹⁸ *Google v Louis Vuitton*, *supra* note 238 at para 22.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid* at para 23.

³⁰¹ *Ibid.*

³⁰² It was also established that Google offered advertisers the possibility of selecting not only keywords which corresponds to Louis Vuitton's trademarks, but also those keywords in combination with expressions indicating imitation, such as 'imitation' and 'copy'. *Ibid* at para 29.

³⁰³ The possibility to refer complicated interpretation questions to the CJEU with respect to EU law is open to all EU Member States' national judges; for more information on the preliminary rulings

had Google, by providing its AdWords service, infringed Louis Vuitton's trademark pursuant to the EU Trademark Directive;³⁰⁴ and b) may a search service on the Internet benefit from the safe harbors afforded hosts under Article 14 of the E-Commerce Directive.³⁰⁵

The CJEU found with respect to the first question that Google's actions did not amount to a trademark infringement: "[t]he fact of creating the technical conditions necessary for the user of a sign and being paid for that service does not mean that the party offering the service itself uses the sign."³⁰⁶ With respect to the question regarding the application and interpretation of the E-Commerce Directive safe harbors, the CJEU held:

the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31. Likewise, concordance between the keywords selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server. By contrast, in the context of the examination referred to in paragraph 114 of the present judgment [i.e. whether the liability of a referencing service provider may be limited under the safe harbor afforded hosts], the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.³⁰⁷

procedure, see e.g. "The Reference for a Preliminary Ruling" (20 February 2013), online: Europa <<http://europa.eu>>.

³⁰⁴ EC, *Commission Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks* [1989] OJ, L 40 at 1 arts 5(1)-(2).

³⁰⁵ *Supra* note 238 at para 1.

³⁰⁶ *Ibid* at para 57.

³⁰⁷ *Ibid* at para 116-118.

As Andreasson & Schollin note, the CJEU's statement is interesting given the similarities between Google's AdWords service, and the P2P intermediary The Pirate Bay.³⁰⁸ First, similar to Google, The Pirate Bay facilitated intellectual property infringement by providing a system of links.³⁰⁹ It has been shown in chapter 3 that one of the main tasks of a P2P intermediary is to store torrent files. A torrent file does not contain any information, it merely *links* users to bits and pieces of sometimes copyrighted works stored somewhere else on the Internet. Consequently, both Google and The Pirate Bay provided its users with links, with the only differences that Google, unlike The Pirate Bay, both *charged* its users for the provision of these links, and *indexed* them.³¹⁰ Second, the use of the links is, in the case both of Google and The Pirate Bay, was facilitated by the provision of a search service.³¹¹ In accordance with the CJEU's ruling quoted above, there mere provision of these services by Goggle was not enough reason for Google not being protected from liability under the safe harbor afforded hosts:

[C]oncordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its systems by advertisers and stored in memory on its server.³¹²

The CJEU further held that in determining whether Google enjoyed protection under the safe harbor afforded hosts, the following must also be taken into account:

³⁰⁸ *Supra* note 32 at 552.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Supra* note 238 at para 117.

[T]he role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.³¹³

In the light of CJEU's considerations in *Google v Louis Vuitton*, it is thus unfortunate that the Swedish Court in the *Pirate Bay* held that The Pirate Bay is not a host, because:

[T]he damage claim...is not based on liability of the content of the information that is stored on [The Pirate Bay's] website, but rather [on the claim] that the functions provided [by The Pirate Bay] have furthered the users' copyright infringements.³¹⁴

In *Google v Louis Vuitton*, however, it was as Andreasson & Schollin note, exactly the provision of a *function* that the CJEU dealt with.³¹⁵ It is further worth noting that, unlike Google, a P2P intermediary does not index the torrent links. It can therefore be argued that a P2P intermediary has even less control over the data than Google, who was granted protection under the safe harbor due to the lack of control of the data it stores.³¹⁶

Moreover, the purpose of the E-Commerce Directive on which the SwECA is based, serves as additional support of the argument that P2P intermediaries should qualify for protection under the safe harbor for hosts. The purpose of the E-Commerce Directive safe harbors and its SwECA counterpart is to contribute to the smooth functioning of the EU internal market by creating possibilities for the

³¹³ *Ibid* at para 118.

³¹⁴ *Supra* note 31 at 49.

³¹⁵ Andreasson & Schollin, *supra* note 32 at 553.

³¹⁶ See *ibid*.

provision and development of information society services.³¹⁷ Liability exemption for actors engaged in conduit, caching and hosting services is an important component in the realization of this purpose.³¹⁸ It is thus important, Andreasson & Schollin hold, that “the Directive’s safe harbors are not too narrowly interpreted, especially not in the context of technological business models and other phenomena that were not foreseen by those who drafted the Directive.”³¹⁹ It is important to keep in mind that even if The Pirate Bay and other P2P intermediaries would qualify for protection under the Swedish safe harbors, this is not determinative for the question of liability. As has been seen in this chapter, in order for a service provider acting as host to benefit from the safe harbors afforded hosts, it must participate in the K&TD system.

To sum up, in light of: a) the Court of Appeal’s conclusion that The Pirate Bay was both a service provider and a provider of host services; b) the CJEU’s finding in *Google v Louis Vuitton* that the provision of a link function used by others for intellectual property infringement did not deprive Google liability exemption under the E-Commerce Directive safe harbors afforded hosts; c) the purpose of the E-Commerce Directive and the SwECA; and d) the fact that qualification for protection under the safe harbors would not automatically exempt P2P intermediaries from liability, it is indeed strange that the Court of Appeal denied The Pirate Bay access to the safe harbor for hosts. However, if the Court would have ruled that the safe

³¹⁷ *Supra* note 21 Preamble 40.

³¹⁸ *Ibid*; *Prop. 2001/02:150*, *supra* note 29 at 87-88

³¹⁹ *Supra* note 32 at 550-551 [translated by author].

harbor afforded hosts applied, The Pirate Bay's liability would have depended on the question if it had fulfilled its obligations under the K&TD system. That is, liability could have been imposed on The Pirate Bay only if it would have had actual knowledge and awareness that it hosted copyright infringing content, and had failed to take actions to remove or disable access to the infringing content. The information stored in a P2P intermediary's database, however, consists solely of torrent files that link to millions of small pieces of sometimes copyrighted works stored somewhere else on the Internet (typically on the computers of the users). Arguably, since torrent files contain no information, there would have been no illegal content for The Pirate Bay to take down or prevent from being disseminated over the Internet with the result that The Pirate Bay would have been shielded from liability. Perhaps this is the reason why the Swedish Court chose to deny The Pirate Bay access to the safe harbors, and instead apply the Swedish doctrine on contributory copyright liability under which the Court held The Pirate Bay liable for contributory copyright infringement. After all, the outcome of the *Pirate Bay* case would affect Sweden's future trading position with the United States within the WTO.³²⁰

By contrast, the main rule under the *Copyright Modernization Act* is that all providers of network service are granted immunity, when they act as communicators, cachers and hosts. Although there is not yet a precedent in place clarifying how a P2P intermediary's service is to be defined under Canadian law, it is in light of the foregoing considerations likely that a P2P intermediary would be

³²⁰ See *Letter from MPAA*, *supra* note 173.

considered a host (and possibly also a communicator). However, unlike the SwECA, the *Copyright Modernization Act* provides that the safe harbors do not apply in respect of a service provided by a network service provider, if the provision of that service constitutes an infringement of copyright under Subsection 27(2.3) of the CaCA i.e. the enabling provision. As result, unlike the SwECA, the CaCA could never grant immunity to a P2P intermediary whose service primarily enables acts of copyright infringement.

5 IMPOSING COPYRIGHT LIABILITY: ENABLING, AUTHORIZATION AND CONTRIBUTORY COPYRIGHT INFRINGEMENT

5.1 Introduction

This chapter outlines how copyright liability is imposed on P2P intermediaries under Swedish and Canadian law. The goal of this chapter is to show that the Canadian authorization doctrine is not suitable against P2P intermediaries and that the liability of these actors therefore depends solely on the application of the enabling provision. Another goal of this chapter is to show the shortcomings of the Swedish Court's application of the Swedish doctrine on contributory liability in copyright law, in the *Pirate Bay* case. Section 5.2 outlines the main features of the enabling provision and describes how it applies to P2P intermediaries. Section 5.3 provides an account of the authorization doctrine. By analyzing the Canadian Supreme Court case *SOCAN* this section argues that the authorization doctrine is not suitable to P2P intermediaries. Section 5.4 outlines the copyright liability standard that applies to P2P intermediaries under the Swedish doctrine on contributory liability in copyright law. With an analysis of the *Pirate Bay* case, this section argues, by drawing on Andreasson & Schollin, that the Swedish Court did not take into account all factors that should be taken into account, pursuant to the contributory liability doctrine, when assessing the liability of The Pirate Bay.

5.2 Liability for enabling copyright infringement under the Copyright Modernization Act

With the enabling provision provided under Section 27(2.3) of the CaCA, a new type of secondary liability is introduced in Canadian law. The enabling provision holds that it is an infringement of copyright to provide a network service that enables acts of copyright infringement.

It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

The purpose of the enabling provision is, according to the Canadian Government, to fight illegal file sharing services.³²¹ The Government states that the enabling provision gives “copyright owners the tools to pursue those who willfully and knowingly enable copyright infringements online, such as operators of websites that facilitate illegal file sharing.”³²² The Government further holds that:

[T]he most effective way to stop online copyright infringement is to target those who enable and profit from the infringements of others. By allowing copyright owners to pursue these “enablers”, such as illegal peer-to-peer file sharing sites, this Bill supports the development of significant legitimate markets for downloading and streaming in Canada.³²³

³²¹ Government of Canada, Media Release “What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators” (3 October 2011) online: Balanced Copyright <<http://balancedcopyright.gc.ca>>.

³²² *Ibid.*

³²³ *Ibid.*

In determining whether a network service provider has infringed copyright under the enabling provision, Section 27(2.4) of the CaCA sets out a list of non-exhaustive factors for the Court to take into account, including:

- (a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
- (b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
- (c) whether the service has significant uses other than to enable acts of copyright infringement;
- (d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
- (e) any benefits the person received as a result of enabling the acts of copyright infringement; and
- (f) the economic viability of the provision of the service if it was not used to enable acts of copyright infringement.

Hagen notes that these factors are basically culled from various foreign decisions concerning forms of secondary liability: “[f]or example, the factor cited in section 27(2.4)(a) is reminiscent of the test for liability for inducement to infringe established under *Grokster*... [and] the factor cited in section 27(2.4)(d) is similar to a provision in section 101(A) of the Australian *Copyright Act*”.³²⁴ Point (d) is particularly interesting, because in *SOCAN* and *CCH*³²⁵ cases reviewed in the next section, the

³²⁴ *Supra* note 43 at 381.

³²⁵ *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 399 [*CCH*].

Canadian Supreme Court rejected the Australian case *Moorhouse*³²⁶ in which the Australian High Court found that copyright had been infringed because the service provider suspected that its services was used for infringing purposes, had the possibility to prevent the infringements, but failed to do so.³²⁷ Thus, with the introduction of Point (d), network service providers must, where it is able to prevent acts of copyright infringement, take actions to do so. What type of actions the network service may take was not specified in the *Copyright Modernization Act*.

Michael Geist argues in a large number of articles and blog posts that the enabling provision is not needed because the already established authorization doctrine is robust enough to deal with illegal P2P file sharing sites (see literature review above). The next section looks into the accuracy of Geist's statement, by analyzing the applicability of the Canadian authorization doctrine to P2P intermediaries.

5.3 Liability for authorizing copyright infringement under the Canadian Copyright Act: SOCAN

The scope of the authorization doctrine was before the Canadian Supreme Court in *SOCAN* in which the Court dealt with the question of who should compensate musical composers and artists for their Canadian copyright in music downloaded on the Internet. SOCAN, a collecting society, wanted to collect royalties from Canadian ISPs (providers of Internet access) because they, in SOCAN's

³²⁶ *Moorehouse v University of New South Wales*, [1976] RPC 151 [*Moorehouse*].

³²⁷ *SOCAN*, *supra* note 45 at para 127; *CCH* *supra* note 325 at para 41.

opinion, “infringe[d] the copyright owner’s exclusive statutory right to communicate the work[s] to the public by telecommunication and to authorize such communication.”³²⁸ Thus, the question before the Canadian Supreme Court, was what acts of an ISP constitute authorization.

In answering this question the Court turned to another Supreme Court case; *CCH*³²⁹ that had ruled on the issue of whether the library of the Law Society of Upper Canada’s Great Library at Osgoode Hall, by providing a photocopier, authorized patrons to make copies of works. In *CCH*, the Court ruled that authorization requires that one “sanction, approve and countenance” the infringing activity.³³⁰ The Court further held that:

a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law.³³¹

In *SOCAN*, the Court had the opportunity to apply this reasoning in the context of Internet and the services provided by ISPs.³³² The Court began its judgment by stating that while the availability of “free” music, is indeed a powerful inducement for Internet users to sign up with ISPs, a good deal of the material on the Internet is not subject to copyright, just like a good deal of the material in the Law Society’s library

³²⁸ *Supra* note 45 para 3.

³²⁹ *Supra* note 325.

³³⁰ *Ibid* at para 38.

³³¹ *Ibid*.

³³² Hagen, *supra* note 43 at 371.

in *CCH* was not copyrighted.³³³ In light of this, the Court held that a person does not authorize infringement by merely authorizing the mere use of equipment that could be used to infringe copyright.³³⁴ Of course, the Court held, the operation of the Internet is much more complicated than the operation of a photocopier, however,

it is true here, as it was in the *CCH* case, that when massive amounts of non/copyrighted material are accessible to the end users, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material.³³⁵

Thus, just like with photocopiers, the Canadian Court found that the services provided by ISPs can be used to violate copyright. However, given the vast amount of content on the Internet (and in a library) that are not copyrighted for which the services may be and are used, the mere provision of these services are not enough to constitute authorization under the *CaCA*. In order to hold an ISP liable, the Court continued, something more than the mere provision of Internet access or hosting content is required.³³⁶

That being said, the Court turned to the question whether an ISP's *knowledge* of infringing activity, could constitute authorization. By referring to the *CCH* case, the Court held that "[t]he knowledge that someone might be using neutral technology to violate copyright (as with the copier in the *CCH* case) is not necessarily sufficient to

³³³ *Supra* note 45 at para 121-122.

³³⁴ *Ibid* at para 122.

³³⁵ *Ibid.*

³³⁶ *Ibid* at para 127.

constitute authorization”³³⁷. The Court in *CCH* had arrived at this conclusion by rejecting the Australian High Court Case *Moorhouse*³³⁸ in which the Australian Court stated that where a library knew or had reason to suspect that the photocopiers it provided were likely to be used for infringing purposes, and could have prevented the infringements, but failed to do so, the library infringed.³³⁹ It follows from the Canadian court’s rejection of *Moorehouse* that even if an ISP suspects infringement, and has the possibility to prevent the infringement (e.g. by putting into place a filtering or blocking system), the ISP may not be held liable for authorizing infringement if it fails to prevent it.³⁴⁰ It can thus be concluded from the Canadian court’s reasoning that an ISP who has

- knowledge that its service might be used for copyright infringement;
- an ability to prevent the infringement by others using the service; and
- a failure to prevent such infringement

does not authorize its subscribers’ copyright infringement.³⁴¹ The Canadian Court’s view in *SOCAN* may be explained by the fact that an ISP’s service could still be used for legal purposes.³⁴² Moreover, the Court in *CCH* had ruled that even if the provision of an Internet service did authorize sharing of copyrighted materials,

³³⁷ *Supra* note 45 at para 127.

³³⁸ *Supra* note 326.

³³⁹ *Supra* note 325 at para 41.

³⁴⁰ Hagen, *supra* note 43 at 372.

³⁴¹ *Ibid* at 372.

³⁴² *Ibid* at 374.

“[c]ourts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law.”³⁴³ However, the Court in *CCH* also held that “[t]his presumption may be rebutted if it is shown that a *certain relationship or degree of control* [emphasis added] existed between the alleged authorizer and the persons who committed the copyright infringement.”³⁴⁴ SOCAN argued with respect to this statement that, when material is made available on the Internet, the ISP acts as a commercial partner with the content provider.³⁴⁵ However, the Court found that “rights and obligations of partnership can[not] be so casually imposed”.³⁴⁶ Instead, the Court elaborated with the concept of ‘content neutrality’ by pointing out that copyright liability may attach if the activities of an ISP cease to be ‘content neutral’.³⁴⁷ The Court mentioned as an example of when the activities of an ISP cease to be content neutral, when the ISP has received a notice that a content provider has posted material on its system and fails to take remedial action: “notice of infringing content, and failure to respond by ‘taking it down’ may in some circumstances lead to a finding of ‘authorization’”.³⁴⁸ Thus, in light of *SOCAN*, an ISP that has knowledge that it hosts infringing content and the ability to take it down, but fails to do so, may be held liable for authorizing infringement.³⁴⁹ However, given

³⁴³ *Supra* note 325 at 38; see also *ibid* at 375 explaining that such legal purposes include, for example, downloading public domain or licensed works, or downloading for the purposes of fair dealing and for uses that fall under the CaCA’s private copying provisions.

³⁴⁴ *Supra* note 325 at para 38.

³⁴⁵ *Supra* note 45 at para 122.

³⁴⁶ *Ibid*.

³⁴⁷ *Ibid* at para 124.

³⁴⁸ *Ibid* at para 127.

³⁴⁹ Hagen, *Supra* note 43 at 373.

the fact that the Canadian government has rejected a N&TD system in favor of the N&N system, it is unclear (if not unlikely) if notifications, as the Court in *SOCAN* suggests, would impose an obligation on the ISP to take down the content.

To sum up, in order to impose liability on an ISP under the authorization doctrine it must be shown that there exists is a certain relationship or degree of control between the ISP and the persons who commit the copyright infringement. Such relationship or degree or control exists where the ISP ceases to be content neutral, which could be the case when the ISP has received a notice of infringement, and a fails to take down the illegal content. Consequently, “a finding of infringement requires actual control over the actions of infringers, rather than merely potential control...When the requirements of specific knowledge of infringement and actual control over the acts of infringers are present, there exist a *de facto* NTD system”³⁵⁰ under Canadian law. However, the Court in *SOCAN* did not define the level of knowledge required, or what kind or degree of control that would be necessary to constitute authorization.

Having outlined the conditions for liability of ISPs set out by the Canadian Supreme Court in *SOCAN*, the next question is how the Court’s reasoning applies to the activities of a P2P intermediary. In light of *CCH*, only if a P2P intermediary “sanctions, approves and countenances”³⁵¹ the infringing activity, has it authorized

³⁵⁰ *Ibid.*

³⁵¹ *Supra* note 325 at para 38.

its users' copyright infringements. What kind of acts of a P2P intermediary could constitute authorization?

First, in accordance with *CCH* it is not authorization to merely authorize the equipment that could be used to infringe copyright.³⁵² As shown in chapter 3, the 'equipment' typically provided by a P2P intermediary include a website, a search directory for torrent files, storage space on which torrent files may be uploaded and downloaded by users, and a tracker. This equipment is perfectly legal, and while it could be used for infringing purposes, it can also be used for the purpose of sharing works which are not protected by copyright. Thus, in light of *SOCAN*, a P2P intermediary may not be held liable for authorizing infringement by merely providing the file sharing service which could be used to infringe copyright, because there is typically a good deal of material available on a P2P file sharing service that is not subject to copyright, just as there was a good deal of material in the Great Library at Osgoode Hall that was not copyrighted in the *CCH* case.³⁵³ In the *Pirate Bay* case the Swedish Court found that an equal amount of copyrighted as non-copyrighted works was shared by using The Pirate Bay's file sharing services.³⁵⁴

Second, a P2P intermediary's knowledge that someone might be using its services to infringe copyright is not sufficient to constitute authorization.³⁵⁵ In addition, it follows from the Canadian Court's rejection of the Australian High Court's

³⁵² *Ibid* at para 38; see also *SOCAN*, *supra* note 45 at para 122.

³⁵³ See *SOCAN*, *supra* note 45 at para 122.

³⁵⁴ *Supra* note 31 at 25.

³⁵⁵ *SOCAN*, *supra* note 45 at para 127.

reasoning in *Moorehouse* that under Canadian law, a P2P intermediary who knows that someone might be using its services for infringing purposes, and can prevent the infringement, for example by filtering or block the copyrighted works, but does not do so, does not thereby authorize infringement.³⁵⁶ However, as shown above, with the introduction of the enabling provision, an ISPs ability to limit acts of copyright infringement, and any action by the ISP to do so, is a factor that will be considered in determining whether an ISP is an enabler of copyright infringement pursuant to Section 27(2.3) of the CaCA.

Third, since the service provided by a P2P intermediary may be used for legal purposes, the court should, in accordance with *CCH*, presume that when a P2P intermediary authorizes an activity it does so only so far as it is in accordance with the law.³⁵⁷ Such legal purposes include the provision of storage space for torrent files associated with works that are not copyright protected, and the provision of a tracker, search directory and website for these legal files. However, this presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer (i.e. the P2P intermediary) and the persons who committed the copyright infringements (i.e. the users of the file sharing service).³⁵⁸ It follows from *SOCAN* that if the P2P intermediary has specific knowledge of the infringement, for example by being notified by the copyright owner, and has actual control over the acts of the infringers, then the P2P must take down the infringing

³⁵⁶ Hagen. *supra* note 43 at 374.

³⁵⁷ *SOCAN*, *supra* note 45 at para 122; see also *CCH*, *supra* note 325 at para 38.

³⁵⁸ *SOCAN*, *supra* note 45 at para 122; *CHH*, *supra* note 325 at para 90.

content to escape liability for authorizing infringement. It is difficult, however, to define the degree of control that would be necessary to constitute authorization for a P2P intermediary.³⁵⁹ As explained in chapter 3, a P2P intermediary has *de facto* no control of the works shared over a P2P file sharing network. Works subjected to file sharing are stored on the computers of the individual file sharer. The individual file sharer may create torrent files which link to the works he/she has stored on his/her computer, and upload these torrent files on the P2P intermediaries' website. None of these acts, however, require any actions from the P2P intermediary; the P2P intermediary merely stores the content (i.e. torrent files) provided by the user. Moreover, torrent files contain no copyrighted works, and whereas some of them may link to bits and pieces of copyrighted work, others link to bits and pieces of works not protected by copyright. The tracker function merely connects users with each other. Thus, while the role of the P2P intermediary is to provide services that are all perfectly legal, the users may use these for infringing purposes. However, how individuals chose to use the P2P intermediary's services is beyond the P2P intermediary's control. The P2P intermediary is not involved in the storage, indexing and managing of the torrent files; this is all done by the users. The same goes for the tracking function which is an automatic function which requires no action on behalf of the P2P intermediary. As a result, while the role of the P2P intermediary as an accomplice to the file sharers' infringements, or an enabler of these, is easier to see, it is more difficult to see how the acts of a P2P intermediary could result in an authorizing infringement. Thus, contrary to Michael Geist's opinion, the authorization

³⁵⁹ See Hagen, *supra* note 43 at 374.

doctrine seems rather weak in its application to P2P intermediaries. Consequently, there is a need for an additional liability provision that is able to target P2P intermediaries to the extent these provide services used for illegal purposes. Therefore, the enabling provision is an important contribution to Canadian copyright law. Sweden has taken a different approach to the liability of P2P intermediaries, with the doctrine on contributory liability in criminal law reviewed in the next section.

5.4 Liability for contributory copyright infringement under Swedish criminal law: the *Pirate Bay* case

Copyright liability in the context of P2P file sharing was for the first time before the Swedish court in the *Pirate Bay* case. The Pirate Bay was one of the more spectacular and major P2P file sharing services in the world.³⁶⁰ Through its technical platform, located in Sweden, it made itself available all over the world to millions of Internet users.³⁶¹ In 2009 the Swedish prosecutor brought an indictment against the four operators of the website. The indictment was supported by a number of European and American film and music companies claiming significant damages for films and music albums alleged to have been made available at The Pirate Bay website.³⁶² As mentioned in chapter 4, Swedish law allows for civil claims being brought jointly with criminal indictments.³⁶³ The case reached the Court of

³⁶⁰ Danowsky, *supra* note 35 at 129.

³⁶¹ *Ibid.*

³⁶² The indictment covered a specific period (1 July, 2005 - 31 May, 2006) and 34 cases of copyright infringements, of which 21 were related to music files, 9 to movies and 4 to computer games.

³⁶³ Danowsky, *supra* note 35 at 129.

Appeal in 2010, and the question remained: could the operators of The Pirate Bay be held liable for the administration, hosting and development of the P2P file sharing website on which a large number of films and music albums had been made available to the public. On 26 November 2010 the Court of Appeal found the operators guilty of secondary liability for copyright infringement and sentenced each founder to 10 months in prison. They were also required to pay approximately SEK 46 million (~ CAD 6.6 million) in damages to the plaintiffs.³⁶⁴ The Court of Appeal's judgment is final since the Swedish Supreme Court on 1 February 2012 decided not to grant the case leave to appeal.³⁶⁵

(a) *Contributory copyright infringement under Swedish law*

The Pirate Bay, supporting the BitTorrent file sharing protocol, contained all of the typical features of a P2P file sharing service outlined in chapter 3. It had a website on which users could upload and store torrent files, a database in which users could upload torrent files, an open directory in which users could search for torrent files, and a tracker that enabled users to find and get in touch with each other to carry out the file sharing. To answer the question of whether the operators of the

³⁶⁴ On April 17, 2009 the Stockholm District Court had also found the four founders of The Pirate Bay guilty of secondary liability for copyright infringement and sentenced them each to a one year prison term. They were also required to pay approximately SEK 30 million (~ CAD 4.3 million) in damages to the plaintiffs. All defendants appealed the verdict, and the Court of Appeal thus shortened the prison sentences but increased the damages. On 1 February 2012, the Swedish Supreme Court decided not to grant leave to appeal whereby the Court of Appeal's judgment stands. *Pirate Bay District Court*, *supra* note 79; *Pirate Bay*, *supra* note 31; *Pirate Bay Supreme Court Decision*, *supra* note 175.

³⁶⁵ *Pirate Bay Supreme Court Decision*, *supra* note 175.

P2P file sharing site could be held liable for their users' copyright infringements by providing these services, the Court turned to Swedish criminal law and principles.

Contributory infringement is the act of participation in, or contribution to, the infringing acts of another.³⁶⁶ As mentioned above, copyright infringement is a criminal offense under Swedish law. Accordingly, the SwPC and general criminal principles establish, together with the SwCA, the principles for contributory liability in copyright law. Chapter 23, Section 4 of the SwPC sets out the basis for holding somebody liable who has not directly committed a crime:

Punishment as provided for an act in this Code shall be imposed not only on the person who committed the act but also on *anyone who furthered it by advice or deed* [emphasis added]. The same shall also apply to *any other act punishable with imprisonment under another Law* [emphasis added] or statutory instrument.

Copyright infringement is punishable under the Swedish Copyright Act. Article 53 holds: “[a]nyone who...infringes the copyright enjoyed in the work...shall...be punished by fines or imprisonment”.³⁶⁷ Hence, in accordance with Chapter 23, Section 4 of the SwPC, punishment may also be imposed on anyone having furthered a copyright infringement by advice or deed. For a criminal prosecution to succeed, both the objective and subjective elements of the crime must be met. That is, there must both be a guilty act and a guilty mind – *actus non est reus, nisi mens sit rea*.³⁶⁸ The objective element of a crime refers to the “states of affairs, or facts,

³⁶⁶ Axhamn, *supra* note 86 at 27.

³⁶⁷ Translated by Henry Olsson (Ministry of Justice Sweden: 2009).

³⁶⁸ Markus D Dubber & Mark G Kelman, *American Criminal Law: Cases, Statutes, and Comments*, 2d ed (New York: Foundation Press, 2008) at 198.

that exist independent of how they might be perceived by someone, most importantly the person who stands accused of having committed an offense”³⁶⁹ or contributed hereto. The subjective element of the offense refers to the alleged offender’s (or contributor’s) perception of a state of affairs.³⁷⁰ In the context of copyright infringement, the prosecutor must establish the following two objective elements: ownership of a valid copyright, and copying of protected elements of the plaintiffs work. With respect to the subjective element, it must be proved that the defendant has acted willfully or with gross negligence. Article 53 of the SwCA reads as follows:

Anyone who, in relation to a literary or artistic work [objective element], commits an act which infringes the copyright enjoyed in the work [objective element]...shall where the act is committed willfully or with gross negligence [subjective element], be punished by fines or imprisonment for not more than two years.³⁷¹

When assessing the liability for contributory copyright infringement the objective element is the same: It must be shown that works protected by copyright have been infringed (by somebody who is not the contributor); there must be an underlying or direct copyright infringement committed by somebody else than the alleged contributor. With respect to the subjective element, it must be shown that the alleged contributor (1) *knew or had reason to know* of the underlying infringement; and (2) *willfully* furthered the direct infringement by advice or deed. As mentioned in chapter 4 of this thesis, a service provider may only be held criminally liable if it has acted

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Translated by Henry Olsson (Ministry of Justice Sweden: 2009).

willfully.³⁷² Copyright infringement is a crime otherwise punishable both if committed willfully and with gross negligence (see Article 53 of the SwCA). Having concluded that The Pirate Bay was a service provider in the SwECA's sense (see chapter 4), the Court assessed the following four points:

- i) Whether the film and music albums in question were protected by copyright (objective element);
- ii) whether these copyrighted works had been infringed (objective element);
- iii) whether The Pirate Bay by providing its services had furthered these copyright infringements (objective element); and
- iv) whether the operators had willfully furthered the copyright infringements (subjective element).³⁷³ An alleged contributor's intent must cover both the underlying infringements and his/her own contributory acts.

(b) The subjective element: The intent of the operators

In assessing the operators' intent, the Court held that only a *general* awareness of the risk that the service is occasionally used for dissemination of illegal content, does not automatically constitute the level of intent that is required for all crimes committed by those who use the service:

³⁷² "A service provider who transmits or stores information may be held criminal liable for the content of the information, only if the crime has been committed willfully." *Swedish E-Commerce Act, supra* note 27 art 19 [translated by author].

³⁷³ *Pirate Bay, supra* note 31 at 26.

A person who provides an online service and is generally aware of the risk that this [service] is occasionally used for dissemination of illegal material, cannot merely because of this awareness, be deemed to have intent to any crime – such as defamation, hate speech, child pornography – that have committed by using the online service.³⁷⁴

Although this statement implies that general awareness is not sufficient for liability, it appears, as Andreasson & Scholli note, as it was in fact the operators' general awareness that the Court attached importance to in deciding whether they had enough intent to be held liable as contributors to their users' copyright infringements.³⁷⁵ The Court concluded:

[t]he investigation does not support the conclusion that Fredrik Neij knew that the copyrighted music and films in question were shared on The Pirate Bay's website. There is even less support for the assumption that he was aware of circumstances such as who the seeder was, where this person was located, the extent to which the works in question had been transmitted or for how long the file sharing had been going on. However, this is not a prerequisite for liability. Through cease and desist letters, email correspondence, and Fredrik Neij's own statements³⁷⁶, it is clear that he was well aware of the circumstances that constitute the prerequisites for copyright infringement: that torrent files associated with copyright protected works frequently occurred at [The Pirate Bay's] website, that these torrent files had been uploaded without the right holders' consent, and that these works were communicated to the public through The Pirate Bay's services. Therefore, the Court of Appeal finds that he had an intent that covers both the direct infringements and his own contributory act.³⁷⁷

Thus, for the finding of intent to an underlying infringement and a contribution hereto of a P2P intermediary, the P2P intermediary does not have to have specific

³⁷⁴ *Ibid* at 27.

³⁷⁵ Andreasson & Schollin, *supra* note 32 at 537.

³⁷⁶ The founders usually posted cease and desist letters, emails etc. that they had received on their website, clearly stating their intent not to take any actions to comply with such letters.

³⁷⁷ *Supra* note 31 at 27.

knowledge about the copyright infringements committed on his file sharing service, such as what works have been infringed, or who the direct infringer is. It is enough that the P2P intermediary is “aware of the circumstances that constitute the prerequisites for copyright infringement”.³⁷⁸ Consequently, a P2P intermediary’s general awareness that its service is used for infringing purposes is clearly enough to meet the subjective element of the crime.³⁷⁹ Andreasson & Schollin notes that with such low knowledge requirement, basically any online meeting and search service, also those who typically provide legitimate services, will meet the requirement of intent for contributory copyright infringement under Swedish law.³⁸⁰ By taking Google as an example, Andreasson & Schollin further notes that Google constantly receives cease and desist letters from copyright owners that believe that Google, by providing its services, is infringing their copyright either directly or as a contributor.³⁸¹ Of course Google’s CEO is aware of the circumstances that constitute the prerequisites for copyright infringement, i.e. that links linking to copyrighted works frequently appear on Google’s search engine, that such works have been uploaded without the copyright owners’ consent, and that such works are communicated to the public by Google’s services.³⁸² Since basically all P2P intermediaries, and most other service providers, have a general awareness that their services occasionally are used for infringing purposes, they will always meet

³⁷⁸ *Ibid* [translated by author].

³⁷⁹ Andreasson & Schollin, *supra* note 32 at 537.

³⁸⁰ *Ibid* at 538.

³⁸¹ *Ibid*; see also Katie Hafner, “We’re Google. So Sue Us”, *The New York Times* (23 October 2006) online: The New York Times <<http://www.nytimes.com>>.

³⁸² Andreasson & Schollin, *supra* note 32 at 539.

the requirement of intent under the Swedish doctrine on contributory copyright infringement. As a result, a P2P intermediary's (and other service providers') liability under Swedish law depends solely on the objective element of the crime,³⁸³ that is, whether the P2P intermediary, by providing its services, can be said to have furthered its users' copyright infringements.³⁸⁴

(c) *The objective element: The Pirate Bay's criminal contribution*

The Court was able to decide quickly points i) and ii) above; the music and film companies works were protected by copyright, and unknown perpetrators had infringed these works through file sharing.³⁸⁵ The Court then moved on to the more complicated question of whether The Pirate Bay, by providing its file sharing service, had furthered these unknown perpetrators' copyright infringements. The Court answered this question by relying on general criminal principles, and taking into account the character of the file sharing service and how users chose to use it.³⁸⁶

The Court began with an analysis of the *character of the file sharing service* and held that The Pirate Bay, through its search functions, uploading and storage functions for torrent files, and tracker which connects individual users to each other, provides a service that facilitates the users' copyright infringements.³⁸⁷ Because of this service, the Court further held, copyrighted works have been made available to

³⁸³ See *ibid* at 539.

³⁸⁴ *Pirate Bay supra* note 31 at 27.

³⁸⁵ *Ibid* at 16-17.

³⁸⁶ *Ibid* at 23-24.

³⁸⁷ *Ibid* at 24.

the public, and thus infringed.³⁸⁸ The Court added: “[e]ven though the service was not a necessary condition for the individual [copyright infringements] to be committed, it has *typically made it easier and faster* [emphasis added] for the users to communicate the works to the public by file sharing.”³⁸⁹ Therefore, the Court concluded that a person, by providing such service, furthers these copyright infringements, for which he or she shall be held liable as a contributor pursuant to Chapter 23, Section 4 of the SwPC and Article 53 of the SwCA.³⁹⁰

With this conclusion, it would be difficult for any P2P intermediary (and certainly also other service providers that provide services relating to exchange and transmission of information) to operate in Sweden: a P2P intermediary will always make it easier and faster to communicate information to the public, this is the purpose of its service. However, as the Canadian Supreme Court in *SOCAN* acknowledged: while the availability of “free” music, is a powerful inducement for Internet users to sign up with ISPs, a good deal of the material on the Internet is not subject to copyright, just like a good deal of the material in the Law Society’s library in *CCH* was not copyrighted.³⁹¹ The same apply to P2P file sharing services: while “free” music, is indeed, a reason for individuals to sign up with a P2P intermediary such as The Pirate Bay, typically a good deal of the material on a P2P intermediary’s servers is not subject to copyright. In the *Pirate Bay* case, the

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid* [translated by author]; see also *Pirate Bay District Court*, *supra* note 79 at.

³⁹⁰ *Supra* note 31 at 24.

³⁹¹ *Supra* note 45 at para 121-122.

Swedish Court found that there were equal amounts of torrent files associated with copyright as non-copyrighted works stored in The Pirate Bay's database.³⁹² Because an ISPs' service could be used both for legal and illegal purposes, the Canadian Court in *SOCAN* held that the mere provision of equipment that *could* (and surely was) used to infringe copyright did not amount to an infringement of the copyright owners' exclusive right to authorize the communication of their works to the public by telecommunication.³⁹³ Accordingly, the plaintiffs in the *Pirate Bay* case argued that there are numerous online search and storage services, such as Google and YouTube that would never be considered illegal even though they can, and certainly are, used for infringing purposes.³⁹⁴ In response, the Swedish Court acknowledged that there are *general criminal principles* in Swedish law supporting the view that the rules on contributory liability in criminal law should not always be applied strictly in accordance with the wordings of Chapter 23, Section 4 of the SwPC. This is the case if such strict application would lead to unreasonable and unintended results.

The Court held:

It has been argued that a number of digital search and storage services on the Internet, which are generally perceived as entirely legitimate, can also facilitate copyright infringements and other crimes. In this context, Google and YouTube have been mentioned. Without assessing the lawfulness of these services, the Court of Appeal finds that the reference to [Google and YouTube], services which have not been subjected neither to prosecution nor civil litigation in Sweden, raises the legal

³⁹² *Pirate Bay*, *supra* note 31 at 25.

³⁹³ *Supra* note 45 at para 122.

³⁹⁴ *Supra* note 31 at 24.

theories of exemption from liability on the grounds of so called lack of *criminal intent or social benefits* [emphasis added].³⁹⁵

In essence, the theories of criminal intent and social benefits imply that an offense which involves a conscious risk taking for a detrimental effect, under certain conditions may still be legal, considering circumstances, such as the nature of the risks, the values the risks are aimed at, the social value of the offense, and the possible precautions that could have been taken etc.³⁹⁶ In Sweden, these theories are considered ‘security provisions’ without which it would not be possible to excuse from liability in cases where there is no support in the law for the view that the deed is legal, and where it appears unreasonable and unintended to impose criminal liability.³⁹⁷ Thus, lack of criminal intent and social benefits are the tools left that prevent Sweden from ending up in a situation where all service providers, who provide an online service which typically makes it easier to communicate works to the public, is liable for contributory copyright infringement.³⁹⁸ However, a number of Swedish scholars note that the application of these tools is “pronouncedly normative, and...very difficult”.³⁹⁹ It is in light of this statement Andreasson & Schollin hold that “it is important that these general principles are analyzed and applied with utmost care”.⁴⁰⁰ And when applied to P2P intermediaries it is important that “these

³⁹⁵ *Ibid* [translated by author].

³⁹⁶ *Ibid*; Nils Jareborg, *Allmän kriminalrätt* (Stockholm: Isustus 2001) at 212, 233, 290.

³⁹⁷ Jareborg, *supra* note 396 at 233; see also Andreasson & Schollin, *supra* note 32 at 540.

³⁹⁸ Andreasson & Schollin, *supra* note 32 at 540.

³⁹⁹ Jareborg, *supra* note 396 at 35; see also Petter Asp & Jan Rosén, “The Pirate Bay - En kommentar” (2011) 1 SvJT 103 at 114; Andreasson & Schollin, *supra* note 32 at 540.

⁴⁰⁰ Andreasson & Schollin, *supra* note 32 at 540 [translated by author].

principles are applied especially in light of an *all-comprehensive* evaluation of their importance for the digital economy and the open society, which is increasingly dependent on information society services of different kinds.”⁴⁰¹ The Court in the *Pirate Bay* case, however, did not, as argued below, apply these principles in light of such all-comprehensive evaluation suggested by Andreasson & Schollin.

The Court held that an online service is beneficial for the society if:

- the service is used mainly for legitimate activities;
- the service is a valuable tool primarily for lawful activities;
- the service is generally beneficial for the society; and
- precautions have been taken to prevent dissemination or transmission of copyrighted content.⁴⁰²

In assessing these bullet points, and hereby determining whether The Pirate Bay’s service was beneficial for the society, the Court weighed:

- (a) the authors’ legitimate interest in a distribution channel of this kind, and the users’ equally valid interest in a quick and free consumption of culture and entertainment ⁴⁰³

against

⁴⁰¹ *Ibid* [translated by author].

⁴⁰² *Supra* note 31 at 24; see also Andreasson & Schollin at 541.

⁴⁰³ *Supra* note 31 at 25.

- (b) what the Court had found through the investigation, namely that although there were equal amounts of torrent files associated with copyright as non-copyrighted works stored in The Pirate Bay's database,⁴⁰⁴ the predominant activity among the Pirate Bay's users was to share files protected by copyright.⁴⁰⁵

In weighing these two interests against each other, the Court found two things. First, that the users' illegal activities violated fundamental values in our legal culture: authors, artists and photographers' rights to their works are protected under the Swedish Constitution.⁴⁰⁶ Second, that no precautions had been taken by The Pirate Bay to remove torrent files that were associated with copyright protected works, even though The Pirate Bay had received notifications and cease and desist letters from copyright owners.⁴⁰⁷ Therefore, the Court held:

In weighing the social benefits of providing a service for file sharing of lawful material, against the entirely obvious risk that these activities, to a massive extent, would lead to infringement of copyright holders' constitutionally protected rights, the Court of Appeal finds that a release from liability on the grounds of unwritten exception rules of social benefits and lack of criminal intent cannot be relevant...Providing the file sharing service must therefore, objectively viewed, be deemed to constitute a punishable furtherance of the [users'] copyright infringements.⁴⁰⁸

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid*; see also Andreasson & Schollin, *supra* note 32 at 541.

⁴⁰⁶ "Authors, artists and photographers shall own the rights to their works in accordance with rules laid down in law." *Regeringsformen*, SFS 1974:152 c 2, art 16.

⁴⁰⁷ *Pirate Bay* at 25.

⁴⁰⁸ *Supra* note 31 at 25 [translated by author].

The Court further discussed the severity of this form of infringement elsewhere in the judgment.

Copyright infringement through illegal file sharing is a societal problem which, in recent years, has spread like a wildfire...It is clear that the unlawful file sharing has quickly taken on proportions which mean that the general preventative considerations must be accorded great weight in the application of the law. With respect to this very form of copyright infringement, in the opinion of the Court of Appeal, there is therefore very special cause to classify the crime as of such a nature that the sanction should normally be imprisonment.⁴⁰⁹

The question then is, did the Court apply the 'beneficial for society' test or tool in light of an all-comprehensive evaluation of The Pirate Bay's importance for the digital economy and an open society as suggested by Andreasson & Schollin? For Andreasson & Schollin the answer to this is no. They point out a number of additional factors that could have been considered by the Court in determining whether The Pirate Bay's service was beneficial for the society.⁴¹⁰ They argue, for example, that The Pirate Bay had beneficial economic effects for the society. They explain that intellectual property rights have had significant importance for the development of the society: "without protection of intellectual property rights probably very few would be willing to invest in the commercial production of, for example music, movies and computer software."⁴¹¹ However, of equal importance for economic development, Andreasson & Schollin continues, "is the preservation of an 'open' society [a so called 'public domain'] where the exclusive right to intellectual

⁴⁰⁹ *Ibid* at 46-47; see also Danowsky, *supra* note 35 at 130.

⁴¹⁰ See Andreasson & Schollin, *supra* note 32 at 541-545.

⁴¹¹ *Ibid* at 541-542.

property rights does not exist”.⁴¹² This type of openness, Andreasson & Schollin argues, is especially important in the digital economy where innovation and production takes place within creative networks.⁴¹³ “For example, without illegal file sharing sites, such as The Pirate Bay, it is unlikely that legal alternatives, such as the Swedish commercial music streaming service Spotify⁴¹⁴ would have been created.”⁴¹⁵ Spotify provides its users with music from the major record labels including Sony, EMI, Warner Music and Universal, for a monthly fee of approximately CAD 15 (or free of charge if the user signs up for a subscription which allows commercial breaks). Spotify is used by 4 million Swedes and is the largest distributor of music on the Swedish market - bigger than Apple’s iTunes.⁴¹⁶ The founders of Spotify say in an interview from 2009 that they have observed the illegal file sharing in creating the future business model for music online, and that it is the existence of services such as The Pirate Bay’s that have made it possible for them to reach success in negotiations, especially with conservative copyright owners.⁴¹⁷ Although the answer to whether The Pirate Bay should be considered a negative or positive factor for the development for the digital economy is far from given, there is an actual possibility that The Pirate Bay has already played an important role in the

⁴¹² *Ibid* at 542 [translated by author].

⁴¹³ *Ibid*.

⁴¹⁴ Spotify provides legally DRM-protected content from most major independent record labels including Sony, EMI, Warner Music and Universal; <http://www.spotify.com/>.

⁴¹⁵ Andreasson & Schollin, *supra* note 32 at 542 [translated by author].

⁴¹⁶ Peter Vinthagen Simpson, “‘Spotify Earns More than iTunes’: Sony BMG”, *The Local* (11 August 2009) online: The Local <<http://www.thelocal.se>>.

⁴¹⁷ “Music Ally Welcomes Spotify, YouTube and the BigChampagne to the Great Escape”, *Music Ally* (1 April 2009) online: Music Ally <<http://musically.com>>; see also Andreasson & Schollin, *supra* note 32 at 542.

development of legal online music services.⁴¹⁸ Although taking into account this additional factor may not have changed the outcome of the *Pirate Bay* case, I agree with Andreasson & Schollin that this is a factor that the Court should have taken into account, since the Court ruled that the assessment of the lawfulness of a P2P intermediary's service depends on whether it is beneficial for the society.

Moreover, in determining the liability of The Pirate Bay, the Court took into account whether precautions had been taken by The Pirate Bay to prevent dissemination or transmission of illegal content.⁴¹⁹ However, the Court, did not specify what type of precautions the P2P intermediary could have taken. Considering the recent trend in Europe, it is likely that the Court had in mind the installation of various blocking and/or filtering technologies that filters out torrent files associated with works protected by copyright.⁴²⁰ However, in the recent CJEU decision, *Scarlet v SABAM*⁴²¹, the CJEU held that under EU law, a national court may not impose an injunction requiring an ISP to install filtering systems to tackle illegal downloading. The CJEU denied the installation of the filtering system in question on the following three grounds:

⁴¹⁸ Andreasson & Schollin, *supra* note 32 at 544.

⁴¹⁹ *Supra* note 31 at 24; see also Andreasson & Schollin, *supra* note 32 at 541.

⁴²⁰ See e.g. *IFPI Danmark v Tele2 A/S*, [2007] Danish Supreme Court F1-14324/2007; *Belgian Anti-Piracy Federation v NV Telenet*, [2011] Court of Appeal Antwerp 3399 2011/8314.

⁴²¹ *Scarlet v SABAM*, C-70/10, [2011] ECR I-271 [*Scarlet*].

1. The filtering technology was inconsistent with EU law, because Article 15 of the E-Commerce Directive prohibits Member States from imposing a general monitoring obligation on service providers;⁴²²
2. the filtering technology would restrict the service provider's freedom to conduct business, because the filtering technology required a costly and permanent computer system to be installed at the service provider's own expense;⁴²³ and
3. the filtering technology was disproportionate as it could potentially undermine the fundamental freedom of information; filtering systems might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.⁴²⁴

As illustrated by *Scarlet v SABAM*, installation of filtering and blocking technologies may restrict a users' freedom of information, the ISPs' freedom of conducting business, and is inconsistent with the E-Commerce Directive's general monitoring prohibition. Thus, it is not clear whether, how and to what extent P2P intermediaries

⁴²² "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14 [i.e. mere conduit, caching and hosting] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity." *E-Commerce Directive*, *supra* note 21 art 15.

⁴²³ The CJEU held that "the injunction to install the contested filtering system is to be regarded as not respecting the requirement [provided for in the Enforcement Directive] that a fair balance be struck between, on the one hand, the protection of intellectual-property right enjoyed by copyright holders, and, on the other hand, that of freedom to conduct business enjoyed by operators such as [access providers]." *Supra* note 421 at para 49.

⁴²⁴ *Ibid* at para 52.

(and other service providers) could take precautions to prevent illegal content on their servers. Consequently, in determining whether The Pirate Bay had a possibility to take precautions, the Swedish Court should not only have taken into account The Pirate Bay's practical ability to do so, but also if such precautions are lawful, and proportionate to the negative consequences these might have.⁴²⁵

Furthermore, the second point that was determinative for The Pirate Bay's liability was the fact that the Swedish constitution protects intellectual creations and these represent a fundamental value in the Swedish legal culture.⁴²⁶ However, in accordance with Article 27(1) of the Universal Declaration of Human Rights, "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." When the assessment of the lawfulness of an online service is based on whether the service respects fundamental values in our society, *all* relevant fundamental values should be taken into account;⁴²⁷ not only those of the copyright owners, but also those of the individuals.

Regardless of whether The Pirate Bay and other P2P intermediaries should be considered beneficial for society or not, it can be concluded from above that the tool the Court of Appeal has given to assess P2P intermediaries' (and other service providers') liability in Sweden is a quite complicated one. It requires a difficult

⁴²⁵ Andreasson & Schollin, *supra* note 32 at 545.

⁴²⁶ *Pirate Bay*, *supra* note 31 at 25.

⁴²⁷ Andreasson & Schollin, *supra* note 31 at 548; see also Patricia Akester, "The New Challenges of Striking the Right Balance Between Protection and Access to Knowledge, Information and Culture" (2010) 32:8 EIPR 372.

normative assessment of what is beneficial for the society at the time of assessment, hereby making the copyright liability of a P2P intermediary (and other service providers) very difficult to foresee. This is only one of many reasons for why the next chapter argues that the Canadian enabling provision and the N&N system is a much better approach to the liability of P2P intermediaries, than the Swedish doctrine on contributory liability in copyright law and the K&TD system.

6 COMPARATIVE ANALYSIS

6.1 Introduction

This chapter aims to bring together the comparative findings of this thesis, carry out a comparative analysis of these findings, and provide an answer to the question of which approach to the liability of P2P intermediaries – the Canadian or the Swedish – is the better one. In order to do so, section 6.2 summarizes the comparative findings of this thesis to form a basis for the comparative analysis carried out in section 6.3 and 6.4. Section 6.3 compares the Canadian enabling provision against the Swedish doctrine on contributory liability and section 6.4 compares the Canadian N&N system against the Swedish K&TD system. Section 6.5 then, concludes the comparative analysis. This chapter argues that the Canadian enabling provision provides a tool that is more effective, predictable and well-balanced in curbing illegal P2P file sharing, than the Swedish doctrine on contributory liability. It is also argued that the Canadian N&N system, even though not as effective against time-sensitive postings as the Swedish K&TD system, is more effective against copyrighted works shared over P2P networks, and comes across as a much more well-balanced approach to the taking down of illegal content on the Internet, than the K&TD system.

6.2 Summary of comparative findings

Since the commercial introduction of the Internet the question of legal liability for ISPs for unlawful content which is disseminated by third parties has been a contentious issue. Content on the Internet can be illegal for numerous reasons, but

this thesis has focused on the unauthorized dissemination of copyrighted works. Internet possesses an unprecedented set of challenges on copyright: On the Internet works can be infinitely replicated without loss of quality, communicated instantaneously to hundreds of millions of people around the world at no cost, and in most cases are the copies circulated by anonymous Internet users over P2P networks.⁴²⁸ “Add to this the difficulties in negotiating issues of national jurisdiction in the online world and the emergent culture of access and participation on the part of users (including an increasingly sophisticated awareness of, and in some instances disregard for, copyright law)”.⁴²⁹ Because of these difficulties, the ISPs have become the targets of copyright owners' enforcement claims. Internet content is hosted, located and disseminated by the ISPs but generally, however, they have little or no control over the content which is posted by the content providers. Arguably, the ISPs are merely the postmen of the Internet; they make the transmissions possible and more efficient, and they provide space on their servers where they host the content.⁴³⁰ However, as ‘gatekeepers’ to the Internet, the ISPs have been identified by right owners, collective societies, and governments as being in the best position to control the activities of Internet users, and curb online copyright infringement.⁴³¹ As a result, jurisdictions worldwide have established liability regimes which determine the circumstances under which ISPs may be held liable for their involvement with copyrighted content in carrying out their intermediate services.

⁴²⁸ Hamilton, *supra* note 3 at 289.

⁴²⁹ *Ibid.*

⁴³⁰ See Bernstein & Ramchandani, *supra* note 63.

⁴³¹ Hamilton, *supra* note 3 at 289; *ibid.*

Today, however, there is a much wider range of ISPs involved in the transmission, storage and location of content on the Internet. In the field of copyright liability, in particular, new types of Internet intermediaries have emerged which were unlikely in the minds of the legislators at the time of drafting the leading immunity instruments in the late 1990s, such as the EU E-Commerce Directive and the US DMCA.⁴³² These are the intermediaries who enable or assist in the downloading and uploading of files, both legal and illegal, by means of P2P software,⁴³³ defined in this thesis as 'P2P intermediaries'.

By focusing on the application of the Swedish and Canadian ISP liability laws to P2P intermediaries, it has been shown that Canada and Sweden present two quite different approaches to the liability of these new types of ISPs. First it was shown that whereas P2P intermediaries fall under the definition of a 'network service provider' and 'host' under the CaCA and hereby likely benefit from the Canadian safe harbor provisions, the Swedish Court of Appeal in the *Pirate Bay* case denied the P2P intermediary in question access to the Swedish safe harbors, even though the Court concluded both that P2P intermediaries fall under the definition of a 'service provider' and is a provider of a 'host service' under the SwECA. It has been argued that P2P intermediaries should be able to qualify for protection under the Swedish safe harbors. Support for this argument was found in: a) *Google v Louis Vuitton*; b) the purposes of the E-Commerce Directive; and c) the fact that even though P2P intermediaries would qualify for protection under the Swedish safe

⁴³² Edwards & Waelde, *supra* note 17 at 7.

⁴³³ *Ibid.*

harbors, this does not mean that they are granted an unconditional immunity, they must also participate in the K&TD system. However, as discussed in chapter 4, this could have led to the finding that The Pirate Bay would have been shielded liability under the Swedish safe harbors, because The Pirate Bay, just like other P2P intermediaries, merely provided storage space for torrent files. Torrent files contain no illegal content. In fact, torrent files contain no content at all, their only function is to link users to bits and pieces of sometimes copyrighted content stored somewhere else on the Internet (typically on the computers of the individual file sharers). As a result, if The Pirate Bay would have been granted access to the Swedish safe harbor provision, there is a risk that the Court would have found that The Pirate Bay had not failed in participating in the K&TD system, and hence was protected from liability under the safe harbor afforded hosts. This is a finding that the Swedish Court probably wanted to avoid considering the United States' threat to blacklist Sweden within the WTO.

There is not yet a precedent in place clarifying whether the safe harbors introduced by the *Copyright Modernization Act* apply to P2P intermediaries. However, in light of the discussion above, and the fact that P2P intermediaries fall both under the definition of network service providers, and their services are characterized as hosting, it is likely that P2P intermediaries will qualify for protection under the Canadian safe harbors. Unlike the SwECA, however, the *Copyright Modernization Act* ensures that only legitimate P2P intermediaries (and other network service providers) will benefit from the safe harbors. The *Copyright Modernization Act* explicitly states that the Canadian safe harbors do not apply in

respect of a service provided by a network service provider if the provision of that service constitutes an infringement of copyright under the enabling provision.⁴³⁴ This is an important provision, especially since the N&N system does not operate to limit the scope of the safe harbor provisions. As shown in chapter 4, the N&N system does not, unlike the K&TD system, require that network service providers take down any content. This is instead the responsibility of the content provider, to whom the network service provider is obliged to forward notices of infringement. Consequently, the liability of a P2P intermediary under Canadian law depends on whether the P2P intermediary is deemed an enabler of copyright infringement under Section 27(2.3) of the CaCA.

Michael Geist has argued that the enabling provision is unnecessary, claiming that the already existing authorization doctrine is effective against P2P intermediaries.⁴³⁵ This thesis has argued against Geist, and through an analysis of the authorization doctrine, as it was interpreted by the Canadian Supreme Court in *SOCAN*, it has been shown that it is difficult to apply the authorization doctrine to P2P intermediaries. Thus, the comparative analysis in this chapter will focus on the enabling provision and N&N system only.

A P2P intermediary is liable for enabling of copyright infringement if it:

1. Knows or should have known;

⁴³⁴ *Supra* note 12 s 31.1(6).

⁴³⁵ See literature review chapter 1.3.

2. that its service is designed primarily to enable acts of copyright infringement; and
3. that an actual infringement of copyright occurs when the service is used.⁴³⁶

Further, in determining whether a P2P intermediary is an enabler under the CaCA, Section 27(2.4) establishes a list of non-exhaustive factors to take into account, including whether:

- a. The P2P intermediary has marketed or promoted its service as one that could be used to enable copyright infringements;
- b. the P2P intermediary has knowledge that its service is used to enable significant numbers of copyright infringements;
- c. the service has significant uses other than to enable copyright infringements;
- d. the P2P intermediary has an ability, as part of providing its service, to limit acts of copyright infringement, and any action taken to do so;
- e. the P2P intermediary receives benefits as a result of enabling acts of copyright infringements; and

⁴³⁶ *Canadian Copyright Act, supra* note 42 s 27(2.3).

- f. the service has economic viability if it is not used to enable copyright infringement.

By contrast, the liability of a P2P intermediary under Swedish law depends on whether the service is beneficial for the society. It is only where this is not the case that copyright liability may be imposed. The Swedish Court of Appeal in the *Pirate Bay* case held that a P2P intermediary's service is beneficial for the society if

- it is used mainly for legitimate activities;
- it is a valuable tool primarily for lawful activities;
- it is generally beneficial for the society; and
- if precautions have been taken to prevent dissemination or transmission of copyrighted content.⁴³⁷

Moreover, in order to hold a P2P intermediary liable pursuant to the *Pirate Bay* case, it must be shown that the P2P intermediary is aware of the circumstances that constitute the prerequisites for copyright infringement.⁴³⁸ As argued in this thesis, this means that it is enough for liability that the P2P intermediary has a general awareness that its service is used for infringing purposes.⁴³⁹

⁴³⁷ *Supra* note 31 at 24.

⁴³⁸ *Ibid* at 27.

⁴³⁹ See also Andreasson & Schollin, *Supra* note 32.

Thus, both Sweden and Canada, will determine the liability of a P2P intermediary by taking into account the *character of the service*. A Swedish Court will look at if the P2P intermediary's service is a valuable tool primarily for legitimate or illegitimate activities (second bullet point), and a Canadian court will look at if the service is provided primarily for the purpose of enabling illegal or legal activities (point 2) and if the service has significant uses other than to enable illegal activities (point c). Moreover, both a Swedish and Canadian Court will look at *how the service is used*. A Swedish Court will attach importance to whether the service is used mainly for legitimate activities (first bullet point), and a Canadian Court will take into account if the service is used to enable significant numbers of copyright infringements (point b). Furthermore, whether the P2P intermediary has *taken actions against illegal activities* that occur on its service plays an important role under both liability systems. A Swedish Court will look at if the P2P intermediary has taken precautions to prevent dissemination or transmission of copyrighted content (fourth bullet point), and a Canadian court will look at if the P2P intermediary has an ability to limit acts of copyright infringement and taken any actions to do so (point d). In addition, the P2P intermediary's *knowledge and awareness* with respect to the character and use of its service is a key point in determining the liability of P2P intermediaries under both Swedish and Canadian law.

Although the Swedish and Canadian tools for assessing liability of P2P intermediaries contain some common features, their overall function, as will be shown in this chapter, differs significantly. Whereas the liability of a P2P intermediary under the Swedish doctrine on contributory copyright infringement

depends on whether the service is beneficial for the society, a P2P intermediary's liability under Canadian law depends on whether the P2P intermediary, by providing its file sharing services, enables significant number of acts of copyright infringement.

6.3 Comparative analysis

(a) *Enabling versus contribution*

The enabling provision requires a considerably higher level of knowledge for liability, than the Swedish doctrine on contributory liability. Under the contributory liability doctrine, it is enough that the P2P intermediary has a general knowledge that its service is used for infringing purposes.⁴⁴⁰ As discussed in chapter 4, with such low knowledge requirement, basically all P2P intermediaries will have the knowledge required for liability, regardless if its operation is primarily legal or illegal.⁴⁴¹ By contrast, a general awareness of infringement is not enough for liability under the enabling provision. Instead, it must be shown that the P2P intermediary provided the service primarily for the purpose of enabling acts of copyright infringement, and that the P2P intermediary *knew* that its service was also used to commit a *significant* number of copyright infringements.⁴⁴² Consequently, unlike the Swedish contributory liability doctrine, the enabling provision will apply only to P2P intermediaries (and other network service providers) who intentionally and systematically provide services that enable acts of copyright infringement, provided that the service is also

⁴⁴⁰ Andreasson & Schollin, *supra* note 32 at 537.

⁴⁴¹ *Ibid.*

⁴⁴² See *Canadian Copyright Act*, *supra* note 42 s 27(2.3)(b).

used to infringe copyright on a large scale. This conclusion is supported by the list of examples on what constitute enabling under Canadian law. These examples all point in the direction that liability as an enabler requires intentional, systematic and large scale enabling of copyright infringement. In accordance with Section 27(2.4) of the CaCA, the enabling provision is intended for those who *market* or *promote* its service as one that could be used to enable acts of copyright infringement.⁴⁴³ It is intended for those who provide a service that enables *significant numbers* of acts of copyright infringements, and is *used primarily* for this illegal purpose.⁴⁴⁴ It applies to those who *take no actions to limit* acts of copyright infringements committed by those using the services.⁴⁴⁵ It applies to those who receive *benefits* as a result of providing the service, and where the service's *economic viability* depends on the enabling of acts of copyright infringement.⁴⁴⁶ Thus, unlike the Swedish doctrine on contributory liability, which targets both legal and illegal P2P intermediaries, the Canadian enabling provision targets only primarily illegal P2P intermediaries of The Pirate Bay's kind, and so does not operate to restrict the operation of legal P2P file sharing services and other network services. However, Hagen questions the efficiency of the enabling provision.⁴⁴⁷

Hagen claims that the enabling provision is not well-suited for P2P intermediaries using the BitTorrent technology. Since BitTorrent technology is the

⁴⁴³ *Ibid* s 27(2.4)(a).

⁴⁴⁴ *Ibid* ss 27(2.4)(b)-(c).

⁴⁴⁵ *Ibid* s 27(2.4)(d).

⁴⁴⁶ *Ibid* ss 27(2.4)(e)-(f).

⁴⁴⁷ *Supra* note 43 at 375-381.

most commonly used file sharing protocol (see chapter 3), it is important to look into the validity of Hagen's claim. He states that "although stopping infringement over peer to peer file sharing networks is the object of the [enabling] provision, it cannot succeed against highly distributed file sharing services, such as those operating in accordance with the bitTorrent protocol."⁴⁴⁸ Hagen explains that this is because in the BitTorrent technology there is no central coordinating entity that can be found liable: "while bitTorrent users may create their individual overlay networks with the intent of enabling infringement by others, and be individually liable for secondary infringement, there is no necessity for a centralized server operator that can be targeted in a bitTorrent network."⁴⁴⁹ Hagen is right that in the P2P technology there is no central coordinating entity (see chapter 3). However, the application of the enabling provision does not require that a central coordinating entity is identified. Taking The Pirate Bay as an example, the enabling provision would likely be successfully invoked against The Pirate Bay, which is based on the BitTorrent technology. By providing a website with a searchable torrent file directory and a tracker function The Pirate Bay, as the Swedish Court of Appeal found, was "not a necessary condition for the individual [copyright infringements] to be committed, [but] it has typically made it *easier and faster* [emphasis added] for the users to communicate the works to the public by file sharing."⁴⁵⁰ The enabling provision does not require that copyright infringement would not have been committed *without* the

⁴⁴⁸ *Ibid* at 381.

⁴⁴⁹ *Ibid* at 382.

⁴⁵⁰ *Supra* note 32 at 24 [translated by author].

service, it is only required that the service *enabled* copyright infringement. A P2P intermediary that makes copyright infringement easier and faster must be said to have enabled the same. Moreover, considering the lists of examples in determining whether a P2P intermediary is an enabler under Canadian law, the enabling seems perfectly suitable to The Pirate Bay: The Pirate Bay was expressly marketed and promoted by its operators as a file sharing service that could be used to enable acts of copyright infringement. For example, they posted all legal threats on The Pirate Bay's website to reassure its stance on intellectual property laws.⁴⁵¹ The operators also frequently made statements in media where they explained their disregard for copyright laws, for example holding that "the existing copyright regime is a broken artifact of pre-digital age, the gristle of a rotting business model that poisoned culture and creativity."⁴⁵² Taking into account the other factors established under Section 27(2.4) of the CaCA, the following can be concluded:

1. Having received a large number of cease and desist letters, it is clear that the operators of The Pirate Bay knew that its service enabled a significant number of acts of copyright infringement.⁴⁵³
2. Although the Swedish Court found that there were equal amount of torrent files linking to copyrighted as non-copyrighted material, the Court concluded that The Pirate Bay's service was used predominantly

⁴⁵¹ See e.g. quotation posted above chapter 1 of this thesis.

⁴⁵² Bassett, *supra* note 24 at 75-76.

⁴⁵³ *Canadian Copyright Act*, *supra* note 42 s 27(2.4)(b).

for infringement of copyright. Thus, The Pirate Bay's service operated primarily to enable acts of copyright infringement.⁴⁵⁴

3. The Pirate Bay had an ability to limit act of copyright infringement, for example to cease promoting the site as one where torrent files linking to copyrighted works could be found. The Swedish Court found that no actions had been taken by The Pirate Bay to limit acts of copyright infringement.⁴⁵⁵
4. Although the Swedish Court did not state anything with respect to The Pirate Bay's benefits and economic viability, it can be assumed, given that the predominant use of The Pirate Bay was to share copyrighted works, that the economic viability of the website and all benefits hereof (such as advertising incomes), stemmed mostly from the illegal and not legal file sharing.⁴⁵⁶

Thus, the enabling provision seems suitable to The Pirate Bay. To say that the enabling provision is not successful against P2P intermediaries based on the BitTorrent technology does therefore not appear to be true. However, Hagen is correct that the enabling provision would not be successfully invoked in cases where individual users create their own overlay networks over which they share files, without the involvement of a P2P intermediary. However, as discussed above, the

⁴⁵⁴ *Ibid* s 27(2.4)(c).

⁴⁵⁵ *Ibid* s 27(2.4)(d).

⁴⁵⁶ *Ibid* ss 27(2.4)(e)-(f).

intention of the enabling provision is not to target individuals. Instead the provision is intended only for those who enable copyright infringement on a systematic and large scale. Rather than being a shortcoming, it must be considered a good balance that individuals are not the targets of the enabling provision. The liability of individuals is instead taken care of by the N&N regime, which gives the individual a chance to take down the illegal content, without court proceedings being initiated. The benefits and shortcomings of the N&N system are evaluated in the next section.

Since basically all P2P intermediaries, will meet the knowledge criteria under Swedish law, it is important that the assessment of whether the service is beneficial for the society is carried out carefully and reflecting an all-comprehensive evaluation of all various benefits that the service might have for the society.⁴⁵⁷ By drawing on Andreasson & Schollin, this thesis has argued that when the Swedish Court of Appeal assessed whether The Pirate Bay was beneficial for the society, a wide range of additional factors of importance could have been taken into account. For example, it was argued that the beneficial effect that The Pirate Bay had in the development of legal alternatives for the society to enjoy music online, such as Spotify, should have been taken into account.⁴⁵⁸ It was also argued that the Pirate Bay's possibility to prevent future, and take actions against ongoing, copyright infringements, should have been evaluated in light of the opportunities the P2P intermediary had to do so, without restricting freedom of expression for consumers and violate the E-Commerce Directive's prohibition against a general monitoring

⁴⁵⁷ Andreasson & Schollin, *supra* note 32 at 539.

⁴⁵⁸ *Ibid.*

obligation.⁴⁵⁹ It was further argued that because the fundamental value of authors' protection for intellectual creations under the Swedish constitution was taken into account, also individuals' right to freely participate in cultural life and enjoy the arts, pursuant to the Universal Declaration of Human Rights, should have been taken into account.⁴⁶⁰ Thus, the Swedish Court's reasoning in the *Pirate Bay* case seems incomplete, reflecting only the interests of the copyright owners. If the liability of a P2P intermediary is made dependent on whether the service is beneficial for the society, all aspects that are beneficial for the society should be taken into account. It is further interesting to note what James Boyle, professor in intellectual property law at Duke University School of law, argued with respect to the positive effects of illegal file sharing. Boyle argues that currently, copyright locks up much of the 19th and 20th centuries' cultural productions.⁴⁶¹ Most of the copyrighted works from this era is commercially unavailable because of the extensive term of copyright.⁴⁶² Boyle explains:

Apart from doing away with the need to indicate that you *want* your works to be copyrighted, we have lengthen the copyright term. We did this without any credible evidence that it was necessary to encourage innovation. We have extended the terms of living and even of dead authors over works that have already been created. (It is hard to argue that this was a necessary incentive, what with the works already existing and the authors often being dead.) We have done away with the need to renew the right. Everyone gets the term of life plus twenty years, or ninety-five year for corporate "works for hire". All protected by a "strict

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ James Boyle, *The Public Domain - Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008) at 15.

⁴⁶² *Ibid.*; see also Andreasson & Schollin, *supra* note 32 at 546.

liability” system with scary penalties. And, as I said before, we have made all those choices just when the Internet makes their costs particularly tragic...We have locked up most of twentieth-century culture and done it in a particularly inefficient and senseless way, creating vast costs in order to convey proportionally tiny benefits. (And all without much complaint from those who normally object to inefficient government subsidy programs.) Worst of all, we have turned the system on its head. Copyright intended to be the servant of creativity, a means of promoting access to information, is becoming an obstacle to both.⁴⁶³

Thus, in light of Boyle’s view, it could even be said that The Pirate Bay satisfied fundamental copyright values such as freedom of information, creativity and freedom of expression.⁴⁶⁴

Whether the outcome of the *Pirate Bay* case would have been another if this factor, and the other factors that have been presented in this thesis, would have been taken into account is difficult to say. However, what the quotations and references above intend to show is that it is not obvious that a service like The Pirate Bay’s, is not beneficial for the society. Consequently, it is not certain that even intentional, systematic and large scale contributors to copyright infringement could be held liable under the doctrine on contributory liability. In order for the Swedish Court of Appeal to impose liability on The Pirate Bay, the Court had to disregard a wide range of factors that were in favor of The Pirate Bay and its users. Possibly because, if the Swedish Court would have taken into account all factors relevant to the ‘test’ of whether The Pirate Bay was beneficial for society (and arguably applying the tool correctly), it is not entirely unlikely that The Pirate Bay – one of the world’s

⁴⁶³ Boyle, *supra* note 459 at 15.

⁴⁶⁴ Andreasson & Schollin, *supra* note 32 at 548.

largest illegal file sharing sites – would have escaped liability. Thus, even though, conceptually, the beneficial for society tool gives those who apply it an opportunity to take into account all interests at stake, it appears too dynamic to be effective even against pronouncedly illegal P2P file sharing services, such as The Pirate Bay. Thus, the enabling provision appears to be a much more *effective* tool against The Pirate Bay and other large-scale enablers of copyright infringement. However, in terms of balance, it must be admitted that the Swedish doctrine on contributory copyright liability indeed gives those who apply it an opportunity to take into account all interests at stake, hereby representing an incomparably well-balanced tool. Unfortunately, with no limits as to the interests to take into account, the result is a liability regime under which liability is both difficult to assess and impose.

Moreover, when the liability of a P2P intermediary depends on whether its service is beneficial for the society, this assessment will always require a complicated normative assessment of an *undefined number of unwritten* factors that the society might find beneficial *at the time of assessment*. As a result, liability of P2P intermediaries under the contributory copyright liability doctrine is difficult to foresee; the liability and the factors for determining this may change as fast as the technology itself, all depending on what the society finds beneficial at the time the P2P intermediary is up for assessment. By contrast, the enabling provision provides clear and straightforward factors to take into account when assessing a P2P intermediary's liability. As a result, the *Copyright Modernization Act* creates a clear and robust liability regime under which liability is considerably more predictable than under the contributory copyright liability doctrine. Consequently, it has in Sweden,

ever since the Court of Appeal passed its judgment in the *Pirate Bay* case, been speculated about who may be held liable as a contributor to somebody else's copyright infringement.⁴⁶⁵

The problem of the doctrine on contributory copyright liability lies in the fact that it will always require an assessment of the degree or level of contribution, because not all contributory acts are unlawful. The beneficial for society tool is thus necessary to set a demarcation line between lawful and unlawful acts. By contrast, liability for enabling does not require an assessment of 'level' or 'degree' of enabling; either the P2P intermediary has enabled the copyright infringement, or it has not enabled it. The only degree or level to assess under the enabling provision is the extent to which a P2P intermediary's (and other network service providers') service is provided *primarily* for the purpose of enable acts of copyright infringements, and whether the service is used to commit a *significant* number of copyright infringements. What 'primarily' and 'significant' mean in the context of enabling of copyright infringement will likely be defined by the Canadian Court in the future. By contrast, an assessment of the degree or level of contribution under the contributory copyright liability doctrine is necessary because if the contributory liability provision under the SwPC⁴⁶⁶ is applied strictly in accordance with its wordings, this could lead to unintended and unreasonable results.⁴⁶⁷ Ironically, while the beneficial for society tool could exclude pronouncedly illegal P2P intermediaries from liability, it may not

⁴⁶⁵ See e.g. Axhamn, *supra* note 86 Danowsky, *supra* note 35; Asp & Rosén, *supra* note 399.

⁴⁶⁶ *Supra* note 36 c 23, s 4.

⁴⁶⁷ See Jareborg, *supra* note 396 at 222; *Pirate Bay*, *supra* note 31 at 25.

be strong enough to exclude from liability actors that are significantly more innocent than these type of primarily illegal P2P intermediaries. Given how the doctrine on contributory copyright liability was interpreted by the Swedish Court of Appeal in the *Pirate Bay* case, a considerably wider range of actors than those targeted by the enabling provision could be held liable as contributors under Swedish law.

In the context of online copyright infringement, a wide range of actors, other than the P2P intermediary, could be identified as *de facto* contributing to the individual file sharers' copyright infringements. For example, The Pirate Bay could not, without Internet access, computers, office space, and electricity run its service and hereby contribute to its users' copyright infringements. Thus, when an ISP provides internet access, a computer manufacturer sells computers, a landlord lets office space, and a utility provider provides electricity to The Pirate Bay, they are *de facto* contributing to The Pirate Bay's contribution to its users' copyright infringements. Without carrying out an assessment of the liability of these actors, it is interesting to note that the Court of Appeal in the *Pirate Bay* case held that it saw no problem in extending the copyright liability chain to those contributing to The Pirate Bay's contributory copyright infringement and even beyond.⁴⁶⁸ As a result, case law following in the wake of the Pirate Bay case, have held a provider of Internet access to The Pirate Bay's tracker,⁴⁶⁹ a provider of indirect Internet access to The Pirate Bay's website⁴⁷⁰, and a provider of computer equipment to the operators of The

⁴⁶⁸ *Supra* note 31 at 31-32.

⁴⁶⁹ *Portlane*, *supra* note 171.

⁴⁷⁰ *Black Internet*, *supra* note 170.

Pirate Bay,⁴⁷¹ liable as contributors to The Pirate Bay's contribution to its users' direct copyright infringements. In light of this, it is not impossible that also a landlord, who obviously knows who he is letting office space to, or a utility provider, who obviously knows whose name it puts on the utility bill, could be held liable for contributory copyright infringement in Sweden. Of course the liability of these actors will depend on an assessment of whether their services are beneficial for the society. While it perhaps seems obvious that landlords and utility providers operate within services that are generally beneficial for the society, it is interesting to note that there is already strong support in Swedish literature for the argument that mediators of advertising space to websites that contributes to its users' copyright infringements, and those who advertise on websites that contribute to copyright infringements – services that must be generally considered beneficial for the society as well – may be held liable under the Swedish doctrine on contributory liability in copyright law.⁴⁷² How far the doctrine on contributory liability may extend to other actors is not clear though. However, in light of the considerations above and the Court of Appeals' ruling in the *Pirate Bay* case, it is not impossible that liability could attach to a contributor's contributor and even beyond! While such extensive reach of the doctrine on contributory liability in copyright law is to the advantage of the copyright owners, who are given a much wide range of actors against whom they may raise enforcement claims, than under the enabling provision, the balance of such regime could be questioned. Imposing liability on an unlimited range of service

⁴⁷¹ *Pirate Bay*, *supra* note 31.

⁴⁷² See Axhamn, *supra* note 86 at 36-38.

providers, providing both online and offline services, who might be very remote from the direct infringement, does not come across as a well-balanced and tempered response to the issue of online copyright infringement and illegal P2P file sharing. By contrast, the enabling provision limits the range of actors against whom copyright owners may raise enforcement claims to those who “over the Internet or another digital network provide a service”⁴⁷³ which primarily enable copyright infringement. Thus, only providers of *online services* may be held liable as enablers of acts of copyright infringement, and specifically, these online services must be of a specific character, namely: they must be intentional, systematic and large-scale enablers of copyright infringement. Given that it is the intentional, systematic and large scale copyright infringement enablers who are likely to cause the most significant economic damages for the copyright owners, it does not seem fair to impose liability on actors that are too remote from the underlying copyright infringement. It is in light of this that this thesis concludes that the enabling provision provides for a more well-balanced tool for curbing copyright infringement committed by means of P2P file sharing.

Moving forward, with the N&N system, copyright owners are granted a tool under which enforcement claims may also be raised against individuals, who are obliged to take down copyrighted content that they have made available on the Internet. The corresponding Swedish tool for the taking down of content is the K&TD system. Although the Swedish Court in the *Pirate Bay* case, indirectly ruled that the

⁴⁷³ *Canadian Copyright Act*, *supra* note 42 s 27(2.3).

K&TD system does not apply to P2P intermediaries (by holding that the safe harbors do not apply to these types of ISPs), this thesis argued that P2P intermediaries should qualify for protection under the safe harbors and hence be required to participate in the K&TD system. The K&TD and N&N systems and their application to P2P intermediaries are therefore compared in the next.

(c) *The N&N system versus the K&TD system*

This thesis has shown that the Swedish and Canadian safe harbor provisions are quite similar. They exempt the same type of actors and activities from liability. However, the two countries take two quite different approaches to the taking down of illegal content. Since the enabling provision does not target copyright infringement committed on legitimate P2P file sharing sites (or other network services), the N&N system deals with infringements that occurs on these primarily legitimate services, and ensures that the infringing content is removed from the Internet. The K&TD system provides the corresponding Swedish solution to the taking down of illegal content. When the N&N and K&TD systems are compared, two very different approaches to service providers' obligation to assist in enforcement of copyright on the Internet are revealed. Whereas Swedish service providers must be quite active in enforcing copyright, and upon knowledge of infringing content on their servers, expeditiously remove that content, Canadian network service providers are only required to forward notices of alleged infringement to their users. The comparative analysis below evaluates which of the two approaches to the taking down of content is the better one.

Barry Sookman argues that the Canadian N&N regime may be inadequate in “effectively deal[ing] with operators of pirate sites that infringe content on a substantial scale and to deal promptly with time-sensitive postings.”⁴⁷⁴ Sookman makes an important point here. The K&TD system is probably more effective against time-sensitive posting than the N&N system, because copyright owners can raise claims directly to the service providers who, under threat of liability, must take down the allegedly infringing content. By contrast, under the N&N system, notifications are forwarded to the alleged infringer, who is first given a chance to take down the illegal content. If he or she refuses to take down the content, the matter will be referred to a court. Thus, while service providers under the K&TD system must take down the infringing content as soon as they have obtained knowledge or awareness of its occurrence, the N&N system requires both that the individual is given a chance to take down the content him or herself, and if he or she refuses to do so, a court must decide on the matter. Naturally, the taking down of content under the N&N system, in cases where the individual refuses to take down the content, is much more time consuming than the K&TD system. However, the effectiveness of the K&TD system against infringing content shared by means of P2P file sharing may be questioned.

Files subjected to file sharing are located on the computers of the persons engaged in the file sharing; an obligation to take down content imposed on the service providers will therefore have limited effect. Although a take down obligation of course could include the taking down of the torrent files, it is important to note that

⁴⁷⁴ Sookman, “Some observations on Bill C-11”, *supra* note 13.

this still does not target the source of the torrent file, i.e. the copyrighted work stored on the users' computers. Thus, while the K&TD system is effective against illegal material posted on websites or stored on servers, the N&N system is more effective in curbing copyright infringement committed by P2P file sharing since it targets the source of the illegal content, i.e. the 'seeder' who creates the torrent files linking to the work he or she has stored on his or her computer.

Moreover, the fact that the assessment of whether content is illegal is under the K&TD system is done by the service provider and not the courts, as is the case under the N&N system, represents a significant shortcoming. As noted by many authors, service providers are not always qualified to assess the sometimes complex issues of determining whether copyright has been infringed.⁴⁷⁵ Although some cases, such as those dealing with famous music and movies, are easy to assess, it is sometimes even for lawyers difficult to tell if a copyright has been infringed. These difficulties are intensified by the fact that traditionally copyrights are demarcated according to territorial boundaries which are not always clear on the Internet.⁴⁷⁶ This raises difficult issues of conflict of laws.⁴⁷⁷ Thus, the Swedish model offers a good solution in easy cases where the question of copyright infringement is straightforward, such as when a well-known Hollywood movie has been infringed. But when the issue of whether copyright has been infringed is more difficult to assess, the Swedish model is not a well-balanced solution. The N&N system, which

⁴⁷⁵ See e.g. *Ibid*; Hamilton, *supra* note 3; Axhamn, *supra* note 86; Gerald Spindler et al, EU Commission Report, "Study on the Liability of Internet Intermediaries" Markt/2006/09/E.

⁴⁷⁶ Spindler, *supra* note 475 at 121.

⁴⁷⁷ *Ibid*.

leaves the task of determining whether copyright has been infringed, is therefore a better and more well-balanced solution.

Furthermore, since service providers' liability depends on participation in the K&TD system, there is a risk for over blocking of content. The K&TD system creates incentives for service providers to remove content without warning or evidence of actual infringement, out of fear of losing its protection under the safe harbors.⁴⁷⁸ As a result, fundamental values including freedom of expression and freedom of information might be violated. Again, also in this regard the N&N system comes across as more well-balanced solution for the taking down of illegal content.

In addition, the deterrent and informative effect of notices forwarded to users/subscribers under the N&N system should not be underestimated. Many infringers may not know that they are engaging in infringing activities, particularly younger Internet users. In these cases, notifications could have a good deterrent and informative effect. Since the Swedish take down system does not reach out to the individual user, the preventive effect of the K&TD system must be significantly smaller. Thus, the N&N and K&TD systems compared, the N&N system, although being a more time-consuming procedure, is both a more effective and well-balanced tool in curbing copyright infringement committed by means of P2P file sharing.

⁴⁷⁸ *Ibid*; Hamilton, *supra* note 3 at 305-306.

6.4 Comparative conclusion

This chapter has argued that the enabling provision is a more *effective* tool for curbing the illegal P2P file sharing than the Swedish doctrine on contributory liability in copyright law because the assessment of liability under the enabling provision is more straightforward and applies effectively to intentional, systematic and large scale illegal P2P intermediaries such as The Pirate Bay. By contrast, the assessment of liability under the contributory liability doctrine, with its beneficial for society tool, requires a complicated normative assessment of what is beneficial for the society, and could excuse from liability even intentional, systematic and large scale contributors to copyright infringement. This thesis has shown that there are strong arguments in favor of the view that even The Pirate Bay – one of the world's largest illegal P2P file sharing sites – was actually beneficial for society.

It was further argued that the enabling provision is a more *well-balanced* tool than the Swedish doctrine on contributory liability because it targets only those actors who are likely to cause the most significant economic losses for copyright owners – i.e. the intentional, systematic and large scale enablers of copyright infringement – and so does not restrict the operation of legitimate P2P file sharing services or other network services. Nor does it target individuals. If copyright owners wish to raise enforcement claims against individuals, they must go through the N&N system which gives the individual a chance to take down the content without court proceedings being initiated, their identity being revealed or liability imposed. By contrast, the Swedish contributory liability doctrine has a much wider reach than the enabling provision. Whereas only network service providers may be held liable

under the enabling provision, anyone who contributes to a copyright infringement, including both online and offline services and individuals, may on the same conditions, be held liable as contributors under Swedish law. Whereas such liability system is beneficial for copyright owners who are given a very wide range of actors against whom they may raise enforcement claims, such system is not very well-balanced as liability may be imposed on actors that are very remote from the underlying copyright infringement.

It has also been argued that the enabling provision provides a more *predictable* liability regime than the contributory liability doctrine. Liability under the enabling provision is straightforward and easy to assess. By contrast liability under the contributory liability doctrine depends on an assessment of what is beneficial for the society at the time of assessment. Consequently, the liability of a P2P intermediary and the factors for the determination of that liability may quickly change, all depending on what the society finds beneficial at the time of assessment.

With respect to the N&N and K&TD systems, it was argued that the K&TD system is more *effective* against time-sensitive postings since it requires the service providers, upon knowledge or awareness of infringing content, to expeditiously take down the illegal content themselves. However, in the context of P2P file sharing the N&N system is more effective because it targets the source of the infringing content – the individuals' who have the copyrighted works, subjected to file sharing, stored on their computers. Since no copyrighted works are stored on the P2P intermediaries' servers, an obligation imposed on a P2P intermediary to take down

content would have limited effect. Moreover, it was argued that the N&N system reflects a better *balance* than the K&TD system because: a) the N&N regime gives individuals a chance to take down the allegedly infringing content, and hereby escape liability, before its identity is revealed and court proceedings are initiated: and b) the K&TD system requires the service providers to make sometimes inexpert decisions on whether copyright has been infringed.

It is in light of the foregoing considerations that this thesis concludes that the Canadian ISP liability regime provides a better tool for curbing online copyright infringement committed by means of P2P file sharing than the Swedish ISP liability regime. It is therefore recommended that Sweden and other countries should learn from Canada's unique approach.

7 CONCLUSION

7.1 Research question and problem

The literature review introducing this thesis showed that the number of comparative studies in the field of online copyright enforcement was very limited in general, and among the available studies, the overwhelming majority focused on the same countries, namely, the ISP liability regimes of France, Germany, the United Kingdom and/or EU generally was compared to the United States ISP liability regime. The literature review further showed that no study had previously compared the Canadian and Swedish ISP liability regimes and no comparative study had previously looked particularly at how these liability regimes apply to P2P intermediaries and the issue of copyright infringements by means of P2P file sharing. Considering the fact that most countries will have to address, or already have addressed, the issue of online copyright infringement through establishment of safe harbor regimes, systems for taking down of infringing content, and/or through other legislative means, it seemed like a significant gap in the literature that almost only the views of United States EU and/or the larger European countries were given on the issue.

By comparing the ISP liability regimes of two countries not previously compared and analyze how these regimes apply to P2P intermediaries, this thesis attempted to fill that gap in the literature. The reason why Sweden and Canada made good comparators (except from the fact that they had not previously been compared) was that their ISP liability regimes were relatively homogenous but still

different enough to provide an interesting and fruitful comparative study. The aim of a comparative study based on the functional approach, is to determine what of two approaches to a certain legal problem is the better one.⁴⁷⁹ Thus, the following research question was posed: what approach to the liability of P2P intermediaries – the Canadian or the Swedish – is the better one? In order to provide a meaningful answer to this rather broad question, it was necessary to limit the analysis, and look at the question from the following three perspectives: what approach to the liability of P2P intermediaries – the Canadian or the Swedish – is i) the most effective in curbing copyright infringement by means of P2P file sharing; ii) provides the most well-balanced tool in curbing copyright infringement committed over P2P networks; and iii) provides the most predictable liability standard.

7.2 Analysis and structure

With the purpose of providing a context to the way in which the Canadian and Swedish ISP liability regimes operate, chapter 2 provided an account of the background to the problem of enforcing copyright on the Internet and the nature of copyright protection under Swedish and Canadian law. With this context established, chapter 3 could move on to the necessary task of defining some key terms and key concepts relevant for the understanding of the further analysis in the thesis. By drawing on primary and secondary doctrinal resources, chapter 3 defined the term ‘ISP’, described what type of ISPs are relevant to the liability of third party content on the Internet, and described the concepts of P2P file sharing and the role played by

⁴⁷⁹ Whytock, *supra* note 114.

P2P intermediaries in the file sharing process. Chapter 3 concluded that the term 'ISP' is a rather broad term comprising not only traditional ISPs that provide Internet access under contract with their customers, but include also a wide range of newer type of actors that provide services online, most notably the P2P intermediaries. It was also concluded that P2P intermediaries fall under the definition of a 'service provider' (Sweden) and 'network service provider' (Canada) under the Swedish and Canadian law. This finding raised the question if P2P intermediaries could benefit from the immunity provisions, or safe harbors, established under the Swedish and Canadian ISP liability regimes.

With this question in mind, chapter 4 turned to the substantial rules of the Swedish and Canadian safe harbors, and analyzed whether P2P intermediaries could benefit from the liability protection granted only specific types of ISPs and ISP activities. It was concluded that P2P intermediaries fall under the definition of at least one of the three types of ISP activities granted immunity under the safe harbors, namely that of 'hosts'. However, the Swedish Court of Appeal in the *Pirate Bay* case, had previously ruled on the issue and concluded that even though P2P intermediaries fall both under the definition of a 'service provider' and a 'host', the P2P intermediary before the Swedish Court – The Pirate Bay – was not eligible for protection under the Swedish safe harbors. With support found in a) the CJEU case *Google v Louis Vuitton*; b) the purpose of the Swedish safe harbors; and c) the fact that the safe harbors do not grant those who qualify for protection under them an automatic immunity (they must also participate in the K&TD system), this thesis argued, by drawing on Andreasson & Schollin, that P2P intermediaries should

qualify for protection under the Swedish safe harbors. With this conclusion, it was meaningful to continue taking into account the Swedish safe harbor provisions, specifically the K&TD system, in the analysis of how this applied to P2P intermediaries. The conclusion in chapter 4 also opened up the further comparative analysis of how liability may be *imposed* on P2P intermediaries under Swedish and Canadian law.

Thus, chapter 5 turned attention to the tools available under Swedish and Canadian law for imposing liability on P2P intermediaries, including the Canadian enabling provision and authorization doctrine, and the Swedish doctrine on contributory liability in copyright law. The analysis in chapter 5 led to a number of interesting findings. First, by analyzing the Canadian Supreme Court case *SOCAN* in the context of P2P file sharing it was found that the authorization doctrine is not suitable to P2P intermediaries. Second, by analyzing the *Pirate Bay* case, and drawing on Andreasson & Schollin⁴⁸⁰, it was found that the Swedish Court of Appeal's application of the doctrine on contributory liability to the P2P intermediary The Pirate Bay was incomplete. The Court had only, in assessing The Pirate Bay's liability, taken into account factors that were in favor of the copyright owners. A wide range of additional factors were identified that could and should have been taken into account in assessing the liability of The Pirate Bay.

Chapter 6 then sought to bring the comparative analysis together by summarizing the comparative findings and analyze the advantages and

⁴⁸⁰ Andreasson & Schollin, *supra* note 32.

disadvantages of the different features of the Canadian and Swedish ISP liability regimes that had been identified throughout the thesis. Through a comparative analysis an answer could be given to the question of what approach to the liability of P2P intermediaries – the Canadian or the Swedish – is the better one. The approach recommended was the Canadian. Although the Canadian approach is perhaps not a perfect solution, for example, the system for taking down of infringing content under the N&N system offers a considerably slower procedure than that offered under the K&TD tool, it was found that the Canadian ISP liability regime, compared to the Swedish, is more effective against intentional, systematic and large scale enablers of copyright infringement, such as The Pirate Bay; provides a more well-balanced tool for curbing copyright infringement committed by means of P2P file sharing; and provides a more predictable liability standard for P2P intermediaries.

7.3 Further research

This thesis has focused on the ISP liability regimes established in Canada and Sweden. However, many of the comparative findings and argument that have been made throughout this thesis could apply also to ISP liability regimes in other countries. Having identified both strengths and shortcomings of the Canadian and Swedish ISP liability regimes, it is hoped that this thesis contributes to future research concerning, for example the issues of how ISP liability regimes are best designed to curb copyright infringement by means of illegal file sharing.

It is also hoped that this thesis serves as an inspiration for future studies in the field, both in terms of methodological choice and the choice of jurisdictions to

compare. Beginning with the former, this thesis has shown that a comparative methodology is an effective method for identifying problems which are shared by more than one jurisdiction, and to find solutions to that problem; when two countries share the same type of problem, there is much to learn from looking at each other's experience in successfully solving, or failure to solve, that problem. With respect to the choice of comparators it is hoped that this thesis serves as an inspiration for future comparative research to look at other jurisdictions than the 'traditional' ones, such as the United States, where the first ISP liability regime was established, or the of EU following the United States' example. While these countries make interesting comparators indeed, there are today many new and different approaches to the issue of ISP liability that are worth looking at. Canada makes one such example with its unique concepts of enabling of copyright infringement and the N&N system.

Finally, it is also hoped that the thorough account for, and translation of, Swedish cases and statutes in this thesis could be useful for a wide range of different future research. For example, it is hoped that the comprehensive analysis of the *Pirate Bay* case and translations of Swedish legal provisions and preparatory works will benefit future researchers, who due to language barriers, would not otherwise have access to Swedish case law, statutory provisions, preparatory works and scholarship.

7.4 A unique approach to the liability of P2P intermediaries

This has shifted the focus from the 'traditional' comparative jurisdictions to two more unconventional ones – Canada and Sweden – and compared these two

countries' approaches to the liability of ISPs. The goal of this thesis was to determine, through comparative analysis, which country – Canada or Sweden – provides the most effective, well-balanced and predictable liability regime for P2P intermediaries. This thesis found that Canada's ISP liability regime is more *effective* against, and targets only, pronouncedly illegal P2P intermediaries, and so does not restrict the operation of legitimate P2P intermediaries and other network service providers. It was also found that the Canadian ISP liability regime provides a more *well-balanced* approach to the problem of copyright infringement committed over P2P networks, and provides a regime under which liability is easily assessed and thus *predictable*. This thesis therefore concludes that, Canada and Sweden compared, Canada provides the better approach to the liability of ISPs. Perhaps it is time to shift focus from the United States ISP liability regime, to Canada's unique approach.

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