



UPPSALA
UNIVERSITET

Department of Law
Spring Term 2017

Master Programme (LL.M.) in *Intellectual Property Law* (2JE660)
Master's Thesis 30 ECTS

Does EU copyright law threaten digital freedom?

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1 Introduction

1.1 Problem description and significance

It has been observed that EU copyright law, the *acquis communautaire*, in recent years has become systematically more harmonised.¹ It is appropriate therefore to contemplate the legal direction taken by the increasingly harmonised *acquis*. Arguably this is the case for all areas of EU harmonisation. Whereas independent Member State law affects only its respective jurisdiction, EU law affects all Member States, and may therefore be so much more cause for caution and concern. Or objectively put, may generally give rise to broader scrutiny from a wider group of commentators than a given piece of national legislation or court judgment. This is the case on the one hand from an academic perspective; as the potential for debating real or imagined disruptive ripple-effects across a multitude of established legal systems is quite endless. And on the other hand from a layman- or public perspective, where impactful laws from aloof Brussels inevitably risk being met with some degree of general scepticism. In this respect the present time may be more appropriate than ever for the purpose of identifying to what extent the EU can fairly be held accountable. Such analysis is particularly important in the case of copyright, as that area of law is potentially even more precarious than ordinary instances. The digital world has no natural or physical borders and almost everyone is connected, creating a variety of regional or even global solidarity between the people, or ‘users’ affected by the laws which attempt to govern it. By contrast, the laws which govern copyright come from a wide variety of traditions and legal origins, and the status of copyright in the greater societal context is subject to heated debate. EU harmonization, therefore, will necessarily compromise the perspective and interests of at very least some parties to the debate. Elevating copyright to the status of unassailable property, expanding exclusivity of rights along an Anglo-Saxon Lockean philosophical line, will please some but outrage others.² Despite of the potential for controversy, and coinciding with the EU aspiration to transcend into a Digital Single Market, significant judgments in the copyright field have recently been handed down from the CJEU. These represent a culmination, building on years of jurisprudence which has gradually enhanced the influence which harmonised EU copyright law may exert on the culture of the information society across all the Member States. These pivotal developments presently necessitate asking where Union law actually stands on certain contentious points of online copyright, and from the perspective of the user and the Member State,

¹ Griffiths J [2013] *Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law* 38 ELR, page 66

² Ginsburg J [2011] *European Copyright Code - Back to First Principles (with Some Additional Detail)* Columbia Public Law Research Paper No. 11-261, page 3

determining what has changed in recent years. Only by such an analysis can it be determined to what extent the EU is accountable for something such as users' restricted digital freedom.

1.2 Research question

The research question; 'does EU law threaten digital freedom?' requires initial clarifications, which will be further addressed in Part 2. However, our basic premise is that 'digital freedom' consists of two elements:

- (1) The online availability of information subject matter.
- (2) Users' ability to consume said information freely.

In this regard, internet users in Europe have become accustomed to enjoying digital freedom to the extent that rightholders offer their free permission to access work. But more importantly, also by domestic law which allows users to partake in any online information regardless of permission, whilst not expecting to be restricted, fined, stigmatised, or even criminalised in the process. Such consequences would seem to be in stark contrast to what has come to be described as the fifth freedom of the EU: The free flow of information.³ Much like the other freedoms however, it is not meant to be implied that all information is free as in wholly without costs. EU law strives to offer rightholders a high level of protection, which often clashes with the interests of our user, and which may limit Member States' discretion to confer digital freedom. Observe that the user's ability to consume information 'freely' may be ambiguous, and its meaning vary in different situations. In one case the user may be able to benefit from a statutory copyright exemption. In another she may be liable of copyright infringement in the strict sense, but remain outside the range of conceivable enforcement methods against her. Member States have adopted different approaches to these issues, based on their separate ideological and political ideas informing their legal and social understanding of copyright. By contrast, the following chapters will examine how EU law has centrally evolved to treat such situations. As Member States' laws gradually approximate on the points of contention between the user and the rightholder, Member State discretion to decide how to extend or limit copyright principles diminishes in favour of the 'unitary regime' to which they all must conform. If Member States already by choice maintain a restrictive copyright regime, allowing users less 'digital freedom' than that required by the harmonised *acquis*, such observations form a separate topic

³ Geiger C, Schön herr F [2012] *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions in:* (ed. Synodinou T-E) *Codification of EU Copyright Law: Challenges and Perspectives* [Kluwer], page 157

outside the bounds of this thesis. The rationale is that Member States have had many years to form a coherent legal doctrine corresponding to domestic notions of public morality and intellectual property. The varying domestically prevailing schemes of managing the balance of protecting the incentive for intellectual creation against the public interest evidently represent an often culturally rooted divergence of opinion. If our inquiry results in the finding that domestic discretion to conduct that balance is being superseded by the imposition of EU standards, this would then beg the question what interests inform these EU standards, and whether they correspond to popular notions of public morality, or perhaps to the economic interests of lobby groups. This thesis will present no empirical research on the latter points, but it is suggested that such inquiry is highly pertinent to the next stage of research.

Although copyright is often seen as a regime of authors' rights⁴, this thesis is instead albeit quite arbitrarily, centred on the users. It therefore becomes appropriate to reverse the starting point central to most academic analyses of copyright.⁵ Throughout this thesis we will therefore focus not on users' interference with rightholders, but instead take as our starting point how copyright under harmonised EU law may interfere with users' ability to *freely* consume information online. More specifically, we will examine how the harmonising measures of the CJEU have been liable to restrict Member States' ability to assert user freedom.⁶ It must be pointed out however that this perspective does not imply a moral judgment. The aim of the research question is merely to identify the degree of harmonisation within the *acquis*, subject to the scope of the inquiry. This exercise must precede an evaluation of actual utility of the law or discussion on legal reform.

1.3 Methodology

We will attempt to answer the main question by dividing it into three parts corresponding to areas of the *acquis* which together have governed (1) the availability of online information, and (2) users' ability to consume that information freely. These sub-questions are:

- 1) Does 'adaptation and supplementation' threaten digital freedom? **(Part 3)**
- 2) Does article 5 Infosoc Directive protect digital freedom? **(Part 4)**
- 3) Does 'striking a fair balance' threaten or protect digital freedom? **(Part 5)**

⁴ And by extension, rightholders' rights.

⁵ This starting point may however be appropriate, as it reflects a present trend concerned with balancing the absolutism of copyright with the fundamental rights of other parties, including users. Cf: **Part 5** (*infra*)

⁶ By extension this perspective allows us to inquire whether there will in future continue to exist a possibility for Member State legal systems to entertain disparate philosophical notions informing the very justification for copyright, as these should ultimately determine its effective limits.

The methodology will follow a traditional legal dogmatic case-based approach focusing on the jurisprudence of the Court of Justice of the European Union. Lenses of analysis will also include legal-economic perspectives with an attempt to rationalise the Court's developments from the objective of EU legal harmonisation.

1.4 Scope of the study

1.4.1 Positive domain

The discussion within this thesis is limited to:

- Presenting a model of the relationship between users and rightholders in the EU digital copyright context;
 - with particular analysis from the perspective of the user.
- Analysing the progression of the relevant harmonising CJEU case law;
 - demonstrating how it is effecting a power shift between stakeholders;
- Highlighting the role and modus operandi of the EU judiciary in developing and harmonising EU copyright law in recent years;
 - with attention to determining the level of EU harmonisation contra ‘Member State discretion’ in the context;
 - thereby ascertaining what can properly be described as a level of 'digital freedom' with relation to EU copyright law;

1.4.2 Negative domain

The discussion within this thesis does not aspire to:

- Questioning or evaluating the normative benefit of protecting copyright.
- Defending or advocating internet piracy.
- Evaluating the upcoming EU copyright legislative revision.⁷
- Evaluating or comparing Member States' national law *per se*.⁸
- Suggesting any particular legislative reform.
- Arguing for or against harmonisation of copyright *per se*.

⁷ Focus will not be on the upcoming legislative changes as they (1) lay in the future (2) are not yet ascertained and analysis would therefore be speculative, (3) focus shall be on the *judicial* harmonisation.

⁸ Although some reference will be made to domestic-level case law.

1.5 Thesis structure

Part 2 will provide a more thorough and necessary examination into the subject matter of the question, examining both the ambiguity of the EU law concept in the semi-harmonised context of the *acquis*, as well as the artificial term ‘digital freedom’, its definition and limits for the purpose of the thesis.

Part 3 will examine the CJEU practice of judicial law-making with respect to article 3(1) Infosoc Directive, and consider the effects upon digital freedom of the recent evolution of the doctrinal interpretation of that article. In this respect the expansion of the concept of communication to the public may correspond to a potential decrease in the free *availability* of information, which is one of the two pillars underpinning digital freedom.

Part 4 will examine whether article 5 Infosoc is capable of allowing digital freedom to subsist under the umbrella of the exceptions and limitations clause. Particular focus will be on the CJEU jurisprudence relating to article 5(1) Infosoc, with respect to the consumption of online information, which is the second pillar underpinning digital freedom.

Part 5 will examine whether the fundamental rights framework is capable of defending digital freedom by preclusion of copyright enforcement measures, both as regard unauthorised availability and unauthorised consumption of online information. In this respect the CJEU case-law on user-identity disclosure and website domain-name blocking measures will be considered. The hard-limits to the otherwise ‘soft’ law of proportionality will also be investigated.

Part 6 will conclude with a joined assessment of the three sub-questions and provide the answer to the main research question., with further reflection on the implications for the continued subsistence of diverse copyright justification philosophies within the EU.

2. How could EU law threaten digital freedom?

In order to answer the question, we need to investigate what ‘EU’ copyright law really is. Whereas the Member States are required to transpose the same directives, including most saliently the Infosoc Directive⁹, in practice there have subsisted significant disparities between Member States, even in the application of the supposedly harmonised areas of copyright law. EU law as directives is ‘filtered’ through national legislatures, *inter alia* in the context of exceptions and limitations under Article 5, where the option exists to determine the extent of implementation from an exhaustive ‘shopping-list’. Similarly EU law in the sense of CJEU decisions may also be somewhat filtered through national judiciaries’ potentially disparate interpretation and application thereof. Both sources of law, legislation and case law thus allow a measure of discretion to national legislatures and courts, resulting inevitably in some continued legal fragmentation within the Union. Indeed the starting point was never full harmonisation. One reason for intentional disparity was originally conceived as accommodating and preserving the important cultural diversity in the Union. However this has been much criticised as a source of uncertainty, and indeed there is no real consensus on how far Member State legal discretion is meant to extend. This disagreement is frequently discernible amongst the submissions of written observations before the CJEU, including by the EU Commission itself.¹⁰ Some Member States may argue that a given question pending before the Court is actually the proper domain for national courts, and needs therefore not be substantively harmonised. Others call for a single Regulation, and Union-wide codification.¹¹ Advocate Generals have similarly expressed opinion regarding the appropriate degree of copyright harmonisation.¹² As has already been pointed out however, and which the topic of this thesis presumes; the general trend is towards an increase in harmonisation, albeit demonstrably at a slow pace. The mere fact that legal development tends toward harmonisation should not in itself be surprising as this is the objective of directives generally. Meanwhile CJEU judgments on contested interpretation of the directives further act to approximate Member State law, as they take precedence over domestic court judgments, and there being no clear limit on the Court’s jurisdiction in this regard. Logically these processes will over time approximate Member State laws rather than cause or uphold legal fragmentation. As harmonisation within EU copyright law has not been complete it needs however to be appreciated that a significant territorial aspect has existed, and in certain ways continue to exist. It follows that one

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [22.06.2001] OJ L 167/10 – “Infosoc”

¹⁰C-610/15 *Stichting Brein v Ziggo BV* [2017] Opinion of Advocate General Szpunar ECLI:EU:C:2017:99, para 3

¹¹ Rosati E [2010] *The Wittem Group and the European Copyright Code* JIPL&P 5(12), page 862

¹² C-610/15 *Stichting Brein v Ziggo BV* [2017] Opinion of Advocate General Szpunar ECLI:EU:C:2017:99, para 3

Member State may *de-facto* impose more stringent copyright measures than another, *vice versa*, if not regarding constitution of primary liability, at least in the context of enforcement. For the purpose of clarification of the scope of this thesis, it cannot in this sense be attributed to EU law that digital freedom is threatened in a given Member State where the national copyright laws which restrict users in that Member State exceed the nominal harmonised level of the *acquis*, as determined over time by CJEU case-law. We shall call this the '*de minimis*' level. Rather, this study aims to dispel misapprehensions regarding the true accountability of the EU in the copyright context by ascertaining this minimum threshold of the harmonised *acquis*, and examining whether the threshold has been *raised* in recent months and years.

2.1 The diffuse extent of EU law

One clear example of the past fragmentation is provided by a comparison between Member States of the availability of imposing an obligation upon an ISP to block certain websites. As an example we may take The Pirate Bay¹³. As a P2P network indexing site which does not itself host copyright work, its global legal status has long been a complicated story. It is arguable that the popularity of the P2P network arose in part because of its ability, with a decentralised structure, to evade copyright law.¹⁴ One of the more effective ways of limiting traffic over such networks is to block their domain names from user access. Rightholders in several jurisdictions including EU Member States have for various reasons struggled to implement laws which allow website-blocking by ISP. By contrast in the United Kingdom TPB's site along with thousands of its mirrors and proxies, and other sites deemed havens of piracy, has been blocked by the main ISP for several years. In Sweden, the country of origin of TPB, a recent ruling introduced the first such blocking measure.¹⁵ In Germany and a few other Member States the site is still fully accessible to internet users. All of the above jurisdictions have purported to apply EU law, or rather, to remain consistent with it. Indeed Member States must remain consistent with EU law. Yet different legal outcomes have been reached by different Member States and at different points in time. Several questions arise in light of these circumstances. Which Member State courts 'correctly' interprets Infosoc and the other related directives of the *acquis*? To what extent is each Member State entitled to reach their individual and disparate conclusions? Is a legal fragmentation intended and justified in terms of a contemplated 'restrained' EU-law, or merely a temporary anomaly before complete harmonisation? The

¹³ "TPB"

¹⁴ Gervais D [2010] *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32* in (ed. Gervais D) *From "Radical Extremism" to "Balanced Copyright" Canadian Copyright and the Digital Agenda* [Irwin Law], page 452

¹⁵ *Bredbandsbolaget* [2017] PMT 11706-15

ambiguously incomplete EU copyright legislation makes it difficult to answer such questions. In fact, Member States have had to rely on unharmonised regimes of secondary liability to take measures against TPB. Evidently the CJEU has a degree of jurisdiction to read more into directives than originally anticipated. In this sense EU law as such is not on every occasion ascertained, but may exist in a sort of waiting room pending judicial determination. If the CJEU has simply not yet touched upon the specific circumstances of the legal status of blocking injunctions against ISP in the context of P2P networks; or indeed explicitly determined the compatibility with Union law of the various measures undertaken, or not undertaken throughout the Member States, their legal status remains open to interpretation.¹⁶

Yet open questions which seem to maintain legal discretion with the domestic courts are not necessarily a good thing. As it lies within the powers of the CJEU to declare national law incompatible with EU law the Court could theoretically strike down national law which relates to copyright enforcement, and by the same action effectively dictate a new ‘explicitly EU-endorsed’ law to take its place. Legal uncertainty may therefore represent a ticking bomb for stakeholders. In addition, as has been repeatedly emphasised by the EU institutions themselves, fragmented systems of law within the Union are liable to compromise the single market objective, hinting at a desire to eventually reach total approximation.¹⁷ We do not however know just what exactly such harmonised law would entail. In this sense, with regard to the matter of P2P file-sharing, we did not until very recently technically *know* the circumstances in which Member States were entitled to impute liability under EU law. That question remained in the ‘judicial waiting room’ until *Stichting Brein v Ziggo*¹⁸ was handed down, and seemingly superseded the fragmented secondary liability regimes throughout the EU. Although the majority of Member States already allowed blocking of TPB under unharmonised domestic regimes, all Member States may now attribute primary liability under art 3(1) Infosoc, which then enables access to injunctive relief. The bar of harmonisation has thus been *raised*. The example suffices to begin to illustrate the difficulties of referring to EU law as such in the matrix of the multiple legal systems which that law serves to guide and limit. To that end, we observe that in the copyright context there is presently:

- 1) A mandatory harmonised level or, *de-minimis* level of EU law;
- 2) a spectrum of discretionary scope containing the extent of compatible Member State law,
- 3) and law which has been declared by the CJEU to be outside the bounds of EU law compatibility.¹⁹

¹⁶ Mazziotti et al [2013] *Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum*, page 119

¹⁷ Ginsburg [2011], page 3

¹⁸ C-610/15 *Stichting Brein v Ziggo BV* [2017] ECLI:EU:C:2017:456

¹⁹ Riordan J [2016] *The Liability of Internet Intermediaries* [OUP], page 81

The parameters of these categories are evidently not static. As we will see, the preliminary rulings given by the CJEU change the copyright regime over time by interaction with all of these levels. As the CJEU has the final say in compartmentalising a given legal interpretation into any of the above categories, the Court alone ultimately has the potential to determine the state of digital freedom in the EU. The question is how the Court will realize that potential over time, and by extension if it will eventually leave Member States with any discretion at all in the copyright context.

2.2 Wait, what did we mean by digital freedom, again?

As digital freedom is not a legal concept, and as the term has been often invoked for other purposes²⁰, it may lend itself to confusion if it were not clearly defined once more. Digital freedom is for the purpose of this thesis merely a convenient denotation representing the ability of the internet user to consume information online, without seeking the consent of any particular rightholder, and without the consequence that her conduct will incur legal penalties. In this respect our ‘user’ is a fictional character much like the ‘reasonable person’²¹ or ‘person skilled in the art.’²² Whereas much scholarly inquiry has gone into examination of the multifaceted roles of real internet users,²³ it becomes necessary to disclaim the ambitions of our fictional user, and limit her interests to the legal sphere under consideration in this thesis. No doubt however, further research should be dedicated to parallel EU copyright developments relating to a more expansively defined user.²⁴ That said, our user is interested merely in consuming information, i.e. being the recipient of information. This information could be entertainment, news, educational material, art, etc. It has already been observed (*supra*) that such consumption, and therefore our hypothetical digital freedom itself, is contingent upon two elements:

- (1) The online availability of information subject matter.
- (2) Users’ ability to consume said information freely.

In these respects, to the extent that EU copyright law limits these elements, it ‘threatens’ digital freedom. It must be pointed out that the degree of freedom that a real internet user in an EU Member State may exercise will depend not in the first place on what we have determined above as EU law but primarily on

²⁰ (<http://www.digitalfreedomfestival.com/>) (<http://www.digitalfreedomfoundation.org/>) (https://en.wikipedia.org/wiki/Digital_Freedom;campaign) (<http://www.freedomdigital.net/>) (<http://www.digitalfreedom.ca/>)

²¹ Cf: “The man on the Clapham omnibus” *Hall v Brooklands Auto-Racing Club* [1933] 1 K.B. 205

²² Cf: T04/98 *Liposome Compositions/SEQUUS* [2001] ECLI:EP:BA:2001:T000498.20010809, paras 12(1)-12(3)

²³ Efroni Z [2010] *Access-Right: The Future of Digital Copyright Law* [OUP], page 54

²⁴ Other obvious paradigmatic aspects of the internet user, such as sharing and transformative works are naturally important.

the domestic law of the particular Member State. Consequently, the level of digital freedom may vary between the Member States to the extent that the *acquis* is unharmonised or copyright is unregulated. It must furthermore be mentioned that it is by no means meant to be implied that EU internet users anywhere, exercise unlimited freedom from copyright law. It is however, supposed as our starting point, that on the contrary; EU law has in the past not required Member States to elevate the exclusivity of copyright to the unlimited. That being so, what we are interested in ascertaining is the degree of freedom made possible to users, despite of the EU copyright regime; or even the extent to which EU copyright law has served to protect users' digital freedom from rightholders.²⁵ The objective of this inquiry, as stated, is to dispel misapprehensions as to the division of accountability between the EU and its Member States as regards legal regulation of copyright in the information society. To that end we direct our inquiry to three identified limits to copyright prepotence in terms of EU law:

- 1) The limits of exclusive rights, as determined by their legal interpretation within the jurisprudence of the CJEU. In particular, and with regard to the availability of subject matter, the jurisprudence of article 3(1) Infosoc.
- 2) The legally enshrined exceptions and limitations to copyright, in the form of article 5 Infosoc. In particular, the mandatory article 5(1) which contemplates temporary copying.
- 3) The *de-facto* limits to copyright as determined by rightholders' practical inability to enforce the exclusivity of their rights. In particular, because sanctions capable of limiting digital freedom may be deemed disproportional with reference to fundamental rights.

Another way of looking at these points would be as points of attrition between users and rightholders; or from the rightholder perspective even as lacuna capable of undermining the functioning of copyright. In that regard, as we will see below, those who would limit users' freedom have not always had an easy time since the inception of the information society, but faced several challenges. Indeed if this thesis were written from the perspective of rightholders, the same legal developments could be considered, but under the heading 'Does EU law finally protect rightholders?' We will consider three such 'challenging' factors below:

²⁵ See for one such example: *Scarlet extended* (Part 5.3 *infra*.)

2.2.1 Can't touch users

Although some Member States have seen more stringent regulation than others beyond the minimum harmonised *acquis*, the practice of targeting individual end-users for alleged copyright infringements has never gained ultimate prominence across the EU.²⁶ It continues to occur throughout Member States, with ISP legally bound to collaborate in supplying the customer details and identity of potential infringing users, but even in the United States where user-targeting has been considerably more widespread, the RIAA declared it to be an inefficient method as early as in 2008.²⁷ Creatively designed schemes of gradual responses and warning notices have appeared in some countries both within and outside the EU, but have often met with criticism for being too expensive to implement and maintain, as well as complaints of fundamental rights violations.²⁸ Importantly, despite active enforcement mechanisms against users subsisting in parts of the EU, there is no EU-wide harmonised agenda in force to support, authorise and centrally coordinate the direction of such endeavours. EU law neither forbids nor prescribes the practice. Resultantly, to the extent that copyright enforcement sanctions have not affected users directly there has been little deterrent effect in terms of limiting users' online conduct. (See **5.1.1** *infra* on 'user enforcement'.)

2.2.2 Intermediaries are not the police

Intermediary enforcement is contemplated although not in a detailed manner, by EU-legislation. The Infosoc Directive makes reference to intermediaries as the parties often best-placed to put copyright infringements to an end²⁹, and both Infosoc and the Enforcement Directive prescribe implementation of legal mechanisms to that effect.³⁰ At the same time intermediaries are also protected by the so-called safe-harbour provisions designed in the early 2000s.³¹ As a matter of policy the starting point at the time these directives were drafted was a low degree of responsibility for intermediaries.³² It was considered that intermediaries would be unduly burdened by having to monitor the vast quantity of digital content

²⁶ Dusollier S & Colin C [2011] *Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?* 34 Colum. J.L. & Arts, page 812

²⁷ Van Buskirk E [2008] *RIAA to Stop Suing Music Fans, Cut Them Off Instead* 19 Dec 2008

²⁸ For a breakdown of how the conflict has been treated in various jurisdictions: Daly M [2013] *Is there an entitlement to anonymity? A European and international analysis* E.I.P.R 35(4), 198–211

²⁹ Infosoc, recital 59

³⁰ Importantly though, with very little substantive guidance as to how these mechanisms should work, and their limits of compatibility as to the *acquis*. See. Infosoc, art 8(3) and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 195, 2.6.2004, p. 16–25, arts 9 & 11

³¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [17.7.2000] OJ L 178/1 – hereafter "ECD", arts 12-15

³² Edwards. L *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights* [2011](WIPO-report), page 5

passing through their gateways, and ascertaining its legal status. It was also considered a privacy issue with a potential chilling effect on free speech if online intermediaries were to be given the go-ahead to conduct indiscriminate surveillance over its users.³³ Insured by its safe-harbour immunities, intermediaries have thus had little impetus to act as copyright police, meaning that users were, again; potentially quite unrestricted. **Part 5** will consider the changing attitude towards intermediary liability in EU law, and the extent to which the user may be affected by domain name blocking and data disclosure.

2.2.3 Decentralisation

Right-holders have exerted significant effort to combat digital enterprises which host or even relay copyright work without authorisation, by means of websites and online platforms. As users aggregate in the thousands or millions around such online platforms, these may generate substantial ad revenue in addition to representing lost potential profit to rightholders. Third parties have thus often had a disingenuous impetus to maintain unauthorised availability of copyright work. Attempting to shut down such platforms instead of going for the users has thus always been the logical option for rightholders. When these efforts have been successful it has naturally had a greater impact than instances concerning only individual users. Broadly speaking rightholders have never been able to determine the liability of every single user of a website which enables or facilitates copyright infringement, but they have sometimes been able to reach tangible results by closing down websites or blocking access to them, thereby simultaneously ending or restricting the supposed copyright infringements at their source. From a global perspective the American *Napster* judgment was the first landmark of this paradigm.³⁴ In the EU similar litigation has taken place, but importantly, it has in such instances been necessary to rely on secondary liability rules not found in EU law or even the copyright regime itself. This is because internet platforms may rely on decentralised structure, whereby the platform itself is technically, and previously also as a matter of the harmonised acquis, detached from primary liability with respect to the infringements that it may facilitate. Because of this ‘decentralisation’, many internet platforms have as a matter of EU law not been liable for primary infringement unless they have actually ‘hosted’ the content at issue.³⁵ This technical distinction has meant that Member States have had to devise their own doctrines of secondary liability in order to implicate such platforms. In addition, Member States have also retained the discretion to refrain from imputing such liability, keeping the door open for digital freedom within

³³ Barceló R & Koelman K [2000] *Intermediary Liability in the E-commerce Directive: So far so good, but it's not enough* Computer Law & Security Report Vol. 16 no. 4, page 235

³⁴ *A&M Records, Inc. v. Napster, Inc* [2001] 239 F.3d 1004

³⁵ See: *UPC Telekabel (infra)* and *Ziggo (infra)*

the meaning of this thesis. In this sense digital freedom in some Member States has been subject to limitation by the cessation of information society services from time to time, and not in others. From the perspective of our user, this has sometimes affected the availability of subject matter, but the cause has been domestic regimes of secondary liability, rather than EU law.

The maxim is often touted that where one ‘*Napster*’ ends another one begins, suggesting a Sisyphean element to the process. The still-widespread internet piracy on a global level arguably testifies to that effect, but the lack of a harmonised EU doctrine of secondary liability could also be seen as having enabled it. In **Part 3** we will examine how EU law has progressed towards a unitary approach in this regard, particularly by expansion of the concept of ‘communication to the public’, seemingly tending towards making domestic regimes of secondary liability redundant, and increasingly eradicating the scope for disparate Member State attitudes towards internet platforms that facilitate information sharing. Similarly, as we will see in **Part 4**, the new clarification of the scope of Infosoc article 5(1) indicates that online information consumption from an unauthorised source (i.e. streaming), may not be exempt under that provision.³⁶

2.2.4 Why is digital freedom relevant?

Within the parameters thus set, the user’s digital freedom, although not necessarily in line with copyright law at every given time, is an inescapable aspect of the digital market. It plays a part in the daily lives of millions of Europeans to the extent that it mirrors their online habits³⁷, and must therefore be considered to serve as a benchmark informing copyright policy development, economic motivation to adapt cultural dissemination, and legal reform.³⁸ Although it is widely recognised that copyright law is often idiosyncratic to the needs of users³⁹, the fundamental disagreements concern exactly how, and what can or should be done about it. As the new Copyright Directive proposal shows, codified copyright law may concede to digital freedom in some instances, and retract from it in others.⁴⁰ An often-contemplated EU-

³⁶ Which is to say, Member States which currently do not consider liability for information reception may in future have to change that stance. Notably Member States have been divided on this uncertain issue, which raises new concerns about enforcement, if not liability *per se*.

³⁷ For a view on how enforcement measures augment user conduct: Monkman S [2006] *Corporate Erosion of Fair Use: Global Copyright Law Regarding File Sharing* 6 *Asper Rev. Int’l Bus. & Trade L.* 265, 282–83

³⁸ Draft Report -on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))-14.1.2015, page 11

³⁹ By comparison, a functioning system of ‘access right’ integrating authorisation to access copyright work independent of physical medium or separate access points, has been suggested as a more convenient for the modern user. Lessig L *Free Culture*

⁴⁰ *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* 2016/0280 (COD) COM(2016) 593 final E.g. By the introduction of additional mandatory exceptions and limitations *contra* revisions concerning added responsibilities for intermediaries. The former concedes to digital freedom, whereas the latter may

wide and mandatory ‘freedom of panorama’ exception, to name a hypothetical example, would make a small concession to digital freedom. On the other hand, the non-existence of such an exception within a given Member State regime, e.g. France currently purports to limit digital freedom in that Member State. However, this can only be said to take effect where rightholders can actually enforce their architectural or artistic rights against hordes of cityscape photographers, which is highly doubtful. For this reason some might argue that the law should adapt in the face of obvious idiosyncrasy, and align with the practical reality of *de-facto* digital freedom. Others would argue that the law is sound as it is, and that on the contrary, enforcement measures need to be tightened. If this were realized, in future few may be able to get away with what is today considered beyond the reach of copyright enforcement. Maybe cityscape photographers should be careful around the Eiffel Tower.⁴¹ The philosophical justification of such views could be that rightholders’ putative detriment to creative incentive principally outweighs any potential benefits of user freedom. The question then becomes whether this view corresponds to prevailing notions of public morality. If EU law increasingly starts imposing laws which do not match public perceptions of utility and purpose of the law, we may drift towards what Lord Templeman described in 1988 as a ‘lamentable position.’ In his view a copyright law that were ‘treated with such contempt’ should be amended or repealed.⁴²

The debate is further obfuscated, as has been pointed out, by the fact that there are interests which work to increase copyright protection not because of concern for fair remuneration for creators, but because it would involve giving major online enterprises substantial ability to control users’ conduct, and thereby place smaller online enterprises at a market disadvantage. In a democratic society we might suppose that the forces at action would eventually approximate, effecting a sort of compromise.⁴³ But where money has become the most significant factor, it seems that the future relationship dynamic risks being determined rather by bargaining power. Although the focus of this study is not the topic of copyright justification itself, a conclusion within this study that harmonisation of EU copyright law limits the diversity of copyright justification within the Union, would beg the question just what, or who, informs the emerging unified policy. We will briefly return to this concern in **Part 6**.

indirectly retract from it.

⁴¹ The installation of lights on the tower is an artistic work protected by copyright. Copyright in the tower itself has expired, but by night its more recent decorative lights remain under copyright.

⁴² *C.B.S. Songs Ltd. and Others Appellants v Amstrad Consumer Electronics Plc. and Another Respondents* [1988] AC 1013

⁴³ Cf. re: SOPA/PIPA:

Wortham J [2012] *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling* NYT

Netburn D [2012] *Wikipedia: SOPA protest led 8 million to look up reps in Congress* LAT

3 Does ‘adaptation and supplementation’ threaten digital freedom?

Recital 5 to the Infosoc Directive reads:

Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be *adapted and supplemented* to respond adequately to economic realities such as new forms of exploitation. (Emphasis added.)

We may not necessarily agree with the contention that no new copyright concepts were needed, or would at least have been desirable for the digital era. However, it is apt that Infosoc, which in that regard essentially transposes the WIPO Copyright Treaty, foresaw changes on the horizon and recognised the need for the law to be able to accommodate new economic realities in a flexible manner. Nevertheless, it has been argued that Infosoc could have done more towards achieving that objective.⁴⁴ Copyright law has always developed primarily in response to technological changes⁴⁵, and it may therefore seem counterproductive to hold on to old paradigms under new circumstances. The new realities addressed by the preamble to Infosoc have indeed surfaced in the information society, and arguably one symptom of this change has manifested as the ability of users to access a great variety of online content. But information flowing freely has not necessarily respected rightholders’ authorisation. The CJEU has duly attempted to adapt the law with the objective of restoring control to rightholders and upholding the objective of the legislation of guaranteeing a high level of protection. This process however, has included qualifying, expanding and even contradicting the actual legislative provisions which were originally conceived as incorporating the international copyright treaties of the 1990s.⁴⁶ New doctrine has been invented along the way, and rightholders’ claims to exclusivity have appeared to continuously widen. It is arguable on the one hand that these have been necessary measures in the sense that without them the public could exploit or ‘pirate’ copyright work freely. In addition, without judicial intervention third parties would in many cases have been able to make financial gain from relaying the free access enjoyed by users. In this regard it may seem as though the Court has had little choice but continuously spearhead further legal ‘adaptation’ to maintain the integrity of the law. In short; closing loopholes.

⁴⁴ Rosati E [2014] *Copyright in the EU: In Search of (In)Flexibilities* 9(7) JIPLP 585-598

⁴⁵ Mills M.L [1989] *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change* 65 Chi.-Kent. L. Rev. 307, page 310

⁴⁶ See *infra*: parts 3-4

It may on the other hand be argued that some of the Court's developments have unfairly come at the expense of desirable and justified digital freedom. The way the Court has chosen to adapt the law has often been criticised, if not that it had to adapt in the first place. These different jurisprudential perspectives may boil down to divided conceptualisations about the justification and role of copyright, to some extent reflecting regional or national sentiments. In the context of weighing digital freedom against rightholder prevalence, the scales tip variously in different Member States, as evidenced by the legal fragmentation of, *inter alia* enforcement paradigms. As the CJEU acts to harmonise the law, the scope for diverse copyright justifications within Member State jurisdictions narrows or disappears. In this chapter we will examine to what extent adaptation of the 'communication to the public' concept, under Infosoc article 3(1). Although spatial constraints limit our discussion to communication to the public, similar analyses by extension could equally be conducted with regard to other evolving provisions of the *acquis*, e.g. the provisions on resale rights, private copying, technological protection measures and digital rights management.

3.1 Setting the stage

The Infosoc Directive under article 3(1) purports to award to the rightholder the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. This gives the rightholder the option to refrain from making work available, as well as to profit from choosing to do so. Since the inception of the information society this right has frequently been undermined. The proverbial cat has often escaped the bag whether rightholders have approved or not, and EU legal doctrine has until recently limited the possibility of putting it back in. But from the perspective of our user, who benefits from access to information, the tightened regulation of communication to the public may translate into a lesser amount of freely available information. Although users themselves are not necessarily responsible for making information available, and in any case not the fictional user of this thesis, it indirectly affects her freedom as it limits the availability of information, and therefore her choice. Whereas consuming work has often involved reproducing it, dogmatic law means that users have infringed copyright in that act, and therefore in theory been subject to the penalties associated with committing an infringement. The limiting factor in relation to these *prima facie* user infringements has instead been the practical matter of enforcement, which will be considered in **Part 5**. But when it comes to the initial unauthorised communication of copyright work which makes the subsequent consumption and hypothetical infringements possible, the *acquis* was initially not prepared for the intricacies of the online world. With the rise of decentralised

methods, nobody could effectively be held responsible for acts of communication, as dogmatic law initially indicated that the parties subject to liability were not easily identified. It is that state which the evolution of article 3(1) came to alter. The starting point of EU law was thus:

- 1) To the extent that originators of ‘unlawful communications’ have been able to escape liability, the availability of unauthorised copyright work has been allowed to subsist.
- 2) Where users in a recipient capacity have also been able to escape liability, the whole ‘unauthorised chain’ of information has, subject to domestic unharmonised legislation, remained undisturbed.

3.2 The CJEU in action - Inventing new doctrine

The part of the *acquis* which deals with the extent of rightholders’ exclusivity is easily understood as a patchwork of case law, together aiming to form coherent doctrine.⁴⁷ As regards the doctrine of communication to the public under article 3(1) Infosoc, a first patch was laid in the 2006 case *SGAE v Rafael Hoteles*.⁴⁸

The case concerned the unauthorised playing of music in the lobby and rooms of a hotel. The Spanish collecting society SGAE claimed that these acts were in breach of the exclusive right of communication to the public. The case went to the CJEU which held that as Infosoc does not itself define ‘communication to the public’⁴⁹ it was necessary to consider not only the wording of the provision but also the context in which it occurs and the objectives pursued by the rules of which it is part.⁵⁰ Seemingly, the Court gave itself a *carte blanche* to interpret the right as widely as would prove necessary to uphold the ‘objectives’ of the *acquis*, namely to establish a *high level of protection* of authors.⁵¹

That said, the Court went on to consider that a communication must necessarily be directed to a public, and conversely be defined by the limits of that public. This meant that when a communication were redirected to reach a further public not contemplated by the original act of communication, this act required separate authorisation.⁵² Under the circumstances of the case, the intervention of the hotel in

⁴⁷ Although, the area of law has been criticised as confusing and inconsistent. Rosati [2017] *GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture* Common Market Law Review, Forthcoming, page 14

⁴⁸ C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764, “SGAE”

⁴⁹ *Ibid*, para 33

⁵⁰ *Ibid*, para 34

⁵¹ *Ibid*, para 36 and recitals 9 & 10 Infosoc

⁵² By its judgment in Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [2013] ECLI:EU:C:2013:147 the Court expanded the new public concept further, holding that a retransmission by means of a separate technology, i.e. the internet, also constituted a communication to a new public not contemplated by the original (TV) transmission.

redirecting the TV signal to its customers' hotel rooms could be considered 'indispensable' for these customers accessing that signal.⁵³ Consequently, the Court decided that the hotel guests, which would otherwise not have been able to benefit from the broadcast, had not been contemplated as recipients of the initial communication. In addition, the Court pointed out that there was a motive for profit behind the hotel's decision to redirect the signal, and that this should also be taken into consideration.⁵⁴ The sum total was that the right under 3(1) had been breached, and probably unbeknownst to anyone at the time, this precedent would set major wheels in motion.

Although it may seem that the judgment in *SGAE* would have had wide implications to the online world right off the bat, the case still relied on certain technicalities which limited its scope. It required a 'transmission'; it had a relatively fixed notion of indispensability, and it did not clarify the importance of profitable motives on the part of the communicator. It would take nearly ten years for the Court to elaborate further on these criteria, and usurp the communication concept into its current state. As will become apparent the legacy of *SGAE* lives on in continued reliance upon the notions of 'new' public and 'indispensable' intervention, albeit slightly re-conceptualised and expanded. The *obiter dicta* of financial motive would also gain significant prominence in the seminal *GS Media* case.

3.3 The linking saga - *Svensson*, *Bestwater* and *GS Media*

The three cases in the linking saga are appropriately examined together, as they all pertain to the gradual incorporation of linking into Infosoc article 3(1). In the first case, *Svensson*⁵⁵ it was essentially up for discussion whether a link to a website containing an authorised communication of copyright work, could itself constitute a communication to a new public and therefore require rightholder authorisation. Retriever Sweden offered a service in the form of aggregating links to online publications of newspaper articles and providing lists of such articles for the benefit of its clients. Retriever thus redirected its users to the original websites where the content had been posted with rightholder permission. The applicants which were article authors, argued that to the internet user it seemed as if Retriever was, rather, the provider of the copyright content and that it was not clear to the user that the links redirected to the original site for publication.⁵⁶ In this regard they claimed that the exclusive right to communication under 3(1) had been breached.

⁵³ *SGAE*, para 42

⁵⁴ *Ibid*, para 44

⁵⁵ C-466/12 *Nils Svensson v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76

⁵⁶ This argument would appear to rely on a considerable underestimation of users' intelligence and internet literacy. It is arguable that the *Svensson* litigation demonstrates that rightholders have a tendency to challenge situations where their work generates financial gain for any other party than themselves. Cf. *Infopaq*, *PRCA*

The Court reciting the earlier jurisprudence on 3(1) held that a communication to the public consisted of two criteria; *a communication*,⁵⁷ and *a public*.⁵⁸ Furthermore the public in question must be *new* in the sense that it had not been contemplated by the original communication.⁵⁹ As such a communication had already been made online, it had to be determined who was contemplated by that original communication. In this regard it was held that the public targeted consisted of all potential visitors to the original site. Moreover, as access to the copyright content on that site was not subject to any restrictive measures, such as pay-walls, all internet users had been contemplated.⁶⁰ On the other hand, the Court pointed out, that a link which acted to ‘intervene’ such that it enabled access to work which would otherwise have been restricted, did require rightholder permission. As the main proceedings concerned only linking to authorised publications, however, the Court did not immerse further into the criteria of indispensable intervention.

In the subsequent *Bestwater*⁶¹ case, a ‘framing’ link incorporating a YouTube video on a third party website was not considered a communication to the public. The reproduction on YouTube had been authorised by the rightholders, and the third party which posted the ‘link-frame’ merely communicated the video to the same public, i.e. the internet public, which already had access to the video. In this instance the link framing the YouTube reproduction could not be considered to constitute a communication to a *new public*, as the public at issue was identical to that of the authorised communication. Despite *Svensson* and *BestWater*, it was still uncertain if the act of linking to copyright content communicated without authorisation, and moreover never having been communicated freely online with authorisation, could itself be a breach of 3(1). That question was decided in *GS Media*.⁶²

The publisher of Playboy Magazine brought proceedings against the Dutch website GeenStijl, alleging that it had breached article 3(1) by posting links to websites hosting illicit scans of the December 2011 issue of Playboy magazine. GeenStijl was a commercial website which generated ad-revenue, and which therefore had an economic interest in attracting as many visitors to its site as possible. It was viewed daily by more than 230 000 users.⁶³ In the main proceedings the question was whether the provision of the clickable links, taking the user away from the GeenStijl website, and redirecting them to various third party hosting platforms which contained the applicant’s copyright work, could be considered a communication in the sense of 3(1). The Court, insisting that the previous linking cases

⁵⁷ *Svensson*, paras 17-20

⁵⁸ *Ibid*, paras 21-23

⁵⁹ *Ibid*, para 24

⁶⁰ *Ibid*, para 26

⁶¹ Case C-348/13 *BestWater International GmbH v Michael Mebes & Stefan Potsch* [2014] ECLI:EU:C:2014:2315

⁶² C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] ECLI:EU:C:2016:644 “*GS Media*”

⁶³ *GS Media*, para 7

could not be taken to confer that linking *per se* was excluded from 3(1), rather meant that these emphasised the importance of rightholder consent for any communication.⁶⁴ But there was still the matter of a requisite degree of ‘intervention’, enabling the public in effect, to access the work in question. In that regard a mere link did not constitute a transmission or retransmission, as envisaged by the Infosoc preamble.⁶⁵ The unauthorised reproduction, and the original communication, took place on a third-party file-storage website. It was already theoretically possible for anyone in the ‘internet public’ to access the content freely. The links on the GeenStijl website merely facilitated such access for the benefit of its considerable audience, each user of which could technically have accessed the third-party website independently, and without the assistance of the convenient links.⁶⁶ But in so doing, GeenStijl took advantage of the unauthorised publications, and despite knowledge of their illegal nature facilitated access with a view to its own financial gain.⁶⁷ Accordingly, the Court ruled, that posting a hyperlink is in fact capable of constituting a communication in the sense of article 3(1), but with the requisite criteria that the poster is aware of the illegal nature of the content to which the link directs, or posts the link with a view to financial gain, in which case such knowledge shall be presumed.⁶⁸

3.3.1 Digital freedom in light of the linking saga

As our fictional user is primarily interested in herself consuming information, the main implication of *GS Media* is not necessarily our user’s own primary liability for sharing information. She has expressed no interest in making financial gain from posting links, or any particular interest in posting links to unauthorised content specifically. Rather the concern with the expansion of 3(1) for the purpose of this thesis lies with its potential effect on the availability of subject matter. In that regard, AG Wathelet’s Opinion echoes the concerns of our recipient user:

“If users were at risk of proceedings for infringement of copyright under Article 3(1) of [the InfoSoc Directive] whenever they post a hyperlink to works freely accessible on another website, *they would be much more reticent to post them*, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society. In my view, such

⁶⁴ Ibid, para 43

⁶⁵ Cf: Recital 23 Infosoc Directive: This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. *This right should not cover any other acts.* [Emphasis added.]

⁶⁶ *GS Media*, para 23

⁶⁷ Ibid, paras 53-55

⁶⁸ Ibid, para 55

interference in the functioning of the internet must be avoided.”⁶⁹ (Emphasis added.)

A reticence to share information, if the AG is correct in this presumption, translates into a lesser amount of available information. Or at least, a lesser amount of freely available information. Before *GS Media*, rightholders could not rely on 3(1) to stifle the propagation of leaked information, but were limited to attacking the leak itself. To the extent that numerous take-down notices were an inefficacious method to that end⁷⁰, it is evident that this practical reality presented a challenge to rightholders. The fact that rightholders can now rely on the liability of a deep-pocketed access node like a major commercial website, represents a major victory for their interests. But it also represents a threat to our conceptualisation of digital freedom. If all commercial websites were to conform to the new standard for 3(1), then theoretically the availability of unauthorised copyright work will become increasingly redundant, as users may not know where to find it.

Similarly, the Court in *Filmspeler*⁷¹ recently confirmed the broad approach from *GS Media* in that an intervention in the sense of 3(1) was not to be seen only as a strictly enabling act, but qualified as such if without that act, the user would ‘find it difficult’ to benefit from protected works.⁷² Although the ratio of the *Filmspeler* case regarding article 3(1) was limited to the supply of media-player hardware with pre-installed links, the common thread is consistent with the new and significantly broader definition of 3(1). Considering the clandestine rise to prominence of the ‘profitable motive’ criteria, and the overhanging risk of catching casual internet users as infringers, it has been suggested that the ‘new public’ doctrine be abandoned altogether in favour of a more intervention-focused approach.⁷³ In either case, the evolution of liability for communication despite its complicated patch-work composition, represents a great expansion of the possibility of attributing liability to whomever supplies the user with information, and has no rightholder authorisation to do so.

3.4 The ‘it’s not practicable’ -critique

Just as AG Wathelet in his Opinion to the case, copyright academia has expressed that the ostensible ambition of EU law after *GS Media* incurs too many problems to be practicable.⁷⁴ Wathelet indeed

⁶⁹ C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] Opinion of Advocate General Wathelet ECLI:EU:C:2016:221, paras 78-79

⁷⁰ Exacerbated by the possibility that leakers may be numerous and remain anonymous.

⁷¹ C-527/15 *Stichting Brein v Jack Frederik Wullems* [2017] ECLI:EU:C:2017:300 "*Filmspeler*"

⁷² *Ibid*, para 41

⁷³ [2017] *Provisional Opinion of ALAI's Executive Committee On the Right of communication to the public; the Advocate General's Opinions in Filmspeler Case C-527/15 and Ziggo Case C-610/15*

⁷⁴ Rosati [2017] Rendas T [2017] *How Playboy photos compromised EU copyright law: The GS Media judgment* 20(11) *Journal of Internet Law* 11 Angelopolous C [2017] *Hyperlinks and copyright infringement* C.L.J. 76(1), page 34

seemed to reason that this factor was one of several to contribute to his proposition that hyper-linking should remain outside the scope of article 3(1). This contention would seem to proceed from a philosophical basis that the law should be practicable. As the latter part of this thesis will largely be dedicated to identifying the gap between the law and its apparent practicable limits, it would be appropriate to highlight this disparity evidently subsisting even within the EU judiciary itself.

Although it may be considered a moot point of mere intellectual interest, the debate of ‘legality versus practicality’ in the copyright context goes back a long way. In the early 20th century German scholars were similarly divided over an analogous issue: the hypothetical example of an entirely hand-copied book.⁷⁵ Van Isacker held that in his view, such a copy could not be a copyright infringement, partly because it would be impossible to discover it. Kohler on the other hand, held that it would not be appropriate to make the law yield to such practical realities, even if the concrete effect, i.e. that no-one would be charged with copyright infringement over a hand-copied book, was the same.

One way of looking at it is that in the wake of *GS Media* the result is a similar anomaly. If we may be so bold as to presume that users will continue linking, numerous of them will be breaching copyright in the process. Yet it may be fair to say that few in comparison, will be charged with any tort, as this would not be practicable rather than because the action itself is permissible by the law. The debate seems to contain a moral dimension, contemplating to excuse, if not exclude infringement, so as to create a tolerated infringement, rather than a loophole or exception in a legal sense. This could be compared to internet users making unauthorised gifs, featuring copyright footage from motion pictures or videos. In the EU, most of this largely unhindered online activity cannot be exempted with reference a ‘fair use’⁷⁶ within the legal framework; but can on the other hand most likely be explained with reference to practicality.⁷⁷ In addition to the issue of practicality, legal enforcement against casual linking would also be subject to a proportionality assessment, which would be capable of further limiting the availability of effective rightholder remedies.⁷⁸

However in comparison to the early 20th century example of the hand-copied book, today matters are slightly different in at least one more respect. Namely that the law should account for future improved methods of detecting and enforcing infringements. Indeed technological development may strive for automated methods in response to law defining infringements broadly. One manifestation of such

⁷⁵ Jaap H. Spoor [1996] *The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?* In Hugenholtz B (ed.) *The Future of Copyright in a Digital Environment* [Kluwer]

⁷⁶ I.e. exempted acts from articles 5(2)-5(3) “proportional use” in EU terminology.

⁷⁷ And perhaps rightholders simply having no genuine interest in the cessation of such putative infringements in light of their beneficial publicity, or the risk of potential negative publicity caused by attempting to seek liability of users. See: Streisand effect’: Riordan [2016], page 501

⁷⁸ See **Part 5** *infra*.

technology that may be implemented for the benefit of rightholders is the recently contemplated legal censoring-bot.⁷⁹ This would have the potential to eliminate the practicality aspect which presently restrains the law from potentially disproportional effect, going beyond the intentions of the Court in *GS Media* and potentially introducing a truly chilling effect into the information society. We may ask ourselves if rightholders would, given the option, prefer to maintain the present levels of users' digital freedom on the internet, or replace it with the option to collect a license fee from every person sending or receiving something like e.g. a User-Generated gif.

3.5 Primary liability for operating P2P file-sharing sites

Although it has long been obvious that users of filesharing sites are *prima facie* committing copyright infringements by breach of Infosoc article 2, and the exclusive right to reproduction, the problems with user-enforcements (*infra Part 5*) have often served to limit the effect of deterrence. The P2P sites' operators, considering the decentralised P2P structure have been a different story. Similarly to the previous non-liability of hyperlinking until *GS Media*, P2P has been a potential escape from copyright law, because the 'real infringer' (as in the original uploader of the torrent-file) has been invisible and anonymous. The filesharing sites have merely aggregated information on how and where to access the actual copyright work, without hosting it. This difficulty of liability attribution has allowed free availability of information to be unaffected, subject to national regimes of secondary liability. As already mentioned however, EU-law has recently harmonised the *primary liability* of such sites, in the seminal case *Stichting Brein v Ziggo*.⁸⁰

Although The Pirate Bay was subject to national judgment in Sweden in 2009, establishing secondary and criminal liability⁸¹ against its operators. And although it has been blocked in most EU Member States under regimes of contributory or accessory liability, it was not until the further expansion of article 3(1) that the reach of harmonised EU law enabled Union-wide attribution of primary liability to the site's operators. This, in turn, will facilitate access to a legal remedy such as domain name blocking in the form of an Infosoc 8(3) injunction. The request for preliminary ruling in *Ziggo* came from the Hoge Raad of the Netherlands, in the context of one such sought blocking-injunction. The questions referred asked whether TPB itself effected a communication, and if not, whether a blocking injunction under arts 8(3) Infosoc and 11 Enforcement Directive could be made anyway. AG Szpunar who delivered

⁷⁹ The proposition to increase intermediaries' liability by installation of content monitoring filters has been dubbed the 'censoring bot' by critical commentators. See: Coustick-Deal R [2016] *Europe's Censorship Robots: An attack on our basic rights*

⁸⁰ C-610/15 *Stichting Brein v Ziggo BV* [2017] ECLI:EU:C:2017:456 "Ziggo"

⁸¹ See: *Hans Fredrik Lennart Neij* [2009] B 13301-06 (The Pirate Bay)

his Opinion in February 2017 had no doubt that TPB indeed effected a communication to the public within the meaning of 3(1).⁸² It was duly observed that this contention would indirectly harmonise secondary liability.⁸³ In June 2017 the Court delivered its judgment, and essentially followed the AG Opinion:

“In the light of all the foregoing considerations, the answer to the first question is that the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.”⁸⁴

3.6 Availability of information – threatened?

In conclusion of **Part 3**, we have thus seen how the CJEU has for the last ten years interpreted article 3 Infosoc ever broader to catch up with what it deems to be undesirable intrusions into the exclusivity of copyright. In the past 12 months in particular, the Court has demonstrated particular zeal for a judicial interpretation of the communication concept whereby whomsoever has made financial gain from facilitating access has become encapsulated within the communication concept.⁸⁵ Following the money in this regard seems to have become the new watershed of copyright liability. It remains to be seen how the unauthorised providers of copyright content will react to this pivotal change. However, in conjunction with the EU-wide availability of effective injunctions, as stipulated by *UPC*⁸⁶ (see **Part 5** *infra*) the *Ziggo* case may well mean that rightholders across the EU will imminently go on the offensive. Together with *GS Media* and the liability for hyperlinking, this could certainly translate into users in future finding free access to copyright protected work significantly more difficult.

⁸² C-610/15 *Stichting Brein v Ziggo BV* [2017] Opinion of Advocate General Szpunar ECLI:EU:C:2017:99, para 44

⁸³ Angelopoulos C [2017] AG Szpunar in *Stichting Brein v Ziggo: An Indirect Harmonisation of Indirect Liability* (Kluwer Copyright Blog)

⁸⁴ *Ziggo*, para 48

⁸⁵ *Ibid*, para 46 *Filmspelers*, para 51 *GS Media*, para 54

⁸⁶ C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192

4 Does Art 5 protect digital freedom?

As a preliminary remark, it should be reminded that as our analysis aims to identify in the first place the responsibility of EU law in limiting users' digital freedom, the mere fact that the majority of article 5 is strictly optional would immediately seem of some importance. In this regard it must be observed that the inherent Member State discretion involved in the choosing or not to implement such exceptions and limitations as are provided in the article 5 'shopping-list' signify that to the extent that a Member State does not accommodate exceptions, that responsibility falls to the domestic legislature. The fundamental objective of this study, after all is mainly to separate the harmonised EU law from the Member State law which goes beyond the *de-minimis* threshold. To that end this approach aims to determine to what extent EU law specifically, is the source of a 'threat' to the user's ability to freely consume online information. In this regard, although nearly every Member State has implemented certain exceptions, e.g. the private copying provision of 5(2)(b), and although that provision⁸⁷ in theory⁸⁸ is to be interpreted uniformly across the EU, there is importance to the fact that the EU legislature did not obligate any particular Member State to implement that provision. In the same way as Member States must be considered responsible for 'neglecting' digital freedom by not transposing article 5 provisions, they must also logically be 'given credit' when having made the choice to confer such freedom. In addition, as content exploitation moves towards streaming, the relevance of the private copying exception may diminish.⁸⁹ Conversely our efforts are best expended towards inquiry into the mandatory aspects of the *acquis* and in that respect the one provision within article 5, namely 5(1), which is mandatory for all Member States.⁹⁰ In this respect the present step of our inquiry is to establish whether the provision which explicitly accounts for restriction of rightholders' supremacy actually carries any weight in the context of digital freedom.

4.1 The “double standard” of EU exceptions and limitations – article 5(5) Infosoc Directive

In assessing whether any provision of article 5 Infosoc is capable of defending the interests of our user, i.e. 'protecting digital freedom', a general observation regarding the exceptions and limitations regime

⁸⁷ By the vast majority of Member States which have indeed transposed it.

⁸⁸ Notably however, the Member States retain discretion as to how 'fair remuneration' for the private copies is to be managed.

⁸⁹ Boulanger J et al [2014] *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU - Analysis of specific policy options*, page 86

⁹⁰ That being said, as interpretation of the transposed exceptions and limitations, including the optional ones, is to be conducted uniformly, a separate study would have to be made with regard to the limitation of Member States' ability to interpret *inter alia* 5(2)(b) in an expansive manner, so as to investigate its potential ability to protect digital freedom *in lieu* of, or in synch with the omnipresent fundamental rights framework.

of the EU *acquis* must be made. Namely, that not only must an instance of unauthorised reproduction or communication be amongst the certified acts within the article 5 ‘shopping-list’, but each separate instance must individually fulfil the criteria of article 5(5) Infosoc:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”⁹¹

It thus falls to the national legislatures to implement the exceptions from paragraphs 5(1)-5(4) in a manner which fulfils these criteria, and subsequently to the judiciary to apply the same criteria again, to a given case which is purporting to be exempt. The original three-step test which article 5(5) Infosoc incorporates, comes from the Berne Convention’s article 9(2)⁹² and TRIPS article 13.⁹³ Yet these treaties do not contemplate the *double execution* of the test. The academic consensus is that the EU regime of exceptions and limitations is thus more limited than the draftspersons of the international treaties contemplated.⁹⁴ The result as our starting point is the opposite of an open-ended fair-use system. Not only must an EU copyright exception be classified as one amongst an exhaustive list of purposes, but it must also be qualified in each case by the omnipresent three-step test under article 5(5). From our user’s point of view, this starting point is not optimal with regard to the goal of securing copyright-exempted benefit from works disseminated online.

4.2 Unlawful reproduction or digital freedom?

Similarly to article 3 and the right to communication, the right to reproduction has recently undergone a significant expansion of scope, but not by virtue of article 2 which is the proper domain of the reproduction right. Rather, the expansion has occurred throughout a series of cases clarifying the applicability of article 5(1)(b), which in turn exempts certain acts from article 2.⁹⁵ There has never as a matter of EU law been any legal scope for users to reproduce online information indiscriminately. To the extent that unauthorised copying in the form of downloads has occurred, the only obstacle to users being charged with copyright infringement has been the practicalities of non-harmonised user enforcement.

⁹¹ Article 5(5) Infosoc Directive a.k.a. “The three-step test”

⁹² Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971 828 U.N.T.S. 221, art 9(2)

⁹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 1869 U.N.T.S. 299, art 13

⁹⁴ Geiger C [2006] *The private copy exception, an area of freedom (temporarily) preserved in the digital environment IIC - international review of intellectual property and competition law* 37(1), page 80

⁹⁵ Article 5(1)(a) being concerned strictly with technical reproductions conducted as part of transmission processes serves to limit intermediaries liability and therefore does not apply to users’ consumption of information directly.

(See, **Part 5** below) However, the obligatory 5(1)(b) provision had on EU level, for some time appeared capable of justifying any reproduction as long as it were transient in nature. By its wording article 5(1)(b) refers to the exemption of a *lawful* use, being clarified by recital 33 as a use which is either authorised or not restricted by law. The circular logic does not make it inherently easy to interpret⁹⁶, but surprisingly enough after *FAPL*⁹⁷ it appeared that users accessing and consuming information displayed on a screen actually qualified as lawful. In this regard it is observed that the consumption of which our user holds a great interest does not necessitate the making of a permanent copy on e.g. a computer hard drive. Any information that merely appears on a user's screen, for example during an audio-visual stream from an internet web-page, may be equally capable of satisfying the user's needs as a file copied onto and replayed from the user's own storage device. Indeed in recent years both authorised and non-authorised streaming services have come to displace the role previously executed by permanent media storage. In legal terms however there remained a technical disparity. It was only in *Filmspeler* that these disparate modes of information consumption were legally approximated within the *acquis*.

From a rightholder perspective the situation where 5(1) encapsulated transient on-screen reproductions has seemed an unfortunate lacuna, and undue abuse of a provision intended in reality to exempt intermediaries from liability for unknowingly relaying data.⁹⁸ Recital 33 Infosoc with regard to the transient copy exception reads; "(...)carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made." And indeed it is arguable that the way 5(1) had developed up until the *Filmspeler* case did not reflect this legislative intent. Nevertheless, as the cases preceding *Filmspeler* demonstrate, there appeared to be judicial reticence to the idea of harmonising the liability of information recipients.

4.3 Creating a lacuna? – *FAPL* to *PRC*

A variety of issues were on the table in the seminal *FAPL* case of 2011, one of them being the transient copy materialising in the cache and on a screen during (satellite) transmission of copyright content. The Court held:

“Acts of reproduction such as those at issue in Case C-403/08, which are performed within the memory

⁹⁶ Mazziotti G [2008] *EU Digital Copyright Law and the End-User* [Springer], page 64

⁹⁷ Joined cases C-403/08 C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631 “*FAPL*”

⁹⁸ Thereby mirroring art 14 ECD and the no-general obligation to monitor.

of a satellite decoder and on a television screen, fulfil the conditions laid down in Article 5(1) of Directive 2001/29 and may therefore be carried out without the authorisation of the rightholders concerned.”⁹⁹

This was in contradiction to Advocate General Kokott’s Opinion.¹⁰⁰ She had suggested on the contrary that the value of a reproduction was dependent on its *exploitation*¹⁰¹, and that the transient copy in the decoder had to be separated from that on the screen for the purpose of assessment of its independent economic significance. Consequently transient copies created on a screen did have independent economic significance within the meaning of Article 5(1). This contention would if followed, have at an early stage stanching the user’s apparent ability to rely on 5(1) to avoid liability for accessing information. But the Court did not follow the AG’s Opinion, holding instead that the economic significance of the transient screen copy had to go beyond the value derived from mere display.¹⁰² Resultantly the scope of 5(1) including 5(1)(b) which stipulates a lawful use, seemed quite broad if yet unclear.

4.4 The legality of internet browsing

In June 2014 the *PRC*¹⁰³ case referred from the UK was handed down by the CJEU. It concerned the copy and display of newspaper extracts, similarly to the subject matter at issue in the seminal *Infopaq* case.¹⁰⁴ Whereas the need for an end-user license if copyright work extracts were printed, downloaded or emailed, had been ascertained by *Infopaq*, the legal status of the mere ‘on-screen’ reproductions was now explicitly addressed. In this context it seemed that ‘criminalising’ mere web-browsing was a small step away.¹⁰⁵ The Court however, chose to follow *FAPL*, holding that:

“...the viewing of websites by means of the technological process at issue represents a *normal exploitation* of the works which makes it possible for internet users to avail themselves of the communication to the public made by the publisher of the website concerned. Given that the creation of

⁹⁹ Ibid, paras 171-178 and operative parts of judgment, point 6

¹⁰⁰ Joined cases C-403/08 C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] Opinion of Advocate General Kokott ECLI:EU:C:2011:43, paras 91-96

¹⁰¹ We will equate AG Kokott's terminology of 'exploitation' to ours of 'consumption.'

¹⁰² *FAPL*, para 175

¹⁰³ C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195 “*PRC*”

¹⁰⁴ C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465

¹⁰⁵ Allgrove B & Silverman I [2014] *The CJEU "saves the internet" with its ruling in the Meltwater case*. E.C.L. Rep. 2014, 14(3), page 6

James S [2014] *And breathe... you can continue browsing the internet, as the CJEU hands down its decision in PRCA v NLA (Meltwater)* C.T.L.R. 2014, 20(6), page 169

the copies in question forms part of such viewing, it cannot operate to the detriment of such an exploitation of the works.”¹⁰⁶

By this reasoning the question of end-user liability was largely evaded. It was merely assumed that the communication conducted had itself been authorised, which limited the ratio of the case. The Court suggested that with a view to the objective of upholding a high level of copyright protection, as transient website reproductions were contingent on communication, and thereby safeguarded by article 3(1) Infosoc, user liability needed not be contemplated.¹⁰⁷ By extension the Court seemed to hope that if all infringements could be stopped at the stage of unauthorised communication, the availability of unlawful information would therefore cease and end-user liability be rendered irrelevant. Taking it one step further, by avoiding an extensive examination of the question of end-user liability in the context of articles 5(1)(b) and 5(5), the Court in *FAPL* and *PRC* seem to condone users’ access to information, safeguarding, for the time being, their digital freedom. Use that was transient in nature, as it was not considered to accompany the requisite economic significance, was ostensibly *lawful*, regardless of the source where it was accessed.

4.5 The pendulum swings back - *ACI Adam* and *Filmspeler*

Whereas it may have seemed that the CJEU had users’ backs, and intended to preserve their right to take part in online information, this had apparently been but a temporary solution. In fact, the question of unlawfully sourced copyright work had been considered in *ACI Adam*¹⁰⁸ only a few weeks before *PRC*, and the demurring stance of deferring questions of liability to article 3(1) was arguably not compatible with the Courts earlier judgment. In April of 2014 the Court had held that with regard to private copying under 5(2)(b), compatible national law must in fact distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful. Different approaches to the ratio of article 5(2)(b) *contra* 5(1)(b) would have translated into an interesting discrepant legal treatment depending on user behaviour. More specifically, how the user consumed information online. A user which consumed online information by downloading it from an unauthorised source, it was established, could not benefit from an exception based on 5(2)(b).¹⁰⁹ However, a user which consumed online information without authorisation directly at a web-page, was in the ambiguous

¹⁰⁶ *PRC*, para 61

¹⁰⁷ *Ibid*, para 57

¹⁰⁸ C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandelingen ThuisKopie vergoeding* [2014] ECLI:EU:C:2014:254 “*ACI Adam*”

¹⁰⁹ *Ibid*, paras 31-35

position of seemingly benefitting from the article 5(1)(b) exception. This inconsistency, whereas surely applauded by our fictional user, had been identified years before, when *PRC* was at the English High Court. Proudman J had said:

“The exception cannot have been intended to legitimise all copies made in the course of browsing or users would be permitted to watch pirated films and listen to pirated music.”¹¹⁰

Whereas this may have seemed an outrageous supposition by Proudman J, the objective of this thesis is not to evaluate the utility of the law *per se*, but merely to investigate how the CJEU has harmonised the factors underpinning the digital freedom over time. In this regard however, commentators may have been inclined to guess that the Court would eventually approximate 5(1) to the stance taken in *ACI Adam*. That eventually happened, in the *Filmspelers* case of April 2017.¹¹¹ Coinciding with seminal judgments on article 3(1), the Court finalised a reconciliation between its earlier cases on 5(1)(b). The context of the proceedings concerned the sale of a media-player capable of directing users to websites which provided streaming services. The seller, one Mr Wullems, promised his customers that streaming, unlike P2P downloading was actually legal. Notwithstanding Dutch national law, in light of CJEU case law it was difficult to prove him wrong as a matter of the harmonised *acquis*. Stichting Brein, the Dutch copyright association nevertheless requested that he stop selling the media players and send a letter to each of his customers, explaining that he had been wrong and that streaming, in fact, is illegal. The Hoge Raad submitted the case to the CJEU, which was at last required to answer the question it had avoided in *FAPL* and *PRC*.

The Court ruled that not only was the supply of the media players itself an unauthorised communication under article 3(1), but the recipients of unlawful streams by means of such media players, did not conduct a *lawful* use in the sense of article 5(1)(b).¹¹² Streaming from an unlawful source was, in the sense of *ACI Adam*, different from viewing content which had been communicated with authorisation. Users may therefore not benefit from the transient copy exception, meaning that they do infringe the reproduction right under article 2 Infosoc by viewing streams from Wullems’ media player.

¹¹⁰ *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2010] EWHC 3099 (Ch); [2011] E.C.D.R. 10 (Ch), para 110

¹¹¹ *C-527/15 Stichting Brein v Jack Frederik Wullems* [2017] ECLI:EU:C:2017:300 “*Filmspelers*”

¹¹² *Ibid*, para 70

4.6 What does it mean if users cannot count on art 5?

It should be noted that although enforcement against end-users is sometimes enabled by ISP compliance in supplying its customers' details for the purpose of copyright enforcement (see *infra* **Part 5**) the gradual increase in scope for users' liability, in the wake of the narrow scope of article 5, does not necessarily signal a policy shift towards enforcement against end-users directly. In July 2014, the Commission communicated its Action Plan 'Towards a renewed consensus on the enforcement of Intellectual Property Rights'.¹¹³ In the plan, the Commission describes a re-orientation of enforcement policy towards a 'follow the money approach' that focuses on commercial scale infringers. As we saw in **Part 3** the CJEU also seems to follow this strategy. Vitally however, the liability of users themselves often needs to be ascertained for the purpose of intermediary injunctions. The individual user infringement is thus part of a larger infringing whole, which it is more efficacious to stop at the source and the main hubs that enable the infringements. Harmonisation of liability, including by means of restricting article 5(1)(b), which seems to compromise a lot of users, thus paves the way for enforcement, as we shall consider in **Part 5**. Worth noting is also the narrow ratio of *Filmspeler*, which limits the non-applicability of 5(1)(b) to the exact circumstances of the case and the media players at issue, rather than declare all transient copies unlawful. This restraint may indicate subsisting reticence towards the idea of a broad catch-all for information recipients.

¹¹³ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee [2014] *Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan* COM(2014) 392 final

5 Does ‘striking a fair balance’ threaten or protect digital freedom?

Under the Lisbon treaty the EU bound itself to adhere to the Charter of Fundamental rights, largely mirroring the European Convention of Human Rights.¹¹⁴ The CJEU was not slow to find application of its principles to the context of copyright enforcement. According to Riordan this trend is a characteristic of the fourth phase of copyright in the information society, namely its ‘balancing.’¹¹⁵ Whereas the first part of the 21st century saw rightholders reacting to the exponential increase in infringements of their rights and the resultant expansion of copyright protection, the latter phase represents a turning point whereby legal developments recognise the need to set limits, safeguarding the interests of other parties. In this regard the Court has ruled particularly on the compatibility with EU law (after incorporation of the fundamental rights principles) of copyright enforcement paradigms. Under EU law these are governed by article 8(3) Infosoc, and articles 9 and 11 of the Enforcement Directive. As the directives leave substantial discretion as to the functioning of copyright enforcement their implementation has been described as a ‘mixed bag’.¹¹⁶ This has meant disparate approaches to liability assessments and fragmented views on extending responsibility for infringements.¹¹⁷ Member States have adopted various approaches to intermediary responsibility¹¹⁸ and the hierarchy of fundamental rights, largely operating with liberty to assess for themselves the applicability of the various methods of copyright enforcement. Users and their digital freedom have thus potentially been ‘protected’ from liability by the residual discretion with national courts in weighing copyright protection against e.g. privacy laws. Meanwhile the CJEU has not played an entirely neutral role, but as we shall see have increasingly interfered with this previously unharmonised legal area. We will examine user-targeting by disclosure of personal information along with domain name blocking, as these are two main strands of global copyright enforcement strategies applied within the EU. In the terminology of fundamental rights the former method conflicts with users’ right to privacy, and the latter with users’ right to information. In the terminology of this thesis, the protection of these rights is tangential to the protection of digital freedom.

Acts of reproduction or communication which although technically infringing copyright cannot be effectively prevented, allow availability of information, and users’ ability to consume that information

¹¹⁴ Consolidated version of the Treaty on European Union - 13 December 2007 [26/10/2012] OJ C 326/19, art 6(3)

¹¹⁵ Riordan [2016], page 5

¹¹⁶ Shapiro T [2011] *Directive 2001/29/EC on copyright in the information society*, in Lindner B & Shapiro T(ed.) *Copyright in the Information Society* [Edward Elgar], page 54

¹¹⁷ Depreeuw S & Hubin J-B [2014] *Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions*, page 20

¹¹⁸ European Observatory on Counterfeiting and Piracy (no publication date) *Injunctions in Intellectual Property Rights* [Studies of the Legal Sub-group], page 5

to subsist. The following chapter should therefore be understood in the context of the former two chapters, which relate to the harmonisation of the constitution of infringements themselves. It has been observed in previous chapters that digital freedom appears increasingly threatened by the judicial harmonisation of liability; by the expansive interpretation of the infringing acts themselves as well as the non-existence of a flexible system for exceptions and limitations. It therefore becomes apt to ask whether the last potential line of defence for our users; their newly asserted fundamental rights, may yet leave scope for Member States to preserve users' ability to freely consume online information. Or if alternatively, the fair balance framework is yet another device acting to further harmonise the *acquis* at the expense of digital freedom.

5.1.1 The disclosure-remedy - General problems with user targeting

As mentioned previously there are cases on Member State level concerning rightholders versus individuals who have been found to upload and/or download files via P2P networks, but such legal action from the rightholder is not a prevalent practice in all parts of the EU. There are several documented reasons for this:

- 1) Firstly, it may require an intermediary internet service provider, or internet access provider (ISP) to divulge the identity of the individual infringer, something which ISP often, but not always, have been reluctant to do.¹¹⁹ The *acquis* makes it clear that as a rule EU law does not require Member States to force intermediaries to be complicit in this regard. The protection of personal data and other fundamental rights supporting digital freedom are valued higher than the protection of copyright in several Member States. ISP reluctance to inform on its own customers where domestic legislation does not force them to, potentially makes it problematic to hold users liable for their infringements.
- 2) Secondly, targeting individual users among thousands is often not seen as efficacious. As Kreimer put it, in economic terms: *With a constant marginal cost of prosecution, an increase in the number of speakers who must be sanctioned raises the cost of suppression, at least proportionally; given a constant enforcement budget, this increase in speakers decreases the probability of successful suppression.*¹²⁰ By extension, if the same 'enforcement budget' can effect a greater decrease by e.g. redirecting efforts to instead effect a website block, that method

¹¹⁹ Breakdown of 'costs and benefits' of disclosure: Riordan [2016], page 76

¹²⁰ Kreimer S [2006] *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link* U-Penn Faculty Scholarship. Paper 127.

then becomes the economically more viable alternative.

- 3) Thirdly, it has been suggested that avoiding court action against individuals is a strategy that pre-empts making ‘martyrs’ of infringers and the resulting widespread disapproval of rightholder industries which might in turn prompt legislative reform.¹²¹ Similarly, in some jurisdictions a majority of cases are settled out of Court, which according to Cohen, is an aspect of that same strategy.¹²² A much publicised case demonstrably has the effect of causing revival of the copyright vs. fundamental rights debate, and conceivably to the detriment of rightholders.

These factors cumulatively weigh against enforcement vs. the individual. Notably, this affects both the legislative level, and in Member State where legislation nevertheless applies, still reduces the impetus for right-holders to select the strategy. Consequently, the user may often ‘get away’ with what she does online, even if it involves acts which strictly contravene copyright, and in particular if, as with our fictional user, the conduct is limited to accessing information, as opposed to unlawfully originating it.

5.1.2 Blocking remedies, and the problem of ‘over-blocking’

The blocking order is one of the more common intermediary injunctions. It is essentially an order that requires the implementation of technical measures disabling access to a specified internet location, which users of the intermediary service access to infringe copyright. As such it is directed towards an internet access provider¹²³, as these exercise the network control within the target jurisdiction. Targeting several ISP within a jurisdiction simultaneously may enhance the effect of the order. Although blocking injunctions have been available in some Member States for several years, in other Member States they are more recent and have been received with controversy. The UK represents the former, with a large number (more than 25) of applications having been made against the six largest ISP, to the effect that in 2016 approximately 120 websites (and thereby thousands of URL to mirror sites and proxy servers) were blocked from access by the customers of those ISP.¹²⁴ Arnold J who has approved several of these orders in the UK estimated in *FAPL* that between the six they account for 94% of the UK internet access service market share.¹²⁵ The main concern addressed with the blocking remedy, judging from the CJEU cases considered below, is ‘over-blocking.’ The technical measure adopted to effect the blocking order will typically also cause a cessation of ‘lawful’ access along with the blocking of unlawful access. This side-

¹²¹ Cohen J [2005] *The place of the user in copyright law* 74 Fordham L. Rev, page 352

¹²² Ibid.

¹²³ Denoted ‘ISP’ throughout the thesis.

¹²⁴ Riordan [2016], p 461

¹²⁵ *FAPL v BSKyB* [2013] EWHC 2058, para 1

effect has been addressed *inter alia* by Arnold J, who has not omitted to take it into consideration in his proportionality assessments of individual blocking orders.¹²⁶ The percentage of lawful blocked content as a percentage figure will vary but is very likely to be significantly lesser than the percentage of infringing material affected by a successful blocking order. This is the case particularly because websites targeted by blocking orders usually have an overtly anti-copyright purpose.¹²⁷ The marketing of such sites, much like in *Filmspeler*, or *Ziggo* may clarify this illegitimate intent, along with the lack of authentic complaint-and-redress mechanisms.¹²⁸ By contrast internet services which go to greater length to accommodate complaints by rightholders have not yet been successfully targeted by blocking orders in the EU. Critics of blocking orders however are likely to argue that they are always disproportionate¹²⁹, perhaps arguing that blocking any non-infringing content *per se* must be considered disproportional. Intrinsic to the conflict is the disagreement about the relationship between fundamental rights and the lack of agreement as to their hierarchy in the information society.¹³⁰

5.1.3 The *soft* or *hard* law of proportionality and ‘striking the balance’

When employing either enforcement measure, whether an injunction ordering ISP to disclose users’ private information for the purpose of copyright litigation, or effecting a website-block, the domestic court retains a degree of discretion by the device of the fundamental rights framework. An enforcement sanction may not be disproportional with regard to the way it affects the rights of all the parties to the sanction. In a manner of speaking it is therefore proportionality which has become the ultimate arbiter of residual domestic discretion within EU copyright law, embodying at once a dynamic justification for taking almost any measure given the circumstances, but also figuring as a constant guarantee of the public interest. It is in other words as ambiguous as can be, with the result that as long as a case boils down to undefined proportionality, no outcome can be completely ruled out. In a word it is ‘soft law’. Moreover it may suggest a reluctance on the part of EU institutions to bear the responsibility of itself determining proportionality in a substantive way. This is understandable given the contentious nature of balancing the rights in question, and in particular the often hostile public reactions both to online restrictions affecting users, and drastic measures traceable to the EU institutions. However, as will be shown below, the Court has since *Promusicae* gradually instilled the balancing-analysis with certain substantive limits,

¹²⁶ Ibid, para 56

¹²⁷ Riordan [2016] 506-507

¹²⁸ *FAPL v BSKyB*, para 22

¹²⁹ See for example: *Giggs (previously known as CTB) v News Group Newspapers Ltd* re: public resentment for ‘censorship’

¹³⁰ Giovanella F [2015] *Effects of Culture on Judicial Decisions: Personal Data Protection vs. Copyright Enforcement* in Caso R & Giovanella F (ed.) [2015] *Balancing Copyright Law in the Digital Age: Comparative Perspectives* [Springer] page 86

moving the *acquis* towards a semblance of harmonisation by way of the fundamental rights framework and nudging, rather than forcibly compelling, Member States towards copyright enforcement methods. In addition, failure to at least consider one way for rightholders to achieve a remedy, as will be seen in the most recent cases, has come to constitute a *hard-line*, even within the *soft law*.

5.2 Introducing: fundamental rights

In *Promusicae*¹³¹, delivered in 2008, a request for preliminary ruling had come from Spain. The claimant had sought to order the disclosure of the identities of subscribers to the services of Telefonica, the largest ISP in that Member State. It was alleged that some of Telefonica's users had engaged in P2P music downloads via the KaZaA platform. The rightholder to the shared music files required the disclosure of user identities by Telefonica, to proceed with user-directed infringement proceedings. However Spanish national law seemingly reserved such disclosure of personal data to more serious offences, relating to crimes or matters of national security. The Spanish court therefore asked the CJEU whether EU law imposed upon national law a duty to contain facilities for disclosure of user information also for the specific purpose of bringing copyright proceedings.

It immediately became clear that there was opposition to this idea. Due to the way the question was worded, a positive 'yes' from the Court and a corresponding mandatory interpretation of EU law which would impose the disclosure of user identities would conceivably set the standard and direction of copyright enforcement across the EU. This would have been to the benefit of right-holders Union-wide, but likely cause serious friction in Member States where personal privacy traditionally tips the scales against protection of intellectual property. It would also have represented an unwelcome interference in Member States where generally the underlying legal philosophy informing enforcement policy instead promoted other means of upholding copyright law. Italy arguably being one such Member State, where the integrity of personal data is historically valued highly, attempted to submit that the question be regarded inadmissible¹³². The Court took note of the risk that right-holders may seek to induce it to propel legal developments in their favour, but did not accept the contention that the question was inadmissible. It proceeded to analyse the case, and would thereby introduce into the area of CJEU jurisprudence the central role of the fundamental rights framework.

Promusicae had sought to argue that its fundamental rights, including the right to property and the right to an effective remedy were breached by Telefonica's lack of collaboration, and Spanish law

¹³¹ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54 "*Promusicae*"

¹³² *Ibid*, para 35

failing to force such collaboration. The CJEU answered that whereas these were indeed fundamental rights, so were the right to protection of personal data and private life.¹³³ Member States, in each case, had to discharge the complicated duty of reconciling these conflicting rights. The Court held that it was up to the Member State legislatures and judiciaries to deal with a new and powerful contradiction. Namely, to take care to rely on an interpretation of Community law which allowed a fair balance to be struck between the various fundamental rights protected by the Community legal order.¹³⁴

To that end, the Court set out to examine all the EU directives pertaining to copyright protection, e-commerce, privacy and enforcement, which had been raised for scrutiny. Claiming to place emphasis on the ‘wording’ of the relevant provisions of each directive¹³⁵ the Court arrived at the conclusion that the possibility for Member States of laying down an obligation to disclose personal data in the context of civil proceedings was not precluded.¹³⁶ However, neither could the directives read together be interpreted as compelling the Member States to lay down such an obligation.¹³⁷ EU law, as it were, lay somewhere in between.

5.2.1 A tripartite dynamic of fundamental rights

Promusicae appeared to show that the CJEU could not easily be induced to take on the role of hastily imposing drastic harmonising measures greatly in favour of rightholders.¹³⁸ Whereas protection of intellectual property was an objective of EU law; the Court recognised that there was now also EU law safeguarding a great many other rights, to consider. It is probably safe to say that not all Member States would have agreed that obligatory disclosure of internet users' identities and the conjoined encroachment on privacy were proportional to the ends of copyright enforcement, nor the best way to take care of the supposed widespread problem of copyright infringement. Neither would Union-wide application of such procedure eliminate the problems associated with end-user enforcement. Importantly these assessments were, for the time being, deemed to be for Member State institutions to make.

Being the first case of a new paradigm, *Promusicae* introduced the model which has been described as a ‘tripartite dynamic’ between right-holders, intermediaries and users.¹³⁹ In this context all

¹³³ Ibid, para 63

¹³⁴ Ibid, para 68

¹³⁵ Perhaps so as to dispel the notion that the Court was exercising considerable discretion of its own, but was merely adhering to unambiguous legislation.

¹³⁶ *Promusicae*, para 54

¹³⁷ Ibid, paras 55, 58, 59, 60

¹³⁸ Academic commentary does not interpret the judgment homogeneously; some have accredited the case with demonstrating that in EU law personal privacy normatively trumps IPR. See: Giovanella F [2015] This would suggest *inter alia* that the Nordic countries are ‘out of synch’ with Giovanella’s purported *EU judicial sentiment*.

¹³⁹ Angelopoulos C & Smet S [2016] *Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability* J.M.L. 2016, 8(2), 266-301, page 6

three parties are in principle always vested with protection for their respective fundamental rights. It is a matter for the legal institutions to strike a balance between these non-absolutes and in so doing, taking account of the principle of proportionality. Evidently, the CJEU in *Promusicae* did not provide much in the way of substantive clues as to an EU wide proportionality baseline, meaning that wide, indeed practically unlimited discretion seemed originally retained on a Member State level.

From a user perspective it nevertheless emerged from *Promusicae* that Member States which were inclined to direct enforcement measures towards users were seemingly at liberty to do so, and to that end free to assign a legal duty on internet access providers to disclose these users' personal information.¹⁴⁰ The only caveat was that this process had to be carried out with due consideration given to proportionality and the fundamental rights of all the parties involved. A court which obediently brought up users' fundamental rights for consideration could however most likely be said to have discharged this duty, regardless of the conclusion at which the court arrived. As there was no substantive guidance from the CJEU as to the concrete limits of proportionality and how to strike a balance it is arguable that there was by virtue of *Promusicae* alone, little hard EU law affecting digital freedom one way or the other. Commentators thus dubbed fundamental rights as being merely 'cosmetic'.¹⁴¹ Although this may still largely hold true, *Promusicae* was only the beginning. The Court would increasingly start to interfere with Member State discretion by contributing more substantive rulings in its subsequent cases.¹⁴²

5.3 A rare sighting of the maximum threshold

In *Scarlet Extended*¹⁴³ the Belgian rights management company SABAM had brought proceedings in 2004 against the internet access provider Scarlet, alleging that its users had downloaded music from SABAM's catalogue via P2P.¹⁴⁴ This led SABAM to set out on a long but fruitless quest for a wide-reaching and vaguely defined blocking order, demanding in effect that Scarlet somehow filter out all file transfers over its network that were infringing SABAM's rights. The proposed measure would be pre-emptive and endure over time. The Brussels first instance court agreed that SABAM's rights had been infringed and appointed an expert to examine the feasibility of introducing something akin to the requested filtering mechanism. The investigation into the relevant filtering technology apparently took

¹⁴⁰ Although in *Bonnier* this would itself be questioned. See *Infra*

¹⁴¹ Griffiths [2013] page 76

¹⁴² Angelopoulos C & Smet S [2016], page 6

¹⁴³ Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771 "Scarlet"

¹⁴⁴ *Ibid*, para 17

more than two years, culminating in the expert's report declaring that there were major obstacles to the implementation of the proposed anti-piracy filter, but that its functioning could not be completely ruled out. This was good enough for the first instance court, which delivered the order in 2007 that Scarlet 'bring to an end the copyright infringements established in the judgment of 26 November 2004 by making it impossible for its customers to send or receive in any way files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.'¹⁴⁵ Unsurprisingly, Scarlet appealed the decision. Notwithstanding all of the technical problems which made it doubtful whether it was at all possible to install and maintain the elusive filter, the appellate court in Brussels also had doubts as to the compatibility of the order with EU law. Notably, Art. 15 E-commerce Directive (ECD) precluded imposing upon intermediaries a general obligation to monitor content, and the filtering order also seemingly raised substantial issues *inter alia* with users' fundamental right to privacy. By this time *Promusicae* had been handed down, and the EU Charter of Fundamental Rights had become established as a central factor to EU copyright jurisprudence.¹⁴⁶ The appellate court stayed proceedings and referred its concerns to the CJEU.

Much like in *Promusicae* the Court was probed as to the cumulative meaning of all applicable EU directives: The ECD, Infosoc, the Enforcement Directive, as well as the directives concerning the processing of personal data and the protection of privacy. Following its own stipulation from *Promusicae* the Court again declared that these directives were to be read together and construed in accordance with the fundamental rights of the *triad* of parties involved. Although the applicable enforcement measures as envisioned by the relevant directives were to be determined by virtue of national law, the Court nevertheless went on to test the compatibility of the contested filter with the EU law and fundamental rights principles with which all national law is required to comply. To this end it came up with several objections. Firstly the filter was deemed to amount to general monitoring, contrary to Art. 15 ECD. Secondly it interfered with ISP's fundamental right to conduct a business. Thirdly, and from the perspective of this thesis most importantly, the Court recognised that the filter would have interfered with users' rights to protection of their personal data and their freedom to receive or impart information.¹⁴⁷ The Court held that the stipulated injunction was not up for evaluation on a Member State level, but was precluded as a matter of EU law.

¹⁴⁵ Ibid, para 23

¹⁴⁶ It was now the year 2010. (The CJEU delivered its judgment in November 2011; 7 years after the Brussels first instance court appointed its technical expert.)

¹⁴⁷ Para 50

5.3.1 Reaching beyond the ceiling of compatibility

Whereas *Promusicae* introduced the fair balance test but wholly left Member State institutions to carry it out, in *Scarlet* the CJEU itself determined the outcome of the test and declared a narrow, but hard and final limit thereto. Granted, the contradiction with the no-general-obligation-to-monitor makes it questionable how much of it came down to fundamental rights. And the ratio of that precedent, as represented by the operative part of the *Scarlet* judgment, is limited in a strict sense to the exact circumstances of the case with the five cumulative criteria extensively defining the filter at issue.¹⁴⁸ Despite of this the case is an important landmark of digital freedom in that it represents a case of EU-wide assertion of an upper limit of Member State law with regard to striking a balance between right-holders and users in the clash of fundamental rights. It is also arguable that the case represents the CJEU avouching its role as arbiter of the fair balance, thereby claiming a more central part in shaping uniform copyright enforcement policy across the EU. On the other hand, the alternative would have been to support a non-legislated¹⁴⁹ shift of responsibilities whereby intermediaries such as ISP would suddenly have found themselves burdened by the task of policing copyright, with all of the issues that this entails.¹⁵⁰ This did not however mean that rightholders had lost the battle of attempting to shift enforcement responsibilities over to intermediaries, but merely that this process had to take place, for now, within domestic frames.¹⁵¹

5.3.2 Impact on digital freedom- a symbolic victory for users?

Having already stated that the right to IPR included in the Charter of Fundamental Rights was not inviolable or absolute, the Court in *Scarlet* took it one step further and declared a factual situation albeit defined to specific circumstances, where copyright would have to give way *inter alia* to users' rights. Although the user factor is only one part of the judgment, it is arguable that it represents a unique concession to users, manifesting as it were a concrete limit to rightholders' otherwise ever-expanding claim to right-of-way. Whereas the main focus of the judgment could perhaps be ascribed to the question of intermediary liability, the fact that the Court nevertheless in explicit discourse draws upon the users' rights directly, rather than in the hinterland of the intermediary question, constitutes important precedent. What the case leaves unanswered in this regard particularly, however, is the substantive scope of EU

¹⁴⁸ Meale D [2012] *SABAM v Scarlet: of course blanket filtering of the internet is unlawful, but this isn't the end of the story* E.I.P.R 34(7) 429

¹⁴⁹ And in contravention of the explicit governing legislation at the time.

¹⁵⁰ See: Case C-70/10 *Scarlet Extended v Societe belge des auteurs compositeurs et diteurs (Sabam)* [2010] Opinion of AG Cruz Villalón ECLI:EU:C:2011:255

¹⁵¹ Langwallner D & Kolodzinski K [2013] *Copyright Law and the Internet after SABAM*, 1 Irish Bus. L. Rev. 47 2013-2014, page 53

recognition of users' rights. In this regard 'over-blocking' was the only aspect considered. The Court mentioned that introduction of the filter could lead to the blocking of *lawful communications*.¹⁵² This may occur where automatic filtering fails to account for territorially applicable statutory exceptions and limitations; fails to account for authorised interaction with copyright work, or similarly fails to account for work not being copyright protected to begin with.

More contentiously, if under EU law there can be any scope for including within the sphere of user's fundamental rights the *unauthorised* access to copyright work, is another matter. The question is not touched upon in *Scarlet* whether the right to information is implicitly limited to non-copyright information, or could as a matter of a Member State's own legal philosophy be of greater breadth. If the former were true the CJEU could however in future judgments be about to eradicate the scope for disparity in the underlying justification for copyright, which may currently in theory vary from state to state, and is arguably a political question.

5.4 A second chance to make things right, or wrong - *Bonnier*

After *Promusicae* where the CJEU had arguably waived its opportunity to declare decisively either for or against the disclosure of personal user data as part of copyright enforcement policy an additional opportunity appeared for further clarification or, as it were harmonisation. The facts of the case in *Bonnier*¹⁵³ were largely similar to *Promusicae* but this time the reference for preliminary ruling came from Sweden. The Högsta Domstolen had stayed proceedings regarding the order of an injunction to disclose the name and address of one person alleged to have uploaded 27 audio books. Whereas it seemed redundant to ask the CJEU the exact same question as in *Promusicae*, there was ostensibly a reason to do so as the Court had not mentioned the Data Retention Directive in that case.¹⁵⁴ The national court wished to ascertain whether the stipulated purpose of data retention as described in that directive could align with facilitating IPR protection. If user information despite seemingly collected for one reason could also legitimately be disclosed to third parties for another purpose, namely facilitating copyright enforcement, a potential obstacle in the way of the integrity of online copyright enforcement would seemingly be defeated.

As it turned out the CJEU placed little emphasis on the Data Retention Directive, instead returning

¹⁵² *Scarlet*, para 52

¹⁵³ Case C-461/10 *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219 "*Bonnier*"

¹⁵⁴ Which was, incidentally, declared incompatible with the general principles of fundamental rights and thus invalid, by judgment of the Court in joined Cases C-293/12 *Digital Rights Ireland Ltd* and C-594/12 *Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and others* [2014] ECLI:EU:C:2014:238

to the balance of interests analysis, reiterating the requirements of *Promusicae*, but also going further by effectively placing a *seal of approval* on the method of user data disclosure, as one viable option for the purpose of copyright enforcement. The Court arrived at the conclusion via a series of logical deductions.

Firstly it was recognised that Sweden's applicable legislation presupposed clear evidence of an infringement of an intellectual property right, and that the harm of this fact should subsequently be weighed against the potential nuisance or harm which may follow from disclosure of data to the person affected by it, i.e. the user.¹⁵⁵ This meant in the Court's view that the legislation at issue enabled the domestic authorities to consider on the individual merits of each case, and weighing the conflicting interests at stake, whether it were proportional to impose an order for data disclosure.¹⁵⁶ Consequently, by inherently taking account of proportionality, the legislation at issue did not itself raise issues with fundamental rights, but on the contrary was 'likely in principle' to ensure a fair balance between the protection of intellectual property rights enjoyed by rightholders and the protection of personal data enjoyed by internet subscribers or users.¹⁵⁷ The Court thus held again that the applicable EU directives did not preclude an order for disclosure of personal data; but it also seemed to verify user data-disclosure as *categorically* capable of being a balanced enforcement measure.

5.4.1 Impact on digital freedom- *Fragmentation*?

As becomes apparent upon a reading of Advocate General Jääskinen's Opinion¹⁵⁸, the fact was that at the time there was no EU law relating specifically to the retention of data for the purpose of identifying copyright infringers, and capable of counteracting the general protection for privacy enjoyed by internet users as codified by the e-privacy directive.¹⁵⁹ This indicates an omission on the part of the legislators which could either be interpreted as deliberate or erroneous. With a view to upholding the integrity of the copyright regime, this obviously being a priority of Union legislation, a deliberate omission in this regard would have seemed based on an ideology that user enforcement is not an appropriate method thereto. On the other hand, it is apparent from *Promusicae* onwards through *Bonnier* that EU law does not rule out the user directed enforcement method, but rather retains a degree of agnosticism to it. Indeed the ratio of the *Bonnier* judgment is a mere clarification that user directed enforcement indeed constitutes one of Member States' available options in copyright enforcement. Yet it presupposes national legislation

¹⁵⁵ Or for some other conflicting interest, presumably referring to the intermediary. *Bonnier*, para 58

¹⁵⁶ *Ibid*, para 59

¹⁵⁷ *Ibid*, para 60

¹⁵⁸ C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2011] Opinion of Advocate General Jääskinen ECLI:EU:C:2011:753

¹⁵⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [31.7.2002] OJ 2002 L 201/37

to that end, and whilst giving its approval, the Court does not force Member States to opt for it. Moreover, the case, on paper, emphasises the importance of paying due consideration to striking a fair balance, suggesting that even in jurisdictions which choose to strike at end users, a cautionary attitude should be respected.

5.5 Endorsing blocking - *UPC Telekabel Wien*

Our second major limb of copyright enforcement, website blocking, had been off to a rough start. The Court in *Scarlet* had rejected ‘filtering’ and so far there was little EU precedent other than to go after users directly. *UPC*¹⁶⁰ came to change that. The case referred from Austria concerned the blocking of an infringing website, by an internet access provider whose customers it was alleged used its services to access the infringing website. The website at issue allowed internet users to stream and download audio-visual work without authorisation from the rightholders. The ISP, UPC Telekabel, was at first instance issued with an injunction to the effect that it could no longer permit its customers to access the site at issue. In addition, this order was to be effected specifically through domain name blocking and IP address blocking. At first appeal the order was partially reversed so as to allow a choice in how the desired result of the injunction be achieved. UPC Telekabel appealed for a second time, arguing that it could not at all be accountable for the infringements carried out by users via the infringing website, as it neither had a contractual relationship with that website, and nor was it established that its customers had actually used its services to infringe copyright. It was additionally argued that the measures requested by the blocking order could in any event be circumvented, and were costly to implement.¹⁶¹ The Austrian Oberster Gerichtshof stayed proceedings and submitted several queries to the CJEU. For the sake of convenience the referred questions have been paraphrased:

- Could the infringing website be said *to use the services* of UPC Telekabel?
 - If not: Did the exceptions to the reproduction right under 5(1) and 5(2)(b) Infosoc, only apply if the original source were authorised?
- Would it be compatible with EU law to issue an injunction worded in general terms; given that the website targeted by the injunction were containing exclusively or predominantly unauthorised reproductions of copyright work, and if so could the ISP discharge the injunction by taking all reasonable measures?

¹⁶⁰ Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192 “*UPC*”

¹⁶¹ *Ibid*, para 16

- If not: Would it be compatible with EU law, and considered to strike a fair balance, to issue an injunction worded in specific terms, even if the specified measures were costly, and could be circumvented?

To the first question the Court answered a resounding yes, and demonstrated that consistently with the case law surrounding the doctrine of making available and the general objective of pursuing not only cessation of infringements, but also their prevention, it was not necessary to prove that the ISP's customers had actually accessed the website targeted by the injunction. In this sense ISP could not be excluded from intermediary status within the meaning of the applicable directives, nor the resultant potential liability which may accrue to intermediary parties. Neither was it therefore necessary to demonstrate any kind of relationship between an infringing website and the provider of internet access. It was sufficient for the establishment of the tortious chain that the party targeted by the injunction was an intermediary, and that its services could theoretically be used to commit the infringement.¹⁶² This being so, the Court determined that it did not need to answer the second question.¹⁶³

By the third question the Court faced the important task of ruling on the compatibility with EU law of website blocking orders in general. Undoubtedly this were to set an important precedent, as such orders represent one of the major global strategies of copyright enforcement. It was hardly conceivable that the CJEU would preclude all application of blocking orders as such.¹⁶⁴ Rather it was important that the Court address the scope of such applications within the fundamental rights framework. The Court set about addressing all the main points to be considered, essentially following the tripartite structure of analysis from *Promusicae*:

Firstly the Court emphasised that the interests of rightholders, i.e. the high level of protection for intellectual property and copyright in particular be safeguarded in accordance with the main purpose of Infosoc. To that end the starting point of the harmonised *acquis* with regard to intermediary liability, although delegating the details of its functioning, is the duty on Member States to implement a system for such liability. The Court then reiterated that although national discretion is allocated towards implementation of this objective, such discretion shall be limited by the EU law requirement for compliance with the fundamental rights of both users and intermediaries. With respect to intermediaries' rights the Court iterated again, that these comprise the right to conduct a business. This in turn meant

¹⁶² Paras 23-40

¹⁶³ Unfortunately, as the questions were pertinent independent of the main proceedings, and would now have to be deferred to later cases. See: *Filmspeler* (*supra*).

¹⁶⁴ Indeed this would leave us guessing what were at all left within the scope of art 8(3) Infosoc and art 11 Enforcement Directive.

that the measures demanded to be taken by intermediaries in the blocking injunction context shall be limited to what is reasonable, as opposed to guaranteeing full prevention of infringements, or incurring unjustifiably excessive costs. The objective, as it were, being to ‘seriously discourage’ copyright infringement. With respect to users’ rights the Court illustrated seemingly only a concern for the risk of over-blocking; manifesting in the requirement that injunctions compatible with EU law not unnecessarily deprive internet users of the possibility of accessing *lawfully* available information. Nothing was said of users’ rights beyond their interest in lawful access. We are again reminded of the lack of clarity surrounding the concept of ‘lawful’ in the context of 5(1)(b).¹⁶⁵

All in all, the Court confirmed the applicability within the Union of website blocking orders as one of the available enforcement methods at the disposal of Member State legislatures and judiciaries. It was merely stipulated as in the case of disclosure of users’ personal data, that although IPR were capable of defeating the fundamental rights concerns posed by the conflicting rights of users, it was necessary for the competent authorities before taking such measures to make sure that these represent the striking of a fair balance. To that end, it seemed users’ interest lay only in not being subject to limitations of *lawful* access.

5.5.1 Impact on Digital Freedom- *Opening the door for blocking?*

Much like the earlier cases on user data disclosure, the *UPC Telekabel* judgment leaves ideological elbow room within the discretion delegated to national authorities. Steering clear of the ominous ceiling and floor of compatibility, the Court neither encourages nor discourages any particular course of action, but rather sets up dynamic parameters. To this end ‘reasonable measure’ merely meant making it difficult to achieve illicit access and of seriously discouraging internet users from trying to access the unauthorised copyright work.¹⁶⁶

More importantly, it was uncontested that the website at issue actually hosted copyright work, as opposed to filesharing platforms which contain ‘magnet-links’ to content hosted by ‘seeders’. This differentiated the website from e.g. TPB. In this regard the judgment did not harmonise national law provisions dealing with the requisite liability of the websites at issue, and which must precede their subsequent potential blocking. This, as already discussed however, subsequently happened in *Ziggo*. *UPC* merely confirmed the compatibility of website blocking injunctions against ISP as an available and compatible enforcement measure, in cases where liability for copyright infringements can be established. In the post-*Ziggo* context, *UPC Telekabel* thus applies to P2P platforms too, subject to the individual

¹⁶⁵ *Supra*: at 4.4

¹⁶⁶ *UPC*, paras 62-64

determination in the relevant context, of proportionality. In this context Advocate General Szpunar addressed fundamental rights in his Opinion to *Ziggo*, and specifically the contention that blocking access to The Pirate Bay would be proportional within the fundamental rights framework, in his view, because of the high percentage of illegal content accessible through the site, and the overtly anti-copyright behaviour of the operators of the site. Together with *Ziggo*, *UPC Telekabel*, currently seems highly capable of setting the future course of EU copyright enforcement along the path of website blocking.

5.6 The lower thresholds – looking out for rightholders

In *Scarlet* the Court had established a symbolically important maximum threshold of copyright protection, to the benefit of our user. The CJEU in *Coty*¹⁶⁷ and *McFadden*¹⁶⁸ would however also put hard limits to the balance of interests, but for the benefit of rightholders.

The Court declared in *Coty* that German national law was in effect below the *de-minimis* required to safeguard the balance of the parties involved. The way this manifested was that rightholders had no legal possibility of access to a remedy for a trade mark infringement. Despite not being a copyright case the judgment remains pertinent to the copyright *acquis*, as it concerned intermediary liability per the Enforcement Directive. Community Trade Marks were held to be in principle governed by that directive, and consequently within the sphere of the same fundamental rights doctrine which is central to the copyright regime. The details of the case were as follows. Identifying in the course of an online sale a perfume product as counterfeit, the trade mark proprietor sought to bring infringement proceedings against the seller. The bank which held that seller's personal data did not wish to collaborate, and claiming protection from domestic banking law refused to divulge these data for the purpose of trade mark enforcement. The German court stayed proceedings and asked the CJEU whether a domestic law which indiscriminately excluded banks from a liability to disclose personal data to facilitate intellectual property enforcement was incompatible with EU law. The Court answered that it was indeed incompatible with EU fundamental rights principles. Importantly, German law was not taking account of the fundamental right framework's requisite ability to strike a balance between competing rights. Instead it was in the relevant context ostensibly elevating one fundamental right to the absolute.¹⁶⁹ Conversely it was offering insufficient consideration to the other, and competing fundamental rights.¹⁷⁰ In this regard, by offering no scope for consideration to the right to intellectual property, German law

¹⁶⁷ Case C-580/13 [2015] *Coty Germany GmbH v Stadtsparkasse Magdeburg* ECLI:EU:C:2015:485 “*Coty*”

¹⁶⁸ Case C-484/14 [2016] *Tobias McFadden v Sony Music Entertainment Germany GmbH* ECLI:EU:C:2016:689 “*McFadden*”

¹⁶⁹ *Coty*, paras 36-38

¹⁷⁰ *Ibid*, para 41

failed to meet an abstract *de-minimis* level of fundamental rights protection. The right in question being the right to IP, we can holistically view this level as tangential to our hypothetical *de-minimis* level of EU law protection for copyright as such.

5.6.1 *Digital freedom statt angst?*

In its next direct interference with the hard limits of the balance of interests, the CJEU addressed the matter of free, anonymous internet access.¹⁷¹ McFadden was a shopkeeper in Germany who offered free wifi with no password protection to his customers or anyone else passing through the area. Ironically enough, in protest against the governmental surveillance culture he had named the access-point ‘freiheitstattangst.’¹⁷² The wifi connection was subsequently used to upload copyright protected work, and Sony which held the rights, brought proceedings for copyright infringement against McFadden. It eventually became common ground that some anonymous third party rather than McFadden himself had committed the infringement. Sony nevertheless sought an injunction holding McFadden liable in an intermediary capacity, demanding cessation of the infringement and reimbursements for the costs of the legal proceedings. The Landgericht München 1 stayed proceedings and submitted no less than ten questions¹⁷³ to the CJEU, asking in essence whether McFadden was a service provider within the meaning of the E-commerce Directive, and if so, then to what degree his responsibilities as such extended in the context. The Court answered affirmatively that McFadden had to be considered a service provider despite his apparently charitable intentions, and that it therefore fell to consider him just as any other intermediary. In this regard he could seemingly benefit from the limitations of ECD articles 12(1); for ‘mere conduit’ and 15(1), having ‘no general obligation to monitor.’ But the Court found that this only limited his liability in terms of excluding certain recourse against him. In particular, he could not be forced to institute monitoring of the data transmitted over his access point; and nor could he be forced to terminate the access point.¹⁷⁴ Yet 12(3) ECD also reserved to Member State courts the open-ended possibility of issuing an order that a service provider prevent infringements, in an unspecified manner, i.e. ‘somehow.’ In this regard it was stipulated that in the context of the main proceedings this undefined possibility were limited to only three hypothetical measures, two of which the Court had been quick to declare incompatible with the *acquis*. By elimination of these two options, the only possibility which remained *de-facto* at the disposal of the national court was to issue an injunction to the effect that

¹⁷¹ “*McFadden*” see note 155

¹⁷² Alluding to a street protest motto used in the context of data privacy in Germany.

¹⁷³ *McFadden*, para 33

¹⁷⁴ *Ibid*, paras 87-88

McFadden subject the access point to password protection, and furthermore lay down a requirement of personal identification in exchange for the password. The Court considered the fundamental rights ramification of such an order, and recognised that it interfered with users' right to information and the service provider's right to conduct a business. Nevertheless the measure struck a fair balance between these rights and the right to intellectual property. Notably, the Court did not determine indefinitely that a password protection measure were necessarily the only available measure, although it was recognised that this was, at least temporarily, the case. The Court therefore bizarrely held: ...[the] provider [must be able to] choose which technical measures to take in order to comply with the injunction even if such a choice is limited to a single measure...¹⁷⁵

5.6.2 Impact on digital freedom- *Never inviolable, never violable?*

Coty and *McFadden* thus provide us with another piece of the copyright-fundamental rights puzzle, and moreover an important piece. By its judgments the Court established that the lowest level of protection that Member States are allowed to allocate to rightholders always has to be more than zero, in the context of a right to a legal remedy. Not only does the Court's adherence to the fundamental rights framework telegraph a harmonising approach, but asserts the role of fundamental rights as an emergency tool in the enforcement arsenal. In the wake of the judgments it may be observed that there is ostensibly a difference between reaching a conclusion due to inflexible legislation, and reaching the same conclusion under a regime purporting to exercise a balance.

It is arguably impossible to objectively prove that a fair balance is struck; or achieve a uniform level of fairness across multiple jurisdictions each with subjective notions as to fairness. Where the Court however, issues guidance as to what, in terms of concrete and substantive criteria, constitutes the fair balance, it becomes increasingly clear that the concept itself may become an artificial construct for achieving a balance of the level of copyright protection, or level of protection for personal data, satisfactory to the motives behind the source of such guidance. It is indicated that the Court is mostly steering clear of imbuing the fundamental rights balance with substantive values, yet it is also clear that it has not been able to completely avoid doing so. Notably the Court has not held, similarly to *Bonnier*, that solid *privacy laws* were inherently capable of fairly protecting *privacy*. On the contrary, privacy was no more absolute than IPR-protection. The cases certify that hard legislation which precludes a domestic court from even weighing the conflicting rights in question, in so far as these are subject to the Charter, will be incompatible with EU law. Notably, the existence of legislation which seemingly allows a

¹⁷⁵ Ibid, operative part of judgment, para 6.

balancing to take place regardless of judicial conclusions, will be qualitatively satisfactory, and therefore remain compatible with the *acquis*. It is clear as such, that as long as a domestic court at very least feigns consideration to a fundamental right, it discharges its duty, for now.¹⁷⁶

5.7 Fundamental rights, or a harmonising device?

As we have seen, the CJEU has for the past 10 years sporadically included fundamental rights as a factor in the copyright context. Yet save for a few exceptions, the exercise has seemingly been a charade, making future developments unpredictable. The right to information has been avouched as mitigating censorship of lawful information, providing no guarantee beyond access such as has been authorised by rightholders. On the other hand, laws which have placed protection of intellectual property at a significant hierarchical disadvantage have been struck down. Still, the lack of substantive legal requirements beyond the execution of the balancing act and adherence to proportionality itself, does seem to leave some judicial discretion with Member State courts. It is observed that when two fundamental rights conflict, left with legal discretion, the concept of legal culture may yet weigh in to determine the outcome, and perhaps in favour of digital freedom.¹⁷⁷ A local judge may choose not to apply a ‘balance’ which would result in an ability for rightholders to assert their exclusivity in the digital context, even as *prima facie* liability of both users and intermediaries has become increasingly harmonised. Whereas on that point it is yet possible to contend for digital freedom; the eventuality cannot be ruled out that in future the CJEU will substantively harmonise the ‘striking of a fair balance’ towards an increasingly quantitative level. Going beyond ‘approving’ enforcement methods as compatible with fundamental rights as in *Bonnier* and *UPC*, the Court could thus eventually eliminate the possibility for EU Member State courts to adhere to a justification and philosophy of the copyright system, other than the elusive one which informs the EU judiciary.¹⁷⁸ For now, however, the answer to whether the fundamental rights framework may threaten or protect digital freedom must remain somewhat inconclusive.

¹⁷⁶ Sganga C [2015] *EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots* in Caso R & Giovanella F (ed.) [2015] *Balancing Copyright Law in the Digital Age: Comparative Perspectives* [Springer] re: “cosmetic display”, page 13

¹⁷⁷ *Ibid*, page 81

¹⁷⁸ *Ibid*, page 83

6 Does EU copyright law threaten digital freedom?

What we have seen is a transition from an *acquis* with considerable scope for fragmentation, to substantial harmonisation of areas previously susceptible only to domestic legislation, which were sometimes capable of conferring users digital freedom. Notably, this transformation of the *acquis* has occurred largely without the intervention of the legislative powers of the EU, but relied on directives issued in the beginning of the 2000s, and at a relatively early stage in the modern information society. That was a perilous and uncertain time for the creative industries, which have since adapted and no longer rely only on selling physical copies of DVDs and CDs. But the powerful copyright law contemplated at the time, then seen as needed to ‘save’ the industry from total market failure, has remained and become constantly more impenetrable. This is clearly evidenced by the expansion of the concept of communication to the public to encompass hyperlinking and P2P platforms, and the asserted non-application of art 5(1)(b) Infosoc for streaming. The old philosophical bases for copyright protection, varying in the traditional jurisdictions, have been seemingly swept away by a form of EU copyright ‘propertization’, which continuously elevates protection of copyright to the extent needed to achieve the unquestioned legislative aim of a *high level of copyright protection*. Notably, this deviates both from the continental tradition, where intellectual property was not property as such, and from the Anglo-Saxon tradition where fair use flexibly accounted for the public interest. This thesis has in the neutral guise of a ‘user’ explored the scope left for a Member State court to protect an aspect of that public interest. As a basis we have presumed that our internet user seeks to consume information, and investigated her ability to access it in spite of copyright laws. We denoted this ‘digital freedom.’ At the outset we thus asked three sub-questions which together aim to answer the main research question: ‘Does EU copyright law threaten digital freedom?’

As to the first sub-question we found that the Court’s recent judicial expansion of ‘communication to the public’ extends the possibility of eliminating *sources of information*. To the second sub-question we concluded that accessing information, in particular by streaming, also has recently undergone a harmonisation of liability. The third sub-question essentially asked whether despite of these developments, the fundamental rights framework may act as an emergency tool in favour of users, effectively saving their digital freedom by rendering enforcement inapplicable. Our conclusion there was that whereas this may sometimes be the case, the fundamental rights framework is a double-edged sword, which may equally act to strengthen enforcement measures. In addition, this may particularly be the case if in future the Court instils the proportionality analysis with further substantive guidelines and hard

limits. In any case, the fundamental rights framework is by no means a guarantee of our user's interests, having only once, in *Scarlet* asserted the rights of users right to information against a 'disproportional' rightholder remedy.

So what is the totality of all this? It must first be admitted that our starting point is somewhat simplistic, by not differentiating between the most unbridled piracy and more easily defensible motives. Yet the conclusion must be that neither does the new regime of EU copyright law. In the past an activist judge could rely on the 'lacuna' within the semi-harmonised *acquis* to reach a conclusion covertly reflecting public views on fairness, yet the direction of harmonisation increasingly forces a separation of a court's underlying philosophies from the applicable law. And moreover, there is no inherent guarantee that any copyright infringement, however slight, will be excused by the ever-expanding *acquis*. As we have seen over time, the Court's direction has reached a position where rightholders may categorically alienate the user, to the point where we might ask how far things will go. As stated however, this thesis holds no illusions of determining the overall efficacy of the harmonised copyright system. Perhaps it is necessary to break some eggs in order to make the EU copyright omelette. What is clear however, is that free access to information, as well as the user's ability to consume free information, is indeed diminishing. For better or worse, digital freedom *is* threatened by EU copyright law. The *next stage*, will be to ask whether this is a good cause.

Bibliography

Primary Sources

Legislation

Consolidated version of the Treaty on European Union - 13 December 2007 [26/10/2012] OJ C 326/19

Consolidated version of the Treaty on the Functioning of the European Union [09/05/2008] OJ C 326/164

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [22.06.2001] OJ L 167/10

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2.6.2004] OJ L 195/16

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [17.7.2000] OJ L 178/1

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [31.7.2002] OJ 2002 L 201/37

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 1869 U.N.T.S. 299

Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971 828 U.N.T.S. 221

Case Law

CJEU

C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764

C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [2013] ECLI:EU:C:2013:147

C-348/13 *BestWater International GmbH v Michael Mebes & Stefan Potsch* [2014]

ECLI:EU:C:2014:2315

C-466/12 *Nils Svensson v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76

C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] ECLI:EU:C:2016:644

C-527/15 *Stichting Brein v Jack Frederik Wullems* [2017] ECLI:EU:C:2017:300

Joined cases C-403/08 C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631

Joined Cases C-293/12 *Digital Rights Ireland Ltd* and C-594/12 *Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and others* [2014] ECLI:EU:C:2014:238

C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195

C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* [2014] ECLI:EU:C:2014:254

C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54

C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465

C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771

C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219

C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192

C-580/13 *Coty Germany GmbH v Stadtsparkasse Magdeburg* [2015] ECLI:EU:C:2015:485

C-484/14 *Tobias McFadden v Sony Music Entertainment Germany GmbH* [2016] ECLI:EU:C:2016:689

Advocate Generals' Opinions

C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] Opinion of Advocate General Wathelet
ECLI:EU:C:2016:221

C-610/15 *Stichting Brein v Ziggo BV* [2017] Opinion of Advocate General Szpunar ECLI:EU:C:2017:99

Joined cases C-403/08 C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] Opinion of Advocate General Kokott
ECLI:EU:C:2011:43

C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2011] Opinion of Advocate General Jääskinen ECLI:EU:C:2011:753

Case C-70/10 *Scarlet Extended v Societe belge des auteurs compositeurs et diteurs (Sabam)* [2010] Opinion of AG Cruz Villalón ECLI:EU:C:2011:255,

Other jurisdictions

A&M Records, Inc. v. Napster, Inc [2001] 239 F.3d 1004

Bredbandsbolaget [2017] PMT 11706-15

Hans Fredrik Lennart Neij [2009] B 13301-06 (The Pirate Bay)

Hall v Brooklands Auto-Racing Club [1933] 1 K.B. 205

FAPL v BskyB [2013] EWHC 2058

C.B.S. Songs Ltd. and Others Appellants v Amstrad Consumer Electronics Plc. and Another Respondents [1988] AC 1013

T04/98 *Liposome Compositions/SEQUUS* [2001] ECLI:EP:BA:2001:T000498.20010809

Secondary Sources

Journals

Griffiths J [2013] *Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law*, 38 ELR

Langwallner D & Kolodzinski K [2013] *Copyright Law and the Internet after SABAM 1* Irish Bus. L. Rev. 47 2013-2014

Dusollier S & Colin C [2011] *Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?* 34 Colum. J.L. & Arts

Angelopolous C [2017] *Hyperlinks and copyright infringement* C.L.J. 76(1) 32-35

Barceló R & Koelman K [2000] *Intermediary Liability in the E-commerce Directive: So far so good, but it's not enough* Computer Law & Security Report Vol. 16 no. 4

Daly M [2013] *Is there an entitlement to anonymity? A European and international analysis* E.I.P.R 35(4) 198–211

Meale D [2012] *SABAM v Scarlet: of course blanket filtering of the internet is unlawful, but this isn't the end of the story* E.I.P.R 34(7) 429

Mills M.L [1989] *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change* 65 Chi.-Kent. L. Rev. 307

Rosati E [2010] *The Wittem Group and the European Copyright Code* JIPL&P 5(12) 862-868

Geiger C [2006] *The private copy exception, an area of freedom (temporarily) preserved in the digital environment* IIC - international review of intellectual property and competition law 37(1) 74-81

Kreimer S [2006] *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link* U-Penn Faculty Scholarship. Paper 127

Angelopoulos C & Smet S [2016] *Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability* J.M.L. 2016, 8(2), 266-301

Rendas T [2017] *How Playboy photos compromised EU copyright law: The GS Media judgment* 20(11) Journal of Internet Law 11

Rosati E [2014] *Copyright in the EU: In Search of (In)Flexibilities* 9(7) JIPLP 585-598

Ginsburg J [2011] *European Copyright Code - Back to First Principles (with Some Additional Detail)* Columbia Public Law Research Paper No. 11-261

Monkman S [2006] *Corporate Erosion of Fair Use: Global Copyright Law Regarding File Sharing* 6 Asper Rev. Int'l Bus. & Trade L. 265, 282–83

Allgrove B & Silverman I [2014] *The CJEU "saves the internet" with its ruling in the Meltwater case.* E.C.L. Rep. 2014, 14(3)

James S [2014] *And breathe... you can continue browsing the internet, as the CJEU hands down its decision in PRCA v NLA (Meltwater)* C.T.L.R. 2014, 20(6)

Cohen J [2005] *The place of the user in copyright law* 74 Fordham L. Rev

Books/Contributions to a book

Geiger C, Schön herr F [2012] *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions* in: (ed. Synodinou T-E) *Codification of EU Copyright Law: Challenges and Perspectives* [Kluwer]

Caso R & Giovanella F (ed.) [2015] *Balancing Copyright Law in the Digital Age: Comparative Perspectives* [Springer]

Sganga C, *EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots*

Giovanella F, *Effects of Culture on Judicial Decisions: Personal Data Protection vs. Copyright Enforcement*

Jaap H. Spoor [1996] *The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?* In Hugenholtz B (ed.) *The Future of Copyright in a Digital Environment* [Kluwer]

Riordan J [2016] *The Liability of Internet Intermediaries* [OUP]

Efroni Z [2010] *Access-Right: The Future of Digital Copyright Law* [OUP]

Shapiro T [2011] *Directive 2001/29/EC on copyright in the information society*, in Lindner B & Shapiro T (ed.) *Copyright in the Information Society* [Edward Elgar]

Gervais D [2010] *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32* in Gervais D (ed.) *From "Radical Extremism" to "Balanced Copyright" Canadian Copyright and the Digital Agenda* [Irwin Law]

Mazziotti G [2008] *EU Digital Copyright Law and the End-User* [Springer]

Internet sources

Edwards. L [2011] *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights* (WIPO)

(http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf)

[2015] *Draft Report -on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (2014/2256(INI))- 14.1.2015

(https://pub.juliareda.eu/copyright_evaluation_report.pdf)

Rosati, E [2017] *GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture Common Market Law Review*, Forthcoming.

(<https://ssrn.com/abstract=2943040>)

Angelopoulos C [2017] *AG Szpunar in Stichting Brein v Ziggo: An Indirect*

Harmonisation of Indirect Liability (Kluwer Copyright Blog)

(<http://kluwercopyrightblog.com/2017/03/23/ag-szpunar-stichting-brein-v-ziggo-indirect-harmonisationindirect-liability/>)

Boulanger J et al [2014] *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU - Analysis of specific policy options*

(http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf)

Coustick-Deal R [2016] *Europe's Censorship Robots: An attack on our basic rights*

<https://openmedia.org/en/europes-censorship-robots-attack-our-basic-rights>

Van Buskirk E [2008] *RIAA to Stop Suing Music Fans, Cut Them Off Instead*

(<https://www.wired.com/2008/12/riaa-says-it-pl/>)

Wortham J [2012] *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling*

<http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology>

Netburn D [2012] *Wikipedia: SOPA protest led 8 million to look up reps in Congress*

<http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>

[2017] *Provisional Opinion of ALAI's Executive Committee On the Right of communication to the public ; the Advocate General's Opinions in Filmspeler Case C-527/15 and Ziggo Case C-610/15* (http://www.alai.org/en/assets/files/resolutions/170327-ALAI-Provisional-opinion_Filmspeler_Ziggo.pdf)

Mazziotti G et al [2013] *Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum* (<https://www.ceps.eu/system/files/Copyright%20in%20the%20EU%20Digital%20Single%20Market%20FINAL%20e-version.pdf>)

EU Studies, reports and communications

Depreeuw S & Hubin J-B [2014] *Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions* (http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf)

European Observatory on Counterfeiting and Piracy (no publication date) *Injunctions in Intellectual Property Rights* [Studies of the Legal Sub-group] (http://ec.europa.eu/internal_market/ipenforcement/docs/injunctions_en.pdf)

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee [2014] *Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan* Strasbourg, 1.7.2014 COM(2014) 392 final (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0392&from=EN>)

Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market 2016/0280 (COD) COM(2016) 593 final