

# **And they lived happily ever after *UPC Telekabel*: a copyright fairy tale or a genuine chance to strike a fair balance? \***

Giulia Dore

## **Introduction**

The case concerns a request for a preliminary ruling by the EU Court of Justice on the interpretation of Article 8(3) of the Directive 2001/29/EC, and of certain fundamental rights protected by European Union law.

The CJEU deals with the liability of intermediaries for copyright infringement and online blocking injunctions, in line with its effort to ensure full protection of copyright on the one hand, and some exceptions to the responsibility of Internet intermediaries on the other.

First, it asserts the intermediary function of Internet service providers (ISPs). Second, it assesses the legitimacy of imposing an injunction aimed at preventing the ISPs' customers from accessing a third-party website that infringes copyright by unlawfully making material available to the public. Then, it explores the feasibility of an order that, instead of indicating the specific measures to execute it, only prescribes an outcome obligation to cease or even prevent the infringement.

---

\* Case 314/12 *UPC Telekabel Wien GmbH vs Constantin Film Verleih GmbH* [2014] OJ C151/2

Similar injunctions are compliant with EU law as long as they allow the ISPs to choose the best applicable measures, which should not impair the necessary fair balance of fundamental rights enjoyed by all stakeholders.

### **Background of the dispute**

In 2011 *UPC Telekabel*, a telecommunications company whose services include Internet access, was ordered to deny its customers access to a website (*kino.to*) that was found to infringe copyright by making some content publicly accessible, short of the consent of the rightsholders, film production companies *Constantin Film* and *Wega*. The applicants succeeded in obtaining an *interim* injunction by the Austrian Commercial Court (*Handelsgericht Wien*), ruling that the order be executed and applying the measure of blocking the infringing website's domain name and its Internet protocol addresses.

The parties lodged an appeal before the Higher Regional Court in Vienna (*Oberlandesgericht Wien*) that partially overturned the lower court's ruling by acknowledging the right of the claimants to seek the injunction, but requiring that the order should only provide a general obligation and not the specific measures to apply. Not satisfied with the outcome, *UPC Telekabel* brought the case before the Austrian Supreme Court (*Oberster Gerichtshof*), radically denying any involvement and then alleging the worthlessness and unreasonableness of any given blocking measure.

Both courts, in the first instance and on appeal, scrutinized the role of ISPs in online copyright infringement, agreeing that *UPC Telekabel* is an intermediary according to Article 8(3) of the InfoSoc Directive.<sup>1</sup> The respondent's services were using the website at issue to perpetrate infringing activities affecting the rightsholders.

What differentiates the rulings is the divergent consideration given to the measures to apply to fulfil the order. The claimants applied for measures that would have blocked access to

the website, a condition that the first court found to be satisfied by indicating all the terms of the injunction. The appealed court's findings differ precisely on this last point, endorsing the respondent's freedom to choose the most reasonable measures to comply with the court's order.

On appeal, *UPC Telekabel* denied any involvement in the infringing activities, insisting that, given the lack of any contractual or business relationship with the website, it was not determined that its services were actually used to perpetrate the infringement; neither was it proved that its customers were engaging in such unlawful activities. Any blocking measures would have been unreasonable in terms of costs, easily bypassed and in clear conflict with several EU provisions. Consequently, the Supreme Court stayed the proceedings to question the CJEU on the interpretation of European law.

### **Matters before the CJEU**

There were four queries for preliminary ruling, of which only two were explicitly addressed, the others being contingent.

They can be summarized as follows. Shall Article 8(3) of the InfoSoc Directive be interpreted as the ISP being an intermediary whose services are used by a third party to infringe copyright, and thus the injunction brought against them is valid under EU law? If so, are the fundamental rights of all interested parties protected and properly balanced when such an injunction allows the ISP to undertake its own measures to comply without impairing all other stakeholders' interests?

Advocate General Cruz Villalón delivered a detailed opinion to the case at issue. He considered the legal framework that applied to the dispute, carefully analysing the facts and terms of the claims in the proceedings and reviewing the previous relevant CJEU's case law.<sup>2</sup>

In line with his arguments, Recital 59 to the Preamble and Articles 3 and 8 of the InfoSoc Directive offer general justification for the highest and most effective level of copyright protection, especially in the case of massive infringement, which has allegedly increased along with new technologies.<sup>3</sup> This puts intermediaries, and ISPs appear to be regarded as such,<sup>4</sup> in the best position to stop and prevent the violation,<sup>5</sup> to the extent that they should be subject to injunctions when third parties use their services to perpetrate such illegal acts.<sup>6</sup>

In his view,<sup>7</sup> such conclusions do not conflict with the prohibition of imposing general monitoring on providers according to Article 15 of the Electronic Commerce Directive.<sup>8</sup> Likewise, in light of Article 3 of the Enforcement Directive,<sup>9</sup> they do not clash with the further requirement that the measures must not be unreasonable in terms of technicality or costs, but abide by the principles of appropriateness, effectiveness and proportionality.<sup>10</sup>

The Advocate General plainly supported the applicants' demand for high and effective copyright protection, which could only be reached by acknowledging the intermediary responsibility of ISPs in the case of infringement, but also indicating the specific remedial measures to be applied. This would satisfy the requirement of proper and fair balance among all fundamental rights at stake.<sup>11</sup>

On the contrary, it can be inferred that a mere outcome prohibition would result in an imbalanced solution since there would be no guidance by the CJEU or the domestic courts in terms of the best compliant measures that least sacrifice other parties' interests.<sup>12</sup>

### **The ruling: a compromised solution for a balanced approach to copyright**

Despite the accurateness of the Advocate General's reasoning, which has the valuable feature of calling for appropriate guidelines, the Court of Justice shares only the first part of his arguments, surprisingly discarding his latest proposal on the accurateness of imposing specific

measures on the respondent. However, the CJEU's disregard may rather be seen as being nothing more than even-handed and cautiously pondered.

The CJEU points out that undoubtedly the website's action of placing content on the Internet, making it available to the public without the consent of its rightsholders, results in copyright infringement.<sup>13</sup> There seems to be no hesitation in determining that usage of the intermediaries' services consists in the mere transmission of the infringement in the ISP's network: when the provider grants access to its network it makes such transmission effective.<sup>14</sup> In other words, the injunction imposed on the service provider that materially consents to such infringement by allowing its customer to access that website is both lawful and consistent with EU law.

The ISP's intermediary role is not contradicted by the lack of any contractual, or a different kind of, relationship between the ISP and the infringing website,<sup>15</sup> it also being irrelevant to prove that the ISP's customers actually accessed the website.<sup>16</sup> Recalling previous cases on the subject, the CJEU also projects a clear preventive role of ISPs against copyright infringement, a circumstance that strengthens the irrelevance of proving that the defendant's customers interact with the infringer by concretely accessing its website.<sup>17</sup>

What appears to predominate in the Court's conclusion is that a failure to acknowledge the intermediary nature of ISPs would resolve in an unwanted decrease in the rightsholders' shield, thus refuting the actual scope of the InfoSoc Directive to ensure the highest and most effective level of copyright protection.<sup>18</sup>

The Court is of the opinion that all affected fundamental rights, not limited to copyright and related rights, shall be protected under EU copyright law.<sup>19</sup> Whether the substantial and procedural aspects surrounding the sanctions for copyright infringement are left to the discretion of national legislators,<sup>20</sup> this does not imply that Member States should not to abide by the limits of EU law when defining the rules for issuing and executing injunctions.<sup>21</sup>

Even in their discretion, domestic courts should always aim to strike a fair balance among all fundamental rights involved, avoiding any conflicts among all interested parties' rights,<sup>22</sup> such as the freedom to conduct business by the ISPs and the freedom of information enjoyed by their customers and users.<sup>23</sup>

Regarding the former, which finds its justification in Article 16 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter),<sup>24</sup> arguably the injunction itself does not utterly deprive such a liberty.<sup>25</sup> The ISP may always prove its compliance with the order providing it has adopted all reasonable measures.<sup>26</sup>

Consequently, injunctions are not boundless, especially when the ability of the ISP to implement the prescribed measures depends on its resources and may entail practical difficulties or excessive costs.<sup>27</sup> Furthermore, the Court foresees that some restricting measures can easily be bypassed, a possibility that is yet consistent with the idea that copyright does not receive unconditional protection.<sup>28</sup>

Concerning the latter, shielded by Article 11 of the Charter, the CJEU highlights the risk of jeopardizing the right of information by adopting measures that, imposing the burden of the injunction on both customer and users, for example, impeding their lawful access to the Internet, unjustly interfere with it.<sup>29</sup>

It can be concluded that an outcome prohibition is compliant with EU law as far as it represents a balanced solution.<sup>30</sup> In the Court's view, it is the ISP's duty to choose the most effective and proportional measures to comply with the court's order while maintaining both their right to conduct business and the customers' and users' rights to access the Internet and to be informed.<sup>31</sup>

## **Analysis**

### **The necessary layer of fundamental rights on top of copyright protection**

The role of injunctions as instruments of rapid and virtually straightforward relief is undeniably relevant, especially when other actions have proved to be unsatisfactory.<sup>32</sup> It is also accurate to say that under EU copyright law Member States have a strict obligation to ensure that rightsholders may effectively seek injunctive relief against intermediaries.

Although rules and procedures for such injunctions remain at the discretion of national legislators, domestic law must always abide by the pertinent EU provisions and general principles that place some boundaries with reference to the intermediary's liability. This results in certain limitations on the general effort to enforce copyright and related rights, their protection not being absolute.<sup>33</sup> The chosen measures to execute the order must, in any case, be fair and equitable, not entailing unnecessary complications or unreasonable costs.

In line with the aim to ensure full protection of copyright, Article 8 of the InfoSoc Directive enables rightsholders to request an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights. Remedies and sanctions must be designed to discourage any further unlawful conduct and, most of all, be fair and proportionate.<sup>34</sup> This means that they should not negatively affect the rights of other stakeholders in copyright and related rights' issues.

While recognizing the ability of intermediaries to stop infringing activities and effectively prevent them, this should not result in an unlimited burden for ISPs and their customers or users.<sup>35</sup> The Court ruling makes it entirely clear that it is critically important to safeguard freedom of information, as well as to conduct business, rights that are as important as copyright and related rights.

The Court of Justice has often shown its commitment to ensuring a balanced approach to copyright.<sup>36</sup> In *LSG vs Tele2*,<sup>37</sup> extensively cited in the instant ruling, the Court resolved that Internet access providers are intermediaries within the meaning of Article 8(3) of the InfoSoc Directive, even if they only provide access to the Internet and no more burdening services such

as hosting. However, the entitlement of copyright holders to seek relief from infringement does not encompass sacrificing fair balance among all involved fundamental rights that any Member State must strike.

The Luxembourg judges have directly addressed the feasibility of specific injunctive measures, such as the installation of filtering software and blocking users' access to infringing websites. In *Scarlet vs SABAM*,<sup>38</sup> the Court ruled that unlimited filtering was not compliant with EU law since it conflicted with the intermediary's freedom to conduct business. In *SABAM vs Netlog*,<sup>39</sup> the injunction against the provider was unlawful as it applied measures that required carrying out general and preventive monitoring to screen the information conveyed, which was particularly costly and impaired the aforementioned balance.

*Bonnier Audio vs Perfect* ruled that there is no formal impediment, according to the concurrent reading of Article 8(3) of the InfoSoc Directive and Article 15(1) of the Personal Data or E-Privacy Directive,<sup>40</sup> for a national court to make the ISP disclose the personal data of its customers when it is proved that they have infringed copyright.<sup>41</sup> However, such an order should always be the result of a careful assessment that targets a fair balance among the different rights at issue, including the protection of personal data and privacy in the electronic environment.<sup>42</sup> The same concerns apply to the safeguarding of other rights enjoyed by customers and users, as well as by intermediaries.<sup>43</sup>

### **Yes, intermediaries. Yet, still protectable**

Returning to the case at issue, there seems to be limited room for rejecting the interpretation of Article 8(3) of the InfoSoc Directive as applicable to ISPs. It is hard to argue that they do not take on this position or that rightsholders cannot seek injunctive relief when a third party using their services infringes their copyright or ancillary rights.

The cautious approach of the CJEU in rejecting the radical approach of the plaintiffs to prescribe specific measures is, for the most part, welcomed. This prudence corroborates the Court's challenge to consider that all interested parties' rights are equally worthy. However, the Court's intents may be, de facto, unrealistic, as it is implausible that all rights will be weighted in the same way. There is a reasonable expectation that the CJEU may guide Member States in the difficult task of deciding whether, and to what extent, one particular right should prevail over the others. It seems insufficient merely to quote the provisions of the EU Charter without providing a more comprehensive in-depth regulation.<sup>44</sup>

Regarding expectations, the Court could have explored another issue that would be welcomed as a further clarification of the risk that some measures concretely entail the general monitoring of communication that EU law bans. Article 15 of the EC Directive prohibits measures requiring the intermediary such as the ISP to conduct general monitoring of information transmitted through its network: no general monitor, either defensive or preventive, is allowed.<sup>45</sup>

This aspect does not seem to worry the CJEU. Besides, this could be precisely the reason why the Court, thus far concerned with fair balance, is discarding the AG's suggestion to impose specific measures. Any measures that require general monitoring, as seems to be the case with filtering systems, would also be in conflict with Article 3 of the Enforcement Directive, being unnecessary and probably costly. They would impair the principle of safeguarding fair balance among stakeholders' rights. As *Scarlet vs SABAM* proves, an injunction to apply similar measures apparently would not strike the necessary balance.

### **A survey of UK case law: a matter of proportionality**

Similar considerations arise when exploring the recent case law on the topic in the United Kingdom. Such a survey is of particular interest as it portrays few controversial aspects in the

matter of blocking injunctions against ISPs. Moreover, looking into another Member State's approach facilitates an overall look at the issue in question and puts forward a different way of understanding the commented ruling.<sup>46</sup>

First, one may wonder whether a similar injunction would satisfy the UK requirements of the intermediary services being used by the infringer and the actual knowledge of such usage by the intermediary, according to Section 97(A) of the *Copyright, Design and Patent Act of 1988* (hereinafter CDPA). Second, it is debatable whether the proportionality principle is observed when a similar order does not merely indicate the outcome of denying access to the contested website, but also specifies the exact measures to apply for compliance.

The law prescribes that an injunction may be granted if the court determines that the ISP had actual knowledge of the fact that its services had been used to infringe copyright. For its purposes, actual knowledge is the situation of knowing that the infringement has occurred by using the intermediary's services. However, it is not that clear from the mere wording of the provision whether a genuine knowledge of a precise infringer using these services is required or, as the UK Court seems to favour, it is sufficient to know that the services are being used to perpetrate any infringement.<sup>47</sup>

As is evident from the literary phrasing of Section 97(A) CDPA, there is no doubt that ISPs are intermediaries. The section explicitly refers to Internet service providers, and the court shall only assess whether or not the respondent of the injunctive claim is an ISP. Furthermore, it has not seemed difficult to assess what specific acts concretely constitute copyright infringement. Nevertheless, it is not immediately possible to assess whether a given injunction conclusively complies with the proportionality principle and therefore strikes the fundamental rights' fair balance that all Member States are expected to seek under EU law.

The UK judiciary has dealt with ISPs blocking injunctions in a number of cases,<sup>48</sup> many decided by Lord Arnold J., whose approach is apparently plain and flawless.<sup>49</sup>

In the *Twentieth Century Fox* disputes,<sup>50</sup> injunctions were granted against ISPs to block users' access to infringing websites. The Court, by explicitly referring to the EU decision in *LSG* to explicate usage of the ISPs' services, ruled that actual knowledge of the infringement was proved, even by the circumstance that the ISPs received previous notice and had the chance to act and defend themselves. In the Court's view, the injunction sought was clear, precise, and technically feasible,<sup>51</sup> while the cost to execute it was part of the business process.<sup>52</sup>

The question of assessing the proper balance among the rights of copyright holders and users was explored in *Golden Eye vs Telefónica*. The Court granted applicants the right to seek injunctive relief through claim letters, guiding the terms of such requests to safeguard the interests of users: a guidance that the CJEU in the case at commentary had the chance to provide but for other reasons sidestepped.<sup>53</sup>

In *Dramatico vs Sky*, after assessing the joint liability of the respondent and the users, Lord Arnold accepted the terms of the agreement reached by the parties to restrict customers' access to the file-sharing facilitator, *the Pirate Bay*,<sup>54</sup> which was allegedly infringing copyright.<sup>55</sup> The agreed measure of IP address blocking was consistent with the provisions of the EU Charter. As he concluded, such a measure was neither excessive nor impaired users' rights to use the ISP's services lawfully.<sup>56</sup>

In *Emi vs Sky* his Lordship ordered that the ISPs block their customers' access to a number of peer-to-peer (P2P) websites, where copyright-protected material was shared massively and unlawfully,<sup>57</sup> and substantial evidence supported awareness of the infringement. The ISPs could have easily complied with the injunctions since they had been respondents in similar cases; it was then reasonable and affordable to execute such orders.

Finally, the recent decisions of *Paramount vs Sky* and *FAPL vs Sky* confirmed the Court's trend to grant injunctions under Section 97(A) CDPA, indicating the applicable measures to fulfil with the order.<sup>58</sup> There was no hesitation in acknowledging the intermediary nature of the

respondents, either in concluding that third parties used their services to infringe copyright or that the ISPs had actual knowledge of this. As simply as that, in both cases the orders were appropriate and proportionate.<sup>59</sup>

In all the cases cited above, Lord Arnold deliberated on the risk that such a measure could have limited subscribers' legitimate use of the ISPs' services. To such an extent, he explicitly considered all the aforementioned issues, although he concluded that the injunctions were justified by the outweighed prevalence of copyright protection. Apparently, this may be seen as the result of an effortless or posturing resolution, but a careful reading of the decisions reveals the contrary.

Applying the proportionality principle before granting the injunctions, the Court ruled in favour of the copyright holders even though this meant overcoming other fundamental rights such as the right of expression and information, and the freedom to conduct business. It was stated that copyright is not, as such, predominant, but rather it is the task of the judiciary to establish, case by case, which rights should prevail over others. The orders were proportionate, given the facts of each dispute and after having compared the rights of all stakeholders, including users and business operators.

In the words of Arnold J on *Emi Records*, in which he comprehensively considered the assessment of proportionality, the interest of copyright owners outweighs the rights protected by Articles 11 and 16 of the EU Charter, but their dominance must be asserted after careful and thorough deliberation on a case-to-case basis. Since the injunctions were also narrowed and targeted, and the cost of implementation modest and proportionate, all the premises were in place to reach such conclusions confidently.<sup>60</sup>

Such a forthright approach may confirm the imprint that a choice – as arbitrary as this may sound – must be made when dealing with balancing rights in copyright law, especially

when the proportionality assessment is evoked as an essential duty of the courts of any Member State, regardless of the CJEU's intention to provide specific guidelines.

The UK solution also has its negative effects. Despite the positive confidence of the judiciary striking the fairest and most proportionate balance among the rights at stake, there is still an implied threat of imposing the burden of the injunction on one side only. It should not be necessarily categorical to opt for one or another, especially when the judiciary has to ponder over a fair balance, as occurred in the *UPC Telekabel* case under consideration.

## **Conclusion**

The *UPC Telekabel* ruling is the result of a cautious but optimistic attitude on the part of the CJEU towards ISP blocking injunctions; to some extent, however, it also demonstrates an attempt to save the unsavable.

Aimed at granting rightsholders the entitlement to seek relief from intermediaries against copyright infringement by third parties, the remedy provides its addressee with an outcome obligation, but with no further impositions of what specific measures meet the terms of the order. The Court finds such an order to be compliant with EU copyright law as it virtually avoids the risk of endangering the already fragile equilibrium among all fundamental rights arising in this context.

The CJEU is not persuaded by the AG's argument that a fair balance can be struck only by imposing certain measures, since ISPs may choose measures that are more likely to endanger such an equilibrium.

Nevertheless, the discretion left to the intermediary may be too broad and concretely ends up in non-compliance. This consequence is supported by the cautious assumption of the Court that the measures to be adopted may be easily circumvented or, in any case, too expensive for the intermediary's business. The ISP's defence card of unreasonableness, which can be

played anytime by the respondent, must also be taken into account and may not be disregarded by the courts. Otherwise, the CJEU could have taken a more practical and perhaps blasé approach, similarly to the UK judiciary, which apparently seems to have reached the conclusion that a non-painful solution is far from being accomplished.

In truth some compromise must be made, either at the cost of the copyright holders or sacrificing other stakeholders' freedoms, without automatically implicating a "may the best man win" ending. Besides, there might still be a chance (or hope) of reaching a more comprehensive compromise for all sides concerned.

Uncertainty remains in terms of the exact boundaries of the intermediary liability of providers; moreover, the lack of proper guidance, first, by the CJEU, can be a dangerous weapon in the hands of the judiciary. It is yet accurate to assume that an excessively rigorous picture may result in weakening the fair balance of fundamental rights that the CJEU seems to promote every step of the way. The Court's tactful referral may be seen as the second-best solution to clarify the interpretation of the prickly issues thus far discussed, unless the European legislator makes its move and positively translates the concerns of the Court of Justice into statutory words.

---

<sup>1</sup> Directive (EC) 29/2001 of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

<sup>2</sup> Case 314/ 12 [2014] OJ C151/2, Opinion of AG Cruz Villalón, §1 et seq.

<sup>3</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §21–23.

<sup>4</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §33, 36.

<sup>5</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §51, 57.

<sup>6</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §26, 36.

<sup>7</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §77–78.

<sup>8</sup> Directive (EC) 31/2000 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

<sup>9</sup> Directive (EC) 48/2004 of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] L157/45.

<sup>10</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §75–76, 79 et seq.

<sup>11</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §109.

<sup>12</sup> [2014] OJ C151/2, Opinion of AG Cruz Villalón, §91–94.

<sup>13</sup> [2014] OJ C151/2, Judgment of the Court, §24–25, 31.

<sup>14</sup> [2014] OJ C151/2, Judgment of the Court, §30–32.

<sup>15</sup> [2014] OJ C151/2, Judgment of the Court, §35.

<sup>16</sup> [2014] OJ C151/2, Judgment of the Court, §36–39.

<sup>17</sup> [2014] OJ C151/2, Judgment of the Court, §39.

<sup>18</sup> [2014] OJ C151/2, Judgment of the Court, §33, 35.

<sup>19</sup> [2014] OJ C151/2, Judgment of the Court, §46.

<sup>20</sup> For a full analysis of the procedural issues, including jurisdiction and choice of law matters, see P Savola, ‘The ultimate copyright shopping opportunity - jurisdiction and choice of law in website blocking injunctions’, (2014) 45(3) IIC, 287–315.

<sup>21</sup> [2014] OJ C151/2, Judgment of the Court, §43–44.

<sup>22</sup> [2014] OJ C151/2, Judgment of the Court, §46–47.

<sup>23</sup> On the dangerous tendency to disregard consumers and users in copyright law, see A Stazi, ‘Digital copyright and consumer/user protection: moving toward a new framework?’, (2012) 2 (2) QMJIP, 158–174.

<sup>24</sup> Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

---

<sup>25</sup> [2014] OJ C151/2, Judgment of the Court, §48–51.

<sup>26</sup> [2014] OJ C151/2, Judgment of the Court, §52–54.

<sup>27</sup> [2014] OJ C151/2, Judgment of the Court, §50–52.

<sup>28</sup> [2014] OJ C151/2, Judgment of the Court, §58, 60–61.

<sup>29</sup> [2014] OJ C151/2, Judgment of the Court, §63.

<sup>30</sup> The conflict between copyright and freedom of expression, with reference to the most relevant decisions of the European Court of Human Rights, has been recently explored by C Geiger and E Izyumenko, ‘Copyright on the human rights’ trial: redefining the boundaries of exclusivity through freedom of expression’, (2014) 45(3) IIC, 316–342.

<sup>31</sup> [2014] OJ C151/2, Judgment of the Court, §62–63.

<sup>32</sup> On this point, see M Walter and S Von Lewinsky (eds), *European Copyright Law. A Commentary* (Oxford University Press, NY 2010) at ss. 11.8.12 (1087) and 13.11.3 (1297–1298).

<sup>33</sup> A broader analysis of communication intermediaries’ liability is offered by T Margoni and M Perry, *Deep Pockets, Packets & Harbours: Never the Three Shall Meet* [2013] <http://ssrn.com/abstract=2296216> Last access: 10 June 2014.

<sup>34</sup> Such fair balance is becoming a significant concern in academic discourse. See, among others, A Giannopoulou, *Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality*, [2012] 3(1) EJLT <http://ejlt.org//article/view/122/204>. Last access: 10 June 2014.

<sup>35</sup> On the ISPs’ liability dilemma, see also S Stalla-Bourdillon, ‘Sometimes one is not enough! Securing freedom of expression, encouraging private regulation, or subsidizing internet intermediaries or all three at the same time: the dilemma of internet intermediaries’ liability’, (2012) 7(2) JICLT, 154–175.

<sup>36</sup> Cf. Case 119/12 *Josef Probst v mr.nexnet GmbH* [2012] OJ C26/15; Case 614/10 *European Commission v Republic of Austria* [2012] OJ C379/6, which look at the fundamental rights’ balance from the perspective of processing personal data and privacy in electronic communications.

<sup>37</sup> Case 557/07 [2009] ECR I-1227.

<sup>38</sup> Case 70/10 *SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)* [2011] ECR I-11959.

<sup>39</sup> Case 360/10 [2012] 2 CMLR 18.

<sup>40</sup> Directive (EC) 58/2002 of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

<sup>41</sup> Case 461/10 [2012] OJ C165/4.

---

<sup>42</sup> Similar conclusions were reached in *Promusicae*, where the ECJ acknowledged how an obligation to disclose personal data in a civil proceeding for copyright infringement brought before the domestic court is undoubtedly admissible insofar as its property takes into account all the stakeholders' interests in the case. Case 275/06 [2008] ECR I-271.

<sup>43</sup> As properly warned, the conflict that arose between the interests of copyright holders on one hand, and of intermediaries and users on the other should not be underestimated. To such an extent, some predict that after *Promusicae* and *SABAM*, courts would need to pay more attention to the balancing of rights. T Headdon, 'Beyond liability: on the availability and scope of injunctions against online intermediaries after *L'Oreal v Ebay*', (2012) 34(3) EIPR, 137–144.

<sup>44</sup> On the necessary fair balance among fundamental rights, some warn that a simplistic and rhetorical application of the Charter will not be sufficient. See J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law', (2013) 38(1) EL Rev, 78. If a mere referral to the EU Charter is not enough, there are still three further options for EU copyright law, as envisaged by Cook and Derclaye, namely unifying through Regulations, harmonizing through Directives, guiding through Recommendations (the fourth being do nothing). T Cook and E Derclaye, 'An EU Copyright Code: what and how, if ever?', in 2011 I.P.Q. 3, 259–269.

<sup>45</sup> [2012] 2 CMLR 18.

<sup>46</sup> Concerning the legal uncertainty that Member States share in this context, see C Angelopoulos, 'Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe', (2013) 3 I.P.Q., 253–274, where three nationals are examined, revealing important differences but also common trends.

<sup>47</sup> For example, by establishing that prior notifications of the infringement substantiate the actual knowledge required by the law.

<sup>48</sup> Particularly after the ECJ decision on *Scarlet vs SABAM*.

<sup>49</sup> See, among others, E Duah, 'An injunction to prevent access to copyright infringing content, or perhaps not yet: UK perspective' (2013) 27 IRLCT, 46–59.

<sup>50</sup> [2011] EWHC 1981 (Ch); [2011] EWHC 2714 (Ch); [2010] EWHC 608 (Ch).

<sup>51</sup> [2011] EWHC 1981 (Ch) § 177.

<sup>52</sup> Neither did they conflict with Article 15 of the E-Commerce Directive since the monitoring was specific and not general. For further reference, see N Caddick G. Davis and G Harbottle (eds), *Copyinger and Skone James on Copyright* (Sweet and Maxwell, 2013) at ss 121-2; 173; 183–4.

---

<sup>53</sup> [2012] EWHC 723 (Ch).

<sup>54</sup> [2012] EWHC 268 (Ch).

<sup>55</sup> The *Dramatico* cases strengthen the Court's argumentations for granting the injunctions on the basis that the infringement was clearly established in the activity of P2P music sharing. [2012] EWHC 1152 (Ch).

<sup>55</sup> [2012] EWHC 1152 (Ch), § 13.

<sup>56</sup> [2012] EWHC 1152 (Ch), § 13.

<sup>57</sup> [2013] EWHC 379 (Ch).

<sup>58</sup> [2014] EWHC 937 (Ch); [2013] EWHC 2058 (Ch), especially § 38–43.

<sup>59</sup> In 2013 the Court reached similar conclusions recognizing the claimants' right to seek injunctive relief against the defendant ISPs, having established that they were service providers whose services were used by a third party to infringe copyright and they had actual knowledge of that. Similarly, the injunctions were proportionate.

<sup>60</sup> [2013] EWHC 379 (Ch), in particular §100-107.