Emerald Insight

info

Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability

Christina Angelopoulos

Article information:

To cite this document:
Christina Angelopoulos , (2015),"Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability", info, Vol. 17 Iss 6 pp. 72 - 96
Permanent link to this document:
http://dx.doi.org/10.1108/info-05-2015-0028

Downloaded on: 03 November 2016, At: 23:55 (PT)
References: this document contains references to 50 other documents.
To copy this document: permissions@emeraldinsight.com
The fulltext of this document has been downloaded 260 times since 2015*

Users who downloaded this article also downloaded:

(2015),"Regulating the new information intermediaries as gatekeepers of information diversity", info, Vol. 17 Iss 6 pp. 50-71 http://dx.doi.org/10.1108/info-05-2015-0034

(2015),"Guest editorial", info, Vol. 17 Iss 6 pp. - http://dx.doi.org/10.1108/info-07-2015-0038

Access to this document was granted through an Emerald subscription provided by emerald-srm:563821 []

For Authors

If you would like to write for this, or any other Emerald publication, then please use our Emerald for Authors service information about how to choose which publication to write for and submission guidelines are available for all. Please visit www.emeraldinsight.com/authors for more information.

About Emerald www.emeraldinsight.com

Emerald is a global publisher linking research and practice to the benefit of society. The company manages a portfolio of more than 290 journals and over 2,350 books and book series volumes, as well as providing an extensive range of online products and additional customer resources and services.

Emerald is both COUNTER 4 and TRANSFER compliant. The organization is a partner of the Committee on Publication Ethics (COPE) and also works with Portico and the LOCKSS initiative for digital archive preservation.

*Related content and download information correct at time of download.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability

Christina Angelopoulos

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Christina Angelopoulos is based at the Institute for Information Law (IViR), University of Amsterdam, Amsterdam, The Netherlands.

Abstract

Purpose – *The purpose of this article is to analyse the concept of a fair balance between conflicting fundamental rights in the context of intermediary liability for third party copyright infringement.*

Design/methodology/approach – *European Legal Method.*

Findings – *Fair balance is the appropriate conflict resolution mechanism in cases of fundamental rights clashes. Balancing is in essence a call for rational judicial deliberation. In intermediary liability, balancing excludes the imposition of filtering obligations on intermediaries for the purpose of copyright enforcement, but allows blocking.*

Originality/value – *An in-depth look at a complicated, vague and underdeveloped area of law with significant practical effect.*

Keywords *Internet, Electronic commerce, Copyright law, Information media, European law*

Paper type *Research paper*

1. Introduction

In recent years, the enforcement strategy of copyright holders in Europe has focused on Internet intermediaries. The liability rules of the E-Commerce Directive enable this approach: although they offer immunity to mere conduit, caching or hosting providers against claims for monetary compensation, they explicitly leave open the possibility of injunctions against intermediaries whose services are used by third parties to commit an infringement, as well as – in the case of host service providers – duties of care to detect and prevent such illegality. In this way, although liability for the copyright infringements of third parties is excluded for those three types of intermediaries, the possibility of the imposition of both preventive and reactive obligations to take action against third party infringement remains on the table (Synodinou, 2015; van Eecke, 2011; de Beer and Clemmer, 2009). Moreover, for intermediaries not qualifying for safe harbour protection, both third party liability and copyright-enforcing obligations are possible. As a result in recent years a series of cases have found their way before the CJEU (Court of Justice of the European Union) seeking clarification on the reach of these obligations: what and under which conditions can be demanded of intermediaries with regard to the infringements of others?

The emerging case law has so far rested heavily on the notion of a "fair balance" between conflicting fundamental rights: the CJEU, while recognising that copyright is protected as a fundamental right under Article 17(2) the EU's Charter of Fundamental Rights, has emphasised that it is nonetheless not absolute and must therefore be reconciled with the counterbalancing fundamental rights of others, most notably the right of the intermediary to conduct a business and the rights of its users to the protection of their personal data and their freedom of expression. This has elevated the discussion on intermediary liability to the

Received 11 May 2015
Revised 12 July 2015
Accepted 14 July 2015

hierarchically higher legal plane of primary law, thus providing a legal basis in EU law for the regulation of the responsibilities of intermediaries with regard to third party copyright infringements beyond the limited scope of the E-Commerce Directive.

But the vagueness of the basic rules thus invoked inevitably results in poor guidance as to the appropriate solutions. The individual cases heard miss the forest for the trees, shedding light only on the specific circumstances that concerned them. The CJEU's rulings fail to illuminate the boarder picture: where does the "fair balance" lie? Currently, no general standard is discernible. The result is legal uncertainty for intermediaries and right-holders and chilling effects on the exercise of fundamental rights. Substance, however, may nonetheless with some digging be uncovered: in this article the concept of the fair balance shall be traced back to its origins to seek an understanding of its aims and approach and help concretise its meaning with regard to intermediary responsibility for third party copyright infringement.

2. Legal context: intermediary liability in the EU directives and CJEU case law

As opposed to direct infringement, the rules governing the indirect violation of a copyright have not been harmonised by EU law. Instead, the modalities through which liability is imposed on indirect infringers, as well as the conditions required for such liability, remain fragmented across the European Union (Angelopoulos, 2013). In principle, this includes the liability of intermediaries whose services are used by third parties to commit an infringement. Nevertheless, a limited unification of the rules of intermediary liability for third party copyright infringements has been achieved through Section 4 of the E-Commerce Directive[2]. This contains a cluster of horizontal conditional liability exemptions for so-called "information society services". These "safe harbours" or "immunities" protect intermediaries from liability, including for actions that constitute a participation in an infringement of copyright, in the provision of three types of services: "mere conduit" (Article 12), "caching" (Article 13) and "hosting" (Article 14). Each safe harbour is governed by a separate set of conditions that must be met before the intermediary may benefit.

The reach of the safe harbours is limited to liability in the strict sense, i.e. for monetary damages. All three safe harbours contain express permissions in their final paragraphs regarding the imposition of any kind of injunctive order on the providers of information society services by "courts and administrative authorities" to "terminate or prevent an infringement"[3]. As a result, injunctions are left to the regulation of national law. Specifically in the area of copyright, EU law goes one step further and demands that Member States allow for the possibility of injunctive orders imposed on Internet intermediaries whose services are used by third parties to infringe: Recital 59 of the Copyright Directive[4] observes that in many cases such intermediaries are best placed to bring infringing activities occurring on their digital premises to an end. It accordingly concludes that, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject matter in a network. Article 8(3) of the Copyright Directive explicitly instructs Member States to "ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right". The 2004 Enforcement Directive[5] reinforces this obligation in Article 11 *in fine*, which refers to the Copyright Directive and repeats the order.

In addition, according to Recital 48 of the E-Commerce Directive, the hosting safe harbour of Article 14 should not be interpreted as prohibiting Member States from requiring:

> [. . .] service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

How liability for failure to abide by a duty of care would in practice differ from liability for third party infringement may be questioned. The possibility is particularly problematic, given that the hosting safe harbour is predicated on the idea that, upon receiving "actual knowledge" or "awareness of facts or circumstances" that make infringement apparent, the host "acts expeditiously to remove or to disable access" to it, thus setting a lower, reactive standard than that of pro-active prevention (Edwards, 2009). The questions thus raised have been highlighted by case law in a number of Member States (Angelopoulos, 2013).

Nevertheless, neither all injunctive orders nor all duties of care against intermediaries are fair game: a significant limitation on the permissible scope of both is imposed by Article 15 of the E-Commerce Directive, which prohibits the imposition of general obligations on service providers, in the provision of services protected by the three safe harbours, to monitor the information which they transmit or store or to actively seek facts or circumstances indicating illegal activity. The key term in this regard is the word "general". Recital 47 of the E-Commerce Directive indicates what might qualify as a "general monitoring obligation" by contrasting such obligations with monitoring obligations imposed in a "specific case" that are issued "by national authorities in accordance with national legislation". Further than this, interpretation has been left with the courts.

Significantly, injunctive orders and duties of care directed against intermediaries when offering services other than those identified in Articles 12-14 are exempt the general monitoring order prohibition of Article 15 of the E-Commerce Directive. Yet this does not mean that the imposition of general monitoring or indeed any other kind of obligation on intermediaries that do not enjoy immunity – either because they offer services not covered by the safe harbours (such as search) or because they do not satisfy the conditions of the corresponding safe harbour – is necessarily compatible with EU law. As subsequent CJEU case law has demonstrated, far broader limitations on the obligations that national law may impose on intermediaries may also arise directly from the primary sources and in particular the law of fundamental rights.

3. A fair balance between copyright and other fundamental rights

In its seminal *Promusicae*[6] decision, the CJEU was called upon to clarify whether EU law requires Member States to impose a duty on Internet intermediaries to retain and communicate the personal data of users generated by their communications to ensure the effective protection of copyright in the context of civil proceedings. Concerning as it did the processing of personal data and the protection of privacy, areas explicitly excluded from the reach of the E-Commerce Directive[7], the case could not be resolved with reference to that text's prohibition on general monitoring obligations. Instead, the CJEU approached it with the only tool available in its interpretative arsenal: as an instance of conflict between opposing fundamental rights, as these are protected in the Charter of Fundamental Rights of the EU[8]. In the case at issue, these were identified as: (a) the right of property, including intellectual property (protected under Article 17 of the Charter) and (b) the right to effective judicial protection (Article 47 of the Charter) on the one hand; and (c) the protection of personal data (Article 8 of the Charter) and (d) the right to private life (Article 7 of the Charter) on the other: according to the Court, where several rights and interests are at stake:

> [. . .] the Member States must [. . .] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.

From this starting point, the fair balancing principle was subsequently applied to a series of intellectual property cases where Article 15 of the E-Commerce Directive would arguably have sufficed. These primarily concerned injunctive orders against intermediaries for the purpose of copyright enforcement.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

In *L'Oréal* v. *eBay*[9], a trademark case and the earliest CJEU judgment on injunctions against intermediaries, the Court confirmed that injunctions aimed at bringing an infringement to an end, as well as preventing further infringements, may be imposed on intermediaries regardless of any liability of their own. The Court then repeated its fair balance instruction, noting that measures that do not successfully strike it may not be imposed. No guidance on how to achieve a fair balance was given; however, the Court did make a number of observations with regard to the type of measures that may be ordered, derived from the lattice of contradictory obligations Member States must respect in the enforcement of intellectual property rights outlined in Article 3 of the Enforcement Directive: any injunctions ordered against intermediaries must be "effective and dissuasive" and the national rules governing them must "designed in such a way that the objective pursued by the Directive may be achieved". The measures they impose must be "fair and proportionate and must not be excessively costly". They must also "not create barriers to legitimate trade".

In the subsequent twin *Sabam* cases, *Scarlet*[10] and *Netlog*[11], the CJEU examined the question of filtering obligations. *L'Oréal* v. *eBay* had already confirmed that the active monitoring of all the data of each of the intermediary's customers to prevent a future infringement of copyright is excluded by dint of Article 15 of the E-Commerce Directive. In *Scarlet*, an extreme case which involved a request for the imposition on an Internet access provider of a filtering system geared at identifying copyright-protected works exchanged on the provider's networks with a view to blocking their transfer, it repeated this conclusion. Following this, the Court went on to find that such a burdensome request would also violate the competing fundamental rights of the intermediary, as well as those of its customers. In particular, the freedom of the intermediary to conduct a business (Article 16 of the Charter) and the rights of its customers to the protection of their personal data (Article 8 of the Charter), as well as their freedom to receive and impart information (Article 11 of the Charter), were identified. In conclusion, the Court stated that:

> [. . .] it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

The same result was reached a few months later in *Netlog*, this time with regard to a hosting service provider.

In *UPC Telekabel Wien*[12], the CJEU once again applied the notion of fair balance. The case, referred to the Court by the Austrian *Oberster Gerichtshof*, concerned the imposition of an *Erfolgsverbot* or "outcome prohibition", i.e. a type of Austrian injunctive remedy that allows the court to order the defendants to achieve a certain result without specifying the measures that should be taken for that purpose: in that particular case, the blocking of access to copyright infringing content. The Luxembourg Court observed that injunctions requiring the blocking of content result in a conflict of fundamental rights primarily between:

- copyright and related rights, which constitute intellectual property and are therefore protected under Article 17(2) of the Charter;
- the freedom to conduct a business, which economic agents such as Internet service providers enjoy under Article 16 of the Charter; and
- the freedom of information of Internet users, whose protection is ensured by Article 11 of the Charter.

It held that blocking injunctions imposed on an intermediary in the enforcement of copyright that leave the decision as to the specific measures to be employed to the intermediary itself are not precluded by EU law, as long as the intermediary has the opportunity to avoid coercive penalties for breach of the injunction by showing that it has taken all reasonable

measures. In choosing such reasonable measure, the intermediary must make sure to strike a fair balance between the various conflicting rights. Such a fair balance must be understood to have been struck if the measures applied:

- "do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available"; and
- "have the effect of preventing unauthorised access to protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right".

Whether these goals are achieved in practice was found to be a matter for the national authorities and courts to establish.

The case was a peculiar one, arising as it did from the national legal idiosyncrasy of outcome prohibitions; its effects would accordingly not easily be reproduced in jurisdictions other than Austria. Even accounting for this however, the decision was particularly remarkable in the ease with which it moved from requiring that a fair balance be struck by the referring court when ordering the injunction to requiring that the intermediary itself guarantee the protection of all involved fundamental rights (Angelopoulos, 2014).

One conclusion seems inescapable from this line of case law: helpful as all these judgments certainly are, they shed light only on the individual cases they handled. For all the crisp repetition of the vague maxim of "fair balance", no tools are provided to help identify where this balance should lie, or how to find it. Although in each case the Court reached a result which it proclaimed achieved the coveted "fair balance", it did not provide an explanation as to why that was the case. As Griffiths observes, it "is difficult to escape the impression that the Court's application of the Charter [. . .] is little more than window dressing, functioning primarily to bolster [a] prior conclusion" (Griffiths, 2013). Consequently, currently, no common standard is discernible, leaving all intermediaries except those whose case is identical to those already adjudicated in the dark concerning their rights and obligations (Husovec, 2013).

Given the very basic nature of the primary rules this case law rests on, this is perhaps unsurprising and even, for the time being, unavoidable: as AG Mazák noted in Case C-47/07 *Masdar* on an entirely different area of extra-contractual liability:

> [. . .] as is generally the case with general principles of law as a legal source, until there is settled case-law on the matter discussing the concrete content of such a principle can be very much like discussing the shape of a ghost.

4. The origins of fair balance: balancing in legal theory, the CJEU and the European Convention on Human Rights

So how can the ghost of fair balance begin to take shape? AG Mazák's quote indicates the answer. Before turning to a detailed investigation however, below an attempt shall first be made to track the doctrine of "fair balance" back to its legal theoretical and jurisprudential origins, to investigate what it might look like and where it can be found.

In the face of the considerable dismay exhibited by intellectual property lawyers in the wake of *Promusicae* and the criticism they have levied against its retreat to fundamental rights and the accompanying vagaries of fair balance, Groussot (2008), taking a constitutional law perspective, suggests that there was nothing either surprising or obscure about the way the case was decided: instead it constitutes the logical application of decades of CJEU jurisprudence. *Promusicae* might have been the first case in which intellectual property rights were approached as fundamental rights that need to be balanced against others of their kind, but, he notes, a balancing approach has long being applied to reconcile similar conflicts (Kisieliute, 2012).

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Indeed, the theory of balancing enjoys near universal hegemony in contemporary constitutional rights law (Gardbaum, 2007). The notion originated in German constitutional law, before "migrating" across the globe after World War II (Barak, 2010, p. 185)[13]. According to the German understanding, balancing forms part of the more comprehensive principle of proportionality (*Verhältnismässigkeitsgrundsatz*). This consists of the three sub-principles: those of suitability; necessity; and proportionality *stricto sensu* or "balancing" (*Güterabwägung*). German legal philosopher Robert Alexy, one of balancing's primary champions, defines the final principle of proportionality *stricto sensu* as a rule according to which "the greater the degree of non-satisfaction of or detriment to one principle, the greater the importance of satisfying the other" (Alexy, 2005, p. 572). Alexy dubs this the "Law of Balancing" (Alexy, 2002, p. 102). While necessity and suitability are concerned with what is factually possible, according to Alexy, balancing focuses instead on the legal possibilities. Thus, although proportionality, at least in its German conception, consists of three separate tests, balancing may be understood to constitute its essence (Sauter, 2013; Groussot, 2008), the heart of the legal optimisation discourse.

It should be emphasised that in legal theoretical circles balancing remains a controversial notion. Greer summarises the considerable harsh criticism hurled against it: balancing, he explains, is viewed as:

> [. . .] an irrational and illegitimate renunciation of law in favour of a largely arbitrary judicial discretion, difficult to justify according to the ideals of democracy, respect for human rights, and the rule of law and therefore, ripe for elimination from the legal process (Greer, 2004, p. 413).

Put plainly, the main complaint is that balancing lacks rational standards that can allow for its consistent application. Habermas leads the opposition, opining that "[b]ecause there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies" (Habermas, 1996, p. 259). According to this view, the very concept of "rights" is incompatible with the idea of being outweighed by counterbalancing factors: rights must be absolute or they are deprived of their normative strength, reduced to mere factors among many others that decision-makers must consider (Barendt, 2009). Habermas again:

> [f]or if in cases of collision *all* reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses (Habermas, 1996, p. 258).

It should be noted that in this article the intention is not to enter into this (often acrimonious) legal theoretical exchange, but merely to be informed by it.

4.1 "Fair balance" in CJEU case law

From its national law origins, the principle of proportionality eventually jumped into the European arena, where it has evolved into one of the core general principles of EU law. After some tentative exploration of the concept in a series of CJEU judgments in the '50s and '60s, the main breakthrough occurred in the 1970 case *Internationale Handelsgesellschaft* (also known as *Solange I*)[14]. This involved a challenge by the German Federal Constitutional Court to the supremacy of EEC law for an alleged violation of a human right protected on the national level by the German Constitution. There, AG Dutheillat de Lamonthe demonstrated, by making reference to the Treaty and to preceding CJEU case law, that the principle of proportionality had roots in Community law; the Court subsequently followed suit. In this way, proportionality testing emerged, alongside the recognition of fundamental rights as general principles first of the European Communities and later of the EU, as a legal mechanism that allows EU law to avoid national constitutional review, through the reconciliation of fundamental rights with the principle of supremacy (Sauter, 2013). Significantly, these origins indicate proportionality's dual objective both as an instrument of internal market integration and as a tool for the protection of individual fundamental rights (Jans, 2000).

Eventually, with the adoption of the Charter, the principle of proportionality was officially enshrined in Article 52:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The provision confirms that fundamental rights are not envisioned by the European legislator as absolute, but may be limited, and that proportionality testing is the correct tool with which to assess whether such limitations are justified (de Vries, 2013). Stone Sweet and Matthews hail this integration of the principle of proportionality into EU law:

> After the consolidation of the ECJ's "constitutional" doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration (Stone Sweet and Matthews, 2009).

At the same time, importantly, Article 51(1) of the Charter limits the fundamental rights review of Member States' action to areas within the scope of EU law:

> The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
>
> This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

This limitation should be properly appreciated: the Lisbon treaty has not transformed fundamental rights into free-standing rights that can be used to review national law in all situations, but keeps them carefully fettered to EU competence (Groussot *et al.*, 2013, p. 97).

In the meantime, case law has continued to flesh out the relevant concepts. In the 1988 *Wachauf* judgment, the Court ruled that the Member States must respect fundamental rights when enacting legislation in transposition of Community law or, more generally, when they deal with subject matter governed by EU law[15]. This clearly plants the seeds of fundamental rights review that later resurfaced in *Promusicae*. The CJEU elaborated:

> [t]he fundamental rights recognised by the Court are not absolute [. . .], but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights [. . .] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

Thus, fundamental rights, being non-absolute, can be restricted as long as proportionality is respected. But how may a right be limited while its substance is left unaffected? We can only conclude that the answer to that must lie within the right itself: in the investigation of that very substance (Kisieliute, 2012, p. 23).

The 2003 *Schmidberger* case confirmed this introspective focus, whilst shifting towards a balancing terminology. The case concerned a clash between the principle of the free movement of goods and the constitutional right of freedom of expression and assembly. The Court, after accepting the non-absoluteness of freedom of expression and the freedom of assembly, concluded that:

> [. . .] the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

> restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.

On this basis, it then declared that "the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests"[16]. Thus, the Court seems to pass over the first and second elements of proportionality (presumably assuming that the suitability and necessity of the measure) to focus exclusively on the final element of proportionality *sensu stricto*: the achievement of a fair balance[17]. Proportionality, always a flexible tool[18], is in this way parsed down in fundamental rights cases to a mere balancing exercise. This also seems to be precisely the approach favoured in the copyright case law: so, in *Telekabel* for example the Court mentioned "the requirement that a fair balance be found, in accordance with Article 52(1), in fine, of the Charter", thus apparently equating "fair balance" with the "principle of proportionality" mentioned in that provision.

More importantly, in *Schmidberger* the CJEU also indicated how the investigation of the substance of fundamental rights and therefore the location of the fair balance between them should occur: on a case-by-case basis so that due regard can be given to the individual circumstances at hand. According to the Court, "the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests". Fair balance, it would seem, may not be precisely diagnosed on an abstract theoretical level: the centre of balance will differ from case to case. This conclusion is in perfect accordance with the non-absolute nature of the rights in conflict and their equal normative power: no fundamental right may be said to outflank another in absolute terms, but either may take precedence over the other depending on the particular circumstances of the case. There is no stable hierarchy of fundamental rights.

An informative summary of the Court's approach to the question of limitations on fundamental rights and the principle of fair balance was given more recently by the Advocate General in his Opinion on *Zoran Spasic* as follows:

> [. . .] with certain exceptions, fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. The Court therefore seeks, in its case-law, to strike a fair balance between, on the one hand, the various rights and interests and, on the other, the fundamental rights and economic freedoms, and in carrying out that balancing, it also takes into account the objectives underlying the limitation of a fundamental right[19].

Moving on, it should be noted that traditional CJEU balancing jurisprudence mainly concerned conflicts between fundamental rights and other provisions of EU law. This changed with the 2003 *Lindqvist* judgment, which applied a similar logic to a conflict between different fundamental rights that stood in opposition to each other – in that case the freedom of expression and freedom of religion of Mrs Lindqvist, as against the right to privacy of others. After confirming once again that national authorities must interpret their national rules in a manner consistent with the provisions of EU law and, in so doing, avoid interpretations which would be in conflict with fundamental rights or other general principles of Community law, including the principle of proportionality, the Court went on to specify that national authorities and courts responsible for applying the national legislation implementing EU directives must ensure a "fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order". The Court moreover specified that:

> Thus, it is, rather, at the stage of the application at national level of the legislation implementing [Data Protection Directive] in individual cases that a balance must be found between the rights and interests involved[20].

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

This not only recognises that a fair balance must be struck between conflicting fundamental rights, but allocates the investigation of that balance to the national authorities: it is not enough that national authorities implement and apply the provisions of the directives, they must also make sure not to violate higher legal norms in so doing. This is in line with Article 51 of the Charter mentioned above. In this regard it is worth noting that the recognition of national discretion in applying a fair balance is remarkably similar to the "margin of appreciation" doctrine of the European Court of Human Rights (ECtHR) that will be explored below. Accordingly, it would appear that, in adopting the fair balance doctrine, the CJEU is attempting to provide guidelines to its domestic counterparts, while staying within the bounds of its jurisdiction as a supranational court that mean that it cannot do the work of the national courts for them.

In *Sky Österreich* the CJEU recently confirmed the principle of fair balance as the form that the principle of proportionality takes when faced with conflicting fundamental rights and the appropriate conflict resolution mechanism for such cases:

> Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them[21].

In view of this, it becomes clear that, in calling for a fair balance in copyright in *Promusicae* and its progeny, the CJEU is indeed applying its settled fundamental rights case law: the pedigree of fair balance must therefore certainly be conceded. Moreover, a picture of balancing's purpose and origins as a judicial tool in the context of CJEU case law begins to take shape: balancing constitutes the application of the principle of proportionality to cases of clashes between fundamental rights – it is thus revealed as the appropriate conflict resolution mechanism for such cases of conflict and should cause no greater consternation than references to that underlying principle. It is in addition clear that, notwithstanding the perhaps impractical objections of many legal theorists, the Luxembourg Court, as well as the EU legislator, subscribes firmly to the theory of the non-absoluteness of fundamental rights, thus relegating the investigation of fair balance to the level of their application – however this non-absoluteness is not intended to take away from the normative strength of fundamental rights, but instead to reinforce it, by allowing for the preservation of all fundamental rights, while also enabling practical solutions to their incompatibilities. Balancing is therefore revealed as the process through which non-absolute rights are shuffled against each other, so that they can settle into their natural resting place, which will change in each instance depending on the particular circumstances of the individual case.

Is this conclusion sufficient? Harbo criticises the mutability of proportionality in the case law of the CJEU:

> [t]he dissection of the principle reveals that the principle has no clear or fixed substantial meaning. Given that the reason why courts adapt (*sic*) principles of law, and the proportionality principle, in particular, is to secure some kind of predictability, objectivity and thus legitimacy for their decision (and not only to fill out wholes in statutory law), this revelation is surely disturbing (Harbo, 2010).

Objections of ambiguity may thus arise as a result of the vaguely defined relationship between balancing and proportionality. Moreover, lack of consistent application also plagues balancing itself: even if it is clear what balancing is intended to achieve in the CJEU's jurisprudence, little indication is given of how it reaches its goals. Griffiths is blunt: "the concept of the 'fair balance' is, without further elucidation, vacuous and unhelpful" (Griffiths, 2013). The enigma remains steadfast: the mere statement that a fair balance must be sought offers no information as to where that balance might lie. If fair balance may only be struck in practice, how does one go about doing that?

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Van Gerven suggests that, to the extent that proportionality is about weighing conflicting interests, these interests must be inventoried, whether they are legitimate or not must be determined and, to this purpose, an order of priority between them must be established (van Gerven, 1999). This points the way forward. To further investigate this suggestion we shall now dig deeper into balancing's European origins in the case law of the ECtHR. This is particularly pertinent in view of the clear inspiration the CJEU has derived from that source: not only do the Treaties[22], as subsequently confirmed in the Charter[23], explicitly reference the European Convention on Human Rights (ECHR) generally, unambiguously embracing as part of the EU *acquis*, but, also, more specifically, the concept of "fair balance" itself can be traced back to the jurisprudence of that Court. Indeed, in *Varec* the CJEU made the link clear itself, by referring back to the Strasbourg court:

> The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be *balanced* against other rights and interests[24].

Admittedly, like the CJEU, it is apparent from the case law of the ECtHR that it too is struggling to find the right formulation of the principle of proportionality and, even more so, a workable definition of balancing. It is however slightly more advanced in its analysis.

4.2 "Fair balance" in ECtHR case law

Proportionality is central to the ECtHR approach to the limitations of human rights. Like the CJEU, the ECHR recognises that, under certain conditions, deviation from the rights and freedoms it guarantees may be acceptable, provided the principle of proportionality is observed. Indeed, in *Soering* v. *UK*, the Strasbourg Court declared that:

> [. . .] inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

As in CJEU jurisprudence, in the case law of the ECtHR the precise contours of the relationship between the principle of proportionality and the principle of fair balance remain somewhat obscure. Mowbray suggests that "fair balance" is used by the Strasbourg Court as a "basis for assessing the proportionality of respondents' interferences with the Convention rights of applicants" (Mowbray, 2010), confirming the conclusions reached above in the EU context.

In any case, here too proportionality and fair balance take centre stage in cases of limitations imposed on human rights. As opposed to the Charter, which adopts a one-size-fits-all approach to limitations in its Article 52, the ECHR addresses the question of the limitations to each right individually in each of its articles. Different approaches to limitations thus apply depending on the right examined. Significantly, the ECHR does not regard all its rights as non-absolute; however, it should be noted that the principle of proportionality has been used exceptionally to limit even unqualified rights[25]. Below we shall be examining the relevant jurisprudence with regard to freedom of expression, the right to privacy and the right to property (including copyright)[26], these being the main rights relevant to the discussion on intermediary copyright liability, as identified in the CJEU case law analysed above[27].

Article 10 of the ECHR on freedom of expression and Article 8 on the right to respect for private and family life are strikingly similar in their approach to the question of limitations (van Dijk *et al.*, 2006, p. 334): when an interference with either right is identified, no violation may be found subject to three standards explicitly laid down in the two provisions and subsequently developed in the case law: the interference must:

- be *prescribed by law*;
- pursue a *legitimate aim* (corresponding to one of those exhaustively listed in the provision)[28]; and
- be *necessary in a democratic society*.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

These are examined in sequence by the Court in its judgements and, with few exceptions, the breach of any of the three standards will mark the interference's violation of the Convention. The emphasis in the case law lies heavily on the third standard of "necessary in a democratic society". The Court has settled the meaning of this phrase as essentially requiring proportionality: according to the Court's established case-law, the notion of necessity in a democratic society implies that an interference "corresponds to 'a pressing social need' and is 'proportionate to the aim pursued' and [that] 'the reasons given were relevant and sufficient'"[29].

The principle of proportionality is also applied in the examination of restrictions on the protection of property under Article 1 of Protocol No. 1 of the ECHR. Paragraph 1 of the provision guarantees that:

> [n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Paragraph 2 then goes on to state that this should not be understood as impairing, "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". In this context, the Strasbourg Court has maintained that "a reasonable relationship of proportionality between the means employed and the aim sought to be realised" is required, meaning that "fair balance [must be] struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned"[30]. It therefore seems that, with regard to the right to property, proportionality dispenses of the first two standards of necessity and suitability and concentrates exclusively on the more substantial fair balance test.

Significantly, in the context of the ECHR the application of the principle of proportionality is tempered by the complementary principle of the margin of appreciation[31]. The margin of appreciation doctrine means that States are given a certain amount of discretion in how they protect human rights. This is usually explained by the absence of any pan-European consensus on how such matters should be regulated. In particular, it has been found that Contracting States must have a broad margin of appreciation with regard to the balancing of conflicting individual interests, since such cases are delicate ones for which the ECtHR cannot provide a definitive answer[32]. In *Chassagnou*, the Court stated that:

> The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention[33].

However, even allowing for the margin of appreciation, the principle of proportionality will be violated where the requirements for its application in a particular case are so high as to not allow for a meaningful balancing process (Harris *et al.*, 2014, p.13). The scrutiny to which the Court will subject Contracting States therefore depends on the breadth of the margin of appreciation granted to them: if it is wide, the Court will be less exacting, if it is narrow, the Court will be stricter.

Barendt suggests that, as opposed to traditional proportionality analysis as developed in the ECHR's early case law for the resolution of challenges by applicants against limitations imposed by the State on human rights – where the presumption is that the human rights should be respected unless one of a narrowly construct set of exceptions can be established – the fair balance test is better suited to cases of conflicts of rights[34]. This again is in line with the conclusions reached above with regard to EU law. The idea was confirmed in *Von Hannover*[35], where the Court found that competing non-absolute human rights have to be balanced against each other. Significantly, this case originated once again in Germany, where the national courts attempted to address the conflict between the

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

applicant's privacy and the freedom of expression of the publishers circulating intrusive photographs of the applicant through balancing.

Like the EU commentators, Barendt (2009) also calls for a clarification of the circumstances in which a fair balance might be said to have been struck. In the follow-up judgment of *Von Hannover* (*No. 2*)[36], the Court delivered. Here the Court began by first confirming that fair balance is the right tool with which to address the matter. On this basis, and in view of the fact that non-absolute rights "deserve equal respect", the Court then observed that the outcome of an application should not, in theory, vary depending on the right with which it has been lodged with the Court. Most importantly, the Court went on to state that:

> [w]here the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

It identified the following criteria: contribution to a debate of general interest; how well-known the person concerned is, the subject of the report; the prior conduct of the person concerned; the content, form and consequences of the publication; and the circumstances in which the photos were taken. This listing of factors represents a huge insight into the Court's reasoning in balancing cases and an immensely helpful indication of how such weighing should be undertaken.

In *Von Hannover* (*No. 2*)'*s* sister judgment of *Axel Springer*[37], delivered on the same day, the Court listed a second group of criteria, strikingly similar to the first set, though, intriguingly, not identical. This time the criteria included: the contribution to a debate of general interest; how well-known the person concerned is; the subject of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed. In keeping with the principle of the margin of appreciation, in both cases the Court concluded that where:

> [. . .] the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.

It should always be understood that in such cases it will not be the rights and interests themselves in abstract terms undergoing the balancing process, but the circumstances of the case under examination (Harris *et al.*, 2014, pp. 354-355). As in the CJEU case law, here too definitional balancing is clearly rejected:

> [t]he test of whether an interference was necessary in a democratic society cannot be applied in absolute terms. On the contrary, the Court must take into account various factors, such as the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case[38].

As Barendt notes, this approach to balancing, contrary to its detractors' accusations, need not be unpredictable. Instead, it is transformed into a tool for cogent practical discourse that enables a detailed and coherent comparative exercise between the requirements of conflicting rights that can lead to an ultimate rational concluding judgment (Alexy, 2003; Griffiths, 2013; and Smet, 2014, p. 118). If it is sometimes difficult to follow the reasoning of a court, that must be attributed to bad application of the test, not to the insufficiencies of the test itself (Barendt, 2009).

4.3 The Delfi case: the ECtHR tackles intermediary liability

On 20 October 2013 the ECtHR applied its new factor-infused balancing to the area of intermediary liability. The case concerned the liability of Delfi[39], one of the most popular Internet news platforms in Estonia, for defamatory comments posted by its readers on its website beneath one of its news articles. Following a complaint by the victim, Delfi removed

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

the offensive comments, but refused to pay damages. It should be noted that, at the material time, Delfi had three mechanisms in place for dealing with inappropriate comments: a notice-and-take-down system that allowed users to flag inappropriate comments for deletion; a filtering system that automatically deleted comments that included certain obscene words; and the occasional proactive removal of comments. In addition, "rules of comment" warned that insulting or vulgar comments would be removed. Users uploaded comments automatically, without editing or moderation by Delfi. The ECtHR was called upon to decide whether the imposition on Delfi of an obligation to take further measures to ensure that comments posted on its Internet portal did not infringe the personality rights of third persons was in accordance with the guarantees set out in Article 10 of the Convention.

The Court applied its familiar reasoning according to which the interference with Delfi's freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10 and be "necessary in a democratic society". As is usual, the bulk of the Court's analysis rested on an analysis of the notion of "necessity in a democratic society". The Court noted that, in this context, the domestic authorities were under an obligation to strike a fair balance in the resolution of the conflict between freedom of expression and the right to respect for private life: both rights deserve equal respect and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an disputed article or under Article 8 of the Convention by the person who has been the subject of that article. The margin of appreciation should therefore in principle always be the same.

In this context, the Court outlined four criteria to be taken into consideration where the right to freedom of expression is balanced against the right for private life. These were:

1. the context of the comments;
2. the measures applied by the applicant company to prevent or remove defamatory comments;
3. the liability of the actual authors of the comments as an alternative to the applicant company's liability; and
4. the consequences of the domestic proceedings for the applicant company.

A detailed analysis followed. As concerns the context of the comments, the Court noted that, in view of the intense public interest in the topic of the news article it had published and the above average number of responding comments, Delfi was expected to exercise a high degree of caution, as the context of the comments was such that there was a "higher-than average risk" that negative reactions would go beyond the bounds of acceptable speech and reach the level of gratuitous insult or hate speech.

With regard to the measures taken by Delfi to prevent or remove defamatory comments, the Court found that, while Delfi could not be said to have wholly neglected its duty to avoid causing harm to third parties, the word-based filter was easy to circumvent, meaning that, even though some of the insults or threats were deleted, others were allowed through. Likewise, while the notice-and-take-down system did result in the successful removal of defamatory comments after the victim brought them to the attention of the applicant company, that occurred only after they had already been published. The system in place was therefore insufficient to prevent harm to others. This conclusion seems to imply that if a system is not infallible, it is not sufficient, a rather curious result. In this respect, the wide audience for the comments and Delfi's dependence on advertising revenue, as well as the control Delfi exercised over the comments published, were all considered to be pertinent: it was Delfi and not the victim that was in the better position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

public. It was noted, in echo of the CJEU *Telekabel* case, that Delfi could choose which measures to apply in satisfying its duty of diligence with regard to the protection of the rights of others – again, this was viewed as an important factor in reducing the severity of the interference with its freedom of expression.

The ECtHR proceeded to acknowledge that the victim could take action against the actual authors of the comments, but noted that their identity would be difficult to establish. It was therefore not convinced that measures allowing an injured party to bring a claim only against the authors of defamatory comments would have guaranteed effective protection of the injured person's right to private life. In any case, the applicant company's choice to allow comments by non-registered users must be considered to entail an assumption of a certain responsibility for these comments. Finally, the Court observed that the applicant company was obliged to pay the affected person the equivalent of only EUR 320 in non-pecuniary damages and that this sum, in view of the fact that that the applicant was a professional operator of one of the largest Internet news portals in Estonia, could by no means be considered disproportionate to the breach established by the domestic courts.

In summary, the Court found that:

> [. . .] the insulting and threatening nature of the comments, the fact that the comments were posted in reaction to an article published by the applicant company in its professionally-managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable, and the moderate sanction imposed on the applicant company.

Meant that restriction on the applicant company's right to freedom of expression was justified and proportionate.

Despite receiving considerable criticism, the decision was subsequently affirmed by the Grand Chamber of the ECtHR in June 2015, which, if anything, took a stricter stance[40]. The Grand Chamber confirmed not only the outcome of the case, but – more importantly for our purposes – the criteria identified by the First Section for the assessment of whether or not a fair balance has been achieved. This is the most pertinent part: given that the *Delfi* results – being entirely incompatible with the demands of Article 15 of the E-Commerce Directive and the jurisprudence of the CJEU – cannot be reproduced by EU Member States, it is to these criteria and the insights they offer to the jurisprudential method underlying fair balance that the relevance of the case to the topic of the obligations of intermediaries in the EU must be limited.

This is particularly so, given that the only fundamental rights examined in the case were the State's obligation, by imposing duties on an intermediary, to defend the right of a third party to respect for their private life under Article 8 and the freedom of impart information under Article 10 of the ECHR of the intermediary thus affected: in contrast to the CJEU case law, nothing was said about the rights of the intermediary's users, who were not represented in the dispute. More importantly yet, the case also did not concern copyright. Indeed, to date, no case brought before the ECtHR has examined the question of a fair balance between the protection of property and the right to freedom of expression or the privacy of end-users. The closest the Strasbourg Court has come to examining such matters was in *Neij and Sunde Kolmisoppi* v. *Sweden*[41], where it identified a clash between the right to copyright, as protected as a property right, and the right to freedom of expression of the founders of the file-sharing website "The Pirate Bay". That case however did not examine users' rights; moreover, although Sweden was found to have struck a fair balance within its margin of appreciation, factors detailing the Court's thought process in that conclusion were not identified. As a result, the *Delfi* judgment remains the closest – although lacking – approximation currently available in the ECtHR case law to the balancing of intermediary obligations, as this has been approached by the CJEU.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

5. Balancing as legal discourse

As Smet observes, the listing of relevant criteria in *Axel Springer*, *Hannover* (*No. 2*) and *Delfi* has the advantage of providing some much needed structure to the Court's previously abstract balancing test. At the same time however, it is not easy to ignore the fact that, despite the great similarity in the cases examined, the lists supplied differ between the three judgments. Moreover, in all three cases the criteria are customised to conflicts between the freedom of the press and privacy and are inapplicable in other contexts (Smet, 2014, p. 170). They therefore offer little guidance as to how other conflicts should be resolved: presumably the Court would pull another list of, doubtless certainly relevant, but entirely unpredictable criteria out of its judicial hat. As a result, it is not easy to derive clear conclusions, let alone construct a coherent theoretical framework on this inscrutable basis (Harris *et al*., 2014, p. 511). Aside from the changeable nature of the selected criteria, the mode of their application is unclear: Van Dijk and Van Hoof express their dismay at this state of affairs:

> [j]udgments typically contain a (sometimes extensive) listing of the factors to be taken into account, but then somewhat abruptly – without additional arguments as to the weight of the factors concerned – concluded, for instance, that [. . .] "a proper balance was not achieved"[42].

This is one of the most common criticisms against balancing. From across the Atlantic, Coffin laments:

> [a]ll too commonly in judicial opinions, lip service is paid to balancing, a cursory mention of opposing interests is made, and, presto, the "balance" is arrived at through some unrevealed legerdemain (Coffin, 1988).

Certainly, some degree of flexibility may not necessarily be avoidable. Indeed, as noted above, proportionality as a legal tool is generally agreed to be determinable only on a case-by-case basis in light of the particular circumstances at issue (Fischman Afori, 2014). It may therefore be argued that the list of relevant factors will never be capable of an abstract or exhaustive remuneration. In *EMI Records* v. *British Sky Broadcasting*, British judge Arnold J. noted that "the proportionality of a blocking order is bound to be a context-sensitive question"[43]. Mowbray comments that when "assessing if a fair balance has been achieved in specific cases the Court has had to take account of a myriad of competing individual and community interests" (Mowbray, 2010).

This realisation indicates the real value of the listing of factors by the courts: it lies not in the identified factors themselves, but in the ensuing analysis. This moves us closer to a real understanding of how to approach the notion of "fair balance" – not as a myth applied by the courts to obfuscate their subjective assessments or as a scientific method capable of providing definitive answers, but as a metaphor for the exercise of a detailed dissection, comparison and ordering of the available options with a view to identifying the optimal outcome: a call for rational discourse. Greer suggests:

> [. . .] [l]ittle hinges on whether this process is called "defining", "interpreting", or "balancing". The important point is that, since it involves applying, and giving greater precision to, vague norms, judicial discretion is inescapable, although the structure, terms and underlying values of the Convention provide a framework of constraint.

In *Chassagnou* the ECtHR located the very essence of democracy in this evaluative deliberation: "[i]t is precisely this constant search for a balance between the fundamental rights of each individual that constitutes the foundations of a 'democratic society'"[44]. From this perspective accusations according to which balancing is merely a rhetorical device, "window-dressing" employed by courts incapable of actually providing real answers, but only reframing conclusions reached through elliptical thinking, miss the central point: choosing between options on the basis of subjective assessment is often the

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

job of the courts, particularly in difficult cases. As Frantz put it, as "soon as he finishes measuring the unmeasurable, the judge's next job is to compare the incomparable" (Frantz, 1963). What is necessary is that judges lay bare their reasoning and the factors that led them through it to their ultimate decision. As Barendt insightfully argues, courts:

> [. . .] must give coherent and consistent reasons for their decisions [. . .]. Rulings on fundamental rights need not be arbitrary and are no more unreasonable than they are in other areas of law such as the law of negligence or charitable trusts (Barendt, 2009).

From this perspective, it becomes clear that balancing is inextricably intertwined with the deliberative acceptance of a system of principles to guide decisions and achieve rational outcomes – and consequently essentially with policy. The outcomes of balancing is not so much "arbitrary", as dictated by the values of the society in which it occurs. Identifying those values requires investigation through social dialogue. As the ECtHR emphasised, the essence of democratic governance is in the assessment and re-assessment of tough judgment calls between the basic cornerstones of societal organisation, in the constant re-shuffling of values and the unpacking of ideals: ultimately, in constitutional discourse.

It could of course be argued that the courts are not the appropriate venue for such assessments. Jacobs questions whether the judiciary is well-situated to evaluate social, economic or political choices and suggests that that might be a task best performed by the executive within the limits laid down by the legislature (Jacobs, 1999, p. 21). Van Gerven agrees that the basic issues must be solved by the constitutional legislator proper, with the courts limiting themselves to an interpretative and implementational role (van Gerven, 1999, p. 37).

In other words, and now moving back to the EU context, if further guidance is to be provided, it should arguably be formulated not by the CJEU, but by the EU legislator. This could explain the CJEU's reluctance to delve into the details of its balancing thought process, preferring to let the national authorities fill in the gaps as it sees fit. Until a harmonised substantive intermediary liability is adopted by the European legislator, national tort law must continue to govern the area. Synodinou, after pointing out that "the standards of duty of care imposed by national courts continue to differ significantly from jurisdiction to jurisdiction", submits: "[n]ational legal orders balance those rights in a manner that reflects their national values, so any alternative approach of the CJEU is problematic" (Synodinou, 2015). On that note the principle of subsidiarity that binds the EU and the limited scope of application of the Charter are particularly relevant. As Lind and Strand argue:

> [t]he closer we move toward the core values of the EU, the more intense and present is thus the question of how the Court respects the separation of powers and a potential hierarchy of norms. With the Charter now being legally binding, and the succession of the EU to the ECHR pending (further complicating an already complicated relationship to the human rights regime of the Council of Europe), these questions will not cease to gain importance (Lind and Strand, 2011).

Alexy (2005) contemplates this question by reflecting on the interconnection of constitutional judicial review and democratic governance as a guarantor of *tranquillitas publica*:

> The existence of good or plausible arguments is enough for deliberation or reflection, but not for representation. For this, it is necessary that the court not only claim that its arguments are the arguments of the people; a sufficient number of people must, at least in the long run, accept these arguments for reasons of correctness. Only rational persons are able to accept an argument on the ground that it is correct or sound [. . .]. Constitutional review can be successful only if the arguments presented by the constitutional court are sound and only if a sufficient number of members of the community are able and willing to exercise their rational capacities.

Regardless of the conclusion, what is clear is that, if fragmentation is to be avoided, the debate should occur on the European level. Interestingly, this was precisely the concern

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

that motivated the Austrian *Oberster Gerichtshof* in its submission of a request for a preliminary ruling in *Telekabel*. Observing that the courts in different Member States were reaching different conclusions on the proportionality of blocking orders, the Austrian court called for "guidelines for assessing the proportionality of specific blocking measures" laid down by the CJEU, so that the question may "be judged in a uniform manner throughout Europe"[45]. The identification of criteria capable of guiding the discussion on intermediary obligations for copyright enforcement along the lines of the example set by the ECtHR can and should be provided by the EU. A national approach to an Internet – and therefore international – problem is not going to provide adequate solutions (Kuner, 2008).

In this regard, it is worth noting the evolution that occurs in the CJEU's intermediary liability case law: while in *Promusicae* the Luxembourg court limited itself to noting that a fair balance must be struck and deferred the actual balancing operation to the national level, in *L'Oréal* it repeated that edict, but now added instructions as to how to achieve that balance; finally in *Scarlet Extended* and *Netlog*, although again low on the guidelines, it delved into the substantive questions and provided a concrete answer with regard to whether the measure in question struck a fair balance or not. Although the Court's reasoning is opaque, its concrete rejection of the filtering mechanism under discussion is noteworthy (González Fuster, 2012). This different treatment can likely be attributed to the limits of the Court's jurisdiction and the different type of rule under examination in each case: in *Promusicae* the Court was simply reminding its national counterparts of their obligations under EU primary law, while in the *Sabam* cases it was called upon to interpret specific provisions of the copyright directives. If in *Telekabel* the Court then took two steps back to pass the hot potato of "fair balance" further down the line, not even to the national authorities, but to the service providers themselves, this can be attributed to the nature of the submitted question that focused on the Austrian "outcome prohibition" peculiarity. What is of course missing in this line of case law is a decision outlining guidelines for the application of a balancing test and subsequently applying these in a coherent manner that can reveal the appropriate rationale – but that would be making law.

6. Applying fair balance to intermediary liability: filtering v. blocking

Absent guidelines explicitly identified as such in either the EU directives or the CJEU case law, is the identification of the "fair balance" between competing rights currently entirely dependent on the subjective opinions of each national judge? It is suggested that, although obscure, the framework of established CJEU jurisprudence and EU legislation may provide reliable indications of whether specific duties may be imposed on intermediaries in the enforcement of copyright, if approached as parts of an incomplete puzzle (van Enis, 2013). In this way, the gaps in the "fair balance" framework can be filled through logical extrapolation, by utilising the information provided by Copyright, Enforcement and E-Commerce Directives[46], as well as the existing decisions of the CJEU as reference points.

Although indubitably other options also exist, on the basis of the current case law of the CJEU two main options for the obligations of intermediaries with regard to third party copyright infringement have to be considered: the installation of filtering mechanisms and the blocking or removal of copyright-protected content as enforcement measures[47].

6.1 Filtering for copyright-protected content

With regard to filtering, a good starting point is provided by the observation that the injunctions requested by Sabam in both *Scarlet Extended* and *Netlog*, would have involved the installation of a filtering mechanism for all electronic communications, both incoming and outgoing, of for all of Scarlet's customers, *in abstracto* and as a preventive measure, at the cost of the provider and for an unlimited period of time – in other words, they were exceptionally broad. The rulings therefore must technically be read as leaving open the possibility of ordering narrower filtering obligations (Kulk and Borgesius, 2012). Indeed, as

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

noted above, in *L'Oréal* the Court had ruled that injunctions ordering intermediaries to take measures that contribute to preventing further infringements must be allowed. That said, it is hard to envision a filtering duty that would not perforce involve general monitoring, particularly given that to be effective, filtering has to be systematic, universal and progressive, bringing it out of proportion with its aims[48]. Filtering after all, by the very definition of the word, necessarily involves examining a group of communications to identify and "filter out" the objectionable ones. So, while in *L'Oréal* the Court explicitly permitted the imposition of measures seeking to prevent future infringements, pre-emptive action against illegality from unknown sources would nevertheless probably be excluded, as this will often amount *de facto* general monitoring, there being no other way to stop infringing activity of whose existence intermediaries cannot otherwise become aware without outside assistance (Verbiest *et al.*, 2007; DLA Piper, 2009). As such monitoring would also involve an interference with users' privacy rights and data protection, and this gives us a good indication of where the fair balance lies in such circumstances.

Accordingly, the imposition of an obligation for online intermediaries to carry out prior control by means of the installation of a filtering system would appear be of dubious legality under the EU rules. Duties to filter, whether imposed through law or a court order, although not in principle forbidden, may only be ordered after a careful consideration of their implications for competing rights and interests that in effect must amount to an exclusion of their imposition.

6.2 Blocking and removal of copyright-protected content

What about duties to block or remove copyright-protected content? If the above logic is to be completed, duties to suppress specific and clearly identifiable users, websites or content that have been found to engage in or contain illicit information should be deemed acceptable. Insightfully, in *Scarlet*, AG Cruz Villalón pointed out that filtering and blocking mechanisms, although closely related to each other with regard to the objectives they pursue, differ essentially as to their nature. They consequently carry very different legal implications[49]. And indeed, in *L'Oréal* the Court suggested the suspension of the perpetrator of the infringement as an example of a measure that would reconcile all competing interests. This followed the suggestion by AG Jääskinen of a "double requirement of identity", according to which where the infringing third party is the same and the right infringed is the same, an injunction may be issued ordering the termination of the account of the user in question[50]. This would satisfy the balance between too lax and too aggressive an enforcement of intellectual property rights – between, to use the simile made by the AG, the Scylla of allowing the rampant infringement of copyright and the Charybdis of infringing the rights of users and intermediaries[51]. Courts must tread carefully however, as even this suggestion is not without its problems: depending on whether the words "perpetrator" and "infringing third party" here are understood to refer to the actual person committing the infringement or simply the account they happen to hold while executing it, the measure may go beyond mere blocking and require filtering software that could at least run afoul of Article 15 of the E-Commerce Directive (Clark and Schubert, 2011). It is interesting that the wording in the AG's Opinion ("closing the client account of the user") and that of the Court ("suspend the perpetrator") suggest different conclusions. Moreover, requiring that the intermediary proactively attempt to hunt out cases of such "double identity" would require monitoring innocent bystanders and thereby clearly also tip the scales into the realm of "unfair".

It should additionally be noted that even mere blocking can have more extensive repercussions than intended: blocking entire websites, for example, risks collateral damage in the form of disallowing access to entirely legal content that happens to be hosted at the same address (Horten, 2013, p. 27). More significantly yet, a clear distinction between blocking and filtering cannot be made, given that even cases of targeted and therefore "specific" blocking will often necessitate the "filtering" of identifying data that help

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

locate the content and differentiate it from other material, if not the processing of the content itself. So, for instance, URL-based blocking, which compares the website requested by the user with a pre-determined "blacklist" of URLs of objectionable websites, will result in the indiscriminate processing of all URLs passing through the filter, even if only few of these are subsequently blocked. Other measures, such as the termination of an identified user-account, will not pose such problems. Great care is needed in establishing that measures that might at first sight appear to be sufficiently "specific" are indeed so.

7. Conclusion

A final note should be made on the significance of this "constitutionalisation", as it has been termed, of the intermediary liability debate. McCormick has posited that, in the multi-level pluralistic legal order of a united Europe, principles reflecting the common tradition of ideas of EU Member States and securing the compatibility of partially overlapping systems are necessary[52]. He accordingly suggested that fundamental rights law, alongside the principles of proportionality, subsidiarity and natural justice might successfully serve that function. In copyright law, probably currently the most extensively harmonised area of private law in the EU, we can see this suggestion beginning to take practical effect. This was the main offering of the application of "fair balance" to the intellectual property case law: the establishment of fundamental rights – only vaguely nodded at in text of the copyright directives – as an essential component of the discussion on intermediary liability and relevant factors in solving the tensions between copyright and other rights and interests. In this way, the limits of enforcement are identified no longer in the secondary legislation, but in the primary sources, pulling diverse national tort systems closer together.

In this way, as Griffiths (2013) suggests, constitutionalisation is employed as a method of harmonisation: through the injection of fundamental rights into the intermediary liability question, the Europeanising of what would otherwise be a national discussion is unlocked. This should not be seen as in any way paradoxical or undesirable, but rather the natural function of fundamental rights and the obvious jurisdiction of any court that oversees their application. Once fundamental rights have been acknowledged as carrying European authority, a cross-fertilisation of the private and public law spheres will necessarily follow: absent a European substantive intermediary liability regime, let alone a unified tort law, fundamental rights become the only field to which the CJEU can turn for answers. And although fundamental rights and tort law differ drastically as to their mechanisms of enforcement, in their parallel pursuit of a basic standard of decent human behaviour, they constitute two sides of the same coin. Indeed, tort law (including intermediary liability, whether for monetary compensation or injunctive relief) is often the tool through which the State discharges its duty to provide for an effective remedy against a violation of a fundamental right, while at the same time fundamental rights law will determine the cadre within which States must remain when constructing their tort rules. In creating and enforcing its tort law regime, the State may not overstep the boundaries of fundamental rights either by acting in a way that would violate the fundamental rights of private parties or by omitting to put in place guarantees for the practical and effective protection of those rights. This interconnection means that the standard of care that can be imposed on private individuals by state-enacted legal provisions or court-ordered mandates may be illuminated by the underlying fundamental rights obligations of that State: the duties incumbent upon individuals are reflections of the duties incumbent on the State towards those individuals. As Van Dam puts it, "tort rights are human rights" (van Dam, 2013, Section 711-4).

As a result, obligations may be imposed on intermediaries, as long as the State respects, in their selection, fundamental rights law and the "fair balance" that this requires. Simply put, in applying their tort law to intermediary liability, EU Member States must take care to respect fundamental rights[53]. In effect, the result is a very traditional conception of the role of fundamental rights, but with a modern outlook that employs fundamental rights to

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

govern – albeit in very broad strokes – a matter of national tort law. Potentially therefore, the concept of a "fair balance" might allow for a reverse-engineering of intermediary liability and thus, ultimately, serve as the first inroad into the establishment of a European substantive law for intermediary liability[54].

In the meantime, it is important for commentators and policy-makers to properly understand the jurisprudential status quo. To this end, in the text above the concept of a "fair balance" has been traced back to its origins in legal theoretical analysis and the interconnected jurisprudence of the CJEU and ECtHR. In this way, an understanding of exactly what the principle "fair balance" is intended to achieve and how it should be employed to reach those ends can be assembled. The conclusion is that balancing would appear to be nothing more or less than the idea that fundamental rights (or, at least, some fundamental rights) are not, *pace* Habermas, to be conceived of as absolute, but simply of deserving equal protection, each, in this way, forming the natural limit of the other. This in turn means that the resolution of clashes between them may only be decided on a case-by-case basis, the individual circumstances at hand being the only factors that tilt the judgment one way or another: it can never absolutely be said that the right to intellectual property deserves greater protection than the right to freedom of expression and therefore should always prevail or vice versa. Instead, both should, from time to time and depending on the specifics at hand, be used to force the other into its proper place, thus coming together to form a virtuous circle of optimal fundamental rights protection.

But if balancing is case-by-case weighing, what is that which is being weighed? If weighing is what is being done, where are the scales? Currently in CJEU case law they are entirely missing: the Luxembourg Court has for the time being limited itself to simply observing that a fair balance must be struck or, at most, rejecting specific possibilities as not fairly balanced. This is perhaps unsurprising given the subsidiarity barriers that control its jurisdiction. At the same time, mere reference to fair balance with no indication of how the concept should be approached is unhelpful and risks creating fragmentation across Member State borders. As a result, while fair balance offers good possibilities for a rational fundamental rights adjudication, more concrete guidelines as to its requirements need to be formulated. A pan-European framework for fair balance, whether applicable to every instance of a fundamental rights conflict or, at the very least, to the obligations of intermediaries for copyright enforcement would be immensely helpful. The ECtHR appears to be making strides in that direction: acknowledging both proportionality and the margin of appreciation that Contracting States enjoy, the Strasbourg Court has, in its recent case law, attempted to trace out factors that govern the balancing process, thus giving invaluable insights into its judicial reasoning. The CJEU should follow its lead. In either jurisdiction, such judicial analyses should always account for the societal discourse surrounding the topic, as well as clearly embed this in their reasoning, if the outcome is to claim real legitimacy. In this way, as long as the debate, both within and without the courts, perseveres, the ghost of a fairly balanced intermediary liability framework can continue to take ever more concrete shape.

Notes

1. Christina Angelopoulos is a researcher at the Institute for Information Law (IViR) of the University of Amsterdam, where she is currently writing her PhD thesis on intermediary liability for third party copyright infringements.
2. 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) (2000) OJ L 178/1 (E-Commerce Directive).
3. Article 12(3), 13(2), 14(3) E-Commerce Directive. See also, Recital 45. Article 18 also requires that Member States "ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim injunctions, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved".

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

4. 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 (2001) *OJ L167/10* (Copyright Directive).
5. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (2004) OJ L 157/45 (Enforcement Directive).
6. Case C-275/06, *Promusicae*, 29 January 2008.
7. Article 1(5)(b) and Recital 14, E-Commerce Directive. See also, Opinion of AG Kokkot in Case C-275/06, *Promusicae*, 18 July 2007. For additional analysis, see Kiekegaard, 2008.
8. Charter of Fundamental Rights of the European Union, opened for signature 7 December 2000, (2000) OJ C 364/01 (entered into force 1 December 2009).
9. Case C-324/09, *L'Oréal* v. *eBay*, 12 July 2011.
10. Case C-70/10, *Scarlet Extended SA* v. *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011.
11. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* v. *Netlog NV*, 16 February 2012.
12. Case C-314/12, *UPC Telekabel Wien GmbH* v. *Constantin Film Verleih GmbH*, 27 March 2014.
13. For a table depicting the consecutive migrations of proportionality until its current world-wide popularity, see p. 182.
14. Case C-11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970.
15. Case C-5/88, *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*, 13 July 1989.
16. Case C-112/00, *Schmidberger*, 12 June 2003.
17. A similar approach had been taken much earlier in Case C-44/79, *Hauer* v. Land Rheinland-Pfalz, 13 December 1979, para. 30. See for an analysis, van Gerven, 1999.
18. It should be noted that in general the principle proportionality has no fixed substantial form within the case law of the Court. Van Gerven observes that proportionality in CJEU case law sometimes presents as a three-pronged test and sometimes is pruned back to a two-pronged one, skipping on the balancing element (van Gerven, 1999). Jacobs (1999), in another essay in the same edited collection, concludes that this flexibility is precisely one of proportionality's advantages as a tool of judicial review.
19. Opinion of Advocate General Jääskinen, C-129/14 PPU, *Zoran Spasic*, 2 May 2014.
20. Case C-101/01, *Lindqvist*, 6 November 2003.
21. Case C-283/11, *Sky Österreich*, 22 January 2013.
22. According to Article 6(3) of the Treaty on European Union, "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".
23. According to Article 52(3) of the CFREU, in so far as the rights protected by the two documents overlap, "the meaning and scope of those rights shall be the same as those laid down by the said Convention". Article 53 of the Charter further clarifies that the Charter shall not be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by international agreements to which the Union, the Community or all the Member States are party, including the ECHR.
24. Case C-450/06, *Varec*, 14 February 2008.
25. *Kozaciŏglu* v. *Turkey*, application no. 2334/03, 19 February 2009.
26. As opposed to the Charter, the ECHR does not mention intellectual property, but recent case law of the Court of Human Rights makes clear that Article 1 of Protocol 1 to the Convention should be interpreted as encompassing it. In *Anheuser Busch Inc* v. *Portugal* the Court stated that, "intellectual property as such undeniably attracts the protection of Art. 1 of Protocol No. 1". The case was relevant to trademark protection, but was repeated with regard to copyright in *Balan* v. *Moldova*, application no. 19247/03 29 January 2008 and *Neij and Sunde Kolmisoppi* v. *Sweden*, application no. 40397/12, 19 February 2013. See also Helfer, 2008, and Barendt, 2007, p. 247 *et seq.*

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

27. The European Convention on Human Rights does not include an equivalent of the Charter's Article 16 "freedom to conduct a business". The right to an effective remedy shall also not be analysed here, as it was only mentioned in *Promusicae* and omitted in the later CJEU rulings under examination in this article.
28. In the case of Article 8(2) of the Convention these may be "national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others", while in the case of Article 10(2), "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".
29. See Concurring Opinion of Judge Loucaides in *Lindon, Otchakovsky-Laurens and July* v. *France*, applications nos. 21279/02 and 36448/02, 22 October 2007; See also, *Olsson* v. *Sweden*, application no. 10465/83, 24 March 1988; *Leander* v. *Sweden*, application no. 9248/81, 26 March 1987; *Berthold* v. *Germany*, Application no. 8734/79, 25 March 1985; *Sunday Times* v. *the UK*, Application no. 6538/74, 26 April 1979; *Handyside* v. *the UK*, Application no. 5493/72, 7 December 1976.
30. *Sporrong and Lönnroth* v. *Sweden*, application no. 7151/7523, 23 September 1982; *James and others* v. *the UK*, application no. 8793/79, 21 February 1986; *AGOSI* v. *the UK*, application no. 9118/80, 24 October 1986.
31. *Handyside* v. *UK*, application no. 5493/72, 7 December 1976.
32. Chassagnou and Others v. France [GC], application nos. 25088/94, 28331/95 and 28443/95, 29 April 1999; *MGN Limited* v. *the United Kingdom*, application no. 39401/04, 18 January 2011.
33. Chassagnou and Others v. France [GC], application nos. 25088/94, 28331/95 and 28443/95, 29 April 1999.
34. He contrasts such cases to those of conflicting rights of equal value, where a test that assesses the importance and scope of each right in the context of the circumstances of case is more appropriate (see Barendt, 2009).
35. *Von Hannover* v. *Germany*, application no. 59320/00, 24 June 2004.
36. *Von Hannover* v. *Germany (No. 2)*, application nos. 40660/08 and 60641/08, 7 February 2012.
37. *Axel Springer* v. *Germany*, application no. 39954/08, 7 February 2012.
38. *Neij and Sunde Kolmisoppi* v. *Sweden*, application no. 40397/12, 19 February 2013.
39. Delfi v. Estonia, application no. 64569/09, 10 October 2013.
40. *Delfi* v. *Estonia*, application no. 64569/09, Grand Chamber, 16 June 2015. For an analysis of the Grand Chamber decision, see Angelopoulos, 2015.
41. *Neij and Sunde Kolmisoppi* v. *Sweden*, application no. 40397/12, 19 February 2013.
42. Van Dijk and Van Hoof, as found in Smet, 2014, p. 162.
43. *EMI Records Ltd & Ors* v. *British Sky Broadcasting Ltd & Ors* (2013) EWHC 379 (Ch), 28 February 2013.
44. Chassagnou and Others v. France [GC], application nos. 25088/94, 28331/95 and 28443/95, 29 April 1999.
45. *EMI Records Ltd and others* v. *British Sky Broadcasting Ltd and others* (2013) EWHC 379 (Ch), para. 99.
46. Indeed, Recital 41 of the E-Commerce Directive reveals its role as a harbinger of fair balance: "This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based".
47. For a definition of filtering, blocking and content removal see, McGonagle and and van Daalen (2015).
48. Opinion of AG Cruz Villalón, case C-70/10, *Scarlet Extended SA* v. *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 14 April 2011, para. 48.
49. Opinion of AG Cruz Villalón, case C-70/10, *Scarlet Extended SA* v. *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 14 April 2011, para. 46.
50. Opinion of AG Jääskinen, Case C-324/09, *L'Oréal* v. *eBay*, 9 December 2010, para. 182.

51. Opinion of AG Jääskinen, Case C-324/09, *L'Oréal* v. *eBay*, 9 December 2010, para. 171.

52. McCormick, 1993, as discussed in particular reference to intellectual property in Pila, 2013.

53. At least, in the EU context, as concerns areas relevant to EU competence, such as copyright.

54. Indeed, Pila implies that copyright might show the way forward for the European harmonisation of other areas of private law as well, as the title of her chapter suggests, see: J Pila, "Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context" in A Ohly and J Pila, *The Europeanization of Intellectual Property Law: Towards A European Legal Methodology* (Oxford University Press, Oxford 2013) 23.

References

Alexy, R. (2002), *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

Alexy, R. (2003), "Constitutional rights, balancing and rationality", *Ratio Juris*, Vol. 16 No. 2.

Alexy, R. (2005), "Balancing, constitutional review, and representation", *International Journal of Constitutional Law*, Vol. 3 No. 4, pp. 572-581.

Angelopoulos, C. (2013), "Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe", *Intellectual Property Quarterly*, Vol. 2013 No. 3, pp. 253-274.

Angelopoulos, C. (2014), "Are blocking injunctions against ISPs allowed in Europe?: copyright enforcement in the Post-Telekabel EU legal landscape", *Journal of Intellectual Property Law & Practice*, Vol. 9 No. 10, pp. 812-821.

Angelopoulos, C. (2015), "Delfi v. Estonia: ISPs and the freedom to impart information", *IPKat*, 24 June, available at: http://ipkitten.blogspot.nl/2015/06/delfi-v-estonia-isps-and-freedom-to.html

Barak, A. (2010), *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge.

Barendt, E. (2007), *Freedom of Speech*, Oxford University Press, Oxford.

Barendt, E. (2009), "Balancing freedom of expression and privacy: the jurisprudence of the Strasbourg Court", *Journal of Media Law*, Vol. 1 No. 1, pp. 49-72.

Clark, B. and Schubert, M. (2011), "Odysseus between Scylla and Charybdis? The ECJ rules in *L*'Oréal v eBay", *Journal of Intellectual Property Law & Practice*, Vol. 6 No. 12.

Coffin, F.M. (1988), "Judicial balancing: the protean scales of justice", *New York University Law Review*, Vol. 63 No. 1, pp. 16-42.

de Beer, J. and Clemmer, C. (2009), "Global trends in online copyright enforcement: a non-neutral role for network intermediaries?" *Jurimetrics*, Vol. 49 No. 4, pp. 375-409.

de Vries, S. (2013), "Balancing fundamental rights with economic freedoms according to the European Court of Justice", *Utrecht Law Review*, Vol. 9 No. 1, pp. 169-192.

DLA Piper (2009), "EU study on the legal analysis of a single market for the information society – new rules for a new age?, Chapter 6: 'Liability of internet intermediaries'", available at: http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=7022

Edwards, L. (2009), "the fall and rise of intermediary liability online", in Edwards, L. and Waelde, C (Eds), *Law and the Internet*, Hart Publishing, Oxford.

Fischman Afori, O. (2014), "Proportionality – a new mega standard in European Copyright Law", *IIC International Review of Intellectual Property and Competition Law*, Vol. 45 No. 8, pp. 889-914.

Frantz, L.B. (1963), "Is the first amendment law? A reply to professor mendelson", *California Law Review*, Vol. 51 No. 4, pp. 729-754.

Gardbaum, S. (2007), "Limiting constitutional rights", *UCLA Law Review*, Vol. 54 No. 4.

González Fuster, G. (2012), "Balancing intellectual property against data protection: a new right's wavering weight", IDP: Revista de Internet, Derecho y Política, No. 14.

Greer, S. (2004), "'Balancing' and the European court of human rights: a contribution to the Habermas-Alexy debate", *Cambridge Law Journal*, Vol. 63 No. 2, pp. 412-434.

Griffiths, J. (2013), "Constitutionalising or harmonising? The court of justice, the right to property and European copyright law", *European Law Review*, Vol. 38 No. 1, pp. 65-78.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

Groussot, X. (2008), "Rock the KaZaA: another clash of fundamental rights", *Common Market Law Review*, Vol. 45 No. 6, pp. 1745-1766.

Groussot, X., Pech, L. and Thor Petursson, G. (2013), "The reach of EU fundamental rights on member state action after Lisbon", in de Vries, S., Bernitz, U. and Weatherill, S. (Eds), *The Protection of Fundamental Rights after Lisbon*, Hart Publishing, Oxford.

Habermas, J. (1996), *Between Facts and Norms*, Polity Press, Cambridge.

Harbo, T. (2010), "The function of the proportionality principle in EU Law", *European Law Journal*, Vol. 16 No. 2, pp. 158-185.

Harris, D.J., O'Boyle, M., Bates, E. and Buckley, C. (2014), *Harris, O'Boyle & Warbrick – Law of the European Convention on Human Rights*, Oxford University Press, Oxford.

Helfer, L.R. (2008), "New innovation frontier – intellectual property and the European Court of Human Rights", *Harvard International Law Journal*, Vol. 49 No. 1.

Horten, M. (2013), *A Copyright Masquerade*, Zed Books, London.

Husovec, M. (2013), "Injunctions against innocent third parties: case of website blocking", *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 4 No. 2, pp. 116-129.

Jacobs, F.G. (1999), "Recent developments in the principle of proportionality in European community law", in Ellis, E. (Ed.), *The Principle of Proportionality in the Law of Europe*, Hart Publishing, Oxford.

Jans, J. (2000), "Proportionality revisited", *Legal Issues of Economic Integration*, Vol. 27 No. 3, pp. 239-265.

Kiekegaard, S. (2008), "ECJ rules on ISP disclosure of subscribers' personal data in civil copyright cases – Productores de Múrica de España (Promusicae) v Telefónica de España SAU (Case C-27/06)", *Computer Law & Security Report*, Vol. 24 No. 3, pp. 269-274.

Kisieliute, I. (2012), "A 'Fair balance' between intellectual property rights and other fundamental rights", Master Thesis, Spring, Faculty of Law, Lund University.

Kulk, S. and Borgesius, F. (2012), "Filtering for copyright enforcement in Europe after the Sabam cases", *European Intellectual Property Review*, Vol. 34 No. 11.

Kuner, C. (2008), "Data protection and rights protection on the internet: the Promusicae judgment of the European Court of Justice", *European Intellectual Property Review*, Vol. 30 No. 5.

Lind, A. and Strand, M. (2011), A New Proportionality Test for Fundamental Rights?: the joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen, European Policy Analysis No. 7, Swedish Institute for European Policy Studies.

McCormick, N. (1993), "Beyond the sovereign state", *Modern Law Review*, Vol. 56 No. 1.

McGonagle, T. and van Daalen, O.L. (2015), "*Study of fundamental rights limitations for online enforcement through self-regulation"*, IViR Study.

Mowbray, A. (2010), "A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights", *Human Rights Law Review*, Vol. 10 No. 2, pp. 289-317.

Pila, J. (2013), "Intellectual property as a case study in Europeanization: methodological themes and context", in Ohly, A. and Pila, J. (Eds), *The Europeanization of Intellectual Property Law: Towards A European Legal Methodology*, Oxford University Press, Oxford.

Sauter, W. (2013), "Proportionality in EU Law: a balancing act?", TILEC Discussion Paper No. 2013-003, 25 January.

Smet, S. (2014), "Resolving conflicts between Human Rights: A Legal Theoretical Analysis in the Context of the ECHR", unpublished PhD thesis, Ghent.

Stone Sweet, A. and Matthews, J. (2009), "Proportionality balancing and global constitutionalism", *Columbia Journal of Transnational Law*, Vol. 47 No. 1, pp. 73-165.

Synodinou, T. (2015), "Intermediaries' liability for online copyright infringement in the EU: evolutions and confusions", *Computer Law & Security Review*, Vol. 31 No. 1, pp. 57-67.

van Dam, C. (2013), *European Tort Law*, Oxford University Press, Oxford.

van Dijk, P., Van Hoof, F., Van Rijn, A. and Zwaak, L. (2006), *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, Oxford.

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

van Eecke, P. (2011), "Online service providers and liability: a plea for a balanced approach", *Common Market Law Review*, Vol. 48 No. 5, pp. 1455-1502.

van Enis, Q. (2013), "Les mesures de filtrage et de blocage de contenus sur l'internet: un mal (vraiment) necessaire dans une société démocratique? Quelques réflexions autour de la liberté d'expression", Revue trimestrielle des droits de l'homme No. 96.

van Gerven, W. (1999), "The effect of proportionality on the actions of member states of the European community: national viewpoints from continental Europe", in Ellis, E. (Ed.), *The Principle of Proportionality in the Law of Europe*, Hart Publishing, Oxford.

Verbiest, T.S. and Riccio, G.M. (2007), *Study on the Liability of Internet Intermediaries*, Markt/2006/09/E, 12 November.

Corresponding author

Christina Angelopoulos can be contacted at: c.j.angelopoulos@uva.nl

Downloaded by TASHKENT UNIVERSITY OF INFORMATION TECHNOLOGIES At 23:55 03 November 2016 (PT)

For instructions on how to order reprints of this article, please visit our website:
www.emeraldgrouppublishing.com/licensing/reprints.htm
Or contact us for further details: permissions@emeraldinsight.com