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WHETHER PEER-TO-PEER INTERMEDIARIES AND PUBLIC INTERNET ACCESS POINT OPERATORS ARE RESPONSIBLE FOR COPYRIGHT INFRINGEMENTS MADE BY THIRD PARTIES WHILE DOWNLOADING, UPLOADING OR STREAMING COPYRIGHT PROTECTED CONTENT UNDER REGIMES IN EU, US AND LITHUANIA?

Magistro baigiamasis darbas

Teisės vientisųjų studijų programa, valstybinis kodas 6011KX003

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(Parašas) (Data)

Kaunas, 2018

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ABSTRACT IN ENGLISH

This master thesis researches liability of the peer-to-peer intermediary and public internet access point operators' liability for third party infringements performed online, while downloading/uploading and streaming media content by using BitTorrent networks and open/publicly available wireless or wire internet access points.

This research includes mostly European Union and Republic of Lithuania legal regimes, in addition to United States of America regime, which is used to compare and enrich the knowledge.

In this research the reader will find definition of internet (online) intermediary under European Union, Republic of Lithuania and United States of America law. As well as analysis of intermediaries' delictual liability under Republic of Lithuania law, and definitions of Primary infringement and Secondary infringement.

The case law from European Unions' Court of Justice, Republic of Lithuania and United States of America courts are being analyzed in conjunction with authors thoughts and ideas. Such cases as "The Pirate bay case", "Netlog case", Tobias Mc Fadden v Sony Music Entertainment Germany case, Metro-Goldwyn Mayer Studios Inc v Grokster cases is included in this research.

In the conclusion part it is stated that online intermediaries might be held liable for third parties' actions online, however only if certain criteria are met and intermediary acts otherwise than automatic, technical, accidental, passive, non-commercial etc.

ABSTRACT IN LITHUANIAN

Šiame magistro darbo tyrime yra nagrinėjama interneto tarpininkų atsakomybė. Tiriama ar vartotojo-vartotojui tipo tarpininkai ir viešųjų interneto prieigos taškų valdytojai gali būti atsakingi už trečiųjų asmenų (vartotojų) padarytus autorinių teisių pažeidimus, jiems siunčiantis, išsiunčiant ir

transliuojant autorių teisių saugomą turinį. Ypatingas dėmesys skiriamas pažeidimams BitTorrent tinkluose.

Šis tyrimas aprėpia Europos Sąjungos ir Lietuvos Respublikos režimus, bei kartu nagrinėjamas Jungtinių Amerikos Valstijų teisinis režimas.

Šio tyrimo skaitytojas atras tiek teisinį, tiek technologinį interneto tarpininko apibrėžimą pagal Europos Sąjungos, Lietuvos Respublikos ir Jungtinių Amerikos Valstijų teisinius režimus. Skaitytojui yra pateikiama tarpininko deliktinės atsakomybės analizė pagal Lietuvos Respublikos teisę. Taip pat yra pateikiamas apibrėžimas, kriterijai ir sąlygos, apibrėžiantys pirminės ir antrinės atsakomybės taikymą interneto tarpininkui. Siekiant pasiekti tyrimo tikslumo yra nagrinėjami įvairūs teisės aktai Berno konvencija, Paryžiaus konvencija, WIPO autorinių teisių sutartis, Europos Sąjungos elektroninės komercijos direktyva, Europos Sąjungos informacinės visuomenės direktyva, Lietuvos Respublikos Autorinių ir gretutinių teisių įstatymas, Jungtinių Amerikos Valstijų „Digital Millennium“ aktas. Atkreipiamas dėmesys yra įvairių pasaulio mokslininkų ir teisininkų nuomonę.

Dėmesys skiriamas svarbių tarptautinių ir nacionalinių bylų nagrinėjimui ir suformuluotų teisinių taisyklių analizei. Šiame magistro baigiamajame darbe rasite tokias bylas kaip „The Pirate Bay“ byla, kuri pastaruoju metu sukėlė didelį teisininkų susidomėjimą, šioje byloje buvo nustatyta, jog vartotojo-vartotojui platformos operatorius (interneto tarpininkas) gali būti atsakingas už atgaminimo ir paskelbimo visuomenei autorių teisių pažeidimus, jeigu yra įvykdomos tam tikros sąlygos. Taip pat, „Netlog“ byla, Tobias Mc Fadden v Sony Music Entertainment Germany byla, kurioje nagrinėjama interneto prieigos taško valdytojo atsakomybė, bei nustatomos išimtys tokiai atsakomybei kilti. Taip pat, Metro-Goldwyn Mayer Studios Inc v Grokster byla, bei kitos bylos kuriose nagrinėjamos autorinių teisių, interneto tarpininko atsakomybės ir kitos susijusios temos.

Šiame darbe dėmesys skiriamas Europos Sąjungos ir Lietuvos Respublikos teisės aktuose nustatytoms interneto tarpininko atsakomybės išimtims. Nagrinėjamos, interneto tarpininko atsakomybės ribos pagal Europos Sąjungos Elektroninės komercijos direktyvą ir Informacinės visuomenės direktyvą, nustatomos ribos ir sąlygos, kurios turi įtakos interneto tarpininko atsakomybės apribojimui.

Nagrinėjant pirminę ir antrinę interneto tarpininko atsakomybę, nustatomos labai svarbios sąlygos, kurios gali įtakoti interneto tarpininko atsakomybės už trečiųjų asmenų veiksmus atsiradimą.

Pirmiausiai yra nagrinėjama tarpininko pirminė atsakomybė, kurią apibrėžus yra siekiama nustatyti sąlygas antrinei tarpininko atsakomybei. Nors, ir antrinė tarpininko atsakomybė kyla iš pirminės kito subjekto atsakomybės, tačiau interneto tarpininko atsakomybės nagrinėjime antrinė atsakomybė vaidina didesnį vaidmenį, todėl, šiame darbe yra atkreipiamas didesnis dėmesys, sąlygų, antrinei atsakomybei atsirasti, nustatymui. Taigi, nustatomos šios sąlygos, kurios, tiek pavieniui, tiek visos kartu, turi įtakos nustatant interneto tarpininko atsakomybę:

a) infrastruktūros autorinių teisių pažeidimams atlikti sukūrimas ir palaikymas,
b) skatinimas atlikti autorių teisių pažeidimus sukuriant tokią platformą kurioje yra kaupiami taškai už atsisiuntimų kiekį arba suteikiami skirtingi lygiai už įkeltą autorių teisių saugomą turinį,
c) bendruomenės sukūrimas ir palaikymas, ypač tada kai yra sukuriami forumai, tinklaraščiai ir kitos priemonės, kurios įgalina tarpininką bendrauti ir palaikyti tiesioginį ryšį su vartotojais,
d) interneto tarpininko įsitraukimas į komercinę veiklą, pajamų gavimas iš reklamos, bei kitų netiesioginių ar tiesioginių šaltinių.

Kitas svarbus dalykas, kuris yra nagrinėjamas, yra faktinis ir konstruktyvus tarpininko suvokimas apie pažeidžiantį, autorių teises, veiklos pobūdį. Kadangi, kaltė yra viena deliktinės atsakomybės sąlygų, o subjekto ryšys su neteisėta veika ir jo kaltės suvokimas yra svarbus elementas nustatant jo, kaip interneto tarpininko atsakomybę.

Taigi, išsiaiškinus, reikšmingas sąlygas ir aplinkybes interneto tarpininkų atsakomybei už trečiųjų asmenų neteisėtą veiką naudojantis vartotojas-vartotojui platformomis ir viešaisiais interneto prieigos taškais, nustatoma, jog interneto tarpininkų atsakomybė už trečiųjų asmenų (vartotojų) padarytus autorinių teisių pažeidimus, jiems siunčiantis, išsiunčiant ir transliuojant autorių teisių saugomą turinį, gali būti nustatyta, jeigu jei veikia kitaip negu *mere conduit* sąlygomis, t. y. jų veikos pobūdis yra viršijantis vien tik technologinį, automatinį, pasyvų veikimą, o toks jų mere conduit sąlygas viršijantis veikimas gali būti nustatytas vadovaujantis jau ankščiau nustatytomis vieną ar daugiau sąlygų, tokių kaip konstruktyvus suvokimas apie pažeidžiantį, autorių teises, veiklos pobūdį arba tokios antrinės atsakomybės sąlygos kaip veikos komercializmas, skatinimas pažeisti autorių teises ir pan.

INTRODUCTION

RELEVANCY AND PROBLEMS

This master thesis will research rather new field in intellectual property law (hereafter – IP law) – online infringement of rights of copyright holders. While examined theme will dig into responsibility of peer-to-peer intermediaries (hereafter – P2P's) and public internet access points operators (hereafter – APO's) for infringements performed by third parties, various substantial internet network problems will be also assessed. Recently there has been many new developments in jurisprudence, doctrine and recent court rulings which makes copyright holders rights infringement online theme more discussed and hot.

The origins of the intellectual property law are more earlier than in 19th century. Until 19th century intellectual property law was governed by individual jurisdictions. As explained by Brad Sherman and Lionel Bently, it's believed that intellectual property law was first mentioned in United Kingdom in 1624 Statute of Monopolies and later in 1710 Statue of Anne.[1] Back then the most important topics of IP law were industrial property, patents, literacy and artistic works, such branches occurred because of that times trends and needs. Following the trends "[t]he importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886)"[2]. With latter Conventions coming into force IP law started booming while more and more regulated. 1967 was the new era for intellectual property field as new international governing institution was created – World Intellectual Property Organisation (later in text - WIPO) and it became an agency of the United Nations. There have been many various IP law problems before and after WIPO, but the biggest struggle was just about to come – The Internet.

Internet is one of the newest inventions (founded in late 1980s) which has changed our life's. But not only ours, internet changed how people do business, shop, communicate including how people watch movies, play video games, listen to music and with all this in mind comes the digital age struggle which influenced and still influences intellectual property law. As much of the content, found in internet webs, are subject to protection under copyright laws it makes most cases, which are related

[1] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911 (Cambridge: Cambridge University Press, 2003), p. 207*
<http://s1.downloadmienphi.net/file/downloadfile4/206/1391108.pdf> [visited 2017 12 25];
[2] WIPO, *What is Intellectual Property? (WIPO Publication No. 450(E));*
<http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf> [visited 2017 12 25];

to copyright infringements performed in internet networks, solving problematic and unclear. The resistance comes from unclear regulation, lack of legal material, uncertainty and most importantly delicacy of the internet itself. At the start of the era of internet there hasn't been much enthusiasm to arrange everything into their places. After internet was found there has been many tries to regulate intellectual property online. Today only few international (or regional) agreements in addition to Paris and Berne Conventions are being used as foundation sources for regulation of intellectual law (including online) across the globe, which include:

- WIPO Copyright Treaty (1996);
- Digital Millennium act (USA) (1998);
- E-Commerce directive (EU) (2000);
- Copyright directive (EU) also known as "InfoSoc" (2001);
- Directive on the enforcement of intellectual property rights (EU) (2004).

Latter legal acts are the basic foundation for current legal framework and haven't been thoroughly amended since their publicity. The fact that all of above mentioned legal acts are more than 15 years old and Paris Convention dated 1883 (latest amendment 1979) and Berne Convention dated 1886 and that The Internet was developing really fast since, justifies that there is a serious legal gap in Copyright infringement in internet field sphere.

In recent years there have been new developments in online copyright infringement field, which shows relevancy of this topic. As of the 10 of April of 2018 there has been 482 registered pending cases related to Intellectual, industrial and commercial property in the "InfoCuria" the informational system of the Court of Justice of European Union (later in the text – CJEU)[3]. CJEU already made important decisions in online copyright infringement field. CJEU in the "UPC Telekabel Wien GmbH" case No. C – 314/12, court replenishes and confirms the definition of internet intermediary under European Union law. Another case which shortly mentions internet intermediary in the context of copyright infringement is "LSG v. Tele2" case. No. C - 557/07. However, one of recent cases which shows complexity of this topic is Courts' of Justice of European Union judgement in "Pirate

[3] Information from "InfoCuria" as of the 10.04.2018 [http://curia.europa.eu/juris/liste.jsf?pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=21&mat=PROP.DAVD%252CPROP%252Cor&etat=pend&jge=&for=&cid=320559];

Bay case"[4] No. C - 610/15. This case clarifies under what conditions operators of P2P platforms should be held liable for copyright infringement. The court defined that such operators might be liable for copyright infringement however, court suggests that there are different conditions which supposes different degrees of knowledge of infringement. In the light of latter case one of the main topics of discussion in this master thesis as a matter of fact will be different levels of knowledge of infringement, or so called primary and secondary copyright infringement.

Eleonora Rosati Associate Professor in Intellectual Property Law (University of Southampton) in her review about CJEU Pirate Bay judgement expresses that even in the current EU copyright reform debate, legislators are still lacking a definition of what is to be intended as an "act of communication"[5], hence while discussing various articles and case law we will to determine definition of an "act of communication to public" and "act of reproduction".

Under EU law is it only harmonised under which conditions infringers are liable for primary infringement, however it looks to be much more to analyse than that - a secondary infringement is a rather new field of studies and discussions, which is described as "a liability informed by the defendant's subjective state of actual constructive knowledge"[6], which we will analyse in this research.

As for Lithuanian case law, there haven't been many cases which are closely related to online copyright infringement, however there are few cases, one of which case No. 2-652/2010, where Microsoft Corporation sued owners of "Linkomanija.net" (most popular BitTorrent P2P sharing site in Lithuania) for plausible illegal communication to public and reproduction of the plaintiffs' copyrighted content, however case ended after both parties signed peace treaty, so there haven't been much development for case law out of this case. Another case is No. e2A-1407-392/2015, in which UAB „Cgates" (the one of biggest internet access service providers in Lithuania) is sued for compensation of damages, by „Daedalic Entertainment" (copyright holder), where certain customer of UAB "Cgates", over P2P networks, few times downloaded and uploaded computer game, which was created and copyrighted by „Daedalic Entertainment". This case is important in Lithuanian case law, as it by transferring CJEU case law into Lithuanian case law, stresses definition of intermediary and in addition explains conditions for civil delictual liability to arise, while pointing that internet

[4] Case C-610/15, Stichting Brein v Ziggo BV, XS4ALL Internet BV, [2017] ECLI:EU:C:2017:456;
[5] Eleonora Rosati, *The CJEU Pirate Bay judgement and its impact on the liability of online platforms,* (forthcoming in European Intellectual Property Review) p. 2;
[6] Ibid, p. 11 a citation from text: *Angelopoulos*, "CJEU Decision on Ziggo";

access service providers, like UAB "Cgates", is improper defendant in such cases, which supposes that P2P or APO operators might be proper defendants in such cases. Lastly, I would like to mark that so far, the most attention has been paid to another "Linkomanija.net" case, where Lithuanian collective copyright management association LATGA, sued 8 biggest internet access service providers, requesting to block access to "Linkomanija.net". While lower court ruled to block access to site, however, case is not finished yet as appeal has been submitted by the defendants.

In the light of all case law and recent discussions by the Council of the European Union regarding intellectual property and online content sharing service providers, The Council drafted Directive on copyright in the Digital Single Market, which should solve many of the problems and uncertainty about intermediaries' liability, hence there are many discussions still to do, as there is still no certainty regarding definition of communication to public and other matters.

Summing all said, it it's clear that current legislation is outdated and lacks answers to questions businesses, lawyers and consumers are looking for. Case law is poor and still lacking decisive approach to difficult conclusions. It's clear that intermediaries' liability topic should be assessed and discussed to solve current gap in legislation.

PURSUITS AND TASKS OF THE RESEARCH

To assess whether peer-to-peer intermediaries and public internet access point operators are responsible for copyright infringements performed by third parties while third parties downloading, uploading or streaming copyright protected content by using BitTorrent technology, determine extent of possible intermediaries' liability and set the conditions for intermediaries' liability for infringed rights of copyright protected content right holders, these tasks are set:

a) Analyse international and national legal acts to determine actual legal acts which relate to intellectual property law, P2P's and internet APO's liability in the field of research and define them as possible subjects of copyright infringement;
b) Assess relevant scientific researches, doctrine, court rulings to set conditions for P2P's and internet APO's liability for infringed rights of copyright protected content right holders and determine extent of possible intermediaries' liability;

c) By analysing and comparing national and international legal acts determine whether according to the current legislation and by set conditions latter intermediaries could be held liable for infringements performed by third parties while downloading, uploading or streaming copyright protected content by using BitTorrent technology.

RESEARCH TECHNIQUE (METHODS OF THE RESEARCH)

For the research aims to be reached, following methods of the research are being used in this thesis, which are:

a) Analysis – systematic analysis of legal acts, texts, doctrine, court rulings will be used in the whole research for the conclusions to be made. In order to express my opinion and show opinion differences between different scholars' critical analysis will be used.
b) Comparison – international and national legal acts will be compared to determine different conditions for intermediaries' to be held liable for infringements made by third parties;
c) Linguistic – different terminology, meanings and texts will be assessed in lingual method;
d) Summative approach – after analysis is done, summary will be concluded and by summing everything up hypothesis will be either approved or denied.

HYPOTHESIS*:*

Peer-to-peer intermediaries' and public internet access point operators might be held liable for third party (consumers) copyright infringing actions while using Bit Torrent technology – downloading, uploading or streaming media content, if media content was made available in intermediaries operated infrastructure.

BACKGROUND

First of all, in current study, it's really important to define who falls under definition of internet intermediary, as stated in Organisation for Economic cooperation and development (hereafter – OECD) report internet intermediaries identified as:

- *Internet access and service providers (ISPs)*
- *Data processing and web hosting providers, including domain name registrars*
- *Internet search engines and portals*
- *E-commerce intermediaries, where these platforms do not take title to the goods being sold*
- *Internet payment systems, and*
- *Participative networking platforms, which include Internet publishing and broadcasting platforms that do not themselves create or own the content being published or broadcast.* [7]

Out of those six groups of internet intermediaries, ones who are most relevant to this study is internet service provider (hereafter – ISP) and participative networking platforms. Encyclopaedia Britannica simply defines ISP's as "... company that provides Internet connections and services to individuals and organizations"[8], however it's important to say also that ISP's are legal or natural persons who gives access to internet and connects one or more different users to third parties using electronic communications, usually for remuneration and primarily are profit organizations. Sometimes definition ISP might be confusing, as it may be used universally to define any internet intermediary or online service provider, however in this study we will use term internet service provider to distinguish [i*]nternet access providers [as ones] which provide subscribers with a data connection allowing access to the Internet through physical transport infrastructure.* [9]. Examples of ISP's are internet access providers: home and mobile telecommunication companies (British Telecom, Deutsche Telekom, Telefonica, AT&T, Vodafone, Telia), irrespective of their size or market share,

[7] Organization for Economic cooperation and development, *The Economic and Social role of internet intermediaries* (2010 04), <https://www.oecd.org/internet/ieconomy/44949023.pdf> [visited 2018 01 24];
[8] The Editors of Encyclopaedia Britannica, *Internet service provider p. 9* (2008 12 31, updated 2017 08 24), <https://www.britannica.com/topic/Internet-service-provider> [visited 2018 01 24];
[9] Organization for Economic cooperation and development, *OECD Expert Group on Defining and Measuring E-commerce* (2000 04), the idea from the text: Organization for Economic cooperation and development, *The Economic and Social role of internet intermediaries* (2010 04), <https://www.oecd.org/internet/ieconomy/44949023.pdf> [visited 2018 01 24];

type of ownership, it is also important to mention that networks through which services are accessed not necessary shall be owned by the operator (they could be leased or anyhow lawfully managed). Participative networking platforms is big (and rapidly growing) group of intermediaries, today many of our known online service providers could be considered as participative networking platforms, best examples of those are social networks (Facebook, Twitter, Google Plus, YouTube etc.), torrent sites (worldwide: The Pirate Bay, IsoHunt, Limetorrents, in Lithuania: Linkomanija.net, Torrent.ai), blog sites (Wix, Blogger, Tumblr, WordPress etc.) there could be other kinds of participative networking platforms if they fall under certain parameters: significant part of content is created by users of the platform, user created content is uploaded without help or aid from platform operator, spread and distribution of the user content is performed by the user itself, however operator provides means, infrastructure to do so, as well as indexes the content (within the site or server) and usually has either legal duty or moral duty to moderate the content.

For this target of this research to be achieved is it important for both above mentioned groups to be analysed, more importantly two branches of those groups – public internet access points operators and peer-to-peer intermediaries.

TECHNICAL DEFINITION OF PEER-TO-PEER INTERMEDIARY, OPERATION OF THE P2P TECHNOLOGY

Correctly defining peer-to-peer intermediaries could be struggling, however technology is clearly explained by Annika Svanberg: "*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'.*[10]

[10] Annika Svanberg, *"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 (2013 04)*, <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0073735>, quote from text: Carmen Carmack, *How BitTorrent Works* (2005 03 26), <http://computer.howstuffworks.com>;

Generally speaking files are shared between users and downloaded from each other, basically P2P technology is possible when there is at least two users, one who has the file and another who needs the file, then P2P technology comes into action, both users have to install certain software, be connected to internet and share special file (usually with .torrent extension), which consists information about this file which is desired to be downloaded, however this file (.torrent) is not copyright protected file itself, it's more like a route how to reach this file, usually copyright protected, hence not necessarily – in technological language this process is called of seeding (sharing) and downloading (receiving). Although that there is need of minimum of two users, for technology to function, usually, for the proper functioning, there is hundreds of users seeding the file and other significant number of users downloading the file. However, it's not enough only of users, for the P2P technology to function properly, so called "torrent sites" (or P2P intermediaries as we will call them) are necessary for proper functioning. First of all, those P2P intermediaries interconnect third parties together, secondly offers a full indexed list of files which could be downloaded and seeded between the third parties and thirdly they host .torrent files which are necessary for copyright protected file download. Even thought that actual copyright protected files aren't stored in P2P intermediaries' servers (or servers of their hosting provider) and only the .torrent files are stored, as a consequence of .torrent files being stored in intermediaries' servers and being publicly available, action of making .torrent files publicly available could infringe copyright, especially if certain criteria is met.

And so, peer-to-peer intermediary is described as intermediary between two or more persons, usually called downloaders and seeders, without which it wouldn't be possible for P2P network to function and it wouldn't be necessary to discuss intermediaries' liability. P2P intermediary plays substantial role in P2P networking, as if there haven't been P2P operated sites, sharing copyright protected content would have been difficult or not possible at all, as peer-to-peer intermediary acts as a link between third parties.

TECHNICAL DEFINITION OF PUBLIC INTERNET ACCESS POINT OPERATOR

It's important to define, public internet access points operators, as for use in this research, by using this term it is intended to discuss about infringements which could be performed by third parties (internet consumers) while using services provided by businesses or public entities who are offering internet access as auxiliary service in the package of services or as sole service. As for "businesses

or public entities" it is meant any businesses or public entities who are not offering access to internet as main service in their commercial activities. "As the package of services" it is meant that user could be visitor of cafeteria, hotel or other commercial place, where customer in addition to main service (catering, accommodation etc.) for no additional cost (free) gets access to internet over wire or wireless, and by "as sole service" it is meant that user while being in public, connects to publicly accessible internet access point by wire or wirelessly and uses this service for no additional cost (free) or for additional cost as by means of concluding one-time or short term contract (as for example open wireless internet access point in the public city park provided by city municipality for no additional cost or for additional cost).

And so, technology behind public internet access point providers is simple and clearly understandable. APO's usually are the ones who orders internet service from ISPs', later on giving access for third parties to their operated access points and via them third parties connect to internet. Users are usually connecting their internet enabled devices (computers, tables, smartphones etc.) to access point by wire or by wireless means, with the help software and/or hardware. So basically speaking, APO's are kind of intermediaries which intermediate between third parties and ISPs.

APO's are important intermediaries, as they are smaller branches of ISP's, while ISP's are not obliged to track third parties, as well as not liable for their actions, APO's might be in the different situation.

DEFINING P2P INTERMEDIARIES AND PUBLIC INTERNET ACCESS POINT OPERATORS AS POSSIBLE SUBJECTS OF COPYRIGHT INFRINGEMENT

According to famous Lithuanian law scientist Dr. Vytautas Mizaras, intellectual property law is separated into two main branches: *"As we can see, intellectual property could be separated into two types: 1) authors' rights (rights into creations of literature, science, and art), related rights (rights into performance, phonograms, broadcasts, audio-visual work first release) and sui generis rights (rights of databases producers); 2) industrial property law (rights into patents, trademarks, industrial*

design and other industrial property objects);"[11] There are two kinds of assets, as described in Investopedia, in Civil law: tangible and intangible. Copyrights, patents, trademarks, franchises etc. are defined as intangible which are nonphysical assets.[12] Even though that both of above mentioned are intangible assets, in this research industrial property law will be left untouched.

P2P's and APO's are kind of intermediaries of which operations are directly connected to handling content which is related to authors rights (copyright). That's why it's necessary to for us to describe them, so we could tell if such kind of intermediaries might be possible subjects of copyright infringement.

In this chapter of the research, international law defining P2P intermediaries and public internet access point operators as possible subjects of copyright infringement, in addition to European Union, United States of America and Lithuanian law will be assessed.

DEFINITION OF P2P'S AND APO'S UNDER INTERNATIONAL LAW

As it was already mentioned in background part of this research, Berne Convention is international legal document which protect and define rights of authors, in addition to WIPO Copyright Treaty, which is the special agreement under the Berne Convention. Those to two legal acts are absolute international framework for copyright.

Berne Convention, adopted in 1886, provides with basic rights and protection for authors of their works. The Convention provides with three basic principles: principle of "national treatment", principle of "automatic" protection and principle of "independence" of protection. Minimum standards of protection of copyrighted works are: author of (a) "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression"[13], are being granted with exclusive authorization rights: (b) the right to translate, the right to make adaptations and

[11] Vytautas Mizaras, *Autorių teisė: monografija*, (Vilnius: Justitia, 2008) vol. 1, p. 33 (translation);
[12] Investopedia, *What is the difference between tangible and intangible assets? (2017 03 08), < https://www.investopedia.com/ask/answers/012815/what-difference-between-tangible-and-intangible-assets.asp> [visited 2018 01 12];*
[13] Berne Convention, Article 2(1);

arrangements, the right to perform in public, the right to recite, the right to communicate to the public, the right to broadcast, the right to make reproductions, the right to use the work as a basis for an audiovisual work, (c) "the term of protection granted by this Convention shall be the life of the author and fifty years after his death" [14], authors shall (d) "… be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner."[15]. Seeing that Berne Convention provides only basic protection for authors, in light of new internet era, WIPO Copyright Treaty was established. Latter Treaty established more defined rules regarding right of communication to the public, which included communication by wire or wireless means *"... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."*[16]. However, it was agreed, between signatories, that only bare existence of technical ways to infringe authors rights, does not constitute communication to the public itself, there is need for actual action of communication for infringement to be valid.[17] Another, important provision of The Treaty, is defined in article 14 it obliges signatories to adopt measures necessary within their legal systems to ensure the application of the treaty. Also *"Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."*[18]. So, parties shall not only ensure enforcement of authors rights, but also take all measures necessary to "permit effective action", which should mean, that authors should have real possibility to defend their rights, which means not only well organized legal system, but also fair trails, effective evidence of infringement examination together with balanced burden of gathering the evidence between court and author. According to that as how abstractly copyright is regulated by Berne Convention and WIPO Copyright Treaty, any person could be treated as subject of copyright infringement, including P2P's and APO's.

As we can see, from above, Berne Convention, together with WIPO Copyright treaty, provides with basic framework for copyright protection and delegates signatories to implement legal

[14] Ibid, Article 7(1);
[15] Ibid, Article 15(1);
[16] WIPO Copyright Treaty, Article 8
[17] Ibid, footnote 8
[18] Ibid, Article 14(2)

procedures for protection of copyright rights. This makes supranational and national regimes attractive object of research.

DEFINITION OF P2P'S AND APO'S UNDER EUROPEAN UNION LAW

While national legislations provide more base definitions of copyright related matters, "The EU copyright legislation is a set of ten directives, which harmonise essential rights of authors and of performers, producers and broadcasters."[19] European Union law is supranational law system, which is applicable to all of the 28-member states. Copyright law in EU is built on Berne Convention and WIPO Copyright Treaty, to implement those to documents, there was Directive on Information Society (InfoSoc) and Electronic commerce Directive established by the European Parliament and The Council, in addition to Enforcement Directive, which implements Article 14(2) of the WIPO Copyright Treaty.

InfoSoc Directive implements WIPO Copyright Treaty provisions to European Union level. Articles 2 and 3 of the Directive defines Reproduction right and Right of Communication to The Public, which are most commonly infringed online. Article 5 of the Directive sets Exceptions and limitations to the latter rights. While Article 8 defines provisions for sanctions and remedies of copyright infringement, whilst sub-article 3 of Article 8 outlines that "*Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."*[20] Which means, that intermediaries, such as P2P's and APO's are subjects of legal prosecution if copyrights was injured by the third party using their services. However, InfoSoc directive, doesn't define neither intermediary, neither Information Society service as such, consequently Preamble of Directive directs to another Directive – Directive on electronic commerce: *"('Directive on electronic commerce') (1), which clarifies and harmonises various legal issues relating to information society services including electronic commerce."*[21].Therefore, Directive on electronic commerce defines Information Society service and intermediaries, that's why it's important to approach those two Directives as a whole.

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[19] European commission, *The EU copyright legislation* (2015 08 28, updated 2017 09 27), <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> [visited 2018 01 19];
[20] Directive 2001/29/EC, Art. 8(3)
[21] Ibid, Preamble Art. 16

As discussed, the main legal source for framework and definition of Information Society services in European Union is Directive on Electronic commerce[22]. According to the latter Directive, Information Society services could be described as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"[23]. Therefore, Directive sets criteria by which Information Society service should be identified and those should mean: (1) "Any service" is any kind of service, as defined in article 18 of preamble of the Directive: *Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line ... information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service*[24]. (2) "Normally provided for remuneration" means that in the general run of things, recipients of the service (consumers or professionals) usually pays to receive such service. To explain this criterion, it's important to group services into two groups: the ones which are actually paid for and ones which are normally paid for but are free because service provider choice to provide this service free of charge, while earning profit from related services as advertising and etc. To illustrate this, let's take Netflix.com as perfect example of paid service, to use this service you have to be subscribed to service as user and pay monthly fees. A good example of normally provided for remuneration service is Google.com search engine, even thought that probably nobody ever paid for Google.com search engine services, everyone could remember calling to "118" info line in Lithuania, or "118 118" in United Kingdom, both are positioned as "directory enquiries services", those services provides one number for all answers model, which generally means that by calling them you will get answer to basically any question, from train schedule or cinema show times to number for plumber or housekeeping. Unfortunately, this service won't come cheap, 118 in Lithuania costs 0,43 Euro per minute while 118 118 in UK costs 4,49 Pound Sterling connection fee + 4,49 Pound Sterling per minute. Therefore, both Google.com and 118 (and 118 118) services are more or less same – they provide answers to questions, link people to their answers and give directions on how to solve their day-to-day problems. Another example is hybrid model service - Spotify is music, podcast and video streaming service, it has both paid for and free versions of the service, you can choice to pay for subscription and listen to music without any adds or interruptions or listen for free but have limited

[22] Directive 2000/31/EC, Art. 1;
[23] Ibid, Art. 2;
[24] Ibid, Preamble Art. 18;

access to controlling how and what you listen. So, both Google.com and Spotify, as well as Netflix is Information Society service providers as by meaning discussed in the Directive, *...in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data*[25]. (3) "At a distance" should mean that service is provided away from the receiver of services. (4) "By electronic means" mean that service shall be provided by *... means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means*[26]. (5) "At the individual request of a recipient of services" is self-explanatory, therefore more detailed explanation is not necessary.

Taking into account what's said previously, in order to define internet access point operator as Information society service provider, it's necessary to use criterion. Accordingly, let's apply previously discussed criterion:

1. Internet access point operator provides services, which although are not only provided on-line, as the primary connection is made over the wire or wireless while not yet being connected to internet, but having in mind that in preamble of Directive 2000/31/EC there is clearly stated, that "information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network"[27], and so it is clear that Internet access point operator fulfil 1st criteria.

2. Internet access is normally provided for remuneration and it could be treated as an economic activity, so it means, that 2nd criteria is also fulfilled.

3. The internet access point service is provided as virtual service, which is impossible to operate without internet infrastructure, which is made possible by combination of software and hardware. That means that for receiver of internet services it's also necessary to obtain a combination of hardware and software, usually an access code to wireless router (access point) or connection cable (wire), which is provided by the internet access point operator. In order for provider to grant such hardware or software, it might be necessary for provider to deliver

[25] Ibid, Preamble Art. 18;
[26] Directive 2004/48/EC, Art. 1.13;
[27] Directive 2000/31/EC, Preamble Art. 18;

primary part of the service by non-distance means: receiver of service has to obtain access code (for example obtaining over the counter in the hotel reception or by asking for code from the bar attendant) or physically connect the operator provided cable to the device with which internet will be accessed. Hence, it's tricky to clearly state that internet access point service is provided at the distance, however in comparative case European Court of Justice stated:

46 While the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, the installation of such facilities may nevertheless make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal. [28]

So, it's clear that the interpretation of criteria "at the distance" should be taken in broader sense, as it might be possible to infringe authors rights and constitute communication to the public "… irrespective of the technique used to transmit the signal."[29], and hardware or software used.

4. The latter service is provided by means of electronic equipment as explained in point "3".

5. For the service to meet the last criteria it is necessary to state that if service is provided by the individual request of the receiver of services, then service fulfils this criterion. So individual request of code for wireless access point or connection of internet access cable by the individual shall be treated as individual request recipient of services.

Therefore, if such criterion is fulfilled, access point operators could be defined as Information Society service providers. Which mean that APO's could also be subjects for infringement performed by third parties, and so later in this master thesis it will be discussed under which conditions APO's could be responsible for infringements performed by third parties. It should also be in the interest of

[28] Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA. [2006] ECR I-11519;
[29] Ibid;

law to define either third parties, access point operators or ISP's are responsible for copyright infringements performed while using such services.

As it could be seen from latter hence, it wouldn't be possible to share such copyright protected efficiently without such P2P intermediaries', so P2P intermediaries' operations should be under magnifying glass and in case of doubt if there was infringement, further actions should be taken.

For a start, as we already have done for access point operators, let's look into current legislation on P2P intermediaries'. Law on Copyright and Related Rights of the Republic of Lithuania establishes provisions regarding the protection of copyright, retention rights and *sui generis* rights[30], however, the Law doesn't provide direct and clear definition of intermediary, thus using only latter Law it is not possible to define P2P as possible responsible subjects, for infringements performed by third parties. For the purpose of defining possible potentiality of responsibility of P2P's, as it was already done with access point operators, it's necessary to outline them in the sense of Directive on electronic commerce. In order to do so, let's use the same criterion, as defined in point 18 of preamble of Directive on electronic commerce: "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"[31]:

1. P2P intermediaries usually provides' with publicly accessible website which gives consumers easy access to audio-visual and other kinds of content, mostly which is not licensed to be available in such websites. Such audio-visual content is usually shown in cinemas, rented, available as part of subscription package or being sold per license but by no means are available for free. Even that such P2P operators doesn't store audio-visual (or other) files (content) in their servers, they provide easy access to them which wouldn't be possible without them. As it was already found in discussed "Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA" case: "… then communication to the public takes place, irrespective of the technique used to transmit the signal."[32], the technological means of how the infringement took place are not so important, like the fact that such an infringement was committed. Therefore, P2P intermediaries' service could qualify as "any service normally provided for remuneration".

[30] Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas (Law on Copyright and Related Rights of the Republic of Lithuania) (1999-06-09, No. 50-1598), chapter 6;
[31] Directive 2000/31/EC, Preamble Art. 18;
[32] See 20

2. As for the other criteria it is clear from the definition of P2P, that P2P intermediary provides' its services remotely (over the website accessible via internet), by electronic means and at the individual request of a recipient of services.

And thirdly, Directive on the enforcement of intellectual property rights, enables any intellectual property right holder, including copyright holders, to sue any intermediary for damages[33], whose services are used by a third party to infringe an intellectual property right, also injunctions[34], corrective measures [35] etc. could be issued by the national court. As well mentions that copyright or a related rights cases are covered by Directive 2001/29/EC, which examines copyright related infringements in more detail.

DEFINITION OF P2P'S AND APO'S UNDER REPUBLIC OF LITHUANIAN LAW

Generally speaking authors of copyrighted creation works and their creations are covered in Lithuanian law system as any kind of property is. Lithuanian Republic legislation for Copyright law originates from Continental law (Civil law) and incorporates Berne and Paris Conventions into local law system. As Republic of Lithuania is part of European Union, it also ruled by the EU legal acts. Currently, the main law, in Republic of Lithuania, which regulates copyright protected works and protects legitimate rights of authors is "Autorių teisių ir gretutinių teisių įstatymas" (The law of copyright and related rights)[36], in addition there is Codes which provides more general approach and defines punishments for punitive actions for infringements:

- "Lietuvos Respublikos Civilinis kodeksas" (The Civil code of Republic of Lithuania)[37];
- "Lietuvos Respublikos baudžiamasis kodeksas" (The Criminal code of Republic of Lithuania)[38];

[33] Directive 2004/48/EC, Article 13;
[34] Ibid, Article 11;
[35] Ibid, Article 10;
[36] Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas (Law on Copyright and Related Rights of the Republic of Lithuania) (1999-06-09, No. 50-1598);
[37]Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinis kodeksas (The Civil code of Republic of Lithuania) (2000-09-06, Nr. 74-2262);
[38]Lietuvos Respublikos baudžiamojo kodekso patvirtinimo ir įsigaliojimo įstatymas. Baudžiamasis kodeksas (The Criminal code of Republic of Lithuania) (2000-10-25, Nr. 89-2741);

- "Lietuvos Respublikos administracinių nusižengimų kodeksas" (The Code of administrative offences of The Republic of Lithuania)[39].

Additionally, Lithuanian law incorporates EU Directive on electronic commerce 2000/31/EU by "Informacinės visuomenės paslaugų įstatymas" (The law on informational society services)[40], which basically incorporates provisions from Directive.

From the first look the legal system in field of intellectual property in Republic of Lithuania is well systematically arranged but it is rather outdated and not customized for internet era which makes day to day case solving rather complicated.

The main law defining authors rights or copyrighted work (which is the synonym) in Lithuania is as mentioned in latter column "The law of copyright and related rights" which sorts copyright objects, persons (alternatively called - authors) who could be subjects of the copyright law and defines property and non-property rights of authors, as well as other copyright related field matters.

According to the law of copyright and related rights authors hold tangible and intangible rights towards their works. Intangible rights are the rights which are not economic rights, such rights might also be called moral rights of the work author and they include:

- Right of recognition of authorship;
- Right for work to be or not to be identified under authors name;
- Right to the integrity of the work.[41]

Other jurisdictions don't separately sort such rights as for example Copyright laws in United States of America. The next group of copyright rights is tangible rights. This group include all the economic related rights or might also be called as property rights. Those rights cover:

- Right to reproduce;
- Right to publish
- Right to translate;
- Right to remaking or other adaptation;

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[39] Lietuvos Respublikos administracinių nusižengimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo tvarkos įstatymas. Lietuvos Respublikos administracinių nusižengimų kodeksas (The Code of administrative offences of The Republic of Lithuania) (2015-07-10, Nr. 11216);

[40] Lietuvos Respublikos informacinės visuomenės paslaugų įstatymas (The law on informational society services) (2006-06-10, No. 65-2380);

- Right to distribute;
- Right to make the work public (communication to the public right);
- Right to publicly perform (communication to the public right);
- Right to broadcast (communication to the public right).

As it is clear from the law of copyright and related rights, the authors are by the law provided with various rights toward their work.

Therefore, under the current legislation available in EU, P2P intermediaries fall under scope of Directive on electronic commerce, as they fulfil all the criterion to be interpreted as Information society service, as described in discussed Directive. Further it's necessary to say that as Republic of Lithuania is member of European Union, that means that latter Directive also applies in Lithuania, which means that in Lithuania, P2P intermediaries could be also identified as Information society service providers by using the same criterion.

The Law of copyright and related rights of Republic of Lithuania defines intermediary by general definition as user of copyrighted work, which includes natural and legal persons, which uses originals or copies of copyrighted works by any means, including making them available to public or making copies (reproducing)[42] and also by directly naming intermediary as any natural or legal person, which provides electronic communication via network services, of the content provided by third parties, which includes any transmission of third party provided information by electronic means or gives access to network and (or) hosts information (data) provided by third party.[43] General rules for protection of copyright is set in chapter 6 of The Law of copyright and related rights. According to the discussed law, the authors of copyrighted works have a right to defend their rights in accordance with the latter law, Civil code of Republic of Lithuania and by other related law.

Another very important topic to shortly discuss in this part of the master thesis is online intermediary's legal subjection in legal regime of Republic of Lithuania. Under Lithuanian legal doctrine there is three possible types of liability: civil liability, administrative misconduct (liability) and criminal responsibility. Administrative and criminal sanctions are meant to fine or penalize guilty subject whilst civil liability's main target is to restore previous state of the victim subject. Detailed

[42] Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas (Law on Copyright and Related Rights of the Republic of Lithuania) (1999-06-09, No. 50-1598), Article 2(30);
[43] Ibid, Article 78(2)

dispositions of the criminal acts and administrative misconducts for which liability is possible for infringement of copyrights is available in Chapter No. 24 (Articles from 191 to 195) of the Criminal code of Republic of Lithuania[44] and in Article No. 122 of The Code of administrative offences of The Republic of Lithuania[45]. Unlike Criminal code and The Code of administrative offences, The Civil code of Republic of Lithuania[46] offers universal criterion (conditions) which proved subject could be found guilty for damages and asked to restore previous state of the victim subject. Civil liability in Lithuania is built on contractual and non-contractual liability (also known as Delict or Tort). Most of the online copyright infringements are non-contractual which means that they are delictual. For this research delictual liability is important as it is the only judicial way for authors of copyrighted works to be rewarded for damages. For the subject to be held civilly liable its necessary to demonstrate that subject performed unlawful act, damage was done, guilt shall be proven and there shall be causal link between unlawful act and damage. However, according, to the case law and Civil code, guilt of subject is presumed if other conditions were fulfilled.

Summing everything, Lithuanian legal system, by incorporating EU Directives and by local laws, provides definitions of online intermediary in various legal acts, also determines basic guidelines which shall be followed by the plaintiff to prove and find subject liable for delict.

DEFINITION OF P2P'S AND APO'S UNDER LAW OF UNITED STATES OF AMERICA

In addition to international, European Union and Lithuanian legislation, there is a need to define P2P's intermediaries and APO's as possible responsible subjects, for infringements performed by third parties, under regime of United states of America (latter also – USA). The main framework for USA's copyright law is The Copyright Act of 1976. In addition, really important for current research is The Digital Millennium Copyright Act of 1998, which gives description of intermediary as online service provider: "The legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and

[44] See 5
[45] See 6
[46] See 4

Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues."[47]. Latter Act presents two qualifications of service provider:

an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.[48]

a provider of online services or network access, or the operator of facilities therefor.[49]

As we can see, the definition offered by the latter Act is similar and analogous, as to the one offered by the Directive on electronic commerce, hence we can observe that peer-to-peer intermediaries could be identified as "service providers" as set in Digital Millennium Act of 1998 of United States of America, using same criterion as provided in Directive on electronic commerce.

Defining access point operators and peer-to-peer intermediaries' as "information society service providers" (as by European Union Directive on electronic commerce), as "service providers" (as by Digital Millennium Act of 1998 of United States of America) and as "intermediary" (as in The law of copyright and related rights of Republic of Lithuania) is really important as those to legislative documents sets not only widely used definitions of online intermediaries' but also sets limitations for such intermediaries' liability. Liability limitations will be essential part of this study, which will be discussed in following part of this master thesis.

Summing everything up, it's clear that both internet access point operators and peer-to-peer intermediaries could be treated as possible subjects of copyright infringement. It is clear that laws of Republic of Lithuania provide clear criterion qualifying online intermediaries, in addition EU Directive on electronic commerce plays an important role and Digital Millennium Act of United States of America. Important to mention is that APO's and P2P's could be only called as possible subjects of copyright infringement if certain criterion is met and fully fulfilled. Both EU and US legal regimes provides similar and analogous descriptions of such intermediaries, which means that in later

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[47] U.S. Copyright Office, *"The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary"* (1998 12) <https://www.copyright.gov/legislation/dmca.pdf> [visited: 2018 03 10];
[48] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). 512(k)(1)(A);
[49] Ibid, 512(k)(1)(B);

parts of this research only differences will be covered. Next in this research different situations will be covered, and primary and secondary copyright infringements examined.

DEFINING RIGHT OF REPRODUCTION AND RIGHT OF COMMUNICATION TO PUBLIC

There are two types of authors rights of copyright protected content which are usually infringed online: "right of the communication to the public" and "reproduction right". In addition, other rights could also be infringed, however, it's more less likely to online infringe any of those other rights, as for example "right of distribution", which only applies to distribution of exact already created copy of the work (usually "hard", tangible copy), while by infringing "right of reproduction" new copies of the work are being created and later shared among other parties by infringing "right of communication to public".

And so "Right of reproduction" is authors' property right (or in other words monetary right) to forbid or allow to make copies of the copyright protected work in addition to everything what is related to this right (limit quantity of reproduction, place where reproduction could be reproduced and where not etc.) and "Right of communication to the public" (is monetary right) is kind of right which lets author of the copyright protected work to decide to whom the work will be available (place of communication), in what form (performance, public screening, broadcast or making electronically available over the internet etc.) and to choose the public of the communication. Setting the public of the communication (especially the extent) is rather important as in case if latter right is infringed it will later assessed the extent of "the new public" acquired, by the infringer actions of making work publicly available, as it was already formed by the Court of Justice of European Union case law *"In that regard, the Court has held that the term 'public' within the meaning of Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons"*[50].

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (also in the

[50] Case C-135/10 Società Consortile Fonografici (SCF) v. Marco Del Corso, [2012] ECLI:EU:C:2012:140;

text – "InfoSoc" directive)[51] provides rights and exemptions of and for the authors of the copyright protected content. The whole idea of directive, including rights and exemptions is used as European Union framework in the sphere of protection of right holders of copyright protected works.

Therefore, latter discussed rights are being granted by the "InfoSoc" directive:
Article 2 of the "InfoSoc" Directive: *"Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part ..."*[52]

Article 3 of the "InfoSoc" Directive: "1. *Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. 2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them ..."*[53]

As we can see any unauthorised communication to the public or reproduction of the copyright protected content is prohibited. Article 8 of the "InfoSoc" directive provides provisions regarding sanctions and remedies for infringements of the copyrights: *"1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive. ... 3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."*[54]. And so, it is clear that copyright holders are entitled to seek remedies and infringers be sanctioned for their potential infringements.

According to the Lithuanian law, the law of copyright and related rights, article 15 of the Law underlines, that authors have exclusive rights to allow or forbid to reproduce or communicate the

[51] Directive 2001/29/EC;
[52] Ibid, Article 2;
[53] Ibid, Article 3;
[54] Ibid, Article 8;

work publicly by any means making it available including making it available in the computer networks. [55] However, latter law doesn't provide any other more detailed definition of those rights.

COPYRIGHT INFRINGEMENT

As for types of liability in copyright infringement sphere Pablo Baistrocchi outlines two systems: *a strict liability system, an ISP will be held liable regardless of its knowledge and control over the material that is disseminated through its facilities.*[56] and *a system based on fault, an ISP would be held responsible if it intentionally violates the rights of others.*[57] Within fault-based system Pablo Baistrocchi distinguishes two levels of the system based on fault of copyright infringement as found on Directive on electronic commerce: *In a system based on fault, an ISP would be held responsible if it intentionally violates the rights of others. There are two distinct levels in this system: actual knowledge and constructive knowledge.* [58] As it is evident from latter, according to the stricter liability system, it might be really easy to find online intermediary guilty for infringements, "[t]his system is the most restrictive because an ISP can be stated as being responsible (and consequently liable) even though it does not have any knowledge or control over certain material" [59]. However, there could have been clauses introduced which would be in favor of intermediary, as for example to " ... impose to hosting providers the use of effective content recognition technologies"[60] However, currently more common in European Union, as well as in other countries, is fault-based system, which consists of primary copyright infringement and secondary copyright infringement. Consequentially primary copyright infringement and secondary copyright infringement might be performed by infringing previously described rights of authors of the copyright protected content and the potential infringers could be the online intermediaries – operators of the P2P platforms, public internet APO's,

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[55] See 44, Article 15
[56] Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce,* Santa Clara High Technology Law Journal (2003 01), 114, quote from text: Rosa Julia-Barcelo, *Liability for Online Intennediaries: A European Perspective,* Centre de Recherches Informatique et Droit <http://www.eclip.org/eclip_l.htm>, 7, 10;
[57] Ibid;
[58] Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce,* Santa Clara High Technology Law Journal (2003 01), p. 114
[59] See 38
[60] See 48, page 10;

or third parties – consumers, in addition to other parties, which are not being in analysed in this research.

In the fault-based system as we can grasp in order to find person as infringer it's substantial not only to evaluate infringement superficially but also puzzle out why such plausible infringement occurred by determining causal link. In legal doctrine, as well as in Lithuanian case law, causal link is described as consistent of two parts: factual connection between a cause and an effect, so called **actual** causal link and **legal** causal link, those two actual and legal causal links correlate with previously described **actual** and **constructive** knowledge levels:

a) to determinate actual causal link *conditio sine qua non* test is being held, it's being determined whether harmful event has been caused by certain injury or wrongdoing[61]
b) in the second stage of latter test it's being executed to ascertain whether harmful event is not legally too far removed from the unlawful act to determine legal causal link[62]

And so, as we can tell from above both actual and legal causal links are substantial for setting conditions for plausible copyright infringement by P2P's and public internet access point operators. In order to do this, primary and secondary copyright infringements will be examined in the following part.

EXCEPTIONS FOR ONLINE COPYRIGHT INFRINGEMENT UNDER EU AND LITHUANIAN LAW

The exceptions for intermediaries' copyright infringement are set in various legal documents. European Union law sets exceptions and limitations for intermediary responsibility in Directive on electronic commerce and Informational Society directive. The Law on Copyright and Related Rights of the Republic of Lithuania and the Law on informational society services of Republic of Lithuania provides with exceptions of copyright infringement, however mostly it provides with analogous definitions as found in mentioned European Union Directive.

Firstly, exceptions and limitations are set in InfoSoc Directive. The exceptions are valid for Reproduction right and Right of communication to the public. Right of reproduction can be waived

[61] *L. B., I.V., I. Z. A. v. Telšių šilumos tinklai,* Supreme Court of Lithuania (2007, No. 3K-7-345/2007);
[62] Ibid;

in case of temporary acts of reproduction which are transient and integral and essential part of technological process, if it has no separate economic significance and used lawfully, to be transmitted between third party and intermediary. Another really important clause is that all the exceptions and limitations as found in Article 5, should only be applied if they don't conflict with a normal exploitation of the work and don't unreasonably limit the rights or interests of the rightsholder. [63]

Secondly, intermediary liability exclusions were set in Directive on electronic commerce. Articles 12-15 sets exclusions for intermediary liability:

"Mere conduit" is general clause which enables information society service intermediaries, like ISPs' or similar as well as other kinds of intermediaries', to be exempted from liability, if their operation technology involves through network transmission of the data which was provided by the recipient of the service and only if provider (a) does not initiate transmission, (b) does not select receiver of the transmission and (c)[64] does not select or modify the information contained in the transmission. Important to mention that acts of transmission shall be automatic, intermediate and transient, sole purpose of the transmission in the network and that information is not stored for longer than necessary for the transmission.[65] Therefore, intermediaries are exempted from liability if they are acting in good faith and are just acting as "neutral intermediaries", "Mere Conduit" covers:

"Caching" clause which protect intermediaries from liability if they are involved in the automatic, intermediate and temporary storage of information which was provided by the third party.[66] One of the cases which "caching" clause has been investigated by the CJEU, in light of InfoSoc Directive (however also applicable to Directive on electronic commerce) was Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others Case No. C-360/13, were defendant while using media monitoring service compiled reports on press articles published on the internet and provided copies of news content (articles, briefs, analyses), while plaintiff demanded for the licensing agreement to be concluded. The media monitoring service provider haven't agreed to conclude licensing agreement. Therefore, question arose whether media monitoring service providers' customers which while viewing news content provided by provider is making illegal act of reproduction as "… viewing the website leads to copies being made on the user's computer screen ('the on-screen copies') and in the internet 'cache' of that computer's hard disk ('the

[63] Directive 2001/29/EC, Article 5;
[64] Directive 2000/31/EC, Article 12;
[65] Ibid, Article 12(2);
[66] Ibid, Article 13;

cached copies')."?[67] The court, answered that, those copies satisfy conditions set out in Article 5(1) of Directive 2001/29 and "the on-screen copies and the cached copies are created and deleted by the technological process used for viewing websites, with the result that they are made entirely in the context of that process."[68]. Therefore, this case is not only good example of exemptions set out in Article 5 of Directive 2001/29, but also in the indirect way covers Article 13 of Directive 2000/31, explaining that neither third parties, neither intermediaries are liable for automatic, intermediate and temporary storage of information transmitted online. Also, it's important to mention that liability can't be applied if caching is technological process, as it was mentioned in the discussed case, as "… the on-screen copies and the cached copies must be regarded as being an integral part of the technological process at issue in the main proceedings."[69].

Hosting is service for which intermediary is not liable if he is not aware of the hosted content or illegal activity in general, this clause also applies if service provider became aware of the improper content but have deleted or forbade access to the content immediately after becoming aware.

No general obligation to monitor is really general clause. Basically speaking, it's self-explanatory, however, it allows member states to implement local procedures for informing competent governmental institutions of possible infringement. As because this clause is so general, that' there are several cases related to this clause. One of the cases is Netlog Case No. C-360/10, where CJEU was asked if national courts of member states could issue injunction against a service provider to filter (or in other words monitor) user uploaded content. Court stressed that Article 15 precludes court to issue injunction again service provider to install system: "…information which is stored on its servers by its service users, which applies indiscriminately to all of those users, as a preventative measure, exclusively at its expense and for an unlimited period…" [70] However, court haven't expressed clearly, but it shall be noticed that, if any of the above condition is not fulfilled and there is no other intersection with other legal acts, then it might be possible to apply such filtering system, as for example voluntary or by the financial support of the government or if it's meant to be only temporary etc. As for Lithuanian law, the Law on informational society services of Republic of

[67] Case C-360/13 Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others, [2013] ECLI:EU:C:2014:1195;
[68] Ibid;
[69] Ibid;
[70] Case C – 360/10, Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV [2010] ECLI:EU:C:2012:85;

Lithuania requires intermediaries to inform governmental institutions about suspected infringing activity of third party, and also at the request of the institutions provide information which lets to identify the infringer.

Summing up, EU Directives together with local legal acts provide various exceptions to the intermediaries' liability, however, exceptions aren't unconditional. Such circumstances as intermediaries' economic activity, or fact that intermediary is aware of the infringing activity might make exceptions not applicable.

PRIMARY COPYRIGHT INFRINGEMENT

"Primary copyright infringement" could be described as copyright infringement which is direct wrongdoing performed by the party. Direct in this situation means that wrongdoing is performed directly by the person, as for example:

a) An intermediary "ABC", as a part of his service transmits data, of the costumer "CBA", within the intermediaries' network, the data which is transmitted appears to be copyright protected content and by transmitting content over intermediaries' network it's communicated to the public by this mean, without authorisation from author;
b) At the customers "CBA" request, data is transmitted in the communication network of online intermediaries "ABC" network, while transmitting data, as a part of the technological process a reproduction of the copyright protected data has been made;
c) An intermediary "ABC", as a part of his services, hosts files of client "CBA", those files appears to be illegally reproduced copyright protected content;
d) An intermediary "ABC", is a business which provides service of hosting, while the main purpose of this service, is to let other costumers to download the hosted copyright protected content, by this service "ABC" commits communication to the public.

Above discussed examples show a direct copyright infringement, however three out of four might be exempted from liability under the clauses of articles 12 – 15 of the Directive on electronic commerce, as those intermediaries are operating under conditions of "Mere conduit", "Caching", "Hosting" and also, they have an established right for "No general obligation to monitor". Even so for one of infringements which is described in point "d', intermediary might be held liable as doesn't fall under any of the exemption clauses and has all the necessary attributes for delictual liability, in situation "d" it is demonstrated:

a) intermediary performs unlawful act – by knowingly hosting copyright protected content commits communication to the public,
b) damage was done – the author did not earn any income out of his work,
c) fault shall be proven – the intermediary has been acting in bad faith intentionally,
d) and there shall be causal link between unlawful act and damage - because of the infringing actions of the intermediary, the author hasn't earned income out of his work.

And so, as we can tell from latter, primary copyright infringement is really limited system of infringement, that's why we should analyse secondary copyright infringement as the main game changer in online copyright infringement sphere.

SECONDARY COPYRIGHT INFRINGEMENT

While primary liability is wrongdoing by the party him/her self, secondary liability is contribution to the commission of this wrongdoing by him/her self.[71] "Accessory liability [another name for Secondary copyright infringement, as used by the author in the citied text] can therefore not arise unless accompanied by a primary liability of somebody else."[72] So, as we can see it is not possible for secondary liability to arise unless there is primary copyright infringement. Secondary copyright infringement is underdeveloped and still new area of interest in most of European legal systems.[73] *Indirect copyright liability is a term used to describe the liability imposed upon a defendant who is not the direct infringer, but whom the law nonetheless holds liable for damages which the copyright owner suffers from the infringement*[74]. Another really good and informative description of the secondary infringement is submitted in Annika's Svanberg comparative study's while analysing Canadian Copyright Modernization act *The enabling provision* [provision as described in Canadian Copyright Modernization act] *establishes a type of secondary liability by making it an infringement of copyright itself to enable acts of copyright infringement for others*[75].

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[71] Angelopoulos, C.J., "European intermediary liability in copyright: A tort-based analysis", UvA-DARE (Digital Academic Repository), (2016), p. 9;
[72] Ibid, p 9;
[73] Ibid p. 9, see G Williams, Joints Torts and Contributory Negligence (Stevens & Sons Ltd 1951) 11;
[74] Xiao Ma, "Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the United States' Approach", *JIPEL* (Vol. 4 - No. 2, 2015.03.04);
[75] Annika Svanberg, "A Unnique approach to the liability of to the P2P intermediaries": A comparative study of copyright liability of providers of peer-to-peer file sharing services in Canada and Sweden", University of British Columbia (2013 04), p. 12;

As we are examining secondary copyright infringement, it would have been helpful to investigate one of the most familiar BitTorrent sharing websites in Lithuania "Linkomanija.net" and "Torrent.ai". Those two websites are traditional P2P intermediaries which lets their users to upload, download or stream BitTorrent files (which are very small files containing information about downloadable copyright protected file). Those sites indexes, categorizes and make those files available 24/7. Above mentioned sites only store BitTorrent files which are not actual copyright protected content while third parties actually store copyright protected content and by action called "seeding" makes that content downloadable. Just to make clear, those BitTorrent files directly connect and enable the acquisition of copyright protected content, while not being copyrighted content itself. Therefore, without those BitTorrent sites, operators and the infrastructure behind them, wouldn't been that easy to acquire copyright protected content and as consequence possibly infringe rights of copyright holders.

As we already determined, secondary copyright infringement is kind of infringement which is indirect, accessory, it might not be not directly prohibited to perform such action, however by different means as providing infrastructure, technology, encouraging to act wrongly, by implementing complex and archaic "inform and remove" system is enabling wrongdoing by third parties. Similar definition is provided by Xiao Ma: *Indirect liability requires that the defendant (also referred to as the "indirect infringer" below) assist, promote, facilitate or benefit from the direct infringement.*[76].

INFRASTRUCTURE CLAUSE

And so, intermediaries are **providing high quality infrastructure**, which means that intermediaries host specially created website, which has categorized system, indexing, search functions, it is fast and secure (they even use same level security as used for online banking). Such high-quality infrastructure, not only looks appealing, but also is cheaper (than legal multimedia businesses) or even free for users to use.

[76] Xiao Ma, "Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the United States' Approach", *JIPEL* (Vol. 4 - No. 2, 2015.03.04);

One of the cases which outlines the infrastructure as the important clause for making infringements is Tobias Mc Fadden v Sony Music Entertainment Germany GmbH Case No. C-484/14. In this case Mr. Tobias Mc Fadden was the defendant, as the Sony Music sued him as liable for musical work making available through wireless network which Mr. Fadden was operator of. Mr. Fadden is runs business of lightning and sound systems shop, which had free publicly available wireless internet access point in the shop and at the surroundings of. CJEU was asked by the referring court whether there are any more conditions for the Article 12(1) of the Directive 2000/31 to be applied. The Court noted, that there are no other conditions, as only "…must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied."[77] From this case, it looks like, wireless internet access network and its' operation by Mr. Fadden, was in the boundaries of the conditions. However, it was not analysed further, what if infrastructure provided by the defendant was out of the boundaries of the Article 12? What if the operator of the access point, would be more active in his operations? Let's say APO will encourage his customers to download copyright protected content, just by providing welcoming page (which appears after connection to the free network) in which customer will find links to the sites which provides with illegal copyright protected works etc. In my opinion, as well as it looks also in Courts opinion, only technical nature of operations is excepted from liability, and in latter example operator might be found guilty.

COMMUNITY CLAUSE

Intermediary operators are not only operating high class infrastructure, but they are also by **creating and maintaining community** of people who are their users and they reach various levels for their contribution (which enable more features or entitles to special benefits). In addition they cover up infringing actives by **having "rules or disclaimers"**, part of the Disclaimer provided in Linkomanija.net states "… You may not use this site to distribute or download any material when you do not have the legal rights to do so. …"[78], which is misguiding as most of the content is illegally

[77] Case No. C-484/14, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH, [2014] ECLI:EU:C:2016:689;

[78] Disclaimer from www.Linkomanija.net/index.php [visited 2018.04.09 23:47];

communicated to the public and most likely that no copyright holder has given a license to download or upload any of available content.

In the light of the Tobias Mc Fadden v Sony Music Entertainment Germany GmbH case, creating and maintaining community might also not fall under exceptions, as intermediary is not acting as outsider anymore. Intermediaries operation is no more technical, it's no more "… an integral and essential part of technological process".

Another thing to add is that users of the such online services **are encouraged to download, upload or stream** as much as possible as constantly ongoing "leeching events" are being held, which means that users are being secured from their "ratio" falling ("ratio" is kind of level in the systems which increases or decreases depending on ratio of downloading/uploading).

Creating community which has the only purpose (or the purpose of the community is more infringing, than legitimate), shouldn't be tolerated. Courts are always "weights" two or more things in order to decide. This is an absolute opposite to the "Betamax" case where producer of the VCR cassettes with recording or copying capabilities was not found guilty, as there were more non-infringing uses of the technology. However, intermediaries maintaining such community meant mostly for infringing purposes causing more harm, than benefits.

PROMOTION (ADVERTISING) CLAUSE

Important condition for intermediaries' responsibility is whether they are aware of the infringement or not. One of the ways to know if intermediary is aware of infringement is determine whether he is promoting the infringing use of his services. In Metro-Goldwyn Mayer Studios Inc v Grokster Ltd case No. 04-480 it was clearly stated, that *"We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."*[79]

[79] *Metro-Goldwyn Mayer Studios Inc v Grokster Ltd*, 545 U. S. (2005);

Therefore, promotion of the infringing activity, shows not only intermediaries knowledge of the technological possibilities to infringe copyright, but also shows that subject is willing to infringe, or lead to the infringement of the copyright, which undoubtedly defines guilt of the promoting subject.

INVOLVEMENT INTO BUSINESS AND EARNING OF PROFIT CLAUSE

With was said previously in mind, it is also really important to analyse the fact that intermediaries not only directly or indirectly infringing copyrights but also earning profits, which could be one of the conditions for the secondary infringement. The commerciality (or the seeking to earn profit) according to that it is most found in the cases and legal acts, is one of the most important clauses in secondary infringement. The subjects' involvement to commercial activities is a game changer. Different conditions are being set by Enforcement Directive Article 8 if subject is involved into commercial activities. Also, Civil Code of Republic of Lithuania, as well as case law, sets higher standards if subject is commercially involved, as for example in the collection of evidence, court might sue out banking, financial or commercial documents[80]. There are two kinds of profits which are being earned by APO's and P2P's: direct and indirect.

Direct profits are kind of profits which are being earned directly from users of the services. Usually it is profit which comes out of membership plans, which are directly related to infringing activities. Generally speaking those plans allow users to use services more conveniently: download copyright protected content as higher speeds, prioritizes paid membership users against free plan users etc. However, as it was stressed in Tobias Mc Fadden v Sony Music Entertainment Germany GmbH case, there is no difference between free or paid services, the main thing is that the service is usually remunerated for "The remuneration of a service supplied by a service provider within the course of its economic activity does not require the service to be paid for by those for whom it is performed…"[81]

[80] See 36, Article 80(2);
[81] See 79;

Indirect profits could earn much more, than direct profits, as usually those profits come from advertising services. Revenues out of advertising services basically keep those sites running, as they contribute considerably to platform management costs. CJEU in "Pirate Bay case" also drew attention to this phenomenon: *"Furthermore, there can be no dispute that the making available and management of an online sharing platform, such as that at issue in the main proceedings, is carried out with the purpose of obtaining profit therefrom, it being clear from the observations submitted to the Court that that platform generates considerable advertising revenues."*[82]
It is clear that intermediaries are not only infringing copyrights but also earning profits out of this, either direct or indirect, consequently they shall be treated as businesses, which means that higher liability standards should be applied for their activities.

ACTUAL KNOWLEDGE AND CONSTRUCTIVE KNOWLEDGE

Together with secondary infringement it is also important to discuss about **actual** and **constructive knowledge**. After clarifying idea which is behind actual and constructive knowledge, there should be no more doubts about online intermediaries' liability for third parties' downloads, uploads, streams either by using their infrastructure or via their network. As it was already stated in this text actual and constructive knowledge correlate with causal link. Hence, there could be situations when intermediary is not aware of actual infringement which is ongoing, as for example the fact that BitTorrent files leading to copyrighted content are available in the platform, doesn't necessarily show that there is unlawful acts caused, as operator of this platform might not know about infringing nature of the content. Nonetheless, constructive knowledge, means that to find intermediary as infringer, there is necessity to find an sufficient enough link between damage and unlawful actions, for instance constructive knowledge could be fact that the best part of the content which is available in the infrastructure is copyright infringing content or the occurrence that there have already been requests to delete such content from directory, or even situations when intermediary is encourages and promotes the fact that there are such content available and it could be downloaded.

[82] Case C-610/15, Stichting Brein v Ziggo BV, XS4ALL Internet BV, [2017] ECLI:EU:C:2017:456;

Actual and constructive knowledge also could correlate with fault, as the condition of delictual liability. As in both deliberate and careless forms of fault, there is need to identify actual or constructive knowledge or so called mental relationship with an infringing act. For examples in cases when there is relatively large profit received from such online services and intermediary is recognized as business, there is need to set whether person of such abilities and knowledge, could have known and understood his harmful actions.

As we can tell actual and constructive knowledge is another way to ascertain whether internet intermediary might be liable for third parties' actions. Worth mentioning that actual knowledge well correlates with primary infringement, as intermediary must be aware of the infringing nature of his actions, while constructive knowledge might help court to determine intermediaries' actions in the light of general situation. And so, to determine constructive knowledge of the intermediary it's necessary to apply previously discussed secondary infringement clauses, as creating infrastructure, maintaining community, promoting and being involved into business and earning of profit, also other possible clauses. Only while applying such criteria, and determining intermediaries' constructive knowledge, whereas identifying P2Ps' and APOs' fault, unlawful deed, damages caused, causal link between damages and unlawful deed, we can find intermediaries' guilty for third parties' infringement.

Recent "Pirate bay case" perfectly illustrates, that **management** of the P2P platform, which **provides** users with access to copyright protected content, **promotion** of the purpose to make protected works available to the users by blogs, and forums, also encouragement to download those files, and the fact that platform generates considerable advertising revenues, shows that operator of such platform couldn't have been unaware of infringing nature of the platform.[83]

Everything summed up there are many different criterions to apply and tests to carry out to find intermediary liable. International and national legal systems together with doctrine, is currently not harmonised in this field of intellectual property, yet there are only hope for new legislations to be developed, and so now it is only case law which we should trust in our day to day endeavours to keep copyright authors rights protected. However, cases as "Pirate bay case" shows that constructive knowledge of the infringing nature might lead to the liability of the intermediary.

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[83] Ibid;

CONCLUSIONS

To summarize firstly, as it was outlined above, intellectual property together with copyright law and copyright infringement is one of the most underdeveloped areas of law. Copyright infringement lacks harmonisation and mutual understanding. There are different international and national legislation which complement each other but unfortunately law lack contemporary and strong framework.

Currently, draft of Directive on copyright in the Digital Single Market is being discussed by legislators in EU. From the first look it gives really worthy definitions and provisions for online content sharing service providers. Among all other provisions, Article 13 of that draft Directive, provides with definition when intermediary performs an act of communication to the public or an act of making available to the public, with meaning of the Directive 2001/29/EC "… intervenes in full knowledge of the consequences of its action to give the public access to copyright protected works or other protected subject matter uploaded by its users." [84]Therefore, legislators are confirming the significance of determining constructive knowledge of the intermediary, for making him liable. It's good start and all intellectual property community will be looking forward for other suggestions and lastly that Directive entering into force.

Next, it is significant to underline that peer-to-peer and public internet access point operators could be described as online intermediaries, as well as Information society service providers as by Directive on electronic commerce and "InfoSoc" Directive read in conjunction with other legal acts.

Finally, according to the research it is clear that online intermediaries might be responsible and civilly liable for copyright infringements which are being performed by third parties while downloading, uploading or streaming copyright protected content under regimes in EU, US and Lithuania. There are certain conditions which should be taken in account when finding intermediaries

[84] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Consolidated Presidency Compromise Proposal* (2018 03 23); < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7450_2018_INIT&from=EN> [visited 2018 03 10];

liable, such as they actual and constructive knowledge on the infringement, their mental connection with wrongdoing, their profit-making status while being intermediaries.

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