

2016

The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking

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Recommended Citation

Geiger, Christophe and Izyumenko, Elena (2016) "The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking," *American University International Law Review*: Vol. 32 : Iss. 1 , Article 7.
Available at: <http://digitalcommons.wcl.american.edu/auilr/vol32/iss1/7>

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THE ROLE OF HUMAN RIGHTS IN COPYRIGHT ENFORCEMENT ONLINE: ELABORATING A LEGAL FRAMEWORK FOR WEBSITE BLOCKING

CHRISTOPHE GEIGER AND ELENA IZYUMENKO *

I. INTRODUCTION	44
II. A FREEDOM OF EXPRESSION PERSPECTIVE ON WEBSITE BLOCKING: THE EMERGENCE OF USER RIGHTS	52
A. USER RIGHTS: BUT WHICH USERS?	55
B. COLLATERAL EFFECTS OF BLOCKING	59
C. VALUE OF CONTENT: THE GENERAL PUBLIC INTEREST IN INFORMATION	67
D. ALTERNATIVE MEANS OF ACCESSING THE INFORMATION	72
E. NOT ONLY THE <i>USER</i> RIGHTS: FREEDOM OF EXPRESSION OF THE ISPs	73
III. A FREEDOM TO CONDUCT A BUSINESS PERSPECTIVE ON WEBSITE BLOCKING: THE (RISING) ROLE OF THE ISPs IN DIGITAL COPYRIGHT	

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ENFORCEMENT.....	76
A. COSTS AND COMPLEXITY OF BLOCKING	77
B. AVAILABILITY OF REASONABLE ALTERNATIVES (SUBSIDIARITY).....	82
C. LINKS TO INFRINGEMENT: GOING AFTER NON-LIABLE INTERMEDIARIES	87
D. SHIFT OF ENFORCEMENT BURDENS ON INTERMEDIARIES	90
IV. A RIGHT TO PROPERTY PERSPECTIVE ON WEBSITE BLOCKING: TOWARDS A “HIGH LEVEL” OF PROTECTION?.....	96
A. IP AS A HUMAN RIGHT.....	96
B. EFFECTIVENESS OF BLOCKING.....	100
C. “HIGH LEVEL” OF PROTECTION AS A GOAL OF ENFORCEMENT: MEANS TO AN END OR ENDS TO A MEAN?..	106
V. AS A CONCLUSION: IDENTIFYING THE STANDARDS FOR COPYRIGHT ENFORCEMENT ONLINE AND REFLECTING ON ALTERNATIVE SOLUTIONS	108

I. INTRODUCTION

Over the past few years, intellectual property (IP) enforcement by ordering Internet access providers to block infringing websites has been rapidly evolving in Europe. The practice is increasing since going after direct infringers has proven to be “heavy-handed, disproportionate, and ineffective,”¹ whereas targeting the website operators is not an easy task either, as these often run their services from another jurisdiction,² easily change location³ or conceal

1. Neelie Kroes, Vice-President of the European Commission Responsible for the Digital Agenda from 9 February 2010 until 1 November 2014, Speech at the Information Influx International Conference of the Institute for Information Law (IViR): Our Single Market is Crying Out for Copyright Reform (Amsterdam, July 2, 2014).

2. *See, e.g.*, Discussion Paper: Roles and Responsibilities of Intermediaries: Fighting Counterfeiting and Piracy in the Supply Chain, ICC BUSINESS ACTION TO STOP COUNTERFEITING AND PIRACY 74 (March 2015), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/International-engagement-and-Advocacy/Roles-and-Responsibilities-of-Intermediaries/> (noting that “[o]ne of the main challenges is addressing both counterfeiting and piracy from websites based outside the jurisdiction in which the infringement takes place”) [hereinafter BASCAP report]. *See also* CJEU, Opinion of Advocate General Cruz Villalón in

identity.⁴ As a result, injunctions against Internet access providers often remain the most efficient option left to the right-holders.

In the European Union, the legal basis of such injunctions rests on Article 8(3) InfoSoc.⁵ According to this article, “Member States shall ensure that right-holders 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.” An almost identical provision, but with regards to all intellectual property rights, is enshrined in the third sentence of Article 11 of the Enforcement Directive.⁶ In addition, Article 12(3) of the E-Commerce Directive⁷ provides that the so-called “mere conduit” liability exemption that would normally apply to Internet access providers⁸ “shall not affect the possibility for

UPC Telekabel Wien [2013], C-314/12, EU:C:2013:781, at ¶ 23.

3. Indicative in this sense is *The Pirate Bay*, with regards to which “successful court actions only led to shifting from hosting providers in one country to hosting providers in another country” (Arno R. Lodder & Nicole S. van der Meulen, *Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time*, 4 JIPITEC 130 (2013), at ¶ 79).

4. See CJEU, Opinion of Advocate General Cruz Villalón in UPC Telekabel Wien [2013], C-314/12, EU:C:2013:781, at ¶ 23. The same considerations have informed recently the right-holders’ move towards injunctions against the ISPs of end users and not even those of the infringing websites. See *infra* parts II.2-3.

5. Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 *On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, L 167 O.J. 10 (2001) [hereinafter InfoSoc Directive].

6. Directive 2004/48/EC of the European Parliament and of the Council of Apr. 29, 2004 *On the Enforcement of Intellectual Property Rights*, L 195 O.J. 16 (2004) [hereinafter Enforcement Directive].

7. Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 *On Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market*, L 178 O.J. 1 (2000) [hereinafter E-Commerce Directive].

8. It has to be recalled that according to the E-Commerce Directive, “the [‘mere conduit’] service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.” E-Commerce Directive, *supra* note 7, Art. 12. See also Recitals 42 and 43. Lodder & van der Meulen, *supra* note 3, at ¶ 12 (“[a]ccess providers almost intrinsically satisfy all these conditions”) (emphasis added). See also Pekka Savola, *Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers*, 5(2) JIPITEC 116 (2014); Martin Husovec, *Injunctions against Innocent Third Parties: The Case of Website Blocking*, 4 JIPITEC 116 (2013).

a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement." Analogously, Recital 45 of the E-Commerce Directive states the following:

The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.⁹

At the same time, Article 15 of the E-Commerce prohibits the general monitoring obligation.¹⁰

Even though authorized in principle by the European legislator, blocking injunctions have also proven problematic with regard to fundamental rights enshrined in the European legal order, such as the users' right of access to information and the Internet service providers' ability to freely conduct their business. As noted by the European Commission in its 2007 impact assessment, "the adoption of blocking measures *necessarily* implies a restriction of human rights . . . and therefore, it can only be imposed by law, subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society" ¹¹ A

9. Similarly, Recital 59 of the InfoSoc Directive provides that, "without prejudice to any other sanctions and remedies available, right-holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5 [exceptions and limitations]." InfoSec Directive, *supra* note 5. Further on the important distinction between liability and the so-called accountability of intermediaries, see Martin Husovec, *Accountable, not Liable. How Far Should Mandatory Cooperation of Intermediaries Go?*, <http://accountablenotliable.org>.

10. E-Commerce Directive, *supra* note 7. According to Art. 15(1) thereof, "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14 ['mere conduit', 'caching', and hosting], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

11. European Commission, *Accompanying Document to the Proposal for a Council Framework Decision Amending Framework Decision 2002/475/JHA on Combating Terrorism: Impact Assessment* ¶ 4.2 (Council of Europe

uniform approach towards achieving proportionality in website blocking is, however, currently lacking in Europe. Inasmuch as the InfoSoc Directive left “[t]he conditions and modalities relating to such injunctions . . . to the national law of the Member States,”¹² blocking practices vary significantly across Europe. This generates further discrepancies in the case law, “leav[ing] much to be desired in terms of human rights”¹³ and overall level of harmonization.¹⁴

As a response to this situation of legal uncertainty, two major European courts – the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) – have recently provided some guidance on the fundamental-rights balancing in cases of website blocking on the grounds of copyright infringement.¹⁵ The point of departure has been two landmark decisions of these courts, which thus need to be briefly presented: the

Commissioner, Working Paper, No. 14960/07, 2007) (emphasis added).

12. Recital 59 of the InfoSoc Directive, *supra* note 5. See also Recital 23 of the Enforcement Directive, *supra* note 6.

13. Douwe Korff & Ian Brown, *Social Media and Human Rights* (Council of Europe Commissioner for Human Rights, Discussion Paper, 2012), <https://wcd.coe.int/ViewDoc.jsp?id=1904319>.

14. European Commission, *A Digital Single Market Strategy for Europe – Analysis and Evidence* 30 (Council of Europe Commissioner, Working Paper, 2015) (admitting “where local legislation implementing Article 8(3) of the Directive 2001/29/EC provides instruments for obtaining injunctive measures against intermediaries whose services are used by a third party to infringe a copyright or related right, certain aspects of the conditions and procedures relating to these injunctions remain fragmented” (emphasis added)); see also Richard Arnold, *Website-Blocking Injunctions: The Question of Legislative Basis*, 37(10) EIPR 623, 626 (2015) (observing that “[t]he proportionality of website-blocking injunctions remains highly controversial”).

15. On the increasing influence of human and fundamental rights on the resolution of IP disputes, see Christophe Geiger, “Constitutionalising” *Intellectual Property Law?*, *The Influence of Fundamental Rights on Intellectual Property in Europe*, 37(4) INT’L REV. INTEL. PROP. & COMPETITION L. 371 (2006); *Fundamental Rights as Common Principles of European (and International) Intellectual Property Law*, in COMMON PRINCIPLES OF EUROPEAN INTELLECTUAL PROPERTY LAW 223 (Ansgar Ohly ed., 2012); *Reconceptualizing the Constitutional Dimension of Intellectual Property*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 115 (Paul L.C. Torremans ed., 3rd ed., 2015); *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 661 (Christophe Geiger ed., 2015).

so-called *UPC Telekabel* judgment of the CJEU and the *Akdeniz v. Turkey* decision of the ECtHR.

UPC Telekabel

The case before the CJEU, *UPC Telekabel*,¹⁶ involved a major Austrian Internet access provider that was ordered, at the request of two film production companies, to block access of its customers to the website *kino.to*, offering the films of the companies for streaming or download without the right-holders' consent. The order was made in the form of the so-called "outcome prohibition"¹⁷ – a standard injunction under the Austrian procedural law that obliged its addressee to prevent a particular outcome (access to the website in this case) from occurring, without however specifying the means. *UPC Telekabel* appealed, considering that such an injunction could not be addressed to it, given that it did not have any business relationship with the operators of the website and it was not established that its own customers acted unlawfully. The Internet service provider (ISP) also claimed that the various possible blocking measures that could be introduced might, in any event, all be technically circumvented and that some of those were excessively costly. The question was therefore raised before the CJEU on whether it was compatible with Union law, and in particular with the necessary balance between the parties' fundamental rights, to ask an Internet access provider in quite general terms to hinder its customers' access to an infringing website, *without specifying the measures* which that access provider had to take.¹⁸

In a judgment rendered in March 2014, the CJEU held that such an injunction was legitimate in principle,¹⁹ as it was indispensable "to guarantee right-holders a *high* level of protection" envisaged as an objective of the InfoSoc.²⁰ The blocking made it necessary, however, to reconcile the following conflicting rights: i) copyright and related

16. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192.

17. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶¶ 16 and 60.

18. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶ 42.

19. *Id.* at ¶ 64.

20. *Id.* at ¶ 31 (referring to Recital 9 of the InfoSoc Directive) (emphasis added).

rights (protected under Article 17(2) of the EU Charter); ii) an Internet access provider's freedom to conduct a business (Article 16 of the EU Charter); and iii) the freedom of information of Internet users (Article 11 of the EU Charter).²¹ The Court observed in particular with regard to the Internet users' right to information that there would be no infringement of this right, if the blocking was "strictly targeted" and if the users were accorded an opportunity to assert their rights before the national court once the implementing measures taken by the ISP were known.²² As concerns the ISP's freedom to conduct a business, there was no violation of this right either, as an outcome prohibition²³ left the ISP to choose which blocking technique better adapted to its resources to implement.²⁴ Furthermore, the fact that the Austrian outcome prohibition allowed the ISP to avoid liability by showing that it had taken all reasonable measures²⁵ had, according to the Court, the effect that "unbearable sacrifices" would not be required from the access provider.²⁶ Finally, with regard to the right to intellectual property protected under Article 17(2) of the EU Charter, the Court observed that the blocking had to be "sufficiently effective to ensure genuine protection of the fundamental right at issue."²⁷ In practical terms, this meant that even the possibility of circumvention did not preclude the blocking that only had to be "reasonable"²⁸ in discouraging users from accessing infringing content.²⁹

Akdeniz v. Turkey

Interestingly, just a few days before the *Telekabel* judgment was rendered, another supranational court in Europe – the ECtHR (also

21. *Id.* at ¶ 47.

22. *Id.* at ¶¶ 56-57.

23. I.e. a generic order, as contrasted to specific injunctions.

24. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 52.

25. The background to this element lied in the particular national rules for the issuing and enforcement of an injunction at issue. *See generally* CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 10; and CJEU, Opinion of Advocate General Cruz Villalón in UPC Telekabel Wien [2013], C-314/12, EU:C:2013:781, at ¶¶ 60-61, 67-69.

26. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, 27 March 2014, EU:C:2014:192, at ¶ 53.

27. *Id.* at ¶ 62.

28. *Id.* at ¶ 59.

29. *Id.* at ¶ 62.

“the Strasbourg Court”) – likewise had to decide on the issue of website blocking and its effects on human rights. The case before the Strasbourg Court, *Akdeniz*,³⁰ concerned the blocking of access in Turkey, at the request of the Professional Union of Phonogram Producers, to the websites *myspace.com* and *last.fm* on the grounds that they were disseminating musical works in violation of copyright. The applicant, who had applied to the ECtHR as a regular user of the websites in question, complained about the collateral effects of blocking: according to him, the blocking amounted to a disproportionate response in the light of Article 10 (freedom of expression and information) of the European Convention on Human Rights (ECHR).³¹ The only issue raised before the Strasbourg Court thus concerned the freedom of information of the Internet users, as neither the websites in question nor their ISPs contested the blocking. It has to be noted further that no provision analogous to that of the EU Charter’s freedom to conduct a business is envisaged in the ECHR, which largely remains an instrument for the protection of the so-called first-generation rights (civil and political³²).

Unlike the CJEU, that recognized the users’ standing in analogous suits, the ECtHR declared the application inadmissible *ratione*

30. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710.

31. The applicant also complained under Art. 6 of the Convention that the measure blocking websites violated his right to a fair trial and the principle of the presumption of innocence. According to him, in the absence of adversarial procedure, the provisional measure had seriously impeded on his freedom of expression. He added that several procedural flaws, including the opposition period and the obligation to state reasons, have aggravated this measure (ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 12). The ECtHR decided, however, regard being had to the close correlation between the applicant’s claims under Arts. 6 (fair trial) and 10 (freedom of expression) of the Convention, that the applicant’s lack of standing for the purposes of Art. 10 of the Convention equally applied in respect of the Art. 6 complaint (ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 29).

32. Further on different “generations” of human rights, see Christian Tomuschat, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 25 et seq. (2nd ed., 2008). On the nature of rights guaranteed by the ECHR in particular, see David J. Harris et al., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3 et seq. (2nd ed., 2009). On the hierarchy of human rights, see Peggy Ducoulombier, *Interaction Between Human Rights: Are All Human Rights Equal?*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY* 39, *supra* note 15.

personae.³³ The Court noted that the applicant, along with the other Turkish users of the two music-sharing websites, was only indirectly affected by the blocking. According to the ECtHR, this was not sufficient to consider the applicant a victim for the purposes of the Convention.³⁴ The Court further observed that the websites were blocked because they did not comply with copyright legislation and that the applicant had only been deprived of one means of listening to music among many (legitimate) others.³⁵ Furthermore, it was not alleged by the applicant that the websites at issue distributed information of a specific interest for him or that the blocking deprived him of an importance source of communication.³⁶ The Court also differentiated this case from its earlier finding of Article 10 violation in *Yildirim*, in which the applicant, as an owner and user of his *own* website, complained of impossibility to access it as a result of a blocking measure that affected an entire Google module.³⁷ By contrast, Mr. Akdeniz acted as a “*mere*” user of the two websites devoted to the dissemination of music.³⁸ In addition, neither the collateral effects of blocking, nor the commercial nature of the websites concerned, were considered by the Court to raise an important question of general interest.³⁹ Finally, the need to balance freedom of information against the right to property of copyright holders, which is also protected by the Convention, left the national authorities with a particularly wide margin of appreciation in regulating the dispute.⁴⁰

As the above cases demonstrate, European courts advance several factors to inform – from the perspective of different fundamental rights – the website blocking practices for copyright enforcement in Europe.⁴¹ This article examines these factors in detail, starting with

33. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 29.

34. *Id.* at ¶ 24.

35. *Id.* at ¶ 25.

36. *Id.* at ¶ 26.

37. ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218JUD000311110.

38. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 27 (emphasis added).

39. *Id.* at ¶ 28.

40. *Id.*

41. This paper’s focus is on substantive fundamental rights. The procedural (due process) guarantees are also discussed, but only to the extent they affect

the freedom of expression framework for website blocking and the rather revolutionary for European judiciary concept of user rights that has being construed under it.⁴² It then proceeds to discuss the limits of intermediaries' involvement in digital enforcement dictated by the EU-specific freedom to conduct a business. Factors resulting from the human right to property framework for IP, including the required level of efficacy of its enforcement, merit a separate examination. By means of conclusion, the final part of this article identifies the standards for online copyright enforcement online, reflecting further on alternatives to the currently prioritized enforcement strategies.

II. A FREEDOM OF EXPRESSION PERSPECTIVE ON WEBSITE BLOCKING: THE EMERGENCE OF USER RIGHTS

The right to freedom of expression, as protected by Article 10 ECHR and Article 11 EU Charter, benefits from a privileged position in the European constitutional order⁴³ and is sometimes even called the “European First Amendment.”⁴⁴ In the course of recent years, this

substantive rights that are at the center here. For a substantial discussion of the fair trial aspects of enforcement, see Jonathan Griffiths, *Enforcement of Intellectual Property Rights and the Right to a Fair Trial*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 438, *supra* note 15; Kimberlee Weatherall, *Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties*, AM. U. INT'L L. REV. 211 (2016).

42. On the other side of the Atlantic, analogous liberal stance was taken earlier by the Supreme Court of Canada, which since its groundbreaking *Théberge* and *CCH* decisions (*Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339) was increasingly emphasising “a move away from an earlier, author-centric view” towards “promoting the public interest” and the “users’ rights [as] an essential part of furthering the public interest objectives of the Copyright Act” (*SOCAN v. Bell Canada*, [2012] 2 SCR 326, at ¶¶ 9-11; see also *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345).

43. ECtHR, *Handyside v. United Kingdom* (No. 5493/72), CE:ECHR:1976:1207JUD000549372, at ¶ 49 (establishing that “freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man”).

44. Dirk Voorhoof, *Het Europese ‘First Amendment’: de vrijheid van expressie en informatie en de rechtspraak van het EHRM betreffende art. 10 EVRM (1994-1995)*, MEDIAFORUM (AMSTERDAM) 11 (1995); Christophe Geiger, *DROIT D’AUTEUR ET DROIT DU PUBLIC A L’INFORMATION, APPROCHE DE DROIT*

right, which guarantees not only the right to impart information but also the right of the public to receive it,⁴⁵ has evolved towards inclusion of a genuine “right to Internet access.”⁴⁶ In a June 2009 decision on the first HADOPI law,⁴⁷ the French Constitutional Council, for instance, explicitly stated that “[i]n the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, [the right to freedom of expression] *implies freedom to access such services.*”⁴⁸ Since then, this national reading has found further support in the July 2012 UN Human Rights Council Resolution on protection of freedom of expression on the Internet.⁴⁹ Prior to that, the right to Internet access was only implicitly considered by the UN as a human right, insofar as it is inherent in the “freedom . . . to seek, receive and impart information and ideas

COMPARE 166 (2004).

45. See, e.g., ECtHR, *Times Newspapers Ltd v. the United Kingdom* (Nos. 1 and 2) (Nos. 3002/03 and 23676/03), CE:ECHR:2009:0310JUD000300203, at ¶ 27; ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218JUD000311110, at ¶ 50; ECtHR, *Guseva v. Bulgaria* (No. 6987/07), CE:ECHR:2015:0217JUD000698707, at ¶ 36; ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610, at ¶ 56. On the public’s right to receive information, see also Christophe Geiger, *Author’s Right, Copyright and the Public’s Right to Information: A Complex Relationship*, in *NEW DIRECTIONS IN COPYRIGHT LAW* 24 (Fiona Macmillan ed., vol. 5, 2007).

46. See on this question, Pierre-François Docquir, *Internet, les raisons d’un droit d’accès*, in *LE TÉLÉCHARGEMENT D’ŒUVRES SUR INTERNET: PERSPECTIVES EN DROITS BELGE, FRANÇAIS, EUROPÉEN ET INTERNATIONAL* 349 (Carine Doutrelepont et al. eds., 2012); Nicola Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, 19(3) *CARDOZO J. INT’L & COMP. L.* 645 (2011); Molly Land, *Toward an International Law of the Internet*, 54(2) *HARV. INT’L L.J.* 393 (2013).

47. For a comprehensive discussion on the HADOPI law, see Christophe Geiger, *Honourable Attempt But (Ultimately) Disproportionately Offensive Against Peer-to-Peer on the Internet (HADOPI) – A Critical Analysis of the Recent Anti-File-Sharing Legislation in France*, 42(4) *INT’L REV. INTEL. PROP. & COMPETITION L.* 457 (2011); *Counterfeiting and the Music Industry: Towards a Criminalization of End Users? The French “HADOPI” Example*, in *CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 386 (Christophe Geiger ed., 2012).

48. Conseil constitutionnel [Constitutional Council], decision No. 2009-580 DC, June 10, 2009, at ¶ 12 (emphasis added).

49. G.A. Res. 20/8, (July 16, 2012); see also G.A. Res. 26/L.24, (June 20, 2014).

*through any media and regardless of frontiers.*⁵⁰ In Europe, a survey conducted by the ECtHR of the legislation of twenty Member States of the Council of Europe revealed:

[T]he right to Internet access is protected in theory by the constitutional guarantees applicable to freedom of expression and freedom to receive ideas and information. The right to Internet access is considered to be inherent in the right to access information and communication protected by national Constitutions, and encompasses the right for each individual to participate in the information society and the obligation for States to guarantee access to the Internet for their citizens. It can therefore be inferred from all the general guarantees protecting freedom of expression that a right to unhindered Internet access should also be recognized.⁵¹

Accordingly, any measure that is bound to have an influence on the accessibility of the Internet engages the responsibility of the State under Article 10 ECHR.⁵² Within the framework of this Article (to which Article 11 of the EU Charter corresponds⁵³), the court deciding in website blocking cases will have to look, primarily, at the manner of the site usage (1) and the effects of blocking on legitimate communication (2), but also at the public interest in disabled information (3) and whether the alternatives to accessing such information were available (4). Under certain circumstances, it will further be pertinent to consider the Article 10 implications for not only Internet users, but also the intermediaries concerned (5).

50. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), Art. 19 (freedom of expression) (emphasis added).

51. ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218 JUD000311110, at ¶ 31.

52. *Id.* at ¶ 53. *See also*, on the level of the EU, Commission Staff Working Document 531/2012, O.J. 3-4 (Sept. 11, 2013) at ¶ 3.4 (“Any limitations to *access to the Open Internet* can impact on end-users’ freedom of expression and the way in which they can receive and impart information. Although operators need to manage Internet traffic in order to ensure the proper functioning of the networks (including managing network congestion, security threats, etc.), *there are many instances when unjustified blocking and throttling occurs.*” (emphasis added)).

53. The scope of Art. 11 EU Charter is the same as that of Art. 10 ECHR as per Art. 52(3) of the EU Charter. *See also* Note from the Praesidium, *Draft Charter of Fundamental Rights of the European Union*, Text of the Explanations Relating to the Complete Text of the Charter as set out in CHARTE 4487/00 CONVENT 50 (Brussels, 2000), Explanations on Art. 11 of the EU Charter, at 13-14.

A. USER RIGHTS: BUT WHICH USERS?

One prominent consequence of the free speech review of website blocking in copyright infringement cases rests in the idea of user rights as enforceable rights of equal value (and not mere interests to be taken into account⁵⁴). In *Telekabel*, the CJEU explicitly recognized the cause of action for those ISP's customers whose information rights might be affected by website blocking. It held in particular that, "in order to prevent the fundamental rights recognized by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules *must provide* a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known."⁵⁵

54. This contrasts the traditional doctrinal approach, in which users only have interests while right-holders have rights. Favouring the granting of positive rights to users. See, e.g., Robert Burrell & Allison Coleman, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 279 et seq. (2005); Thomas Riis & Jens Schovsbo, *User's Rights, Reconstructing Copyright Policy on Utilitarian Grounds*, 29(1) EIPR 1 (2007); Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User-Rights Approach*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., forthcoming 2016); Christophe Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 28(7) EIPR 366, 371 et seq. (2006); *Copyright as an Access Right: Securing Cultural Participation Through the Protection of Creators' Interests*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? (Rebecca Giblin & Kimberlee G. Weatherall eds., forthcoming 2016). On the emergence of user's rights in the case law of the Court of Justice of the European Union, see Christophe Geiger, *The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union*, in NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW 435 (Irina A. Stamatoudi ed., 2016).

55. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 57 (emphasis added). It is submitted that such cause of action may be provided to the users on the basis of their contractual relationship with the intermediary implementing an injunction (Martin Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, 9(8) JIPLP 631, 633 (2014)). This assumption was in effect further supported by the implementing decision of the Austrian Court that was of the opinion that "[the *locus standi*] requirement is already fulfilled in the Austrian law because the customers can sue their provider on the contractual basis in case they consider the blocking measures not lawful or excessive. Because the contract between the access provider and his consumers is to be, as a rule, interpreted meaning that all – but only those – website blocking injunctions are permitted, which correspond to requirements of the CJEU. Already this possibility suffices to guarantee the right of the customers to legal access to information, which was stressed by the CJEU. In order to reduce the risk of conflicting decisions, the provider will be in such a case able to announce the

Thereby obliging the national authorities to avail the users of the procedural opportunity to challenge the blocking before the courts,⁵⁶ the CJEU advanced the idea that freedom of expression may be invoked not as a mere defense, but as a right on which an action in the main case is based.⁵⁷ Although the CJEU envisaged this possibility within quite a limited context of result-tailored injunctions, some commentators have considered that such procedural standing or *locus standi* of users would “also apply[] to national courts issuing *specific orders*, unless proportionality has also been reviewed from the users’ perspective.”⁵⁸

A similar logic was developed in a number of other cases on the so-called “exceptions” to copyright which the CJEU started to frame as “rights.” In *Painer*, for example, the Court stated that the quotation exception enshrined in Article 5(3)(d) InfoSoc intended to strike a fair balance between the *rights of users* of protected subject-matter and the reproduction right conferred on authors.⁵⁹ According to the Court, striking the balance in this case implied to favour “the exercise of the *users’ right* to freedom of expression over the interest

dispute to the right holder, who gave rise to such blocking” (Oberster Gerichtshof [Austrian Supreme Court], UPC-Telekabel II/kino.to, No. 4Ob71/14s, June 24, 2014, translation from German by Martin Husovec in *Austrian Supreme Court Confirms Open-Ended Website Blocking Injunctions [UPC Telekabel Wien]*, HUŤKO’S TECHNOLOGY LAW BLOG (Aug. 1, 2014), <http://www.husovec.eu/2014/08/austrian-supreme-court-confirms-open.html>).

56. Notably, this procedural guarantee is consonant with one of the principal positions of the Office of the Council of Europe Commissioner for Human Rights on that “[b]locking must be carried out with effective notice on the conclusion of due process, and *interested parties should be given the opportunity to challenge the decision in public judicial proceedings.*” See Korff & Brown, *supra* note 13 (emphasis added).

57. See in this regard Uma Suthersanen, *Copyright as an Engine of Free Speech: An English Perspective*, in COPYRIGHT AND FREEDOM OF EXPRESSION: PROCEEDINGS OF THE ALAI STUDY DAYS 167, 184 (2008) (observing that “[c]ourts need to grasp that when a defendant pleads ‘freedom of expression’, it is not a defence but a counter-claim”).

58. Savola, *supra* note 8, at ¶ 36 (emphasis added). See also Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, *supra* note 55, at 633 (“[E]ven the implementation of technology-specific and fixed website-blocking injunctions can lead to a problem of overblocking of the legitimate content, which might also have been a reason why the CJEU especially requires the need of *locus standi* for users. This would then lead to *locus standi* of users as a general requirement also in cases of all the specific website-blocking injunctions”).

59. CJEU, Judgment in *Painer* [2011], C-145/10, EU:C:2011:798, at ¶ 134.

of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public.”⁶⁰ Furthermore, in *Ulmer*, the CJEU ruled that the Member States were free to authorize the publicly accessible libraries to digitize, without the right-holders’ consent, the works contained in their collections if that was necessary in order to make those works available on dedicated terminals. According to the Court, “[s]uch a right of communication of works [for the purpose of research and private study⁶¹] . . . would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an *ancillary right* to digitize the works in question”⁶² recognized pursuant to Article 5(2)(c) InfoSoc.⁶³ Analogously, in *Deckmyn*, the parody “exception” was likewise framed by the CJEU in a “rights-language,” from which it followed that the application of such exception had to strike a fair balance between, on the one hand, the interests and rights of copyright holders, and, on the other, the rights of users of protected subject-matter to freedom of expression.⁶⁴ Finally, the Charter Article 11 and the ECHR Article 10 rights of users have also featured in a number of the national courts’ rulings.⁶⁵

60. *Id.* at ¶ 135 (emphasis added).

61. Exception under Art. 5(3)(n) of the InfoSoc Directive, *supra* note 5.

62. CJEU, Judgment in *Ulmer* [2014], C-117/13, EU:C:2014:2196, at ¶ 43 (emphasis added).

63. *Id.* at ¶ 44 (emphasis added).

64. CJEU, Judgment in *Deckmyn* [2014], C-201/13, EU:C:2014:2132, at ¶ 27. See the European Copyright Society, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 Deckmyn*, 46(1) INT’L REV. INTEL. PROP. & COMPETITION L. 93 (2015); Jonathan Griffiths et al., *The European Copyright Society’s “Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn,”* 37(3) EIPR 127 (2015).

65. See, e.g., in the UK: Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc [2011] EWHC 1981 (Ch), at ¶¶ 164 and 199; EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch), at ¶¶ 94 and 107; Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors [2014] EWHC 3354 (Ch), at ¶¶ 193 and 196; and Cartier International Ltd & Anor v. British Telecommunications Plc & Ors [2016] EWHC 339 (Ch), at ¶ 49. In Denmark: *Sø- og Handelsretten* [Maritime and Commercial Court in Copenhagen], *Fritz Hansen A/S and Others v. Telia Danmark*, No. A-38-14, Dec. 11, 2014, transcript from the record of judgments, at 10. In Germany: Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 3/14, Nov. 26, 2015, DE:BGH:2015:261115UIZR3.14.0, at ¶ 44; Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 174/14, Nov. 26, 2015,

As it concerns the ECtHR, its stance on user rights in copyright disputes is, however, less clear. Although in a number of website blocking cases the Court ruled positively on the victim status of the applicant-users, none of those concerned copyright.⁶⁶ Moreover, unlike the CJEU, the Strasbourg Court distinguishes between “active” users involved in not only receiving, but also imparting information on the Internet, and the so-called “*mere*” or “simple” users⁶⁷ acting as the passive recipients thereof. As explained recently in *Cengiz and Others*, the answer to the question whether an applicant can claim to be a victim of a measure blocking access to the website would depend in particular on the *manner* in which the website is used.⁶⁸ In that case, which concerned the blocking of access to the website *YouTube*, the Court recognized the victim status of the applicants who used this platform for not only accessing the videos of their interest but also actively, by downloading and sharing files from their *YouTube* accounts.⁶⁹ Analogously, in the case of *Yildirim* mentioned above, *locus standi* was granted to the *owner* of the website blocked in the context of judicial proceedings unrelated to the applicant’s site. By contrast, in the only copyright case on website blocking decided by the Strasbourg Court so far, the ECtHR found the applicant to lack standing because, among others, the use concerned was qualified as passive.⁷⁰

On the substance, however, the approaches of the CJEU and the ECtHR to the rights of users might not be that different. The decision on the victim status was linked by the ECtHR to the assessment on the merits – an approach that essentially boils down to the

DE:BGH:2015:261115UIZR174.14.0, at ¶ 53. In France: Tribunal de Grande Instance de Paris [High Court of Paris], 3rd chamber, *SCPP v. Orange, Free, SFR et Bouygues Télécom*, No. 14/03236, Dec. 4, 2014, at 7. In Greece: District Court of Athens, No. 13478/2014, Dec. 22, 2014.

66. See ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218JUD000311110; and ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610.

67. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 27; ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610, at ¶ 50 (emphasis added).

68. ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610, at ¶ 49.

69. *Id.* at ¶ 50.

70. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 27.

proportionality review akin to that of the CJEU when it weighs the right to property of copyright holders against the freedom of information of the users.⁷¹ Consequently, the ECtHR did not rule out the possibility of users being accorded standing (and ultimately even prevailing) in copyright suits with another factual background.⁷² An outcome of such cases would depend on a number of factors, but primarily – on the effects of blocking on legitimate content.

B. COLLATERAL EFFECTS OF BLOCKING

Collateral effects of blocking constitute, alongside the manner of the site usage, an important factor to be accounted for under the freedom of expression framework. This is all the more so, since, as a report of the Independent regulator and competition authority for the UK communications industries (Ofcom) has emphasized, *each* blocking measure also carries a risk of “overblocking.”⁷³

71. See generally, comparing the approaches of the ECtHR and CJEU to balancing copyright and freedom of expression, Alain Strowel, *Pondération entre liberté d'expression et droit d'auteur sur internet: de la réserve des juges de Strasbourg à une concordance pratique par les juges de Luxembourg*, 100 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 889 (2014); Bernd Justin Jütte, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38(1) EIPR 11 (2016); Elena Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective*, 19 J. OF WORLD INTELLECTUAL PROP. 115 (2016).

72. It might have been preferable, however (if only for the sake of ensuring consistency in the application of fundamental rights by both European courts), if Art. 10 complaint in *Akdeniz* had been rejected on other grounds linked to admissibility and not on the basis of the applicant's victim status. In particular, the proportionality analysis conducted by the ECtHR in *Akdeniz* suggests that the case should have been rather rejected as manifestly ill-founded (notably, due to a clear absence of a lack of proportionality between the aim and the means). All the more so in view of the ECtHR's consistent emphasis that Art. 10 guarantees not only the right to impart information but also the right of the public to receive it. See, e.g., ECtHR, *Times Newspapers Ltd v. the United Kingdom* (Nos. 1 and 2) (Nos. 3002/03 and 23676/03), CE:ECHR:2009:0310JUD000300203, at ¶ 27; ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218JUD000311110, at ¶ 50; ECtHR, *Guseva v. Bulgaria* (No. 6987/07), CE:ECHR:2015:0217JUD000698707, at ¶ 36; ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610, at ¶ 56. On the important differences between the admissibility criteria related to the ECtHR's jurisdiction and those based on the merits, see Council of Europe/European Court of Human Rights, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA (3rd ed., 2014).

73. Ofcom, “*Site Blocking*” to Reduce Online Copyright Infringement: A Review of Sections 17 and 18 of the Digital Economy Act 1, 6 (May 27, 2010),

Consequently, as the CJEU stressed it in *Telekabel*, the blocking should be “strictly targeted,”⁷⁴ meaning that “the measures adopted by the internet service provider . . . must serve to bring an end to a third party’s infringement of copyright or of a related right but *without thereby affecting internet users* who are using the provider’s services in order to lawfully access information.”⁷⁵ The CJEU thereby confirmed the principle first set down by the ECtHR in *Yildirim* and further reiterated in *Akdeniz*. In accordance with this principle, “any measure blocking access to a website [has] to be part of a particularly strict legal framework ensuring both tight control over the scope of the ban and effective judicial review to prevent possible abuse, because it [can] have significant effects of ‘collateral censorship’.”⁷⁶ On the international level, the General Comment No. 34 on freedom of expression analogously states that any permissible restrictions on the operation of websites or any systems to support information dissemination, including Internet service providers, are only permissible to the extent that they are *content-specific*.⁷⁷

Nevertheless, this does not mean that any collateral “overblocking” of legitimate content precludes an injunction. In the

<http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>; *see also* Cormac Callanan et al., *Internet Blocking: Balancing Cybercrime Responses in Democratic Societies* 1, 26 (Open Society Institute, 2009), http://www.aconite.com/sites/default/files/Internet_blocking_and_Democracy.pdf.

74. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 56.

75. *Id.* (emphasis added). *See also*, more recently, CJEU, Judgment in Mc Fadden [2016], C-484/14, EU:C:2016:689, at ¶ 93.

76. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 28, citing ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218JUD000311110, at ¶¶ 64-66 (translation from French draws on the Legal Summary of the case prepared by the Registry of the ECtHR (Information Note on the Court’s case-law No. 173, April 2014)). *See also* the Dissenting opinion of judge Pinto de Albuquerque in ECtHR, *Mouvement raëlien suisse v. Switzerland* [GC] (No. 16354/06), CE:ECHR:2012:0713JUD001635406 (“[U]sers must not be subjected to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery. When *exceptional circumstances* justify the blocking of unlawful content, *it is necessary to avoid targeting users who are not part of the group for whose protection a filter has been activated*” (emphasis added)).

77. UN Human Rights Committee, *General Comment No. 34. Article 19: Freedoms of Opinion and Expression* (Sept. 12, 2011), CCPR/C/GC/34, at ¶ 43.

majority of cases, it would suffice that a *substantial* proportion of the website is infringing, despite certain bits of legitimate content also being affected. It is for this reason that the blocking of *Newzbin2*, for example, was found justified in the UK case of *20C Fox v. BT*,⁷⁸ even on admittance that that measure potentially prevented non-infringing uses.⁷⁹ On the evidence, however, the incidence of such uses was *de minimis*, whereas it was clear that the copyright holders' rights were infringed on a massive scale.⁸⁰ In the same vein, it was recently held by the German Federal Supreme Court of Justice (*Bundesgerichtshof*) that "the block . . . cannot only be accepted if solely unlawful information is made available on the website."⁸¹ According to this court, it is "necessary, in the course of the balancing exercise, to look not at an *absolute amount* of legitimate content on the respective site, but at the *overall ratio* of lawful and unlawful content and whether the former constitutes a *non-significant* amount in comparison with the latter."⁸² In Denmark, the blocking of an online shop *Interior Addict* (on which infringing replica products were sold) was allowed for similar reasons.⁸³ As stated by the Maritime and Commercial Court in Copenhagen, the blocking was proportionate, since "the products infringing on the

78. *Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc* [2011] EWHC 1981 (Ch).

79. *Id.* at ¶ 186.

80. *Id.* at ¶¶ 185-186. Similar reasoning was applied to website blocking in trademark cases. In *Cartier II*, for example, the blocking was allowed even on admittance that it was liable to affect the sale of lawfully marketed goods on the target websites. In that case, the blocking was allowed on consideration that "the claimants have done their best to warn the operators and the operators have chosen to continue to put the Target Websites at risk by marketing counterfeit products on them" (*Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶ 67).

81. *Bundesgerichtshof* [German Federal Supreme Court of Justice], I ZR 3/14, Nov. 26, 2015, *supra* note 65, at ¶ 44, translation from German by the authors. *See also*, to the same effect, *Bundesgerichtshof* [German Federal Supreme Court of Justice], I ZR 174/14, Nov. 26, 2015, *supra* note 65, at ¶ 55.

82. *Id.* (emphasis added).

83. *Sø- og Handelsretten* [Maritime and Commercial Court in Copenhagen], *Fritz Hansen A/S and Others v. Telia Danmark*, No. A-38-14, Dec. 11, 2014, transcript from the record of judgments, *supra* note 65. *See generally* Maria Fredenslund, *Danish Court Issues Website Blocking Ruling Concerning the Illegal Distribution of Replica Products*, KLUWER COPYRIGHT BLOG (Jan. 23, 2015), <http://kluwercopyrightblog.com/2015/01/23/danish-court-issues-website-blocking-ruling-concerning-the-illegal-distribution-of-replica-products/>.

Plaintiffs' rights represent[ed] a *significant part* of the range of products offered at www.interioraddict.co.uk.⁸⁴ It thus followed that the Internet users were not "unfairly prevent[ed] from accessing information to which they [were] legally entitled."⁸⁵ In Norway, likewise, the blocking of seven file-sharing sites, an amount of esteemed infringing content on which varied from 75 to 100 per cent, was authorized by the Oslo District Court on September 2015.⁸⁶

The decision by the District Court of Athens from late 2014 stands out from this general pattern. In that case, the Court rejected an injunction ordering, at the request of five Greek collecting societies, the blocking of a number of file-sharing websites, *The Pirate Bay* being among them.⁸⁷ According to the Court, the blocking was disproportionate with regard to the users' freedom of information, because *some* of the content offered on the websites concerned could be legal, such as the works that lacked originality, have already fallen into the public domain, or those whose communication to the public was authorized by the authors through, for example, creative commons licenses.⁸⁸ In the Court's reasoning, only the blocking of specific (infringing) parts of the website could have been justified,

84. Sø- og Handelsretten [Maritime and Commercial Court in Copenhagen], *Fritz Hansen A/S and Others v. Telia Danmark*, *supra* note 83, at 10 (emphasis added).

85. *Id.*

86. Oslo Tingrett [Oslo District Court], *Warner Bros. Entertainment Norge AS and Others v. Telenor Norge AS and Others*, No. 15-067093TVI-OTIR/05, Sept. 1, 2015, <http://www.dagbladet.no/f/15067093tviotirkjennelse.pdf>. For a comment, see Josef Ohlsson Collentine, *Norway Blocks the Pirate Bay and Other Sites*, PIRATE TIMES (Sept. 3, 2015), <http://piratetimes.net/norway-blocks-the-pirate-bay-and-other-sites/>.

87. District Court of Athens, No. 13478/2014, Dec. 22, 2014, *supra* note 65. See also Yannis Paramythiotis, *Website Blocking in Greece: How Does it Work There?*, IPKAT (Jan. 28, 2015), <http://ipkitten.blogspot.fr/2015/01/website-blocking-in-greece-how-does-it.html>; Ernesto Van der Sar, *Torrent Site Blockades are Disproportional, Greek Court Rules*, TORRENTFREAK (Jan. 21, 2015), <https://torrentfreak.com/torrent-site-blockades-are-disproportional-greek-court-rules-150121/>; Tatiana Sinodinou, *Draft Law Provision on the Administrative Removal and Blocking of Online Copyright Infringing Content. Will 2016 Bring More "Happiness" to Greek Copyright Law?*, KLUWER COPYRIGHT BLOG (Jan. 8, 2016), <http://kluwercopyrightblog.com/2016/01/08/draft-law-provision-on-the-administrative-removal-and-blocking-of-online-copyright-infringing-content-will-2016-bring-more-happiness-to-greek-copyright-law/>.

88. See Paramythiotis, *supra* note 87; Sinodinou, *supra* note 87.

leaving legitimate content intact.⁸⁹

While the proportion of permissible overblocks might remain unclear in some cases, any instances of a so-called “blanket blocking” would most certainly fall short of the Article 10 ECHR (or Article 11 EU Charter) requirements. In the ECtHR case of *Yildirim*, for example, the blocking of the entire *Google Sites* to target only one offending website within that group was considered to create arbitrary effects running contrary to Article 10 ECHR.⁹⁰ Similarly, a violation of the right to receive and impart information was established in the case of *Cengiz and Others v. Turkey* that concerned a wholesale blocking of *YouTube* on the sole basis that the contents of ten video files available on this site were found to be infringing.⁹¹

The collateral blocking considerations have also informed the CJEU’s findings in two *Telekabel* predecessors – the *Sabam* cases. In *Scarlet Extended*, an injunction requiring an Internet access provider to install a system for filtering all electronic communications passing via its services with an aim to prevent any online activity liable to infringe copyright was outlawed by the Court as not being capable to distinguish adequately between unlawful and lawful content, with the result that its introduction could have led to blocking of lawful communications.⁹² In *SABAM v. Netlog*, analogous conclusion was reached with regards to an owner of an online social networking platform.⁹³ As noted by the CJEU in those cases, “the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.”⁹⁴

89. See Paramythiotis, *supra* note 87.

90. ECtHR, *Ahmet Yildirim v. Turkey* (No. 3111/10), CE:ECHR:2012:1218 JUD000311110, at ¶¶ 66 and 68.

91. ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610.

92. CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85, at ¶ 50.

93. CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771, at ¶ 52.

94. CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85, at ¶ 50; and, by analogy, CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771, at ¶ 52. In the sphere of trademark protection, it was likewise

On the national level, in some cases it was considered appropriate to adopt a more targeted form of order, where the blocking of a website with substantial legitimate content was at stake.⁹⁵ Thus, in Italy, the Court of Appeals of Rome overturned an order requiring local ISPs to block access to the video streaming platform *Filmakerz.org* in its entirety, on consideration that the order was too broad.⁹⁶ According to the Court, the partial blocking of specific URLs was to be preferred in that case over the blocking of an entire site.⁹⁷

Apart from the proportion of legitimate content on each individual website, the “collateral censorship” issues might also arise out of the specific technique of blocking.⁹⁸ This is the case in particular with the Internet Protocol (IP) address blocking.⁹⁹ Since multiple websites habitually share a common IP address, blocking of one of those

stated that, although “[o]bviously freedom of expression and information does not permit the infringement of intellectual property rights . . . , it entails that the protection of trade mark proprietor’s rights in the context of electronic commerce may not take forms that would infringe the rights of innocent users of an electronic marketplace” (CJEU, Opinion of Advocate General Jääskinen in *L’Oréal v. eBay* [2010], C-324/09, EU:C:2010:757, at ¶ 158).

95. Savola, *supra* note 8, at ¶ 72.

96. Ernesto Van der Sar, *Court Orders ISPs to Unblock “Pirate” Site*, TORRENTFREAK (Apr. 3, 2014), <https://torrentfreak.com/court-orders-isps-to-unblock-pirate-site-140403/>.

97. *Id.*

98. There are three main forms of blocking commonly applied by the ISPs: the Internet Protocol (IP) address blocking; the Domain Name System (DNS) blocking; and the Deep Packet Inspection (DPI) technique (the latter being a form of the Uniform Resource Locator (URL) blocking). In a lot of cases, a combination of blocking measures was applied. On the technical background on website blocking, *see* Ofcom, *supra* note 73; Callanan et al., *supra* note 73, at 90 et seq. *See also*, for a condensed summary, Lukas Feiler, *Website Blocking Injunctions Under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?*, Transatlantic Technology Law Forum (TTLF) Working Paper No. 13, 2012, at 6-11; *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 25.

99. IP addresses are the most basic addresses that numerically identify computers connected to the Internet (*e.g.*, 120.39.214.983). They are often compared in this sense to telephone numbers. IP address blocking disables users’ communications destined for the IP address of the website concerned (Callanan et al., *supra* note 73, at 92; Ofcom, *supra* note 73, at 3 and 28; *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 25).

would automatically lead to overblocking of all of its “neighbors” that ought not to be blocked.¹⁰⁰ As noted by Justice Arnold in the UK case of *Dramatico v. Sky (No 2)*, “IP address blocking is generally only appropriate where the relevant website’s IP address is not shared with anyone else. If it is shared, the result is likely to be overblocking.”¹⁰¹ In that case, however, the website’s address was not shared, hence the IP address blocking was found appropriate.¹⁰² To the contrary, the Antwerp Court of Appeals expressly dismissed IP address blocking back in 2011 based on a strong likelihood of collateral effects on the websites sharing the same IP address with *The Pirate Bay*.¹⁰³

Significantly, “[o]nly the hosting provider will know how many sites share a particular IP address,”¹⁰⁴ which raises additional concerns with regards to possible arbitrariness associated with this type of blocking.¹⁰⁵ For example, in the UK case of *FAPL v. Sky*, in which the orders at stake required IP address blocking, the right-holder’s evidence was that the IP address of infringing website was not shared.¹⁰⁶ In reality, though, this turned out not to be the case, with a result that the “Internet users were denied access to UK television listings website radiotimes.com, as well as hundreds of other websites.”¹⁰⁷

100. Twentieth Century Fox Film Corporation & Ors v. British Telecommunications Plc [2011] EWHC 2714 (Ch), at ¶ 6; Ofcom, *supra* note 73, at 30.

101. *Dramatico Entertainment Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2012] EWHC 1152 (Ch), at ¶ 13, with further references to Twentieth Century Fox Film Corporation & Ors v. British Telecommunications Plc [2011] EWHC 2714 (Ch), at ¶ 6.

102. *Dramatico Entertainment Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2012] EWHC 1152 (Ch), at ¶ 13.

103. Hof van Beroep, Antwerpen [Antwerp Court of Appeals], VZW Belgian Anti-Piracy Federation v. NV Telenet, No. 2011/8314, Sept. 26, 2011, http://nurpa.be/files/20111004_BAF-Belgacom-Telenet-DNS-blocking.pdf, at 14, cited in Feiler, *supra* note 98, at 23-24; Savola, *supra* note 8, at note 130.

104. Ofcom, *supra* note 73, at 30.

105. See Feiler, *supra* note 98, at 9-10.

106. The Football Association Premier League Ltd v. British Sky Broadcasting Ltd & Ors [2013] EWHC 2058 (Ch), discussed in Savola, *supra* note 8, at ¶ 50.

107. *Premier League Piracy Fight Brings Down Radio Times Site*, WORLD INTELL. PROP. REV. (Aug. 15, 2013), <http://www.worldipreview.com/news/premier-league-piracy-fight-brings-down-radio-times-site>. However, the accuracy of the right-holders’ analysis regarding the sharing of IP addresses continued being accepted by the UK courts, although with a caveat that, “[i]f the ISPs consider that

Finally, as convincingly put by Pekka Savola, “[w]hile overblocking has not yet caused significant problems with the top infringing sites, the ever-expanding blocking implies that this would become a problem. Specifically, for example, proxy sites and less significant websites will most likely almost always use a shared IP address.”¹⁰⁸

Insofar as the Domain Name System (DNS) blocks are concerned,¹⁰⁹ those often target, as the Ofcom report explains, the so-called “uppermost level of the infringing domain.”¹¹⁰ Consequently, if lawful services happen to operate within the same domain zone as infringing ones, overblocks are inevitable.¹¹¹ An Ofcom illustration is the blocking order against the domain name “example.com” that blocks both “guilty.example.com” and “innocent.example.com.”¹¹² In Ofcom’s proposition, it might therefore be necessary that the court “consider[s] the relative amounts of infringing and lawful content within the relevant domain and reach[es] a view on whether the amount of infringing content within the domain zone was sufficient to justify blocking access to all sites within the zone.”¹¹³

The Uniform Resource Locator (URL) blocking¹¹⁴ is generally

the position is open to doubt, they are entitled to require the Court to decide the question.” *See Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶¶ 254-257; *see also Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶¶ 68-70.

108. Savola, *supra* note 8, at ¶ 87.

109. Domain names are unique names that identify Internet resources (*e.g.*, website.example.eu) and are much easier for the users to remember compared to numerical and lengthy IP addresses. In this sense, domain names resemble actual persons’ names in a telephone book (Domain Name System, DNS), to which particular telephone numbers (IP addresses) correspond. DNS blocking thus implies altering the ISP-operated DNS server that allows translating a domain name into the corresponding IP address that computers need to communicate (Ofcom, *supra* note 73, at 3, 31-32; Feiler, *supra* note 98, at 7; Callanan et al., *supra* note 73, at 92-93).

110. In the domain hierarchy, the top-level domains are represented by extensions such as “.com,” “.eu,” “.edu,” etc. *See Ofcom, supra* note 73, at 34.

111. *Id.* at 34.

112. *Id.*

113. *Id.*

114. URL consists of a domain name together with further information identifying specific content on the Internet (*e.g.*, <http://www.domainname.eu/specific/pirate/content.zip>). *See Callanan et al., supra* note 73, at 93; Ofcom, *supra* note 73, at 3, 35-36.

considered to be more precise. One of its forms, the so-called Deep Packet Inspection (DPI)¹¹⁵ is “the only one to combine a highly granular approach with being able to catch all forms of unencrypted traffic.”¹¹⁶ It suffers from other problems though, high costs and complexity coupled with intrusiveness into the users’ private sphere being among them.¹¹⁷

C. VALUE OF CONTENT: THE GENERAL PUBLIC INTEREST IN INFORMATION

The next factor which needs to be taken into account in the balancing process from a freedom of expression perspective is the general public interest in information affected by the blocking measure. Unlike the CJEU, which did not pay much tribute to this criterion in *Telekabel*, the ECtHR provided some guidance on its potential implications for copyright enforcement.

As pointed out by the Strasbourg Court in *Akdeniz*, “the applicant had not alleged that the websites in question disseminated information which could present a *specific interest* for him or that the blocking of access had had the effect of depriving him of a *major source of communication*.”¹¹⁸ Accordingly, “the fact that the applicant had been deprived of access to those websites had not prevented him from taking part in a *debate on a matter of general interest*.”¹¹⁹ The ECtHR further recalled its established case law, in accordance with which:

[W]hile Article 10 § 2 of the Convention does not allow much leeway for restrictions of freedom of expression in political matters, for example, States have a broad margin of appreciation in the regulation of speech in commercial matters . . . , bearing in mind that the breadth of that margin has to be qualified where it is not strictly speaking the “commercial”

115. DPI-based URL blocking examines network traffic with an aim to block specific URLs identified as infringing (Ofcom, *supra* note 73, at 3, 39-40; Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors [2014] EWHC 3354 (Ch), at ¶ 25).

116. Ofcom, *supra* note 73, at 40.

117. *Id.* at 40-41; Callanan et al., *supra* note 73, at 116.

118. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311 DEC002087710, at ¶ 26 (emphasis added), translation from French on the basis of the Legal Summary of the case prepared by the Registry of the ECtHR, *supra* note 76.

119. *Id.* (emphasis added).

expression of an individual that is at stake but his participation in a debate on a matter of general interest.¹²⁰

The Court referred to its earlier findings in *Ashby Donald* – the case that concerned the conviction in France of the three fashion photographers for copyright infringement by taking the photos of designers' clothes and publishing them online without the consent of the right-holders. There, likewise, it was noted that, “although one cannot deny that the public is interested in fashion in general and *haute couture* fashion shows in particular, it could not be said that the applicants took part in a debate of general interest when restricting themselves to making photographs of fashion shows accessible to the public.”¹²¹ In the light of that case law, the Court was not convinced that the case of *Akdeniz* raised an important question of general interest.¹²²

The ECtHR thus seemed to imply that in other cases with greater public interest in information the blocking might *not* be justified in terms of Article 10 ECHR.

Although it is well-known that the ECtHR tends to attach the highest value to political speech,¹²³ it is also notable that the general public interest in information is not reduced to political context. In effect, such interest had previously been recognized by the Court in

120. *Id.* at ¶ 28 (with further references).

121. ECtHR, *Ashby Donald and Others v. France* (No. 36769/08), CE:ECHR:2013:0110JUD003676908, at ¶ 39, translation from French published in the 45(3) INT'L REV. INTELL. PROP. & COMPETITION L. 354 (2014). *See also* Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45(3) INT'L REV. INTELL. PROP. & COMPETITION L. 316 (2014).

122. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311 DEC002087710, at ¶ 28.

123. *See, e.g.*, ECtHR, *Castells v. Spain* (No. 11798/85), CE:ECHR:1992:0423 JUD001179885, at ¶ 42; ECtHR, *Piermont v. France* (Nos. 15773/89 and 15774/89), CE:ECHR:1995:0427JUD001577389, at ¶ 76; ECtHR, *Rekvényi v. Hungary* [GC] (No. 25390/94), CE:ECHR:1999:0520JUD002539094, at ¶ 26; ECtHR, *Ceylan v. Turkey* [GC] (No. 23556/94), CE:ECHR:1999:0708 JUD002355694, at ¶ 34. *See also* ECtHR, Concurring Opinion of Judge Pinto de Albuquerque in *Fáber v. Hungary* (No. 40721/08), CE:ECHR:2012:0724 JUD004072108 (“[O]bjectively and subjectively political nature of the expression is irrefutable, which significantly narrows the margin of appreciation of the respondent State.”).

the information on, e.g. sporting matters¹²⁴ or performing artists,¹²⁵ as well as when the material at issue related to the moral position advocated by an influential religious community.¹²⁶ The standards of scrutiny would also typically be more stringent for artistic, cultural or otherwise “civil” expression.¹²⁷

An interesting example to look at in the context of copyright website blocking is the websites that allow to stream coverage of sporting events. The latest line of cases on broadcasting rights from the CJEU is indicative in this regard.

*Sky Österreich*¹²⁸ revolved around the provision of the Audiovisual Directive¹²⁹ (notably, Article 15(6) thereof), limiting to technical costs the amount of compensation which holders of exclusive broadcasting rights may seek from other broadcasters for short news reports on events of high interest to the public, such as football matches. Legitimacy of this provision was contested by Sky which held exclusive broadcasting rights in Europa League matches in the 2009-2010 to 2011-2012 seasons in Austrian territory and for which it claimed having spent millions of Euros each year on the license and production costs. In its January 2013 judgment, the CJEU held that the contested provision of the Directive was justified in the light of freedom to receive information, which outweighed the freedom to conduct a business of a holder of exclusive broadcasting rights.¹³⁰

124. See, e.g., ECtHR, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (No. 5266/03), CE:ECHR:2007:0222JUD000526603, at ¶ 25 (society’s attitude towards a sports star); ECtHR, *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal* (Nos. 11182/03 and 11319/03), CE:ECHR:2007:0426JUD001118203, at ¶ 28 (an interview by the president of the sports club); and ECtHR, *Ressiot and Others v. France* (Nos. 15054/07 and 15066/07), CE:ECHR:2012:0628JUD001505407, at ¶ 116 (doping practices in professional sport).

125. See ECtHR, *Sapan v. Turkey* (No. 44102/04), CE:ECHR:2010:0608JUD004410204, at ¶ 34 (a book about the Turkish pop star).

126. ECtHR, *Verlagsgruppe News GmbH and Bobi v. Austria* (No. 59631/09), CE:ECHR:2012:1204JUD005963109, at ¶ 76.

127. Harris et al., *supra* note 32, at 457 et seq.

128. CJEU, Judgment in *Sky Österreich* [2013], C-283/11, EU:C:2013:28.

129. Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, L 95 O.J. 1 (2010) [hereinafter Audiovisual Directive].

130. CJEU, Judgment in *Sky Österreich* [2013], C-283/11, EU:C:2013:28, at ¶ 66.

The Court noted in particular the following:

[T]he marketing on an exclusive basis of events of high interest to the public is increasing and liable to restrict considerably the access of the general public to information relating to those events. It is in that connection that Article 15 of Directive 2010/13 seeks . . . to safeguard the fundamental freedom to receive information, guaranteed under Article 11(1) of the Charter, and to promote pluralism of the media in the production and programming of information in the European Union, protected under Article 11(2) of the Charter.¹³¹

The Court went on to say: “[S]afeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest . . . , the importance of which in a democratic and pluralistic society must be stressed in particular *That importance is particularly evident in the case of events of high interest to the public.*”¹³² It thus followed that Article 15 of Audiovisual Directive did pursue an objective in the general interest.

A similar logic accompanied the Luxemburg Court’s findings in the cases of *UEFA and FIFA v. Commission* that followed later the same year.¹³³ There, the CJEU considered that the prohibition on exclusive broadcasting of all the matches in the final stages of the World Cup and EURO was justified by the objective of protecting the right to information and ensuring wide public access to television coverage of those events. Notably, in the Member States concerned (the UK and Belgium) those events were designated, on the basis of the Directive concerning the pursuit of television broadcasting activities,¹³⁴ as events of *major importance for society*. Having

131. *Id.* at ¶ 51.

132. *Id.* at ¶ 52 (emphasis added).

133. CJEU, Judgment in *UEFA v. Commission* [2013], C-201/11 P, EU:C:2013:519; CJEU, Judgment in *FIFA v. Commission* [2013], C-204/11 P, EU:C:2013:477; and CJEU, Judgment in *FIFA v. Commission* [2013], C-205/11 P, EU:C:2013:478.

134. Council Directive 89/552/EEC of Oct. 3, 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, L 298 O.J. 23 (1989), as amended by Directive 97/36/EC of the European Parliament and of the Council of June 30, 1997, L 202 O.J. 60 (1997). Art. 3a(1) of Directive 89/552/EEC authorizes the Member States to draw up the national lists in order to ensure that certain events that they regard as being of major importance for society

stressed a particular importance of the right to receive information in the case of the tournaments at issue, the Court of Justice considered that this right was to be given *priority* over exclusive broadcasting. It observed in particular that restrictions on the right-holders' rights to freedom to provide services, freedom of establishment, freedom of competition and the right to property were expressly authorized by the Union legislature who also found them to be proportionate. The Court also noted that the Member States were accorded a broad discretion in designating the events of major importance, which was not proved to be excessive in the light of the actual perception of the UK and Belgian public and the evidence provided by FIFA and UEFA to the Court.

On the national level, however, in the case which expressly concerned blocking access to the website that indexed the user-generated streams of television broadcasts of sporting events (*FAPL v. Sky*), the value-of-information factor was not even considered by the UK court.¹³⁵ Essentially, Justice Arnold was satisfied that the blocking was proportionate for the reasons advanced by the claimant (*FAPL* in that case)¹³⁶ and that “[t]he interests of [the latter] and the supporting right-holders in enforcing their copyrights clearly outweigh[ed] the Article 11 EU Charter rights of the users of the Websites, who [could] obtain the copyright works from lawful sources.”¹³⁷

All in all, it is hardly imaginable that in a case with strong freedom of expression interests (which might not have been the case of *Ashby Donald*, *Akdeniz*, or *FAPL v. Sky*), the proprietary interests of copyright holders would prevail.¹³⁸ In *Cengiz*, for instance, the

are excluded from exclusive broadcasting so that such events can be available on free television.

135. *The Football Association Premier League Ltd v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch).

136. *Id.* at ¶ 55.

137. *Id.* at ¶ 59.

138. *Contra* Constitutional Court of South Africa, *Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V. t/a Sabmark International*, May 27, 2005, CCT 42/04; 36 INT’L REV. INTELL. PROP. & COMPETITION L. 868 (2005); Court of The Hague, *Nadia Plesner v. Louis Vuitton Malletier SA*, May 4, 2011, No. KG ZA 11-294. In both of those cases, the freedom of expression interests prevailed over the right-holders’ property, on consideration of the strong political (or rather society-critical) message of the expression at issue.

blocking was found disproportionate in terms of Article 10 ECHR on consideration (inter alia) of the fact that “YouTube broadcast[ed] not only artistic and musical works, but [was] also a very popular platform for political discourse and political and social activities. Files disseminated by YouTube includ[ed] amongst other information that could be of particular interest for everyone”¹³⁹ Accordingly, “the contested measure [made] inaccessible a site with information of specific interest for the applicants that [was] not easily accessible by other means. This site [was] also an important source of communication for the applicants.”¹⁴⁰

D. ALTERNATIVE MEANS OF ACCESSING THE INFORMATION

Another, although perhaps less obvious factor that might become important in shaping the width of digital copyright enforcement is the availability of alternative means of accessing the information. In *Cengiz*, in particular, a violation of Article 10 ECHR was established where the blocking rendered inaccessible a website with information of specific interest that was not otherwise easily available and for which there was no equivalent.¹⁴¹ Analogously, by noting in *Akdeniz* that many alternative (legal) means of access to music were available to the applicant,¹⁴² the Strasbourg Court left open the possibility of refusing the blocking injunction in a situation of a lack of (more and better?) legitimate offerings.

As was highlighted in the Ofcom report, “the relative attractiveness of legal alternatives” impacts “[t]he extent to which consumers and site operators will seek to circumvent blocking.”¹⁴³ Accordingly, it has to “form[] part of a broader package of measures to tackle infringement.”¹⁴⁴ The issue of costs might also get involved,

139. ECtHR, *Cengiz and Others v. Turkey* (Nos. 48226/10 and 14027/11), CE:ECHR:2015:1201JUD004822610, at ¶ 51, translation from French by the authors.

140. *Id.*

141. *Id.* at ¶¶ 51-52.

142. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 25.

143. Ofcom, *supra* note 73; Callanan et al., *supra* note 73, at 6.

144. *Id.* See also Brett Danaher et al., *The Effect of Piracy Website Blocking on Consumer Behavior* 26 (November 2015), <http://ssrn.com/abstract=2612063> or <http://dx.doi.org/10.2139/ssrn.2612063> (suggesting that “antipiracy enforcement is more effective when consumers have access to (and are more aware of) attractive legal alternatives”).

since it has often been underlined, albeit in relation to developing countries, that counterfeiting and piracy need to be viewed from the consumption side as well.¹⁴⁵ In this regard, Gene Hoffman, the CEO of Emusic, Inc. has, for example, conceded that “the best way to stop piracy is to make music so cheap it isn’t worth copying.”¹⁴⁶

Viewed in this light, the alternative-means factor is capable of remedying the current “lack of structural incentives for improving access”¹⁴⁷ by partially shifting the onus on the right-holders. The latter have often preferred in the past deterrence models of enforcement to the introduction of more attractive alternatives in the marketplace. In this line, Fred von Lohmann, a Senior Copyright Counsel at Google, has argued recently that in the context of Article 8(3) InfoSoc proceedings there is only an accuser demanding reasonable measures from a defendant, whereas the most effective measure might be something that the accuser himself is capable of bringing in the marketplace.¹⁴⁸ Indeed, while “the court in the context of Article 8(3) lacks the ability to weigh all the interests and improvise a complete set of remedies,”¹⁴⁹ the emphasis on freedom of information, rights of users, and – more specifically – on the “alternative means” factor, opens the way to a broader perspective.

E. NOT ONLY THE *USER* RIGHTS: FREEDOM OF EXPRESSION OF THE ISPS

Apart from the rights conferred on users, some courts have also recognized that website blocking engages the freedom of expression rights of the ISPs.

As noted by the Advocate General (AG) in his Opinion on

145. See Joe Karaganis (ed.), *MEDIA PIRACY IN EMERGING ECONOMIES* i (2011).

146. Committee on Intellectual Property Rights and the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* 80 (2000), cited in Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331, 435 (2003).

147. Rebecca Giblin, *When ISPs Become Copyright Police*, 18(2) *IEEE INTERNET COMPUTING* 84, 85 (2014).

148. Fred von Lohmann, Senior Copyright Counsel, Google, Speech at the Information Influx International Conference of the Institute for Information Law (IVIIR): Filtering Away Infringement: Copyright, Injunctions and the Role of ISPs (Amsterdam, July 3, 2014).

149. *Id.*

Telekabel, “[a]lthough it is true that, in substance, the expressions of opinion and information in question are those of the ISP’s customers, the ISP can nevertheless rely on that fundamental right by virtue of its function of publishing its customers’ expressions of opinion and providing them with information.”¹⁵⁰ In other words, an ISP can “rely on the social importance of its activity” of making Internet access available.¹⁵¹ In support of this contention, AG referred to an established body of the ECtHR case law, in accordance with which “Article 10 guarantees freedom of expression to ‘everyone’, [with] [n]o distinction [being] made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom.”¹⁵² According to the ECtHR, although “publishers do not necessarily associate themselves with the opinions expressed in the works they publish, . . . by providing authors with a medium they participate in the exercise of the freedom of expression”¹⁵³

Indeed, the *human* right to freedom of expression claims of the ISPs are not as such unusual in the practice of the ECtHR. More recently, the Article 10 rights of an ISP have even made their way to the Grand Chamber in a case of *Delfi AS* that concerned the liability of Estonia’s largest Internet portal for hosting infringing content generated by its users, despite the fact that the portal had no actual knowledge of infringing content which it, moreover, removed immediately upon notification by the injured person’s lawyers.¹⁵⁴ On the facts, however, no violation of Article 10 was established – a finding that has since then been widely criticized for imposing on Internet intermediaries an excessively high standard of liability.¹⁵⁵

150. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 82.

151. *Id.* at ¶ 108.

152. ECtHR, *Öztürk v. Turkey* [GC] (No. 22479/93), CE:ECHR:1999:0928 JUD002247993, at ¶ 49, referred to by the Advocate General Cruz Villalón in his Opinion on *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 82.

153. ECtHR, *Öztürk v. Turkey* [GC] (No. 22479/93), CE:ECHR:1999:0928 JUD002247993, at ¶ 49.

154. ECtHR, *Delfi AS v. Estonia* [GC] (No. 64569/09), CE:ECHR:2015:0616 JUD006456909.

155. 69 media organisations, Internet companies, human rights groups and academic institutions that sided with an ISP failed to influence the Grand Chamber’s ruling. See Open Letter addressed to the President of the European Court of Human Rights Dean Spielmann (Jan. 13, 2014), <https://www.laquadrature.net/en/civil-society-calls-on-the-echrs-grand-chamber-to-overturn->

Nevertheless, in a recent judgment on a similar issue the Court found that holding an ISP liable for user comments indeed violates that ISP's freedom of expression.¹⁵⁶

On the national level, it was highlighted in a series of UK cases that, apart from the freedom of expression rights of users, the freedom of expression rights of the ISPs and website operators are also affected by website blocking.¹⁵⁷ Nevertheless, those were clearly outweighed in these particular cases by the property rights of the Studios and other copyright owners.¹⁵⁸

At the end, in the *Telekabel* case, the Court made no mention of

delfi-v-estonia-ruling). See also Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Delfi AS v. Estonia* [GC], no. 64569/09, CE:ECHR:2015:0616 JUD006456909; Lorna Woods, *Delfi v Estonia: Curtailing Online Freedom of Expression?*, EU LAW ANALYSIS (June 18, 2015), <http://eulawanalysis.blogspot.fr/2015/06/delfi-v-estonia-curtailing-online.html>; Eileen Weinert, *Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights Hands Down its Judgment: Website Liable for User-Generated Comments*, 26 ENT. L. REV. 246 (2015); Dirk Voorhoof, *Delfi AS v. Estonia: Grand Chamber Confirms Liability of Online News Portal for Offensive Comments Posted by its Readers*, STRASBOURG OBSERVERS (June 18, 2015), <http://strasbourgoobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms-liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/>.

156. ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (No. 22947/13), CE:ECHR:2016:0202JUD002294713. An ISP at issue was the owner of one of the major Internet news portals in Hungary. The second applicant, in respect of which a violation of Art. 10 (freedom of expression) ECHR has likewise been established, was the self-regulatory body of Hungarian Internet content providers. It is worth, however, noting that – unlike in the case of *Delfi* – the comments at stake in *MTE* were not qualified by the Court as clearly unlawful hate speech. In addition, the Court had regard to the fact that one of the applicants in *MTE*, again in contrast to *Delfi*, was a non-profit organisation which did not operate for economic purpose. For a comment on the *MTE* case, see Lorna Woods, *Freedom of Expression and Liability for Internet Comments: A Key New ECHR Judgment*, EU LAW ANALYSIS (Feb. 21, 2016), <http://eulawanalysis.blogspot.fr/2016/02/freedom-of-expression-and-liability-for.html>; Christina Angelopoulos, *MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression*, KLUWER COPYRIGHT BLOG (March 5, 2016), <http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/>.

157. *Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc* [2011] EWHC 1981 (Ch), at ¶ 200; *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch), at ¶ 94.

158. *Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc* [2011] EWHC 1981 (Ch), at ¶ 200; *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch), at ¶ 107.

the freedom of expression rights of those other than users. However, this could also mean that the CJEU considered, in the circumstances of the case, those interests minor enough not to merit a separate examination.

III. A FREEDOM TO CONDUCT A BUSINESS PERSPECTIVE ON WEBSITE BLOCKING: THE (RISING) ROLE OF THE ISPS IN DIGITAL COPYRIGHT ENFORCEMENT

Apart from freedom of expression, another fundamental right that comes to balancing in copyright website blocking cases is the freedom of access providers to conduct their business as per Article 16 of the EU Charter. In contrast to freedom of expression, which is a right with a long constitutional tradition, the freedom to conduct a business is a quite peculiar fundamental right. As such, it is not known to any other international human rights instrument but the EU Charter. The Charter, having acquired a binding status rather recently,¹⁵⁹ makes the freedom to conduct a business also a relatively young right.¹⁶⁰ As a consequence, “to date the case law has not . . . provided a full and useful definition of this freedom.”¹⁶¹ Both the textual context and the judicial history of Article 16, however, point to its much-qualified nature, allowing the State a wide power to interfere with it.¹⁶² This particularly “weak” substance of the right¹⁶³

159. The EU Charter became binding with the entrance into force of the Treaty of Lisbon on December 2009. *See* Art. 6(1) of the Treaty on European Union (TEU) as amended by Art. 1(8) of the Treaty of Lisbon (European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, C 306 O.J. 1 (2007)).

160. However, some national constitutions have provided for the protection of the freedom to conduct a business long before these supranational developments. *See, e.g.*, Art. 41 of the Italian Constitution of 1947; Art. 38 of the Spanish Constitution of 1978; Art. 49 of the Croatian Constitution of 1990; and Art. 74 of the Slovenian Constitution of 1991.

161. CJEU, Opinion of Advocate General Cruz Villalón in *Alemo-Herron and Others* [2013], C-426/11, EU:C:2013:82, at ¶49.

162. As made clear by the CJEU, “[o]n the basis of . . . case law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof [Freedoms], yet is similar to that of certain provisions of Title IV of the Charter [Solidarity], the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public

has arguably allowed the CJEU in *Telekabel* to rule in favour of right-holders, and establish a “fair balance” where the Advocate General failed to find one.¹⁶⁴ It also influenced the proportionality evaluation of enforcement, including such balancing factors as: the costs and complexity of blocking (1), subsidiarity of injuncting access providers (2), links of injunctions to liability (3), and justifiability of the shift of enforcement burdens on intermediaries (4).

A. COSTS AND COMPLEXITY OF BLOCKING

As noted in *Telekabel*, “[t]he freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.”¹⁶⁵ This is consonant with Article 3(1) of the Enforcement Directive that requires that “the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights . . . [are not] unnecessarily complicated or costly.”

The costs and complexity of blocking made one of the focal points of proportionality assessment in *Telekabel*. There, it was admitted that the outcome prohibition “constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost

interest” (CJEU, Judgment in *Sky Österreich* [2013], C-283/11, EU:C:2013:28, at ¶ 46; CJEU, Judgment in *Schwerdt v. OHIM - Iberamigo (cat&clean)* [2015], T-587/13, EU:T:2015:37, at ¶ 55).

163. Further on the scope and relatively “weak” nature of the freedom to conduct a business under the EU Charter, see Xavier Groussot et al., *Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights*, in RESEARCH HANDBOOK ON EU HUMAN RIGHTS LAW (Sionaidh Douglas-Scott & Nicholas Hatzis eds., forthcoming 2016). See also Tuomas Mylly, *The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 103, 116, *supra* note 15 (noting that the freedom to conduct a business is among “the weakest” rights as “it can be limited more easily than most other freedoms”); *Deutsches Weintor* [2012], C-544/10, EU:C:2012:526, at ¶ 54).

164. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶¶ 85-86.

165. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶ 49.

for him, have a considerable impact on the organization of his activities or require difficult and complex technical solutions.”¹⁶⁶ These constraints did not, nevertheless, in the Court’s reasoning, “seem to infringe *the very substance* of the freedom of an internet service provider . . . to conduct a business.”¹⁶⁷ This was for two main reasons. First, the outcome prohibition “[left] its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he [could] choose to put in place measures which are best adapted to the resources and abilities available to him.”¹⁶⁸ Second, the Court’s conclusion was couched in the particular procedural form of an order at issue that allowed the ISP to avoid liability by showing that it had taken all reasonable steps to comply with injunction. That “possibility of exoneration,” according to the Court, “clearly [had] the effect that the addressee of the injunction [would] not be required to make unbearable sacrifices.”¹⁶⁹

The Court thus appeared to suggest that the result-tailored injunctions less encroach on the freedom to conduct a business than their specific counterparts, as long as the former leave ISPs to make their enforcement choices freely. Some commentators disputed this conclusion. It was observed in particular that the “ISPs typically *want* specific conditions to be stated,” because, if not, they risk penalties for non-compliance.¹⁷⁰ Quite the same with the possibility

166. *Id.* at ¶ 50.

167. *Id.* at ¶ 51 (emphasis added).

168. *Id.* at ¶ 52.

169. *Id.* at ¶ 53.

170. Pekka Savola, *Website Blocking in Copyright Injunctions: A Further Perspective*, THE 1709 BLOG (March 28, 2014), <http://the1709blog.blogspot.fr/2014/03/website-blocking-in-copyright.html> (emphasis added). *See also* in this sense Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, *supra* note 55, at 632; Christina Angelopoulos, *CJEU in UPC Telekom Wien: A Totally Legal Court Order. . . To Do the Impossible*, KLUWER COPYRIGHT BLOG (Apr. 3, 2014), <http://kluwercopyrightblog.com/2014/04/03/upc-telekabel-wien/>; Steven James, *Digesting Lush v Amazon and UPC Telekom: Are We Asking Too Much of Online Intermediaries?*, 25 ENT. L. REV. 175, 177 (2014), stating that “many ISPs would probably prefer to be subject to a specific injunction which tells them exactly what they must do rather than risk falling short of what the court requires.” It is also submitted that the right-holders might not be satisfied with this “blocking shopping” either, “since they will not be able to insist on the exact form of blocking that an ISP must apply under the injunction” (Joel Smith et al., *ISPs and Blocking Injunctions: UPC Telekom Wien GmbH v Constantin Film*

of exoneration envisaged in Austrian outcome prohibition, as, when taking “all reasonable measures,” the ISPs have also to respect the users’ information rights – a situation leaving an intermediary to navigate between possible liability for breach of the order and a potential dispute with its customers on the freedom of expression grounds.¹⁷¹

All in all, despite the particular conclusion reached by the Court in *Telekabel*, the costs and complexity of blocking were highlighted as an important factor in the proportionality evaluation. In the *Sabam* cases,¹⁷² this criterion even led the CJEU to outlaw an injunction that required an ISP to install, as a preventive measure and exclusively at its own expense, a permanent system for filtering all electronic communications passing via its services. According to the CJEU,

[S]uch an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.¹⁷³

The Deep Packet Inspection – a blocking technique that implies monitoring network traffic for infringing content¹⁷⁴ – is considered to be the most problematic from the costs and complexity perspective.¹⁷⁵ Accordingly, as Martin Husovec submits, “if the court were to require that a provider implement a system of Deep Packet Inspection by a smaller provider, it can be well argued that the latter

Verleih GmbH and and Wega Filmproduktionsgesellschaft mbH (C-314/12), 36(7) EIPR 470, 474 (2014)).

171. This ISP dilemma was also pointed at by the Advocate General Cruz Villalón in his Opinion on *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 89.

172. CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771; and CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85.

173. CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771, at ¶ 48; and, by analogy, CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85, at ¶ 46. *See also*, in the trademark context, CJEU, Judgment in *L’Oréal v. eBay* [2011], C-324/09, EU:C:2011:474, at ¶ 139.

174. Ofcom, *supra* note 73, at 39. *See also* *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 25.

175. Ofcom, *supra* note 73, at 5, 40-41.

is not obliged to do so due to considerations of personal cost.”¹⁷⁶

It is notable to observe that both *Sabam* and *Telekabel* judgments seem to assume that an ISP is the one to carry the costs of implementation.¹⁷⁷

An alternative approach to the allocation of costs was suggested by the Advocate General in his opinion on specific blocking measures.¹⁷⁸ As it was considered there, “[s]hould a specific measure prove to be disproportionate . . . in view of its complexity, costs and duration, it must be considered whether proportionality can be established by a *partial or full assumption of the cost burden by the right-holder*.”¹⁷⁹ It is indeed this approach that was taken up recently in France, where the High Court of Paris (*Tribunal de Grande Instance de Paris*) noted that it will be up to the ISPs concerned to demand, if they wish so, the payment of their fees from the right-holders (the French collecting society in that case), having regard to the measures actually taken and expenses specifically incurred for

176. Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, *supra* note 55, at 634.

177. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶ 50; CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771, at ¶ 48 (“[an injunction at issue] would require that ISP to install a . . . computer system *at its own expense*”) (emphasis added); *see also* CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85, at ¶ 46. In *Cartier I*, Justice Arnold was likewise of the opinion that *Telekabel* supported his view that “the ISPs should generally bear the costs of implementation as part of the costs of carrying on business in this sector” (*Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 240). *See also* Savola, *supra* note 8, at ¶ 44; and, from the same author, *INTERNET CONNECTIVITY PROVIDERS AS INVOLUNTARY COPYRIGHT ENFORCERS: BLOCKING WEBSITES IN PARTICULAR* 89 et seq. (2015), <https://helda.helsinki.fi/handle/10138/153602>.

178. Note that the question about specific measures was not addressed by the *Telekabel* Court: it was not necessary for the CJEU to reply to this question, given its finding of lawfulness of generic blocking orders.

179. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 106 (emphasis added). In this sense, *see also* Savola, *supra* note 8, at ¶ 79 contending that, “[g]iven that blocking furthers the IPR holder’s private interest, and the IPR holder is also the sole beneficiary, it would not seem unreasonable for it to cover all costs. This would guide it to do a rigorous assessment of which blocking would be economically justified”; and Husovec, *supra* note 8, at ¶ 49 (“[I]t is theoretically possible to see injunctions against innocent third parties being issued only on the promise that right holders will pay the implementation costs.”).

the implementation of the orders.¹⁸⁰ The French court did not see any contradiction in this allocation of costs to *Telekabel*. On the contrary, and with express reference to the latter, it held that such allocation was justified by the fact that the ISP was “not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.”¹⁸¹

Yet somewhat different approach to considering costs was advanced by Justice Arnold in *Cartier I*.¹⁸² There, a contention was made that, although allocated with the ISPs, the costs would not ultimately be borne by them, as the ISPs are likely to simply pass on the blocking costs to their customers in the form of higher subscription fees.¹⁸³ This re-allocation, in turn, would ease the burden on the ISPs’ business, which would not be compromised by the competitive disadvantage, since all ISPs would be approximately in the same situation, being required to take equivalent measures.¹⁸⁴ According to Justice Arnold, given this level playing field, “[t]he effect of this would be the familiar one of requiring the community as a whole (in this case, the community of broadband users in the UK) to pay the costs of law enforcement action against the minority of people who behave unlawfully or who take advantage of the unlawful behavior of others (in this case, by accessing infringing websites). This is a solution that has been adopted in many other contexts, most obviously in the funding of police forces through

180. Tribunal de Grande Instance de Paris [High Court of Paris], 3rd chamber, SCPP v. Orange, Free, SFR et Bouygues Télécom, No. 14/03236, Dec. 4, 2014, *supra* note 65, at 18.

181. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 51, cited in: Tribunal de Grande Instance de Paris [High Court of Paris], 3rd chamber, SCPP v. Orange, Free, SFR et Bouygues Télécom, No. 14/03236, Dec. 4, 2014, *id.*, at 18. It is worth noting, however, that, in *Telekabel*, the fact that the ISP was not “the author of the infringement” was brought to justify the particular procedural form of Austrian outcome prohibition, allowing its addressee to avoid liability by proving that it had taken all reasonable measures to implement an injunction. The CJEU therefore did not pronounce on any justifications of allocating the implementation costs with anyone but an intermediary against whom an injunction was issued, which seems to be a default option anyway.

182. *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch).

183. *Id.* at ¶ 252.

184. *Id.*

general taxation.”¹⁸⁵ It thus followed that the implementation costs did not lead to the conclusion that the blocking should be refused as disproportionate.¹⁸⁶ The fact remained, though, that the costs-factor was “central to the assessment of proportionality.”¹⁸⁷ Neither did Justice Arnold rule out “the possibility of ordering the right-holder to pay some or all of the implementation costs in an appropriate case.”¹⁸⁸

B. AVAILABILITY OF REASONABLE ALTERNATIVES (SUBSIDIARITY)

Another important factor that comes to balancing in website blocking cases is the proportionality of going after an Internet access provider instead of trying to put an end to infringement at its source, by suing, for example, direct infringers or website operators. The InfoSoc Directive seemed to have already answered this question back in 2001 when it stated (in Recital 59) that “[i]n the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries *are best placed* to bring such infringing activities to an end.”¹⁸⁹ As aptly noted by Justice Arnold, the rationale for going after the access providers (and in particular those of end users) is hence “that [such intermediaries] are the ‘lowest cost avoiders’ of infringement.”¹⁹⁰ The InfoSoc left it open, however, whether the right-holders are required to try all other reasonable remedies first, before recourse is made to the Internet access provider. Neither was this issue addressed by the *Telekabel* Court, which only highlighted that the blocking was justified in the light of the objective of the InfoSoc, “as shown in particular by Recital 9 thereof, which is to guarantee right-holders a *high level* of protection.”¹⁹¹

185. *Id.*

186. *Id.* at ¶ 253.

187. *Id.* at ¶ 204.

188. *Id.* at ¶ 240.

189. Recital 59 of the InfoSoc Directive, *supra* note 5 (emphasis added).

190. *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 251. *See also* *Lodder & van der Meulen*, *supra* note 3, at ¶ 10 observing that “[a]ccess providers are the gate to the virtual world, and consequently are an obvious party to appoint as norm enforcer or gate keeper.”

191. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12,

The question on reasonable alternatives is nevertheless important, as the human rights law requires that any restriction on a fundamental right (the ISPs' freedom to conduct a business in this case) should be the least intrusive measure which would effectively protect the counterbalanced interest (i.e. the right-holders' property). As recalled by Janneke Gerards, the German Federal Constitutional Court (*Bundesverfassungsgericht*), the Canadian Supreme Court, the ECtHR and the CJEU all apply this requirement, which is mostly known as a "least intrusive means" test¹⁹² or the test of necessity. "In this definition, the test requires that, of all the instruments that could be chosen to achieve the aims pursued, that instrument must be selected which is least problematic from the perspective of the individual rights at stake."¹⁹³ It is also famously explained by the metaphor of a sledgehammer that should not be used to crack a nut.¹⁹⁴

Although both the InfoSoc and the Enforcement Directive envisage the possibility of applying for injunctions "[w]ithout prejudice to any other measures, procedures and remedies available,"¹⁹⁵ certain national courts have taken the subsidiarity criterion on board in their assessments of proportionality of the blocking.¹⁹⁶ A recent decision by the German Federal Supreme Court

EU:C:2014:192, at ¶ 31 (emphasis added).

192. Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11(2) INT'L. J. CONSTIT. L. 466, 482 (2013).

193. *Id.*

194. R. v. Goldstein [1983] 1 WLR 151, at 155. See further Aharon Barak, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 333-337 (2012, Doron Kalir trans.); The Rt. Hon. Lord Hoffmann, *The Influence of the European Principle of Proportionality Upon UK Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 107, 108 (Evelyn Ellis ed., 1999); Garreth Wong, *Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality*, PUBLIC LAW 92 (2000); T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 467 (2005); Eva Brems & Laurens Lavrysen, *'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights*, 15(1) HUMAN RIGHTS LAW REVIEW 139 (2015).

195. Recital 23 of the Enforcement Directive, *supra* note 6; analogously, Recital 59 of the InfoSoc Directive, *supra* note 5.

196. See also Savola, *supra* note 8, at 83 (observing that, "[w]hile injunctions may be ordered without prejudice to the other actions available to the right holder . . . , the novel part is taking this into account in the proportionality evaluation").

of Justice (*Bundesgerichtshof*) is illustrative in this respect. In the November 2015 judgments on two cases brought by the German Music Industry and the German collecting society GEMA, respectively, the Court rejected to order the local Internet access provider to block its customers' access to the file-sharing website *goldesel.to*.¹⁹⁷ This was because the claimants failed to show that they tried, with due diligence, to sue the primary or secondary infringers first.¹⁹⁸ According to *Bundesgerichtshof*, blocking injunctions against the Internet access provider

can only be considered if the right-holder has initially made reasonable efforts to take action against those parties who committed the infringement themselves (such as the owner of the website) or who have contributed to the infringement by the provision of services (such as the hosting provider). Recourse to the access provider is only reasonable when recourse to those parties fails or lacks any prospect of success, thereby creating a lacuna in legal protection. Operators and host providers are much closer to the infringement than those who only generally provide access to the Internet.¹⁹⁹

Consequently, “when determining the priority of those against whom the claim should be brought, the right-holder has to a reasonable extent make enquiries.”²⁰⁰ In the Court's view, those could comprise “hiring a detective agency or having recourse to the

197. Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 174/14, Nov. 26, 2015, *supra* note 65. For a comment on these cases, see Martin Schaefer, *ISP Liability Finally Achieved in Germany*, KLUWER COPYRIGHT BLOG (Dec. 22, 2015), <http://kluwercopyrightblog.com/2015/12/22/isp-liability-finally-achieved-in-germany/>; Eleonora Rosati, *Blocking Orders Across Europe: Personality Disorder or are the Swedes Right?*, IPKAT (Dec. 1, 2015), <http://ipkitten.blogspot.fr/2015/12/blocking-orders-across-europe.html>; Martin Husovec, *BGH Accepts Website Blocking Injunctions*, HUŤKO'S TECHNOLOGY LAW BLOG (Nov. 29, 2015), <http://www.husovec.eu/2015/11/bgh-accepts-website-blocking-injunctions.html>.

198. Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 3/14, Nov. 26, 2015, *id.* at ¶¶ 68-75; Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 174/14, Nov. 26, 2015, *id.* at ¶¶ 81-87.

199. Bundesgerichtshof [German Federal Supreme Court of Justice], I ZR 3/14 and I ZR 174/14, Judgments of Nov. 26, 2015, Press Release No. 194/2015, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=72928&pos=14&anz=209>, translation from German by the authors.

200. Bundesgerichtshof [German Federal Supreme Court of Justice], Press Release, *id.*

state investigation authorities.”²⁰¹ Thereby, importance of the least intrusive reasonable alternatives, balancing the rights of copyright holders with those of access providers (but also those of users), was acknowledged by the *Bundesgerichtshof*.

Availability of alternative enforcement options was likewise accepted as “a factor to be taken into account in assessing the proportionality of the [blocking] orders” in the *Cartier I* judgment from the UK.²⁰² There, Justice Arnold considered in detail all alternatives that were available to the claimants²⁰³ – the trademark owners (collectively, Richemont) in that case that sought orders requiring five major UK ISPs to block, or at least impede, access by their subscribers to six websites which advertised and sold counterfeit goods. On the facts, six alternative measures were established, two of which were indeed used by the claimants. That use did not appear decisive, however, as none of the six measures that Richemont could adopt were considered “equally effective, but less burdensome” alternatives.²⁰⁴ On the other hand, it was admitted that some of those measures had to be taken into account in the proportionality analysis.²⁰⁵ A heated debate centred on notice-and-takedown by hosts as a possible effective alternative that the claimants did not adopt.²⁰⁶ Although it was accepted that “website blocking orders impos[ed] compliance costs on the ISPs, whereas notice-and-takedown requests to the hosts [did] not,” Justice Arnold was “not persuaded that, overall, notice-and-takedown [was] an equally effective, but less onerous, measure.”²⁰⁷ Several possible alternatives to website blocking were likewise considered – and rejected as ineffective – in the recent *Cartier II* judgment from February 2016 – the case that concerned yet another website

201. *Id.*

202. *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 217.

203. *Id.* at ¶¶ 197-217.

204. *Id.* at ¶ 217.

205. *See also* in this sense Callanan et al., *supra* note 73, at 94 noting that “the availability of other enforcement options, that offer other more effective methods of preventing access to the material, should also be assessed – especially if they are less costly, less intrusive or more effective towards the availability of the material.”

206. *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶¶ 199-204.

207. *Id.* at ¶ 204.

blocking action on the grounds of trademark infringement between the same parties as those of *Cartier I*.²⁰⁸

As noted above, the *Telekabel* decision left intact the question on justifiability of blocking in the light of reasonable alternatives. The Advocate General, however, was more nuanced in his approach, having noted that “[t]he measure ordered must also not go beyond what is necessary to achieve the objective, and, of several appropriate measures, recourse must be had to the least onerous.”²⁰⁹ Having highlighted further that the order in *Telekabel* concerned not even the infringer’s ISP, but simply an ISP of accessing users, he stated that it was “obvious that an intermediary who is not contractually linked to the copyright infringer can in no circumstances be held *unconditionally* responsible for the termination of the infringement.”²¹⁰ According to the AG, “the originator must, as a matter of priority, so far as possible, claim directly against the operators of the illegal website or their ISP.”²¹¹ Only in the situations when such claim is not possible, can recourse be made to the ISP of end users. As an illustration of such a situation, the AG brought an example of a website placed online by a non-European ISP, with a consequence that “the website and its operators often cannot be prosecuted.”²¹² Only then, according to the AG, an intermediary which is not in a contractual relationship with the operator of the copyright-infringing website can be an “appropriate starting point.”²¹³ Thus, consonant with the recent *Bundesgerichtshof*’s pronouncement in particular and the least-intrusive-means test in general, an injunction would only be justified subject to the lack of other reasonable alternatives available to the right-holders.²¹⁴ Then again, the lack thereof might be something for

208. *Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶¶ 54-62.

209. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 103.

210. *Id.* at ¶ 58 (emphasis added).

211. *Id.* at ¶ 107.

212. *Id.* at ¶ 57.

213. *Id.* See also in this sense Savola, *supra* note 8, at ¶ 85 observing that, “if there is evidence that the website has repeatedly changed providers (as with The Pirate Bay) or the administrators are anonymous and difficult to identify, addressing the issue at the user end might be more easily proportionate.”

214. *Bundesgerichtshof* [German Federal Supreme Court of Justice], I ZR 3/14, Nov. 26, 2015, *supra* note 65, at ¶¶ 68-75; *Bundesgerichtshof* [German Federal

the right-holders to prove.²¹⁵

A different approach was adopted, however, by the High Court of Paris in its judgment of November 2013, where it was ruled that, “if the text of Article L.336-2 of the Code of Intellectual Property [the national implementation of Article 8(3) InfoSoc] is addressed to anyone who can contribute to remedy the violations of protected rights, no legal provision requires calling in the same instance the hosting providers and *no principle of subsidiarity is envisaged*.”²¹⁶ The same approach is followed in Belgium, where the Antwerp Court of Appeals likewise stroke out the subsidiarity factor on consideration that it was not required by Article 8(3) InfoSoc.²¹⁷ As Pekka Savola reports, targeting the direct infringers was also not required on an application of national law by the Helsinki Court of Appeals in June 2012.²¹⁸

C. LINKS TO INFRINGEMENT: GOING AFTER NON-LIABLE INTERMEDIARIES

Another question, which is closely related to the reasonable-alternatives test, but yet needs to be distinguished from it, is the question on the links of the injunctions with infringement. In *Telekabel*, the question was raised on whether it was possible at all to claim an injunction against an ISP of *accessing* users and not only that of the infringing website. In this regard, it was disputed by the ISP that the blocking order could be addressed to it, as it neither had a contractual relationship with the person infringing copyright, nor was it established that its own customers were accessing the website at issue.

Although not addressed by the CJEU under the “right to conduct a business” framework, this was an important question that merited a

Supreme Court of Justice], I ZR 174/14, Nov. 26, 2015, *supra* note 65, at ¶¶ 81-87.
215. *Id.*

216. Tribunal de Grande Instance de Paris [High Court of Paris], *APC and Others v. Auchan Telecom and Others*, No. 11/60013, Nov. 28, 2013, translation from French by the authors (emphasis added).

217. Hof van Beroep, Antwerpen [Antwerp Court of Appeals], *VZW Belgian Anti-Piracy Federation v. NV Telenet*, No. 2011/8314, Sept. 26, 2011, *supra* note 103, cited in: Savola, *supra* note 8, at ¶ 59.

218. Helsinki Court of Appeals, *Elisa*, No. S 11/3097, June 15, 2012, cited in: Savola, *supra* note 8, at ¶ 55.

separate examination by the Luxemburg Court and which might also in the future equally fall under Article 16 EU Charter within the above-mentioned least-intrusive means test.

As claimed by the ISP at issue in *Telekabel*, infringement was being committed by making the work available to the public without its involvement. Consequently, it was only remotely connected to an act of infringement and could not be considered an intermediary whose services were “used” – for the purposes of Article 8(3) InfoSoc – by the copyright infringer.

The CJEU disagreed, holding that “neither the wording of Article 8(3) nor any other provision of Directive 2001/29 indicat[ed] that a *specific relationship* between the person infringing copyright or a related right and the intermediary [was] required.”²¹⁹ According to the Court, such a conclusion was borne out by the objective of the InfoSoc, as spelled out in Recital 9 thereof, to guarantee the right-holders “a *high* level of protection.”²²⁰ In view of this objective, it was sufficient that the Internet access provider was “an inevitable actor in any transmission of an infringement over the internet,” insofar as, “in granting access to the network, it [made] that transmission possible.”²²¹ Neither was it required, in order to obtain an injunction against an Internet access provider, to show that the customers of that provider actually accessed, on the website at issue, the infringing material.²²² In this regard, the CJEU reiterated its earlier finding that injunction can be issued with the purpose of not only ending infringements of copyright, but also of preventing them.²²³ Consequently, viewed in the light of this injunctions’

219. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 35 (emphasis added).

220. *Id.* at ¶¶ 33 and 35 (emphasis added).

221. *Id.* at ¶ 31, with further references to ECJ, Order in LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten [2009], C-557/07, EU:C:2009:107, at ¶ 44. In that case, the CJEU held that “access providers which merely provide users with Internet access, without offering other services such as email, FTP or file-sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29” (at ¶ 46).

222. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 36.

223. *Id.* at ¶ 37, with further references to CJEU, Judgment in Scarlet Extended [2011], C-70/10, EU:C:2011:771, at ¶ 31; and CJEU, Judgment in SABAM v. Netlog [2012], C-360/10, EU:C:2012:85, at ¶ 29. The recent CJEU judgment in

“preventive effect,”²²⁴ even the users’ ISP had to be regarded as an intermediary whose services are used by a third party to infringe copyright.²²⁵

The question on how remote should be the link between an act of infringement and an ISP was somewhat differently addressed in Sweden. Interestingly, Sweden has not transposed Article 8(3) of the Copyright Directive by directly inserting the wording of that article in its Copyright Act. Instead, Article 53(b) of the Swedish Copyright Act explicitly states that, for an injunction to be issued against the party who is not a direct infringer, that party should be *contributory liable*. On this basis, in a recent judgment of November 2015, the Stockholm District Court refused an order against the Swedish Internet access provider B2 requiring it to block its subscribers’ access to *The Pirate Bay* and the local streaming service *Swefilmer*.²²⁶ According to the Swedish court, as it was not established that B2 contributed to copyright infringement, an injunction could not be granted against it. As noted by some commentators, it might not necessarily be the case that Article 53(b) of the Swedish Copyright Act is incompatible with the InfoSoc, as “[i]t would appear from the wording of both Article 8(3) of the InfoSoc Directive and the (soft) language employed by the CJEU in *Telekabel* that what is required from Member States under EU law is

Mc Fadden is also in this line: see CJEU, Judgment in *Mc Fadden* [2016], C-484/14, EU:C:2016:689 (finding that, in order to prevent copyright infringement from occurring, the provider of an open Wi-Fi can be required to password-protect its network). See also, in relation to trademarks, CJEU, Judgment in *L’Oréal v. eBay* [2011], C-324/09, EU:C:2011:474, at ¶ 144.

224. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶ 38.

225. *Id.* at ¶ 40. For an interesting analysis of website blocking against non-liable intermediaries as a phenomenon that extends the rights’ enforcement “against persons that are too far for tort law,” see Husovec, *supra* note 8, at ¶ 51. According to this author, “the theory behind such an extension can be found in the Roman notion of ‘in rem action’” (*id.*).

226. *Stockholms Tingsrätt* [Stockholm District Court], *Universal Music Aktiebolag and Others v. B2 Bredband AB*, No. T 15142-14, Nov. 27, 2015. For a comment, see Rosati, *supra* note 197; Samuel Gibbs, *Sweden Refuses to Order ISP to Block Pirate Bay*, THE GUARDIAN (Nov. 30, 2015), <http://www.theguardian.com/technology/2015/nov/30/pirate-bay-stockholm-district-court-sweden-refuses-order-isp-block-site>; Nedim Malovic, *Stockholm District Court Refuses to Issue Blocking Injunction Against Access Provider*, IPKAT (March 4, 2016), <http://ipkitten.blogspot.fr/2016/03/stockholm-district-court-refuses-to.html>.

only to ensure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or a related right.”²²⁷ This was indeed the position taken up by the Swedish Government. The latter pointed to Recital 59 of the InfoSoc that left it to the national law of the Member States to determine “[t]he conditions and modalities” relating to injunctions. According to the Swedish Government, it was thus not necessary for the Swedish law – in order to meet the InfoSoc Directive’s requirements under Article 8(3) – to provide that it should *always* be possible for right-holders to claim an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights.²²⁸ However, the decision of the Stockholm District Court has already been appealed by the right-holders and is currently pending before the *Svea hovrätt* (Swedish Court of Appeal)²²⁹ which is likely to shed further light on this issue.²³⁰

D. SHIFT OF ENFORCEMENT BURDENS ON INTERMEDIARIES

As the above considerations demonstrate, a general trend can be observed in European law (with some deviations) to shift enforcement burdens on intermediaries.²³¹ In this sense, *Telekabel*

227. Rosati, *id.* See also in this sense Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, *supra* note 55, at 633 observing that *Telekabel* decision “does *not* address whether the website-blocking injunctions are *required* by European Union law under Article 8(3) of the InfoSoc Directive, but only whether they are *compatible* with it” (emphasis in the original).

228. Stockholms Tingsrätt [Stockholm District Court], *Universal Music Aktiefbolag and Others v. B2 Bredband AB*, No. T 15142-14, Nov. 27, 2015, *supra* note 226, at 23-24. Cf. BASCAP report, *supra* note 2, at 77 (“This action [website blocking] *should not* require a finding that the ISP itself has engaged in any unlawful conduct, as the remedy is to prevent harm caused by infringements by third-party sites or services”) (emphasis added).

229. Erik Wisterberg, *Bredbandsbolaget friades – nu överklagas blockeringsdomen*, DAGENS MEDIA (Dec. 18, 2015), <http://www.dagensmedia.se/medier/digitalt/bredbandsbolaget-friades-nu-overklagas-blockeringsdomen-6240741>.

230. The reference to the CJEU can also be expected.

231. See, e.g., EU Council, *Presidency Paper on Enforcement of Intellectual Property Rights*, 501st Sess., Doc. No. 13076/14 (2014), at 2-3 stating that, in order for the current legislative framework to fit for the purpose of the digital environment, “[i]t is important to . . . [i]mprove the efficiency of actions to stop IPR infringements *through better involvement of intermediaries*” (emphasis added). See also the very recent Proposal for a Directive of the European

contributes to the growing number of laws and judicial decisions that put the burden of IP enforcement, previously allocated primarily with the right-holders, on the ISPs.²³²

The main concern of those opposing this shift of IP enforcement competences usually deals with the argument that, once intermediaries are asked to do more in their new role of active IP enforcers, “it may be hard to identify a plausible cut-off point”²³³ at which “impartial enforcement” would not be at risk.²³⁴ Nevertheless, there might not be a “black and white” solution to this problem, which boils down – again – to the question of “fair balancing” of all the interests and rights involved.²³⁵

Parliament and of the Council *On Copyright in the Digital Single Market* - COM(2016)593 (Brussels, Sept. 14, 2016), Recital 38 (“... information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users *should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies.* . . .”) (emphasis added).

232. For an overview of the current initiatives requiring Internet access providers to take “a more active role” in combating copyright infringement, *see* the BASCAP report, *supra* note 2, at 69. The report outlines those initiatives as follows: “(a) implementing and enforcing terms of service by which the customer agrees not to engage in P2P or other illegal activities; (b) adopting ‘graduated response programs’ by which customers engaging in P2P infringements can be educated and provided with a notice and, in appropriate circumstances, can be sanctioned; (c) participating in public awareness programs; and (d) site blocking based on orders from competent authorities” (*id.*).

233. Maurice Schellekens, *Liability of Internet Intermediaries: A Slippery Slope?*, 8(2) SCRIPTED 154, 154 (2011).

234. Niva Elkin-Koren, *After Twenty Years: Revisiting Copyright Liability of Online Intermediaries*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* 29, 48 (Susy Frankel & Daniel Gervais eds., 2014).

235. Lodder & van der Meulen, *supra* note 3, at ¶ 69. *See also* in this sense, Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS 375, 409 (2009), observing that “[w]hether or not intermediaries should ultimately play a more active-preventative role in online copyright enforcement remains an open question [which] . . . can be answered in an intelligent manner only if lawmakers and policymakers are informed about its broader context and implications.” For further discussion of the role of ISPs in digital copyright enforcement, *see* Benjamin Farrand, *The Future of Copyright Enforcement Online: Intermediaries Caught Between Formal and Informal Governance in the EU*, in *NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW* 397, *supra* note 54; Anjanette H. Raymond, *Intermediaries’ Precarious Balance Within Europe: Oddly Placed Cooperative Burdens in the Online World*, 11 NW. J. TECH.

The same cannot be said, however, of the shift of the fundamental-rights balancing on the third parties, which occurred in *Telekabel*. There, indeed, the Luxemburg Court went on to transfer to the ISPs not only the burdens of enforcing IP, but also those of balancing the fundamental rights at issue. According to the CJEU, it was for the ISP (and not the national court) to ensure that a “fair balance” between the different fundamental rights was struck.²³⁶ Failing that, a (non-liable) intermediary would either risk a dispute with its customers on the grounds of unjustified interference with their freedom of information or face the coercive penalties for non-compliance with the outcome prohibition.

This shift of the burden of human-rights enforcement resulted from the CJEU allowing generic injunctions alongside their specific counterparts. Under the outcome prohibition, in particular, whether the blocking takes account of the parties’ fundamental rights is not examined before the order is made.²³⁷

The Advocate General was clearly concerned about this shift of proportionality evaluation to the enforcement stage of proceedings and, unlike the CJEU, was of the opinion that generic injunctions were simply not precise enough to comply with Union law.²³⁸ In his opinion, an outcome prohibition (unlike the measure-specific injunctions) failed with regard to proportionality “[i]n logical terms alone,” but also in light of the case law requirement that a balance of rights is observed *before* the injunction is issued.²³⁹ Likewise, Italy,

& INTELL. PROP. 359 (2013); Jon Bright & José R. Agustina, *Mediating Surveillance: The Developing Landscape of European Online Copyright Enforcement*, 9(1) JOURNAL OF CONTEMPORARY EUROPEAN RESEARCH 120 (2013); Dennis S. Karjala, *International Convergence on the Need for Third Parties to Become Internet Copyright Police (But Why?)*, 12(2) RICH. J. GLOBAL L. & BUS. 189 (2013); Uta Kohl, *The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond – Connectivity Intermediaries*, 26 INTERNATIONAL REVIEW OF LAW, COMPUTERS AND TECHNOLOGY 185 (2012); Giblin, *supra* note 147; Jonathan Zittrain, *A History of Online Gatekeeping*, 19(2) HARV. J.L. & TECH. 253 (2006).

236. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 55.

237. See CJEU, Opinion of Advocate General Cruz Villalón in UPC Telekabel Wien [2013], C-314/12, EU:C:2013:781, at ¶ 68.

238. *Id.* at ¶¶ 85-90.

239. *Id.* at ¶ 88. See also, highly critical of this move to take the fundamental-rights balancing out of the court’s focus when granting the order, Husovec, *CJEU*

the Netherlands and the United Kingdom considered it to be “*the task of the national courts* to examine the nature of the injunction in the specific case in the light of certain requirements, in particular of the principle of proportionality and of a fair balance between the rights of the parties concerned.”²⁴⁰ Finally, the Commission also saw:

[A] breach of the principle of proportionality in the inability of the national court to undertake a review of proportionality for *lack of knowledge of the scope* of the necessary measures, . . . [t]he possibility of avoiding incurring coercive penalties . . . [not being a] substitute for a proper review of proportionality when an injunction is issued.²⁴¹

It might therefore be preferable if the CJEU reconsiders its approach towards *post factum* “fair balancing” as not only being problematic in terms of the human rights law application, but also as burdening intermediaries with the tasks commonly attributed to the legislators or courts. While it might be true that “[i]n many cases . . . intermediaries are best placed to bring . . . infringing activities to an end,”²⁴² they might not be best placed to judge on the matters of the human rights law application with its numerous tests and balancing criteria.²⁴³ The excessiveness of this burden was clearly recognized

Allowed Website Blocking Injunctions with Some Reservations, *supra* note 55, at 633. As argued by this author, it is not impossible that, might generic injunctions be brought to the scrutiny of the ECtHR one day, the Strasbourg Court would find them falling short of the quality of law foreseeability requirement. *See id.* at 634.

240. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 64 (emphasis added).

241. *Id.* at ¶ 66 (emphasis added).

242. Recital 59 of the InfoSoc Directive, *supra* note 5.

243. Consider also Graeme B. Dinwoodie, Lecture within the framework of the CEIPI Research Seminars: A Comparative Analysis of the Liability of Intermediaries for Facilitating Trade Mark Infringement (May 20, 2014, Strasbourg), noting that the CJEU in *Telekabel* basically made the ISPs responsible for the respect of fundamental rights, which is not common in international public law, where the fundamental rights violations are attributable to the States. Similarly voicing concerns about the fact that “[c]ompanies have increasingly become the arbiters of freedom of expression” and other fundamental rights, *see* the Final Report of the Global Commission on Internet Governance, *One Internet* (2016), <https://www.ourinternet.org/report>. For a comprehensive analysis of the question of what legal limitations follow from the human rights framework for self-regulation and privatized enforcement online, *see* the recent study by the Institute for Information Law (IViR), University of Amsterdam: Christina Angelopoulos et al., *Study of Fundamental Rights Limitations for Online Enforcement through Self-Regulation* (2015), <http://www.ivir.nl/publicaties/>

by the Advocate General, who pointed that “[i]f, in the interest of its customers’ freedom of information, [the ISP] decides on a mild blocking measure, it must fear a coercive penalty in the enforcement process. If it decides on a more severe blocking measure, it must fear a dispute with its customers. The reference to a possible opportunity to defend itself in the enforcement process does not in any way alter the ISP’s dilemma.”²⁴⁴

On the other hand, possible adverse consequences of the CJEU allowing generic injunctions might not be far-reaching in certain parts of Europe. Under some Member States’ procedural laws comparable types of injunctions are simply not provided.²⁴⁵ That is the situation, notably, in the UK, where, as pointed by Justice Arnold, “the proportionality of a blocking order is bound to be a context-sensitive question.”²⁴⁶ Accordingly, “the Court will carefully consider such [proportionality] matters *before* any blocking order is made.”²⁴⁷

However, the type of an order analogous to Austrian outcome prohibition requiring an ISP to implement “all appropriate measures to prevent access” exists, for example, in France. In the judgment of November 2013 (referred to above), the High Court of Paris (*Tribunal de Grande Instance de Paris*) ordered the Internet access providers to block all sites belonging to *Allostreaming* network “*by any effective means, including by blocking domain names.*”²⁴⁸ Following the CJEU judgment in *Telekabel*, this generalized

download/1796.

244. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 89.

245. See Angelopoulos, *supra* note 170. See also Husovec, *CJEU Allowed Website Blocking Injunctions with Some Reservations*, *supra* note 55, at 633 observing that “not all of the countries will be able to issue open-ended injunctions of this kind.”

246. *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch), at ¶ 100.

247. *Id.* at ¶ 97 (emphasis added). See also *Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶ 48, where Judge Hacon highlighted that “proportionality must be assessed on the facts of each case and that it is possible for the injunction sought in [one case] to lack proportionality even though the one granted in [a similar case] did not.”

248. *Tribunal de Grande Instance de Paris* [High Court of Paris], *APC and Others v. Auchan Telecom and Others*, No. 11/60013, Nov. 28, 2013, *supra* note 216, translation from French by the authors (emphasis added).

blocking has only flourished in France, the *Tribunal de Grande Instance* having already issued another decision requiring Internet access providers to implement “all appropriate measures to prevent access.”²⁴⁹ In a decision from December 2014, the court explicitly referred to *Telekabel*, noting that the French-style outcome prohibitions were justified insofar as they “allow[ed] each Internet access provider the opportunity to determine the specific nature of the measures to be implemented, with due regard to the legal and technical structure of its business, to the effects of the implementation measures and to the evolution of the dispute.”²⁵⁰

Apart from the generic injunctions, which are now allowed by European case law, the shift of enforcement burdens also occurs on the level of voluntary agreements between the ISPs and right-holders, for which no judicial oversight is required in some countries. This is the case in Portugal in particular, where the memorandum signed in 2015 between the Portugal’s Ministry of Culture, ISP group, and copyright holders including anti-piracy group MAPiNET did not envisage any degree of judicial control over the blocking.²⁵¹ This lack of judicial review might result in substantial overblocking, the most recent example being the blocking of a music news website for embedding official *YouTube* videos. As the *TorrentFreak* reports, the journalist running the website “works with international record labels who send him information about releases and even request that he embeds their videos in his site. However, local anti-piracy group MAPiNET believes that embedding YouTube videos is illegal unless Vinaixa’s [the journalist] website is licensed.”²⁵² This is despite the CJEU’s 2014 finding in *BestWater* (building on *Svensson*) that embedding is not an infringement when content has already been

249. Tribunal de Grande Instance de Paris [High Court of Paris], 3rd chamber, SCPP v. Orange, Free, SFR et Bouygues Télécom, No. 14/03236, Dec. 4, 2014, *supra* note 65, at 15, translation from French by the authors.

250. *Id.*

251. Andy, *Rapid Pirate Site Blocking Mechanism Introduced by Portugal*, TORRENTFREAK (July 31, 2015), <https://torrentfreak.com/rapid-pirate-site-blocking-mechanism-introduced-by-portugal-150731/>; Andy, *Portugal Rapidly & Voluntarily Blocks Dozens More “Pirate” Sites* [Blog Post], TORRENTFREAK (Nov. 7, 2015), <https://torrentfreak.com/portugal-rapidly-voluntarily-blocks-dozens-more-pirate-sites-151107/>.

252. Andy, *News Site Blocked by ISPs for Embedding Official YouTube Videos*, TORRENTFREAK (Jan. 29, 2016), <https://torrentfreak.com/news-site-blocked-by-isps-for-embedding-youtube-videos-160129/>.

made available (with the authorization of the right-holder) on a freely accessible basis on another website.²⁵³

IV. A RIGHT TO PROPERTY PERSPECTIVE ON WEBSITE BLOCKING: TOWARDS A “HIGH LEVEL” OF PROTECTION?

Another important fundamental right implicated by blocking injunctions is the right to property of IP holders. This is also the right against which the users' freedom of information and the ISPs' freedom to conduct a business need to be balanced. In Europe, this balancing is predetermined by the fundamental-right status of intellectual property as per Article 17(2) EU Charter and (somewhat implicitly) Article 1 of Protocol No. 1 ECHR (1), as well as by considerations on how effective an enforcement of this fundamental right must be (2). The latter, in turn, would depend on what the European legislator regards as a valid objective of copyright protection (3).

A. IP AS A HUMAN RIGHT

As noted by the ECtHR in the recent decision concerning *The Pirate Bay*: “As to the weight afforded to the interest of protecting the copyright-holders, the Court would stress that intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention.”²⁵⁴ Consequently, as stated in that

253. CJEU, Order in *BestWater International* [2014], C-348/13, EU:C:2014:2315; CJEU, Judgment in *Svensson and Others* [2014], C-466/12, EU:C:2014:76. Further on this, see the Opinion of the European Copyright Society on the reference to the CJEU in Case C-466/12 *Svensson* (Feb. 15, 2013), http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Statement/European_Copyright_Society_Opinion_in_Case_C-466__12_Svensson-1.pdf; Francisco Cabrera Blázquez et al., *Copyright Enforcement Online: Policies and Mechanisms* 57-59 (IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015), <http://publi.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en3.pdf/890ed458-f2a3-40b1-b4a6-2ac0d6310cbe>. For the latest developments in the sphere of hyperlinking, see CJEU, Judgment in *GS Media* [2016], C-160/15, EU:C:2016:644 (establishing that hyperlinking to unauthorized content is not a communication to the public if the “hyperlinker” did not know or could reasonably have known about the illegal nature of such content).

254. ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (dec.) (No. 40397/12), CE:ECHR:2013:0219DEC004039712, at 10. For a comment on this case, see Geiger & Izyumenko, *supra* note 121.

case and further reiterated in *Akdeniz*, when balancing two competing interests both protected by the Convention on the level of human rights, the States are afforded “a particularly wide” margin of appreciation.²⁵⁵

The European position that IP *by definition* enjoys the human rights protection of Article 1 of the First Protocol to the ECHR and Article 17 of the EU Charter was patently predetermined by a number of prior developments on both judicial and legislative levels.

First of all, the EU Charter, unlike the ECHR, expressly enshrined the protection of the right to intellectual property in its catalogue of rights under Article 17(2).²⁵⁶ The ECHR, on its part, although not containing a specific IP clause, has been interpreted within the years by the Strasbourg Court as extending its Article 1 Protocol No. 1 protection to the entire range of traditionally recognized IP rights.²⁵⁷ The most indicative in this regard is probably an oft-quoted *Anheuser-Busch* case, which expanded Article 1 First Protocol

255. ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (dec.), *id.* at 11; ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710, at ¶ 28. *See also* ECtHR, *Ashby Donald and Others v. France* (No. 36769/08), CE:ECHR:2013:0110JUD003676908, at ¶ 40.

256. *See generally* Christophe Geiger, *Intellectual “Property” after the Treaty of Lisbon: Towards a Different Approach in the New European Legal Order?*, 32(6) EIPR 255 (2010); and, from the same author, *Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision With an Unclear Scope*, 31(3) EIPR 113 (2009).

257. *See in the field of copyright:* ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710; ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* (dec.) (No. 40397/12), CE:ECHR:2013:0219DEC004039712; ECtHR, *Ashby Donald and Others v. France* (No. 36769/08), CE:ECHR:2013:0110JUD003676908; ECtHR, *Balan v. Moldova* (No. 19247/03), CE:ECHR:2008:0129JUD001924703; ECtHR, *Melnychuk v. Ukraine* (dec.) (No. 28743/03), CE:ECHR:2005:0705DEC002874303; ECtHR, *Dima v. Romania* (dec.) (No. 58472/00), CE:ECHR:2005:0526DEC005847200; ECommHR, *Aral, Tekin and Aral v. Turkey* (dec.) (No. 24563/94), CE:ECHR:1998:0114DEC002456394; ECommHR, *A.D. v. the Netherlands* (dec.) (No. 21962/93), CE:ECHR:1994:0111DEC002196293. *In the field of trademarks:* ECtHR, *Paeffgen GmbH v. Germany* (dec.) (Nos. 25379/04, 21688/05, 21722/05 and 21770/05), CE:ECHR:2007:0918DEC002537904; ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC] (No. 73049/01), CE:ECHR:2007:0111JUD007304901. *In the field of patent law:* ECommHR, *Lenzing AG v. United Kingdom* (dec.) (No. 38817/97), CE:ECHR:1998:0909DEC003881797; ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* (dec.) (No. 12633/87), CE:ECHR:1990:1004DEC001263387.

protection to “mere” applications for the registration of trademarks.²⁵⁸

This European approach on an autonomous fundamental-right nature of intellectual property might lead, however (if only intuitively), to a more rigorous protection of IP interests *vis-à-vis* other fundamental rights that come to balancing, including the users’ information rights and the ISPs’ business freedom.²⁵⁹

258. ECtHR, *Anheuser-Busch Inc. v. Portugal* [GC] (No. 73049/01), CE:ECHR:2007:0111JUD007304901. Further on this case, see Klaus-Dieter Beiter, *The Right to Property and the Protection of Interests in Intellectual Property – A Human Rights Perspective on the European Court of Human Right’s Decision in Anheuser-Bush Inc v Portugal*, 39(6) INT’L REV. INTELL. PROP. & COMPETITION L. 714 (2008).

259. See, e.g., Callanan et al., *supra* note 73, at 163 and 167, listing the *fundamental* right to intellectual property as a right that *supports* the blocking, contrasted with such rights as privacy and freedom of expression that might be endangered by it. For further critique of the approach towards treating the right to intellectual property and other fundamental rights “as if they were of equal rank,” see Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 132, *supra* note 15; see also Robert Burrell & Dev Gangjee, *Trade Marks and Freedom of Expression: A Call for Caution*, 41(5) INT’L REV. INTELL. PROP. & COMPETITION L. 544 (2010); Christina J. Angelopoulos, *Freedom of Expression and Copyright: The Double Balancing Act*, 3 IPQ 328 (2008). This approach might also appear in certain tension with Art. 27(2) of the Universal Declaration of Human Rights (UDHR) and Art. 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which secure to authors the benefits from the “protection of the moral and material interests resulting from [their] scientific, literary or artistic production.” As stressed in the report by the UN Special Rapporteur in the field of cultural rights, although it is tempting to infer from the wording of these provisions that Art. 15(1)(c) recognizes a human right to protection of intellectual property, “*this equation is false and misleading*” (UN General Assembly, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, COPYRIGHT POLICY AND THE RIGHT TO SCIENCE AND CULTURE, Human Rights Council, Twenty-eighth session, A/HRC/28/57, Dec. 24, 2014, at ¶ 26, emphasis added). The UN Committee on Economic, Social and Cultural Rights (CESCR) – the body in charge of the implementation of the ICESCR – made this abundantly clear in its *General Comment No. 17* on Art. 15(1)(c) of the ICESCR (Jan. 12, 2006, E/C.12/GC/17). According to the CESCR, an evident distinction exists in principle between standard IP rights and the human rights protection given to creators in accordance with Art. 15(1)(c). Thus, it is acknowledged by the CESCR that Art. 15(1)(c) guarantees some sort of protection; however, it cannot be interpreted as guaranteeing IP rights or as elevating IP to the human rights regime. Moreover, neither the UDHR nor the ICESCR determine that the material and immaterial interests of the creators should be protected by way of a property right.

On the other side, the potential negative consequences of the (human) right to property protection for IP should not be overestimated. As noted by the CJEU in *Telekabel*, “there is nothing whatsoever in the wording of Article 17(2) of the Charter to suggest that the right to intellectual property is inviolable and must for that reason be absolutely protected.”²⁶⁰ Article 17(2) of the Charter could then be considered to be nothing more than a simple clarification of Article 17(1), that clearly recalls that: “[t]he use of property may be regulated by law *in so far as is necessary for the general interest*.”²⁶¹ Likewise, the first paragraph of Article 1 of the First Protocol to the ECHR provides for the possibility of restrictions of the right “in the public interest,” while the second paragraph of the same provision allows the State “to enforce such laws as it deems necessary to control the use of property *in accordance with the general interest . . .*”²⁶²

This limited nature of the right to property was clearly envisaged by the drafters of the ECHR and the Charter. As the *travaux préparatoires* of the First Protocol to the ECHR demonstrate, a newly introduced property paradigm was viewed as being of a “relative” nature as opposed to the absolute right to own property in a sense it was understood by Roman law.²⁶³ A similar logic, clearly excluding an “absolutist” conception of IP, accompanied the preparatory documents of the EU Charter, insofar as the drafters took care to specify that “the guarantees laid down in paragraph 1 [of Article 17] shall apply as appropriate to intellectual property” and

260. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶ 61. *See also*, to that effect, CJEU, Judgment in *Scarlet Extended* [2011], C-70/10, EU:C:2011:771, at ¶ 43; CJEU, Judgment in *SABAM v. Netlog* [2012], C-360/10, EU:C:2012:85, at ¶ 41; and, in the sphere of trademarks, ECJ, Judgment in *Eurohypo v. OHIM (EUROHYPO)* [2006], T-439/04, EU:T:2006:119, at ¶ 21; CJEU, Judgment in *Cytochroma Development v. OHIM – Teva Pharmaceutical Industries (ALPHAREN)* [2013], T-106/12, EU:T:2013:340, at ¶ 45.

261. Emphasis added.

262. Emphasis added.

263. Council of Europe, *Preparatory Work on Article 1 of the First Protocol to the European Convention on Human Rights*, CDH (76) 36, Strasbourg, Aug. 13, 1976. *See, e.g.*, presentation of Mr. de la Vallée-Poussin (Belgium), at 12; consider also the statement made by Mr. Nally (United Kingdom) at 16 that the “basis of Europe’s fight for survival is a struggle for the subordination of private property to the needs of the community.”

that “the meaning and scope of Article 17 are the same as those of the right guaranteed under Article 1 of the First Protocol to the ECHR.”²⁶⁴

B. EFFECTIVENESS OF BLOCKING

Even on admittance of the non-absolute nature of the right to intellectual property, the Court in *Telekabel* was yet of the opinion that it was necessary to achieve a “high level” of protection of this right.²⁶⁵ An important factor that comes to balancing in this connection is the required degree of effectiveness of blocking in terms of preventing unauthorized access.

In *Telekabel*, the CJEU admitted that it was possible that “a means of putting a complete end to the infringements of the intellectual property right [did] not exist or [was] not in practice achievable, as a result of which some measures taken might be capable of being circumvented in one way or another.”²⁶⁶ Nonetheless, this did not preclude every blocking that – in view of the objective to guarantee right-holders a high level of protection – only had to be “*sufficiently effective* to ensure genuine protection of the fundamental right at issue.”²⁶⁷ According to the CJEU, this meant that an injunction “must have the effect of preventing unauthorized access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users . . . from accessing the subject-matter made available to them in breach of . . . [the] fundamental right [to intellectual property].”²⁶⁸

The issue of effectiveness was, however, somewhat differently addressed in the Netherlands, where the Court of Appeal of The Hague rejected (in a decision rendered two months prior to the CJEU judgment on *Telekabel*) to issue an order requiring two major Dutch

264. Note from the Praesidium, *supra* note 53, Explanations on Art. 17 of the EU Charter, at 19-20.

265. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 35.

266. *Id.* at ¶ 60.

267. *Id.* at ¶ 62.

268. *Id.* See also, more recently, finding that requiring the provider of an open Wi-Fi to password-protect its Internet connection in order to prevent copyright infringement was “necessary in order to ensure *the effective protection* of the fundamental right to protection of intellectual property,” CJEU, Judgment in Mc Fadden [2016], C-484/14, EU:C:2016:689, at ¶ 99 (emphasis added).

ISPs to block access to *The Pirate Bay*.²⁶⁹ The Court reached this conclusion on consideration of the evidence (notably, an empirical study from the Institute for Information Law (IViR) of the University of Amsterdam²⁷⁰), suggesting that “blocking access to file-sharing platforms seem *relatively ineffective* to reduce [the overall level of] unauthorized file-sharing.”²⁷¹ This was due, first, to the ease of circumvention, and, second, – to the availability of alternative torrent sites. Consequently, the blocking did not achieve its purpose of protecting intellectual property rights and was therefore disproportionate with regards to the ISP’s freedom to conduct a business.²⁷² This conclusion was not invalidated by the contention made by the claimant (Dutch collecting society BREIN in that case) that the blocking would not have cost anything to the ISP.²⁷³ According to the Court, the blocking, after all, was an interference with the ISP’s freedom to act at its own discretion, which, in view of that blocking inefficacy, could not be justified by the need to protect intellectual property.²⁷⁴ All the more so, the court reasoned, that the ISP was not itself committing an infringement.²⁷⁵

Following the CJEU judgment in *Telekabel*, however, the Dutch Supreme Court had to reject the Appeal Court’s evaluation of effectiveness.²⁷⁶ It held, with references to *Telekabel*, that the Court of Appeal had erred in its assessment of the blocking efficacy based on the *overall* effect of the measure on illegal file-sharing on the Internet.²⁷⁷ Thereby, according to the Supreme Court, the lower court

269. Gerechtshof Den Haag [Court of Appeal of The Hague], Ziggo and XS4ALL v. BREIN, No. 200.105.418/01, Jan. 28, 2014.

270. Another source relied upon by the Court was a report from the Netherlands Organisation for Applied Scientific Research.

271. Joost Poort et al., *Baywatch: Two Approaches to Measure the Effects of Blocking Access to The Pirate Bay*, TELECOMMUNICATIONS POLICY 9 (2014) (emphasis added).

272. Gerechtshof Den Haag [Court of Appeal of The Hague], Ziggo and XS4ALL v. BREIN, *supra* note 269, at ¶ 5.22.

273. *Id.*

274. *Id.*

275. *Id.*

276. Hoge Raad [Dutch Supreme Court], Ziggo and XS4ALL v. BREIN, No. 14/02399, Nov. 13, 2015. See Karlijn van den Heuvel, *To Block or not to Block? The Dutch Blocking Injunction Saga Continues...*, KLUWER COPYRIGHT BLOG (Dec. 20, 2015), <http://kluwercopyrightblog.com/2015/12/20/to-block-or-not-to-block-the-dutch-blocking-injunction-saga-continues/>.

277. Hoge Raad [Dutch Supreme Court], Ziggo and XS4ALL v. BREIN, *id.* at

had failed to recognize that even if certain measures did not lead to a complete cessation of all copyright infringements, they could still be compatible with the requirement of proportionality of Article 52(1) of the EU Charter by at least making unauthorized access difficult or seriously discouraging to achieve.²⁷⁸

The “reasonable effectiveness” standard was likewise followed in a number of UK cases, including those issued prior to *Telekabel*. In *20C Fox v. BT* (from July 2011) for example, the blocking of *Newzbin2* was found to be sufficiently effective “even if it only prevented access to *Newzbin2* by a minority of users.”²⁷⁹ Insofar as the circumvention possibility was concerned, it was suggested that due to the additional technical expertise it required, coupled with the lower quality downloads and slower performance caused by circumvention, this could discourage certain users.²⁸⁰ As to the so-called “‘substitutability’ of unblocked websites for the blocked one,”²⁸¹ this was addressed in *Cartier I* (from October 2014) by stating that “the right-holder does not have to show that blocking access to the *target website* is likely to reduce the *overall level of infringement* in order to obtain relief.”²⁸² This was for two main reasons. First, it was considered to be “wrong in principle” to allow such a defense, which would, in Justice Arnold’s contention, “not only undermine intellectual property rights, [but] would also be inimical to the rule of law” that had to treat equally online and offline infringements.²⁸³ An example of burglars was brought in this respect, to which the application of such reasoning would have clearly been unacceptable.²⁸⁴ Second, *Telekabel* judgment was referred to, insofar as it

made it clear . . . that the measures taken by the addressee of the injunction must at least have the effect of making access to the protected

¶ 4.4.2.

278. *Id.* with references to CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶¶ 62-62.

279. *Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc* [2011] EWHC 1981 (Ch), at ¶ 198.

280. *Id.* at ¶¶ 194-195.

281. *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), at ¶ 176.

282. *Id.* (emphasis added).

283. *Id.* at ¶ 173.

284. *Id.*

subject-matter difficult to achieve and of seriously discouraging internet users *who are using the services of the addressee* from accessing that subject-matter.²⁸⁵

Justice Arnold went on to note that the CJEU “did not say that internet users who were using the services of other intermediaries must also be discouraged. Still less did the Court suggest that the addressee would be let off the hook if users used the services of other intermediaries instead.”²⁸⁶ At the same time, the overall-impact factor was not completely ruled out by Justice Arnold either, as it was also accepted that “blocking access to the target website is less likely to be proportionate if there is a large number of *alternative websites* which are likely to be equally accessible and appealing to the interested user than if that is not the case.”²⁸⁷ The approach set out in *Cartier I* has been endorsed recently in *Cartier II* from February 2016, despite the fact that the former case was pending an appeal at the material time.²⁸⁸ The access providers’ contention in *Cartier II* was that there was “a very large number of websites selling counterfeits under the Trade Marks and so it [was] not clear that the closure of the Target Websites will make any difference to the scale of infringement of the Trade Marks.”²⁸⁹ Judge Hacon’s (sitting as a

285. *Id.* at ¶ 174 (emphasis in the original).

286. *Id.*

287. *Id.* at ¶ 176 (emphasis added). *See also* in this sense Callanan et al., *supra* note 73, at 94 observing that “the availability of alternative methods of access to the same content, by whatever means, can be seen as a measure for effectiveness of blocking in the absence of precise data. This means that where the blockade may well be effective, an easy alternative to publicising the same content on a different channel is a good indicator of the impact on the availability of the material and the success of the blockade in that respect.”

288. *Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch). *See* Eleonora Rosati, *Blocking Injunctions May be Granted Without Need for Claimant to Demonstrate Efficacy and Dissuasiveness*, IPKAT (Feb. 24, 2016), <http://ipkitten.blogspot.fr/2016/02/blocking-injunctions-may-be-granted.html>. As noted by Judge Hacon in *Cartier II*, pending any decision to the contrary by the Court of Appeal, he had to “assume that the whole of the reasoning in *Cartier I* [was] correct” (*Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶ 48). All in all, *Cartier I* was eventually upheld in July 2016 and the appeal against it rejected. *See Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658.

289. *Cartier International Ltd & Anor v. British Telecommunications Plc & Ors* [2016] EWHC 339 (Ch), at ¶ 63.

High Court judge) response to this was that, “[f]or the reasons discussed in *Cartier I* . . . , although the presence of alternative websites may in certain circumstances have a limited bearing on proportionality, there is no requirement for the claimant to show that blocking access to the target websites in issue is likely to reduce the overall infringement of his trade marks.”²⁹⁰

In France, considerations of reasonable effectiveness informed the decision of the High Court of Paris (*Tribunal de Grande Instance de Paris*), which on December 2014 ordered four of the country’s largest ISPs to block access to *The Pirate Bay* service.²⁹¹ As it was stated in that judgment, “[w]hile it is true that any blocking measure can be circumvented by some part of users, it is not established, first, that the vast majority of Internet users who are accustomed to free communications and to a number of Internet services, have strong will to participate in global piracy on a large scale. Second, the requested measures target the largest number of users, who do not necessarily have the time and skills to discover the means that specialists find and retain in memory.”²⁹² The Court then cited *Telekabel*, maintaining that impossibility to ensure complete enforcement of the orders was not an obstacle to blocking and did not have to result in the lack of recognition of the rights of IP holders by the courts.²⁹³

This was also the position of the AG, who noted in his Opinion on *Telekabel* that, although “[i]t is true that potentially many users may be in a position to circumvent a block, . . . it by no means follows from this that every one of those users will actually circumvent it.”²⁹⁴ The AG went on to say that “[u]sers who learn, as a result of a website’s being blocked, that the page is illegal may well forgo access to the website. To presume an intention of the part of every user to gain access to a website despite a block would . . . mean that

290. *Id.* at ¶ 64, with further references to *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) at ¶¶ 163-176 and 218.

291. *Tribunal de Grande Instance de Paris* [High Court of Paris], 3rd chamber, *SCPP v. Orange, Free, SFR et Bouygues Télécom*, No. 14/03236, Dec. 4, 2014, *supra* note 65.

292. *Id.* at 14, translation from French by the authors.

293. *Id.*

294. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, at ¶ 100.

one assumes inadmissibly that every user intends to further a breach of the law. Finally, . . . while it is true that quite a few users may be in a position to circumvent a block, far from all users would be in such a position.”²⁹⁵ Insofar as it concerned the possibility for the operator to provide the page in identical form under a different IP address and domain name, this did not, in the AG’s opinion, preclude the appropriateness of blocking either. According to the AG, “here too, users, having had their attention drawn by the blocking measure to the illegality of the content, may forgo visiting the page. Secondly, users will have to resort to search engines in order to find the page. With repeated blocking measures, even a search via search engines will be difficult.”²⁹⁶

It is worth, however, noting that the “reasonable effectiveness” justifications for blocking were questioned by some commentators. Pekka Savola observes, for example, that “blocking seems to – at most – accomplish a slight deterrence against some non-recurring users, provide ‘education’ to those users, and make it seem that IPR holders are doing something.”²⁹⁷ It is also noted that the studies on blocking effectiveness relied upon by the national courts in the majority of cases were conducted or commissioned by the right-holders and could not be verified.²⁹⁸

All in all, in the absence of the evidence-based decisions of the European judiciary, “reasonable effectiveness” considerations advanced by the CJEU in *Telekabel* might still be called into question. This could be done following the logic of the Court of Appeal of The Hague when it refused to order the blocking based on the overall ineffectiveness of such measure.²⁹⁹ It suffices only to

295. *Id.*

296. *Id.* at ¶ 101.

297. Savola, *supra* note 8, at ¶ 75.

298. *Id.* at ¶ 74. *See also* in this sense Joe Karaganis, *Rethinking Piracy*, in *MEDIA PIRACY IN EMERGING ECONOMIES* 1, 1, *supra* note 145, noting that “[w]hat we know about media piracy usually begins, and often ends, with industry-sponsored research.”

299. *Gerechtshof Den Haag* [Court of Appeal of The Hague], *Ziggo and XS4ALL v. BREIN*, *supra* note 269. Consider also in this sense Kevin T. O’Sullivan, *Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Human Rights*, 36(9) *EIPR* 577, 581 (2014), pointing that “[t]he ruling of the Court of the Hague [will] continue[] to present a policy challenge.”

mention the recent decision of the District Court of Athens (referred to above) that rejected the blocking as ineffective in the light of the various circumvention measures available to the ISPs' customers and websites' operators.³⁰⁰

C. "HIGH LEVEL" OF PROTECTION AS A GOAL OF ENFORCEMENT:
MEANS TO AN END OR ENDS TO A MEAN?

As noted by Pekka Savola, "the goal of blocking as perceived and accepted by a court doing a proportionality evaluation incurs implications on the level of accepted proportionality."³⁰¹ In *Telekabel*, the CJEU considered that the objective of a "high level" of IP protection envisaged in Recital 9 InfoSoc³⁰² justified (even the relatively inefficient) blocking.³⁰³ As per the Court, such goal would be achieved even by "making it difficult" to access infringing websites or by "seriously discouraging internet users" from doing that.³⁰⁴

It should, however, be noted that the InfoSoc also pursues other objectives such as "a fair balance of rights and interests between . . . right-holders and users of protected subject-matter."³⁰⁵ Furthermore, both Article 8(1) InfoSoc and Article 3(2) of the Enforcement Directive embody proportionality requirement as a necessary precondition for enforcement of intellectual property rights.³⁰⁶ This would mean that all fundamental rights implicated by enforcement of intellectual property should be considered equally, with no

300. District Court of Athens, No. 13478/2014, Dec. 22, 2014, *supra* note 65; commented upon by Paramythiotis, Van der Sar, and Sinodinou, *supra* note 87.

301. Savola, *supra* note 8, at ¶ 97.

302. Recital 11 InfoSoc is even more categorical in its insistence on a "rigorous" system for the protection of copyright and related rights as "one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers" (emphasis added).

303. CJEU, Judgment in *UPC Telekabel Wien* [2014], C-314/12, EU:C:2014:192, at ¶¶ 31 and 62.

304. *Id.* at ¶ 62.

305. Recital 31 of the InfoSoc Directive, *supra* note 5. On a more general level, proportionality is enshrined in Art. 5(4) of the Treaty on European Union and Art. 52(1) of the EU Charter.

306. See also Art. 20 and Recital 10 of the E-Commerce Directive, *supra* note 7; Recital 58 to the InfoSoc Directive, *supra* note 5; Recital 31 to the Enforcement Directive, *supra* note 6.

hierarchical differentiation on “high” and “low,” maximal and minimal standards of protection being drawn between them. The objectives and conditions of the exercise of intellectual property then would always be examined in the light of the general interest and competing interests. On the contrary, once the exclusive rights are given greater value than the rights of users or those of the (non-liable) intermediaries, it would be tempting for the economic players to use IP rights abusively in a somewhat “maximalist” manner.³⁰⁷ It is also then easier for the courts to justify a somewhat ineffective protection, insofar as such protection would still achieve symbolic, educational, or politically-driven objectives.³⁰⁸

It is worth recalling in this context that the gradual portrayal of exclusive rights as the “rights to forbid” or “rights to sanction” does not make their acceptance in the public opinion easier, especially when other competitive values are being somewhat underrated.³⁰⁹ In the recent discourse on the strengthening of legal means of protection, copyright is more frequently presented as an investment-protection mechanism, at times acting as a scarecrow rather than a vehicle of cultural and social progress. Quite naturally, this has provoked certain counter-reactions: as copyright is perceived mainly as a right to exclude or punish, infringing copyright has evolved (predominantly among younger generations) to an act of protest, leading to a serious crisis of legitimacy. Even among creators, copyright is increasingly perceived as a hurdle in the creative process, as the success of the so-called “open content” models clearly demonstrates.³¹⁰

307. For a critical commentary of this tendency, see Alexander Peukert, *Intellectual Property as an End in Itself?*, 33(2) EIPR 67 (2011); Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information*, 1 IPQ 1 (2010); Alexander Peukert, *Intellectual Property Shall be Protected!?*, *supra* note 256.

308. Savola, *supra* note 8, at ¶ 91. As noted therein, “[t]he crucial question is which and to which degree these underlying motives of blocking can be accepted as legitimate. Specifically, are enforcement mechanisms (especially at intermediaries’ expense) available only for efficient enforcement that produces economically quantifiable results? Or is blocking also acceptable for educational, symbolic or politically motivated gestures?” See *id.*

309. See Geiger, *Copyright as an Access Right*, *supra* note 54.

310. Further on this crisis of legitimacy of intellectual property law and possible solutions to it, see Christophe Geiger, *The Social Function of Intellectual Property Rights, Or How Ethics Can Influence the Shape and Use of IP Law*, in

Despite all this, as aptly noted by Lukas Feiler, the fact that “many people do not see copyright law as benefiting them and their interests . . . is . . . not the subject of the current debate in the EU or the United States. Indeed, the scholarly debate as well as the public debate is focused on whether to enforce copyright law and fails to address the more fundamental question of whether substantive copyright law itself is actually representative of the – often conflicting – interests of all stakeholders.”³¹¹

V. AS A CONCLUSION: IDENTIFYING THE STANDARDS FOR COPYRIGHT ENFORCEMENT ONLINE AND REFLECTING ON ALTERNATIVE SOLUTIONS

In conclusion, it appears that, even in the light of the guidance provided by European courts, national judges will continue to have a difficult time identifying Europe’s standards applicable in the field of blocking orders and their collateral effects on fundamental rights.³¹² Nevertheless, existing national and European courts’ practice still allows identifying some criteria that can serve this delicate evaluation. In this article, those were summarized as follows (under

INTELLECTUAL PROPERTY LAW: METHODS AND PERSPECTIVES 153 (Graeme B. Dinwoodie ed., 2013).

311. Feiler, *supra* note 98, at 74. *See also* Geiger, *id.*

312. *See* in this sense European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe* (Brussels, May 6, 2015, COM(2015) 192 final), at 7 (admitting that “the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given in particular the growing involvement of these intermediaries in content distribution”). Seeking such clarification, and with a view to analyse “whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems” (*id.*), the European Commission has recently launched the Public Consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy that ran from 24 September 2015 until 6 January 2016. For the first results of this consultation, *see* European Commission, *Digital Agenda for Europe: A Europe 2020 Initiative, First Brief Results of the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy* (Jan. 26, 2016), <https://ec.europa.eu/digital-agenda/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

the right to freedom of expression): (1) the manner in which the website is used (active or passive); (2) adverse effects of blocking on legitimate content (“collateral censorship”); (3) the general public interest in information; (4) availability of alternative means of accessing the information; and (5) accounting for the ISPs’ own freedom of expression interests in their capacity of the publishers of their customers’ expression. Insofar as the EU-specific freedom to conduct a business is concerned, the factors that can tilt the scales of proportionality evaluation encompassed: (1) the costs and complexity of blocking; (2) availability of reasonable alternatives (subsidiarity or necessity); (3) links of injunctions to liability; and (4) the degree of permissive private ordering. Finally, the right to property perspective on website blocking dictated: (1) a particularly wide margin of appreciation that the States would enjoy in balancing IP (as a human right) against other interests of equal value; (2) required degree of efficacy of the blocking; and (3) its intended purpose.

Overall, it is notable, on the one hand, that the importance of proportionality analysis in enforcement and competing fundamental rights was confirmed. The CJEU was even ready to go as far as to mandate that the “user rights” could be enforced in courts,³¹³ thereby being arguably more observant of freedom of expression and information than was the ECtHR when it first ruled on copyright website blocking.³¹⁴ On the other hand, the CJEU (unlike its Advocate General³¹⁵ or the ECtHR) shifted a considerable part of the human-rights-sensitive enforcement choices on the intermediaries, taking a rather delicate policy decision. As we have seen, its proportionality evaluation is moreover debatable and has not been shared by the Advocate General.³¹⁶ To break it down, the Luxemburg

313. CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶ 57.

314. ECtHR, *Akdeniz v. Turkey* (dec.) (No. 20877/10), CE:ECHR:2014:0311DEC002087710.

315. See CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* [2013], C-314/12, EU:C:2013:781, on the fourth question left unaddressed by the CJEU.

316. See II.4 above. Furthermore, some commentators argued that the CJEU in *Telekabel* has largely negated the positive effect from its *Sabam* rulings, as “[s]ome forms of website-blocking require all the attributes which *Sabam* and *Scarlet* seemed to outlaw in their cumulation” (Husovec, *CJEU Allowed Website*

Court seems to consider that intermediaries cannot be entirely passive but must “do something” to prevent infringement, not knowing exactly what and in which cases.³¹⁷ Arguably, it is not an easy task and it is difficult to blame the Court of Justice for trying to come up with some kind of solution to a very delicate question, with the legal tools it has at hand.³¹⁸ The same can largely be said of the European Court of Human Rights, which is not accustomed to resolving issues of copyright enforcement.³¹⁹ However, this should be understood as an invitation to the legislator to take their responsibility and define the rules of the game of the information society.³²⁰

It can further be observed that each blocking technique, even when being less problematic from the perspective of one fundamental right, would with high probability pose serious risks to another. For example, IP address and DNS blocking have dangerous “collateral censorship” effects,³²¹ whereas “granular” Deep Packet Inspection (a form of URL blocking) is also “the most technically complicated and expensive technique to deploy” which is moreover questionable from

Blocking Injunctions with Some Reservations, *supra* note 55, at 634, referring to costs that are to be bared exclusively by providers, preventive nature of an injunction, its applicability to all electronic communications, indiscriminate application to all users, and unfixed period for which the blocking is implemented).

317. See also Angelopoulos, *supra* note 170; Eleonora Rosati, *Breaking News: CJEU Says that Blocking Orders are OK and Do not Have to be Specific*, IPKAT (March 27, 2014), <http://ipkitten.blogspot.fr/2014/03/breaking-news-cjeu-says-that-blocking.html>.

318. If these have been correctly applied is another question that was already addressed above.

319. The last few years have seen, however, a notable increase in the Strasbourg Court’s activity in this sphere. See Izyumenko, *supra* note 71.

320. In May 2015, the European Commission presented – within the framework of the ongoing EU copyright reform – its Digital Single Market Strategy that highlights a “fit for purpose regulatory environment for platforms and intermediaries” among the key actions that the Commission intends to deliver by the end of 2016 (European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, *supra* note 312, at 6-8 and 11-12). In line with this purpose, the role of intermediaries has been addressed, in fact, in the new set of copyright reform proposals issued on Sept. 14, 2016. See Proposal for a Directive of the European Parliament and of the Council *On Copyright in the Digital Single Market* - COM(2016)593 (Brussels, Sept. 14, 2016), Recital 38.

321. Ofcom, *supra* note 73, at 30 and 33; Callanan et al., *supra* note 73, at 118.

the perspective of the right to privacy and personal data protection.³²²

All this certainly leaves the door open for further thoughts and clarification, all the more valuable in view of the future EU accession to the ECHR,³²³ which is likely to only strengthen the present tendency to test IP enforcement by fundamental rights.³²⁴ An experience of recent years raises, however, a more fundamental question of whether it is always appropriate to respond to technological changes by systematically strengthening the IP enforcement mechanisms.

Currently, the strategy adopted by the legislators and the judiciary, with a strong encouragement from cultural industries, has been to enhance the level of deterrence mechanisms. Out of those, graduated response used to be the preferred solution. Its relative failure has, however, partially shifted the focus of online enforcement strategies towards targeting the Internet access providers, in particular those of end users.³²⁵ It must be admitted, though, that none of such strategies

322. Ofcom, *id.* at 5, 40-41; Callanan et al., *id.* at 116.

323. See Art. 6(2) TEU as amended by Art. 1(8) of the Treaty of Lisbon; and Art. 59(2) ECHR as amended by Art. 17 of Protocol No. 14 to the ECHR. Although the CJEU rejected the latest draft agreement of EU accession to the ECHR (Opinion 2/13 of Dec. 18, 2014, EU:C:2014:2454), this only delayed the accession, which remains binding on the EU.

324. See (for copyright and related rights), starting with ECJ, Judgment in Promusicae [2008], C-275/06, EU:C:2008:54, at ¶¶ 65-68; ECJ, Order in LSG [2009], C-557/07, EU:C:2009:107, at ¶¶ 28-29; CJEU, Judgment in Scarlet Extended [2011], C-70/10, EU:C:2011:771, at ¶ 53; CJEU, Judgment in SABAM v. Netlog [2012], C-360/10, EU:C:2012:85, at ¶ 51; CJEU, Judgment in Bonnier Audio and Others [2012], C-461/10, EU:C:2012:219, at ¶ 56; CJEU, Judgment in UPC Telekabel Wien [2014], C-314/12, EU:C:2014:192, at ¶¶ 46-47; CJEU, Judgment in GS Media [2016], C-160/15, EU:C:2016:644, at ¶ 31; CJEU, Judgment in Mc Fadden [2016], C-484/14, EU:C:2016:689, at ¶¶ 82-83. For trademarks, see ECJ, Opinion of Advocate General Poiares Maduro in Google France v. Louis Vuitton [2009], C-236/08 to C-238/08, EU:C:2009:569, at ¶ 102; CJEU, Judgment in L'Oréal v. eBay [2011], C-324/09, EU:C:2011:474, at ¶ 143; CJEU, Judgment in Coty Germany [2015], C-580/13, EU:C:2015:485, at ¶ 33.

325. E.g., Penelope Thornton et al., *Is 2015 the Year of the Website-Blocking Injunction?*, HOGAN LOVELLS GLOBAL MEDIA AND COMMUNICATIONS QUARTERLY 3, 3 (Spring 2015) (“[R]ights holders, dissatisfied with some of the existing national graduated response regimes, are increasingly turning to the powerful and effective tool of website-blocking injunctions”); Petteri Günther, *The Plan for a Digital Single Market in Europe and Reforming EU Copyright Rules to Develop a Market-Oriented Approach to Reduce Infringement on the Internet*, 38(1) EIPR 43, 49 (2016) (“In practice, injunctions against ISPs in Europe to block access to allegedly infringing content are the favoured approach today, and the

did so far achieve the expected results,³²⁶ thus clearly raising the question of their appropriateness and calling for an examination of alternative solutions.

Some of these alternatives to tougher copyright enforcement in the online world still need to be elaborated. If it seems fair that all actors involved in the production, distribution and consumption of culture

legal situation does not appear to lack clarity in this respect.”). *See also* Eleonora Rosati, *2015: The Year of Blocking Injunctions?* [Editorial], 10(3) *JIPLP* 147 (2015); Joseph Jones, *Getting the Look for Less? Look no More – Blocking Injunctions are the Fashion: Cartier International v BskyB*, 37(7) *EIPR* 463 (2015). At the same time, although it is true that some of the graduated response initiatives might have declined (as is the case with the French HADOPI, for example), others could only be gaining strength, specifically in cases where the “ISPs voluntarily assume greater policing responsibilities” (Giblin, *supra* note 147, at 86, emphasis in the original). *See further*, in detail, Rebecca Giblin, *Evaluating Graduated Response*, 37(2) *COLUM. J.L. & ARTS* 147 (2014); Christophe Geiger, *The Rise of Criminal Enforcement of Intellectual Property Rights... And its Failure in the Context of Copyright Infringements on the Internet*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* 113, *supra* note 234; de Beer & Clemmer, *supra* note 235; Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 *OR. L. REV.* 81 (2010); Peter K. Yu, *The Graduated Response*, 62 *FLA. L. REV.* 1373 (2010); and, from the same author, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY* 455, *supra* note 15.

326. *See, e.g.*, (in relation to graduated response and certain other initiatives) Christophe Geiger, *Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach*, in *RESEARCH HANDBOOK ON THE CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY* 704 (Paul L.C. Torremans ed., 2014). As it concerns website blocking, consider, for example, Günther, *id.*, noting at 49 that “the results of blocking orders seem unclear with respect to reducing the actual levels of online piracy while still maintaining a balance between conflicting rights. Their effect has been deemed questionable, for instance because the data on BitTorrent traffic levels in connection with adopted website blocking measures have been inconclusive, and blocking orders are also problematic concerning satisfying the requirement of proportionality of the enforcement measures.” Joe Karaganis also argues on this line:

“Despite the stream of lawsuits and site closures, we see no evidence – and indeed very few claims – that these efforts have had any measurable impact on online piracy. The costs and technical requirements of running a torrent tracker or indexing site are modest, and new sites have quickly emerged to replace old ones. P2P continues to account for a high percentage of total bandwidth utilization in most parts of the world, and infringing files represent, by most accounts, a very high percentage of P2P content.”

Karaganis, *supra* note 298, at 30.

participate in the financing of such a crucial sector for society,³²⁷ other systems of collection and redistribution of the value of creative products online could be imagined, which would be less intrusive for equally important fundamental rights and values. Some in fact have been explored, with promising results.³²⁸ One of them involves the legalization of certain practices through a system of equitable remuneration as it was often proposed in the context of non-commercial file-sharing.³²⁹ This system, sometimes called the “global license,”³³⁰ subjects downloading to a sort of statutory license by analogy with the private copy exception, while the communication of the file (in other words the “upload”) is subject to mandatory collective management,³³¹ on the model of what has been

327. And this of course includes intermediaries as well, which conduct profitable businesses.

328. See, for example, a large-scale empirical study of Alternative Compensation Systems conducted through 2012 to 2015 by a multidisciplinary research group at the Institute for Information Law (IViR), University of Amsterdam: Balázs Bodó et al., *Copyright in an Age of Access: Alternatives to Copyright Enforcement* (2015), <http://ivir.nl/onderzoek/acs?lang=en>.

329. See in particular João Pedro Quintais, *Alternative Compensation Models for Large-Scale Non-Commercial Online Uses*, Paper presented at ALAI International Congress – 50 Years of the German Copyright Act: Remuneration for the Use of Works – Exclusivity vs. Other Approaches, Bonn, June 18–20, 2015 (ALAI Conference Proceedings). See also P. Bernt Hugenholtz, Lecture within the framework of the CEIPI conferences on fundamental questions of intellectual property: Copyright Piracy on the Internet: Litigate, Legalize, Licence or Laissez-faire? (Feb. 22, 2010, Strasbourg), suggesting that all the consequences should be drawn from the failure of the repressive solutions, and envisaging a certain number of legal options to solve the question of downloading from the Internet. See also the proposals made by Philippe Aigrain, INTERNET ET CREATION, COMMENT RECONNAITRE LES ECHANGES SUR INTERNET EN FINANÇANT LA CREATION? (2008).

330. See on the “global licence” in particular Lionel Thoumyre, *La licence globale optionnelle: un pare-feu contre les bugs de la répression*, (15) RLDI 80 (2006). Draft laws aimed at implementing a “global licence” have been proposed in France. Thus, during the debates on the DADVSI Bill in December 2005, the French Parliament adopted an amendment according to which a download from an online communications service by a private individual for private use (downloading a file) was lawful, under the condition that fair compensation is awarded. Subsequently, however, the Parliament revised this amendment. Also in Belgium the legislative proposals introducing a “global licence” have been advanced: see on this question, Caroline Colin & Séverine Dusollier, *Les perspectives de légitimation des échanges des œuvres sur les réseaux peer-to-peer en Belgique*, in LE TÉLÉCHARGEMENT D’ŒUVRES SUR INTERNET, *supra* note 46.

331. See on this, Carine Bernault & Audrey Lebois (under the supervision of André Lucas), PEER-TO-PEER FILE SHARING AND LITERARY AND ARTISTIC

set up for other types of mass-use that are difficult to control individually.³³²

More generally, it would seem vital to rethink copyright in the 21st-century in order to identify solutions that would benefit all players in the creative process equitably,³³³ and specifically the author who is often the great forgotten of the copyright system.³³⁴ As it was aptly noted by Neelie Kroes in her capacity as the Vice-President of the European Commission responsible for the Digital Agenda:

Today's world is a very different one to that of the 2001 EU Copyright Directive. With new expectations for consumers, new opportunities for creators, new tools from social media to big data. Every day citizens . . . across the EU break the law just to do something commonplace. And who can blame them when those laws are so ill-adapted. . . . Technology moves faster than the law can, particularly in the EU. Today, the EU

copyright framework is fragmented, inflexible, and often irrelevant. It

PROPERTY: A FEASIBILITY STUDY REGARDING A SYSTEM OF COMPENSATION FOR THE EXCHANGE OF WORKS VIA THE INTERNET (Institute for Research on Private Law, University of Nantes, June 2005).

332. For a detailed discussion, *see* Geiger, *supra* note 326.

333. *See* in this sense Francis Gurry, *Developments in the International Intellectual Property System*, in *THE INTELLECTUAL PROPERTY SYSTEM IN A TIME OF CHANGE: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 61 (Christophe Geiger ed., 2016), underlining that the role of copyright is “finding a balance between all the competing interests that surround the act of cultural creation. On the one hand, there are the interests of the creators, who derive their economic existence through the restriction on access that copyright entails. On the other hand, there are the interests of society and the general public. Access is the reason for which we are interested in cultural production.”

334. A large majority of creators, in the absence of an effective author's contract law, frequently participate only insufficiently in the exploitation of their works. For a discussion of this aspect of the issue, *see* Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12(3) *VAND. J. ENT. & TECH. L.* 515 (2010); Reto M. Hilty, *Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht*, in *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts*, Festschrift für Gerhard Schrickler zum 70. Geburtstag 325 (Ansgar Ohly et al. eds., 2005); Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 *BERKELEY TECH. L.J.* 1383 (2014).

should be a stimulant to openness, innovation and creativity, not a tool for . . . obstruction, limitation and control. . . . Things need to change in Europe and they need to change right now.³³⁵

335. Kroes, *supra* note 1. The current Commissioner for the Digital Economy and Society, Günther H. Oettinger, followed up on this, when stating recently: “[W]e want a copyright environment that is stimulating, fair, rewards investment in creativity and makes it easier for Europeans to access and use content legally. Our ongoing work on the role of platforms and online intermediaries will also help to translate our plan into concrete proposals.” European Commission Press release, *Commission Takes First Steps to Broaden Access to Online Content and Outlines its Vision to Modernise EU Copyright Rules* (Brussels, Dec. 9, 2015), http://europa.eu/rapid/press-release_IP-15-6261_en.htm.